Neutral Citation Number: [2022] EWHC 2475 (Ch)

Case No: BL-2021-MAN-000103

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

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 7 October 2022

Before:

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

(1) KENNETH TAYLOR
(2) TRACEY TAYLOR — **Claimants**

- and -

LEGAL AND GENERAL PARTNERSHIP SERVICES LIMITED — **Defendant**

- -
- -

Chris Hegarty (instructed by **High Street Solicitors)** for the Claimants
Tom Asquith (instructed by **Clyde & Co. LLP.**) for the Defendant

Hearing dates: 5-7 September 2022

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Approved Judgment

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

HHJ CAWSON KC:

Introduction

1. This is a sad and unfortunate claim brought by a husband and a wife, the victims of an investment fraud, who seek by the present proceedings to hold a mortgage advisor responsible for losses suffered in consequence of the failure of their investment where the mortgage advisor had recommended an interest only mortgage that they granted as security for a loan made to fund the investment that failed.

2. In March 2007, the Claimants, Kenneth Taylor ("**Mr Taylor**") and Tracey Taylor ("**Mrs Taylor**"), granted a mortgage ("**the Mortgage**") over their home as security for an advance made to them by Platform Home Loans Limited ("**Platform**") for the purposes of discharging an earlier mortgage and providing further funds to pay a deposit for an *"off plan"* purchase of a property on a development in St. Vincent in the West Indies.

3. The development was never completed in consequence of, amongst other things, the fraudulent misapplication of monies paid by way of deposit by investors such as Mr and Mrs Taylor, resulting in the total loss of the investment acquired using the monies advanced by Platform and paid by Mr and Mrs Taylor by way of deposit, as well investments made by Mr and Mrs Taylor the previous year using monies received from an inheritance that had been used to pay deposits for the purchase of other properties on the same development.

4. In the present proceedings Mr and Mrs Taylor seek to recover the losses they claim to have suffered in consequence of having entered into the Mortgage by way of a claim in negligence against the Defendant, Legal and General Partnership Services Limited ("**Legal and General**"), a mortgage broker, whose appointed representative, Kinleigh Financial Services Limited ("**KFS**"), arranged the Mortgage on its behalf.

5. Mr and Mrs Taylor's principal contention is that the Mortgage should not have been recommended to them before KFS had ensured that they had obtained independent advice in respect of the proposed investment for which the deposit was provided, and that had KFS done that which it ought to have done, the relevant transaction would not have gone ahead.

6. Legal and General disputes liability. Whilst recognising that it is responsible for the actions of KFS as its appointed representative, it denies that it (or KFS) owed any relevant duty of care to Mr and Mrs Taylor, denies that there was any breach of any relevant duty of care, and denies that any breach was causative of any loss or damage. It further denies that any loss or damage suffered by Mr and Mrs Taylor fell within the scope of any relevant duty of care, and contends that the claim is, in any event, statute barred.

7. Mr Chris Hegarty of Counsel appeared on behalf of Mr and Mrs Taylor. Mr Tom Asquith of Counsel appeared on behalf of Legal and General. I am grateful to them both for their written and oral submissions.

8. I have been assisted in the preparation of this judgment by a note of the evidence and submissions prepared by the Solicitors instructed by Legal and General, which such note has been agreed by those representing Mr and Mrs Taylor. I have, of course, ensured that this note accords with my own note of the evidence, which it does.

Witnesses

9. So far as evidence of fact is concerned, I heard evidence from Mr Taylor and, very briefly, from Mrs Taylor.

10. Legal and General did not call as a witness the employee/agent of KFS who dealt with Mr and Mrs Taylor, Ray Margetson ("**Mr Margetson**"). No point was taken by Mr Hegarty that any adverse inferences ought to be drawn from Legal and General not calling Mr Margetson. However, I, myself, raised the point with Mr Asquith in closing. Mr Asquith, in my judgment quite correctly, responded that it would be inappropriate for me to draw any significant adverse inferences if not raised and developed in argument on behalf of Mr and Mrs Taylor by reference to the particular inferences that it might be said ought to be drawn from the failure to call Mr Margetson. Mr Asquith also took the point that an employee/agent such as Mr Margetson, who would no doubt have been dealing with many mortgage applications at the time, could not, some 15 years after the event, reasonably be expected to have any significant or reliable recall of this particular transaction. In these circumstances, I do not consider it appropriate to draw any adverse inferences from the fact that Mr Margetson was not called to give evidence, and I do not do so.

11. I had the benefit of expert evidence as to mortgage broking practice, hearing from David Griffiths ("**Mr Griffiths**"), called by Mr and Mrs Taylor, and from Nicholas Baxter ("**Mr Baxter**"), called by Legal and General.

My assessment of the witnesses, and the correct approach to the evidence

Witnesses of fact

12. The evidence in the present case centres upon events dating back to 2007. In the circumstances, it is necessary for me to bear firmly in mind the much repeated observations of Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse Limited* [2013] EWHC 3560 (Comm) at [15]-[22] with regard to the unreliability of memory, and his caution to place limited weight on witnesses' recollections of what was said in the course of historic meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or provable facts.

13. A particular danger identified by Leggatt J resulting from the passage of time is that of a witness honestly, but falsely, recalling matters in their own mind, and doing so in a self-serving way as the events of the case are reconstructed in their mind during the course of the litigation process.

14. I must therefore have regard to these considerations when assessing the oral evidence of Mr and Mrs Taylor, recognising that I should make any necessary findings of fact by reference to all the evidence, placing such weight as is appropriate, and as the circumstances require, upon the documentary and witness evidence respectively.

15. Mrs Taylor's witness statement largely repeats matters referred to by Mr Taylor in his witness statement. It is evident from their evidence that Mr Taylor was primarily concerned with any communications and discussions with Mr Margetson, and that Mrs Taylor was essentially prepared to leave matters to Mr Taylor, and to go along with decisions taken by him. Consequently, the cross examination of Mrs Taylor was

extremely short, and she essentially confirmed that there was nothing of substance that Mr Taylor had said that she disagreed with.

16. I found Mr Taylor to be a fundamentally honest witness doing his best to assist the Court given the constraints of the passage of time that I have identified. His evidence was impressive because he did not, to my mind, seek to either exaggerate, or play down facts to suit any particular narrative or agenda, and where he was unable to recall events, he frankly said so. Further, he realistically accepted, in a number of instances, when documents, or common-sense propositions were put to him, that he is likely to have acted in the way suggested thereby even if not necessarily helpful to his case. This is all much to his credit.

Expert witnesses

17. So far as the expert witnesses are concerned, I unhesitatingly found the opinion evidence of Mr Baxter to be more reliable and of more assistance than that of Mr Griffiths.

18. There are a number of key reasons for this:

    i) Firstly, Mr Griffiths' background, is, essentially, a banking background in which he has primarily been concerned with the entry into mortgages from a lender's perspective. On the other hand, Mr Baxter's background includes a wider range of financial services activity, including, specifically, mortgage brokering.

    ii) The significance of this difference in background came to the fore in a number of responses to questions posed of Mr Griffiths where he was plainly considering matters, and in particular aspects of due diligence, more from the position of a lender concerned as to the value and enforceability of its security, that of a borrower looking for a mortgage for a specific purpose, and the concern of the borrower to be able to meet his or her obligations thereunder.

    iii) Mr Griffiths' initial position in evidence was that the relevant duty of care for mortgage brokers was informed by the Mortgage Conduct of Business rules ("**MCOB**"), and specifically by MCOB chapters 4.7 and 11, and that he, when supervising from a regulatory perspective lending by his employer, would have regard to both of these rules. However, under cross examination, Mr Griffiths ultimately accepted that MCOB 4.7 had no application to lenders, and that MCOB 11 had no application to mortgage brokers.

    iv) Whilst Mr Griffiths was a robust witness, he was not, as I see it, realistic in respect of a number of the answers that he gave, and had a tendency to be argumentative and give what appeared to be a set speech, rather than concentrating on directly answering questions posed. This was in contrast to what I consider to be Mr Baxter's very much more balanced and considered approach with the benefit of the wider experience that I have identified.

