Neutral Citation Number: [2016] EWHC 1286 (QB) (TCC)

Case No: HT2016-000032

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/06/2016

Before :

Mr Justice Soole

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Between :

(1) BPC HOTELS LIMITED	**Claimants**
(2) BALA PERAMPALAM CHANDRA	
(3) MARIA PERPETUA CHANDRA	
- and -	
(1) WRIGHT HASSALL LLP	**Defendants**
(2) MAX MALLIN	

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- -

Simon Howarth (instructed by Shakespeare Martineau LLP) for the Claimant
Ben Quiney QC (instructed by BLM) for the First Defendant
Andrew Onslow QC and Hannah Glover (instructed by Mills & Reeve LLP) for the Second Defendant

Hearing dates: 3-4 May 2016

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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.

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Mr Justice Soole :

1. These are the applications of the First Defendant solicitors ('WH') and the Second Defendant barrister ('MM') for summary judgment on the Claimants' claims of professional negligence against them, pursuant to CPR 24.2 and/or 3.4. The claims concern advice which they gave in 2009 in respect of a claim of professional negligence against the Claimants' previous solicitors Brooke North/Brooke North LLP ('BN') for advice given in 2003.

2. Evidence having been adduced by the parties, I consider these applications to fall under CPR 24.2 rather than 3.4. The parties remind me of the summary of principles for such applications by Lewison J in Easyair Ltd v. Opal Telecom Ltd [2009] EWHC 339 (Ch) as approved by the Court of Appeal in AC Ward & Son v. Catlin (Five) Ltd [2009] EWCA Civ 1098. I will not set those out again but particularly bear in mind the imperatives that the applications should not turn into a mini-trial and that account is to be taken not only of the evidence in these applications but of any evidence that can reasonably be expected to be available at trial.

Narrative

3. It is necessary to set out the story in some detail. What follows is taken from the material put before me by the parties and is not in dispute for the purpose of these applications.

4. The First Claimant ('BPC') is a company owned by the Second and Third Claimants (respectively 'Mr C' and 'Mrs C').

5. During the 1990s Mr and Mrs C built up and sold a chain of nursing homes. They invested the substantial profits in a hotel business for which BPC was their corporate vehicle.

6. In 1998 BPC bought Princess Court, a Victorian office building in Manchester, with a plan to convert it into a four-star hotel ('the Hotel'). Costain was appointed main contractor. The finance was to be provided by the bank RBS.

7. A further finance agreement dated 20.9.00 RBS agreed to lend BPC £10.65m for this purpose. Costain started work on 2.10.00. The formal Main Contract ('MC') between BPC and Costain was entered on 30.4.01. It contained the usual provisions for termination in the event of default by either party.

8. As a condition to drawdown, BPC on 23.7.01 granted RBS a debenture creating fixed and floating charges over its business and assets, with the usual power to appoint administrative receivers ('Receivers') and a first legal charge over the property. This power had a particular significance because of the agreement which BPC had entered for the Hotel to operate as a Holiday Inn franchise, which included a provision that the franchise would be lost if BPC entered receivership. In consequence the value of the completed Hotel would be diminished. Furthermore the effect of insolvency on the MC was to render the time for completion of the development 'at large', so that BPC would lose the right to deduct liquidated damages for delay.

9. By a further condition, a Deed of Warranty ('the Deed') was executed on 18.7.01 by Costain, BPC and RBS. On 12.7.01 RBS provided overdraft facilities limited to £300,000 and repayable on demand.

10. By clause 8.1 of the Deed Costain undertook to give RBS not less than 21 days notice of its intention to terminate the MC. Service of such a notice then triggered the 'step-in' provision of clause 9, unless the MC was not determined for any reason (clause 8.3), e.g. if RBS provided further funding.

11. Clause 9 provided (subject to clause 8.3) that, within the period of Costain's notice, RBS should give notice to Costain requiring it to continue its obligations under the MC and acknowledging that RBS was assuming all the existing and future obligations of BPC thereunder. The MC would then be deemed to continue in full force and effect as if it had been made between RBS and Costain. It is now common ground that, if triggered, this 'step-in provision' was mandatory.

12. By clauses 10 and 11 of the Deed there was a distinct step-in provision. In the event of BPC being in default of the finance agreement, RBS could give notice to Costain that it proposed to proceed with the development by itself or its nominee as Employer; for the contract to continue as if made between Costain and RBS/its nominee; and for RBS to be responsible for the existing and future obligations under the contract (and where a nominee was appointed, supported by guarantee).

13. On 30.10.01 BPC and RBS entered a second finance agreement for a loan of £700,000. As security for this loan Mr and Mrs C gave personal "all monies" guarantees limited to that sum and secured by a second charge on their matrimonial home.

14. By early 2003 the project was experiencing difficulties. There were delays and cost overruns, for which each party blamed the other. BPC needed further funds to complete the development. A further instalment of c.£485,000 was due to Costain on 20.5.03, together with substantial sums to other parties performing services for the development.

15. On that day at 11.30 RBS (Mr Logan) telephoned Mr C to say that the payment would not be made unless by 2 pm he and Mrs C increased their personal guarantees to £1.65m. If not, there would a breach of the MC and RBS would appoint Receivers. As Mr and Mrs C drove to a meeting with RBS that morning they telephoned BN's Mr Lopeman for advice.

16. Having received copies of the proposed forms of guarantee Mr Lopeman gave advice to them (via their car speakerphone) as they drove. Following that advice Mr and Mrs C signed the guarantees (in fact limited to £1.15m), the further funds were advanced by RBS and Costain duly paid. Mr Lopeman's advice on that day is at the heart of the allegations of professional negligence against BN, albeit it is said that he gave negligent advice after that date.

17. On 23.6.03 Mr C telephoned WH (Mr Stockdale) and told him that he was under severe pressure from RBS. They wanted a meeting and suggested that BPC bring a legal representative. In this context, a further instalment of payments would be due to Costain in July.

