Neutral Citation Number: [2020] EWHC 1022 (Ch)

Case No: BL-2018-000671

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building, Royal Courts of Justice
Fetter Lane, London EC4A 1NL

Date: 30 April 2020

Before :

MR JUSTICE NUGEE

- -

Between :

ANDREW COLE & others — **Claimants**

- and -

SCION LIMITED & others — **Defendants**

- -
- -

Michael Pooles QC and Simon Howarth
(instructed by **DAC Beachcroft LLP**) for **Carpenter Rees Ltd**

Graham Chapman QC and Mark Vinall
(instructed by **Peters & Peters Solicitors LLP**) for the **Claimants**

Hearing date: 2 April 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10 am on Thursday 30 April 2020.

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MR JUSTICE NUGEE

Mr Justice Nugee:

Introduction

1. This is the hearing of an application by the 3rd Defendant, Carpenter Rees Ltd (**"CRL"**), for summary judgment on, or strike out of, the claims brought against it on the grounds that they are statute-barred. The relevant claims are brought in negligence. It is accepted that the primary limitation period of 6 years has expired, but the Claimants rely on the latent damage provisions in s. 14A of the Limitation Act 1980 (**"LA 1980"**). The case for CRL is that the Claimants were given sufficient information to start time running by a particular letter sent shortly over 3 years before the proceedings were started, and hence the claims are all statute-barred. CRL do not for the purposes of this application rely on actual knowledge, only on constructive knowledge.

2. The relevant Claimants say that this issue is not suitable to be determined summarily. Some of them say they did not in fact receive the letter in time; all of them say that the letter did not contain enough information to start time running; or that they needed a reasonable time to take expert advice before they could be regarded as having the requisite knowledge, which would mean that their date of knowledge was less than 3 years before the proceedings were started.

3. Mr Michael Pooles QC and Mr Simon Howarth appeared for CRL; Mr Graham Chapman QC and Mr Mark Vinall for the Claimants. The hearing was conducted, as is becoming standard practice in the present circumstances, as a remote hearing using Skype for Business. This proved, as it has done in other cases I have heard, a perfectly satisfactory way to hold the hearing, and I do not think that the Court's ability to hear and test the argument, and determine the application, was impaired in any way.

4. I agree with the Claimants, and propose to dismiss the application, for the reasons which follow.

Background

5. This action is another claim brought by individuals who were persuaded to invest in film finance schemes promoted as tax-efficient investments. As with many such schemes, the anticipated tax advantages have not in the event been forthcoming as hoped, although in this case the participants have not been denied all relief as they have in some others. It bears some similarity to the Ingenious litigation (for which see *Barness v Ingenious Media Ltd* [2019] EWHC 3299 (Ch) and *Rowe v Ingenious Media Holdings plc* [2020] EWHC 235 (Ch)), and was initially brought as part of that litigation until deconsolidated, as I explain below, but it differs considerably in its details.

6. I can take the background from the Re-Amended Particulars of Claim. I am conscious that none of the facts have yet been proved, but I have no reason to think this summary is disputed. There are 17 Claimants in all (not including one case where a claim now vested in trustees in bankruptcy has been stayed). Each of them invested in one or more of three schemes promoted under the brand "Scion Premier" by companies using the name "Scion". Under each scheme the participants became

partners in a Jersey limited partnership, the relevant partnerships being Scion Films Premier (First) LP (**"Premier 1"**), Scion Films Premier (Second) LP (**"Premier 2"**) and Scion Films Premier (Third) LP (**"Premier 3"**). Although numbered in this way, Premier 2 was in fact first in time, followed by Premier 1 and Premier 3. Each Claimant brings claims against two of the Scion companies involved, Scion Ltd and Scion Financial Partners Ltd. Those claims include, among others, claims in deceit and negligence but I am not concerned on this application with the claims against the Scion Defendants and the details do not matter.

7. Many, but not all, of the Claimants also bring claims against a company called Formation Asset Management Ltd (**"Formation"**). Formation was a firm of independent financial advisers (or IFAs), called at the relevant time Kingsbridge Asset Management Ltd, which had a particular focus on clients in professional sports. Most of the Claimants were involved in professional football either as a player or as a manager, and many of them were advised in relation to the Premier schemes by advisers working for Formation.

8. Premier 2 was, as I have said, the first in time. A number of the Claimants invested in Premier 2 on Formation's advice. Those investments were made in the tax year 2005/06, most (if not all) in October 2005. Formation was not then a representative of CRL, and no claim in relation to Premier 2 is advanced against CRL in these proceedings. I am therefore not concerned with any claims in relation to Premier 2.

9. From 5 December 2005 however Formation was an appointed representative of CRL. Three of the Claimants (Mr Zatyiah Knight, Mr Daniel Murphy and Mr Martin O'Neill) invested in Premier 1 in early 2006 (and, I think, in the tax year 2005/06). Eight of the Claimants (the same three, and also Mr Andrew Cole, Mr Sean Davis, Mr Ian Pearce, Mr Christopher Powell and Mr Robert Savage) invested in Premier 3 in the next tax year (2006/07), either in late 2006 or early 2007. All eight were at the time either professional footballers or (in one case) a manager.

10. Each of these eight brings claims against CRL in relation to their investments in Premier 1 and/or Premier 3, and in the rest of this judgment **"the Claimants"** refers to these eight Claimants. The claims are put in two ways: (1) CRL is said to be liable for Formation's activities as appointed representative of CRL (either by virtue of statutory provisions in the Financial Services and Markets Act 2000, or because it is vicariously liable at common law), and Formation is said to have acted negligently in the advice it gave; (2) CRL is said to have owed the Claimants a direct duty of care as Formation's principal to carry out checks that Formation was acting with an appropriate level of competence and to have failed to carry out, or carry out adequately, such checks.

11. The claims in this action were initially included in a claim form issued on 6 November 2015 with claim number HC-2015-004561. That claim form also included a large number of other claimants, and claims against other parties, including in particular claims in relation to the Ingenious schemes, and was therefore part of the Ingenious litigation. By Order dated 7 March 2018 Morgan J, who was then the Managing Judge for the Ingenious litigation, ordered (by consent) that the present claims be dealt with in separate proceedings and directed that a new claim form be filed and served and allocated a new claim number. He also directed that the filing of such new claim form should not affect the existing parties' positions with respect to

limitation. Pursuant to this the present claim form was issued on 22 March 2018 with claim number BL-2018-000671, but for limitation purposes the proceedings are to be regarded as having been brought on 6 November 2015.

12. It is not disputed that the date when the Claimants suffered their claimed losses was when they made their investments, and that the primary limitation period of 6 years started running then (at the latest). Since all the investments were made in the period 2005 to 2007, the primary period expired long before these proceedings were brought. In relation to the claims against CRL (whether vicarious or direct) no claim is brought in fraud, which means that the Claimants can only avoid the claims being statute-barred by relying on s. 14A LA 1980. As is well-known this in effect gives a claimant in a claim for negligence 3 years to bring a claim after he or she has the knowledge required for bringing such an action. I will have to look at the law in some detail later, but there was little dispute as to the law and it is agreed that the question is whether the Claimants did or did not have (or are deemed to have) the requisite knowledge by 5 November 2012. If they only acquired it on 6 November 2012, or at any later date, the proceedings would have been brought in time.

13. CRL relies on letters written by one of the Scion companies to the Claimants on either 31 October 2012 or 1 November 2012 as giving them the requisite knowledge; I will refer to these as **"the October/November letters"**. It can be seen that the timing is quite tight, but if the Claimants did have (or are deemed to have) knowledge on or before 5 November 2012, the fact that they are only a day or two out of time is neither here nor there; as Mr Pooles reminded me, it is not unknown for a claim form to be only a day or two late,[1] but if one leaves it to the last moment one has only oneself to blame.

