ENGLAND AND WALES / JUDGMENT

Ellen Kay v Martineau Johnson (A firm)

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Neutral Citation Number: [2026] EWCA Civ 224 Case No: CA-2025-000626 IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS IN BRISTOL BUSINESS LIST (ChD) His Honour Judge Russen KC (sitting as a Judge of the High Court)

[2024] EWHC 2451 (Ch) Royal Courts of Justice Strand, London, WC2A 2LL Date: 05/03/2026 Before: LORD JUSTICE NEWEY LORD JUSTICE MALES and LORD JUSTICE LEWIS

- Between: ELLEN KAY

- and - MARTINEAU JOHNSON (A firm)

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- Claimant/ Appellant Defendants/ Respondents James Hall (instructed by Sehdeva Law) for the Appellant Simon Wilton KC (instructed by Travelers Legal) for the Respondents Hearing dates: 10 and 11 February 2026

- Approved Judgment This judgment was handed down remotely at 10.30am on 5 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives. ..... Judgment Approved by the court for handing down. Kay v Martineau Johnson Lord Justice Newey: 1. What is at issue in this appeal is whether the claim for negligence which the appellant, Ms Ellen Kay, has brought against the respondents, Martineau Johnson, is statute- barred. His Honour Judge Russen KC ("the Judge"), sitting as a Judge of the High Court, held that it was, but Ms Kay disputes that. The point turns on the extent, if any, to which section 14A of the Limitation Act 1980 ("the 1980 Act") served to extend the usual six-year limitation period. Basic facts 2. 3. Ms Kay was formerly married to Mr Ajay Mahan. However, Ms Kay and Mr Mahan each petitioned for divorce and in December 2007 Ms Kay instructed Martineau Johnson, a firm of solicitors, to act for her in her claim for ancillary relief. The relevant partner in the firm was Mrs Mary Kaye, whose practice focused on private family law related matters. On 25 April 2008, a settlement was reached at a financial dispute resolution hearing, and that was embodied in a consent order on 29 September 2008. The settlement provided for Ms Kay to receive the net proceeds of sale of a property called Manor Cottage, a £4,000 lump sum for spousal maintenance and 80% of any money recovered from a claim against a builder who had done work on Manor Cottage. The settlement constituted a "clean break". 4. Ms Kay has said in a witness statement: "There was no advice from Mrs Kaye at any stage other than a clean

break would be best so I could 'get on with my life and not rely on him'. She said that I was 'a strong woman' and 'it would be unlikely he would make the payments'." 5. 6. Even before the settlement was agreed, Ms Kay had concerns about whether Mr Mahan had revealed the full extent of his financial resources. Such concerns revived soon after the settlement had been concluded and so in October 2008 Ms Kay approached Martineau Johnson to see whether the settlement could be reopened. In November 2008, the firm advised that there was no basis for setting aside the settlement, and they repeated that advice in May 2009. The firm ceased to act for Ms Kay in June 2009. There is no hint of criticism of Martineau Johnson in the correspondence from this period that I have seen. To the contrary, Ms Kay referred to Mrs Kaye as "a fantastic lady" in an email of 11 November 2008 to someone else at the firm. It is plain, however, that Ms Kay was not happy with what the settlement gave her. Thus, she wrote in an email to Mrs Kaye of 20 March 2009, "There has been a material change in circumstances since the [FDR] ... and I would now like a fair deal". Shortly afterwards, she said in an email to Mrs Kaye, "he [i.e. Mr Mahan] has pushed me beyond my level of patience and I am NOT willing to just listen and play to his tune anymore". 7. It was also in 2009 that proceedings were issued against the builder who had worked on Manor Cottage. It seems that the claim succeeded but that nothing was ultimately Judgment Approved by the court for handing down. Kay v Martineau Johnson 8. 9. recovered because the builder declared himself bankrupt. As for Manor Cottage, the value of that was impaired by the global financial crisis. Ms Kay told the Judge that she received £100,000 from its sale in 2011. Ms Kay returned to the question of whether the settlement could be reopened after, she explained, she had learned of particularly conspicuous indications of wealth on Mr Mahan's part. She said in a witness statement that "[b]etween 2017 and 2018 it became increasingly apparent that [Mr Mahan] was living an affluent lifestyle while [she was] struggling to raise two children with no regular income". In the same period, at about the end of 2017, she became romantically involved with Mr Richard Morgan, who was then a litigation solicitor (but not a practitioner in family law) with Harrison Clark Rickerbys, and he began to assist her on an informal basis. On 23 April 2018, Ms Kay asked Martineau Johnson for their file in respect of her ancillary relief claim and the firm provided that in the following month. On the basis that what Ms Kay had been given had not included them, in January 2019 Mr Morgan requested Mr Mahan's Form E and accompanying documentation, and the firm supplied copies of these on 18 January 2019. In the next month, Ms Kay asked Martineau Johnson for the "Hildebrand bundle" (named after Hildebrand v Hildebrand [1992] 1 FLR 244) relating to Mr Mahan's finances which had been compiled for the purposes of her ancillary relief claim. Ms Kay chased for that in July 2019, but it appears that it had in fact been surrendered in 2008 to solicitors acting for Mr Mahan's brother.

10. Ms Kay and Mr Morgan began living together in April 2022. In earlier years, however, there was what Mr Morgan described as some volatility in their relationship, with the result, Ms Kay said, that there were periods of separation during 2018 and

2019. Mr Morgan explained in evidence that the relationship had broken down at Christmas 2019 and it was only after a reconciliation that he had decided that he would pay for advice from counsel. 11. 12. However, on 27 March 2020, at his expense, Mr Morgan instructed Ms Victoria Edmonds, a barrister specialising in family law, to advise on whether Ms Kay's settlement with Mr Mahan could be reopened. On 3 May 2020, Ms Edmonds advised in writing that such an application would not succeed, saying that there was no clear evidence that Mr Mahan had failed to disclose assets he held at the date of the settlement such as would have led to a different outcome. That advice was provided to Mr Morgan on 9 May 2020, and he spoke to Ms Edmonds around that time. She told him that there might be a claim against Martineau Johnson. The present proceedings were issued a little less than three years later, on 6 March

2023. By them, Ms Kay claims damages for loss which she alleges that she suffered as a result of negligent advice from Martineau Johnson in connection with the ancillary relief claim. In broad terms, it is said that the firm failed to give Ms Kay adequate advice as to the options for and merits of further investigating Mr Mahan's means (including by means of forensic accountancy advice and a pension sharing report), failed to give her adequate advice in relation to the possibility of seeking an order under section 37 of the Matrimonial Causes Act 1973 and recommended that she enter into the settlement when that was not advisable. A specific complaint is that the firm "[f]ailed adequately or at all, to advise [Ms Kay] of the availability and/or merits of pursuing a nominal spousal maintenance order in circumstances where it Judgment Approved by the court for handing down. Kay v Martineau Johnson was obvious or ought to have been obvious to [Martineau Johnson] that Mr Mahan had likely failed to disclose assets and means and/or was likely to be capable of acquiring substantial earnings and wealth in the future". The Judge recorded in paragraph 130 of his judgment ("the Judgment") that Mrs Kaye had explained in evidence that under a nominal spousal maintenance order ("NSMO") initial maintenance might be set at £0 but (depending on whether the order was of indefinite duration or for a defined term or expressed by reference to the minority of a child) it might be possible to come back to Court in the event of a later change in circumstances. Mrs Kaye further said that it was likely that an NSMO would have been made had Ms Kay's application for ancillary relief proceeded to a final hearing.

13. Martineau Johnson deny that they were negligent. They have also, however, contended that Ms Kay's claim is statute-barred. 14. In the circumstances, on 8 February 2024 District Judge Brown directed the trial of a preliminary issue as to whether the claim was barred by the 1980 Act. That issue was the subject of a two-day trial, with oral evidence from Ms Kay, Mr Morgan and Mrs Kaye, in September 2024. Giving judgment on 1 October 2024, the Judge determined the issue in favour of Martineau Johnson and so dismissed the claim.