18. On 25.6.03 the meeting took place and Mr Lopeman attended with Mr C. By letter to BPC/Mr C on the following day Mr Lopeman recorded that RBS had stated that it would not undertake any further funding pending agreement of a fixed price and time deal with Costain and stressed that it was not prepared to fund the projection beyond practical completion. The letter concluded : *'The Bank also mentioned the importance of taking insolvency advice bearing in mind the potential insolvency of the company and your position as a director. In this respect, can you please contact my Partner, Stuart Frith, who will be able to assist.'*

19. By 17.7.03 RBS appreciated that the clause 9 step-in provision in the Deed was mandatory; so that in the event of default by BPC Costain could oblige RBS to pay for the completion of the project. However BN had on 3.7.03, 7.7.03 and c.21.7.03 advised that the step-in provisions were optional at the election of RBS.

20. During August 2003 Mr C contacted solicitors Pannone LLP, who had a specialised construction department. Pannone agreed to act for BPC against Costain, provided that BPC appointed Construction Consultants to advise on Costain's EOT claims. Pannone recommended a consultancy firm but they were conflicted. The evidence does not show whether Pannone was ultimately retained.

21. By an internal 'outcome statement' dated 8.8.03 RBS noted that the Hotel was nearing completion. Current bank exposure was £12.2m; the anticipated total exposure might be as high as £17.8m. Costain's extension of time claims were estimated at £3.5m, subject to adjudication and to potential set off for liquidated damages claims by BPC. It was noted that the mandatory step-in provisions rendered RBS potentially responsible for all the liabilities under the MC; and that, were the step-in discretionary, RBS could avoid much of the disputed and contingent liabilities through an insolvency process. An analysis of the potential loss to RBS under various scenarios, including receivership, was attached.

22. On 19.8.03 an internal RBS e-mail (Macklin-Logan and others) stated that *'...if we can get effective and full control then this has to be better than insolvency.'* The identified means of obtaining control was by a bank-appointed director, which raised legal questions.

23. On 20.8.03 a response from Mr Logan recorded Mr C as having spoken to a potential bank-appointed director (David Evans) and said that, if he became a director, he would want an indemnity from him to the extent of his investment and guarantee, i.e. £6m. Mr Logan described this as *'clearly a non-starter'* and said that Mr C was *'...becoming increasingly aggressive and agitated'*. He concluded that *'given the further breakdown in the relationship'* the only way forward was the appointment of Receivers without delay.

24. On 28.8.03 RBS demanded repayment from BPC and appointed Receivers over its business and assets. BPC's total indebtedness was c.£12.3m.

25. On 29.9.03 Costain gave notice of its intention to terminate the MC and pointed to RBS' obligations under clause 9. RBS in fact took the course of stepping in under the alternative provisions of clauses 10 and 11 and thereby nominated an SPV owned by the Receivers to act as Employer for the remainder of the project and guaranteed the SPV's liabilities to Costain.

26. With the new structure in place RBS advanced to BPC in receivership the funds to complete the development and settle Costain's various claims. By early 2004 the building works were complete. In March 2004 the hotel was sold for £13.5 million. This left a shortfall of £4.118 million owed by BPC to RBS.

27. In January 2005 RBS commenced proceedings against Mr and Mrs C for recovery of the indebtedness under the secured guarantees and for possession of their matrimonial home. Mr and Mrs C (separately represented and acting by other solicitors and Counsel) defended the claims. The defences included the contention that the arrangements made for the continuation of the development after the appointment of Receivers constituted a sham attempt to reimpose upon BPC a continuing liability for the cost of the building works, in breach of RBS' equitable duty to Mr and Mrs C as guarantors. By contrast, the effect of the 'step-in' would have been to require RBS to complete the development at its own expense without recourse to BPC; with the result that any increase in value resulting from the completion of the building development would accrue to the benefit of BPC. I will call this the 'non-recourse argument'. As to Mrs C's personal guarantee, it was contended that this had been procured by her husband's undue influence of which RBS had notice.

28. The action did not come on for trial until October 2009.

29. Whilst this litigation was going forward Mr and Mrs C (and BPC, of which they had regained control after discharge of the Receivers in November 2006) considered the role which BN had played in the hotel project. They concluded that the advice and/or lack of advice from BN had caused the project to founder. As will be seen, proceedings against BN were commenced on 18.5.09.

30. The Particulars of Claim (POC) in the present action allege that WH was retained *"...in or about the spring of 2009, to advise and act for them in relation to their claims against [BN] ("the Claims")* : para.30; and that *"[WH] instructed [MM], in early May 2009, to advise the Claimants in relation to the Claims and to draft necessary documents, including Claim Forms and Particulars of Claim."*: para.31.

Instructions to MM

31. By Instructions dated 1.5.09 (received 5.5.09) MM was asked to advise on 7 identified issues. The sixth and seventh issues were in respect of professional negligence claims (i) by BPC against BN ('the company claim') and (ii) by Mr and Mrs C against BN ('the personal claims').

32. As to the company claim, the identified question was: *"Did the actions of* [BN] *amount to negligence and if so did they cause Mr and Mrs* [C] *and/or BPC to suffer any losses."* In the following paragraph, the details of that potential claim related to advice given by Mr Lopeman prior to the execution of the Deed on 18.7.01.

33. However the Instructions contained and referred to a 224-page 'Chronology of [BPC's] case' ('the Chronology') prepared by Mr C. That document included his contention that on 20.5.03 Mr L should have advised BPC/Mr and Mrs C : (i) not to sign the further personal guarantee; (ii) not to fund the cost overrun by increasing the overdraft facility repayable on demand (as this would increase the risk of RBS appointing Receivers without notice) (iii) to default on 20.5.03 in its payment

to Costain; (iv) then to enforce (by injunction) the mandatory step-in obligation on RBS. So advised, BPC would have been saved from receivership and the work completed. Thereafter BPC would have refinanced to repay its indebtedness to RBS. I will call this the 'default strategy claim'. Underpinning this was Mr C's belief in the no-recourse argument.

34. The Chronology also included Mr C's detailed account of his belief and case that RBS and the Receivers had colluded in a fraudulent/sham scheme to avoid the mandatory step-in provisions by using a demand on BPC's overdraft facility in order to achieve the object of the appointment of Receivers. I will call this 'the fraud claim'.