Section 14A LA 1980

14. It is convenient to set out the terms of s. 14A LA 1980 at this stage. It was introduced into LA 1980 by the Latent Damage Act 1986, and was modelled on similar provisions in ss. 11 and 14 LA 1980 which apply to personal injury claims. It remains in the same form as originally enacted and provides as follows:

> "**14A. Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual.**
>
> (1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.
>
> (2) Section 2 of this Act shall not apply to an action to which this section applies.
>
> (3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.
>
> (4) That period is either—

[1] As he and I happen to have occasion to know: *3M United Kingdom plc v Linklaters & Paines* [2006] EWCA Civ 530.

(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above *"the knowledge required for bringing an action for damages in respect of the relevant damage"* means knowledge both—

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are—

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) the identity of the defendant; and

(c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

15. It can be seen that the effect of s. 14A is as follows:

(1) It only applies to claims in negligence (and only to claims other than claims for personal injury): s. 14A(1).

(2) The purpose of the section is to correct the injustice that could be caused by the ordinary 6 year time limit for a claim in tort. A cause of action in negligence accrues as soon as the claimant suffers loss as a result of the defendant's negligence, and a claimant may suffer loss without being aware of it, particularly (although not only) in cases of economic loss. Under the law as it previously stood, a claimant who suffered such latent damage might therefore find that their action was barred before they even knew they had a claim. The effect of s. 14A(4) is to give a claimant in such a case a secondary period of 3 years from the *"starting date"*.

(3) The starting date is usually the date when the claimant has the requisite knowledge. By s. 14A(5) the claimant must also have the right to bring an action for damages, but in most cases, including this one, this has no practical effect on the starting date. In practical terms the question is when the claimant first has the requisite knowledge.

(4) The combined effect of s. 14A(6)-(8) is that there are four things that the claimant has to know. The first (by s. 14A(6)(a) and (7)) is that he has suffered sufficiently serious damage to make it worth suing. This relates solely to matters of quantum (*Haward v Fawcetts* [2006] UKHL 9 (***"Haward"***) at [107] per Lord Mance). Since the putative defendant is assumed not to dispute liability and to be able to satisfy a judgment, this is not a very high bar and only really serves to cut out the case where all the claimant knows is that he has suffered loss in some trivial amount, *"so minor that no-one would contemplate instituting proceedings"* (*Haward* at [106]).

(5) The second (by s. 14A(6)(b) and (8)(a)) is that the damage was *"attributable to"* the act or omission alleged to constitute negligence. This requirement is the one that has given rise to most difficulty in the authorities, and I will have to look at it in more detail below. In practice in the present case it means that for the vicarious liability claim what the Claimants needed to know is that the damage was attributable to the advice, or lack of it, given by Formation.

(6) I can take the third and fourth together. The effect of s. 14A(6)(b) and (8)(b) and (c) is that the claimant needs to know the identity of the defendant, and, in a case of vicarious liability, the identity of the person whose act or omission is in question, and the facts making the principal liable. In the present case, that means that for the vicarious liability claim against CRL, what the Claimants needed to know was (i) that it was Formation who gave the relevant advice (or lack of it); (ii) the identity of CRL and (iii) the facts that make CRL liable for Formation's acts – in effect that Formation was an appointed representative of CRL. It is not disputed that the Claimants, who all knew they had taken advice from Formation, knew the identity of Formation. Mr Pooles said that no point was taken on the pleadings about the Claimants' knowledge of the identity of CRL, and its responsibility for Formation's acts, but Mr Chapman said that that was in fact in issue. I revert to this below.

(7) Strictly speaking for the direct claim against CRL, what the Claimants needed

to know was (i) the identity of CRL and (ii) that the damage was attributable to the acts or omissions of CRL alleged to constitute negligence (that is the lack of adequate supervision) but it can be seen that this raises much the same questions: did the Claimants know the facts that are said to have made CRL responsible for supervising Formation?

(8) By s. 14A(9) a claimant does not need to know that the relevant acts or omissions constituted negligence. This provision has given rise to a certain amount of difficulty in the reported cases, but it is not suggested that anything turns on it in the present case.

(9) Finally, s. 14A(10) in effect extends a claimant's knowledge from his actual knowledge to his constructive knowledge. This is central to the present application where Mr Pooles does not rely on the actual knowledge of the individual Claimants, but relies solely on their constructive knowledge, that is what a reasonable person might have been expected to understand from the October/November letters. I did hear some argument on the application of this provision, which I will deal with as appropriate below.

16. The section has now been in force in this form since 1986 and has unsurprisingly accumulated a fair amount of authority. As I have said there was little dispute as to the law, and I can summarise what I take from that cited to me in the present case as follows:

(1) The leading case on s. 14A is *Haward*. This was in fact a case of actual knowledge not constructive knowledge, but much of what their Lordships said is relevant to both. For a convenient summary, Mr Pooles referred me to the judgment of Tomlinson LJ in *Jacobs v Sesame Ltd* [2014] EWCA Civ 1410 (***"Jacobs"***) at [26ff] where he cited the relevant passages from speeches of four of their Lordships. I do not think it necessary to set them all out, although I refer to certain points that emerge from them below.

(2) The burden of proof under s. 14A is on the claimant to establish that he brought his claim in time. It is incumbent on the defendant, as with all limitation defences, to raise the issue by pleading it, but once it has been raised, it is for the claimant to prove that he first had the requisite knowledge 3 years or less before the proceedings were brought. There was no dispute about this, and it is supported by authority at the highest level (see eg *Haward* at [23]-[24] per Lord Nicholls and at [128] per Lord Mance; see also *Jacobs* at [4] per Tomlinson LJ), although at first blush it seems a little odd. Limitation is a defence, and normally one would have thought it was for a defendant to make out a defence. I can see that there may be pragmatic reasons why it is appropriate to require the claimant to establish when he first had actual knowledge of something, as this is something which (by definition) is peculiarly within the claimant's own knowledge and about which the defendant will usually be in the dark; but is it not clear why the same should be the case where a defendant is relying not on actual knowledge but on constructive knowledge, which is an objective question (see below). One might have thought that if a defendant wished to allege that the claimant had constructive knowledge, it would be for him to establish what a reasonable person would have known. But the authorities are clearly to the contrary, and

it was common ground that the burden was on the claimant, and I will therefore proceed on this basis.

(3) There is a substantial body of authority on what *"knowledge"* requires. It is summarised by Lord Nicholls in *Haward* at [8]-[10]. It does not require knowing with certainty, but it requires more than suspicion:

> "It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence".

See also at [112] per Lord Mance.

(4) Not only does the claimant not need to know with certainty, he also does not need to know in detail. There are many statements to this effect, mostly in the context of attributability. As long ago as *Wilkinson v Ancliff (B.L.T.) Ltd* [1984] 1 WLR 1352, a case on the similar provisions in relation to personal injury claims in ss. 11 and 14 LA 1980 decided before the Latent Damage Act 1986 was even passed, Slade LJ said at 1365A-B that he thought that an employee who had *"broad knowledge"* that his injuries were due to his working conditions might well have enough knowledge of attributability to start time running:

> "even though he may not yet have the knowledge sufficient to enable him or his legal advisers to draft a fully and comprehensively particularised statement of claim."

(5) Other statements to similar effect can be found collected in the speech of Lord Nicholls in *Haward* at [10], such as that a claimant needed to know *"in general terms"* that her complaint was capable of being attributed to an operation, or that a claimant needed to know the *"essence"* of the relevant act or omission, or have *"in broad terms"* knowledge of the facts on which the complaint is based; see also at [66] per Lord Walker referring to the *"essence"* or *"essential thrust of the case"* or facts which *"distil what [the complainant] is complaining about"*.

(6) So far as the question of attributability under s. 14A(8)(a) is concerned, *"attributable"* means *"capable of being attributed to"* (rather than *"caused by"*): *Haward* at [122] per Lord Mance, approving a line of cases to this effect. What is required for a claimant to have knowledge of attributability is therefore knowledge in broad terms of: (a) the facts on which the claimant's complaint is based; (b) the defendant's acts or omissions; and (c) that there was a real possibility that those acts or omissions had been a cause of the damage.