15. Ms Kay now appeals against that decision. The legal framework 16. Section 2 of the 1980 Act imposes a six-year time limit on tort claims. However, a claimant wishing to bring a negligence claim who was unaware of the relevant facts when the cause of action accrued

may be able to take advantage of section 14A of the 1980 Act (headed “Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual”). That provides for a three-year limitation period running from “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”: see subsection (5). Subsection (6) explains that “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)”. By subsection (7), “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”. The remaining subsections are in these terms: “(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 Judgment Approved by the court for handing down. Kay v Martineau Johnson (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) (10) 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. 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.” 17. 18. Section 14A was inserted into the 1980 Act by the Latent Damage Act 1986. That latter Act also added section 14B to the 1980 Act. Section 14B provides a 15-year longstop, barring claims for negligence after the expiration of 15 years from the date of any act or omission which is alleged to constitute negligence and to which the relevant damage is said to be attributable. The Latent Damage Act 1986 reflected recommendations which the Law Reform Committee had made in its 24th Report (Latent Damage) (Cmnd 9390). The Committee had said in paragraph 4.4 of that report: “We consider that a plaintiff who has no means of knowing that he has suffered damage should not as a general rule be barred from taking proceedings by a limitation period which can expire before he discovers (or could discover) his loss. But we are equally convinced that defendants require protection from stale claims and that a time limit must be set to a legal action by a plaintiff.” The Committee therefore recommended both “the introduction of an extension to the ordinary period of limitation so as to give a plaintiff in a negligence case involving latent damage an additional period of years from the date on which he knows (or ought reasonably to have known) that he has suffered significant damage” and “the introduction of a long stop which would operate to bar legal action in

cases of latent defect or damage after a defined period of years". With regard to the former, the Committee concluded that the best approach was "the adaptation of section 14 of the Judgment Approved by the court for handing down. Kay v Martineau Johnson 1980 Act to cases of latent defect other than those of personal injury": see paragraph 4.8. 19. Section 14A is, as the Law Reform Committee suggested, modelled on section 14. Section 14 provides that, for the purposes of claims for personal injuries and under the Fatal Accidents Act 1976, time should run from: " the date on which he first had knowledge of the following facts— (a) (b) (c) (d) that the injury in question was significant; and that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and the identity of the defendant; and 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" with the proviso that "knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant": see section 14(1). It is further stated, in section 14(3), as follows: "For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire— (a) (b) from facts observable or ascertainable by him; or from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek; but a person shall not be fixed under this subsection with 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." 20. As Lord Mance pointed out in Haward v Fawcetts [2006] UKHL 9, [2006] 1 WLR 682, at paragraph 114, "there are tensions arising from the interaction of subsection (8)(a) and subsection (9) of section 14A". Lord Mance had noted in the previous paragraph that these subsections mean that "there must be knowledge of the act or omission allegedly constituting negligence, but there need not be knowledge that, as a matter of law, such act or omission involved negligence". Drawing that distinction may be difficult, especially where a professional's failure to say or do something is alleged to have been negligent. Lord Mance explained in paragraph 115 that Janet O'Sullivan had shown the problem to be "most acute in a case of alleged negligence on the part of a solicitor or other adviser, where the negligence consists simply in Judgment Approved by the court for handing down. Kay v Martineau Johnson omitting to do something which it was the adviser's duty in law to do (or in doing something that it was his duty not to do) and where the only reason why the client does not attribute any resulting damage to the adviser is that he does not know that the adviser would have been expected so to do (or not to do)". 21. The following guidance as to section 14A of the 1980 Act can, as it seems to me, be derived from Haward v Fawcetts: i) Rather less than knowledge as a certainty will suffice. Lord Nicholls said in paragraph 9 that "knowledge": "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: 'Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice.' In other words, the claimant must know enough for it to be reasonable to begin to investigate further"; ii) Knowledge of "the facts which are the 'essence' or 'essential thrust of

the case' or which 'distil what [the claimant] is complaining about'" is enough, to use the words of Lord Walker at paragraph 66. See, too, Lord Nicholls at paragraph 10, Lord Scott at paragraph 49 and Lord Mance at paragraph 120; iii) Where a claim relates to professional advice, the fact that the claimant knew that he had incurred loss as a result of acting in accordance with the advice need not mean that he had knowledge that "the damage was attributable ... to the act or omission which is alleged to constitute negligence" for the purposes of section 14A(8)(a). Lord Mance said in paragraph 118 that "it is ... wrong to suggest that all a claimant needs to know is that he has received professional advice but for which he would not have acted in a particular way which has given rise to loss, or that he has not received advice when, if he had received it, he would have acted in a way which would avoided such loss", adding: "A claimant who has received apparently sound and reliable advice may see no reason to challenge it unless and until he discovers that it has not been preceded by or based on the investigation which he instructed or expected. A claimant who has suffered financial loss in a transaction entered into in reliance on such advice may not attribute such loss to the advice unless and until he either makes the like discovery about the inadequacy of the work done, or at least discovers some respect in which the transaction was from the outset unsound giving him ... prima facie cause to complain. Such a scenario may well occur where there are other causes of loss which appear to him capable of explaining the whole loss." In a similar vein, Lord Nicholls said: Judgment Approved by the court for handing down. Kay v Martineau Johnson "19. ... As already noted, in addition to having knowledge of the material facts about the damage, a claimant must know there was a real possibility the damage was caused by ('attributable to') the acts or omissions alleged to constitute negligence. The conduct alleged to constitute negligence in the present case was not the mere giving of advice. The conduct alleged to constitute negligence was the giving of flawed advice: Mr Austreng did not give the advice appropriate to the true financial state of the company's affairs.

20. This feature of the advice cannot be brushed aside as a matter of detail. Nor can it be treated, as it was by the judge, as a matter going only to particulars. Far from it. This feature is the very essence of Mr Haward's claim. Stated in simple and broad terms, his claim is that Mr Austreng did not do his job properly. Time did not start to run against Mr Haward until he knew enough for it to be reasonable to embark on preliminary investigations into this possibility.

21. There may be cases where the defective nature of the advice is transparent on its face. It is not suggested that was so here. So, for time to run, something more was needed to put Mr Haward on inquiry. For time to start running there needs to have been something which would reasonably cause Mr Haward to start asking questions about the advice he was given." 22. In Witcomb v J Keith Park Solicitors [2021] EWHC 2038 (QB), [2021] PNLR 24, Bourne J said after quoting from Haward v Fawcetts: "36 From all of this, I conclude that where the essence of the allegation of negligence is the giving of wrong advice, time will not start to run under s.14A [of the 1980 Act] until a claimant has some reason to consider that the advice may have been wrong. 37 Similarly, where the essence of the allegation is an

omission to give necessary advice, time will not start to run under s.14A until the claimant has some reason to consider that the omitted advice should have been given." 23. Those comments received support from the Court of Appeal when the Witcomb case ("Witcomb") reached it. Thirlwall LJ, with whom Baker and Nicola Davies LJJ agreed, said that paragraph 36 of Bourne J's judgment had been "plainly correct": see Witcomb v Keith Park Solicitors [2023] EWCA Civ 326, [2023] PNLR 20, at paragraph 55. With regard to paragraph 37 of Bourne J's judgment, Thirlwall LJ said in paragraph 57: "In [37] the judge is not saying (by the use of 'should have been given') that the claimant must know that the lawyer was Judgment Approved by the court for handing down. Kay v Martineau Johnson under a duty to give the omitted advice. That would offend against s.14A(9) which the judge had well in mind (see for example [86] of his judgment). He is saying no more than that in a case of omission time will not start to run until a claimant has some reason to consider that the necessary advice has not been given." 24. Returning to the degree of certainty required for "knowledge", the relatively low threshold will have reduced the significance of section 14A(10) of the 1980 Act. The fact that knowledge which a claimant "might reasonably have been expected to acquire" is to be taken into account under subsection (10) must matter less once it has been established that "knowledge" for the purposes of subsections (6)-(8) demands no more than "knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ" or "know[ing] enough for it to be reasonable to begin to investigate further". Even so, it is evident from the structure of section 14A that "actual" knowledge under subsections (6)-(8) involves more than "constructive" knowledge under subsection (10). As Lord Mance said in Haward v Fawcetts at paragraph 126: "The language of section 14A thus recognises a range of different states of mind: (a) actual knowledge of the material facts about the damage and other facts relevant to the action (including therefore knowledge that the loss was capable of being attributed to an act or omission alleged to constitute negligence); (b) knowledge that a claimant might reasonably have been expected to acquire (from facts observable by himself or ascertainable by him or with the help of appropriate expert advice which it would have been reasonable for him to seek); and (c) ignorance. Actual knowledge within (a) involves knowing enough to make it reasonable to investigate whether or not there is a claim against a particular potential defendant .... Constructive knowledge within (b) involves a situation where, although the claimant does not yet know sufficient for