35. As to the personal claims, the identified question was : *"Did* [BN]*'s advice (lack of) regarding the personal guarantee on 20 May 2003 amount to negligence?"* This was followed by the statement: *"It is Mr and Mrs* [C]*'s position that* [BN] *failed to advise them upon the implications of executing the second personal guarantee on the 20 May 2003. Had they received appropriate advice it is their position that they would not have executed the personal guarantee."*

Conference on 7.5.09

36. The conference with MM took place on 7.5.09. It faced the imminent deadline of the expiry of the primary limitation period for advice given by Mr Lopeman on 20.5.03, i.e. 20.5.09. The attendance note in particular records that MM noted the legal and factual complexity of the matter; that he could not give prospects of success in proceeding with the 'several allegations' within the Instructions and any further points raised in the conference; and the importance of drafting a protective Claim Form in terms wide enough to cover all possible claims. During the 4-month maximum period between issue and service this would give the opportunity to digest all of the facts and to provide a full advice upon the prospects of succeeding. As to timescale he explained that in order to put Mr and Mrs C in the best possible position to succeed with their claim WH would need to go through all the relevant steps of obtaining information, digesting that information and providing an advice.

37. The note continues *'Clearly, with 12/13 bundles of papers, whilst [MM] has read these papers, it will take a substantial time to formulate an argument using the documents'.* MM then explained that it would be possible to save time and costs by arranging a consultation with Michael Kent QC (MK) (Leading Counsel for Mr C in respect of the possession action for the past 4 years) to test several of his arguments.

38. The note records Mr C's opinion on the non-recourse argument; and MM's response that such a windfall for RBC was commercially a "*ludicrous proposition*" and "*ridiculous*" and that the Court would look at the commerciality when construing documents. The note then records Mr C's explanation of the fraud claim.

39. Mr C was also advised that the claim in respect of the drafting of the Deed (2001) would appear to be time-barred.

40. As to the personal guarantee, Mr C stated that his expectation upon giving this (20.5.03) was that there would be a further (third) finance agreement with RBS. However RBS did not provide this and paid Costain through an increase in BPC's overdraft facility, repayable on demand. The note records MM as stating that it was

arguable that this was the point where the matter went wrong. Mr C said that in July 2003 he still thought that a further finance agreement would be forthcoming, because it was not in RBS' interest to 'step-in' to the MC.

41. As to funding of litigation, the Claimants wished to proceed by CFA. This would require advice on prospects of success in the relevant claims, which MM could not provide by the limitation date. The note records *"This is a complex matter both factually and legally and will take any solicitor/Counsel some time to get up speed before providing a full advice."*

42. There was discussion as to the selection of MM as Counsel rather than MK. Mr C said that this was because of the fact that his case including the allegation of fraud which was identified in MM's CV as a particular speciality. MM said that at present he did not see a case of fraud nor therefore could he plead any such claim.

43. It was agreed to have a joint consultation with MK to consider all issues, including Mr C's allegations of fraud.

Consultation 12.5.09

44. On 12.5.09, the consultation with MK took place, with MM, two representatives of WH and Mr and Mrs C. The note records MK's advice that (i) clause 9 was a mandatory step-in provision (ii) clause 10 was not mandatory (contrary to Mr C's view); and if so *'...there is no open-ended payment without recourse to the company.'* The note continues '*it was accepted that Mr C finds this advice hard to accept.*' MM agreed, stating that a non-recourse outcome was '*absurd*'.

45. The fraud claim was discussed at length. MK's view was that no such claim could be pleaded.

46. As to negligence claims against BN, the focus was on the advice given on 20.5.03 and the primary limitation date of 20.5.09. Mr C asked whether BN had a duty to both BPC and themselves individually in May 2003 when advising upon the personal guarantee.

47. In the course of the discussion Mr C is recorded as stating that, by appointing the Receivers, RBS were put in a weak position. MK's recorded response is that the appointment was a classic unwise commercial decision, but whether it gave a cause of action in law was another matter.

48. As to the personal claims, MK said that the first aspect was whether BN provided sufficient advice on the speakerphone prior to execution of the guarantee (i.e. 20.5.03). He then raised the question of a clause (3.1/3.2) in the guarantee which provided for discontinuance of the guarantee upon one month's notice, subject to the guarantor remaining liable for liabilities accrued prior to expiry. He questioned whether they had been made aware of this provision; and whether this was routine advice given by solicitors.

49. It was not possible to give a concluded view on the prospects of success of claims against BN. It was agreed that WH would contact Mr and Mrs C the following day to discuss how they wished to proceed in the light of the advice.

50. On 14.5.09 there was a telephone discussion between Mr C and WH (Sarah Perry). The attendance note records that the instructions concerning claims against BN were that the Claim Form should comprise (i) Mr and Mrs C's personal claim in respect of the personal guarantee and the absence of advice on clause 3.1/3.2. (ii) the company's claim 'concerning professional negligence'. The question of funding was discussed. WH required £5000 on account of costs to cover MM's and their fees for the preparation of the Claim Forms and the issuing fees.

51. MM was instructed to settle the 'brief details of claim' for Claim Forms against BN, RBS and Tweeds (construction consultants). As against BN the company and personal claims were in separate Claim Forms. The personal claims were for breach of contract/negligence 'in relation to a personal guarantee' signed by each on 20.5.03. The company claim was drafted in much broader terms : *"(a) ... as solicitor for* [BPC] *in relation to various agreements entered into by* [BPC] *in between* (sic) *1999 and 2004 and, in particular, in relation to an agreement dated 18 July 2001...and referred to as..."* [the Deed]; and (b) *'...as solicitor for* [BPC] *in relation to finance arrangements and/or agreements between* [BPC] *and* [RBS] *between 1999 and 2004 and, in particular, in relation to the funds loaned to* [BPC] *by* [RBS] *by way of increased overdraft on or about 20 May 2003 and thereafter.*'

52. These four Claim Forms were issued on 18.5.09. On 19.5.09 Mr C issued a Claim Form against RBS and the Receivers which he had drafted personally, i.e. without the involvement of WH or MM. As elaborated in his Chronology, this alleged fraud by *'...colluding with each other to evade the precise terms of* [the Deed]'.

53. On 17.6.09 Mr and Mrs C met WH (Sarah Perry) at their offices. The attendance note records that Mr C reiterated his disagreement with the advice that the clause 10 provision was not mandatory. As to funding, he did not want any work done on his matters unless it was absolutely necessary. He was advised that if he wished the four claims that had been issued to be pursued it was absolutely necessary that MM was instructed within the next few weeks to provide advice and to draft the POC. Such advice would also be required for the purposes of third-party funding.

