Neutral Citation Number: [2022] EWHC 3197 (Ch)

Case No: PE-2022-000001

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 15 December 2022

Before :

THE HONOURABLE MR JUSTICE TROWER

Between :

1. Honda Group-UK Pension Scheme Trustee Limited
2. Honda Motor Europe Limited
3. Honda Motor Europe Logistics N.V
4. Honda R&D Europe (UK) Limited
5. Honda of The UK Manufacturing Limited
6. Honda Trading Europe Ltd
7. Honda Finance Europe PLC

Claimants

- and -

(1) Mercer Limited
(2) Sedgwick Noble Lowndes Limited

Defendants

Paul Newman KC and George Spalton KC (instructed by **Sacker & Partners LLP**) for the **Claimants**
Nicolas Stallworthy KC and Nicholas Hill (instructed by **Stephenson Harwood LLP**) for the **Defendants**

Hearing dates: 12 – 14 July 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Trower :

Introduction

1. In these proceedings the claimants are the current trustee and the current principal and participating employers of the Honda Group-UK Pension Scheme (the "Scheme"), a contracted-out occupational pension scheme originally established by an interim trust deed dated 30 November 1973. The defendants, Mercer Ltd and Sedgwick Noble Lowndes Ltd, provided what were described in the claim form as "actuarial, administration, benefits consultancy, documentation and related services in respect of the Scheme", including during the period 1994 to 1999. The distinction between the two defendants is not relevant to the present applications, and I shall therefore treat them as the same for all material purposes.

2. The claimants allege that, in the conduct of their retainer to provide such services, the defendants acted in breach of duty by failing to act as reasonably competent specialist pensions advisers in relation to two specific issues. The first, called the "HUM benefits error", was a failure, during the course of the drafting of a deed eventually completed in 1998, to notice and bring to the claimants' attention an error which had occurred in 1986 (the "1986 HUM benefits error"). This related to the incorporation of certain benefits into the Scheme rules in respect of members who were employed by the fifth claimant, Honda of the UK Manufacturing Ltd ("HUM"). The second, called the "LPI increase error", was a failure to incorporate into the Scheme's rules the changes to annual increases to members' pensions in payment from fixed increases to 5% LPI prior to a deed of amendment dated 12 November 1999.

3. In circumstances to which I will come a little later in this judgment, the claimants seek to reformulate the HUM benefits error as a failure, when advising as to the manner in which amendments to the governing documents of the Scheme should be made by a definitive trust deed and rules dated 10 December 1998 (the "1998 Deed"), to advise that certain benefits could not be incorporated into the Scheme rules in respect of members who were employed by HUM by way of retrospective amendments to the governing documents of the Scheme.

4. The first application with which this judgment is concerned is made by the defendants and seeks an order that those parts of the claimants' particulars of claim and reply that relate only to the HUM benefits error be struck out pursuant to CPR 3.4(2) because they disclose no reasonable grounds for bringing the claim. The defendants also seek summary judgment against the claimants on those parts of the claim which they seek to strike out on the grounds that the claimants have no real prospect of success and there is no other reason for the case to be disposed of at trial. The defendants do not make similar applications in relation to the claimants' claim arising out of the LPI increase error.

5. There are two grounds for the defendants' application. The first is that any claim in respect of the HUM benefits error was already statute-barred by the time the claim form was issued in the Bristol District Registry on 21 December 2009. There is no doubt that the limitation period for any claim for breach of contract had long expired. The issue is whether any claim in tort seeking damages for negligence is also statute barred by operation of section 14B of the Limitation Act 1980 (the "1980 Act"). It is said by the defendants that any operative act of negligence in relation to the HUM benefits error

(which is in any event denied) occurred on or before 21 October 1994, i.e., more than 15 years before the issue of these proceedings.

6. The second ground is that the particulars of claim, which were not served until 27 August 2021, seek to introduce new claims which are outside the scope of the claim form, originally issued almost 12 years earlier. The claim form seeks damages for losses sustained as a result of negligence by the defendant as the provider of certain services and in relation to certain advice in respect of the operation of the Scheme from 1978. The negligence is described as a failure properly to advise as to the manner in which amendments to the governing documents of the Scheme should be made and/or a failure to implement amendments adequately or at all.

7. The defendants' case is that the claim form does not encompass the nature of the claims now advanced in the particulars of claim. It is said that the particulars of claim allege a different duty (viz. to give legal advice), a different breach (viz. that in 1998 the defendants should have given retrospective advice about how historic amendments to the Scheme's rules should have been made by the defendants' predecessor, Noble Lowndes Pensions Limited ("NLP") in 1986) and a different loss (viz. a 'loss of a chance').

8. Also listed for hearing at the same time was an application by the claimants for permission to file and rely upon amended particulars of claim, which they assert will deal with all or some of the complaints made by the defendants in their strikeout application. These include but are not limited to the reformulation of the HUM benefits error. In the alternative they seek permission to amend the claim form so that it incorporates within it such of the allegations in the particulars of claim as are said to fall outside the scope of the existing claim form. The defendants submitted that the application to amend the particulars of claim is misconceived. They said that the substance of the claim is unchanged from that advanced in the original particulars of claim.

9. The significant delay between the time at which the claim form was issued and the time at which the particulars of claim were served occurred because these proceedings were stayed pending the pursuit of two other actions brought by the claimants in an attempt to resolve the 1986 HUM benefits error. The first was a Part 8 proceeding brought by Honda Motor Europe Limited ("HME") and HUM in October 2012 against a representative employee of HUM and Honda Group-UK Pension Scheme Trustee Ltd (the "Trustee") in an attempt to deal with the 1986 HUM benefits error as a matter of construction of the relevant documentation. This claim was unsuccessful before Asplin J (*Honda Motor Europe Limited and others v Powell and another* ([2013] EWHC 3149 (Ch)) and in the Court of Appeal ([2014] EWCA Civ 437). The other was a rectification claim, in which I was told that the defendants' solicitors acted for the claimants, which commenced on 1 August 2017, but which settled shortly before the trial in 2020.

The Scheme and the 1986 HUM benefits error

10. In order to understand the nature of the current claim, it is necessary to say a little about the history of the Scheme's governing documentation. This is a strike out application based on the statements of case, but both parties referred to parts of the documentary

evidence and to some extent did so in documents not specifically referred to in the pleadings.

11. Although the Scheme was originally established by an interim trust deed dated 30 November 1973, the first definitive trust deed and rules governing its terms was dated 24 November 1981 (the "1981 DDR"). At some stage during the course of 1986, the then trustees of the Scheme together with the second claimant, HME then called Honda (UK) Ltd, the principal employer in relation to the Scheme, and HUM instructed NLP to provide advice in respect of the benefit structure which HUM may wish to offer to its employees if they were admitted to membership of the Scheme.

12. Having received NLP's advice on potential options, it was agreed between HME and HUM that HUM's employees would be admitted to membership of the Scheme, but with a benefit structure (the "HUM benefit structure") differing from that of its existing members. The benefits to be offered to HUM employees were less generous in the following principal respects:

    i) Benefits would be calculated by reference to HUM employees' average basic pay in the three best consecutive years in the 10 years before retirement, while existing members were entitled to a calculation based on pensionable earnings in the year before retirement.

    ii) Dependants of HUM employees would be entitled to a pension on death of the member of half of the member's pension, while dependants of existing members were entitled to a pension of two-thirds of the member's pension.

    iii) Benefits for HUM employees would include a lump sum payable on death in pensionable service amounting to 2½ times the member's basic pay plus a refund of contributions, while the equivalent benefit for existing members was four times the member's earnings plus a refund of contributions.

    iv) Pensions in payment for HUM employees were to be increased at a rate of 3% per annum, while increases for existing members were 5% per annum.

    v) Members who were HUM employees would be required to contribute at a rate of 5% of pensionable earnings, while existing members were not required to make any contributions.

13. The HUM benefit structure was announced to HUM employees by an announcement from HUM dated 1 August 1986 (the "Announcement"). The HUM employees were informed that the Announcement gave brief details of the benefits which would be available to them and their dependants, further details of which would be contained in a booklet to be issued in due course. It is the claimants' case that NLP advised that it was necessary for HME, HUM and the then trustees to execute a deed of adherence. In the events that occurred, a deed of adherence dated 6 October 1986 (the "Deed of Adherence") was then drafted and executed.

14. The Deed of Adherence extended the benefits of the Scheme to all eligible employees and directors of HUM with effect from 1 August 1986. However, it made no mention of the HUM benefit structure. The consequence was that, as from 1 August 1986, HUM members accrued benefits on the basis of the structure which applied to existing

Scheme members under the terms of the 1981 DDR rather than on the basis of the HUM benefit structure which, as was made plain by the Announcement, was intended to apply to them.

15. Although this consequence of what occurred in 1986 and thereafter was eventually established as a matter of construction of the Deed of Adherence by the decision of the Court of Appeal in *Honda Motor Europe Limited and others v Powell and another* [2014] EWCA Civ 437, the claimants did not appreciate that this was or even might be the case for many years after the date the Deed of Adherence was executed. It is common ground in these proceedings that they believed that the HUM benefit structure had been validly established as intended. The fact that it was not, is what amounted to the 1986 HUM benefits error.

16. It is the claimants' case that NLP acted in breach of their duty of care in a number of respects at the time of execution of the Deed of Adherence. It is said that NLP failed to implement an effective amendment to the governing provisions of the Scheme by way of formal deed taking effect from 1 August 1986, so as to provide HUM members with the HUM benefit structure. It is also said that NLP failed to draw the attention of the Scheme's trustees or employers to the need for a formal deed of amendment and the risks of proceeding without one. It is said that NLP failed to warn the trustees or the employers that the result would be that the benefit structure applicable to HUM members with effect from August 1986 would be that they would be entitled to the benefit structure applicable to existing Scheme members rather than the HUM benefit structure.

17. The claimants contend that the consequence of the 1986 HUM benefits error was that the liabilities of the Scheme were significantly greater than would have been the case if the HUM benefit structure had been implemented in accordance with the Announcement. They also contend that, if NLP had advised the claimants that it was necessary for the HUM benefit structure to be incorporated by a formal amendment to the Scheme's rules, the claimants would have complied with that advice.