(a) to apply, he knows sufficient to make it reasonable for him (by himself or with advice) to acquire further knowledge which would satisfy (a)." 25. The other authority which I think it worth mentioning at this stage is Forbes v Wandsworth Health Authority [1997] QB 402 ("Forbes"). In that case, the plaintiff had had a leg amputated. Ten years later he received medical advice that the amputation could be attributed to failure to perform a bypass operation earlier. He brought proceedings for negligence against the hospital, but the Court of Appeal held by a majority (Roch LJ dissenting) that they were statute-barred. Stuart-Smith LJ did not consider the plaintiff to have had actual knowledge that his injury was "attributable ... to the act or omission which is alleged to constitute negligence" within the

meaning of section 14(1) of the 1980 Act more than three years before the issue of the writ, but he concluded that section 14(3) applied. He said at 413: “In my judgment, a reasonable man in the position of the deceased [the plaintiff having died], who knew that the operation had been unsuccessful, that he had suffered a major Judgment Approved by the court for handing down. Kay v Martineau Johnson injury which would seriously affect his enjoyment of life in the future, would affect his employability on the labour market, if he had any, and would impose substantial burdens on his wife and family in looking after him, if he was minded to make a claim at any time, should and would take advice reasonably promptly.” 26. Stuart-Smith LJ had said at 412-413: “Turning to the words of section 14(3), it is clear that the deceased could reasonably have been expected to acquire the relevant knowledge with the help of suitable medical advice. The real question is whether it was reasonable for him to seek that advice. If it was, he took no steps at all to do so. One of the problems with the language of section 14(3)(b) is that two alternative courses of action may be perfectly reasonable. Thus, it may be perfectly reasonable for a person who is not cured when he hoped to be to say, ‘Oh well, it is just one of those things. I expect the doctors did their best.’ Alternatively, the explanation for the lack of success may be due to want of care on the part of those in whose charge he was, in which case it would be perfectly reasonable to take a second opinion. And I do not think that the person who adopts the first alternative can necessarily be said to be acting unreasonably. But he is in effect making a choice, either consciously by deciding to do nothing, or unconsciously by in fact doing nothing. Can a person who has effectively made this choice, many years later, and without any alteration of circumstances, change his mind and then seek advice which reveals that all along he had a claim? I think not. It seems to me that where, as here, the deceased expected, or at least hoped, that the operation would be successful and it manifestly was not, with the result that he sustained a major injury, a reasonable man of moderate intelligence, such as the deceased, if he thought about the matter, would say that the lack of success was ‘either just one of those things, a risk of the operation, or something may have gone wrong and there may have been a want of care; I do not know which, but if I am ever to make a claim, I must find out.’ In my judgment, any other construction would make the Act unworkable since a plaintiff could delay indefinitely before seeking expert advice and say, as the deceased did in this case, ‘I had no occasion to seek it earlier.’ He would therefore be able, as of right, to bring the action, no matter how many years had elapsed. This is contrary to the whole purpose of the Act which is to prevent defendants being vexed by stale claims which it is no longer possible to contest.” Judgment Approved by the court for handing down. Kay v Martineau Johnson The Judgment 27. The Judge concluded in paragraphs 140 and 141 of the Judgment that Ms Kay had what he termed “actual trigger knowledge” (i.e. knowledge satisfying section 14A(6) of the 1980 Act other than pursuant to section 14A(10)) by no later than the end of 2009; that, if she did not have actual knowledge by that stage, she should be attributed with “constructive trigger knowledge” (i.e. knowledge satisfying section 14A(6) on the strength of section 14A(10)); and that she would anyway have had “constructive trigger knowledge” by no later than the end of 2018.

28. With regard to the first of these ("actual trigger knowledge"), the Judge said that by June 2009 it "must … have been obvious to Ms Kay that, on her case in these proceedings, something must have gone wrong in the advancement of her ancillary relief claim": see paragraph 144. On the assumption that Martineau Johnson were negligent, "by the time Martineau Johnson ceased to act for her in June 2009, Ms Kay knew enough to cause her to investigate the possibility that the lack of recourse to Mr Mahan may have been attributable to fault on the part of [Martineau Johnson]": see paragraph 145. "Allowing for the fact that the early 2008-9 inquiry about re-visiting the ancillary relief claim was driven as much if not more by her own post-Settlement impoverishment than by Mr Mahan's apparent financial position at that time," the Judge said in paragraph 145, "she would or should have asked herself: 'How is it that, with the supposed benefit of legal advice, I have found myself in this position?'" Distinguishing Witcomb, the Judge said that, while "Ms Kay should not be attributed with knowledge in 2009 that there was such a thing as a NSMO", she "did know that the Settlement gave Mr Mahan a 'defence' based upon the clean break" and "there was no overlooked claim of a kind that only materialised and came to Ms Kay's attention much later": see paragraphs 146 and 148. After citing Forbes, the Judge said in paragraph 148 that "[k]nowing what [Ms Kay] did she was then [i.e. in 2009] at the stage of deciding whether to conclude the finality of the Settlement was just one of those things, which she had to accept, or instead to investigate whether she was in that position because something had gone wrong with the legal advice she had received". "The very nature of the later advice (discouraging as it was in relation the likelihood of success on any attempt to re-visit the Settlement) was such that it raised a suspicion about the soundness of the earlier advice", the Judge observed in paragraph 149. "She knew enough for her to begin investigating whether or not [Martineau Johnson were] at fault", the Judge concluded in paragraph 149. 29. Turning to the finding of "constructive trigger knowledge" by the end of 2018, the Judge explained in paragraph 153 of the Judgment that this rested "essentially upon the application of section 14A(10), as at the end of 2018, by reference to what in fact transpired when expert … advice was sought some 15 months later". The Judge said in paragraph 160: "There was no reason why the advice sought in March 2020 could not have been sought and obtained (that exercise in 2020 took a couple of months) by the end of 2018. There is no excuse for the delay on Ms Kay's part during the second half of 2018 and the whole of 2019. The personal reasons she relied upon are irrelevant …." Judgment Approved by the court for handing down. Kay v Martineau Johnson 30. After noting in paragraph 161 of the Judgment that Ms Kay's counsel had argued that "Ms Kay's very limited financial resources during the period provide a good reason for her not acting sooner", the Judge said: "162. I have already explained that it was Mr Morgan who in fact paid for counsel's advice in 2020. He also paid £5,000 for [Ms Kay's] 50th birthday celebrations in early 2018. The birthday party money might have been used instead to pay for counsel's advice at some point in 2018 or 2019. Of course, she may never have met Mr Morgan or come across any alternative way of paying for the expert assistance. On the other hand, she might in other circumstances have resumed her financially rewarding work as an environmental consultant or otherwise come into enough money to instruct counsel. I am prepared to assume that Ms Kay had no 'claim', or even expectation, that Mr Morgan would

pay for either the party or the advice and also that her own financial resources were throughout the 15 years from April 2008 (the longstop period) as stretched as she says they were in 2018 and 2019.