54. Under the heading "Claims to be Progressed" the note recorded that *"In May 2003, Mr C is adamant that* [BN were] *retained for funding purposes and to advise* [BPC] *generally. Mr C is adamant that* [BN] *were negligent in that they did not ask RBS how the project would be funded. Sarah Perry is of the opinion that* [BN] *have not been negligent as Mr and Mrs* [C] *(at the time), i.e. May 2003 were not prepared to let the hotel go or lose control of the project and accordingly they had no choice but to sign the personal guarantee. Accordingly, even if* [BN] *had given negligent advice, it is likely that Mr and Mrs C would still have proceeded with executing the personal guarantee and accordingly, a claim for professional negligence is unlikely to succeed. Mr* [C] *would not accept this advice...'*

55. The note then records Mr C's opinion that BN should have requested further documentation from RBS before advising that Mr and Mrs C could execute the personal guarantee; and that on 20.5.03 Mr Lopeman was being asked to advise not only in relation to the guarantee but also in relation to whether funding was available to the company. Mr C explained that BN was advising Mr and Mrs C and BPC on that date *'...and accordingly, the Company may have an action against them for negligence as at this date.'* The note continued : *'There is nothing within the papers to*

suggest that [BPC] *instructed* [BN] *at this stage. In any event, if they had, there would have been a clear conflict of interest.'* Under 'Instructions – How to Proceed' the note included '[MM] *to provide an advice. Likely costs to be in between £7,500-£12,000.'* The note concluded with Mr and Mrs C's confirmation that they would now decide as to which claims they wished to proceed with.

56. By letter dated 24.6.09 WH confirmed that in respect of the company claim against BN there were substantial hurdles as the terms of the retainer and the instructions given to BN in May 2003 were '*...at best ambiguous*'; so that it was highly unlikely that ATE or third party funding would be available. Similar pessimistic advice was given in respect of the personal claims. The letter concluded by requiring clear instructions as to which claims were to be served, together with funds, so that MM could advise on prospects of success and draft Particulars of Claim.

57. Having received such instructions and funds from the Claimants in July/August 2009, WH prepared draft Instructions to MM and on 28.8.09 sent these to Mr C with a request to approve or amend their content.

58. On 2.9.09 Mr C responded with amendments. The draft instructions were duly revised and sent to MM on 2.9.09. They asked him to provide an advice on the prospects and value of the claims "*detailed below*" in order to approach third-party funders; and that if the prospects of success exceeded 60% to draft POC accordingly.

59. As to the company claim against BN, MM was instructed that the claim in respect of advice in 2001 concerning the Deed was not to be pursued. This left the claim that "*2.* [BN] *failed to give appropriate legal advice on 20 May 2003 to prevent BPC from receivership and thereby forfeiting the development.*" The Instructions cross-referred to Mr C's Chronology (pages 113/114). Those pages identified the relevant claim by BPC against BN as the failure to give appropriate legal advice on 20 May 2003 (paragraph 189.1.3) and stated that the appropriate advice should have been to pursue the default strategy. This was repeated in WH's Instructions (p.6).

60. As to the individual claims, these were identified as the failures (i) to advise Mr Mrs C of the implications of entering the guarantees on 20.5.03 (ii) to advise Mrs C to receive independent legal advice (iii) to advise them both of the implications of clause 3.1/3.2.

61. In a conference call on 8.9.09 MM repeated his view that the non-recourse argument was "*idiotic*"; and that at present (pending the repossession proceedings and issues to be determined therein) he had real problems in advising that Mr and Mrs C and/or BPC had prospects of success on their claims at 60% or above.

62. MM then drafted POC. Mr C commented on these by letter dated 10.9.09. In these comments he repeated his contention that the advice should have been to default; and that BPC's liability to RBS would have been frozen at the sum due on 20.5.03.

63. MM's final POC in respect of BPC's claim against BN (11.9.09) duly included the claim as instructed : see in particular paras. 34.3-5 and 36. The focus was on the events of 20.5.03. Likewise the POC for Mr and Mrs C's personal claim concerned the advice given/not given on that day.

64. On 1.10.09 the BN actions were stayed by consent pending the outcome of the possession proceedings.

65. The RBS possession claim was heard by David Richards J over 10 days in October 2009. In his judgment handed down on 28.1.10 the Judge upheld Mrs C's defence based on the lack of independent legal advice but otherwise rejected all the defences to the claim. He found Mr C to be an unsatisfactory witness in various respects. He rejected the non-recourse argument and the associated defence of 'sham'. In consequence he upheld the claim for possession of the matrimonial home. The order was executed on 15.7.10.

66. In the meantime, on 28.5.10 WH's retainer was terminated for lack of funds. Mr and Mrs C (on their own behalf and on behalf of BPC) thereafter acted in person against BN.

67. On 14.11.11 they applied to amend the POC in both actions against BN. The amendments included an allegation of negligence in respect of the 2001 date. However the critical new allegation was that BN had been negligent in not advising them of the alleged option of entering what was described as an "Exit Route Agreement" ('ERA') with RBS.

68. The proposed pleading in the company claim described the ERA in these terms: "- [BPC] *should give a guarantee to RBS indemnifying all the reasonable cost of to* (sic) *take over and completing the Development by step in via its nominee under clause 10 of the Deed of Warranty*

- *RBS should step in under clause 10 on 20 May 2003 or immediately thereafter*
- *both Mr and Mrs* [C] *should give Further Personal Guarantees limited to £1.65 million to BPC*
- *RBS should give reasonable time to* [BPC] *after completion of the Development (and completion of the final certified accounts by the Claimant's Architect, Michael Hyde & Associates), to refinance an exit from the relationship with RBS."* (para. 66).

69. The proposed amendment continued that that there were no compelling reasons for either party not to enter into such an agreement and that they would have done so *"on 20 May 2003 or immediately thereafter"* (para.67). In the present action this is described by the Claimants as the consequence of their 'alignment of interest' with RBS. RBS would have stepped in by its nominee SPV on 20.5.03 (or immediately thereafter) and completed the development on 16.2.04 (para.67.1).

70. The new allegation continued that this advice should have been given by BN *'on 25 June 2003 (or thereafter) and on 7 July 2003 (and thereafter)'* (para.78.7). It then deleted the previous allegation that BPC should have been advised on 20.5.03 to default and trigger the RBS obligation to step in under clause 9, i.e. the default strategy claim (para.78.7).

