Neutral Citation Number: [2015] EWHC 2015 (TCC)

Case No: HT-20113-00037

**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 16th February 2105

**Before** :

Deputy High Court Judge Stephen Furst QC

- - - - - - - - - - - - - - - - - - - - -

**Between :**

|  |  |
| --- | --- |
|  **Simon N Hodgson**  | **Claimant**  |
|  **- and -**  |  |
|  **Richard Wilson Solicitors Ltd** **(Formerly Richard Wilson & Co)**  | **Defendant**  |

Allen Dyer for the Claimant

Rupert Higgins for the Defendant instructed by Reynolds Colman Bradley LLP

Hearing dates:

27th and 28th January 2015

Introduction

1. The Claimant, Simon Hodgson, brings this action against the Defendant, Richard Wilson Solicitors Limited (formerly Richard Wilson & Co), a firm of solicitors, alleging that they failed to prepare and issue proceedings against three entities or failed to advise him to issue proceedings against those three entities. In consequence, so he contends, he lost the opportunity to bring proceedings against those entities by reason of the expiry of the limitation period, and therefore lost the chance to recover damages from them. The three entities, which I refer to below as “the Third Parties” are John Falconer Associates (“Falconers”), a firm of architects, the Rhodes Partnership (“Rhodes”), a stonework specialist, and CP Bigwood or Bigwoods

(“Bigwoods”), a firm of Chartered Surveyors.

1. By an order made on 30th July 2014 a trial of the following preliminary issue was ordered:

*“Whether the Claimant instructed the Defendant between November 2007 and May 2008 to issue proceedings against John Falconer Associates and the Rhodes Partnership and C P Bigwood and/or Bigwoods, or whether the Defendant was under a duty during that period to advise the Claimant to issue proceedings against any or all of those parties or to prepare and issue proceedings in the Claimant’s name against any or all of those parties.”*

1. The Claimant now accepts that there is no evidence that he instructed the Defendant to issue such proceedings and that if the Defendant was under no duty to advise him to issue such proceedings against any or all of those Third Parties, the Defendant cannot have come under a duty to prepare and issue proceedings in the Claimant’s name. Accordingly the preliminary issue is now limited to the following question:

*“Whether the Defendant was under a duty between November 2007 and May 2008 to advise the Claimant to issue proceedings against any or all of John Falconer Associates and the Rhodes Partnership and C P Bigwood and/or*

*Bigwoods.”*

1. The action arises out the construction of Lentune House in Church Brampton,

Northampton. In short Mr Hodgson purchased an existing bungalow on the site in Church Brampton in 1997 with a view to demolishing the bungalow and redeveloping the site to provide two separate dwellings. Work on the first property started in July 1999 and was completed in January 2001. It would seem there were no problems with this property. Work on Lentune House started in August 2000 but soon ran into difficulties, the walls suffering extensive frost damage. Mr Hodgson contends there were other serious defects. Thus Mr Hodgson’s complaint is that had he been advised to issue proceedings against the Third Parties, he would have done so within the limitation period and had that occurred he would have been able to recover some or all of his losses arising out of the defective work. The Claimant pleads his loss against Falconers and Rhodes as being in the region of £215,000 and against Bigwoods as being in the region of £872,000.

1. For the purpose of this preliminary issue, and for that purpose only, it has to be assumed that Mr Hodgson had causes of action against the Third Parties as at November 2007 but by reason of the expiry of the limitation period, those causes of action became statute barred shortly after May 2008.

1. Mr Richard Apley of Richard Wilson Solicitors Ltd was the solicitor who at all times dealt with this matter. He was originally instructed by Mr Hodgson in January 2005 but ceased to act in May 2008 by reason of a conflict of interest. The preliminary issue is however only concerned with the period from November 2007 since this is six years prior to the issue of these proceedings.

1. Whilst the preliminary issue is only concerned therefore with a period of some seven months, it is necessary to set out some of the background. It is complex and involves a large number of people and organisations.