163. However, as I have said in addressing the effect of section 14A above, in my judgment there is no place for a corresponding assumption that even now (in 2024 and 16 years after the Settlement which she says is the cause of her financial position) she might, but for Mr Morgan's assistance and having since hit the section 14B longstop, still be in the position of saying that this limb of the sub-section should not be held against her. Such conjecture about the vicissitudes in a claimant's financial position over a potential period of 15 years provides a clear indication that her wherewithal, or lack of it, is irrelevant to the inquiry under section 14A." The parties' positions

31. Mr James Hall, who appeared for Ms Kay, argued that the Judge was wrong to conclude that Ms Kay had actual knowledge satisfying section 14A(6)-(8) of the 1980 Act by the end of 2009. He submitted that at that stage Ms Kay did not in fact consider Martineau Johnson's advice to have been wrong and that there was no reason for her to do so. Mr Hall sought support for his submissions in Witcomb and contended that the Judge was wrong to distinguish that decision. With regard to the Judge's alternative finding that by the end of 2009 Ms Kay had constructive knowledge, Mr Hall accepted that it had been reasonable for Ms Kay to seek appropriate expert advice, but he said that she had done so by returning to Martineau Johnson and, the firm having neither raised any possibility of their having been negligent nor (more plausibly) advised her to obtain independent advice, she could rely on the proviso to section 14A(10). 32. Turning to the later period, Mr Hall pinned his colours to the mast of impecuniosity. Mr Hall accepted that it would have been reasonable for Ms Kay to obtain the advice from counsel sooner if she had not been short of money. He maintained, however, that the steps which she took were reasonable given her straitened circumstances. Judgment Approved by the court for handing down. Kay v Martineau Johnson 33. 34. For his part, Mr Simon Wilton KC, who appeared for Martineau Johnson, cited Haringey London Borough Council v Ahmed [2017] EWCA Civ 1861, [2018] HLR 9 and Re Sprintroom [2019] EWCA Civ 932, [2019] 2 BCLC 617 to remind us that the circumstances in which this Court will interfere with findings of fact or evaluative assessments by a trial judge are limited. In the present case, Mr Wilton said, the Judge was justified in finding that Ms Kay had actual knowledge by the end of 2009. As for whether Ms Kay had constructive knowledge at that stage, Mr Wilton accepted that it had been reasonable for her to go back to Martineau Johnson in the first instance, but he said that, once they had told her that there was no basis for challenging the settlement, she ought reasonably to have sought further advice elsewhere. Failing that, Mr Wilton supported the Judge's conclusion that Ms Kay had constructive knowledge by the end of 2018. Mr Wilton denied that impecuniosity could be of any significance in the context of section 14A(10) of the 1980 Act. In any case, he argued, the evidence did not show the delay in consulting counsel to have been attributable to impecuniosity. It was, he said, referrable to lack of prioritisation, not lack of funds. 2008-2009: Actual knowledge 35. In Witcomb, on which Ms Kay placed reliance, Mr Witcomb had suffered leg injuries in a road traffic

accident. He brought proceedings against someone whom he alleged had been responsible and agreed to accept £150,000 in settlement. His lawyers had explained that the payment would be on a “once and for all” basis, but he nonetheless chose to proceed with the settlement. Some years later his symptoms worsened and he had to have an amputation. He then sued his lawyers for negligence alleging that they had failed (a) to obtain a report which would have highlighted the risk of a need for a future amputation and (b) to advise him to seek an award of provisional damages. Bourne J held that the claim was not statute-barred on the strength of section 14A of the 1980 Act and his decision was upheld by the Court of Appeal. 36. Bourne J concluded that Mr Witcomb had not acquired the knowledge referred to in section 14A(6)(b) of the 1980 Act before January 2017. He explained: “82 On 16 December 2009, although he knew about the risk of under-settlement, the claimant had absolutely no reason to suspect that that risk was caused by anything done or not done by his advisers. On the contrary, those very advisers expressly advised him that the risk existed, and reminded him to decide for himself whether it was a risk he was willing to run. On the basis of the advice given (that a settlement would necessarily be full and final), he may have felt critical of the legal system for not providing any alternative solution. But that was not a reason to suspect that it was his advisers who were depriving him of that solution. 83 In my judgment he had no reason to suspect that there had been flawed advice or flawed omissions from the advice, before

2017. When his condition worsened in 2015 and 2016, he was experiencing precisely the kind of post-operative problems which his advisers themselves had referred to in 2009 when Judgment Approved by the court for handing down. Kay v Martineau Johnson they identified the risk of under-settlement. That was not a reason to consider that he might have been wrongly advised. 84 Nor did he necessarily acquire that knowledge as soon as Mr Kang introduced the possibility of amputation on 19 January

2017. It remained the case that the risk of deterioration about which the defendants had warned him was eventuating, albeit to an unanticipated extent or in an unanticipated way. 85 What happened, nevertheless, is that this momentous development led to his taking new legal advice and discovering that he could have attempted to claim provisional damages.” 37. In the Court of Appeal, Thirlwall LJ observed in paragraph 61 that “[a]t what stage the claimant had knowledge of attribution … was a matter of fact for the judge” and said in paragraph 64: “The fact that the claimant’s condition worsened significantly and sooner than expected might have made him think that his medical experts had got things wrong, but it did not. There was no reason in 2016, any more than there was in 2009, for him to think that he might have been wrongly advised by his lawyers about the nature of the settlement. There was nothing intrinsic to his situation to alert him to the fact that he had received flawed advice. He might, as the judge observed, have thought there were problems with the legal system which did not, as he had been told, allow for a further application for damages, but it did not follow that there might be problems with the advice he had been given. He was in the same position as a claimant would have been before 1985 when provisional damages were introduced by the Senior Courts Act 1981. He believed, as a result of what he had been

told, that only a lump sum in full and final settlement was possible."

38. Mr Hall argued that the present case is similar. Just as Mr Witcomb's ignorance of the possibility of provisional damages meant that he did not have actual knowledge for the purposes of section 14A of the 1980 Act before 2017, the fact that Ms Kay had no reason to suspect that Martineau Johnson had failed to advise her about the potential for an NSMO should, Mr Hall contended, have led the Judge to conclude that she did not have actual knowledge. Not having even heard of NSMOs, Ms Kay could not be expected to have realised that the damage of which she complains was attributable to Martineau Johnson's failure to advise her about them. 39. The analogy between the present case and Witcomb might have been compelling had Ms Kay's allegations against Martineau Johnson related only to the availability of an NSMO. They are not, however. She also alleges that Martineau Johnson were negligent in other ways. The relevant question is therefore a wider one than whether Ms Kay was put on inquiry in relation to Martineau Johnson's failure to take account of the possibility of an NSMO. In broad terms, it is whether the fact that the settlement with Mr Mahan did not give her what she regarded as a "fair deal" sufficed to give her some reason to believe that advice which Martineau Johnson had given in Judgment Approved by the court for handing down. Kay v Martineau Johnson 40. 41. 42. 43. connection with the settlement was wrong or that they had not given necessary advice. In that connection, it can be observed that the fact that the settlement in Witcomb had proved to be an under-settlement was of itself "not a reason to consider that [Mr Witcomb] might have been wrongly advised" (to quote Bourne J). However, it need not follow that Ms Kay had no reason to believe that she might have received deficient advice. Regard must be had to the particular facts of each case. As, however, Lord Mance explained in Haward v Fawcetts, it is not the case that "all a claimant needs to know is that he has received professional advice but for which he would not have acted in a particular way which has given rise to loss, or that he has not received advice when, if he had received it, he would have acted in a way which would avoided such loss". The fact that a transaction has proved disadvantageous to someone will not necessarily give him cause to question advice in reliance on which he entered into it. Advice can remain "apparently sound and reliable" (to use words of Lord Mance) even if it has led the recipient to do something which, in the event, has not turned out well. Where the defective nature of advice is not apparent on its face, "something more" (to quote Lord Nicholls) is needed to put the recipient on inquiry. Further, a person may know sufficient to make it reasonable for him to acquire further knowledge (such that section 14A(10) is in point) without being deemed to have actual knowledge. The problem with the Judge's finding of actual knowledge in the present case is that it is not apparent from paragraphs 143-151 of the Judgment, in which he explained his thinking, that the Judge had in mind the need for "something more" or, if he did, what he considered that to be. He said in paragraph 144 that by June 2009 it must have been "obvious to Ms Kay that, on her case in these proceedings, something must have gone wrong in the advancement of her ancillary relief claim". Not only, however, does the correspondence from the period indicate that Ms Kay did not in fact draw the suggested inference, but I do not myself see that the implication was

a necessary one. It was entirely possible for Martineau Johnson to have given non-negligent advice and yet for Ms Kay's settlement with Mr Mahan to have proved not to have given her a "fair deal". In the course of his analysis, the Judge cited Forbes and echoed the remarks of Stuart- Smith LJ which I have quoted in paragraph 26 above. However, Stuart-Smith LJ made those remarks in the context of constructive rather than actual knowledge. In fact, he considered that the plaintiff in that case had not had actual knowledge. In the circumstances, it seems to me that we need to consider afresh whether Ms Kay had actual knowledge by the end of 2009, and my own view is that she did not. Mr Hall accepts that it was reasonable for Ms Kay to seek appropriate expert advice for the purposes of section 14A(10). I do not think, however, that there was the "something more" which would have given rise to actual knowledge. Ms Kay believed that her settlement with Mr Mahan had turned out badly for her, and there was reason for her to take expert advice in relation to it, but it remained the case that the advice which Martineau Johnson had given was "apparently sound and reliable". 2008-2009: Constructive knowledge 44. The proviso to section 14A(10) of the 1980 Act states that "a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the Judgment Approved by the court for handing down. Kay v Martineau Johnson help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice".