18. Although the defendants admit that these were the consequences of the 1986 HUM benefits error, they do not accept that NLP was negligent in respect of the breaches relied on by the claimant. More particularly they contend that solicitors were instructed to draft the Deed of Adherence and that NLP was not a legal advisor to the trustees or any of the employers in relation either to the Scheme or to the process by which the HUM benefit structure was to be implemented under the Scheme.

The retainer of the defendants

19. Although there are similarities in the name of the second defendant and NLP, and their association as entities before NLP was dissolved in 2001 seems to have underpinned an allegation of conflict of interest which features later in the story, the defendants did not themselves have any role in (or responsibility for) the 1986 HUM benefits error at the time it occurred. Their role in relation to the Scheme did not arise until several years later.

20. By an agreement in writing dated November 1994, but expressed to run from 1 December 1993, the defendants contracted to provide consultancy and other services to some of the claimants in a number of areas. These included what for fee purposes were called "Specified Services" comprising continuing active consultancy advice including the "Regular reappraisal of scheme design, benefit levels, eligibility and retirement dates, and the needs of particular groups of members, including executives". By section 7 of the retainer agreement, the Specified Services were further particularised to include "maintaining a library of relevant documentation and regular monitoring of documentation to ensure compatibility with changes in practice and legislation" and "advice on the necessary alterations, and the provision of specimen interim, definitive and other documents to assist the appointed solicitors in their drafting."

21. Although the defendants' retainer does not seem to have been formally documented until November 1994, their involvement started rather earlier (as indicated by the date from which it was expressed to run). Matters seem to have been kicked off with a report sent to the claimants on 4 November 1993, which was considered at a meeting of the trustees of the Scheme held on 23 November 1993. In that report, the defendants said (amongst other matters) that, since the execution of the 1981 DDR, it had become evident that changes to the Scheme's benefit basis had been promulgated to members but had not been formally incorporated into the Scheme's governing documentation. They said that:

> "Whilst it is common practice to rely on announcements to amend pension plans' benefit bases, these should be regularly "swept-up" and included in a formal amendment to the Scheme's Definitive Deed."

22. The defendants then recommended the complete replacement of the existing definitive deed (the 1981 DDR) with a new consolidating deed. Internal memoranda dating from March 1994 indicate that the defendants were prepared to do the necessary work for a fixed fee, but only on the basis that they would not have to deal with 'open ended' discussions with the claimants' solicitors which would give rise to too much uncertainty. They were however, prepared to agree "to taking responsibility for the legal efficacy of the pension scheme document for this client".

23. In a letter to the claimants dated 29 April 1994, the defendants explained their position and in particular that they were not happy to agree to a fixed fee in circumstances in which "using an external solicitor for vetting the document could lead to significant costs totally out of our control". They therefore agreed that their technical staff would produce a first draft of the new deed for a fixed fee of £8,000 and that they could offer the additional service of using their in-house barrister "to independently check the Deed and to take full professional responsibility for it, thereby removing the need to use an external solicitor" for which a further fee of £4,000 would be charged. Because the work was to be done for a fixed fee, the defendants also said:

> "Accordingly I would advise that the costs identified in 1 and 2 above will include a reasonable amount of negotiation but would not include the production of second or subsequent draft documents, attendance at meetings or lengthy negotiations."

This proposal was accepted by the claimants on 10 June 1994, who gave instructions for the work to proceed.

24. The defendants submitted that this part of the retainer was formulated so as to divide the work into two segments, which reflected a clear division between the first stage which was completed when the fixed fee work had been done and the later stage for which the fixed fee was not payable. This division featured as the foundation for one of the arguments advanced by the defendants on their first ground for striking out the claim. I merely note at this stage that it is arguable that the fixed fee work extended beyond the production of a first draft and encompassed at least the possibility that post-draft discussions and negotiations would take place before the process of producing the second draft commenced, and that the defendants would participate in those negotiations.

25. The claimants plead that it was an implied term of the defendants' retainer that they would exercise the degree of skill and care to be expected of reasonably competent providers of pensions services and advice, including the legal and consultancy services and advice referred to above. They also plead that the defendants owed the claimants a duty of care in tort in the same terms. It was said that the duty in tort extended beyond the trustees and the participating employers at the time of the provision of the relevant services and encompassed all the trustees of the Scheme and all the Scheme's participating employers from time to time. The claimants' case that the defendants assumed responsibility to future employers is denied, but is not in issue in the present applications.

26. The claimants contend that, in undertaking the work within the scope of their retainer, the defendants assumed responsibility to them for the drafting of the governing documentation of the Scheme, including all of the Scheme's deeds and rules. This also included the provision of legal advice in respect of that documentation and the services of an in-house barrister. They say that, on their acceptance of the claimants' instructions, the scope of the defendants' retainer therefore extended to drafting the 1998 Deed and taking all reasonable steps to ensure its validity as a matter of law.

27. While the defendants do not accept that they were under any separate and freestanding duty in tort to take all reasonable steps to ensure the validity of the 1998 Deed as a matter of law, they accept that they were under a duty in tort to exercise the skill and care of reasonably competent providers of the services and advice which they actually agreed to provide. On this aspect of the retainer, Mr Newman KC for the claimants accepted the defendants' case that the duty owed to the claimants did not extend beyond a duty to act with reasonable care and skill in the drafting of the 1998 Deed. The drafting of the 1998 Deed was one of the tasks identified in the retainer and to that extent the scope of the work in respect of which the defendants assumed a duty to act with reasonable skill and care was defined by it.

The defendants' work on the 1998 Deed

28. It appears that a meeting of the Scheme's trustees held on 12 October 1994 was told that a first draft of what was to become the 1998 Deed was ready. It was then sent to a number of Honda entities including some of the claimants under cover of a letter from the defendants dated 21 October 1994.

29. This first draft of the proposed new deed provided that it was to take effect from the date of its execution in place of the 1981 DDR, although the calculation and provision of any benefits for members who ceased to be in pensionable service before the date of its execution were to be governed by the terms of the 1981 DDR. It also reflected the distinctions in benefits for those members of the Scheme who had been employees of HME (called Category II Members) and those members of the Scheme who had been employees of HUM (called Category I Members) which had been described in the Announcement. It was drafted on the basis that these distinctions had been validly incorporated in the governing documents of the Scheme by the Announcement. The commentary which was circulated with this draft sought instructions in relation to a material number of matters, including several relating to the differences in the positions of the Category I Members and the Category II Members and the benefits to which they were entitled under the Scheme.

30. This draft was considered at a meeting of the Scheme's trustees held on 30 March 1995. A representative of the defendants (Mr R Giffin) led the meeting through the draft "identifying balance of power issues and changes". It appears that those present were asked for confirmation of a large number of points referred to in the commentary which accompanied the draft. These matters of confirmation included points as to whether the drafting accurately reflected the intended HUM benefit structure, as to which those present confirmed the position to Mr Giffin, but said that further confirmation of some of the detail (relating to the definition of final pensionable salary for Category I members, i.e. HUM employees, and the rate of increase applicable to their pensions in payment) was awaited from an absent trustee, Mr McEnaney.

31. The defendants were then requested to make a number of amendments and proceed to the preparation of a second draft. The defendants were also requested to provide a summary of the points debated and a further summary of the key issues to be endorsed by the principal employer. The defendants relied on the fact that, in so far as they related to the HUM benefit structure, these points required further confirmations and other inputs from the trustees, not (as the defendants put it in submissions) further investigations to be carried out by them.

32. On 21 June 1995, the defendants wrote to the claimants enclosing a second draft of what was to become the 1998 Deed, together with four notes (a) itemising all the points discussed at the March meeting of the Scheme trustees, (b) listing the points agreed for ratification by all of the trustees, (c) identifying the points on which they still sought the trustees' agreement and (d) identifying the points which the principal employer needed to consider. There were a number of amendments to the draft which related to the differences between the Category I and the Category II members (and the differences in their applicable benefits) which had originally been considered at the March meeting.

33. The defendants said that the points outstanding referred to in this letter were not matters that required further investigation by them. They submitted that the accompanying notes made clear that none of the changes in the drafting involved or demanded a revisitation of the entire validity of the implementation of the HUM benefit structure or an analysis of the effect of the Deed of Adherence. They particularly criticised as being without any realistic prospect of success a plea in the claimants' reply to the effect that "it is to be inferred" that in dealing with the next draft of the 1998 Deed, the defendants would have had cause to revisit the HUM benefits structure.

34. The drafting process then continued at a somewhat leisurely pace. It was referred to at meetings of the Scheme's trustees held on 11 April 1996, 23 July 1996, 15 January 1997, 29 April 1997 and 29 July 1998 at which further consideration was given to the progress being made and to a series of issues that had arisen during the drafting. The defendants pointed out (correctly) that no specific reference was made in the minutes of any of these meetings to the HUM benefit structure. The same can be said of the other material referred to in the claimants' statements of case. These were a letter from the defendants dated 7 June 1996 referring to a third draft of the proposed new deed without any reference to the HUM benefit structure or the Deed of Adherence, and two internal memoranda dated 2 May 1997 and 16 September 1998 neither of which made explicit reference to the HUM benefits structure either. The defendants submitted that none of the correspondence, and none of the internal memoranda, raised or referred to points which gave them cause to revisit the way the HUM benefit structure had been included in the drafts.

35. However, although the covering letter enclosing the third draft did no more than reconfirm that the defendants were taking professional responsibility for the relevant documentation, the draft itself referred to one matter which would not have been necessary if there were not to have been differences between the HUM benefit structure and the benefit structure applicable to other members: it included amended definitions of Category I and Category II members. To that extent, the differences between the HUM employee members and the remaining members remained a matter to which the defendants were continuing to apply their minds. The claimants submitted that the court could not be satisfied at this stage of the proceedings that there were not other occasions during the drafting process in which the same point could be made.

36. A final version of the 1998 Deed was eventually executed on 10 December 1998. In light of the fact that the claim form was issued on 21 December 2009, these proceedings were therefore commenced well within the period of 15 years from that time. Their commencement was, however, more than 15 years from the time at which the defendants' initial work product was first sent to their clients (21 October 1994).

37. On 19 November 1999, a deed of amendment (the "1999 Deed") was executed amending the terms of the 1998 Deed. This was done in response to changes introduced by the Pensions Act 1995 ("PA 1995") and the work was carried out some time after the execution of the 1998 Deed. It was not part of the same project. As will appear I consider that different considerations apply to this work from those that apply in relation to the work on the 1998 Deed.