71. On 15.11.11 Master Eyre considered the application on a 'without notice' basis and gave permission to amend, but with leave to BN to apply to set this aside. On 8.3.12

HHJ Thornton QC upheld the grant of permission against objections that they were at least arguably time-barred. He held that the Claimants did not have the relevant "knowledge" (Limitation Act s.14A) until they had read and digested the judgment of David Richards J in January 2010.

72. On 5.12.13 the Court of Appeal allowed BN's appeal on the bases that (i) the new claim had to be measured against the POC rather than the wide terms of the original Claim Form and (ii) the Claimants arguably had 'knowledge' of the new claim more than 3 years before the date when permission to amend was first given by the Master (i.e. by 15.11.08 at the latest), given (a) their advice from Counsel in the possession proceedings as to the effect of the contractual arrangements and (b) their own knowledge of what advice Mr Lopeman had/had not given them.

73. On 6.6.14 an application to strike out the remaining claim was unsuccessful (Akenhead J). BN contended that BPC's case on causation had no real prospects of success because it would have gone into receivership in any event. Although the Judge considered the case on causation to be weak, in the absence of evidence from RBS or Costain as to what they would or might have done in an alternative factual scenario he would not dismiss the case.

74. In a witness statement made on 22.10.14 in the continuing BN action, Mr C stated *"I confirm that I did not consult* [BN] *or Mr* [Lopeman] *on funding matters to the period leading up to 20 May 2003. The funding matters were commercial matters (and not legal matters) between RBS and BPC. It was my strict practice since I started working with* [BN or Mr Lopeman] *from the year 1990, not to seek or expect commercial advice from* [them]. *This is because of my firm belief that as a businessman I should be able to make my own decisions on commercial matters without any advice from* [them]. *However I would have contacted* [Mr Lopeman] *prior to 20 May 2003, if RBS had approved the so-called Third Finance Agreement (in order to execute the further guarantee in return for the so-called Thrd Finance Agreement) prior to 20 May 2003."*

75. On 20.1.15 the claims against BN were settled by Tomlin Order, in terms whereby Mr and Mrs C were paid a net sum of £371,875.

76. This action was commenced by Claim Form dated 22.12.15. The POC were served on 5.1.16.

The pleaded allegations

77. As to the personal claims, the POC says that the underlying negligence of BN towards Mr and Mrs C was on 20.5.03 'and thereafter' (paras.28.1/2); and that they should have (i) been given proper independent advice in relation to the guarantees (paras.28.1/28.2); (ii) advised of the clause 3.1/3.2 notice provision (28.3); (iii) advised not to allow an increased overdraft facility (28.5); (iv) advised not to pay Costain on the 20.5.03 but to arrange a meeting with RBS which would have led to the ERA (28.4); (v) reconsidered their advice after 20.5.03 (para.28.2). Furthermore they should have advised Mr and Mrs C in the same terms and at the same time as advising BPC (paras.28.6-10).

78. As to the company's claim, the alleged underlying negligence of BN to BPC is that BN should have advised at the meeting on 25.6.03 "or at any material time before 28.8.03" (para. 28.6) that (i) it was not in RBS' interest to appoint Receivers (ii) the step in provisions were mandatory (iii) it was not clear that RBS was entitled to indemnity from BPC if it had to step in (paras. 28.6.3; 28.7.4; 29.5.4); (iv) it was imperative for BPC to avoid receivership (28.7);(v) BPC's bargaining position was strong vis a vis RBS (28.8; 28.10); (vi) it would be reasonable to accept the requirement of RBS to appoint a nominee Director as this person would be bound to act in the interests of the company; (vii) it should enter the ERA (28.6.4); (viii) it was wrongly advised on 26.6.03 to appoint an insolvency practitioner; (ix) it was wrongly advised that the step in provisions were not mandatory (para.28.11).

79. As to causation : Had this been done the ERA would have been entered; the appointment of receivers avoided (or that there was a substantial chance to that effect); the development completed; and ownership of the Hotel would have been retained. The POC annexes a very lengthy Schedule of alleged loss and damage running to 53 pages and claims damages in excess of £50m. These are based on various scenarios but their underlying premise is the avoidance of receivership. The personal claims comprise loss of matrimonial home (£2.95m), loss of salaries from BPC (£1.8m), loss of pension contributions and enhanced pension funds (£3.6m)

80. As against WH, the POC alleges that they were negligent in failing to obtain advice from or to instruct a specialist construction/commercial property lawyer or barrister (46.1/46.2); to ensure that the Claim Forms were drafted sufficiently broadly pending full investigation of the claims (46.3; 46.4, 46.5, 46.10) so as to avoid the sort of limitation problems which occurred; to consider adequately or at all the advice given/not given by BN after 20.5.03 (46.6); and to conclude and advise that BN between May and August 2003 should have identified the alignment of interest between BPC and RBS and advised them to bargain for and achieve the ERA (46.6-46.9).

81. WH submits that in essence these allegations all lead or amount to the same thing namely that the Claimants should have been advised by WH that there was an arguable claim that BN should have identified and advised the ERA strategy between 20.5.03 and August 2003. I understood Mr Howarth essentially to agree with this; and in any event that is my interpretation of the claim.

82. As against MM, the allegations are in similar terms, namely : failure to advise the need for advice from a specialist (47.9); drafting Claim Forms too narrowly (47.1-3, 47.8); failure to consider the advice given between 20.5.03 and 23.8.03 (47.4-7); failure to identify a failure by BN to identify the alignment of interest etc and to advise in terms which would have led to the ERA (47.4-6). As with the claim against WH, these allegations all amount or lead to the allegation concerning identification of the ERA.

The law

83. As to the extent of the duty to advise, Jackson LJ has summarised the relevant principles for solicitors as follows. Albeit the pleaded claim is in tort, it is not disputed that similar principles apply to a barrister.

"(1) A solicitor's contractual duty is to carry out tasks which the client has instructed and the solicitor has agreed to undertake;

(2) it is implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out;

(3) in determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client;

(4) in relation to [that], it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client;

(5) the solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. As a matter of good practice solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept any such restriction was agreed." (Minkin v. Landsberg [2015] EWCA Civ 1152 at para.38).