The Facts

1. Mr Hodgson engaged P. A. Groves (“Groves”) to build Lentune House. In about December 2000 Mr Hodgson was sufficiently concerned about possible frost damage to the newly constructed walls to engage Bigwoods to report on the defects. Its report, produced in February 2002, valued the cost of remedying the defects in the sum of £23,000. This, Mr Hodgson maintains, was a gross underestimate bearing in mind its subsequent report, produced in September 2006, valuing the cost of remedying the defects at £530,000. Notwithstanding the defects Mr Hodgson reengaged Groves in June 2001 under a JCT Minor Works Agreement, apparently on Falconers’ recommendation. Falconers administered the JCT Agreement and also undertook inspections of the works. Rhodes were also appointed and produced a report in December 2001 on the stonework and roof. The National House Building Council (“NHBC”) inspected the property and initially advised that it should be demolished but subsequently a scheme of repairs was agreed and apparently included as part of the works under the JCT Agreement.

1. The complaints made against Falconers, Rhodes and Bigwoods, as set out in the

Particulars of Claim, are as follows:

*“5. During their purported administration of the contract Falconers acted in breach of contract and/or negligently in that they:*

* 1. *Overvalued the works;*

* 1. *Failed to advise Groves to protect the works and the roof coverings from in particular frost damage;*

* 1. *Failed to issue any certificate after October 2001;*

* 1. *Failed to advise the Claimant that in respect of any certificate issued he could serve a withholding notice in respect of current defects and defects in works valued in previous certificates;*

* 1. *Advised the Claimant to determine the JCT contract with Groves;*

* 1. *Failed to advise the Claimant that to determine the JCT contract would prejudice the operation of the warranty under Part 1 of the National House Building Council ("NHBC'') policy which requires the NHBC in the event of the insolvency of the builder to pay the costs of alternatively to arrange for the completion of outstanding works. ·*

1. *In December 2001 Rhodes inspected and reported upon the stonework and roof works of the properties which inspection was carried out and report produced in breach of contract and/or negligently in that:*

* 1. *Wrongly advised that frost-damaged lime mortar would set;*

* 1. *Failed to observe and/or to report on frost damage which had been covered up by*

*Groves;*

* 1. *Failed to observe and/or to report on an incorrectly laid mortar bed thickness;*

* 1. *Failed to observe and/or to report on the use of wall ties unsuited to the method of construction and incorrectly applied by Groves:*

* 1. *Failed to observe and/or to report on the defective roof covering and lead work;*

* 1. *Failed to advise the Claimant that in respect of any certificate issued he could serve a withholding notice in respect of current defects and defects in works valued in previous certificates.*

1. *Rhodes subsequently advised and supervised the carrying out of remedial works involving face pointing of the external walls, based upon the incorrect advice which it had given as set out in paragraph 6.1 above. Those remedial works failed.*

1. *In December 2001 the Claimant appointed C P Bigwood and/or Bigwoods ("Bigwoods") as surveyors to report on the defects at the properties. It was an implied term of Bigwoods' appointment that they would exercise reasonable care and skill in the performance of their surveying duties. Further Bigwoods owed the Claimant a duty to like effect.*

1. *In January 2002 Bigwoods produced a report grossly undervaluing the defects existing in the properties in the sum of £23,000. The report was prepared by Bigwoods in breach of contract and/or negligently in that they failed to observe and/or to report upon the following detects:*

* 1. *Inadequate Radon precautions;*

* 1. *Defective Radon cavity installation:*

* 1. *Excess fill under the ground-bearing slab;*

* 1. *Disintegrating mortar;*

* 1. *Undersized lintels;*

* 1. *Inadequate cavity fill;*

* 1. *Wall ties unsuited to the method of construction and incorrectly applied;*

* 1. *Wall constructed in an incorrect position;*

* 1. *Excessive size of mortar joints leading to misalignment of internal block and external stonework;*

* 1. *Risk of mortar breaking down and entering cavity;*

* 1. *Cavity trays discharging into the cavity;*

* 1. *Undersized rainwater goods;*

* 1. *Defective roof covering and lead works.*

*In September 2006 Bigwoods produced a further report which then valued the defects at £530,000.Bigwoods failed between January 2002 and September 2006 to advise the Claimant of the true extent of the defects at the properties.*

1. *Bigwoods also failed to advise the Claimant:*

*10.1.that the advice given to him by Rhodes as set out in paragraph 6.1 above was incorrect and the remedial scheme based on it referred to in paragraph 7 was accordingly flawed;*