45. Mr Hall argued that, in the present case, Ms Kay took reasonable steps to obtain expert advice in relation to her settlement with Mr Mahan by reverting to Martineau Johnson and, not having been alerted by them to any possibility that their advice might have been deficient, she should not be taken to have known of that possibility. Mr Hall relied in support of his submissions on Gosden v Halliwell Landau [2020] EWCA Civ 42 ("Gosden"). In that case, the claimants had sought advice from the solicitors, Gateleys, who they now alleged had been negligent in failing to protect their interest in a property which had subsequently been sold to a third party without their consent. Counsel for the defendants accepted that, if it was reasonable for the claimants to have consulted those solicitors, they were "fixed with the way in which Gateleys carried out their instructions" (see paragraph 59), and Patten LJ, with whom Peter Jackson and Asplin LJJ agreed, concluded that the claimants did act reasonably in returning to Mr Laidlow, the relevant individual at Gateleys. Patten LJ said in paragraph 60: "It seems to me that the claimants did act reasonably in choosing to go to Mr Laidlow in the first instance. He indicated to them that he was prepared to accept instructions in relation to the trusts and to investigate how the Property had come to be sold. From the claimants' point of view, he was in many ways the obvious choice. He had set up the trusts and had continued to advise Dr Weddell [i.e. the first claimant's mother] when the position changed in 2005. He had complete understanding of the EPS scheme [i.e. the estate protection scheme which Dr Weddell had adopted] and how it was intended to operate. He was therefore best placed, one might have thought, to provide the claimants with a relatively swift explanation as to what had gone wrong. It was certainly not unreasonable for them to select him as their first port of call. We, of course, know that he was aware that the restriction had not been registered but did not disclose this to the claimants even though it

was, I think, part of his obligation to them as clients to notify them that he could not act because they might have a claim against him. The fact that he and Gateleys chose not to make that disclosure is not something which should be held against the claimants." 46. For his part, Mr Wilton argued that, once Ms Kay had been told by Martineau Johnson that there was no basis for challenging the settlement, she ought reasonably to have obtained advice from other solicitors on the specific question of whether she might have a claim against Martineau Johnson. Martineau Johnson's advice, Mr Wilton said, should have focused Ms Kay's attention on the remaining possibility: that she might have been ill-served by her lawyers when entering into the settlement.

47. Mr Wilton pointed out that the proviso to section 14A(10) of the 1980 Act requires a claimant to have taken "all" reasonable steps to obtain the relevant expert advice and referred to Forbes. Like the claimant Forbes, he suggested, Ms Kay had a choice: she could say either that the unsatisfactory nature of her settlement with Mr Mahan was Judgment Approved by the court for handing down. Kay v Martineau Johnson "just one of those things" or that "something may have gone wrong and there may have been a want of care" and "if I am ever to make a claim, I must find out".

48. While the Judge said that, had he not found Ms Kay to have had actual knowledge, he would have made a finding of "constructive trigger knowledge", he did not comment on whether Ms Kay could rely on the proviso to section 14A(10) to the 1980 Act. We must therefore consider the question for ourselves. 49. The point does not strike me as easy. In the end, however, I have concluded that it was not incumbent on Ms Kay to seek further legal advice and that she can therefore rely on the proviso to section 14A(10) to the 1980 Act. Martineau Johnson could have been expected to advise Ms Kay to obtain independent advice had they considered that they might have been negligent. They did not do so, doubtless because they did not think that they had been negligent. Instead, they advised Ms Kay in unqualified terms that the settlement could not be reopened. It seems to me that it was reasonable for Ms Kay to understand from what she was told that there was nothing she could do and so to leave matters there. Even without a "something more" giving rise to actual knowledge, it had been reasonable for Ms Kay to seek expert advice, but she had done so. It is true that the advice she asked for was on the question whether the settlement could be challenged rather than whether Martineau Johnson had been negligent, but it was reasonable to assume that Martineau Johnson would have alerted her to the possibility of negligence had there been one. In the circumstances, I do not think that Ms Kay reasonably had to go elsewhere for further advice. 50. It follows that, in my view, Ms Kay did not have constructive knowledge in 2008- 2009. 2018-2020: Constructive knowledge 51. 52. 53. 54. As I have mentioned, Ms Kay's challenge to the Judge's finding that she had constructive knowledge by the end of 2018 is based on her having been impecunious. It is said that the steps she took were reasonable given her straitened circumstances. The cases to which we were referred in this context were Adams v Bracknell Forest Borough Council [2004] UKHL 29, [2005] 1 AC 76 ("Adams"), Gravgaard v Aldridge & Brownlee [2004] EWCA Civ 1529 ("Gravgaard") and Gosden. In Adams, the claimant claimed damages from the defendant council, whose schools he had

attended, on the basis that it had been negligent in failing to assess his educational difficulties and to provide him with appropriate treatment. The House of Lords held the claim to be statute-barred. The claimant had argued otherwise on the strength of section 14 of the 1980 Act, but the House of Lords decided that he had had constructive knowledge under section 14(3) more than three years before the proceedings were issued and, hence, that section 14 did not avail him. In his speech, at paragraph 46, Lord Hoffmann expressed disagreement with a passage in Nash v Eli Lilly & Co [1993] 1 WLR 782 in which, at 799, Purchas LJ had said that "[i]n considering whether or not the inquiry is, or is not, reasonable, the situation, character and intelligence of the plaintiff must be relevant". While "the plaintiff must be assumed to be a person who has suffered the injury in question and not some other person", Lord Hoffmann said in paragraph 47, he did "not see how his particular Judgment Approved by the court for handing down. Kay v Martineau Johnson character or intelligence can be relevant". On the other hand, Lord Hoffmann said in paragraph 49: "In principle, I think that the judge was right in applying the standard of reasonable behaviour to a person assumed to be suffering from untreated dyslexia. If the injury itself would reasonably inhibit him from seeking advice, then that is a factor which must be taken into account." 55. Lord Phillips did not consider that the case before the House of Lords turned on the true construction of section 14(3) of the 1980 Act, but he said this in paragraph 58: "I would add that the test of what is reasonable is one which is a recurrent motif in the provisions of the 1980 Act and some, at least, of those provisions suggest that the test of what is reasonable is an objective test which applies the standards of the reasonable man. Thus the reference to 'all reasonable steps' in section 14(3)(b) itself and, in a similar context, in section 14A(10)(b) suggests an objective standard. The same is true of the provision in section 14A(7) that '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 ...' These provisions lend some support to the conclusion that the standard of reasonable behaviour for the purposes of section 14(3) is one which does not have regard to aspects of character or intelligence which are peculiar to the claimant." 56. For his part, Lord Scott said in paragraph 71: "The reference in section 14(3) to 'knowledge which he might reasonably have been expected to acquire' should, in my opinion, be taken to be a reference to knowledge which a person in the situation of the claimant, i e an adult who knows he is illiterate, could reasonably be expected to acquire. Personal characteristics such as shyness and embarrassment, which may have inhibited the claimant from seeking advice about his illiteracy problems but which would not be expected to have inhibited others with a like disability, should be left out of the equation. It is the norms of behaviour of persons in the situation of the claimant that should be the test." In paragraph 73, having observed that "[s]tatutory provision for constructive knowledge in the context of limitation of actions must strike a balance between the interests of claimants and those of defendants", Lord Scott said: "In my opinion, the approach to section 14(3) constructive knowledge should be mainly objective. What would a reasonable person placed in the situation in which the claimant was placed have said or done?" Judgment Approved by the court for handing down. Kay v Martineau Johnson 57.