84. The standard of care of course entails that a claimant has to show that the alleged error was one which no reasonably competent member of the relevant profession would have made: see e.g. Hall v. Simons [2002] AC 615 per Lord Hobhouse at p.737.

85. Thus, as to the alleged failure to identify a claim, the question is whether the possibility of such a claim should have occurred to any reasonably competent barrister or solicitor (respectively) at the time: see e.g. Pritchard Joyce and Hinds v. Batcup [2009] EWCA Civ 369 per Sullivan LJ at para. 94; also Sedley LJ : *"The law does not, however, demand either omniscience or infallibility in lawyers any more than it does in doctors or architects. The law's standard of reasonable competence means not only that there will be errors which are not compensable but that legal advisers are not expected to divine every claim that a client may theoretically have."* (para.103).

86. Even if a point might be characterised as arguable a barrister is not bound to plead it if in his judgment it is likely to fail : Shirley v. D.J. Freeman [2001] All ER (D) 145, citing McFarlane v Wilkinson [1997] PNLR 578.

MM submissions

87. Mr Onslow QC submits that the relevant instructions to MM were in three stages: the conference/consultation; the drafting of Claim Forms; and the drafting of POC. He submits that the claim as pleaded (and evidenced) sets out no claim against MM which has a realistic prospect of success. Thus the evidence provides no realistic basis for alleging that no reasonably competent barrister in MM's position would have failed to identify an arguable claim that BN should have advised in a way which would have led to the ERA. He makes this submission both by reference to the

Instructions which MM received, i.e. the ambit of his retainer, and to the implausibility of such an underlying claim.

88. As to the first conference (7.5.09) the Instructions sought advice in respect of a possible claim by BPC against BM in respect of advice given before the Deed was entered in 2001. The Instructions cross-referred to Mr C's Chronology which identified a claim that BPC should have been advised on 20.5.03 to pursue the default strategy claim. As to the personal claim, the Instructions related solely to the advice on 20.5.03 concerning entering the further guarantee. These Instructions defined the retainer. There was no instruction to 'advise generally'.

89. As to the conference itself, Mr Onslow acknowledges that the discussion ranged more widely but submits that there was nothing which widened the retainer or could or should arguably have triggered identification of an ERA claim. MM was not instructed at the end of the conference to pursue a train of inquiry as to other possible bases of claim. Furthermore MM made clear his view on the 'non-recourse argument'. It is not arguable that that view was unreasonable; and notwithstanding that the argument was in fact pursued in the defence to the possession proceedings.

90. As to the consultation (12.5.09) there was again no basis to contend that there was a change in the terms of MM's retainer or that it should have somehow triggered the identification of a claim based on the ERA.

91. The next stage was the Instructions to draft Claim Forms. MM carried these out. There was no basis to suggest that they should have been drafted any wider than they were.

92. The final stage concerned the drafting of the POC. These were drafted in accord with the Instructions as amended and approved by Mr C.

93. In any event Mr Onslow submits that, whatever the terms of the retainer, there is no arguable claim that a competent barrister should have identified the ERA as an arguable basis of claim against BN. The ERA is a construct developed by the Claimants in 2011 and quite at odds with the position which Mr C was presenting in 2009.

94. In particular the ERA assumes a consensual approach based on the supposed alignment of interest; whereas the previous default strategy involved hostile action. Equally, the new allegation that RBS would have entered such an agreement in preference to appointing Receivers, was quite contrary to the Claimants' case in 2009 that RBS had conspired with the Receivers in order to achieve that object.

95. Mr Onslow also pointed to the distinction between the ERA as pleaded in the unsuccessful application to amend and as pleaded in this action. This further demonstrated the continuing difficulty of the Claimants in identifying the advice which it is said no reasonably competent lawyer could have failed to provide.

96. In any event there was no arguable case that RBS would or might have entered such an agreement and acted otherwise than by appointing Receivers. Whilst Akenhead J did not strike out the claim on causation, that was a decision (i) in respect of the previous default strategy claim and (ii) on the basis of uncertainty as to whether RBS

and/or Costain might give evidence in the action against BN. No such evidence had emerged in that action and there was no reason to believe that this position would change.

WH submissions

97. As to the ambit of WH's retainer, Mr Quiney QC essentially adopted Mr Onslow's submissions in respect of MM, as equally applicable to WH.

98. As to BN's retainer, he emphasised the ad hoc nature of the Claimants' requests for advice (notably on 20.5.03; also to attend the meeting on 25.6.03). This was supported by Mr C's own letter to BN dated 23.2.09 which stated that following work carried out by BN/Mr Lopeman in 1998-2001 *"Thereafter,* [BN] *was carrying out work for* [BPC] *on an adhoc basis in response to the specific instructions from me."* He also pointed to the absence of any requirement for commercial advice, as acknowledged in Mr C's witness statement in the BN action. This accorded with Jackson LJ's observations in point (4) of his summary in Minkin.

99. Furthermore BPC was by August 2003 seeking advice from the specialist department of another firm (Pannone LLP).

100. Mr Quiney then developed the arguments on the implausibility of the ERA claim. By reference to the factors which were alleged to underpin the Claimants' new case, he submitted in particular that : (i) BPC/Mr and Mrs C were not in a 'strong bargaining position' with RBS at any time in May-August 2003. On the contrary, all the evidence indicated that they were in a desperate position : see e.g. the Chronology's repeated references to 'economic duress'; (ii) the relationship with RBS had evidently broken down : see e.g. RBS' internal e-mails in August and the reference to Mr C requiring an indemnity from the proposed nominee Director; (iii) RBS knew the disadvantages of receivership but ultimately considered that it had become the only option; (iv) RBS took that course in the knowledge that the clause 9 step-in provision was mandatory; (v) there is no evidence that RBS was troubled by the non-recourse argument when it arose in the possession proceedings; and no reason to think that it would have been if presented with a proposal for ERA : see also the evidence from the Receivers recited by David Richards J[1]; (vi) there was no 'alignment of interest' with BPC.

101. This all supported the proposition that there was no arguable case on breach or causation.

102. As to the personal claims Mr Quiney submitted that, in any event, the claims of loss (extending to loss of salary, pensions etc) went beyond any conceivable scope of duty.

103. He also submitted that the Schedule of loss and damage was a confusing and unsatisfactory document, but I did not understand him to press that as an independent basis for striking out or dismissing the claims.