The law on summary disposal

38. The legal principles underpinning the first ground for the relief sought by the defendants is uncontroversial. Under CPR 3.4(2), all or any part of the particulars of claim may be struck out if (a) they disclose no reasonable ground for bringing the claim; (b) they are an abuse of process or are otherwise likely to obstruct the just disposal of the proceedings; or (c) there has been a failure to comply with any rule or practice direction. Under CPR 24.2, the court may give summary judgment to the defendants on particular issues if the claimants have no real prospect of success on them, a basis for summary

judgment at the suit of the defendants which is closely allied to the basis for strike out pursuant to CPR 3.4(2)(a).

39. Where both rules are invoked, they should be taken together and a common test applied. The Court of Appeal has recently confirmed the correct approach in *Standard Life Assurance Ltd v Building Design Partnership Ltd* [2021] EWCA Civ 1793, [2022] 1 WLR 878 at [38] as follows:

> "The approach to such twin applications was summarised in *Global Asset Capital Inc v Aabar Block SARL* [2017] 4 WLR 163, para 17. In a case of this kind, CPR rr 3.4(2) and 24.2 should be taken together and a common test applied. If a defendant is entitled to summary judgment because the claimant has no realistic prospect of success, then the statement of claim discloses no reasonable grounds for bringing a claim and should be struck out. The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91. In essence, the court is determining whether or not the claim is "bound to fail": see *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804, paras 80 and 82."

40. An often-cited authority on the test to be applied where summary disposal of a claim is sought is the decision of Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), as recently approved by the Court of Appeal in *Iiyama (UK) Ltd v Samsung Electronics Co Ltd* [2018] EWCA Civ 220, [2018] 4 C.M.L.R. 23 at [39]:

> "15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
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> > i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All E.R. 91;
> >
> > ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
> >
> > iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
> >
> > iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
> >
> > v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550;

> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] F.S.R. 63;
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> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. … it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

The claim and the defendants' limitation defence

41. The essence of the claimants' case is that, in advising as to the manner in which the amendments to the 1998 Deed should have been made, the defendants failed to notice and advise them in relation to the failure by NLP properly to incorporate the HUM benefit structure into the Scheme in 1986. This also meant that the 1998 Deed was incorrectly drafted, because the defendants wrongly assumed that the HUM benefit structure had been properly incorporated into the Scheme at that stage. It is also said that the consequence of this error was that the 1998 Deed was invalid to the extent that it purported to apply the HUM benefit structure to the HUM members in respect of accruals prior to the date of the 1998 Deed. This was because the amendment power pursuant to which the 1998 Deed was made prohibited the detrimental amendment of rights accrued prior to the amendment.

42. It was said that, if the defendants had identified the issue and advised the claimants accordingly during the course of their drafting of the 1998 Deed, the claimants would have taken certain steps, leading (amongst other things) to a claim against NLP within the limitation period. That claim would have been for the increase in the Scheme liabilities which had been caused by the original HUM 1986 benefits error – a claim which had become time-barred by 2001, long before the claimants became aware of the issue. The claimants allege that they have lost the opportunity to make that claim.

43. The defendants submitted that the court can be satisfied that the claim in relation to the HUM benefits error has no realistic prospect of success, because it can now be seen that it is statute barred. They made that submission on the basis that the nature of the claim is as the claimants now contend it to be, without prejudice to their argument that the way the claim is now formulated is neither reflected in the existing version of the particulars of claim, nor open to the claimants because it does not fall within the scope of the claim form.

44. It is the defendants' case that the date of sending the first draft to the claimants (21 October 1994) was the date on which any operative act of negligence, which is in any event denied, occurred. They rely on the fact that the very first step in a consolidation project is to identify the prior amendments that need to be consolidated into the new consolidating rules. They submitted that, because it is the claimants' case that the defendants were in breach of duty (a) in failing correctly to identify the prior valid and effective amendments to be consolidated and (b) in treating inclusion of the HUM benefit structure in the 1998 Deed as consolidation of such an amendment, it necessarily follows that the breach of duty occurred when the defendants produced the first draft, so consolidating the invalid HUM benefit structure without advising or warning the claimants about the 1986 HUM benefits error. They submitted that they were not in breach of duty thereafter, because they never had cause to revisit the issue.

45. The claimants' answer to the defendants' limitation defence is that the date of the final causative negligent act or omission was the date at which the defendants last had the opportunity to identify the erroneous implementation of the HUM benefit structure before the 1998 Deed was executed. This was either the date on which they produced the final draft of the 1998 Deed (in or around 25 March 1997) or sometime between 25 September 1998 and 10 December 1998 which was when the final draft was sent by the defendants to their clients for the purposes of execution. This was because the scope of the defendants' duty in any event extended to a duty to act with reasonable care in carrying out their duty to ensure the validity of the 1998 Deed as a matter of law. If they had carried out their duty properly, they would also have identified that the HUM benefit structure had not been properly implemented.

46. In their particulars of claim, the claimants do not identify any particular moment in time during the course of the drafting process at which they say that the defendants should have considered the validity of the implementation of the HUM benefit structure. However, in paragraph 17 of their reply, they allege that the reason for this is that the duty to warn about what they called the HUM benefits issue was not tied to the drafting of the 1998 Deed but arose because the defendants were under a duty to take reasonable care in the steps they took to ensure the legal efficacy of the 1998 Deed, and it extended up to the date of its execution.

47. They also pleaded in their reply that there were in any event identified stages later in the conduct of the drafting process at which there was reason for the defendants to have revisited the validity of the implementation of the HUM benefit structure. In particular they refer to issues that arose during the course of the 30 March 1995 trustees' meeting and an inference that, in dealing with the points outstanding from that meeting, including some directly concerning the HUM benefit structure, the defendants would have had cause to revisit the HUM benefit structure, and ought at that time to have identified the failure validly to incorporate it within the governing provisions of the Scheme. All of this occurred within the 15 year period for which provision is made by section 14B of the 1980 Act ("section 14B").

48. It is common ground that any claim for breach of contract relying on the facts pleaded in the particulars of claim was barred long before the proceedings were issued on 21 December 2009 (section 5 of the 1980 Act). It is also common ground that the provisions of section 14B operate so as to bar any claim in negligence arising out of acts or omissions occurring more than 15 years before the date of issue (i.e. 21 December 1994).

49. Section 14B is in the following terms:

> (1) An action for damages for negligence, other than one to which section 11 of this Act applies, shall not be brought after the expiration of fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission—
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> (a) which is alleged to constitute negligence; and
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> (b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).
>
> (2) This section bars the right of action in a case to which subsection (1) above applies notwithstanding that—
>
> (a) the cause of action has not yet accrued; or
>
> (b) where section 14A of this Act applies to the action, the date which is for the purposes of that section the starting date for reckoning the period mentioned in subsection (4)(b) of that section has not yet occurred;
>
> before the end of the period of limitation prescribed by this section.

50. The question which therefore arises is whether any act or omission which is alleged to constitute negligence, and to which all or some part of the loss in respect of which damages are claimed is attributable, occurred less than 15 years before 21 December 2009. It is the defendants' case that, if there was any negligence, and for the purposes of this application I can assume that there was, it occurred no later than in or shortly before October 1994. If that is correct, and there is no later act or omission, the claim will be statute barred, because it will have been commenced more than 15 years later. If the claimants have a realistic prospect of showing that there was any later act or omission, the claim cannot be struck out, nor can summary judgment be given against them on the grounds that the limitation period has expired.

51. The defendants submitted that the question which arises is whether the claimants have a realistic prospect of establishing that the defendants committed what is often called a continuing breach after 21 December 1994. The way that the defendants plead their case on this point is as follows:

> "37. The Particulars of Claim plead no instruction or reason which should have led the Defendants to revisit the validity of the implementation of the HUM Benefit Structure after provision of the 1998 Deed First Draft on 21.10.94. The Defendants had no reason to do so."

52. They then further explained this in correspondence as follows:

> "As to the HUM Benefits Error, the Defendants' case … is that the last date of any act or omission which could be alleged to constitute negligence by the Second Defendant in not bringing to the Claimants' attention the HUM Benefits Error was 21 October 1994, when the Second Defendant sent out the first draft of the 1998 Deed (having consolidated the HUM Benefits Structure). That date was more than 15 years before the issue of the Claim Form on 21 December 2009…"

53. The defendants did not dispute that there are some contexts in which providers of professional services will continue to commit a breach of duty if they fail to draw to their client's attention an error which they ought to have identified over the period in time for which they were working on a particular project. If that is the case, a new cause of action may accrue from day to day for the duration of that period. However, they submitted that, during an ongoing project, a professional who believes that he has completed a task commits no 'continuing breach' in failing to revisit past work to check for latent mistakes of which he is otherwise unaware, unless something specific occurs to make it necessary for him to do so. For these purposes, the mere existence of a continuing retainer is not sufficient.

54. For these propositions Mr Stallworthy KC for the defendants relied on two cases in which the claim was made against architects *(New Islington and Hackney Housing Association Ltd v Pollard Thomas & Edwards Ltd* [2001] PNLR 20 ("*New Islington*") at [14]-[20] and *Tesco Stores Ltd v Costain Construction Ltd* [2003] EWHC 1487 (TCC) ("*Tesco Stores*") at [270]-[271), one case in which a claim arose out of advice by solicitors (*West Wallasey Car Hire Ltd v Berkson & Berkson (A Firm)* [2009] EWHC 3454 ("*West Wallasey*") at [55] & [102]-[106] and one case in which drafting services were provided and advice was given by a pensions consultancy (*Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2015] EWCA Civ 1310 ("*Capita*")).

55. The critical question in such cases is to identify the nature and scope of the ongoing duty of care on which reliance is placed. In *New Islington*, Dyson J held at [14] that, although it is necessary to look at the circumstances of each engagement "a designer who also supervises or inspects work will generally be obliged to review that design up until that design has been included in the work", although that duty to review may in particular instances continue until practical completion. He went on to explain (at [20]) that the corollary of this principle is that an architect is under no duty to review any particular aspect of the design which he has already completed unless there was some good reason for doing so. However, as part of the analysis, he also said (at [16]) that, where an architect is not just responsible for the design but is also supervising the construction, the duty to review may well arise if something occurs during the course of the construction he is supervising to make it reasonable for him to go back and review the design that he had already carried out.