Background

19. Legal and General has, at all relevant times, carried on regulated activities within the meaning of s. 22 of, and Schedule 2, to the Financial Services and Markets Act 2000

("**FSMA**"). Further, Legal and General has, at all relevant times, had authorisation from the Financial Services Authority ("**FSA**"), now the Financial Conduct Authority ("**FCA**"), under registration number 300792, such authorisation including the promotion of financial products. KFS, at all material times from 31 October 2004 until 16 May 2016, acted as an Appointed Representative of Legal and General in accordance with the provisions of s. 39 of FSMA.

20. At all relevant times, Mr and Mrs Taylor have owned and lived at 31 Stonehill Drive, Rochdale, OL12 7JN ("**the Property**"), a property that they acquired in 1984. As at February 2007, Mr and Mrs Taylor had an interest only endowment mortgage, with an outstanding balance of £26,147 secured against the Property.

21. In the previous year, 2006, Mr Taylor and his brother and sister received a substantial inheritance, with Mr Taylor himself receiving approximately £112,000.

22. In or about April 2006, Mr Taylor came across a property development in St Vincent being advertised by *"Overseas Dreams"*, acting as agent for the developer thereof, Harlequin Hotels and Resorts ("**Harlequin**"). This property development concerned the development of a resort known as Buccament Bay, St Vincent ("**the Resort Development**").

23. In or about May 2006, Mr Taylor and his brother, who is an accountant, visited the Resort Development, and were shown around the same by a representative of Overseas Dreams. They were impressed by what they saw, and by the information provided in respect of the Resort Development. Mr Taylor's brother expressed satisfaction to Mr Taylor with regard to the figures.

24. Against this background, Mr and Mrs Taylor, together with Mr Taylor's siblings, invested some £172,500 by way of deposit for the purchase *"off plan"* of two units that it was proposed would be constructed at the Resort Development, namely Cabana 126 (subsequently called Cabana 4022) and Cabana 127 (subsequently called Cabana 522). In addition, Mr and Mrs Taylor, together with Mr Taylor's siblings, paid a deposit in respect of a villa at another proposed development by Harlequin in the Dominican Republic.

25. It was Mr Taylor's evidence that there was a market for *"off plan"* interests so acquired, and that the interest under the relevant contract acquired for some £172,500 could have been sold for £250,000 in late 2006, and that the expectation was that the value of the investment would go up to £350,000-£400,000 once the relevant properties on the Resort Development had been built, which was initially expected to be by 2009/2010.

26. In approximately November 2006, and after these initial investments had been made by Mr Taylor (and possibly also Mrs Taylor) and Mr Taylor's siblings, Harlequin promoted a scheme under which investors would obtain loan finance secured on their homes or other property to fund the payment of 30% deposits in respect of further *"off plan"* purchases of units on the Resort Development. This involved Harlequin introducing investors to a mortgage adviser in order to provide advice as to a suitable and appropriate mortgage to take out to fund the deposits to be paid.

27. Given his existing confidence in respect of the investments already made with Harlequin, Mr Taylor was attracted by the scheme being promoted by Harlequin as providing a further investment opportunity.

28. On or about 29 November 2006, Mr and Mrs Taylor paid a refundable £1,000 reservation fee for Cabana 125, another unit proposed to be built at the Resort Development. Further, Mr Taylor was referred to Mr Margetson, a mortgage advisor employed or otherwise engaged by KFS.

29. On or about 18 February 2007, Mr and Mrs Taylor completed a mortgage application seeking an advance from Platform in an amount of £101,000 to be used to refinance the existing mortgage, with the balance advanced being invested by way of payment of the 30% deposit for Cabanas 125. The mortgage application form was completed so as to set out, amongst other things, details of Mr and Mrs Taylor's means, and Section M of the application form was completed so as to say that if the mortgage was interest only, which it was to be, then the mortgage capital was to be repaid from: *"sale of property in future"*.

30. In addition, on the third page of the application form, Mr Margetson completed a number of boxes so as to set out the *"Level of Advice"* provided. In doing so, he confirmed as follows:

> *"E1* *I have undertaken a detailed assessment of the applicant(s) income and expenditure, and I believe that the applicant(s) will be able to maintain the mortgage payments, including the increased payments after any benefit period has expired.*
>
> *E2* *I confirm I have supplied a KFI to the applicant(s) for the mortgage product applied for in this application*
>
> *E3* *If the mortgage term extends into retirement, I confirm that the customer has arrangements in place to enable them to maintain the mortgage repayments in retirement*
>
> *E4* *If the mortgage is to be repaid on an interest only basis I confirm I have discussed repayment methods with the applicant(s) and that arrangements have been or will be made to repay the capital."*

31. The KFI that Mr Margetson confirmed that he had supplied has not been produced in evidence, there has only been produced a key facts document relating to KFS's services. That is not, however, to say that a KFI was not supplied to Mr and Mr Taylor at the time.

32. There has however been produced in evidence a *"Mortgage Record of Suitability"* dated 13 March 2007. This records that Mr Margetson recommended a mortgage product offered by Platform whereby the £101,000 would be advanced on an interest only basis for a term of 20 years. The recommendation was expressed to be based upon information provided.

33. The following further matters referred to in the Mortgage Record of Suitability are relevant for present purposes:

i) The purpose of the application is said to be: *"Capital Raising - Remortgage"*.

ii) With regard to *"Repayment Method"*, Mr Margetson completed the document so as to comment as follows:

> "*I have explained the different repayment methods to you and discussed your needs as to whether you require a guarantee that your whole mortgage is repaid at the end of the term, or whether you are prepared to take an element of risk that some of your mortgage may not be repaid. You indicated that you are not concerned about having any form of guarantee that your mortgage is repaid at the end of the mortgage term. I have therefore recommended a repayment method of interest only, where you will pay only the interest charged by the lender and none of the original amount borrowed. You have advised that the amount you originally borrowed will be repaid by the sale of your property in the future. However, this could leave you with a potential shortfall, as the value of your property could go down as well as up."* [my emphasis added]

iii) With regard to *"Interest Rate Type"*, Mr Margetson has completed the document so as to comment as follows:

> *"Having discussed the interest rate options available, you indicated that it is important to you to keep monthly payments in line with the true bank base rate in the early years rather than knowing what your maximum monthly payments will be. I have therefore recommended a Tracker rate product. I recommend having considered your needs and preferences, that this Tracker period is 1 year because this suits your current financial circumstances. These products usually represent the lowest rates available, although monthly payments are subject to fluctuation in line with the Bank of England base rate. This means payments could increase as well as reduce. I recommend that at the end of this Tracker period, you review your mortgage arrangements."*

iv) With regard to *"Term"*, Mr Margetson has completed the document so as to comment as follows:

> *"I have recommended a term of 20 years for the amount of your mortgage that is on an interest only basis as this coincides with your existing arrangements in place to repay this amount. Please note that I am unable to advise you on these arrangements and the extent to which they are likely to pay any given amount. If you are unsure about the level of guarantee your investment offers, you should seek independent advice before placing reliance on it to repay all or part of your mortgage. I have recommended a term of 20 years for the remaining amount of your mortgage advanced on a repayment basis as this matches the retirement age which arises first which you stated was your preference. I should however point out that your budget indicates you could afford a shorter term, which would reduce the overall cost to you of this mortgage."* [my emphasis added]

34. There has also been produced a *"Client Review"* document, seemingly completed by Mr Margetson and including, amongst other things, details of Mr and Mrs Taylor's

assets and liabilities, and income and expenditure. It is to be noted that the analysis of income and expenditure identifies an excess of income over expenditure of £2,577 per month, which is referred to as being available to meet new commitments.

35. A formal mortgage offer was made by Platform on 9 March 2007, which was accepted by Mr and Mrs Taylor on 13 March 2007. The Mortgage was formally granted on 22 March 2007 and registered on 23 March 2007. As anticipated by the above, this was an interest only mortgage in respect of an advance of £101,629 (including various charges). For the first 12 months, interest payments were due at a fixed discounted rate of 5.74%, namely £486.13 per month, and thereafter at a variable rate then currently 7.25%, namely £614.01 per month. Whilst there was a charge for early repayment prior to 1 May 2008, there was no charge thereafter, and although Mr Taylor said in evidence that he was not aware of this, the terms of the mortgage did provide for overpayments of the monthly payments to be made.