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[1] *"More vividly still,* [Mr Dawson] *he said that the company was never going to get a free lunch and have its hotel competed at someone else's expense."* (judgment para.73).

The Claimants' submissions

104. In his witness statement on their behalf, the Claimants' solicitor Mr Litherland says that the best way of putting the claim against BN was *"...at all times staring the defendants in the face"*. Had WH/MM properly reviewed and considered the material provided to them by Mr Chandra, and consulted with appropriate specialists in construction and commercial property development, the ERA claim against BN would have been *'readily identified.'*; and that *'even a cursory review'* of the BN file would have revealed that the interests of the claimants and RBS were closely aligned; and that this had been completely overlooked by BN in the period May to August 2003.

105. As to MM, Mr Litherland criticises the choice of Counsel but in any event says that MM was *'clearly being asked to advise generally'*. He points to the fact that WH (Sarah Perry) was advising of the difficulties with the two identified claims on the basis that Mr and Mrs C and had no choice but to sign the second personal guarantees in order to secure the emergency overdraft funding; and that this was a further reason why MM and WH should have looked more widely and identified another basis of claim. He cites MK's identification of the clause 3.1/3.2 argument as an example of the need to identify new ways of presenting a claim to the lay client. He notes that the Court of Appeal did not suggest that the claims were unarguable; and points to its finding that the Claimants, having the benefit of advice from Counsel, arguably had 'knowledge' by at least November 2008. If so, it is equally arguable WH/MM should have identified such a claim.

106. As a general point Mr Litherland and Mr Howarth submit that it is for the legal adviser, not the client, to identify solutions. That is why they are instructed and why the advice needs to account of the whole commercial situation.

107. Mr Howarth submitted that, although Mr C's Chronology did not go into detail beyond 20.5.03, that was understandable and did not excuse the Defendants from failing to obtain better instructions. They should have been struck by three particular matters concerning advice from WH/Mr Lopeman which '*leaped from the page*' and which demonstrated incompetent advice and therefore the need to investigate further. These were (i) the evident absence of 'independent' advice to Mrs C as she and her husband travelled in their car (ii) the failure to revisit the papers at more leisure, i.e. after the hurried circumstances of 20.5.03 and thereby to identify clause 3.1/3.2; and (ii) the advice that the clause 9 step-in provision was not mandatory.

108. Furthermore MM's comments at the conference (7.5.09) indicated the need and intention to review all the papers at greater leisure and to formulate an appropriate claim. The need to embark on a train of inquiry should likewise have been triggered by e.g. MM's comment as to the '*arguable point when the matter went wrong*': and the exchange between Mr C and MK as to RBS' position being weakened by the receivership : see paragraphs 40 and 47 above.

109. Mr Howarth also pointed to the attendance note of 17.6.09 which recorded that Mr C was adamant that BN were retained for funding purposes in May 2003. This immediately raised the question of what advice they gave and what advice should have been given.

110. As to Mr C's statement in 2014 that he was not seeking commercial advice, there was no bright line between commercial and legal advice. It was not sufficient for Mr Lopeman to conclude that he had discharged his duties in the hurried circumstances of 20.5.03. He was advising generally on the funding and should have gone back to the matter. He attended a meeting on 25.6.03 and his letter of the following day showed that BN was still advising on the practicalities of funding and in a position to devise a solution. Even as late as 19.8.03 RBS were still reluctant to appoint Receivers.

111. All in all, the evidence showed a properly arguable case that MM/WH should have identified that BN had failed to get a grip, pull together all the points, identify the ERA and present it to RBS as a reasoned and cogent alternative to their reluctant course of receivership.

112. As to the chances of RBS entering an ERA, Mr Howarth points to the decision of Akenhead J in refusing to strike out the case on causation. This is an area where there could be further evidence from RBS, albeit none has yet been sought or obtained. As with any counterfactual, RBS' actual conduct does not determine how it would have responded if presented with the ERA.

Conclusions on claim against MM

113. The claims of BPC and Mr and Mrs C are aligned in this action and I shall take them together.

114. Applying the principles summarised by Jackson LJ in Minkin the questions are whether there are real prospects of a successful argument that :
(i) MM was instructed to carry out the task of identifying further claims to be made against BN, alternatively that this task was incidental to his instructions ('Instructions');
(ii) if the answer is yes, that MM should have identified the ERA as a basis of claim BN ('Identification').

Instructions

115. In my judgment there is no arguable case to this effect.

116. As to the conference on 7.5.09, the Instructions did not ask MM, whether expressly or by necessary implication, to advise generally. On the contrary they sought advice on specific claims. As to a claim by BPC the instructions identified the claims as relating to the advice given (i) in 2001, prior to the execution of the Deed (ii) on 20.5.03 (not after or before that date), to the specific effect that Mr Lopeman should have identified the default strategy. I see no arguable claim that those Instructions required MM to consider other bases of claim by BPC.

117. As to the personal claim, the Instructions were clearly limited to the question of the advice given to Mr and Mrs C by Mr Lopeman on 20.5.03 on the implications of entering the further personal guarantee. I do not accept that there is an arguable case that MM should have identified an obligation by Mr Lopeman to review that advice after 20.5.03; and see no basis for such an obligation.

118. As to the conference itself, I do not think it arguable that anything was said which either demonstrates that MM had a wider understanding of his Instructions or that it gave rise to a further instruction to advise on a wider basis. In particular MM's reference to the need to read all the papers and 'formulate an argument' cannot have that effect. In any event it was clear that any further instructions were subject to funding, which was a major and unresolved problem.

119. As to the consultation on 12.5.09, I likewise see no arguable basis to suggest that anything said that on that occasion demonstrates any wider existing or future retainer of MM. The attendance note demonstrates that the focus was, in each case, on the advice given on 20.5.03. I do not accept that there is any significance in the fact that MK raised the question of clause 3.1/3.2 of the guarantee. That was something he had evidently noted in the course of preparation for the consultation and which he drew to his clients' attention as a possible argument. It does not follow that this reflects any wider scope of instructions for him or MM. At the end of the consultation it was left that WH would discuss with the Claimants as to how they wished to proceed in the light of the advice.

120. Following those discussions MM was instructed, funds having been provided for that specific purpose, to draft the Claim Forms. The draft reflected his Instructions. The Claim Form on behalf of BPC was in broad terms. As the POC in this action acknowledges, those terms would have been wide enough to embrace the ERA claim (assuming it had occurred to anyone), until it was narrowed by the POC as served. The Claim Form for the personal claim again reflected the Instructions.