56. In *Tesco Stores* at [270], HHJ Richard Seymour QC gave the following explanation of the applicable principle and the reasoning for it:

> "The notion that a professional person owes a continuing duty to review the quality of the performance of his retainer or engagement is not a straightforward one unless it is intended simply as a transparent mechanism for delaying artificially the commencement of some period of limitation. In the ordinary conduct of human affairs a task which is considered to have been completed satisfactorily is put behind one as the next task is embraced. To expect someone in real life continuously to review what he or she is doing is to expect them to be paralysed into substantial inactivity by anxious traversing of old ground until eternity. A more realistic approach is to recognise, as Oliver J did in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* that:—

> 'It is not seriously arguable that a solicitor who or whose firm has acted negligently comes under a continuing duty to take care to remind himself of the negligence of which, ex hypothesi, he is unaware.' "

57. The way that the point was explained in *West Wallasey* at [104] was as follows:

> "The courts are generally reluctant to impose a duty on professionals, either in contract or tort, to review work already undertaken and correct errors. Thus, in *Bell v Peter Browne & Co* [1990] 2 QB 495, the Court of Appeal rejected the analysis that it was implicitly a solicitor's duty to his client pursuant to his (continuing) retainer to identify and remedy earlier breaches of that retainer. See in particular the judgment of Mustill L.J. at 512F to 513B."

58. I should say straight away that I do not think that *West Wallasey* adds very much to the analysis in the present case. Mr Newman submitted that, in the light of what Coulson LJ had to say about the case in *Sciortino v Beaumont* [2021] Ch 365 at [48] and [49], I should treat what was said in *West Wallasey* with caution. I agree that, in the light of Coulson LJ's comments, it would not be right to regard it as giving authoritative guidance on the issues which arise in the present case.

59. Of much greater significance is the *Capita* case, a decision of the Court of Appeal. It is factually closer to the present situation, because the issue arose in the context of negligent advice given by the provider of pension advisory and management services to the trustees and principal employers of an occupational pension scheme. The negligence was a failure to tell the trustees and the employer that amendments to accrual could only be made by the trustees' execution of a formal document (an announcement was not enough) and that amendments could not be retrospective.

60. The majority (Longmore LJ and Henderson J) concluded that there was no continuing breach even though there was a continuing retainer. They expressly rejected the proposition (which appeared to have been established by the decision of Oliver J in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384) that the continuation of a retainer and the subsequent occasional consideration of the matter to which the original negligence related of itself meant that there was a continuing duty to correct the original mistake with the consequence that a fresh cause of action continued to accrue from day to day thereafter. As Longmore LJ said at [19]:

> "The obtaining and receiving of advice after a mistake has been made (even if the mistake can be easily rectified) cannot to my mind mean that an obligation to correct one's mistake or negligence continues to accrue and give a fresh cause of action every day after the mistake has been made. As Mustill LJ pointed out in the *Bell* case [1990] 2 QB 495 it would be unusual for there to be an express term in the average retainer contract (or the average pension adviser contract) requiring the adviser to exercise continuing vigilance to discover any mistakes he may have made and then to busy himself to put them right."

61. After the conclusion of the argument, the defendants' solicitors drew my attention to *PSGS Trust Corp Limited v Aon UK Limited* [2022] EWHC 2058 (Ch) ("*PSGS*"), a case in which Miles J considered and applied the Court of Appeal's decision in *Capita*. *PSGS* was a case in which the same defendants were alleged to have been in breach of duty in failing to implement certain amendments to a pension scheme's governing

documentation in the correct manner. It was also said that they continued to be in breach of duty up until 2015 by failing to advise on the validity and legal effectiveness of those changes during the course of their administration of the scheme. The professionals alleged to have been negligent were under a retainer which continued after the various flawed amendments to the rules had been made. Miles J was satisfied that, apart from the continuing retainer, there were no other facts pleaded sufficient to found a basis for alleging that the defendants in that case were under a duty to correct their earlier errors and so he struck out the allegations of continuing breach.

62. In my view, Miles J's decision in *PSGS* was a conventional application of the established principles, but it is also a useful illustration of how the cases are all fact specific and ultimately the answer will depend on the scope of the duty. In that case, there was a continuing retainer for the provision of scheme administration services. In the present case, the work being carried out under the retainer can more obviously be characterised as the single task of preparing and drafting a new consolidating deed.

63. The defendants submitted that what may constitute good reason for requiring a professional to review any particular aspect of the work that he has already done (per Dyson J in *New Islington*) will be very fact specific. I agree. They then identified a significant number of respects in which the first draft of what was to become the 1998 Deed, which was provided to the claimants on 21 October 1994 (and in respect of which the defendants completed their work a short while before that date), misapprehended that that the HUM benefit structure had been validly introduced. They also pointed out that they were provided with the Announcement and the Deed of Adherence for the purposes of preparing the first draft and so, to the extent that they failed in their duty by not warning that the HUM benefit structure had not be implemented in 1986, that breach of duty had already occurred.

64. I agree that, if the defendants were negligent in the respects alleged by the claimants, it is quite likely that their first operative act of negligence occurred when the first draft of what amounted to a consolidating deed was prepared, anyway to the extent that they should have picked up the point when designing the structure of the new deed and identifying the points that needed to be included. But that does not answer the question of whether it is appropriate to regard the preparation of the first draft of the deed as completion of a basic aspect of the design which the defendants never had cause to revisit.

65. As part of their argument that I could be satisfied that it was, the defendants relied on the fixed fee agreement which I referred to earlier. They submitted that the work covered by the retainer could be split between fixed fee work and work for which a time cost or other fee could be charged. Mr Stallworthy said that the fixed fee work was all done at or before the time the first draft was sent out and that it was a discrete first part of the exercise. I disagree with both elements of this submission.

66. First of all, I do not think that the agreement is at all clear on the extent of the work to be covered by the fixed fee element and consider that it may well have been intended to cover at least some discussion and negotiation both pre- and post-production of the first draft. The precise stage at which an entitlement to make an additional charge arose is insufficiently specified for me to reach a conclusion on a strike out application.

67. Secondly, and in any event, this fee-related issue does not detract from the fact that the extent of the task which is covered by the retainer is the production of a new consolidating deed, not just a first draft. In my view, there is nothing about the arrangements in the present case which indicates that the production of a first draft could be said to be the completion of a discrete task which the defendants had agreed to carry out independently of or separately from the whole. The highest it can be put is that it was the end of one stage in the developing process by which a single piece of work was being produced. I think it is very well arguable that, notwithstanding the agreement of a fixed fee for stage one, it is artificial to introduce the division for which the defendants contend.

68. The defendants submitted that the claimants' particulars of claim were inadequately pleaded, because they did not sufficiently identify specific times after the production of the first draft at which the HUM benefit structure should have been further investigated by them. In an echo of what was said by Miles J in *PSGS*, they submitted that the statements of case did not sufficiently identify what were said to be the facts which did or should have caused the defendants to revisit the form of the proposed new consolidating document as it related to the 1986 HUM benefits error, or otherwise to revisit the question of whether the HUM benefit structure had been validly incorporated in the governing documents of the Scheme.

69. Mr Stallworthy also submitted that the way in which the claimants formulated the times at which the defendants failed in their duty to revisit the validity of the implementation of the HUM benefit structure was incoherent and internally inconsistent. He pointed out that in paragraph 3 of the particulars of claim the date is said to have been 1998 (when the 1998 Deed was finally executed), but later (at paragraph 34(i)) the date was said to have been at some point in 1996, 1997 or 1998. This was further refined in the claimants' reply to have been 30 March 1995 when the trustees' meeting was taken through the first draft or alternatively when, on 7 June 1996, the defendants reiterated that they were taking professional responsibility for the documentation.

70. He also took me through the drafting process to demonstrate that there was nothing in the various meetings that were held and the various documents that were exchanged which indicated that the defendants might have had any specific cause to revisit their initial approach to the design of the proposed new consolidating deed. He said this was critical, because it demonstrated that the claimants could not prove (and indeed had not pleaded in the particulars of claim) the facts necessary to establish their claim.

71. Thus, without prejudice to what they said were basic deficiencies in the pleadings, the defendants were able to make submissions on the documents referred to in the particulars of claim and (so they said impermissibly) in the reply. They sought to explain that a careful analysis of what is recorded as having been discussed at meetings of the trustees and then further considered by them during the period between the production of the first draft and the eventual execution of the 1998 Deed demonstrates that there was never any further occasion on which it can be said that a fresh act or omission in the form of an actionable failure to warn arose. They submitted that there was no good reason for them to revisit the work they had already done which related to this issue.

72. Mr Newman submitted that there were a number of problems with the way in which the defendants present these arguments. Most generally, he said that all of these points

assumed that it was appropriate for the court to attempt an analysis of the documentary material on a strike out application, which he did not accept. He pointed out that some of the defendants' submissions on the documents involved a level of inquiry as to the evidence, which was illegitimate at this stage of the proceedings. I think there was some substance in that submission.

73. Leaving that to one side, he made five specific submissions on why the defendants were wrong to contend that they committed no breaches of duty in relation to the HUM benefits error after October 1994. The first flowed from the fact that, although the defendants were under a duty to take reasonable care in their consideration of the validity of the implementation of the HUM benefit structure at the time they were preparing the first draft of the 1998 Deed, there is no evidence and no pleaded case that they did in fact give it any consideration at all. This is not surprising and is consistent with the likely fact that the defendants' starting point in drafting the 1998 deed was an assumption that the HUM benefit structure had been validly incorporated in 1986. I agree with Mr Newman that the way the case is pleaded (and indeed those parts of the evidence to which I was taken during the hearing) is wholly consistent with the defendants having made that assumption without further enquiry, and Mr Stallworthy did not submit that it was not.

74. It follows from this that the legal principles which are applicable to identifying the circumstances in which a professional is under a duty to revisit a task that he has already carried out do not provide a clear answer in the present case. There is nothing on which the defendants can rely to support a case that once the issue was considered there was no need to reconsider it, because it was never considered in the first place. In other words, if they did not go through the process of thinking about the validity of incorporation of the HUM benefit structure into the 1981 DDR, they were in continuing breach of their duty to take reasonable care in their conduct of the retainer throughout the period prior to the time they completed their work on the 1998 Deed.