Lord Walker said in paragraph 77: “The distinction between circumstances and personal characteristics is intelligible and helpful in many cases, but there are bound to be some in which the distinction is elided (an extreme example being a claimant who has suffered serious head injuries raising an issue as to whether he has legal capacity either to commence or to compromise legal proceedings on his own: see Masterman-Lister v Brutton & Co (Nos 1 and 2) [2003] 1 WLR 1511). Baroness Hale’s distinction between personal characteristics which affect a person’s ability to acquire information and those which affect a person’s reaction to the information once acquired is a distinction which will be useful in some cases. But characteristics such as shyness, embarrassment and lack of assertiveness (which feature in several of the reported cases) may be relevant both to the acquisition of information and to acting (or failing to act) on it.” 58. Finally, Baroness Hale said in paragraph 91: “In my view, all the cases to which we have been referred are explicable on the basis that the law expects people to make such inquiries or seek such professional advice as they reasonably can when they have good reason to do so. Their motive for not doing so will generally be irrelevant. But I would not want to rule out that their personal characteristics may be relevant to what knowledge can be imputed to them under section 14(3). There is a distinction between those personal characteristics which affect the ability to acquire information and those which affect one’s reaction to what one does know. A blind man cannot be expected to observe things around him, but he may sometimes be expected to ask questions. It will all depend upon the circumstances in which he finds himself. As McGee and Scanlan have suggested, in an attempt to reconcile the authorities, a factor or attribute which is connected with the ability of a claimant to discover facts which are relevant to an action should be taken into account; but a factor in his make-up which has no discernible effect upon his ability to discover relevant facts should be disregarded: see ‘Constructive knowledge within the Limitation Act’ (2003) 22 CJQ 248, 260. They go on to suggest that qualifications, training and experience may have such an effect, while intelligence may not. It will all depend upon the facts of the case.” 59. In Gravgaard, the Court of Appeal concluded that a claim for negligence against a firm of solicitors was statute-barred notwithstanding section 14A of the 1980 Act. In the course of her judgment, Arden LJ, with whom May LJ and Black J agreed, said this: Judgment Approved by the court for handing down. Kay v Martineau Johnson “20 There is, of course, an issue as to whether the court should, in determining whether it is reasonable to expect a person to seek legal advice, take into account the surrounding circumstances and any special characteristic or attribute of the claimant. Section 14A(10)) is silent as to the matters which the court must take into account and leaves such matters to the courts to work out. The test, however, is clearly objective. In my judgment, the court should take into account external surrounding circumstances, such as the significance of the issues to a reasonable person in the position of the claimant. 21 The more difficult issue is whether the court should take into account matters such as the fact Mrs Gravgaard already had her hands full because she was a working mother and wife and was struggling hard, as the Recorder put it, ‘to keep her financial head above water’. These factors could make it more difficult for her to get advice (though, as regards Mrs Gravgaard’s financial position, no one has suggested that if she had

sought to do so in 1988 she would not have been entitled to legal aid if she otherwise met the conditions for such assistance). Although Mrs Gravgaard does not rely on these matters, a court could not fail to observe the difficulty of her position and to admire her success at juggling the many pressures on her. She has survived her ordeal with her home and marriage intact, and she had gone on to further education and to hold public office in local government. Mr Gravgaard's business continues to trade. 22 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). This conclusion is consistent with the general approach of s.14A. Section 14A attaches importance to the claimant having actual knowledge. Constructive knowledge applies only if the conditions of s.14A(10) are fulfilled. Moreover, as I pointed out earlier, s.14A(10) does not automatically impute the knowledge of an expert instructed by a claimant to the claimant." 60. In Gosden, as I have mentioned, the claimants alleged that solicitors had been negligent in failing to protect their interest in a property which had subsequently been sold to a third party without their consent. The sale had taken place in 2010, but the claimants did not learn of it until 2015. As Patten LJ, with whom Peter Jackson and Asplin LJJ agreed, explained in paragraph 30, the first instance judge "attributed the Judgment Approved by the court for handing down. Kay v Martineau Johnson delay in making enquiries to what he described as the very significant distress, regret and anxiety which was caused to Professor Gosden [the first claimant] by his lack of contact with his mother after 2008 and the effect on him of her death". 61. The Court of Appeal ultimately concluded that the judge had been right to consider that the claimants could rely on section 14A of the 1980 Act and, accordingly, that the claim was not statute-barred. Patten LJ had, however, said this in paragraph 50: "On the judge's findings as to when the claimants first knew that the Property had been sold, the starting date for the alternative three-year limitation period under s.14A(4)(b) and

(5) would not have been before 30 April 2015. But the knowledge required for bringing an action for damages in respect of the relevant damage within the meaning of s.14A(5) includes knowledge which the claimants might reasonably have been expected to acquire from facts obtainable or ascertainable either by themselves or with the help of appropriate expert advice which it was reasonable for them to seek: see s.14A(10). The judge was therefore required to apply an objective test which meant that he was compelled to disregard the effect on Professor Gosden personally of his mother's death and the other surrounding factors I have referred to and instead to have asked what a reasonable person in the position of the claimants would have done." 62. Drawing some threads together, it seems to me that the following can be said: i) ii) The approach to section 14A(10) of the 1980 Act should (as Lord Scott said in Adams in relation to section 14(3)) be "mainly objective". Similarly, Arden LJ

spoke in Gravgaard of “the objective test imposed by subs.(10)” and Patten LJ referred in Gosden to the judge having been “required to apply an objective test”; That being so, characteristics of the claimant which are peculiar to him are, at least generally, irrelevant. Thus, in Adams Lord Hoffmann said that he did not see how a claimant’s “particular character or intelligence” could be relevant; Lord Phillips identified matters lending support to the conclusion that “the standard of reasonable behaviour for the purposes of section 14(3) is one which does not have regard to aspects of character or intelligence which are peculiar to the claimant”; Lord Scott said that “[p]ersonal characteristics such as shyness and embarrassment” should be left out of the equation; and Baroness Hale appears to have favoured the view that “a factor in [a claimant’s] make-up which has no discernible effect upon his ability to discover relevant facts” should be disregarded. Subsequently, Arden LJ saw “characteristics peculiar to the claimant” as immaterial and Patten LJ considered the effect on the claimant of his mother’s death as of no significance; and iii) A disability affecting a person’s ability to acquire information can potentially be material, at any rate if the disability may have been the result of the alleged negligence. In Adams, Lord Hoffmann considered that “untreated dyslexia” Judgment Approved by the court for handing down. Kay v Martineau Johnson should be taken into account if it would “reasonably inhibit [the person] from seeking advice”; Lord Scott saw “the norms of behaviour of persons in the situation of the claimant” as the test; and, perhaps more generally, Baroness Hale thought that “personal characteristics which affect the ability to acquire information” could be relevant. The cases have not addressed in terms the question whether impecuniosity can matter. Mr Hall argued that Arden LJ’s reference, in paragraph 21 of Gravgaard, to Mrs Gravgaard’s financial position indicated that a claimant’s financial position can be of significance, but I do not think that Arden LJ’s words, which amounted to no more than an aside, are of any help. Further, the “mainly objective” approach applicable to section 14A(10) of the 1980 Act tends to suggest that the resources available to a claimant, which are “peculiar” to him, should rarely, if ever, be of significance. While, moreover, ignoring impecuniosity might sometimes be thought harsh from the point of view of a claimant, Parliament has attempted to strike a balance between the interests of claimants and the similarly legitimate interests of defendants (as Lord Scott noted in Haward v Fawcetts, at paragraph 32, and also in Adams, at paragraph 73). It is also to be remembered that (a) a claimant to whom knowledge is attributed under section 14A(10) will still have three years in which to bring proceedings, (b) some legal advice and assistance can be obtained without payment, (c) the existence of section 33 allows section 14, on which section 14A is modelled, to be interpreted “with a greater regard to the potential injustice to defendants if the limitation period should be indefinitely extended” (to quote Lord Hoffmann in Adams, at paragraph 45) and (d) while neither section 33 nor any equivalent serves to mitigate the effects of section 14A, “the approach under both provisions [i.e. sections 14 and 14A] should be the same, as should the approach between the two parts of section 14(3) and 14A(10)” (to quote Baroness Hale in Adams, at paragraph 87). The upshot, I think, is that it is questionable whether a claimant’s impecuniosity can ever matter for the purposes of section 14A(10) of the 1980 Act. Even, however, if there can be circumstances in which