(7) For the purposes of constructive knowledge, the test is an objective one, based on what a reasonable person with the general characteristics of the claimant would have done: see *Gravgaard v Aldridge & Brownlee* [2004] EWCA Civ 1529 at [22] per Arden LJ:

> "Section 14A(10) does not state that a person's knowledge includes knowledge "which a reasonable person might be expected to acquire" but

> rather that a person's knowledge includes knowledge "which he [she] might reasonably be expected to acquire" (contrast s.14A(7)). In my judgment, this choice of wording is significant. It means, in my view, that in general the court must have regard to the characteristics of a person in the position of the claimant, but not to characteristics peculiar to the claimant and made irrelevant by the objective test imposed by subs.(10)."

It is common ground that in the present case that means that one must have regard to the fact that the Claimants are professional footballers or managers, and that in assessing their constructive knowledge, what has to be considered is what knowledge a professional footballer or manager might reasonably be expected to have acquired. One does not however have regard to the particular characteristics of each individual Claimant.

(8) In this context, a reasonable person is expected to read his correspondence: *Webster v Cooper Burnett* [2000] PNLR 240 (***"Webster"***) at 246C per Swinton Thomas LJ. Mr Chapman expressly accepted that that was the case here.

17. In the case of investments made on financial advice, Mr Pooles said that a claimant generally had the requisite knowledge when he knew enough reasonably to believe that he had been led to enter into the transaction on flawed advice. I was referred by way of example to *Haward* and *Jacobs*.

18. In *Haward* the claimant, an experienced businessman, had invested in a company on the advice of his accountant and had lost money. Not all their Lordships took quite the same view of the facts but the following indicates the general tenor of the decision. Lord Nicholls said that it was not enough for Mr Haward to know that he had invested on advice and had lost his money. The conduct alleged to constitute negligence was not the mere giving of advice, but the giving of flawed advice. That was the essence of Mr Haward's complaint. Time did not run until he knew enough for it to be reasonable to embark into preliminary investigations into this possibility (at [19]-[20]). Lord Brown said that Mr Haward knew that his advisers had led him into a bad investment, and that was enough for him to realise that there was a real possibility of his damage having been caused by some flaw or inadequacy in his advisers' investment advice (at [90]). Lord Mance referred to the client discovering that the transaction was from the outset intrinsically unsound (at [116]).

19. In *Jacobs*, the claimant, an inexperienced investor, put £65,000 in 2005 into an Investment Bond linked to property on the advice of the defendant. Mrs Jacobs gave evidence, accepted by the trial judge and not appealed, that she had been led to believe that she would at least get her £65,000 back after 5 years. She received annual statements however which showed that although the value of the bond had increased in the first 2 years, by June 2008 it had fallen back to some £61,000 and by July 2009 it had fallen to some £43,000. Her own evidence was that she was *"horrified"* at the *"massive"* loss, and that the investment was *"haemorrhaging money"*. Tomlinson LJ expressed some doubt as to the trial judge's finding that she did not have actual knowledge in 2009, but did not need to resolve this as he had no doubt she had constructive knowledge because she might reasonably have been expected to learn that the return of the amount invested was not, as she had been led to believe, guaranteed. There was I think no real difference between counsel on what

can be drawn from that case, namely that where there is a very stark disjunct between what an adviser had led the claimant to expect, and what she could see for herself had actually happened, it is not difficult to see that a reasonable person would ask questions.

20. There are three points of law to add to the above summary. One concerns the application of the constructive knowledge provisions in s. 14A(10) to the cases where Claimants say that they did not in fact see the letter when it was delivered. I deal with this point below.

21. The second is one that appeared at first to be in issue between the parties. The Claimants' case, as pleaded at paragraph 104 of the Re-amended Particulars of Claim,[2] was that they:

> "…did not have the requisite knowledge for the purposes of s. 14A (including any reason to believe that they had suffered any damage of a kind satisfying the requirements of s. 14A) until a reasonable time (that is to say, several months in order to obtain professional advice and for the advisor to investigate matters) after they received the letters from the General Partners dated 31 October and 1 November 2012…"

22. Mr Pooles initially took issue with this on the basis that it was incorrect as a matter of law. In response Mr Chapman relied on a passage in *McGee, Limitation Periods* (8th edn, 2018) at §6.027 as follows:

> "The wording of the proviso to s.14A(10) also calls for examination; the vital words are "so long as". If there is a fact ascertainable only with expert advice, then the claimant has a reasonable time (and what is reasonable must surely vary from case to case) in which to seek that advice. Until that reasonable time expires, he is not deemed to know the fact. If he seeks the advice within the reasonable time, then his date of knowledge is postponed until he receives the advice (even if this does not happen until after the expiry of the reasonable time for seeking the advice)."

23. By the end of the argument however there appeared to be no real difference between counsel. Mr Pooles accepted that it depended on how a reasonable person in the position of the Claimants (that is a reasonable professional footballer or manager) would have understood the October/November letter. If the reaction would have been: "I can't make head or tail of this; I don't know whether it has any serious consequences for me; I will have to send it to my IFA and ask him if I should be worried or not", then he would not have the requisite knowledge until the adviser comes back and says "Yes, you should be worried." If, on the other hand, the reaction would have been "This looks like I have a serious problem; I will have to ask my IFA how bad it is", then time would start to run as soon as he appreciated he had a problem. Mr Chapman said that he did not disagree with that: if the October/November letters were sufficient to give the Claimants sufficient knowledge, they did not get any extra time; but if they could not, or are to be taken as not being

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[2] One might have thought that a claimant's case on limitation should strictly be a matter for the Reply, being responsive to a defence; but in the present case, where it was always obvious that limitation would be relied on, it was directed (at a stage when these proceedings were still part of the Ingenious litigation) that the Claimants should plead their case on limitation in the Particulars of Claim.

able to, work that out for themselves, and needed expert assistance to have the knowledge, they are given reasonable time to seek that assistance. In the latter case, he said, the Claimants would be in time (or at least have a reasonable prospect of establishing that) given that there were only a matter of days between the letters arriving and the cut-off date of 5 November 2012.

24. The other point of law did not receive much attention during the argument but may potentially be of some significance. CRL's pleaded case (at paragraph 63 of its Defence) is that it was apparent from the October/November letters that the Premier partnerships had not generated the anticipated tax advantage, and that they:

> "had not, therefore, had the effect which it was anticipated they would have had and the Claimants were significantly financially disadvantaged as a result."

25. As can be seen that plea relies on a comparison between the position the Claimants would have been in had the Premier schemes worked as expected and the position they were actually in. That reflects one of Mr Pooles' submissions, namely that a claimant in an investment case is likely to have the requisite knowledge that something has gone wrong if there is a disjunct between what the claimant was told by his adviser would happen and what has in fact happened.

26. In many cases this may be so: both *Haward* and *Jacobs* are examples. In *Haward* the initial advice to invest was on the basis that just over £100,000 would need to be advanced in 2005 and that losses that year would be about £5,500, whereas advances in the year totalled over £430,000 and losses over £260,000 (see at [97]). In *Jacobs*, as referred to above, Mrs Jacobs was led to believe that, come what may, she would at least get her £65,000 back, whereas in fact by July 2009 the value of the bond had fallen to some £43,000.

27. Strictly speaking however I do not think this is the right comparison. By s. 14A(6)(a) a claimant needs to know *"the material facts about the damage in respect of which damages are claimed"*, and by s.14A(7) this requires him or her to know that it is sufficiently serious to justify instituting proceedings. These provisions make it clear that the *"damage"* here referred to is damage for which damages could be claimed in proceedings. Since s. 14A only applies to actions for negligence (s. 14A(1)), that must be confined to the sort of damage for which damages could be claimed in a negligence action. That is supported by something said by Lord Walker in *Haward* at [59] where he referred to:

> "the word "damage" (which must in this context mean actionable damage, or at any rate what the claimant believes to be actionable damage, the cause of action being negligence)."

But where a claimant's complaint is that he was negligently advised to enter into a transaction which he should not have been, his measure of damages is not the difference between the position he is in fact in and the position he would have been in had the investment had the result that was anticipated; his measure of damages is the difference between the position he is in and the position he would have been in had he not invested at all. All that is I think well established.