75. Mr Newman therefore submitted that it is no part of the claimants' case that a failure occurred at a particular time when the defendants actively considered the incorporation issue while drafting the 1998 Deed. This is why it was quite wrong to criticise the claimants' case as incoherent and internally inconsistent. Their case is that the defendants omitted to identify the issue at any stage in the drafting process. The fact that this is pleaded as a breach of duty by omission, is a critical part of the analysis. It would only have been if the claimants were relying on a particular occasion during the defendants' retainer which required them to have spotted the issue and informed the claimants accordingly that the identification of a particular date would have been necessary.

76. Mr Stallworthy's repost was that there is no difference in principle between a situation in which the original negligent act was the production of a draft which merely assumed the valid implementation of the HUM benefit structure in the governing documents of the Scheme, and one in which active consideration was given to the point. He submitted that it is dangerous to differentiate between acts of commission and omission in this context. More specifically he relied on the fact that the claimants did not found their case on an argument that there was any particular moment in time which required the defendants to have spotted and informed the claimants of the issue, but rather was a continuing failure throughout the retainer to do so.

77. I think that Mr Newman's arguments on this point have a realistic prospect of success. In my view, it is far from fanciful to contend that the defendants continued to be in breach of their duty to take reasonable care in the conduct of their retainer by proceeding throughout the drafting process on the basis of an assumption that the HUM benefit structure had been validly incorporated into the 1981 DDR when the Announcement was made in 1986. This is the assumption that the defendants appear to have made and they certainly make no allegation to the contrary. The case against them is not that they failed to revisit an issue. The case against them is that they had never considered it in the first place and that, until they did so, they were in continuing breach anyway to the extent that they were still engaged in the drafting process. Only when they had done so might it be said that they were not required to keep on going back and looking again.

78. The second submission made by Mr Newman feeds off the first. He said that it is wholly artificial to break down the task for which the retainer was agreed into different stages. He said that, as a matter of commercial reality, it is wrong to approach a case such as the present on the basis that the final advice is given in a piecemeal fashion or to say that once one part of the drafting has been completed the draftsman moves onto a separate task, and will not thereafter reconsider issues on which he has already reached a conclusion. He criticised Mr Stallworthy's submission that it was a question for the professional as to whether or not he believed that he had completed a task, and I agree that the answer to this issue, where it arises, is that the court must determine objectively on the evidence when the task is completed depending on what the task is, viewed in the context of the parameters of the retainer.

79. Mr Newman submitted that the authorities relied on by Mr Stallworthy on this point were of limited assistance. He said that they did not concern when the last act or omission occurred for section 14B purposes, they did not involve a professional retained to produce a legal document which was the subject of a long drawn out drafting process and they were all concerned with an attempt to rely on the accrual of a new cause of action by reason of a continuing duty arising after the performance of the relevant task.

80. In my view there is substance in this submission. Thus, in *New Islington* there was a clear distinction between the stage of the retainer at which the architect was engaged in what was alleged to be a negligent design, and the stage of the retainer at which the architect was fulfilling a supervisory role. In the present case, I think it is well arguable that it was only when the drafting exercise was complete that the defendants reached an equivalent stage in the conduct of their retainer that had been reached by the architects in *New Islington* when they completed their work on the design. While I do not rule out the possibility that the defendants' argument may succeed at trial, I do not consider that such work as the defendants carried out on designing the structure of the 1998 Deed for the purposes of preparing its first draft ought to be treated as the completion of a task for these purposes. In my view, the claimants have a real prospect of success in their argument to the contrary.

81. I think that a very similar point can be made in relation to *Tesco*. In that case the relevant issue was whether an architect owed a continuing duty to his client to review his design such that a contractual failure to prepare a competent design was a breach of duty which continued until completion of the structure which he had designed. Mr Newman described Judge Seymour's statement that "in the ordinary conduct of human affairs, a

task which is considered to be completed satisfactorily is put behind one as the next task is embraced" as a homily used to illustrate a point. Whether or not that is the right way of describing it, I agree that it is at least well arguable that the task in the present case can only have been considered to have been completed satisfactorily once the drafting process was complete. To the extent that the omission to notice that there was no valid incorporation of the HUM benefit structure into the governing documentation of the Scheme in 1986 and/or to reflect that failure to incorporate in the drafting of the 1998 Deed was negligent, that omission was a breach throughout the drafting process. It was only at its conclusion that it can have been thought by either party that there had been a satisfactory completion of a task.

82. Mr Newman also cited *Pearson Education Limited v The Charter Partnership Limited* [2007] EWCA Civ 130 at [55], a case in which the Court of Appeal was concerned with the negligent design of a rainwater cistern. The relevant issue was whether the completion of the design was the material breach or whether it was the incorporation of the design into the building. Lord Phillips of Worth Matravers CJ explained the court's conclusion as follows:

> "We do not accept Mr Dennys' submission that, for limitation purposes, the relevant act or omission on the part of CPL was their initial mistake in adopting an inadequate capacity for the drainage. Section 14B … requires the court to identify the latest date when CPL were responsible for a negligent act or omission to which PEL's damage can be attributed. The gravity system designed by CPL was not incorporated in the warehouse. Whether or not CPL showed a failure to exercise reasonable skill and care in adopting a design capacity of 75 mm for that system, and on the evidence we believe that they did, is not relevant. The relevant negligent act or omission was the act or omission that caused an inadequate drainage system to be incorporated in the building. We consider that the most obvious negligent act that had this effect was specifying to Fullflow, who designed and installed the siphonic system, a design capacity that they, CPL, should have known was inadequate. That occurred in late January 1989, within the 15 year limitation period."

83. Having reached this conclusion, the Court of Appeal said that it did not need to go on and consider the difficult question of whether or not there was a continuing breach in failing to keep the design under review. However, while recognising that all of these types of case will be very fact sensitive, I consider that some limited analogy can be drawn with the situation in the present case. The design of the 1998 Deed (first considered by the defendants in the run up to the production of the first draft in October 1994), only eventually caused the HUM benefit structure to be incorrectly incorporated into the 1998 Deed at the time it was executed.

84. The issue that arose in *Pearson Education* was then considered again by the Court of Appeal in *Cameron Taylor Consulting Limited v BDW Trading Limited* [2022] EWCA Civ 31. Coulson LJ summarised the position as follows at [46]:

> "In a negligent design case, an error on a drawing is only the start of the process. That drawing might be stored in a cupboard and never seen again; it might even be thrown away. It might be superseded the following day or the following week. It might be issued for a limited purpose which had nothing to do with the construction. It might be issued to record the as-built condition of the building. By

> itself, therefore, a defective drawing proves nothing; what matters is what happened to that drawing, and in particular whether and when that drawing was issued to the contractor with the instruction (express or implied) to build in accordance with it. It is in that way that the defective design is then incorporated into the building as built."

85. Mr Newman submitted that, as with what occurred in *Cameron Taylor*, it was only when the drafting process was complete that it could sensibly be said that the design of the proposed new deed had been incorporated into the final product which eventuated in the 1998 Deed. In my view there is a relevant analogy in the present case and Mr Newman's submission has a more than fanciful prospect of success at trial. If it is correct, I also agree with Mr Newman's submission that the question of a continuing duty to revisit the design does not arise. The issue is simply whether the defendants were negligent in failing throughout the drafting process to warn the claimants of the invalidity of the incorporation of the HUM benefit structure in the documentation governing the Scheme, which led to the consequential deficiencies in the 1998 Deed.

86. Although *Capita* is significant because the factual context in which the issue arose is closer to the present case than some of the building and architect cases, there is still an important point of difference which assists in explaining how the underlying principle should apply in the present case. In *Capita* there was an attempt to impose liability on professionals for what were said to be negligent omissions in circumstances in which they had completed the task, but had an ongoing retained relationship with the client. It was also a case, like the others relied on by Mr Stallworthy, in which the court was concerned with an issue on the primary limitation period (the accrual of the cause of action) not the application of section 14B.

87. I agree with Mr Newman that *Capita* does not assist on the different situation where the liability relates to failures occurring not just during the retainer but while the task in respect of which the original duty arose was still being performed. It is not of course possible to generalise, but where a professional is still engaged in a task the product of which is not yet fit to be used by their client and remains the subject of further discussion and negotiation, there will be cases and this may well be one of them, where the professional must keep the form of the work he is engaged in under continuing review.

88. Mr Newman's third point can be taken more shortly, because the conclusions I have reached on his first and second arguments dispose of the defendants' application on this ground in any event. He said that the difficulty with the defendants' analysis is that it leads to inherent uncertainty as to the actual date from which the section 14B 15-year period should run. He submitted that the time at which the breach occurred would have been unknown to the claimants, because the failure to identify and then warn of the earlier deficiency was a part of the process which was invisible to them if the breach was before the first draft had been properly explained to the claimants.

89. This he said illustrated how unsatisfactory it was to conclude that the last breach in the form of a failure to warn occurred before the time of the first occasion on which the trustees were taken through the first draft by the defendants' representative (Mr Giffin). This only occurred at the 30 March 1995 meeting, which was within the 15-year period. At the very least Mr Giffin would have had to acquaint himself with the form of the first draft for the purpose of this first meeting and Mr Newman said that he should have

reviewed it in its entirety including its design as part of the process by which he presented the proposed new consolidating deed to the meeting.

90. Mr Stallworthy emphasised that this submission was based on an unpleaded allegation. But on the substance he said that it was unreal to suggest that, in preparation for the trustees' meeting to address the questions raised by the commentary, Mr Giffin would or should have repeated the work of review. I disagree. The important point is the nature of the breach in this case. The claimants allege that the defendants failed to identify in the process of drafting the new consolidating deed a problem which flowed from the way in which the original governing documentation for the Scheme had been drafted and was assumed to work. I think that they have a realistic prospect of establishing that, in the light of the task which he was undertaking at the March 1995 meeting, this was something that a reasonably competent provider of the services set out in the retainer ought to have identified at this stage. In other words, it was not reasonable simply to rely on the original structure and design of the draft deed, without giving it further thought at the time it was being explained to the defendants' clients.