impecuniosity is relevant, they will be rare, and it must be incumbent on a claimant who wishes to rely on impecuniosity to provide detailed evidence as to his financial circumstances and how they prevented him from obtaining appropriate advice. Turning to the evidence in the present case, Ms Kay said in her witness statement for the trial of the preliminary issue that the delay from January 2019 was "due to [her] impecuniosity and the issues referred to above and in the personal relationship between [her] and [Mr Morgan]". Earlier in her witness statement, Ms Kay had said: 63. 64. 65. "This was an extremely stressful and hectic period for me. I had been pursuing a court action (successfully) against a former acquaintance who proved to be a fraudster and had 'borrowed' my parent's life savings to invest in a property deal that turned out to be a scam. I obtained judgment after a week long trial in Manchester, and the Defendant then sought permission to appeal which was refused in 2018. I also had to involve the police due to harassment from my opponent in that case. I then had to pursue a case in the Lands Tribunal to enforce a charging order securing the judgment. In 2019 I was evicted from my home in Leicestershire, and had to involve the police Judgment Approved by the court for handing down. Kay v Martineau Johnson again due to harassment by the Landlord. I had to seek and renovate property for my parents as well as a new home for me and my sons. My sons were also taking their A level and GCSE exams, and having to deal with a host of issues with their father. Amongst assisting with several of these issues, on 18 January 2019 [Mr Morgan] received a copy of [Mr Mahan's] Form E from the Defendant."

66. Mr Morgan, too, made a witness statement for the purposes of the trial of the preliminary issue. He referred in this to having had to lend Ms Kay money and further said this: "I agreed to compile instructions to counsel for advice as to whether there was any prospect of reopening the divorce case. I agreed to fund written advice from a Family Law Barrister, and to compile instructions to the Barrister, as a favour to Ellen. This was on a completely pro bono basis .... As this was a pro bono exercise it had to be undertaken in my spare time and fitted into occasional free moments within my then very busy schedule."

67. When giving oral evidence about this period, Ms Kay said that she had "let it go" and "moved on", that she did not feel that there was a need to move quickly and that she had prioritised her children and their exam studies. For her, she said, "there was no urgency, it was just making sure [Mr Morgan] got everything he needed to help [her] put some information together for a barrister who was an expert in the field". She also explained: "I needed help to find an appropriate barrister ... to speak to, and unfortunately my life circumstances in 2018 were even worse than when I was getting divorced, so I didn't make a formal approach and, during that year, Mr Morgan and I fell out several times." 68. Since the hearing before the Judge, Ms Kay and Mr Morgan have both made further witness statements. In hers, Ms Kay emphasised that she had been "dependent on [Mr Morgan] for financial assistance for several years, including from 2018 to 2020". For his part, Mr Morgan explained that, with the exception of a party for Ms Kay's 50 th birthday for which he paid about £5,000 as a gift, he was "unwilling to fund expenditure unless [he] considered it to be essential". Between them, Mr Morgan and Ms Kay provided details of the following funding from Mr Morgan: i) A loan

to Ms Kay of £10,000 in August 2017 to enable her to repay a director's loan from Myndcode Limited, a company through which she charged for her work. Mr Morgan said that he had understood that there would be a significant tax liability if the director's loan were not repaid and that Ms Kay "did not have any income (other than ... housing benefit) or other resources from which the director's loan could be repaid"; ii) A loan to Ms Kay of £22,000 in November 2018 to enable her to buy a second hand Range Rover car; and Judgment Approved by the court for handing down. Kay v Martineau Johnson 69. 70. iii) In 2019, Mr Morgan's property company bought a property in Ashby de la Zouch as a home for Ms Kay and her sons. A valuer assessed the rent at £1,100 per month, but Ms Kay was only able to obtain £481 per month from housing benefit and so the balance was accumulated. In my view, the evidence adduced before the Judge did not come close to establishing that this is one of those rare cases in which impecuniosity might possibly justify a claimant's failure to obtain advice earlier for the purposes of section 14A(10) of the 1980 Act. Nor, as it seems to me, have the additional witness statements changed that. There is no reason to doubt that Ms Kay was short of money in 2018-2020. While, however, there is no evidence as to how much Ms Edmonds charged for her advice, the cost is unlikely to have been all that great (perhaps a few thousand pounds) and Ms Kay has not gone into her financial position in any detail at all. Neither in the evidence put before the Judge nor even in the more recent witness statements has Ms Kay explained quite what money she had, what her financial commitments were or what earning capacity she had. Ms Kay referred in the earlier of her witness statements to having pursued a claim against "a former acquaintance who proved to be a fraudster" through to a week-long trial and an application for permission to appeal and subsequent Lands Tribunal proceedings. She did not expand on how she was in a position to prosecute this litigation but yet not to obtain advice on her settlement with Mr Mahan.

71. What is apparent, especially from the more recent evidence, is that Ms Kay received significant financial assistance from Mr Morgan. He has himself spoken of funding expenditure which he considered essential and, in particular, of having agreed to fund written advice from counsel. 72. 73. It is also noteworthy that there is no suggestion that Ms Kay investigated other ways in which she might have been able to obtain advice. There is, for example, no reference to finding out whether a lawyer might have been prepared to act pro bono or on a conditional fee basis. Overall, I agree with Mr Wilton that the evidence suggests that the delay in obtaining Ms Edmonds' advice was caused by a lack of prioritisation rather than shortage of money. Ms Kay saw no need to move quickly and gave priority to other matters. Martineau Johnson provided Ms Kay with her file in May 2018, but nothing then happened until January 2019, when the Form E was requested and promptly supplied, and Ms Edmonds was not instructed until March 2020. It is true that Ms Kay asked for, and then chased, the "Hildebrand bundle" in February and July of 2019, but the file which Ms Kay already held indicated that Martineau Johnson had surrendered the "bundle" years earlier and there was anyway lengthy delay after July 2019. 74. In all the circumstances, I agree with the Judge that Ms Kay had constructive knowledge more than three years before the present claim was issued in March 2023 and, hence, that it is statute-

barred.

Conclusion

75. I would dismiss the appeal. Judgment Approved by the court for handing down. Kay v Martineau Johnson Lord Justice Males: 76. I agree that this appeal should be dismissed, although my reasons differ in some respects from those of Lord Justice Newey. As this does not affect the outcome of the appeal, I will explain briefly. The position in 2009 77. Although it is easy to blur the distinction between actual and constructive knowledge, it is important to keep them distinct, in accordance with the structure of section 14A. Thus subsections (5) to (9) are concerned with actual knowledge, while subsection

(10) is concerned with constructive knowledge. Actual knowledge 78. 79. 80. 81. A claimant will only have actual knowledge if he or she actually knows the things specified in subsections (6) and (8). The claimant must know the material facts about the damage and that the damage was attributable to the defendant. In the present case Ms Kay did know very soon after her settlement with her ex-husband 'the material facts about the damage in respect of which damages are claimed'. She knew that she had obtained what she regarded as a bad deal. The requirement in subsection (6)(a) was therefore satisfied. The issue on actual knowledge in this case, in the language of subsection (8)(a), is whether Ms Kay knew 'that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence'. In the case of a claim against a solicitor for the giving of negligent advice, the question is whether the claimant knows that the damage (in this case, the bad deal with her ex-husband) was attributable to bad advice given by her solicitor. The claimant need not know that the giving of such bad advice amounted to actionable negligence (subsection (9)), but in order to have actual knowledge for the purpose of section 14A, she would have to know – i.e. actually to know – that there was something wrong with the advice which she had been given. As Haward v Fawcett [2006] UKHL 9, [2006] 1 WLR 682 explains, she need not know that with certainty, but the minimum requirement for actual knowledge in such a case is that the claimant is sufficiently conscious of the possibility of flawed advice having been given to justify embarking on the preliminaries to the issue of proceedings, such as submitting a claim to the proposed defendant, taking advice and collecting evidence (see e.g. Lord Nicholls at para 9). It is not enough for actual knowledge that the claimant knows facts from which the possibility of a claim against the defendant can be inferred if he or she does not actually draw that inference. Depending on the circumstances, that may be enough for constructive knowledge, but not for actual knowledge. I think that it is preferable to approach the issue of actual knowledge in this way, by reference to the terms of the statute, rather than by asking whether a claimant has 'some reason' to consider that advice given to him may have been wrong (cf. Witcomb v Keith Park Solicitors [2023] EWCA Civ 326, [2023] PNLR 20, paras 55 and 56). To ask that question risks blurring the distinction between actual and constructive knowledge. Judgment Approved by the court for handing down. Kay v Martineau Johnson 82. In the present case it is clear that it did not in fact occur to Ms Kay in 2009 that her solicitors had given her bad advice. On the contrary, she made clear that she

