Kay v Martineau Johnson [2026] EWCA Civ 224 Case Note

Preliminary

1. In its recent decision of *Ellen Kay v Martineau Johnson* (A Firm) [2026] EWCA Civ 224, the Court of Appeal has provided clarity on the difference between constructive knowledge under Section 14A(10) of the Limitation Act 1980 ('the 1980 Act') and actual knowledge, and considered (obiter) whether a claimant's lack of means might be relevant to whether they had taken all reasonable steps to obtain legal advice.

The Facts

2. In 2007, Ms Kay had retained the Defendant to advise on an ancillary relief application in her divorce proceedings. A 'clean break' settlement was agreed with her husband on 25 April 2008 (and recorded in a consent order of 29 September 2008).

3. Ms Kay had suspected (even prior to the settlement being reached) that her husband had not fully disclosed his assets. The Defendant advised, however, that she had no basis for re-opening the concluded settlement. Ms Kay's evidence was also that, prior to the settlement, the Defendant had not advised her to seek any settlement other than the 'clean break'.

4. In June 2009, she terminated the Defendant's retainer.

5. Almost 9 years later, on 23 April 2018, Ms Kay requested her file from the Defendant, which it provided the following month.

6. By this time, Ms Kay was in a relationship with a litigation partner of a solicitors' firm; albeit one who did not specialise in family law.

7. On 27 March 2020, Ms Kay's new partner instructed a family law barrister to advise Ms Kay on whether there were grounds for re-opening the settlement she had reached with her ex-husband. The barrister's advice, given on 3 May 2020, was that such an application would not succeed, as there was insufficient evidence that the ex-husband had concealed assets.

8. Ms Kay then issued proceedings on 6 March 2023. Evidently, by this point, any claim in contract would be statute-barred under Section 5 of the 1980 Act; as would any claim in tort under the 'primary' 6-year period provided by Section 2. In broad terms, Ms Kay's allegations of breach were that the Defendant:

a. Failed to adequately advise her of the options for, and merits of, investigating her ex-husband's means; particularly by way of forensic accounting advice, and a pension-sharing report;

b. Failed to advise her of the possibility of seeking an order under Section 37 of the Matrimonial Causes Act 1973; and

c. Recommended the 'clean break' settlement which, in the circumstances, was not advisable, rather than advising of the 'availability and/or merits of pursuing a spousal maintenance order in circumstances where it was obvious or ought to have been obvious to [the Defendant] that [the ex-husband] had likely failed to disclose assets and means'.

9. The Defendant denied negligence but also contended that the claim was statute-barred under the 1980 Act.

10. District Judge Brown directed limitation to be tried as a preliminary issue. That trial took place over 2-days, in September 2024, and concluded in the Defendant's favour.

11. Ms Kay appealed to the Court of Appeal.

Decision

Actual Knowledge in 2009

12. Ms Kay did not have actual knowledge in 2009 (contrary to the findings of the court below).

13. A Claimant would only have 'actual knowledge', if they had knowledge of the matters specified in Section 14A(6) and 14A(8). They must know:

a. The material facts about the damage; and

b. That the damage was attributable to the Defendant.

14. In the present case:

a. The Defendant knew 'the material facts about the damage in respect of which damages are claimed' in 2009.

b. She knew that she regarded her settlement as a bad deal.

c. Accordingly, Section 14A(6)(a) was satisfied [78].

15. However, Section 14A(8)(a) was not met. The Claimant did not know 'that the damage was attributable in whole or in part to the act or omission which is

alleged to constitute negligence.' As Males LJ stated [79], as regards this requirement in solicitors' negligence claims:

> *…In the case of a claim against a solicitor for the giving of negligent advice, the question is whether the claimant knows that the damage (in this case, the bad deal with her ex-husband) was attributable to bad advice given by her solicitor. The claimant need not know that the giving of such bad advice amounted to actionable negligence (subsection (9)), but in order to have actual knowledge for the purpose of section 14A, she would have to know – i.e. actually to know – that there was something wrong with the advice which she had been given. As* Haward v Fawcett *[2006] UKHL 9, [2006] 1 WLR 682 explains, she need not know that with certainty, but the minimum requirement for actual knowledge in such a case is that the claimant is sufficiently conscious of the possibility of flawed advice having been given to justify embarking on the preliminaries to the issue of proceedings, such as submitting a claim to the proposed defendant, taking advice and collecting evidence (see e.g. Lord Nicholls at para 9).*
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> (emphasis added)

16. Accordingly, the decision clarifies that, for 'actual knowledge' the Claimant must be specifically aware of the possibility that the advice s/he received was flawed.

Constructive Knowledge in 2009

17. The Court held, however, that the Claimant did have constructive knowledge under Section 14A(10) in 2009, and therefore her claim was statute-barred.

18. To quote Section 14A(10) in full:

> *'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.'*

19. The dispute cantered around the proviso in the final sub-paragraph: namely, had Ms Kay taken all reasonable steps to obtain such advice?

20. Males LJ stated [86] that the question was not 'whether it was reasonable for Ms Kay to seek advice about the finality of the settlement and to accept the advice which she was given'. But rather, 'the question is whether, having obtained that advice, she ought reasonably to have sought advice as to whether the reason she found herself in this predicament was because she had received bad advice from [the Defendant]'?

21. Though Ms Kay did not *subjectively* suspect that the Defendant might be at fault, this was held to be irrelevant, on the basis that the test at Section 14A(10) was objective [88].

Constructive Knowledge in 2018

22. As to whether Ms Kay could be deemed to have constructive knowledge after she had obtained her file, her counsel accepted that the relevant facts would have been ascertainable with the help of appropriate expert evidence, but submitted that it had been reasonable for her not to seek such advice, because she did not have the funds to do so.

23. After having considered the authorities, Newey LJ (with whom Males LJ and Lewis LJ agreed), determined that the test under Section 14A(10) is 'mainly objective', but that impecuniosity had never been specifically addressed. He held [64] that:

> *The upshot, I think, is that it is questionable whether a claimant's impecuniosity can ever matter for the purposes of section 14A(10) of the 1980 Act. Even, however, if there can be circumstances in which impecuniosity is relevant, they will be rare, and it must be incumbent on a claimant who wishes to rely on impecuniosity to provide detailed evidence as to his financial circumstances and how they prevented him from obtaining appropriate advice.*

24. In the case of Ms Kay's (alleged) impecuniosity specifically, it was held that the evidence 'did not come close to establishing that this is one of those rare cases in which impecuniosity might possibly justify a claimant's failure to obtain advice earlier' [69].

<u>Conclusions</u>

25. This is likely to become an oft-cited case, by claimants and defendants alike. Overall, the stress on the objective nature of the Section14A(10) test, and the difficulty in justifying the relevance of one's impecuniosity, is a boon to defendants. However, the Court of Appeal has left the door open, to a very limited extent, for truly impecunious claimants to justify not seeking expert advice earlier; provided they can establish that impecuniosity by way of extensive financial disclosure.

hailshamchambers

Tom Stafford
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