36. On 12 April 2007, Mr and Mrs Taylor applied £74,000 of the monies advanced by Platform by way of deposit paid to Harlequin in respect of the *"off plan"* purchase of Cabana 125.

37. So far as the circumstances behind the grant by Mr and Mrs Taylor of the Mortgage are concerned, the following points from the evidence require to be highlighted:

    i) On the basis that he was usually a cautious person, Mr Taylor accepted that he would generally read documents that he was provided with, or at least read the gist thereof.

    ii) Mr Taylor said that he knew that the Mortgage was an interest only mortgage, as had been the existing endowment mortgage, and that he was aware of the distinction between an interest only mortgage on the one hand, and a capital repayment mortgage under which the capital would be repaid during the course of the term on the other hand. Mr Taylor accepted that he did not require advice from Mr Margetson on this distinction.

    iii) Mr Taylor's evidence was that it was envisaged that the mortgage would be repaid on the sale of Cabana 125 when built, or alternatively upon Cabana 125 subsequently being re-mortgaged when built with a new mortgage advance being obtained locally in St Vincent at that stage. However, Mr Taylor accepted that he knew that there was risk involved on the basis that it was, as he put it, *"plausible"* that the unit would not get built, and if that was the case, then there would be an issue so far as selling or re-mortgaging the same was concerned. His evidence was that he assumed that Mrs Taylor was aware of the risk as well. Mrs Taylor's evidence did not suggest to the contrary.

    iv) When asked whether he had any concerns as to how the capital would be repaid, Mr Taylor responded that he thought about this from time to time, but knew that his backstop position was that he and his wife could pay the monthly payments from their earnings, albeit that he was not aware of his ability to make overpayments pursuant to the terms of the Mortgage. Mr Taylor was asked about the Mortgage Record of Suitability, and about Mr Margetson's reference therein, when commenting on *"Repayment Method"*, to discussion as to whether Mr and Mrs Taylor required a guarantee that the whole mortgage was paid at

the end of the term, or whether they were prepared to take an element of risk. Mr Asquith put to Mr Taylor that he did not require a guarantee because he had a backstop plan. Mr Taylor responded by saying: *"We had a backstop plan, yes"*. He went on to say that while he cannot recall discussing a backstop plan with Mr Margetson, he accepted that he probably did. He also accepted that it was *"probably correct"* that there was nothing that Mr Margetson could add to his knowledge with regard to these matters.

v) Mr Taylor accepted that if he had been advised by Mr Margetson with regard to the risks of investing in an *"off plan"* purchase of the kind proposed, then it was *"likely"* that he and his wife would have proceeded in any event, albeit suggesting that *"a more expensive one is debatable"*, which I understood him to mean that he and his wife might, in those circumstances, have opted for a capital repayment mortgage rather than an interest only mortgage.

38. As I have mentioned, it was initially anticipated that the relevant unit, Cabana 125, would be built by 2010, if not earlier. This did not happen. It was Mr Taylor's evidence that he visited the Resort Development again in 2010, and was reassured by the fact that a number of properties within the development had been completed and rented out, and that this gave him confidence that Cabana 125 would be built out too, albeit with some delay.

39. There was delay also in the construction of the units that Mr and Mrs Taylor, and Mr Taylor's siblings had made initial investments in respect of in 2006. It is Mr Taylor's evidence that, in November 2015, agreement was reached that the deposits then paid would be transferred over so as to fund the outright acquisition of a property with the benefit of additional funds of £32,500 which were introduced by Mr Taylor and his siblings at that time. The thinking was that this would ensure that they had one tangible asset once the building had been completed. These arrangements did not concern Cabana 125 which remained separate. Mr Taylor said that this was because this Cabana was in phase 3 of the development, which meant construction was still some time off. Mr Taylor says that he was confident with regard to the investment with Harlequin at this time, and that he was of the understanding that all works were proceeding as planned, although clearly, on any view, the development was taking considerably longer than initially contemplated to be built out.

40. In September 2016, Mr and Mrs Taylor were contacted by Platform with an enquiry as to how they proposed to repay the capital sum. In his witness statement, Mr Taylor says that he informed Platform that he had several overseas properties, which he held with Harlequin, and that it was his intention to sell these off in order to redeem the capital balance. Platform's note of the relevant conversation has been produced, and this does confirm what Mr Taylor said with regard to repayment intentions. However, the note also records that Mr Taylor asked if he was able to make lump sum payments towards the balance, and that Mr Taylor was advised that this was fine, and that no early redemption charge was applicable.

41. In paragraphs 30 to 33 of his witness statement, Mr Taylor explains that in December 2016, he was informed that Harlequin had won a case against their accountant, which he construed to be positive such that he *"hoped"* that the award would have a positive impact *"on the ability for Cabana 125 to be completed and for Harlequin to continue as a potential investment venture."* However, Mr Taylor then refers to the Resort

Development having closed after this decision, albeit that Mr Taylor cannot recall the exact date. Mr Taylor refers to having then, in March 2017, joined the *"Pro Harlequin"* group, after which he was informed that there was a potential claim against the mortgage adviser that had arranged the re-mortgage to raise funds to invest in the deposit for Cabana 125, and that he was subsequently put in touch with Mr and Mrs Taylor's present solicitors, High Street Solicitors, by *"the Claims Bureau"*.

42. In paragraph 34 of his witness statement, Mr Taylor said this: *"During the period between 2012-2017, I was aware that there were delays in respect of construction within* [the Resort Development] *and that there were internal legal issues which involved the accountants and construction company, but Harlequin continued to provide reassurance that they would be successful in these actions and that in turn, this would mean the prospects of the Harlequin resorts remaining open and my investment succeeding were reasonable."*

43. On 5 April 2016, an email was sent by Harlequin to investors, including Mr and Mrs Taylor, in which it was said, amongst other things, that:

> *"You may have heard that some investors have received redress from the FOS or FSCS on account of poor independent financial/mortgage advice they received when originally purchasing their Harlequin overseas property investment. As you know, Harlequin did not provide financial advice, but we support the right of investors to make valid redress claims on this basis (if you require information on your investment to assist with a redress claim, please let us know and we will gladly help)."*

44. In a subsequent email to investors dated 19 August 2016, Harlequin suggested that *"a prominent firm of solicitors"* was offering to pursue redress claims on what was said to be an *"exorbitant" "no-win, no fee"* basis. The email stated that: *"Although Harlequin does not provide financial advice, we fully support the right of investors to seek valid redress claims if they believe they were mis-sold their investments."*

45. Mr Taylor was asked about the email dated 5 April 2016 and his concerns at the time thereof. He responded that he was concerned, but not *"desperately concerned. I knew people were making claims against pension advisers."* Mr Asquith put to him that the email dated 5 April 2016 was about mortgage advisers, to which Mr Taylor responded: *"yes people getting mortgage and pension advice. Our patience had not run out at that stage."*

46. On 10 October 2016, Brian Glasgow of KPMG ("**Mr Glasgow**") wrote to creditors of Harlequin, including Mr and Mrs Taylor, informing them that he had been appointed as a Trustee in respect of a Notice of Intention to make a proposal in respect of Harlequin, a restructuring process available under the relevant insolvency legislation in St Vincent and the Grenadines whereby a company might come to an arrangement with its creditors. The accompanying documentation made it clear that the proposals were being put forward on the basis that Harlequin was insolvent. By subsequent emails, further information was provided by Mr Glasgow in respect of the progress of the relevant restructuring proposal.

47. On 10 November 2016, Harlequin emailed investors again with regard to redress claims, stating, amongst other things, that: *"We are advised by a claims management*

company that Harlequin investors may be able to obtain mortgage redress" if they met certain criteria.

48. On 24 January 2017, Mr Glasgow, in his capacity as *"Proposal Trustee"*, wrote again to creditors informing them that the Resort Development was closed on 15 December 2016 as a direct consequence of the financial failure of the relevant operating company controlled by one David Ames ("**Mr Ames**"). It was said that, in response thereto, an application had been made to appoint Mr Glasgow as Interim Receiver. The email further stated that Mr Glasgow, as the Proposal Trustee, was yet to receive Harlequin's final proposal.