91. I therefore agree that this gives further support to the claimants' case on this application. In my view, a failure to take reasonable care in that process of review such that he did not identify the invalidity in the original attempt to incorporate the HUM benefit structure in the Scheme's governing documentation, is as capable of being a negligent omission at that stage as it was when the first draft was being prepared.

92. Mr Newman had two further points on this part of the case. The first of these was an as yet unpleaded argument that, if the drafting team had spotted the issue in relation to the invalidity of incorporation of the HUM benefit structure, they could not have advised the claimants, because the advice would have required them to consider whether the claimants had a claim against NLP arising out of the 1986 HUM benefits error. NLP and the defendants were then part of the same corporate group and so there would have been a clear conflict of interest. It is said by the claimants that the failure to identify and advise in relation to that conflict was an obvious and (more importantly) continuing breach. Mr Newman submitted that it followed that this continuing breach subsisted throughout the period of the work on the drafting of the 1998 Deed in any event.

93. This argument would require an amendment to the particulars of claim, a point to which I shall come a little later. But Mr Stallworthy said it was misconceived, because there could be no breach of duty in failing to tell a client that they must take independent advice unless they had prior knowledge of the past error. He relied on *Ezekiel v Lehrer* [2002] EWCA Civ 16 at [25], including the colourful passage in Ward LJ's judgment about Rugby's mythical Ooh Aah bird, as authority for the proposition that it would be absurd to place a professional under a duty to tell a client that he needed to obtain independent advice on the quality of his work, when he genuinely believed that the advice he had given was good advice.

94. Based on the principle articulated in *Ezekiel*, I accept Mr Stallworthy's submission. I do not consider that there is an arguable case that the defendants were in breach of duty in failing to recognise that the claimants needed to take independent advice on the incorporation of the HUM benefit structure into the governing documents of the Scheme, when there is no suggestion that the defendants knew or suspected that NLP had committed any form of error in 1986. It follows that I do not think that Mr

Newman's argument that there was in any event a continuing breach throughout the retainer based on a failure to take steps in the light of a conflict of interest, which would save his claim if he were to fail on his main argument, is a good one.

95. However, I should also say that I did not understand Mr Stallworthy to contend that, if there was an arguable basis for saying that there was a breach of duty in failing to identify the 1986 HUM benefits error and its consequences throughout the process of drafting the deed, questions of conflict were then irrelevant. I do not think that they are in the sense that, if the defendants had identified the 1986 HUM benefits error, I think it is arguable that they should then have advised the claimants to seek independent advice because of the conflict. However, that goes to the issue of what would or should have happened if the breach had not been committed. In my judgment, for the reasons explained in *Ezekiel*, it does not justify a plea of a freestanding breach of duty.

96. Mr Newman's final point was to identify within the documents those occasions on which the defendants had cause to reconsider that aspect of the drafting of the 1998 Deed which related to the HUM benefit structure. This submission was made essentially without prejudice to his principal arguments, and also on the assumption that it was appropriate for the court to attempt some form of analysis of the underlying documentary material on this strike out application. Having carried out that exercise, he summarised this aspect of his case as follows:

> "These facts - and potentially others which may emerge from disclosure and/or witness evidence - illustrate Ds' ongoing retainer to draft the 1998 Deed and that their responsibility for the legal efficacy of the deed continued throughout that period during which important aspects of the HUM Benefit Structure were still being considered. These facts give the lie to Ds' contention that the initial failure to notice the non-introduction into the Scheme's governing documents of the HUM Benefit Structure at the time of the first draft of the 1998 Deed was the first and last negligent omission for the purpose of s.14B."

97. The approach Mr Newman adopted to this part of the case explains why the facts on which he sought to rely were pleaded in the claimants' reply. He submitted that they were responsive to the defendants' allegation in the defence that, once the first draft of the 1998 Deed had been produced, there was no need for it to be reconsidered. In circumstances in which the essence of the claimants' case is that there was a continuing breach and the defendants plead limitation as a defence, I think that this is an appropriate way for the claimants to plead their case and complies with the rules. As I shall explain, if this is wrong, the permission now sought by the claimants to move these amendments to the particulars of claim should be granted.

98. I think that some of the events described in paragraph 84 of the claimants' skeleton are more about giving rise to an opportunity to revisit than they are about cause to do so. However, I do not accept Mr Stallworthy's submissions to the effect that this can be seen now to be the case. Disclosure has not yet taken place in these proceedings and once it does, and the evidence is complete, the significance of particular events may take on a different appearance. In particular I disagree with the defendants that it is fanciful to suggest that they had cause to revisit the HUM benefit structure during the course of their preparation of the second draft of what was to become the 1998 Deed. I think it is arguable that the number of outstanding issues relating to the HUM benefit structure as a result of the March 1995 meeting means that a reasonably competent

advisor should have revisited this aspect of the drafting in its entirety. On an issue of this sort, I think it is premature at the strike out stage to conclude that they did not.

99. For all of these reasons, and subject only to one point, I reject the defendants' first ground for striking out the relevant parts of the particulars claim.

100. The single exception relates to the 1999 Deed. In paragraphs 43 to 45 of the particulars of claim, the claimants plead a failure when drafting the 1999 Deed to advise or warn the trustees or employers of the failure correctly to incorporate the HUM benefit structure at the time of the Deed of Adherence. No facts are pleaded to justify the allegation that this did or should have fallen within the scope of the work which they were instructed to carry out.

101. The work on the 1999 Deed was wholly separate from the work on consolidating the governing documents of the scheme into the 1998 Deed. Not only was it a separate task but, unlike a consolidation exercise, the work on the 1999 Deed gave the defendants no obvious reason to focus on any parts of the governing documentation other than those which related to the changes required by the PA 1995. In other words it was not inherent in the exercise that the defendants needed to give reconsideration to the form of the HUM benefit structure or its treatment in either the Deed of Adherence or the 1998 Deed.

102. Furthermore, there was no explanation in either the particulars of claim or the reply as to why the defendants should have reconsidered the point, whether by reference to the scope of the work they were doing and the duties they had then assumed or any other consideration, and Mr Newman did not address the point in his submissions. No part of the pleadings alleges a basis on which the defendants had cause to revisit the HUM benefit structure or its treatment as part of their work on the 1999 Deed. In my view, this allegation is analogous to the situation with which Miles J was concerned in *PSGS*. In the light of the *New Islington* line of authority, this part of the claimants' case has no realistic prospect of success and paragraphs 43 to 45 should be struck out accordingly.

The scope of the claim form

103. Turning to the second ground, it is provided by CPR 16.2(1)(a) that the claim form must contain a concise statement of the nature of the claim and specify the remedy which the claimant seeks. In *Libyan Investment Authority v King* [2021] 1 WLR 2659 at [61] Nugee LJ said that this means that, although the details of the claim that a claimant has to include in the claim form can be brief, there is a certain minimum that every claimant has to include. He then referred with approval to *Marshall v London Passenger Transport Board* [1936] 3All ER 83, a decision on the equivalent rule in the RSC (Ord 6, r 2) which was still applicable under the CPR, and said:

> "in that case … Romer LJ had said that the plaintiff must give the defendants some general idea of the nature of his claim, and that it was not sufficient for the plaintiff to indorse his writ merely with a claim for damages, or damages for breach of contract or negligence, but he had to give some indication of the contract said to be broken, or the duty which the defendants were said to have failed to perform. I accept therefore that a claimant does not need to put very much in the way of details

in the claim form (although he can add more if he wants to), but there is a certain minimum that he needs to state."

104. In the present case, the relevant part of the claim form sought:

> "Damages for losses sustained by the Scheme and/or the Employers as a result of the negligence of the Defendants as the provider of actuarial, administration, benefits consultancy, documentation and related services in respect of the Scheme, in relation to advice provided and/or omitted to be provided to the Claimants in respect of the operation of the Scheme from about 1978 to the present date, in that the defendants:
>
> > (i) failed properly to advise as to the manner in which amendments to the governing documents of the Scheme should be made and/or failed to implement amendments adequately or at all;
> >
> > (ii) prepared actuarial valuations which valued the liabilities of the Scheme incorrectly; and
> >
> > (iii) failed to administer the Scheme correctly in accordance with the Scheme's governing documents."

105. The defendants submitted that the nature of the claim is therefore described as one which arises in connection with their advice as "the provider of actuarial, administration, benefits consultancy, documentation and related services in respect of the Scheme". They point out that it makes no mention of the provision of legal services, despite that being central to the claims now advanced by the claimants and criticised the terminology of documentation and related services as being obscure. They also pointed out that there is no indication in the claim form about when any breach occurred, not least because the period from 1978 to the present date refers to the period in respect of the operation of the scheme, not the period during which the breaches are alleged to have occurred.

106. The defendants also drew attention to the fact that the allegations of negligence in relation to the advice provided and/or omitted are, as a matter of language, qualified by the three breaches alleged in the numbered sub-paragraphs. They contend therefore that it is necessary for any allegation of negligence to fall within one of the three categories of pleaded failure in order for the nature of the claim to have been sufficiently identified. They point to the fact that paragraphs (ii) and (iii) include a reference to conduct which is not the subject of criticism in these proceedings, and reflects the illegitimately non-specific nature of the claims then made. They also submitted that there is nothing in the claim form which identifies which amendments and which governing documents are the subject matter of the claim.

107. Fundamentally, it was said by the defendants that what is set out in the claim form is both abusive in its generality and inadequate as a description of the claim now made. The defendants' case, as set out in [12(d)] of their Defence, is that the claim form does not allege any duty to "warn" about alleged "inadequacies, deficiencies and/or uncertainties in documentation" and/or "work carried out in relation to the Scheme by … [the defendants]". The defendants contend that the claim form only alleges that they were negligent "as the provider of.... documentation and related services" in that they

"failed to advise as to the manner in which amendments to the governing documents of the Scheme should be made and/or failed to implement amendments adequately or at all".

108. It is said that this description of the nature of their case encompasses (a) failures to advise as to the manner in which new amendments should be made and (b) failures to implement new amendments (which is concerned with a prospective question). It is the defendants' case that the wording only encompasses failures to advise as to how new amendments should be made (for example as regards documentary formalities and other requirements for exercising the amendment power) and that the wording does not encompass failures to warn (retrospectively) about how historic amendments should have been made or historic advice should have been given in the past. It is said that these are all very serious deficiencies because they demonstrate that the precise nature of the claim now made was not properly articulated at the time the proceedings were commenced. This has important consequences for limitation purposes.