28. Mr Pooles indeed accepted that that was the correct position as a matter of law, but said that the Claimants' immediate consideration would not be how the claim would

be addressed as a matter of law but would be "What was I promised, what am I getting?". That may be right as a matter of fact, but I do not think quite answers the point. What a claimant needs to know is that he has suffered damage, and indeed sufficiently serious damage. For reasons given above, that seems to me to require a claimant to appreciate that he is worse off than if he had never gone into the transaction at all, that is that he is actually out of pocket by doing so. That is not the same as appreciating that he has not had the benefits that he was promised. Suppose for example, a claimant such as Mrs Jacobs had been led to believe that after 5 years the bond that cost her £65,000 would be worth at least £75,000, but it was in fact only worth £67,000. The mere fact that she knew that she had not got what she was promised would not in my view be sufficient to establish that she knew that she had suffered damage. For that she would have to appreciate that she would have been better off if she had never invested at all and put the money on deposit, something that might or might not be true, and, even if true, might not be something that she appreciated or ought to have done.

29. What this means in the present case is that the Claimants in my view are only to be regarded as having had the requisite knowledge if they knew, or a reasonable professional footballer or manager would have appreciated, that they had lost money by participating in the Premier schemes. It would not be enough if all that they, or a reasonable person, would understand is that the schemes had not worked as promised.

The facts – the Premier schemes

30. I have not seen any of the underlying documentation of the Premier schemes, but I will give an account of my understanding of how they were intended to work, drawn from the pleadings and other material I was shown, together with certain explanations given by Mr Chapman. This is no doubt a simplification of more complex arrangements, and may not be entirely accurate, but it will I think suffice for present purposes.

31. The essential idea behind the schemes was that a taxpayer would become a partner in the relevant Premier partnership, and subscribe for a certain amount of capital. The partnership would spend this capital on financing films. The difference between the monies spent by the partnership and the value of the assets thereby acquired would generate a Year 1 trading loss. The intention was that this loss would be apportioned to the partners (on the basis that a trading partnership is transparent for income tax purposes) and would be available to them by way of "sideways loss relief" to set against their other taxable income for the year.

32. It is helpful to set out an example (taken from worked examples given by the Scion Defendants in answer to a request for further information). I will assume in this, and the discussion below, that the nominal amount of capital subscribed to a Premier partnership by a partner was £100,000. On this basis:

    (1) The partner does not have to contribute the whole amount in cash, but only £28,000. The other £72,000 is lent to him by a Scion entity.

    (2) The £28,000 might be contributed by the partner out of his own resources, but it might be – and it appears in several cases was – borrowed from a bank. It is convenient to refer to this as "external borrowing" to distinguish it from the

"internal borrowing" from the Scion lender which was an integral part of the scheme.

(3) The £72,000 borrowed internally was lent by means of a full recourse 10-year loan which carried a meaningful rate of interest (assumed to be 6.75% pa in the worked examples).

(4) The partnership would take the £100,000 and (together with the capital subscribed by other participants) spend it on financing films, thereby generating a trading loss. The worked examples assume that the Year 1 loss is 85% of capital contributed (and that a further 15% can be carried forward against future profits). This loss is attributed to the partners so that a partner who subscribed £100,000 is apportioned a loss of £85,000.

(5) On the basis that sideways loss relief is available, the partner can use this £85,000 to set against his other income. If his other income has had tax deducted under the PAYE system, this should generate a repayment from HMRC. Assuming a tax rate of 40%, the repayment would be 40% x £85,000, or £34,000. This would be more than sufficient to reimburse him for the £28,000 cash contributed, or, if he funded it by external borrowing, to repay that borrowing.

33. The Claimants' pleaded case is that the Premier partnerships as described to them allowed individuals to invest in film businesses, and share in the returns from them, in a way which was said to offer them protection of their capital investment. The detail of quite what the Claimants were told was not explored during the hearing – and may in any event differ from one Claimant to another – but my understanding of this generic plea is that the overall thrust of what the Claimants understood was that they would get back the capital they had put in (the £28,000 in the example), so as to recoup their outlay, or, as the case may be, repay their external borrowing, while also being able to share in income if the films they invested in turned out to be successful. Mr Chapman summarised the Claimants' case on this as follows: what they were advised by Formation they were going to get was effectively a "free bet" which because of the tax relief would not require them to be out of pocket.

34. That account however omits a significant part of the overall picture, which is the need for the partner to repay the internal borrowing of £72,000 plus interest in or about Year 10. The intention was that these would be repaid out of profits of the partnership, and it appears that there were options in place which, if duly exercised, would generate the necessary profits (save for a marginal amount of interest). But whether derived from the exercise of the options or from other trading receipts, the effect would be to produce a trading profit for the partnership which would be apportioned to the partners and give rise to taxable income.

35. The point can again be illustrated by reference to the worked examples:

(1) On the assumption (above) that sideways loss relief of £85,000 was available in Year 1, giving rise to repayment of £34,000 income tax, the partner would have a positive cashflow of £6,000 in Year 1 (£34,000 less the £28,000 cash contributed).

(2) After 10 years however the partner would need to repay the Scion lender £72,000 plus interest of £48,600,[3] making a total of £120,600. Assuming that the partnership generated sufficient profit to repay this, this would give rise to taxable income. The worked examples assume that the taxable income would be £57,000, a figure which is calculated on the basis (i) that loan interest relief could be obtained in the sum of £48,600 and (ii) that there was a further £15,000 initial loss that could be carried forward. At a rate of 40% the tax payable on income of £57,000 would be £22,800.

(3) It can be seen that in pure cash terms (leaving aside the timing benefit of getting tax relief in Year 1 but only having to pay tax in Year 10), the partner is on these figures £16,800 out of pocket (£22,800 – £6,000).

36. The Claimants' case as initially pleaded was simply that HMRC had not allowed the sideways loss relief that had been claimed, but had only allowed it on the cash element of a partner's capital contribution (the £28,000), with the balance of the claimed loss capable of being claimed against future profits only; that the partnerships had settled with HMRC on that basis; and that as a result the Claimants could not claim the full loss relief that was integral to the investment.

37. The Scion Defendants however pleaded in their Defence that the effect of the settlement with HMRC was that the partners did in the event become entitled to full loss relief, both in respect of the cash contribution (the £28,000) and in respect of the internal loan (the £72,000). In their worked examples they explained how the loss relief was in fact fully utilised as follows:

(1) The effect of restricting sideways loss relief to the £28,000 was that the partner only received in Year 1 a tax repayment of £28,000 x 40% = £11,200. He is therefore at that stage £16,800 out of pocket (ie £28,000 – £11,200).

(2) In Year 10 the loan and interest of £120,600 is repaid out of partnership receipts and there are partnership profits of that amount. These are apportioned to the partner and are *prima facie* taxable. But as to £48,600 the partner is entitled to loan interest relief, and as to the £72,000, the partner can use the balance of the Year 1 loss (£57,000) and the other loss carried forward (£15,000) with the result that there is no tax to pay.

(3) The overall result (as with the previous example) is that the partner's net cash position is again that he is £16,800 out of pocket, the only difference being timing ones (which is not to suggest that these may not be important).

38. The Claimants have recently amended their case and now allege in addition that they are worse off than if they had never invested in the partnerships. Consistently with the views I have expressed above, I think this must now be the essence of their complaint. If their only complaint was that they had not got the full tax relief they had expected, that would not necessarily give rise to a claim in negligence; what they need to show is that they are worse off than if they had not gone into the scheme, the relevant comparison being, as Mr Chapman accepted, between the Claimants' position as it is now understood to be and the position they would have been in had

[3] ie £72,000 x 6.75% x 10 – this assumes simple interest with no compounding.

they not invested at all.

Letters to the partners June 2008 to June 2011

39. With that rather lengthy introduction, it is now possible to come to the correspondence on which Mr Pooles relies. This consists of a series of letters from one or more of the Scion companies to Mr Powell (one of the Claimants, who invested in Premier 3) and they relate to Premier 3 in particular, but there was no dispute that similar letters were sent to the other Claimants both in relation to Premier 3 and Premier 1. The general submission of Mr Pooles was to the effect that the letters were positive and robust until the October/November letters which struck a very different note.