49. Importantly, Mr Glasgow's email dated 24 January 2017 went on to refer to the proceedings brought by Harlequin against its accountants, Wilkins Kennedy LLP. It stated that whilst £10.5 million had been recovered by Harlequin in those proceedings, the relevant monies had been ordered to be paid into Court. The email then said as follows:

> *"Mr Ames said in his letter to investors that he has proven in court how much "we have been let down by others". You may not be aware that the English Judge* [Coulson J] *ruled that the money paid into court must not find its way to David Ames for fear that it will be lost. After hearing Mr Ames give evidence over three days during the course of that trial, the Judge said:*
>
> *" … the Harlequin business model might be said to bear the hallmarks of a serious and significant scam … It is important not to pull any punches when describing the Harlequin business model. There were elements of it which was similar to what might be called a "Ponzi" scheme, where the money paid by gullible investors was not spent as they thought it would be, but the scheme and those responsible for it became rich, whilst the investors ended up with nothing." (emphasis added by KPMG)"*
>
> *The Judge added that David Ames "through an unhappy mixture of dishonesty, naivety and incompetence, has caused irreparable loss to thousands of people."*
>
> *The judgment can be viewed in full here: http://www.bailii.org/ew/cases/EWHC/TCC/2016/3188.html*
>
> *In the light of the Judge's findings and the closure of the resort, the Court in St Vincent appointed Brian Glasgow of KPMG as Interim Receiver over the Company's assets in order to protect and preserve them for the benefit of all creditors."*

50. Mr Taylor accepted that he recalled these emails. He was asked by Mr Asquith as to whether they concerned him. His response was that he was getting more and more concerned, and that the final straw was when the restructuring proposal fell apart, which it did by March 2017. It was put to him that in January 2017 he knew that a High Court judge said that the Harlequin business model was a scam, and that it was irreparable. To this, Mr Taylor responded that until March 2017, he did not know that he had a valid claim. In response to that, it was put to him that he knew that something was going wrong, to which he replied: *"yes, they needed cash and in December Harlequin was still trying to restructure. When the court refused further time for restructuring, a*

matter of days or weeks later I was advised to join PHIG and that is when it became apparent that I have no claim for the inheritance money, but that it was possible I had a claim in respect of a mis-sold mortgage."

51. The agreed note of the evidence then records the following further exchanges between Mr Asquith and Mr Taylor:

"TA – someone told you that?

KT – yes when contacting PHIG. Mr Maynard contacted me and that was at the end of March 2017.

TA – but you knew claims against the mortgage advisors were being brought from April 2016?

KT – I knew people were claiming but I didn't know it was tangible until March 2017 and then spoke to Mr Maynard in July 2017 and he said then that I am in the category that has a claim.

TA – but you knew in April 2016 that people were bringing claims against mortgage advisors?

KT – amongst claims against other advisors yes.

TA – knew fraud re builders?

KT – yes

TA- you knew serious allegations re accountants?

KT – yes

TA – you knew by end of 2016 that Harlequin only obtained 20% of what was being sought from accountants, shortfall?

KT – yes possibility of shortfall.

TA – knew BB closed?

KT - yes

TA – knew KMPG receivers by end of 2016?

KT – think it was in October, they were assisting with the restructuring which fell apart in 2017.

TA – In Jan you knew High Court Judge was making serious comments about scheme and effects on investors?

KT – yes but didn't have knowledge re my particular mortgage until March 2017.

TA – should've set alarm bells ringing

KT – alarm bells were ringing but no definitive knowledge until end of March

TA – real concerns?

KT - growing

TA – by end of Jan 2017 real concerns?

KT – yes but they were saying that they were raising a committee to join in with Harlequin…

TA – you had by the end of Dec 2016 and Jan 2017 a reasonable belief that you would lose a lot of money?

KT – by then it was probable.

TA – yes or no, reasonable belief that you would lose a lot of money?

KT – I had a reasonable belief.

TA – obvious to you in 2016 that the investment had been highly risky?

KT – by 2016 it was looking more risky than the beginning

TA – highly?

KT – more risky

TA – by Jan 2017?

KT – highly risky

TA – you knew the person who had advised you was Mr M?

KT – yes

TA – you believed he had a duty to recommend a suitable mortgage?

KT – not at the front of my mind at that stage

TA – you knew in 2016?

KT – I knew in 2016 people were claiming for mortgage advice but didn't know that was my case until later.

TA – you knew in 2016 what an investment was, how risky it was and that people believed they could sue their mortgage advisors about it?

KT – I knew people were doing that but on what grounds I didn't know."

52. The restructuring proposal came to nothing because the court in St Vincent, in or about March 2017, refused an extension of time for putting forward the proposal, and Harlequin collapsed into insolvency. In June of this year Mr Ames was convicted in

this country of various offences of fraud in relation to the operation of Harlequin, the case against him being that he had, through Harlequin, operated a Ponzi scheme, involving the misapplication of customer deposits. On 30 September 2022, he was sentenced to 12 years in prison.

53. In the event, and upon the failure of Harlequin and the Resort Development, Mr and Mrs Taylor lost not only the £74,000 odd invested in April 2007, but also the monies invested together with Mr Taylor's siblings in 2006.

54. Fortunately, and to their credit, Mr and Mrs Taylor have avoided losing their home because they were able to apply the backstop that had been envisaged at the time that they entered into the Mortgage. After Harlequin and the Resort Development had failed, and from late 2017/early 2018, Mr and Mrs Taylor began to save, managing to save approximately £41,000 by February 2020. Earlier this year Mr and Mrs Taylor were able to re-mortgage so as to redeem the Mortgage and enter into new affordable mortgage arrangements going forward.

55. However, the loss of the relevant investments has seriously affected Mr and Mrs Taylor's retirement plans given that it had been their intention to utilise profits from the investments with Harlequin to fund their retirement. Having lost the benefit of these investments, they will have to delay their retirement, and will have fewer funds available to fund their retirement.

56. A letter of claim was sent on Mr and Mrs Taylor's behalf on 17 December 2018. This was substantively responded to on behalf of Legal and General on 13 August 2019.

57. On 18 March 2020, a Standstill Agreement was entered into suspending time until 14 May 2020. A Claim Form was hand-delivered to the Court on 13 May 2020, and although the proceedings were not formally issued by the Court until 26 June 2020, they are properly to be regarded as having been commenced on 13 May 2020, within the suspended period provided for by the Standstill Agreement.

58. Consequently, 18 March 2020 is a date of particular relevance so far as the calculation of relevant limitation periods are concerned.

The essence of Mr and Mrs Taylor's case

Duty

59. Recognising that any claim in contract is now statute barred, and that only a claim in negligence is capable of being pursued if and to the extent that Mr and Mrs Taylor are able to rely upon the latent damage provisions of s. 14A of the Limitation Act 1980 ("**the 1980 Act**"), Mr and Mrs Taylor's case is based upon an alleged breach of a common law duty of care said to have been owed by Mr Margetson, for whose actions Legal and General are ultimately responsible as Mr Margetson was the employee or agent of their Appointed Representative.

60. It is Mr and Mrs Taylor's case that the scope of the relevant duty of care is informed by relevant provisions of MCOB, and, in particular, MCOB 4.7, the relevant provisions which provide as follows:

"4.7.1R Principle 9 requires a firm to take reasonable care to ensure the suitability of its advice. In accordance with that principle, a firm should take reasonable steps to obtain from a customer all information likely to be relevant for the purposes of MCOB 4.7.