109. The claimants criticised the unmeritorious nature of this part of the application, based on the fact that the defendants can have been in no doubt as to the true nature of the claims made against them. They said that that the defendants would not have been so active in attempting to mitigate their potential liability through their participation in the construction and rectification claims if they had not appreciated the true nature of the current proceedings. This is relevant in the sense that this is not a case in which the defendants can contend that they were taken by surprise when the particulars of claim were served, but is only of limited relevance to the question of whether the claims made in the particulars of claim fall within the scope of the claim form. It may have more relevance to the question of the relief the court should grant if they do not.

110. As to the substantive point, the claimants submitted that the defendants' arguments ignore the principle that claim forms are concerned with the nature of the claim and are not required to set out causes of action. Thus, where it is said that proposed amendments to particulars of claim should not be allowed under CPR 17.4 on the basis that they give rise to new claims outside the limitation period, the only issue for the court is to compare the original particulars of claim with the proposed amendments. The fact that the claim form is wider than the original particulars of claim is neither here nor there, because a claim form is not required to plead any cause of action (*Chandra v Brooke North* [2013] EWCA Civ 1559 at [79] to [86] applying *Steamship Mutual Underwriting Association Ltd v Trollope and Colls (City) Ltd* (1986) 33 BLR 77, 97).

111. Dealing first with the argument that the claim form does not refer to the provision of legal services, the claimants submitted that the breaches of duty alleged in the particulars of claim fall within the concept of documentation and related services. As a concept this extends to legal services in a limited drafting or documentation related sense. Mr Newman submitted this was actually the right way of describing the nature of the services being provided because it was not the claimants' case that they relied on a free standing legal duty to advise on matters relating to the Scheme that arose independently of the drafting of its governing documentation. He also explained that the claimants have sought to make this clear in part of their application to amend their particulars of claim by a deletion of paragraphs 8 and 34, which was said by the defendants to give rise to an impermissible extension of their duty of care.

112. The claimants accepted that none of this means that the claim does not involve allegations as to errors of law. But they said that the crucial point is that the errors were made in the provision of documentation and related services because the working-out of what the prior amendments were or ought to have been was a necessary step in the preparation of the consolidating deed. Put another way, it is said that whilst the breaches relied on in these proceedings relate to legal issues, those legal issues arise out of the provision by the defendants of documentation and related services.

113. In my judgment the claimants are right on this point. I consider that documentation and related services is wide enough as a concept to cover the services in respect of which the current allegations of negligence against the defendants are made. I think that this conclusion is consistent with the terms of section 7 of the retainer agreement which I described earlier in this judgment and is part of the context in which the claim form is to be construed. The documentation services there described extended to dealing with legal issues arising in the context of the provision of those services but were not described in a manner that separated the legal element of the work done on documents from the documentation services more generally. While the inclusion of the adjective 'legal' would have put the position beyond doubt, I am satisfied that the true construction of the current version of the claim form extends to the services in respect of which the claimants make complaint against the defendants.

114. The next issue is the defendants' submission that the claim form refers only to a failure to advise as to how new amendments should be made and does not encompass failures about how historic amendments should have been made.

115. The claimants initially understood the defendants' argument to be that the claim form only related to those parts of the 1998 Deed which were intended to introduce new changes to the Scheme, rather than those which were intended to replicate existing terms of the Scheme. They submitted that this argument would have ignored the fact that the purpose of the consolidating deed was not to amend the Scheme so that its terms were different to those which already existed. Its purpose was to produce a single document which incorporated both the terms of the 1981 DDR and the various amendments which have been made to the Scheme since that deed was first executed. It therefore follows that, when the concept of amendment to the governing documents of the Scheme is used (the phraseology used in the claim form), it is apposite to cover both changes to the terms of the Scheme itself and changes to the wording of the Scheme's governing document to reflect changes to terms of the Scheme which had already been made by reason of prior amendments.

116. If this had been the argument, I would have agreed with the claimants' submission on this point. When this well-understood concept of 'amendment' in the context of a consolidation exercise is properly understood, the amendments which *should be made* to the consolidating deed include not only new changes to the terms of the Scheme, but also changes to the wording of the Scheme's governing documents, which do not create new terms but which reflect changes to the terms which had already been made. This is consistent with the claim form's explicit reference to amendments to the governing documents of the Scheme rather than amendments to the existing terms of the Scheme. This reference encompasses a failure to advise on the wording which should have been incorporated in the 1998 Deed to reflect changes which had already been made – such as the purported introduction of the HUM benefit structure in 1986. The failure relates to the draft 1998 Deed so as to reflect the non-incorporation of the HUM benefit

structure in 1986. It involves a change to the governing documents (i.e. the new consolidating deed and rules) which *should be made*, not a change which *should have been made*.

117. I have explained how the defendants' argument initially appeared to be being run, because it throws some light on the ultimate answer, but in fact it transpired that the true nature of the defendants' criticism of the claim form on this point was slightly different. It was that, because there was no defect in the drafting of the 1998 Deed (it adequately implemented the HUM benefit structure), the claim could not be related to the drafting of the 1998 Deed. Therefore, it was said that the claim could only be based on a free-standing legal duty (arising independently of the drafting process) to advise the claimants about the earlier failure to incorporate the HUM benefit structure. This was not a claim that was covered by the wording of the claim form.

118. Mr Newman submitted that this criticism was misconceived. He said that the drafting of the 1998 Deed did not take account of the fact that, in the absence of any earlier valid implementation of the HUM benefit structure into the governing documentation of the Scheme, the 1998 Deed itself could not validly apply that structure to the HUM members' benefits for the entirety of their pension accrual from the time when HUM commenced participation in the Scheme. To do so would have infringed the proviso preventing exercise of the amendment power so as to interfere with accrued rights. The error, therefore, was a failure to limit the application of the HUM benefit structure to pensionable service after the effective date of the 1998 Deed.

119. Mr Newman submitted that this error was a classic example of negligence in the steps taken by the defendants to ensure the legal efficacy of the 1998 Deed in accordance with its terms as at the end of the drafting process. It was one which plainly arose out of the drafting of the 1998 Deed and, importantly, was an error in the form of a failure to implement amendments to the governing documents of the Scheme adequately. If the work had been done adequately, the 1998 Deed (as a consolidating deed) would have identified a distinction between the validity of the HUM benefits structure as it applied to HUM members' benefits going forward and the invalidity of the application of the HUM benefits structure to accruals prior to the effective date of the 1998 Deed.

120. I agree with the claimants' case on this part of the argument. In my view the argument that a reasonably competent draftsman should have taken reasonable steps to ensure that the terms of the 1998 Deed were comprehensive on this point and to the extent that he did not do so he was negligent, is correct. It follows that I agree that the defendants' criticism of the claimants' case on this point is based on a misconception. The mere fact that the defendants included the HUM benefit structure in the drafting of the 1998 Deed does not answer the criticism that is made of their conduct by the claimants. There may have been other ways of formulating the claimants' underlying criticisms of the defendants' conduct, but the fact that the drafting did not distinguish between the accruals in respect of which the implementation of the HUM benefit structure were and were not effective meant that the implementation of the amendments was inadequate.

121. This was arguably the case as a result of the defendants' negligence, and if they had not been negligent there was a realistic prospect that the 1986 HUM benefits error would have been identified in sufficient time to enable them to make a claim against NLP which only became time barred in 2001. In its essence, this is a claim for damages for loss of the chance to recover against NLP. It is also pleaded that the claimants lost the

chance to seek relief under the rule in *Re Hastings Bass* to avoid the additional liabilities altogether by setting aside the Deed of Adherence, a claim which the claimants say would, if available, have been easier to pursue than the rectification claim which was brought but failed.

122. The next issue relates to the defendants' complaint that the claim form only refers to a failure properly to advise as to the manner in which the amendments were made. It was submitted that this language did not extend to drafting the content of the 1998 Deed, but was limited to the mechanics by which any drafting amendments were to be implemented. I disagree. I also think that the claimants were correct to submit that "the manner in which" amendments to the governing documents to the Scheme should be made covers the terms in which any amendments to the new consolidating governing deed and rules were drafted. Changing the contents of a relevant deed such as the 1981 DDR is part of the manner in which the documents governing the terms of the Scheme (a generic rather than a specific description) are amended. This is more particularly the case when read in conjunction with the succeeding words "and/or failed to implement amendments adequately or at all".

123. The defendants also submitted that there is no reference in the claim form to the actionable loss being the loss of a chance to make a claim against NLP. I agree with the claimants that there is a short answer to this point. The claim form in the present case identifies that damages are claimed and also that they are said to result from the negligence of the defendants in a number of material respects. The statement of the nature of the claim for the purposes of CPR 16.2(1) is required to be concise. It does not require a particularisation of the quantum of the damages or the methodology by which they are to be computed.

124. For similar reasons I do not think that the defendants are correct to submit that the claimants were required to identify in the claim form the precise date of each of the breaches on which they base their claim. The most recent authority to which Mr Newman drew my attention was the decision of Eyre J in *USAF Nominee No 18 Limited v Watkin Jones Ltd* [2021] EWHC 3173 (TCC). Eyre J's judgment was concerned with an application to strike out the claim form in proceedings against a design and build contractor for damages caused as a result of fire safety and other defects on two separate bases. The first, which is not in issue in the present case, is that there had been an abuse of process (based on Cooke J's judgment in *Nomura International Plc v Granada Group Ltd* [2007] EWHC 642 (Comm)) because there was no present intention to prosecute the claim. The second was that the provisions of CPR 16.2 had not been complied with.

125. It is clear from the claim form in *USAF* that it did not include any reference to the dates on which the breaches of duty alleged against the defendants were said to have been committed. Notwithstanding this omission, Eyre J concluded at paragraph 61 that, construed in the context of the surrounding circumstances including the correspondence to which he had referred earlier in his judgment, the claim form was adequate (albeit as he put it "only by the skin of its teeth"). He also said that, even if it had not been, in the absence of a *Nomura* abuse, which he concluded had not been established, it would be an irregularity of the kind that could be cured by amendment if necessary and would not be such as to warrant the striking out of the claim.