* 1. *of the importance of the issue of certificates under a JCT contract and of the availability to the employer of the service of a withholding notice;*

* 1. *of the importance of continuing to issue certificates and withholding notices until the completion of the contract works or the earlier insolvency of the builder;*

* 1. *of the importance of notifying Groves and the NHBC of the existence of all defects in the properties;*

* 1. *that to determine the JCT contract would prejudice the operation of the warranty under Part 1 of the NHBC policy which requires the NHBC in the event of the insolvency of the builder to pay the costs of alternatively to arrange for the completion of outstanding works.*

1. *Further Bigwoods supported the advice given to the Claimant by Falconers to determine the JCT contract with Groves.”*

1. Mr Hodgson initially instructed the firm of Wright Hassall in connection with an adjudication brought by Groves. Subsequently he instructed Mrs Sarah Shemmings as his solicitor. She was a partner or employee of the firm Field Seymour Parkes but subsequently established her own firm known as Silver Shemmings.

1. On 11th July 2003 Mr Hodgson attended a conference with Mr John Whitting of Counsel. According to the attendance note, Mr Whitting considered a number of possible claims, including a claim against Falconers. Mr Whitting advised that they had a case to answer in respect of their administration of the JCT Agreement and breach of their duties. He also considered a possible claim against the consulting engineer, Neil Blackwell of NRB Engineering Consultants Ltd. Mr Hodgson subsequently brought an action in the TCC (“the TCC Action”) in November 2004 against the consulting engineer. A copy of this attendance note was forwarded to Mr Apley on 10th December 2007.

1. In July 2004 Mr Wilson of Mellis, consulting engineers, provided a draft report on the instructions of Silver Shemmings. Unfortunately that report does not record his instructions but it is apparent from its content that Mr Wilson was asked to consider several possible claims, including claims against Bigwoods and Falconers. He came

to no clear conclusion as regards a possible claim against Bigwoods but advised that Falconers failed in their performance of their duties in various respects.

1. In September 2004 Mr D Roger Dyer was appointed as the arbitrator in an arbitration, under the NHBC Buildmark Scheme, commenced by Mr Hodgson against Groves.

This is referred to as “the NHBC arbitration.” In the event it took more than four years to finally resolve the issues under that arbitration when the arbitrator produced his final award on costs in November 2008. Whilst Mr Hodgson obtained a Partial Award in his favour in January 2007 no payment was made until the net amount due, taking account of costs and VAT, was established in November 2008. Mr Hodgson was dependent upon the NHBC paying this net sum since Groves were either in liquidation or had insufficient assets. As set out below, Mr Apley played a role in this arbitration.

1. In about January 2005 Mr Hodgson instructed the Defendant firm. I have been provided with the Defendant’s Terms of Business dated 8th March 2005 in which Mr Apley describes the matter on which he was instructed as *“Various different issues in connection with your construction dispute.”* An hourly rate of £180 plus VAT was set out and the estimate of fees for the work was stated to be *“As discussed separately in each case”.*

1. Mr Hodgson maintains that he instructed Mr Apley on the recommendation of Mr Ian Salisbury, his architectural expert in the NHBC arbitration. He wanted Mr Whitting to settle the Statement of Claim for the purposes of an arbitration but needed a solicitor to instruct him to do so, thus the engagement of Mr Apley. In January 2005

Mr Hodgson emailed Mr Whitting informing him that he had retained Mr Apley and

stating: *“Mr Apley knows the position and has been asked to only do very limited work on the basis he accepts my statements are true for which he has been given a deposit of £500.”* The reference to *“the position”,* read in the context of the email, must be a reference to the NHBC arbitration and, possibly, to the fact that Mr Hodgson wished to bring a further claim against Groves under the JCT Agreement but that Mr Dyer was not prepared to accept jurisdiction over this further matter. In due course Mr Hodgson commenced a further arbitration in relation to the JCT Agreement in October 2005.

1. However, by a letter dated 28th February 2005 to Mr Apley, Mr Hodgson referred to advice he had apparently received from Mr Apley that he, rather than Mr Whitting, should draft the Statement of Claim in the NHBC arbitration himself. In due course this is what happened.