121. As to the POC, the Instructions were specific. The company claim was to be drafted in respect of advice which should have been given on 20.5.03 (i.e. in the circumstances when Mr and Mrs C were calling from their car) and related to the default strategy.

122. As to the personal claims, these again concerned the advice that should have been given on 20.5.03 as to the implications of entering the further guarantees, the absence of independent advice for Mrs C and the clause 3.1 point which MK had noted. MM duly prepared the POC in accordance with those instructions. In my view it is quite unarguable anything in those Instructions required MM to draft the POC on any other basis.

123. Equally I consider it quite impossible to argue that MM should have devised this possible argument as an 'incident' to his Instructions. The proposed bases of claim, which no one had suggested, were in no way incident to the instructions which he had been given. On the contrary they involved a complaint which was quite at odds with the complaint which he was being asked to draft. That allegation involved the hostile act of default. The ERA approach was consensual and dependent on a supposed alignment of interests.

124. The about-turn in Mr C's approach to the matter is further demonstrated by the Claim Form which he prepared alleging fraud against RBS and the Receivers. In that Claim Form he alleged, as in his Chronology, that they had colluded with each other to evade the terms of the Deed, i.e. together acted against BPC's interests.

125. Mr Howarth stressed that the task of a lawyer is not just to follow instructions but to look for solutions. In my view that is a false dichotomy. However even if correct, it provides no support for the contention that on the facts of the case it is arguable that no competent lawyer could have failed to devise the ERA for which the Claimants belatedly contend. The Claimants' own difficulties in formulating their new case further demonstrate the point.

126. Thus I do not accept Mr Howarth's various submissions to the effect that there is an arguable case that the information provided to MM should have set him on a train of enquiry to identify and formulate another claim.

Identification

127. In any event, I consider it unarguable that MM should or would thereby have identified the failure in 2003 to identify the ERA as a tenable basis of claim against BN.

128. For the reasons elaborated by Mr Onslow and Mr Quiney, the identification of such an argument was flatly at odds with (i) the respective positions of the Claimants and RBS in 2003 and (ii) the Claimants' presentation of their case to MM and WH in 2009.

129. Furthermore Mr C's witness statement (22.10.14) in the BN action and letter of 23.2.09 are quite inconsistent with the proposition that BN had a continuing retainer (after 20.5.03) to review the position or that the Claimants were seeking or in need of commercial advice : see Jackson LJ in Minkin.

130. It follows that I do not accept Mr Howarth's submission that it is arguable that a train of enquiry would have led to the identification of the ERA claim; let alone Mr Litherland's assertion that this was '*staring the defendants in the face*'.

131. Equally, I do not consider that the decision of the Court of Appeal gives the Claimants any help. The issues on the appeal did not concern the merits of the proposed claim but (i) whether it was a new claim and, if so, (ii) whether it was arguably time-barred. The Court held that for the purpose of s.14A of the Limitation Act 1980 it was arguable that the Claimants had the relevant 'knowledge' from their legal advisers before November 2008. That provides no support for the argument that MM (or WH), in the light of his instructions and the information provided to them, should have identified the ERA.

Loss of a chance in underlying claim

132. I accept of course that the fact that a third party acted in one way does not necessarily determine how it would have acted in other hypothetical circumstances. I take account of the refusal of Akenhead J to strike out the plea of causation. However that decision concerned a claim based on the default strategy claim, not the ERA, and there is still no evidence from RBS or Costain. In the context of a new claim based on a consensual approach and the supposed alignment of interest, such evidence would be all the more important to the success of the claim.

133. In any event, I consider the proposition that there was an alignment of interest to be untenable. When coupled with the absence of any indication that such evidence will be forthcoming, I see no arguable basis for the case that there was a substantial (rather than speculative) prospect that RBS would have entered the ERA rather than appoint Receivers. Accordingly I would dismiss the claim on this basis as well.

Quantum

134. As to quantum, the Schedule is an unsatisfactory document and a reconstruction which is difficult to follow. However I would not have dismissed the claims on that ground alone.

Conclusion on claim against WH

135. I turn to the claim against WH. In my judgment its position is no different from that of MM. On the face of the pleadings the Claimants draw no substantive distinction between the alleged retainer of WH and MM : see the comparison of the allegations in POC paras.30 and 31, considered above. The standard of care is then expressed in similar terms (paras. 32 and 33). With this identity of retainer the claim against WH is in principle no better than that against MM.

136. Likewise, the allegation of failure to appreciate the ERA argument is made against "the Defendants" (paras. 38 to 41) and WH is said to be liable for approving the draft statements of case prepared by MM: see paras. 41, 46.3, 46.4, 46.5, 46.6, 46.7., 46.10.

137. As to the allegation that it was negligent to instruct MM and that there should have been a specialist construction and/or commercial property lawyer, I see no arguable basis for doubting MM's suitability; but in any event the allegation amounts or leads to the same point that both Defendants should have identified the ERA claim.

138. Since there is no criticism of the instructions which were given by WH to MM these must equally reflect their instructions from the Claimants. In these circumstances they are in principle in no different position to MM.

139. Mr Howarth pointed to the statement made by Mr C in the attendance (not involving MM) on 17.6.09. Under "Claims to be progressed" this stated *"In May 2003, Mr C is adamant that* [BN were] *retained for funding purposes and to advise* [BPC] *generally. Mr C is adamant that* [BN] *were negligent in that they did not ask RBS how the project would be funded"*. In my view this takes matters no further. The claim which the Claimants wished to pursue was as set out in the Instructions to Counsel to draft the POC.

140. As to the meeting on 25.6.03, there is nothing in the circumstances of that meeting which should arguably have triggered a potential claim on the ERA basis. This was ad hoc advice which Mr C acknowledged was the basis on which he retained WH from time to time.

141. In all the circumstances I see no basis for distinguishing the position of WH from MM.

Conclusion

142. Returning to the principles set out in Easyair, I remind myself about mini-trials and the prospect of further evidence. I am satisfied that my analysis and conclusions do not involve a mini-trial and that there is no reason to expect any further relevant evidence. In my judgment these claims have no real prospect of success and should be dismissed.