126. Mr Newman also drew my attention to *Tetra Pak Ltd v Biddle & Co* [2010] 1 WLR 1466, a case in which the employers and trustees of an occupational pension scheme sued a firm of solicitors and a firm retained to provide actuarial and consultancy services. The claim related to what was alleged to be a failure to advise adequately and draft effective documentation in relation to the equalisation of members' retirement ages. In that case the details of claim on the claim form did not identify the dates of the breach save that the omissions in issue were said to have occurred from the time after the date at which they were instructed. I do not gain a great deal of assistance from *Tetra Pak* because the form of the claim form was not the subject matter of Warren J's judgment. But Mr Newman is entitled to submit that the nature of the matters with which Warren J dealt in his judgment indicated that, if anybody had thought that there was a problem with a claim form drafted in that way, it seems probable that the point would have been taken.

127. While there are aspects of the claim form in the present case which were not very happily drafted, I have reached the conclusion that the defendants are wrong to contend that it does not comply with CPR 16.2. In my judgment it sufficiently identifies the nature of the claim. Even if it had not done so, this would not have been a case for striking out the proceedings, because there is not and could not be an allegation that the claim form was issued in circumstances where there was no present intention to prosecute the claim such that issue was an abuse of process. Subject to questions arising under CPR 17.4, and consistently with the conclusion reached by Eyre J in *USAF*, any such deficiency is likely to be curable by amendment.

Claimants' application to amend the particulars of claim

128. The claimants' application to amend their particulars of claim is the third matter for determination. In light of my decision to refuse the defendants' applications to strike out the claim arising out of the HUM benefits error on section 14B grounds in any event, the amendment applications are relevant to a more limited extent than if their only purpose had been to save a claim that would otherwise have been struck out. Their purpose now is simply to reformulate the claimants' claim in circumstances in which I have concluded that the claim as it presently stands can proceed to trial.

129. The application for permission to amend the particulars of claim is made under CPR 17.1(2)(b). If a limitation period has expired, the court is only empowered to allow any amendment whose effect is to add or substitute a new claim if the new claim arises out of the same or substantially the same facts as a claim in respect of which the claimants have already claimed a remedy in these proceedings (CPR 17.4(2)). The defendants' opposition to the proposed amendments was based on the submission that they contravened this rule.

130. As to the correct test for determining whether an amendment adds a new claim arising out of the same facts or substantially the same facts, Mr Newman cited the decision of the Court of Appeal in *Bellinger v Mercer* [2014] EWCA Civ 996, in which Tomlinson LJ cited with approval at paragraph 34, the following statement of principle from Colman J's judgment in *BP Plc v Aon Ltd* [2006] 1 Lloyds Rep 549, 558:

> "Whether one factual basis is "substantially the same" as another factual basis obviously involves a value judgment, but the relevant criteria must clearly have regard to the main purpose for which the qualification to the power to give permission to amend is introduced. That purpose is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim."

131. The first amendment for which permission is sought is to paragraph 3(i) and is designed to track more precisely the wording of the claim form itself and to remove an ambiguity on the issue of whether or not the claimants are making an allegation arising from a free standing legal duty. In my view it achieves that purpose, it does not give rise to a new claim within the meaning of CPR 17.4(2) and if anything narrows the ambit of the matters in dispute.

132. The second proposed amendment is to delete paragraph 8 for similar reasons. It appears to plead implied terms that arise out of a free standing duty as the provider of legal services, although Mr Newman contended that this was not what it was intended to do. He said that it sought to set out the contract that governed the retainer, but accepted for present purposes that its inclusion was unnecessary. In my view, it is appropriate for permission to be granted to delete paragraph 8.

133. The third series of proposed amendments relates to paragraph 30 of the particulars of claim. They are designed to plead in the particulars of claim allegations currently made in paragraph 17 of the reply relating to the occasions on which the defendants ought to have revisited the HUM benefit structure after the production of the first draft of what was to become the 1998 Deed. These allegations are made without prejudice to the claimants' case, which I have concluded has a realistic prospect of success, that they do not need to plead particular occasions on which the defendants were required to revisit the validity of the HUM benefit structure when the defendants had not themselves pleaded the occasion on which they contended that the issue was first visited during the retainer.

134. Mr Newman submitted that moving these allegations from the reply to the particulars of claim did not offend the policy which underpinned the restriction on the circumstances in which the court can grant permission to amend as explained in the passage I have cited from *Bellinger*. I agree. In my judgment they constitute a pleading of further or reformulated breaches occurring during a material period ending with the execution of the 1998 Deed in December 1998. The defendants would have had to carry out an investigation of that period in any event in relation to the matters already pleaded in paragraph 30 of the particulars of claim. That investigation would have covered the matters sought to be included in the amendments proposed to paragraph 30 and in my view the scope of their inquiry would have remained essentially the same. To the extent that those proposed amendments give rise to a new claim, and I consider that the better view is that they do not, they arise out of the same or substantially the same facts.

135. The next series of proposed amendments relate to paragraph 33. The claimants seek to include three new (or at least reformulated) negligent failures in the advice they gave

as to the manner in which amendments to the governing documents of the Scheme should be made by the 1998 Deed. The first was that they acted in breach of their duty of care in failing to identify that there was an issue as to whether the amendments could validly be made retrospectively. The second and third are pleas that the defendants failed to identify that a conflict of interest had arisen upon which the trustees and the employers should take urgent independent legal advice and that they failed to advise the trustees and the employers to do so.

136. The defendants contend that the first of these proposed amendments is misconceived, because the 1998 Deed did not purport to be retrospective and only took effect from the date of its execution. I do not agree with that submission. I accept Mr Newman's point that the question which arises is whether the 1998 Deed purports to apply the HUM benefit structure retrospectively to accrued benefits when it could not validly do so. In my judgment it is arguable that the defendants were negligent in failing to identify an invalidity on the face of the 1998 Deed, and that is what is alleged in the first proposed amendment to paragraph 33.

137. As to the proposed amendments relating to the conflict of interest, the defendants contended that they are objectionable because they can only be based on a duty to provide legal advice, which would fall outside the scope of the claim form. I do not agree with the submission expressed in that form. I agree with Mr Newman's answer, which is that the scope of the professional duty of the barrister employed by the defendants as part of the retainer was to vet the legal efficacy of the deed drafted by the defendants. In that capacity, if the barrister was negligent in his failure to identify the conflict, that would be just as much a failure in the provision of the same documentation and related services to be provided with the assistance of a lawyer, as was the failure to identify that the HUM benefit structure had not been validly incorporated in the governing documents of the Scheme in 1986.

138. However, that begs the question of whether the barrister or the defendants were negligent in failing to identify the conflict in the first place, which was the point discussed in Ward LJ's judgment in *Ezekiel*. For the reasons that I have already explained when dealing with the fourth of Mr Newman's five submissions on why the defendants were wrong to contend that they committed no breaches of duty in relation to the HUM benefits error after October 1994, I do not consider that this argument has a realistic prospect of success. It is not suggested that there was any stage during the drafting process at which the defendants knew or believed that the 1986 HUM benefits error had been committed by NPL. In the same way that there is no duty on a professional to tell a client that he needed to obtain independent advice on the quality of his work when he genuinely believed that the advice he had given was good advice (per Ward LJ in *Ezekiel* at [25]), there can be no duty to do so when the same question arises in relation to the work of an associate. The existence of the conflict informs what should have happened if the breach had occurred, it does not found a free-standing claim in its own right without regard to the question of what it was that the defendants knew or believed, as to which the claimants make no positive case.

139. For these reasons I shall grant permission to amend the particulars of claim to plead the breach proposed as a new paragraph 33(i)(i)(a), but refuse permission to amend the particulars of claim to plead the breaches proposed as new paragraphs 33(i)(i)(b) and 33(i)(i)(c).

140. The claimants then seek permission to amend paragraph 34 of the particulars of claim, which plead causation. The first proposed amendment deletes words in a manner that is consistent with the deletions proposed for paragraph 8, as to which my conclusion is the same. The second and third proposed amendments include a pleading of additional steps that would have been taken if the defendants had acted in accordance with their duty of care. It is said that they would have taken independent legal advice and also that they would have taken steps to implement what is called a "capping deed" as a matter of the greatest urgency. The capping deed would have operated, or so say the claimants, to apply the HUM benefit structure to accruals between 1994 when the drafting process started and December 1998 (after which time HUM members would have accrued benefits under the less generous HUM benefit structure in accordance with the 1998 Deed in any event). These consequential steps are further or in the alternative to the pleading in the original particulars of claim that the claimants would have commenced proceedings against NLP, or would otherwise have obtained compensation from them, and would have been able to apply to court under the rule in *Re Hastings Bass* (with the consequences that I have already explained above).

141. The defendants accepted that these amendments relate to causation and do not raise any new claims for the purposes of CPR 17.4. In my judgment they raise an arguable case and it is appropriate for permission to amend to be granted.

142. The final series of amendments relate to the 1999 Deed. In the light of the conclusions I have reached on the application to strike out paragraphs 43 to 45 of the particulars of claim, I refuse permission for these amendments.

143. For these reasons I shall allow the amendments to the particulars of claim in the version considered at the hearing, save for those which relate to the allegation of a breach of duty in failing to identify a conflict of interest (although permission to amend to plead the conflict in the context of causation is granted) and those which relate to the 1999 Deed.

Claimants' application to amend the claim form

144. The final part of the claimants' application was their application to amend the claim form. They submitted that this application is only necessary if I were to agree with the defendants on their application in respect of its scope. It seeks to include in the claim form those paragraphs of the original particulars of claim which form the basis for the claims now sought to be made in these proceedings on the hypothesis that its existing scope is not wide enough, but nonetheless the original claim is not statute barred by section 14B.

145. Mr Newman accepted that, in those circumstances, and because the amendments on this hypothesis will have the effect of adding or substituting a new claim, the application to amend the claim form has to satisfy the test under CPR 17.4(2), i.e., that the allegations to be included must arise out of the same facts or substantially the same facts as the existing claim. This is because a claim form is also a statement of case (CPR 2.3(1)) to which the provisions of CPR 17.4 therefore apply.

146. In light of the conclusions I have reached on the meaning of the existing version of the claim form, I consider that the amendments are not only claims which arise out of the same or essentially the same facts, but are also strictly unnecessary. Nonetheless, there is something to be said for the elucidation now expressed in the proposed amendments to be included in an amended claim form, and I will therefore give the claimants the permission to amend they still seek.