1. An attendance note dated 15th April 2005, prepared by Mr Apley, shows that Mr Hodgson discussed a number of matters connected with the building works and claims against various parties. It also records that his previous solicitors had advised Mr Hodgson that the professionals, which for these purposes included Rhodes and Falconers, should be informed that they might be sued and that they should notify their insurers. At the bottom of the note there is the following entry:

 *“6 years – Groves from Dec 00. Everyone else is after that. So we’ve got a year.”*

1. It is common ground, as is obvious, that the Terms of Business did not specify with any clarity which aspect or aspects of the *“construction dispute”* Mr Apley was engaged to deal with. The references set out above give some flavour as to the matters that were discussed initially however I think it more probable than not that Mr Hodgson provided Mr Apley with a general overview of the various claims he might have, as well as the NHBC arbitration, and that it was agreed or understood that Mr Apley would advise or act for Mr Hodgson as and when he was asked to do so, thus the reference in the Terms of Business to fee estimates being provided in respect of *“each case”.* In the event fee estimates were not provided in respect of each case or matter, and Mr Apley appears to have charged on a time basis without distinguishing between the various claims or matters he advised on.

1. On 5th October 2005 Mr Hodgson emailed Mr Apley attaching a seven page document setting out his views of the possible claims (together with possible defences to such claims) against various people involved in the project (including solicitors and other advisers Mr Hodgson had instructed). Amongst those criticised in Mr Hodgson’s document were Rhodes, Falconers and Bigwoods. The note concluded that Rhodes and Falconers (but not Bigwoods) should be joined in the TCC action. Mr Apley responded to the email, making various comments and asking for further information.

One of his comments read as follows:

*“The question really comes down to one we’ve discussed before: how much of the liability is theirs [i.e. Groves] for the initial bad work and their following refusals to sort it quickly, and how much is that of the professionals who then advised you what to do and did so negligently or in conflict.”*

1. On 31st October 2005 Mr Hodgson wrote to Mr Apley stating that he proposed joining Falconers, Rhodes and Groves into the TCC action. On 1st November 2005 Mr Apley responded saying: *“It sounds sense to joint (sic) the Architect, Stone Expert and builder into the claims against the Engineer which is proceeding in the TCC.”*

1. Mr Apley attended a directions hearing in the NHBC arbitration on 2nd November

2005. Following that hearing, on 7th November 2005 he wrote an email to Ian Salisbury, an architect who Mr Hodgson had engaged in connection with the NHBC arbitration, in the following terms:

*“Simon tells me that in the claim against the structural engineer that he has running in the Technology and Construction Court, the most likely defence is "it wasn't me, it was the architect, and the Judge is more or less openly telling him to join the architect. I haven't read the Particulars (as always to try to save Simon money), but it concerns me he doesn't and that is the defence, and the defence succeeds, he'll not only lose but lose costs. He says that you advised him to try not to join the architect because he needed to try to keep him on-side. Is there a middle way?”*

1. In the event Mr Hodgson, representing himself, made the joinder application in the TCC action. The application was made on 30th November 2005, the relevant papers having been prepared by Mr Hodgson, seeking to join Falconers, Rhodes and Groves.

In each case he stated that he wished to join them *“for statute of limitation reasons”.*

1. On the 8th November 2005, Mr Hodgson forwarded to Mr Apley the draft report of

Mr Wilson of Melliss.

1. On 14th and 15th November 2005 there was an important exchange of emails. It is unclear what initiated the exchange and Mr Apley had no recollection:

Mr Apley:

*“Simon, if some of the work began in December 1999, then the Limitation Act on some claims is likely to start biting any week now. That means that if anything needs putting in front of a Court rather than an Arbitration, it’s just about to start being too late. Forever. I know that some matters are in front of both. But nothing like every Defendant and nothing like every issue. I also know that lots of the claims arise rather later, in relation to professional advice given to you one or two years after December 1999 or even more recently in some cases. But it is terribly important not to let this slide by, because it is for the most part absolute.”* Mr Hodgson:

*“Is not the 6 years from the time the fault was found?”*

Mr Apley:

*“Nope. Three years from when the fault was found. Six years from when the breach of contract or act of negligence actually happened.”*

Mr Hodgson:

*“I think it is time to send the application to court for the builder, the stone/mortar adviser and the architect.”*

Mr Apley: *“well you’ve had my advice, and I can’t be more specific on it as things stand.*

*So it really is up to you. Obviously you don’t want to open several more fronts at once without pretty careful thought.”*

Mr Hodgson:

*“Wright Hassall told us to write to the architect, stone/mortar expert and structural engineer in Jan 2003 to notify insurers, so I presume on that basis there are three years from then ie Jan 2006.”*

1. Following this exchange of emails Mr Hodgson made the application in the TCC action for joinder, as referred to above. The application was refused on 6th January
	1. It is to be noted that Mr Hodgson never sought or was given advice by Mr Apley as to the merits of the claims against Falconers, Rhodes and Groves.

1. There was then something of a hiatus until Mr Aeberli of Counsel was instructed by Mr Hodgson under the Bar Direct Access Scheme to prepare closing submissions following the hearing in the NHBC arbitration in September 2006, although Mr Aeberli had not attended the hearing.

1. In March 2007 there was a costs hearing in the NHBC arbitration. Mr Aeberli attended on behalf of Mr Hodgson. Following that hearing, probably as a result of an email Mr Aeberli sent to Mr Hodgson on 13th March 2007, Mr Aeberli was instructed to advise on further claims Mr Hodgson might have. That email also advised as follows:

*“You should consider with you (sic) solicitor when instructed, your potential claims against Rhodes (mortar and stone specialists) as a matter of urgency, as the limitation period is running out. Again, since your claim concerns negligence, you should discuss with your solicitor the need for an initial report from an appropriately qualified expert to consider the merits and grounds of your complaints, so as to be able to prepare your Case Statement in those proceedings.”*

1. A conference took place on 23rd March 2007 attended by Mr Aeberli, Mr Apley and Mr Hodgson. A subsequent email dated 10th May 2007 addressed to Mr Apley (but not Mr Hodgson) recorded the matters considered at the conference. A number of claims and matters were discussed including Mr Hodgson’s claim against Rhodes.

 The email recorded the following:

*“Mr Hodgson advised that his concern with Rhodes’ performance related to their supervision of the mortar remedial works in 2001. He noted, however, that he had been compensated for the defects in the mortar by Mr Dyer’s Award. I advised that, in these circumstances, a claim against Rhodes was not worth pursuing.”*

1. Mr Hodgson maintains that he has very little clear recollection of this conference and further that Mr Aeberli’s email of 10th May 2007 was not forwarded to him by Mr

Apley at that time. As regards the advice recorded above in relation to Rhodes, Mr Hodgson says that he does not recollect that discussion, however he contends that whilst he was compensated for the defects in the mortar by the award in the NHBC arbitration, he had further claims against Rhodes. However Mr Apley asserts that at this conference Mr Hodgson agreed that he did not wish to pursue a claim against Rhodes. Mr Hodgson believes that had there been such a discussion he would have said that Falconers bore the primary liability and that Bigwoods should have properly costed the repairs. Mr Aeberli maintains that he did not know that Mr Hodgson had claims against Rhodes which went beyond the defects in the mortar. According to Mr

Hodgson there is some support for his recollection in an email from Mr Aeberli dated 16th September 2009 in which he apparently accepted that Bigwoods was mentioned at a conference in 2008. Since Mr Hodgson did not attend a conference in 2008 at which Mr Aeberli was also present, he believes that Mr Aeberli must have been referring to the conference of 23rd March 2007. Whilst Bigwoods may well have been mentioned at that conference I think it is more probable that the email of 10th May

* 1. correctly summarises the main points discussed and the advice given by Mr Aeberli.

1. Mr Apley maintains that Mr Hodgson never instructed him during the course of this conference to consider claims against Falconers or Bigwoods. He also says that at this conference Mr Hodgson agreed that he did not want to pursue a claim against Rhodes.

1. Mr Aeberli’s evidence was that he could not recall the details of this conference but that he did not think that there was discussion about claims against Falconers or Bigwooods.

1. Mr Aeberli attended the costs hearing in the NHBC arbitration on 9th March 2007 but thereafter it was agreed that Mr Apley would act as a post-box for the purposes of passing on letters concerned with the enforcement of the award which were to be drafted by Mr Aeberli.