4.7.2R A firm must take reasonable steps to ensure that it does not make a personal recommendation to a customer to enter into a regulated mortgage contract, or to vary an existing regulated mortgage contract, unless the regulated mortgage contract is, or after the variation will be, suitable for that customer …

……

4.7.4R For the purposes of MCOB 4.7.2R:

(1) a regulated mortgage contract will be suitable if, having regard to the facts disclosed by the customer and other relevant facts about the customer of which the firm is or should reasonably be aware, the firm has reasonable grounds to conclude that:

(a) the customer can afford to enter into the regulated mortgage contract;

(b) the regulated mortgage contract is appropriate to the needs and circumstances of the customer; and

(c) the regulated mortgage contract is the most suitable of those that the firm has available to it within the scope service provided to the customer;

(2) no recommendation must be made if there is no regulated mortgage contract from within the scope of the service provided to the customer which is appropriate to his needs and circumstances;

4.7.7E In assessing whether a customer can afford to enter into a particular regulated mortgage contract, a firm should give due regard to the following:

(a) information that the customer provides about his income and expenditure, and any other resources that he has available;

(b) any likely change to the customer's income, expenditure or resources; and

(c) costs that the customer will be required to meet once any discount period in relation to the regulated mortgage contract comes to an end (on the assumption that interest rates remain unchanged).

4.7.11ER(1)(b)

> *(1) In assessing whether the regulated mortgage contract is appropriate to the needs and circumstances of the customer for the purposes of MCOBS 4.7.4R(1)(b), a firm should give due regard to the following:*
>
> *(a) whether the customer's requirements meet the eligibility criteria for the regulated mortgage contract (for example, the amount that the customer wishes to borrow, or the loan-to-value ratio);*
>
> *(b) whether the customer should have an interest only mortgage, a repayment mortgage, or a combination of the two;*
>
> *(c) whether the customer has a preference for a particular term;*
>
> *(d) whether the customer has a preference or need for stability in the amount of required payments, especially having regard to the impact on the customer of significant interest rate changes in the future.*
>
> *4.7.12(2)G Where the scope of the advice provided is based on a selection of regulated mortgage contracts from a single or limited number of lenders, the assessment of suitability should not be limited to the types of regulated mortgage contracts which the firm offers. A firm cannot recommend the "least worst" regulated mortgage contract where the firm does not have access to products appropriate to the customer's needs and circumstances. This means, for example, that a firm dealing solely in the sub-prime market should not recommend one of these regulated mortgage contracts if approached for advice by a customer with an unblemished credit record."*

61. In essence, it is Mr and Mrs Taylor's case that a reasonably competent mortgage adviser acting in accordance with the duty of care owed to a client would comply with MCOB when advising clients such as Mr and Mrs Taylor – see paragraph 22 of the Amended Particulars of Claim.

62. It was submitted on behalf of Mr and Mrs Taylor that the relevant provisions of MCOB require to be construed and applied in accordance with guidance provided by the FSA/FCA from time to time. Mr Griffiths, in the experts' joint report, identified a document produced by the FSA in December 2006 that referred to the need for consumers with interest only mortgages to have *"robust repayment plans"*. It was Mr Griffiths' evidence that this pointed to a requirement that before a mortgage advisor recommended an interest only mortgage, he should ensure that the customer had in place a robust repayment plan, which would not be satisfied where the intention was to repay using the intended proceeds from a risky investment.

63. Particular emphasis was placed by Mr Hegarty upon the requirements of MCOB 4.7.4 that a mortgage was to be regarded as suitable if there were reasonable grounds to conclude that the customer could afford to enter into the mortgage, and that the latter

was *"appropriate to the needs and circumstances of the customer"*. He submitted that, in the present case, Mr Margetson could not have had reasonable grounds to conclude that the Mortgage was suitable, in the sense of being affordable and appropriate to the needs and circumstances of Mr and Mrs Taylor, without first requiring that independent advice be obtained by Mr and Mrs Taylor in respect of the Harlequin investment.

64. It was Mr Griffiths' opinion evidence that a proper application of MCOB 4.7 required a mortgage adviser, in a case where monies are being advanced in order to fund an *"off-plan"* purchase such as that in the present case on terms providing for repayment on an interest only basis during the course of the term of the advance, to carefully scrutinise and advise upon the risks of the proposed investment, and as to matters such as the need for an escrow account to hold the relevant monies in order to prevent them being misapplied. This approach of Mr Griffiths is in contrast to the evidence of Mr Baxter which was to the effect that a mortgage adviser could not be expected to scrutinise the relevant investment, and that, indeed, a mortgage adviser would generally be in no position, not having the requisite expertise, to give advice in relation to such matters. It was Mr Baxter's evidence that *"off plan"* purchases of properties involving the putting down of not insignificant deposits represented a recognised form of investment, certainly in and around 2007, and that it could not sensibly have been incumbent upon a mortgage adviser to advise against such investment, at least unless it patently represented something akin to an obvious gamble rather than a legitimate investment.

65. It was not, however, Mr Griffiths' evidence that the competent mortgage adviser would have advised Mr and Mrs Taylor not to proceed at all. Rather it was Mr Griffiths' evidence that a competent mortgage adviser in circumstances such as the present would have advised Mr and Mrs Taylor to enter into a repayment mortgage rather than an interest only mortgage in order to reduce the risks in the event of the failure of the investment.

Breach

66. A series of allegations of breach of duty are pleaded in paragraph 33 of the Amended Particulars of Claim. However, in closing the case, Mr Hegarty, on behalf of Mr and Mrs Taylor, focused upon a case that Mr Margetson should not have recommended the Mortgage without having required Mr and Mrs Taylor to take independent advice with regard to the proposed further investment with Harlequin involving the putting down of a 30% deposit of £74,000 in respect of Cabanas 125.

Causation

67. It was submitted by Mr Hegarty that had Mr Margetson done that which it was alleged that he should have done, then the transaction would simply not have proceeded because either advice would not have been obtained and so Mr Margetson could not have recommended the Mortgage, or Mr and Mrs Taylor would have taken independent financial advice and, in the light thereof, would not have proceeded.

68. In either of these events, so it is argued, the £74,000 would not have been advanced, and thereafter lost on the relevant investment in the Resort Development.

Damage

69. The total sum claimed by Mr and Mrs Taylor by way of damages is £115,271.62, made up of the following:

    i) Loss of Harlequin investment: £74,000;

    ii) Total amount of interest payments made to Platform during the subsistence of the Mortgage: £33,530.35;

    iii) Insurance and Take On Fee: £54.97;

    iv) Arrangement Fee: £439.07

    v) Legal and Broker Fees: £597.39;

    vi) Redemption Fee: £113.62;

    vii) Life Insurance premium: £6536.22.

70. So far as any claim for damages might be said to be limited by the scope of the relevant duty of care that arose in the circumstances of the present case, Mr Hegarty submitted, by reference to *Manchester Building Society v Grant Thornton* [2022] AC 783, that this was what he described as an *"archetypical"* case of a duty being linked to harm that the duty was imposed to guard against. Mr Hegarty identified that harm as being, in the present case, the suffering of a significant reduction in the value of the equity in the relevant property. Indeed, Mr Hegarty submitted that the identification of this particular harm informed the scope of the particular duty of care to be imposed in the first place.

Further considerations regarding breach

71. Insofar as it might be suggested that Mr and Mrs Taylor had a fallback position based on an ability to repay the mortgage advance out of available income, Mr Hegarty submitted that Mr Margetson acted in breach of duty given that there was, he submitted, no analysis by Mr Margetson, or proper consideration of Mr and Mrs Taylor's ability to repay the liabilities under the Mortgage in that way.