40. The letters start with one of 26 June 2008 enclosing the accounts for Premier 3 for the period ending 5 April 2008. This referred to the fact that HMRC had opened an enquiry into the partnership tax return for 2005/06, that it was now standard practice for HMRC to open an enquiry into every partnership whose business involved the exploitation of films, and that PricewaterhouseCoopers (**"PwC"**) had been appointed to act on behalf of the partnership *"in order to bring a swift resolution to this enquiry"*. The letter ends with:

> "It is important that you take advice from the Independent Financial Adviser that introduced you to the Partnership, or currently advises you, if you do not fully understand anything contained herein."

I accept that the general tone of the letter is that there is nothing particular to worry about, HMRC's enquiry being portrayed as routine and capable of being brought to a swift conclusion.

41. The next update was dated 6 November 2008. This was a general update in relation to all the Premier partnerships. It said that HMRC enquiries into the tax returns for 2005/06 had initially been dealt with by the specialist Film Unit and PwC had quickly secured repayments for partners while HMRC enquiries continued. (This suggests that participants in at least Premier 1 received their Year 1 repayments). For 2006/07 however responsibility was moved to another HMRC department, called the Special Compliance Office Investigations (or SCI) team; the letter said that it had taken SCI an inordinate amount of time to get a basic understanding of how the partnerships worked, and they still did not fully comprehend the structures. It also explained that HMRC were withholding repayments and that it was unlikely that they would make repayments until the enquiry was concluded; and that they had opened an enquiry into 2007/08, which it described as standard procedure where there was an ongoing enquiry into an earlier year. Mr Pooles described it as relatively low-key in tone.

42. The next update in evidence is dated 2 November 2010. It reported on a meeting between PwC and HMRC on 4 October 2010. HMRC had put forward a proposal to close the enquiries without litigation, which was to allow sideways tax relief on the cash element of a partner's contribution (the £28,000), with the balance of the loss being recognised and available to carry forward to set off against future profits arising from the trade of the relevant partnership. The letter described this initial offer from HMRC as one that *"did not appear to be attractive"*, that PwC's and Scion's view was that it was *"unappealing"* but represented *"just the starting point"*, and that they

did not recommend that it be accepted. Mr Pooles said that the stance at that stage was that the partners should battle on.

43. The next update is 22 February 2011. This reports on a further meeting on 8 February 2011 between PwC and HMRC. It referred to HMRC's previous proposal and PwC's and Scion's view that it was unappealing, and to the fact that the partnerships had voted against it. It then explained that one of HMRC's major concerns was the partners' obligation to repay the (internal) loans, and said that they did not seem to understand that the loans were full recourse loans; PwC's position was that the loans were indeed full recourse loans and that they were seeking sideways relief on both the cash and loan elements of the contribution. HMRC indicated that if the loans were full recourse then they would regard the Premier partnerships as in a different category from many other film structures, and when asked if they had any other concerns, said they did but did not identify them, suggesting that the loan financing was their main area of concern. The conclusion was that PwC would again provide documentation to HMRC to demonstrate that they were full recourse loans, and Scion would commission a Guernsey legal opinion to the same effect and provide it to HMRC. I think it is fair to say that the general tone is cautiously optimistic: the impression given is that it should be possible to convince HMRC that the loans were indeed full recourse, at which point it was hoped everything would fall into place, although there is no assurance to that effect.

44. The next update is dated 13 June 2011. PwC and Scion had provided HMRC with information regarding the loans. HMRC had provided a response in writing on 13 May 2011, and at a further meeting with PwC on 17 May 2011. HMRC were now asking further questions, including the purpose and commerciality of the loans, and whether all the funds had been used to finance production of films. HMRC's written response came shortly after the Supreme Court had handed down a decision in a case called *Tower MCashback* (ie *Tower MCashback LLP 1 v HMRC* [2011] UKSC 19), and it was apparent that HMRC were taking a *"harder stance"* as a result. HMRC at the meeting had reiterated their previous proposal to settle the enquiries by allowing sideways loss relief only on the cash element of the partners' capital contributions with the balance of the loss recognised but only available to carry forward to set off against future profits of the partnership, and indicated that they would not be able to discuss anything more favourable. The conclusion was that PwC and Scion would respond to HMRC, refuting HMRC's contentions, explaining issues that HMRC had failed to understand, and distinguishing *Tower MCashback*; depending on HMRC's response, a further proposal might be put, with the option of litigation should it become clear that an appropriate settlement could not be reached. Annexed to the letter was a 2-page analysis by PwC of *Tower MCashback*, ending with a statement that their continuing negotiations with HMRC would highlight the distinguishing features of the case with a view to agreeing a more favourable settlement.

45. Mr Pooles' characterisation of this letter was that Scion were largely indicating that they were taking a strong response to HMRC, although things had clearly moved on. I do not intend to reach any concluded views, but I would not regard the letter as necessarily very optimistic: a comparison of it with that of 22 February 2011 suggests that matters were proving to be rather more difficult than expected. In February the general message was that so long as HMRC could be made comfortable that the loans were full recourse loans, everything should be fine; but by May the discussion has

moved on to other matters, and the general message is that litigation might well prove necessary. (A careful reading of the letter by a lawyer might also suggest that unless HMRC could be persuaded, or it could be established in litigation, that *Tower MCashback* could be distinguished, the prospects were not that promising, but that seems to me well beyond what a lay reader such as the Claimants could be expected to glean from it for themselves.)

The October/November letters

46. The next letter is the one that is relied on by Mr Pooles as giving the Claimants the requisite knowledge. The version sent to participants in Premier 1 is dated 31 October 2012; that sent to participants in Premier 3 is dated 1 November 2012. I give the details below for the Premier 1 letter. Save for certain details specific to each partnership (such as the time of the AGM, the details of the particular films financed, and their financial performance) I will assume that the Premier 3 letter was in materially the same terms. This seems to be the case and no relevant difference was identified or relied on before me.

47. The evidence is that the letters were sent by first class post on the dates they bear. Counsel were agreed that a letter sent by first class post can be assumed to have been delivered 2 working days later, so the Premier 1 letter dated 31 October 2012 (which was a Wednesday) can be assumed to have been delivered on Friday 2 November, and the Premier 3 letter dated 1 November on Monday 5 November.

48. The Premier 1 letter, taken together with its enclosures, is a lengthy document. It consists of a 3-page covering letter, a 6-page Update Report, and a 3-page Appendix with a Film Performance Report on the financial performance of the 3 films financed by the partnership for Universal Films (**"Universal"**) (the equivalent Appendix to the Premier 3 letter is also 3 pages but covers 8 films in all, 5 for Universal and, more briefly, 3 for independent producers). Relevant features of this package of documents are as follows:

    (1) The covering letter (from a Scion company called Premier Administrative Services Ltd, the General Partner of the partnership) gives details of the AGM for the partnership, to be held on 22 November 2012.

    (2) It refers to the Update Report enclosed which it says involves consideration of four specific matters, namely (i) the likelihood of income being received from the films; (ii) certain options held by Universal, the consequences of their exercise or not, and the likelihood of them being exercised; (iii) the potential settlement of the HMRC enquiries; and (iv) individual partners' repayment obligations in respect of their personal loans (ie the internal borrowing).

    (3) It says that the General Partner intended that the Update Report and the AGM should be the *"start of a discussion regarding the future of the partnership"*; partners were urged to attend the AGM (in person or by telephone) to hear what was being discussed; and following the AGM it was likely that the General Partner would present a number of written resolutions to be voted upon. It was anticipated that these would ask the partners to give the General Partner discretion to make arrangements to accelerate and ensure the exercise of Universal's options; authorise the General Partner to submit a proposal for

settlement of the HMRC enquiries; and agree that partners should *"if necessary"* contribute additional capital to cover all extraordinary costs incurred in connection with the proposed actions.