1. In the meantime proceedings had been commenced by Silver Shemmings in September 2006 to recover outstanding fees from Mr Hodgson. On 19th June 2007

Mr Apley wrote an email to Mr Hodgson in the following terms:

*“You have instructed me to do two things: one is to have conduct of the Shemmings dispute strictly under the advice and guidance of Mr Aeberli; the other is to deal with the NHBC in relation to the First Partial Award. I don’t think I can advise on this, therefore, because I just don’t know enough. I’m sorry.”*

1. Understandably, in this period, throughout 2007 and into 2008, Mr Hodgson was pressing to have the question of the costs and VAT liability in the NHBC arbitration decided so as to be able to obtain a net payment from the NHBC. It is apparent from his witness statement, the documents and his oral evidence that Mr Hodgson had financial difficulties. He had limited resources and this no doubt explains the limited matters on which Mr Apley was asked to advise or in respect of which he acted. In addition Mr Hodgson was in the course of divorce proceedings and fell into arrears on his mortgage, leading to proceedings brought by Birmingham Midshires. There is no doubt Mr Hodgson was under considerable stress in dealing with these matters as well as meeting his work obligations in developing computer software for the National Health Service.

1. On 13th December 2007 a mediation took place in relation to the Silver Shemmings fee claim. This was attended by Mr Aeberli, Mr Apley and Mr Hodgson. Mr

Hodgson’s Position Paper for the purposes of the mediation complained that Silver Shemmings had failed to control costs and that over a period of a year and a half Mr Hodgson had paid about £175,000 on account of legal and expert fees and that he had very little to show for this expenditure. It also complained that Silver Shemmings had failed to properly investigate the claims that might be available under the NHBC Warranty which were dependent on defects and damages being notified by September 2004. These counterclaims were quantified at £395,000.

1. Mr Hodgson maintains that during the course of the mediation, whilst the mediator was consulting Silver Shemmings, there were discussions with Mr Aeberli and Mr Apley about his other claims. In particular he maintains that he wanted Silver

Shemmings to accept responsibility for failing to put forward a full claim against Rhodes and that he would have said that Falconers should bear primary liability and that Bigwoods should have properly costed the repairs.

1. By contrast Mr Apley cannot recall claims against other parties being discussed although in his oral evidence he accepted that such claims could have been discussed.

1. The proceedings brought by Silver Shemmings were compromised as a result of the mediation with a net payment to Mr Hodgson of £15,000.

1. On 30th March 2008 there was an important exchange of emails between Mr Hodgson and Mr Apley. It started by Mr Hodgson referring to the Birmingham Midshires proceedings, in respect of which Mr Apley was not instructed. However in one of the emails he referred to the fact that Birmingham Midshires’ surveyor had been

appointed in June 2003.

Mr Hodgson:

*“I guess they [i.e. Birmingham Midshire] want protection before we/they fall foul of the 6 year rule. Surveyor valued in Jun (sic) 2003 and that also leads on to everyone else who was appointed in 2002/2003 before we get to the end of this year.”*

Mr Apley:

*“I think you’re saying you won’t instruct me yet. That’s how I am taking it. It means not only that I won’t be considering it, but also that I won’t be noting the limitation date.”*

Mr Hodgson:

*“I think we need to discuss this……*

*There is a limitation date coming up in May 2008 when Challinors Discovered their conflict.*

*Wright Hassall will be July 2008 Rhodes Contract will be Summer 2008.*

*Biscoe Adjudication July 2008*

*Merchant Bank QS Summer 2008*

*Schofield Lothian Jan/Feb 2009*

*FSP Mar/April 2009*

*So on that basis I take it you think I should instruct you.”*

Mr Apley:

*“My difficulty as usual is that I have only the vaguest idea what we’re talking about. If you would like to tell me that (sic) the negligence of Challinors and Bigwoods amounts to, I may be able to tell you whether instructing me could be cost-effective.”*

Mr Hodgson:

*“Challinors/Bigoods to do with determination of the Contract both advising. Challinors blame Bigwoods.*

*Bigwoods stated nothing wrong with Property in May 2002, rather at odds with their report of Feb 02. Bigwoods “supervised”/”Specified” the internal block work repairs in August 2002, Dyer has commented on this. NHBC have hinted at this.”*

1. On the following day Mr Hodgson sent a further email to Mr Apley:

*“In light of your previous email, ref statute of limitation.*

*Wright Hassall told me to write to the architect and the Rhodes Partnership in Jan 2003 telling them to inform insurers.*

*Groves were informed by Wright Hassall in Sep 2002 that they should inform insurers that a claim for breach of contracts was likely to be made.”*

1. There appears to have been no discussion between Mr Hodgson and Mr Apley about these matters and subsequent emails do not refer to this exchange or advance the matter.