72. A point taken by Mr Asquith is that the case as advanced by Mr Hegarty as referred to in paragraph 66 above was not pleaded as such, albeit that it was alleged in the Amended Particulars of Claim that had Mr Margetson advised as he should have done, then the transaction would not have proceeded. In closing, I asked Mr Hegarty to identify which, if any, of the ten subparagraphs of paragraph 33 of the Amended Particulars of Claim particular reliance was placed upon. In response, Mr Hegarty identified, in this order, subparagraphs 33.8, 33.6 and 33.10. The allegations therein are the following:

    i) Subparagraph 33.8 - *"Made a recommendation when the correct position was that no recommendation to borrow could properly be made;"*

    ii) Subparagraph 33.6 - *"Failed to conclude and advise the Claimants that the proposed Mortgage was not affordable on the terms proposed given that their ability to meet the obligation to repay the capital sum at the end of the Mortgage*

term depended upon the income from the value of the high risk Development, an investment that met the criteria of an Unregulated Collective Investment Scheme and one that should have only been recommended to persons of high net worth and/or sophisticated investor, the Claimants were neither;"

iii) Subparagraph 33.10 - *"Failed to ensure that the Claimants had an adequate, or any, understanding of the risks involved specifically with regards (i) the risks of raising money by a mortgage to invest; (ii) affordability of the mortgage; (iii) explain clearly what costs they would need to cover should investment fail."*

73. It is to be noted that although Mr Griffiths gave robust evidence to the effect that Mr Margetson should have concerned himself with regard to advice in respect of the proposed Harlequin investment, and the risks involved therein, in particular given the absence of evidence of provisions in respect of an escrow account, as referred to in paragraph 64 above, it was not his evidence that Mr Margetson should have declined to recommend the Mortgage unless Mr and Mrs Taylor obtained independent investment advice, rather it was his evidence that, given the risks involved, Mr Margetson ought to have advised Mr and Mrs Taylor to enter into a capital repayment rather than an interest only mortgage. It is to be noted, however, that the Amended Particulars of Claim contain no pleading as to any alternative case to this effect, nor any plea as to causation or damages in these alternative circumstances.

Limitation

74. It is not in dispute that any claim in contract is statute barred, as is any claim in tort pursuant to s. 2 of the 1980 Act, save to the extent that it might be open to Mr and Mrs Taylor to rely upon the latent damage provisions of s. 14A of the 1980 Act. This is on the basis that the primary limitation periods of six years in tort and contract will have begun to run in 2007. The Amended Particulars of Claim make no plea of reliance on s. 14A, a point taken in paragraph 2 of the Amended Defence, and no Reply has been served.

75. The possible application of s. 14A is touched upon in Mr and Mrs Taylor's Response to a Request for Further Information of the Particulars of Claim, where, in dealing with a request in respect of Mr and Mrs Taylor's Solicitors' email dated 1 May 2020, reference was made to a further letter dated 10 December 2020. However, this latter correspondence does not articulate a cogent case with regard to when, by reference to the key date of 18 March 2017 (being three years prior to the date referred to paragraph 58 above), Mr and Mrs Taylor first had the requisite knowledge for the purposes of s. 14A.

76. Although Mr and Mrs Taylor's case on s.14A has not been pleaded as it ought to have been, I indicated during the course of the trial that I would deal with the relevant limitation issues, and indeed with other issues that ought properly to have been pleaded out, on a de bene esse basis.

77. S. 14A of the 1980 Act provides as follows:

"14A Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual.

> *(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.*
> *(2) Section 2 of this Act shall not apply to an action to which this section applies.*
> *(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.*
> *(4) That period is either—*
> *(a) six years from the date on which the cause of action accrued; or*
> *(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.*
> *(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.*
> *(6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both—*
> *(a) of the material facts about the damage in respect of which damages are claimed; and*
> *(b) of the other facts relevant to the current action mentioned in subsection (8) below.*
> *(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.*
> *(8) The other facts referred to in subsection (6)(b) above are—*
> *(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and*
> *(b) the identity of the defendant; and*
> *(c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.*
> *(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.*
> *(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—*
> *(a) from facts observable or ascertainable by him; or*
> *(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;*
>
> *but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."*

78. During the course of the trial, Mr Hegarty prepared a formulation of Mr and Mrs Taylor's case as to the application of s. 14A of the 1980 Act and their state of knowledge for the purposes thereof. This was provided to Mr Asquith, and subsequently to me during the course of closing submissions. This formulation was in the following terms:

> *"Relevant knowledge being knowledge of (i) the highly risky nature of a Harlequin investment; and (ii) the obligations upon a mortgage adviser to gather information and advise as to suitability, particularly in relation to the proposed repayment vehicle (either failing to note the unsuitable repayment vehicle or, if aware of it, to properly draw to Cs' attention the need for advice in relation to the same); therefore lacking both of those facts Cs did not have the knowledge necessary to begin the preparatory steps to bringing a claim.*
>
> *For completeness' sake Cs aver insufficient knowledge before 18 March 2017."*

79. Mr Hegarty recognises that, for the purposes of s 14A(5), the onus falls upon Mr and Mrs Taylor to show that the earliest date upon which they had both the knowledge required for bringing an action for damages in respect of the relevant damage and right to bring such action fell on or after 18 March 2017. Mr Hegarty's formulation of Mr and Mrs Taylor's case recognises that the key issues are as to when Mr and Mrs Taylor first had the requisite knowledge that relevant damage had been suffered, and when they had the requisite knowledge that that damage was attributable to Legal and General/KFS.

80. As to the former, namely knowledge that the relevant damage had been suffered, it is, in essence, Mr and Mrs Taylor's case that they did not have requisite knowledge until March 2017, when it became clear that the restructuring proposal in respect of Harlequin would not proceed because an extension of time to submit the proposals had been refused.

81. As to knowledge of attribution to Legal and General/KFS, it is Mr and Mrs Taylor's case that they did not have the requisite knowledge that the damage was so attributable until thereafter, when contacted by PHIG, leading to discussions with Mr Maynard that then, but only then, led Mr and Mrs Taylor to believe that they might have a claim against Legal and General/KFS as mortgage adviser.

82. As to the issue of requisite knowledge regarding attribution, and the effect of ss. 14A(8)(a), (9) and (10), Mr Hegarty referred me the leading decision of the House of Lords in *Haward v Fawcetts* [2006] 1 WLR 682, and, in particular, to the speech of Lord Nicholls at [10] et seq, identifying the tensions between knowledge for the purposes of attribution under ss. (8), and knowledge of legal consequences deemed irrelevant under ss. (9). Adopting a submission advanced as referred to in *Jago v Mortgage4You Ltd* [2019] EWHC 533 (QB) at [31], Mr Hegarty submitted that it was not until Mr and Mrs Taylor understood that Legal and General's/KFS' duty to them encompassed an obligation to refuse to recommend any mortgage without first requiring that independent financial advice be obtained, and until they had any real concept as to what was required of Mr Margetson in fulfilling his duties, that Mr and Mrs Taylor could have sufficient knowledge of attribution for the purposes of s. 14A(8).

83. Mr Hegarty also referred me to the recent decision of Bourne J in *Witcomb v J Keith Park Solicitors* [2021] EWHC 2038 (QB), where, at [36], Bourne J had emphasised that where alleged negligence consisted of the giving of wrong advice, time did not start to run for the purposes of s 14A until the claimant had some reason to consider that the advice might be wrong, and that where the essence of the allegation was an omission to give necessary advice, time would not start to run until the claimant had some reason to consider that the omitted advice should have been given. Applying this to the present

facts, it was Mr Hegarty's case that Mr and Mrs Taylor did not have any reason to consider that the allegedly omitted advice in the present case should have been given until after 18 March 2017 when they received legal advice.

Determination of the present case

Duty

84. I do not consider it to be open to serious dispute that mortgage advisers such as Mr Margetson will owe a duty of care to the customer/borrower the scope of which will, at least to some extent, be informed by the requirements of the relevant provisions of MCOB.

85. However, given the way that the case has been advanced, I consider that the focus of enquiry in the present case must be upon whether the scope of the relevant duty was, in the present circumstances, such as to require Mr Margetson to decline to recommend the Mortgage, or indeed any mortgage to Mr and Mrs Taylor, until such time as they had obtained independent advice in respect of the investment that they proposed to make by way of the payment of a deposit of £74,000 to Harlequin in respect of the *"off plan"* purchase of Cabana 125, or at least as to whether the scope of the duty extended to acting in the way that it is alleged that Mr Margetson failed to act as set out in subparagraphs 33.8, 33.6 and/or 33.10 of the Amended Particulars of Claim.

86. I do not consider that the harm that MCOB can be said to be intended to guard against is, properly considered, as broad as that contended by Mr Hegarty, namely the suffering of a significant reduction in the value of the equity in the property proposed to be mortgaged. Rather, having regard to the wording of MCOB, and having regard to the evidence of Mr Griffiths and Mr Baxter in relation thereto, I consider that the harm sought to be guarded against by MCOB is more accurately to be described as that of customers/borrowers being introduced to a mortgage that is unsuitable for them, either because the mortgage in question is not reasonably affordable by them, e.g. because the circumstances disclose an unacceptable risk that they will not be able to meet their obligations thereunder, or because the mortgage in question is otherwise inappropriate to the needs and circumstances of the particular customer/borrower.