(4) The letter ended, after a reminder to keep matters confidential, with a disclaimer to the effect that no Scion entity could advise individual partners as to their personal financial, legal or tax position and that nothing in the letter constituted such advice, and added:

> "It is important that you take advice from the Independent Financial Adviser that introduced you to the Partnership, or currently advises you, or another appropriate adviser to ensure that you consider the implications of the matters in this letter in relation to your personal financial, legal and tax position."

(5) The Update Report identified five key variables that had the greatest potential impact on the partnerships and individual partners. One of these was the partners' personal liability for their (internal) loans, which was fixed and certain, but the other four had been unpredictable; greater clarity was however now possible.

(6) The first was the performance of the films; one of the films, *Gone*, had generated some income for the partnership (some $400,000), but the other two had not, and it was unlikely that there would be any further revenue. Details were given in the Appendix. (In the case of Premier 3, one of the independent films, *Becoming Jane*, was producing receipts for the partnership, totalling some $4.2m as at 5 April 2012, but none of the others were expected to do so).

(7) The second concerned the exercise of options. Universal had options to buy out the partnership's right to income from each film at a price equal to the then outstanding balance of the partners' internal loans (including accrued interest, save for a margin of 0.05% pa). The options were exercisable as from 6 October 2015 but the General Partner suggested that Universal might be open to an early exercise; its objective was to ensure that this could be done at zero net cost to partners, other than the interest margin *"and any extraordinary fees incurred"*: it was likely that accelerating the options would give rise to extraordinary costs. (In the case of Premier 3, the position was similar save that it was assumed that the options would not be exercised in the case of the two unsuccessful independent films).

(8) The third concerned HMRC's enquiries into the tax returns. This is the key passage for the present application and I deal with it in detail below.

(9) The fourth concerned the income tax treatment of the exercise of the options. This explained that the Chancellor had announced in the Budget in March 2012 that Government would consult on a proposal to introduce a cap on income tax relief, and in July HM Treasury had published a consultation document. The proposal would cap income tax relief for each tax year to 25% of an individual's "adjusted total income" (with a minimum of £50,000), with effect from 2013/14. This could potentially have a significant effect on partners' tax position if the options were exercised. It had always been

assumed that the option price would represent taxable income in the hands of the partners but that a deduction would be available for interest accrued and paid, but if the proposals were enacted it was possible that partners might still be liable for tax on the income but restricted in the relief they could claim. For this reason it might be in partners' interests to ensure that any relief claimed was claimed in the current tax year (2012/13) which might be achieved by early exercise of the options and settlement with HMRC.

(10) After a reference to the fact that the partners were personally liable for their loans and that if the options were not exercised, they might well have to repay them out of other resources, the Update Report ended with a summary as follows:

> "Despite all of the variables the worst possible outcome is easily identified.
>
> Were there no exercise [of] any of the options and if Partners were not to receive any income from any of the Films, Partners would be liable for full repayment of their outstanding loan and accrued interest. Further, either Partners may not be able to reach a settlement with HMRC and so may obtain no benefit from the initial loss relief claims or Partners may choose to litigate, lose and suffer the costs of litigation as well as obtaining no benefit from the initial loss relief claims.
>
> Identifying the best outcome is more complex but is likely to involve an early settlement with HMRC at least providing some measure of relief and an early exit from the Partnership on a negotiated basis with Universal that provides for the maximum contribution towards repayment of Partners loans and avoids the uncertainty of the future changes in law and circumstances."

(11) The Appendix set out the performance of each film. Although some of the films had generated substantial income, they had also incurred significant costs and for the most part resulted in an overall deficit. It is not necessary to set out the details.

49. I referred above to the section in the Update Report on the possibility of a settlement with HMRC, which I should deal with in detail. It referred to the enquiries by HMRC and said that the partnership's contention was that tax returns originally filed reflected the correct tax position. It then referred to extensive and protracted discussions between Scion and PwC on the one hand and HMRC on the other, and to the fact that they had sought to negotiate a settlement proposal. Whilst HMRC were initially open to negotiating a settlement *"their recent successes with the Tribunal Service and in the higher courts"* had resulted in them refusing to move beyond considering a settlement allowing sideways loss relief equivalent to partners' cash contributions only with the balance of losses incurred being carried forward against future profits of the partnership.

50. It continued:

> "It is important that each Partner understands the possible consequences of settling the enquiry on this basis, which is as follows:
>
> - the Partnership's loss for each year should remain as claimed in the tax return

submitted;

- Partners should be able to sideways loss relief their share of that loss equal to their original cash contribution to the Partnership, provided they are not otherwise restricted by statute from doing so;

- Partners should be entitled to interest on overpaid tax due to the sideways loss relief actually given or should be liable for interest on tax relief originally claimed but not now due;

- the remainder of the Partnership loss will be carried forward and should be available to be set against the Partnership's profits from the same trade which may include the Option Prices; and

- Partners should be able to offset, against their share of Partnerships profits, which may include the Option price, relief for accrued interest paid on Partners' loans. It should be noted the availability of loan interest relief may be compromised by proposed legislation which might restrict the availability of tax reliefs generally from 6 April 2013 onwards. PwC has informed the General Partner that HMRC have, for the first time, suggested that they may be able to consider agreeing to Partners obtaining an interest deduction for paying the accrued interest on their loan were this to happen as part of a settlement and were the options to be exercised and the interest paid this fiscal year."

It then said that HMRC would not consider a greater claim for loss relief without the matter being litigated and that there could be considerable costs in such litigation with no certainty as to the outcome. The very best outcome would clearly be that HMRC granted the loss relief originally claimed in full, although the timing benefit of this would have been considerably eroded by the delay and costs associated with litigation, but at worst it was possible that HMRC or the courts would seek to deny any relief at all. This section concluded:

> "Partners may well therefore conclude that a negotiated settlement with HMRC represents their best option as it minimises costs and avoids the risk that no relief at all is given.
>
> The settlement of the HMRC enquiry will likely give rise to extraordinary costs for the Partnership. These extraordinary costs are likely to include any legal fees of the Partnership, the Partnership's administrator's fees and PwC's costs."

Principles for summary judgment

51. CRL's application was brought in the alternative for summary judgment under CPR Part 24, or for the claims to be struck out pursuant to CPR r 3.4, but the basis of both limbs of the application was the same, namely that it could be seen at this stage that the claims were statute-barred, and it was not suggested that the latter in practice added anything to the former. If the claims are not amenable to summary judgment, it would be wrong to strike them out; and if they are, it would be unnecessary. I need therefore only consider the application for summary judgment.

52. As is well known, the basis for granting summary judgment against a claimant on the application of the defendant is that the claimant has no reasonable prospect of succeeding on the claim (CPR r 24.2(a)(i)). (It is also necessary by CPR r 24.4(2)(b)

to show that there is no other compelling reason for the claims to go to trial, but it is not suggested that that has any application here). It is well established, and there was no dispute, that the overall burden of proof rests on the applicant to show that there are no reasonable prospects of success, although in practice the respondent has an evidential burden to show some reasonable prospect of success. The standard however is not a high one, and it suffices to point to a triable issue: see *The White Book (Civil Procedure) 2020* at §24.2.5. There is a substantial body of authority on what can constitute a triable issue, but there was no dispute between the parties on the principles. I was referred to the oft-cited summary by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], which I have re-read, but I do not think it is necessary to set it out.

Analysis

53. The points advanced by Mr Chapman as giving rise to triable issues can be divided into three: (i) some of the Claimants say they did not receive, or do not admit receiving, the October/November letters by the crucial date of 5 November 2012; (ii) the letters in any event are not such as to convey the requisite knowledge to the Claimants; and (iii) the Claimants did not know, or have constructive knowledge of, the identity of CRL and the facts making CRL responsible for Formation's advice. I will take the second of these first.

Did the October/ November letters convey the requisite knowledge?