1. Mr Apley’s retainer was ended on 23rd May 2008 because he had been informed of matters, during the course of a mediation between Mr and Mrs Hodgson, which gave rise to a conflict of interest in all matters which related to Lentune House.

1. In the main I have derived the history of the matter from the documents and in particular the emails. I refer to some the oral evidence below but, unsurprisingly, the witnesses’ recollection was limited.

The oral evidence

1. Mr Hodgson’s view was that he expected Mr Apley to consider the claims against the Third Parties and *“put a notice in”* to stop time running. Later in his evidence he stated that since Mr Apley was his adviser, he expected Mr Apley to tell him what to do or give him advice. He accepted however that in early 2008 he knew he had potential claims against the Third Parties and also knew that those claims would expire shortly. Mr Hodgson further suggested that Mr Apley should have advised him to stay the NHBC arbitration in order to enable him to meet the costs of proceeding against the Third Parties. He maintained that Mr Apley was fully aware of the nature of the claims against the Third Parties. He maintained that he did not instruct Mr Apley to issue proceedings against the Third Parties because he did not have the money to pursue them until receipt of the monies from the NHBC arbitration. In the

event Mr Hodgson did not receive the net sum arising from that arbitration until about

October and November 2008.

1. Mr Aeberli freely accepted that he could not recall the events and matters with which this action is concerned, save by reference to the documents. Insofar as relevant, I have referred to Mr Aeberli’s evidence above.

1. Finally Mr Apley gave evidence. He maintained that when he was first instructed Mr Hodgson articulated an enormous number of different problems. He was provided with a large number of papers which he read over the weekend. It was agreed that since Mr Hodgson could not afford for him to look into all the matters, it would be better if he was instructed on specific matters as they arose. Once again I have set out Mr Apley’s evidence above, where relevant. However Mr Apley maintained he could not advise about the Third Party claims since he did not know about them and, in any event, he would not have advised without the input of Counsel. He maintained that Mr Hodgson was generally knowledgeable, he knew about limitation and that in March 2008 he did not need to be reminded about it.

Findings of fact

1. I have tried to summarise the relevant history and evidence, albeit it is somewhat lengthy. However what is not apparent from that summary, save to a limited extent, is the large number of emails sent to Mr Apley, nor their diverse nature covering large numbers of topics and referring to a multitude of persons or organisations in respect of which Mr Hodgson believed or may have believed he had claims against nor the fact that many of the emails appeared to have been forwarded to Mr Apley for his information or the large number of emails raising issues or points or observations directly with Mr Apley without specifying what he wanted Mr Apley to do about these matters.

1. Insofar as relevant to the issue of law set out below I find that:

* 1. Mr Apley’s account of his initial engagement in January 2005 is to be

preferred, namely that he was to advise on specific matters or act on behalf of Mr Hodgson as and when he was instructed to do so. The terms of his retainer did not require Mr Apley to review and consider each and every matter that Mr Hodgson raised, save insofar as he was instructed to do so;

* 1. Whilst I believe that Mr Apley tended to understate what he knew about the potential claims against the Third Parties, I accept that he was never given sufficient information either to issue proceedings or to advise on the issue of proceedings against the Third Parties. It is now accepted by Mr Hodgson that he gave no instructions to this effect;

* 1. Mr Hodgson is clearly an intelligent and able person but he was under considerable strain both personal and financial. Indeed it is apparent that the reason why he did not seek further advice from Mr Apley or instruct the issue of further proceedings was due to his financial difficulties;

* 1. Whilst Mr Hodgson is intelligent and able, he is obviously not a lawyer. However he knew and understood that his claims might be barred by limitation unless proceedings were commenced by a certain date. He also knew and understood, at least in general terms, the nature of the claims he

might have arising out of the works at Lentune House and he also knew and understood that if the potential claims were to be pursued against the Third Parties they would have to be investigated and analysed. I do not accept that he believed that Mr Apley would advise, without express instructions, or that he would act, without express instructions, in order to protect Mr Hodgson’s interests.