87. I consider that it thus follows that the scope of duty in any particular case, as informed by the requirements of the relevant provisions of MCOB, is likely to be highly sensitive to the particular needs and circumstances of the particular customer/borrower, *"needs"* in this context being, as I see it, primarily concerned with the particular requirements of the customer, rather than with whether, looking at the matter objectively, the customer intends to apply the monies raised in a financially prudent way.

88. On the present facts, I do not accept the proposition that Mr Margetson was under a duty to decline to recommend the Mortgage until such time as Mr and Mrs Taylor had obtained independent financial advice in respect of the proposed Harlequin investment. Apart from the fact that this proposition goes further than Mr and Mrs Taylor's expert Mr Griffiths was prepared to go given that his evidence was that the appropriate course would have been to advise a repayment mortgage rather than an interest only mortgage, the following factors in particular, in my judgment, point firmly against Mr Margetson being subject to any such duty:

i) Mr and Mrs Taylor came to Mr Margetson enthusiastic about making a further Harlequin investment, having already made significant investments in respect of Harlequin's Resort Development the previous year, and having done so after Mr Taylor had visited the Resort Development, and had input from his brother, an accountant, in respect of the relevant figures.

ii) I accept Mr Baxter's evidence that, at least in 2007, investments involving *"off plan"* purchases in overseas developments were by no means exceptional, and that mortgage advisers such as Mr Margetson could not reasonably have been expected to advise in relation thereto, or to be in a position to identify what might be a good or bad investment. In any event, the Mortgage Record of Suitability records Mr Margetson having informed Mr and Mrs Taylor that, to the extent that they were looking to repay the Mortgage out of their proposed investment, he was unable to advise them in respect of the relevant arrangements and the extent to which they were likely to pay any given amount, and that if they were unsure about the level of guarantee that their investment offered, they should obtain appropriate advice before placing reliance upon it to repay all or part of the Mortgage. I am satisfied that this was not only recorded in the Mortgage Record of Suitability, but reflected discussions between Mr Margetson and Mr and Mrs Taylor at the relevant time.

iii) I consider that it would have amounted to an unreasonable restriction on Mr and Mrs Taylor's autonomy as consumers for Mr Margetson to have been obliged to decline to recommend a mortgage unless Mr and Mrs Taylor took financial advice that they did not consider necessary.

iv) As Mr Taylor accepted in giving evidence, he and Mrs Taylor were aware that there were risks involved, and that it was, at least, *"plausible"* that the relevant property proposed to be purchased would not be built, and therefore the investment lost and not available to repay the Mortgage.

v) Further, and in my judgment highly significantly, Mr and Mrs Taylor had a fallback position in the event of the investment failing that Mr Taylor accepted was likely to have been discussed with Mr Margetson, and which involved them using their surplus income in order to pay off the Mortgage if the worst came to the worst, which it did. I consider it highly relevant that, in the circumstances, Mr Margetson noted in the Mortgage Record of Suitability that: *"You indicated that you are not concerned about having any form of guarantee that your mortgage is repaid at the end of the mortgage term. I have therefore recommended a repayment method of interest only …"* (my emphasis).

vi) As I have noted above, the Client Review, which contained details of Mr and Mrs Taylor's income and expenditure, disclosed a significant excess of income over expenditure. That provided evidence to support an ability to make good the fallback position. Events have subsequently borne out the ability of Mr and Mrs Taylor to raise a significant capital sum, and re-mortgage on a basis that they could afford, in order to discharge the Mortgage liability.

89. In the circumstances, having identified that Mr and Mrs Taylor were aware that what was proposed was not without risk, that they had a realistic fallback position in the event that the Harlequin investment failed, and having advised Mr and Mrs Taylor that

if they had any concerns with regard to reliance upon the Harlequin investment for the repayment of the Mortgage, they should seek independent financial advice, I do not consider that Mr Margetson was under any obligation to go further and decline to recommend a mortgage unless and until that independent financial advice was obtained.

90. Mr Hegarty contended that the consideration of the fallback position by Mr Margetson was insufficient to enable him to be satisfied that the fallback position was robust so far as an ability to repay the Mortgage debt in the event of the failure of the Harlequin investment is concerned. It is certainly true that there is no evidence of any detailed analysis of the position by Mr Margetson, but the information provided did disclose a significant surplus of income over expenditure which one might reasonably expect to have been taken into account, and Mr Taylor's evidence is that the fallback position is likely to have been discussed with Mr Margetson. Given further that one was concerned with a fallback position, and given that the primary intention was that the Harlequin investment would be used to effect repayment, and that Mr Margetson clearly advised Mr and Mrs Taylor that if they had any concerns, then they should take independent financial advice, I am not persuaded that there is any case that Mr Margetson failed in his duty to Mr and Mrs Taylor in not investigating further the fallback position. However, in any event, if that is the complaint, then it is difficult to see that it was causative of any loss given that Mr and Mrs Taylor were in fact able to successfully rely upon the fallback position.

91. As to whether there was a duty to advise consistent with the breaches alleged in subparagraphs 33.8, 33.6 and 33.10 of the Amended Particulars Claim:

i) As to subparagraph 33.8 - I do not accept the proposition that no recommendation with regard to a mortgage could properly have been made. This allegation really adds nothing to the primary case advanced, which I have rejected, that no recommendation could properly have been made unless and until Mr and Mrs Taylor took independent investment advice.

ii) As to subparagraph 33.6 - The premise of the allegation therein is that Mr and Mrs Taylor's ability to meet the obligation to pay the capital sum at the end of the Mortgage term depended upon the income from and/or value of the Harlequin investment. However, on the facts, given the fallback position, and as proved by events, this was not the case. I therefore reject the contention that Mr Margetson was under a duty to conclude and advise that the Mortgage was not affordable on this basis.

iii) As to subparagraph 33.10 - This allegation of breach depends upon a contention that Mr Margetson was under a duty to ensure that Mr and Mrs Taylor had an adequate understanding of the risks involved in raising money by mortgage to invest, as to the affordability of the Mortgage, and as to what costs they would need to cover should the investment fail. However, I consider it to be reasonably clear from what was set out in the Mortgage Record of Suitability, and from Mr Taylor's frank evidence as to his knowledge of the risks, as to his thinking and understanding in respect of a fallback position, and as to his knowledge of the distinction between an interest only mortgage and a repayment mortgage, that Mr and Mrs Taylor did have an adequate understanding of the matters referred to. In these circumstances, I consider it difficult to see that Mr Margetson was

subject to any duty to go further than he actually did go in ensuring that Mr and Mrs Taylor had an adequate understanding of the Mortgage transaction.

92. The alternative way that Mr and Mrs Taylor's case was put was, as I have said, that Mr Margetson ought to have advised a repayment mortgage rather than an interest only mortgage. As I have identified, this is not Mr and Mrs Taylor's pleaded case, and I can see that there are a number of not insubstantial grounds for objection to a late amendment to allow such an alternative claim given that the evidence, including the expert evidence, has been prepared on the basis of the case as pleaded. However, even if it were open to Mr and Mrs Taylor to run this alternative case, I do not consider there to be any merit in it.

93. As I said, Mr Taylor accepted in evidence that he was fully aware of the distinction between a repayment mortgage and an interest only mortgage. At the time, Mr and Mrs Taylor had reasons for minimising the amount of the monthly payments made by way of interest. The fallback position that I have referred to was formulated on the basis that the Mortgage was to be an interest only mortgage, and that if the worst came to worst, there might be need to raise the whole capital sum, which would not otherwise have been repaid during the course of the term given the failure of the investment. It is apparent from the Mortgage Record of Suitability that Mr Margetson considered the options and came to a reasoned conclusion that an interest only mortgage was appropriate on the present facts. As matters turned out, Mr and Mrs Taylor have, as I have said, been able to rely upon their fallback position.

94. In the circumstances, I am not persuaded that Mr Margetson was subject to a duty to advise Mr and Mrs Taylor that they should enter into a repayment mortgage rather than an interest only mortgage.