continued to have a high regard for the advice given by Mrs Mary Kaye, even after the advice given in May 2009 that nothing could be done about the settlement agreement. In my view that is fatal to any finding of actual knowledge in 2009. Constructive knowledge 83. The concept of constructive knowledge is dealt with in subsection (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.' 84. I shall refer to these last few lines ('but a person shall not be taken ...') as 'the proviso'. In the present case Mr James Hall accepted on behalf of Ms Kay that, if it were not for the proviso, Ms Kay would have the constructive knowledge described in this subsection, the test here being objective ('knowledge which [s]he might reasonably have been expected to acquire'). That acceptance was amply justified in view of the Judge's findings that 'It must by [June 2009] have been obvious to Ms Kay that, on her case in these proceedings, something must have gone wrong in the advancement of her ancillary relief claim' (para 144); that by June 2009 'Ms Kay knew enough to cause her to investigate the possibility that the lack of recourse to Mr Mahan may have been attributable to fault on the part of the Firm' (para 145); and that 'she would or should have asked herself: "How is it that, with the supposed benefit of legal advice, I have found myself in this position?"' (para 145).

85. Mr Hall's submission on constructive knowledge therefore focused on the proviso, his submission being that by asking the solicitors whether a claim could be brought against her ex-husband despite the clean break nature of the settlement, and accepting the advice that nothing could be done, Ms Kay had taken all reasonable steps to obtain and to act on expert advice. 86. I would accept that it was reasonable for Ms Kay to seek advice whether a claim could be made against her ex-husband and to accept the (correct) advice that it could not. But this does not meet the Judge's analysis, which was concerned with the knowledge which Ms Kay might reasonably have been expected to acquire after she had sought and obtained advice about the finality of the settlement. The question is not whether it was reasonable for Ms Kay to seek advice about the finality of the settlement and to accept the advice which she was given. Rather, the question is Judgment Approved by the court for handing down. Kay v Martineau Johnson whether, having obtained that advice, she ought reasonably to have sought advice as to whether the reason why she found herself in this predicament was because she had received bad advice from Martineau Johnson. If she ought reasonably to have sought such advice, she had not (in the words of the proviso) 'taken all reasonable steps'. 87. The Judge's finding of fact was that by the time the solicitors ceased to act for Ms Kay in June 2009, she did know enough to cause her to investigate the possibility that the lack of recourse to Mr Mahan may have been attributable to fault on the part of Martineau

Johnson (para 145). That finding, as it seems to me, amounts to a finding that there were facts ascertainable by Ms Kay with the help of appropriate expert advice, i.e. as to whether she had been given bad advice, which she might reasonably have been expected to acquire at that stage. As the Judge also put it, by reference to the position in June 2009 after Ms Kay had been advised that nothing could be done about the settlement: '149. ... The very nature of the later advice [i.e. in May 2009] (discouraging as it was in relation to the likelihood of success on any attempt to re-visit the Settlement) was such that it raised a suspicion about the soundness of the earlier advice. Her then realisation that she was probably stuck with the terms of the Settlement (the "relevant damage" for section 14A purposes) gave her cause to consider that the reason for her predicament might lie in the negligence of the Firm which she now alleges. Her position was akin to the patient in Forbes v Wandsworth H. A. who knows the medical treatment has gone wrong. She knew enough for her to begin investigating whether or not the Firm was at fault.' 88. 89. Of course Ms Kay did not in fact begin any such investigations, but that was because it had not occurred to her that her solicitors were or might be at fault. However, as the test under subsection (10) is objective, and it is not suggested that there were any reasons at that stage which would have prevented her from undertaking such investigations, that is irrelevant to the issue of constructive knowledge. It is true that the Judge did not expressly frame his findings by reference to the terms of the proviso. Nevertheless, in my judgment his findings are clear and were open to him as the trial judge, such that this court should not interfere, applying the well- known principles concerning appellate interference with the findings of trial judges set out in cases such as Re Sprintroom [2019] EWCA Civ 932, [2019] 2 BCLC 617. 90. On this basis Ms Kay had constructive knowledge for the purpose of section 14A by June 2009 and her claim is time-barred. The position in 2018-20 91. So far as the position in 2018-20 is concerned, Mr Hall confined his submissions to the issue of impecuniosity (surely a word which appears in the law reports but almost nowhere else). In other words, he accepted that the relevant facts would have been ascertainable with the help of appropriate expert advice, but submitted that it was reasonable for Ms Kay not to seek such advice because she could not afford to do so. On that issue I agree with what Lord Justice Newey has said. Judgment Approved by the court for handing down. Kay v Martineau Johnson 92. Accordingly, if time did not begin to run in June 2009, it began to run in accordance with the Judge's decision by the end of 2018, so that the claim is time-barred on this basis also. Lord Justice Lewis: 93. 94. 95. 96. I agree that this appeal should be dismissed. The difference in reasons between Newey LJ and Males LJ concerns the question of whether time for bringing the claim for negligence began to run from about 2009. In short, they both agree that Ms Kay did not have the requisite knowledge (sometimes referred to as actual knowledge) within the meaning of section 14(A(6)-(8) of the Limitation Act 1980 ("the 1980 Act") in 2008 or 2009. I agree with that conclusion for the reasons that they give. Section 14A(10) of the 190 Act, however, provides that a claimant is also to be treated as having knowledge of facts that he could reasonably have been expected to acquire with the help of expert advice which it was reasonable to obtain subject to the proviso that a person is not to be taken to have knowledge of a fact ascertainable with expert advice "so long as he has taken all reasonable steps to obtain" that advice. The real issue in

relation to the 2009 period concerns the operation of that proviso. I agree with Males LJ that it was reasonable, in the first instance, for Ms Kay to seek advice from the solicitors who had acted for her during the divorce proceedings on whether a claim could be made against her former husband. She was advised, correctly, that the settlement was final and a claim could not be brought. I also agree that it was open to the Judge to find that, from about June 2009, Ms Kay knew enough to cause her to investigate whether the fact that she could not take further proceedings against her husband was attributable to the advice given to her by her former solicitors. It was open to the Judge to find that Ms Kay had not taken all reasonable steps to obtain such advice. Ms Kay is, therefore, to be treated as having knowledge of facts that she would have ascertained if she had obtained such advice, i.e. that the damage that she had suffered might be attributable to the advice given by her former solicitors. In other words, I agree with the analysis of Males LJ in paragraphs 83 to 90 of his judgment and his conclusion that the claim was time-barred from June 2009 onwards. I agree with Newey LJ and Males LJ that, in any event, Ms Kay is to be treated as having knowledge of the facts that she would have ascertained if she had taken expert legal advice in 2018 or 2019. The ground of challenge here is that Ms Kay could not have afforded to take legal advice and, therefore, she had taken all reasonable steps she could, given her limited resources. I agree with Newey LJ's analysis at paragraphs 52 to 64 of his judgment and his conclusion that it is questionable whether a claimant's lack of resources can be relevant for the purposes of section 14A(10). In any event, for the reasons given at paragraph 69 of Newey LJ's judgment, the evidence in this case does not establish that any alleged impecuniosity or lack of resources on Ms Kay's's part was the cause of the failure to obtain legal advice earlier. Ms Kay had not, therefore, taken all reasonable steps and she is to be taken as having knowledge of the facts that such legal advice would have enabled her to ascertain. Ms Kay had the requisite knowledge in 2018 or 2019, i.e. more than three years before the claim was issued in the present and the claim is, therefore, time- barred. 28

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