54. Mr Pooles' submission was as follows. The October/November letters were a watershed. Previous correspondence had been reassuring, but overnight Scion's position had changed from reassurance to a recommendation of settlement. That settlement would involve a restriction on the tax relief available. Any reasonable person reading through the correspondence so as to understand why Scion had so radically changed its tune as now to be recommending settlement would discover that the deal being proposed was essentially the same deal as that which had been described as *"unappealing"* in November 2010. That meant that the Claimants were in the same position as Mr Haward and Mrs Jacobs. The schemes, in which they had invested large sums of money in the confident expectation, based on the advice they had received, of receiving full relief on the sum invested, were not now going to operate as intended. A reasonable person would immediately perceive that one possible reason for this situation was that the initial advice received was flawed. That was sufficient to give the Claimants the requisite constructive knowledge and to start time running.

55. I do not think that matters are as starkly straightforward as Mr Pooles submitted. First, although it is no doubt true that if one takes the letters and reads them in a continuous run, as Mr Pooles did at the hearing, it is possible to see that this one is noticeably less positive than earlier ones (although even then I am not sure that it represents such a sudden and dramatic volte-face as Mr Pooles would have it; the previous letter in June 2011 was perhaps not as positive as this would suggest (paragraph 45 above)). But even assuming this were so, would a reasonable person in the position of the Claimants appreciate that there had been a marked change? That would require him either to remember the effect of the previous correspondence (despite the fact that the last letter was well over a year before, and the one describing HMRC's offer as unappealing was 2 years before) or to look back through it; and

although it is common ground that a reasonable person reads their correspondence, it is not at all self-evident that a reasonable person with the characteristics typical of a professional footballer or manager not only keeps their correspondence (and has a sufficiently organised filing system to be able to lay their hands on it quickly) but promptly re-reads it when receiving a letter like this.

56. Second, Mr Pooles' submission made much of the point that the settlement with HMRC now being recommended was materially the same as that described in the November 2010 letter as unappealing. But it is not clear that the current proposal was in fact quite the same. Mr Chapman pointed to two differences: first, HMRC's offer in 2010 had been a standalone proposal, whereas what was now being discussed was a potential package under which the options would be exercised early, the HMRC enquiries settled, and everything brought to a close. Second, the Update Report said that the proposal should allow partners to claim tax relief on their loan interest: PwC had told Scion that HMRC had for the first time suggested that they might be able to consider this. If it could be secured, this would be a potentially important point: the worked examples considered above show that loan interest relief (in the sum of £48,600) was in fact more valuable than the initial relief on cash contributions (of £28,000) (paragraph 37(2) above), and would make a significant difference to the overall outcome.

57. Third, as this last point illustrates, the exact practical effect of what was being proposed depended on a number of detailed matters. The letters and their enclosures are long and detailed. Mr Pooles said they were not complex, but I doubt that many footballers (or managers) would agree. They are not like the statements sent to Mrs Jacobs which made it clear that her bond had lost large amounts of money, or like the short document which Mrs Webster signed in *Webster*, where Swinton Thomas LJ said (at 246C) that it *"could not be plainer in its terms"* and that if Mrs Webster had read it, it would have been *"clear beyond peradventure"* that the charge she executed was an all-moneys charge. The overall message of the October/November letters was that there was an AGM coming up at which partners would be asked to vote on certain proposals, combined with some detailed and technical explanations. One suspects that professional footballers or managers would have many other things to think about during the season, and that the reaction of many would have been to refer the whole thing to their financial adviser to tell them what it meant for them and what if anything they ought to do, rather than trying to work it out for themselves. I think it distinctly arguable that that would have been reasonable. In terms of the distinction drawn above (paragraph 23), it would mean that this would be a "Do I have a problem?" case rather than a "This is a problem – how bad is it?" case. If that is right, then I also accept that the Claimants have a reasonable prospect of showing that time did not expire until a reasonable time had elapsed to take advice, and, given the assumed dates of delivery, that that would take them past 5 November 2012.

58. Fourth, even if the Claimants should have read the entirety of the letter carefully and tried to work out for themselves what it meant, it is not obvious that they would have been able to. It is true that if one reads the whole of the October/November letter carefully, one can see that the proposal to settle with HMRC will mean giving up something, because it describes the best outcome as one that granted the tax relief originally claimed in full, and it was clear that HMRC were not willing to go that far without litigation. But there is nothing that spells out quite what that will mean for

the Claimants (which in any event would depend on each Claimant's individual tax position), and indeed Scion makes the point that it cannot give individual financial or tax advice, and that the partners should take their own advice. It is noticeable that there are no worked examples even on an illustrative basis.

59. So even accepting that the Claimants could have seen for themselves that this proposal represented a less good outcome than that they had originally (many years before) been led to believe would be available, there does I think remain a question whether it was such as to give them the knowledge that it would mean that they would have been better off not going into the scheme at all. But as I have sought to explain above (paragraph 28), in my view that is the relevant question when considering whether the Claimants knew, or a reasonable person in their position would have known, that they had suffered damage sufficiently serious to be worth taking proceedings.

60. Mr Pooles pointed to other aspects of the October/November letter which he said were pessimistic in tone, such as the prospect of Universal not exercising its options and the partners having to repay their loans out of their own pockets, as well as the warning that partners might have to fund extraordinary costs. But I do not think these take matters any further. They are warnings of things that might happen. Being told that something might happen is not the same as knowing that it will. There is in fact no evidence before me that any of these things did happen: the Claimants' case pleads that the partnerships reached agreement with Universal and others for the early exercise of options which resulted in the balance of the partners' loans being repaid, and there is no claim that the Claimants had to contribute any further funds for extraordinary costs.

61. In all the circumstances I accept Mr Chapman's submission that there is a reasonable prospect of the Claimants establishing that they did not have the requisite constructive knowledge as a result of the October/November letters. That is sufficient to mean that the application for summary judgment fails. At one point in his submissions Mr Chapman went so far as to say that the answer to whether the letters gave the Claimants constructive knowledge was *"plainly no"*, but he made it clear that he was not asking me to determine the point in his favour, only to dismiss the application, which I will do.

62. That makes it unnecessary to consider another point relied on by Mr Chapman on the October/November letters which is that even if they were sufficient to give the Claimants knowledge that they had suffered damage, they did not indicate that that was attributable to poor advice by Formation – indeed they did not mention Formation, let alone CRL, at all; and there were indications in the letters that HMRC's position had hardened because of subsequent cases, and that one of the reasons for accepting the proposed settlement was an imminent change in the law which meant that there were good reasons for coming to a settlement before the new tax year. I do not propose to consider this point – as appears above (paragraph 16(6)), it is sufficient for knowledge of attributability if the claimant knows enough for it to be a real possibility, worth investigating, that the damage he has suffered is due to the defendant's acts or omissions. That is not a demanding test, and in the light of the conclusions I have already come to, it is not necessary for me to consider whether it is here met – indeed unless a claimant knows he has suffered damage, one cannot sensibly ask whether he knows what the damage he has suffered is attributable to.

Knowledge of identity of CRL

63. Nor is it strictly necessary to consider the other points relied on by Mr Chapman, but I will give my views on them. As appears above (paragraph 53) there were two of these. One turns on the question whether individual Claimants received the October/November letters, and the other on whether the Claimants had knowledge of the identity of CRL. I will take the latter first as it is a general point applicable to all the Claimants.

64. Mr Pooles said that the point was not taken in the pleadings, or covered in the evidence filed for this application, and was only first raised in Mr Chapman's skeleton argument. Mr Chapman pointed to paragraph 28.2 of the Reply which does plead the requirements in s. 14A(8)(b) and (c) LA 1980 (including the requirement for a claimant to know the identity of the defendant and the facts that make the defendant liable for someone else's acts), but it can scarcely be said that any positive case is advanced under this head. It is in a section dealing with the individual claimants' actual knowledge (and so does not directly address the question of constructive knowledge) and in any event nothing specific is pleaded as to whether the Claimants were aware of the identity of CRL or not. Given that the burden of proof is accepted to be on the Claimants, I doubt this amounts to a sufficient pleading of the point. And Mr Pooles is I think right that it is not mentioned in the evidence.