Breach

95. Given the conclusions that I have reached as to the scope of the duty of care that Mr Margetson was subject to, and my conclusion that it did not extend to acting or advising in the way that it is contended that Mr Margetson ought to have done so as to give rise to the breaches alleged, it follows that I do not consider that it has been established that Mr Margetson has acted in breach of duty or negligently as alleged.

Causation

96. If, contrary to my findings, Mr Margetson was subject to a duty not to recommend a mortgage unless and until Mr and Mrs Taylor had obtained independent financial advice in respect of the Harlequin investment, and if Mr Margetson had acted in breach of duty owed to Mr and Mrs Taylor in recommending a mortgage notwithstanding that Mr and Mrs Taylor had not obtained such advice, then I can see that a case on causation might conceivably be made out in that, in those circumstances, the transaction would not have proceeded. But Mr and Mrs Taylor were very enthusiastic about the proposed investment, and even if independent financial advice had been taken and, as a result, warnings were given as to the risks involved, I consider it more likely than not that Mr and Mrs Taylor would have proceeded in any event. However, the point is academic given my findings in respect of duty and breach.

97. Even if a case could, contrary to my findings, have been made out that Mr Margetson was in some other way in breach of duty, e.g. as alleged in subparagraphs 33.8, 33.6 or 33.10 of the Amended Particulars of Claim, I consider it likely that the same causation difficulties would have arisen given how determined Mr and Mrs Taylor were to proceed, and given that they did proceed with a viable fallback position.

Damages

98. Again, given my findings on duty and breach, the question of damages is academic.

99. In these circumstances, I would merely observe that even if Mr and Mrs Taylor could have made out a case on liability, it is difficult to see on what basis the capital loss in respect of the Harlequin investment could properly be said to fall within the scope of the duty of care in accordance with the principles explained by the Supreme Court in *Manchester Building Society v Grant Thornton* (supra).

Limitation

100. Again, given my findings in respect of duty and breach, the limitation questions that arise are, again, academic. I shall therefore deal with them fairly shortly.

101. As identified above, the key questions are as to whether Mr and Mrs Taylor had:

i) The requisite knowledge as to damage; and

ii) The requisite knowledge that this damage was attributable to Legal and General/KFS;

prior to 18 March 2017.

102. So far as requisite knowledge of damage is concerned, as formulated by Mr Hegarty on behalf of Mr and Mrs Taylor, this turns upon when they had knowledge that the Harlequins investment was of a highly risky nature. The case advanced by Mr Hegarty is that this was only when the restructuring proposal in respect of Harlequin was no longer pursued as from March/April 2017. However, Mr Taylor accepted under cross examination that by December 2016/January 2017 it had become *"probable"* that he and Mrs Taylor would lose a lot of money, and that by January 2017 the investment had become *"highly risky"*. In the light, in particular, of the information provided by Mr Glasgow/KPMG in the email dated 24 January 2017 with regard to Coulson J's comments in respect of Harlequin, and Mr Ames, in his judgment in the claim against Harlequin's accountants, Mr Taylor could hardly, as I see it, have suggested otherwise. In the light of these admissions, it is, in my judgment, plain that prior to March 2017 at least, Mr and Mrs Taylor had the requisite knowledge so far as the relevant damage is concerned.

103. The more difficult point is as to whether Mr and Mrs Taylor had the requisite knowledge that the relevant damage was attributable to Legal and General/KFS given the tension between knowledge for the purposes for attribution under ss.14A(8), and a knowledge of legal consequences deemed irrelevant under ss.14A(9).

104. The relevant principles were considered were by the House of Lords in *Haward v Fawcetts* (supra), by Lord Nicholls at [10] et seq, by Lord Scott at [44] et seq, and by Lord Mance at [113].

105. I find particular assistance for present purposes from what Lord Mance said at [113]:

> *"Turning to the phrase ""the act or omission which is alleged to constitute negligence"", the word ""constitute"" is in my view significant. It indicates that the claimant must know the factual essence of what is subsequently alleged as negligence in the claim. Once such knowledge has been acquired, it is under subsection (9) irrelevant whether or not the claimant knew that the relevant act or omission ""did or did not, as a matter of law, involve negligence"". So, there must be knowledge of the act or omission allegedly constituting negligence, but there need not be knowledge that, as a matter of law, such act or omission involved negligence. Whether an act or omission involves negligence is a matter of law for the court, even though a court may of course hear a good deal of evidence (e g, about accountancy principles and practices) in order to determine it…"*

106. In the context of professional negligence cases subject to s. 14A, it may be that that, on the particular facts, a claimant may not know the loss or damage is attributable to the acts or omissions alleged to constitute negligence until the point at which he is advised of a potential claim in negligence.

107. For present purposes, Mr Hegarty focuses upon what contended to be Mr and Mrs Taylor's lack of knowledge as to the obligations upon a mortgage adviser to gather information and advise as to suitability, particularly in relation to the proposed repayment method, and to draw to the borrower's/customer's attention the need for advice in relation to the same, which such knowledge, it is said, was only gained once legal advice as first sought after 18 March 2017.

108. Legal and General's primary contention is that there is no evidence to support the contention that it was only after 18 March 2017 that Mr and Mrs Taylor gained knowledge as to the obligations upon a mortgage adviser when they obtained advice thereafter. There is force in this point, not least given that paragraph 32 of Mr Taylor's witness statement only goes so far as to say that, in March 2017, he joined the Pro Harlequin group and "*was informed that there was a potential action against the financial adviser that had been involved in the arrangement and inception of my re-mortgage which released the funds I needed in order to purchase Cabana 125"*, without specifically dealing with question of when he gained knowledge of the obligations upon a mortgage advisor.

109. However, s. 14A(10) requires the Court to have regard not only to the claimant's actual knowledge, but to knowledge that the claimant might have been expected to acquire from facts observable or ascertainable by him, or ascertainable by him with the help of appropriate expert advice which is reasonable for him to seek.

110. In the present case, the position is that Mr and Mrs Taylor knew by the beginning of 2017 at the latest that there was a very real risk that their investment would be lost through the failure of Harlequin, and that there was evidence that this was because Harlequin had been conducted by Mr Ames on a fraudulent basis. Mr and Mrs Taylor were aware of the fact that Mr Margetson had, on behalf of Legal and General/KFS,

recommended the Mortgage as suitable for them. In addition, Mr and Mrs Taylor knew in 2016 that other Harlequin investors were making claims in respect of the mortgage advice that they had obtained in consequence of the fact that their investments were at risk.

111. In the circumstances, I consider that, prior to March 2017, it would, in any event, have been reasonable for Mr and Mrs Taylor to have sought expert advice in the form of legal advice which would, if there had been merit in the claims, have led to them ascertaining what duties were owed to them by Mr Margetson on behalf of Legal and General/KFS. Thus I consider that Mr and Mrs Taylor's knowledge is, for the purposes of ss. 14A(8) to be treated, pursuant to ss. 14A(10), as extending to the knowledge that might have been expected to be gained in seeking such legal advice.

112. Consequently, even if mere knowledge that significant loss was likely to be suffered as a result of the relevant Harlequin investment, and that Mr Margetson had recommended the Mortgage having given the advice that he did, is not enough, in itself, to constitute the requisite knowledge, I consider that the requisite knowledge is provided by the constructive knowledge referred to in paragraph 110 above. In the light of this finding, it is not necessary for me to determine Legal and General's submission that there is, in any event, no evidence to support Mr and Mrs Taylor's case about an alleged ignorance of a mortgage advisor's scope of duty.

113. It follows, in my judgment, that I am bound to conclude that Mr and Mrs Taylor had the requisite knowledge, both as to damage and as to attributability of that damage to Legal General/KFS, prior to 18 March 2017, and thus that even if they had, contrary to my findings above, had a good claim, it would have become statute barred prior to the relevant date of 18 March 2020 when the standstill agreement was entered into.

Overall conclusion

114. In the light of my findings above, but with considerable sympathy for the position of Mr and Mrs Taylor as the victims of fraud, I consider that the present claim against Legal and General must be dismissed.