65. Nevertheless, taking it on its merits, the Claimants in my judgment have a reasonable prospect of success on the point. (This assumes that the point can be, and is, properly pleaded; no application to amend is currently before me.) It is accepted that the Claimants all knew that they had been advised by Formation, but this does not mean they knew that CRL were responsible for Formation's advice, or for supervising them. Mr Pooles relied on two things. One was that Formation's relationship with CRL was a matter of public record, accessible by consulting the Financial Services Register maintained online by the Financial Conduct Authority. I will assume he is right about that, and that it would have been easy in November 2012 to discover that Formation had been an appointed representative of CRL. But the question posed by s. 14A(10) LA 1980 is not whether it would have been easy to discover some fact but whether the knowledge is knowledge that the claimant *"might reasonably have been expected to acquire"* from facts ascertainable by him. I think it must be doubtful if it would have been reasonable to expect a person in the position of the Claimants receiving and reading the October/November letters to have immediately, and without the benefit of expert advice, gone online to look for information about Formation.

66. Mr Pooles' second point was that Formation was obliged to notify its clients that it acted as an appointed representative of CRL and would have done so, typically in paragraph 1 of its terms of business. That again may well be so (although it is not actually dealt with in the evidence), but begs a number of questions, namely whether a reasonable person in the position of the Claimants is assumed not only to read letters but to study the terms of business of their financial adviser, whether if they had done they would have remembered, or it would be reasonable to expect them to check, the position when reading the October/November letter over 5 years later, and whether knowledge that Formation was the appointed representative of CRL was by itself sufficient to give them the requisite knowledge without expert assistance.

67. For these reasons I would have declined to grant summary judgment on this ground as

well (although if it had been the only ground, I would have made it conditional on the Claimants applying successfully for permission to amend).

Receipt of letters by individual Claimants

68. The final point relied on by Mr Chapman is that some of the Claimants either do not admit receiving the October/November letters or say they did not receive them in time.

69. Four of them (Messrs Powell, Davis, Knight and O'Neill) have made witness statements for this application. Of these Mr Powell (whose first witness statement was in time) accepts that he received and read the October/November letter, and does not suggest that he received it late. The other three witness statements (and a second witness statement of Mr Powell correcting his first) came in late and Mr Chapman applies for a retrospective extension of time to enable them to be put in; Mr Pooles, while not formally consenting, did not actively oppose the application. I propose to grant the application and allow them in; since nothing turns on it in the light of the decisions I have already come to, I will give my reasons very briefly. The principles applicable are the same as those applicable to an application for relief from sanctions. The default was, as Mr Chapman accepted, a serious one, but there was good reason (they were responding fairly promptly to new evidence giving the addresses to which the letters were sent), and in any event, taking account of all the circumstances, it would in my judgment be just to grant relief.

70. There is no evidence from the other four Claimants (Messrs Cole, Murphy, Pearce and Savage). Mr Murphy accepts in the Reply that he was aware of the October/November letter by 5 November 2012 as on that day he spoke about it to a Mr Muffitt. Mr Pearce's pleaded case in the Reply is that he did not read or understand the correspondence, but he does not say anything about not receiving it; similarly Mr Savage's pleaded case is that he did not realise there was a problem until later, but again does not say anything about not receiving the letter. Mr Cole makes no admissions as to receipt of the letter, but given that the onus is on him, I do not think this is sufficient to raise a triable issue on the point: there is evidence of posting, and in the absence of anything pointing to non-receipt (and there is no reason to think the evidence will be any different at trial) the Court would in my judgment be bound to conclude that he had failed to establish that he did not receive it in the ordinary course of post. None of those four therefore raises a triable issue on the question; nor does Mr Powell.

71. That leaves Messrs Davis, Knight and O'Neill. The evidence of each of them is as follows:

    (1) Mr Davis's letter was sent to an address in Wimbledon. That had been his address until 2009 when he transferred to Bolton Wanderers and moved to a property in Cheshire. He sold the Wimbledon property in November 2010. He believes he would have set up a mail forwarding arrangement when he left the Wimbledon address, but they are only available for up to 12 months so he does not think it would have been active in November 2012.

    (2) Mr Knight's letters were addressed to an apartment in Birmingham. This was Mr Knight's address in 2012 (albeit not quite right – the postcode was wrong

and the building name slightly inaccurate), but in July 2009 he too had transferred to Bolton Wanderers. That meant he spent much of the week staying near Bolton, usually returning to his Birmingham apartment twice a week. However by looking at records of what was happening at Bolton Wanderers at the time, Mr Knight believes that he was in Bolton for the whole of the week beginning Monday 29 October 2012 (which was the first week of a new manager); he also played in two home matches, one on Saturday 3 November and one on Tuesday 6 November, and would have stayed in Bolton all weekend, not returning to Birmingham until after the match on 6 November at the earliest.

(3) Mr O'Neill's letters were addressed to a property in Farnham Common in Buckinghamshire. That was his address (although he and his wife also had a London property where his wife spent much of her time) but in November 2012 he was managing Sunderland and spent most of the working week in the North-East. There were home matches on both Tuesday 30 October and Saturday 3 November, and Mr O'Neill believes he would have stayed in Sunderland until at least Sunday 4 November. There was another match the next Saturday, 10 October, and Mr O'Neill thinks it likely that if he went to the Buckinghamshire property at all, it would have been on Wednesday 7 November as he often gave the players a Wednesday off if they had matches on consecutive Saturdays with no midweek fixture.

72. I accept that this evidence raises a triable issue in relation to each of these three Claimants that they did not actually receive the October/November letters before 6 November 2012.

73. Mr Pooles says that this does not matter. In relation to Mr Knight and Mr O'Neill there is no reason to think that the letters were not duly delivered to their addresses in time, and were sitting on their doorsteps. That meant, he said, that they were *"ascertainable"* by them, and it did not matter that in fact they were not there to receive them. In the case of Mr Davis, he said that a reasonable person would have notified Scion of his change of address, and hence the information in the letter would have been ascertainable; that required an objective assessment, and a person could not rely on his own failure to keep in touch.

74. These questions raise issues as to the true scope of the provision in s. 14A(10) LA 1980 that a person's knowledge includes knowledge that he could reasonably have been expected to acquire from facts ascertainable by him. I was referred to no authority on the point, and received little in the way of argument. I do not find the point entirely straightforward, but I have considerable doubts whether Mr Pooles is right.

75. Take the case of Mr O'Neill. In one sense of course, the information in each letter was indeed ascertainable by him on the date it was delivered: he could have seen it had he been there. But it would seem to me at least well arguable that he could not *"reasonably have been expected to acquire"* the knowledge in the letters unless it was reasonable to expect him to have some system in place for checking his post every day. It could scarcely be reasonable to expect him to drive down from Sunderland every day, or ask his wife, who was generally in London, to drive out to Buckinghamshire every day to check his post. The same applies to Mr Knight, who

could not reasonably be expected to return from Bolton to Birmingham every night.

76. As for Mr Davis, I think there is a real question whether there were any relevant facts observable or ascertainable by him at all. On his case he simply did not receive the letter. That may or may not have been his fault in failing to keep the address Scion had for him up to date, but I do not see how that makes the letter ascertainable by him. What Mr Pooles was really arguing for was an interpretation of the statute which fixed him with the knowledge which he could have derived from facts that would have been ascertainable by him had he acted reasonably. But this is not what it says and I am very doubtful if it can be stretched to mean that.

77. In those circumstances if the issue had been a live one I would have allowed the case to proceed to trial on this ground as well, on the basis that I am not satisfied that Mr Pooles is right in his interpretation of s. 14A(10) LA 1980 and that the point should be argued more fully at trial after the facts have been fully found.

Conclusion

78. For the reasons I have given, CRL has not established that there is no reasonable prospect of success on the claims against it, and I will dismiss the application for summary judgment. For reasons already given, that means that I will also dismiss the application to strike the claims out.

79. Mr Chapman raised a procedural question. CRL did not in its Defence plead to the schedules to the Particulars of Claim which set out the facts particular to each Claimant. That was largely on the basis that it would be disproportionate to do so until the current issue was disposed of. Mr Chapman would like CRL now to do so. I did not understand Mr Pooles to dissent from that in principle. I will leave it to counsel to see if they can agree suitable directions, but if there is any dispute, it can be raised as part of the matters consequential on the handing down of this judgment.