The Law

1. The parties are agreed on the applicable law, as derived from *Mason and others v Mills & Reeve* [2011] EWHC 410 (Ch) and the cases referred to in the judgment. The relevant propositions that can be derived are as follows:

* 1. A solicitor’s duty to his client is primarily contractual and its scope depends on the express and implied terms of his retainer;

* 1. The key implied term of a solicitor’s retainer is to exercise reasonable skill and care;

* 1. The scope of that duty of care will depend on the content of the solicitor’s instructions and on the particular circumstances;

* 1. One of the relevant circumstances is the nature of the client. Thus a youthful client unversed in business affairs might well need more explanation and advice when entering into a commercial transaction than an experienced businessman. However it cannot be assumed that an intelligent layman will spot points that would be obvious to a lawyer;

* 1. A solicitor is not under a general obligation to expend time and effort on issues outside his retainer. However if, in the course of doing that for which he is retained, he becomes aware of a risk or potential risk to the client, it is his duty to inform his client. Jackson & Powell on Professional Liability, seventh ed., suggests that it is the solicitor’s duty to identify any matters which are or may be important to the client and bring them to his notice. (Paragraph 11-168)

The Claimant’s case

1. Mr Dyer, who appeared for Mr Hodgson, argued that the original retainer in 2005 was unclear and that was the genesis of the problem. In the event fees were not agreed or estimated for the purposes of each case, as had been contemplated by Mr Apley’s Terms of Business, but instead invoiced on a six monthly basis, according to how much time he had spent on this matter.

1. In some cases Mr Apley’s role was defined; for example acting as post-box in relation

to the NHBC arbitration but in others it was less clear.

1. In October 2005 Mr Hodgson set out his view of the claims he might have, including claims against Rhodes and Falconers. He also informed Mr Apley later that month of his wish to join Falconers and Rhodes into the TCC action. That led to Mr Apley’s advice concerning limitation in the emails of 14th and 15th November 2005.

1. Mr Dyer argues that Mr Apley had a continuing duty in respect of these matters, continuing into 2008. There were two *“golden opportunities”* when Mr Apley should

have advised Mr Hodgson to issue proceedings against Falconers, Rhodes and Bigwoods. First during the mediation in December 2007, during the pauses which inevitably occur in the course of mediation, and secondly in the context of the exchange of emails on 30th March 2008 when limitation was again discussed.

1. Insofar as it was necessary to obtain advice about the merits before giving advice to issue proceedings then that was a concomitant duty on Mr Apley. Furthermore Mr

Apley was well aware that Mr Hodgson had a tendency to become sidetracked.

1. Mr Dyer points, in particular, to the exchange on 30th March 2008 (quoted above) and the fact that Mr Apley did not revert to Mr Hodgson either to advise him whether pursuing Bigwoods would be cost-effective or to suggest that the information Mr Hodgson had provided about the Bigwoods claim was not sufficient to give him such advice.

The Defendant’s case

1. Mr Higgins, who appeared for the Defendant, argued that the retainer did not give rise to a duty to give the advice as alleged. In fact Mr Hodgson did not want to or could not have issued such claims since, as pleaded by the Voluntary Particulars: *“The enforcement of the arbitration award was therefore an essential precursor to the*

*Claimant’s ability to commence proceedings against Falconers, Rhodes and Bigwoods.”* The criticism of Mr Apley pre-supposes that Mr Hodgson would have commenced proceedings against Falconers, Rhodes and Bigwoods had he been given such advice, but he was not in a position to do so since no recovery was made in the NHBC arbitration until after May 2008 to enable him to finance those proceedings.

1. Furthermore the duty, if there is a duty in this case, is a duty to warn, not to give advice. In any event Mr Hodgson was fully aware of the significance of limitation and was fully informed of the potential claims against the Third Parties

Discussion and decision

1. I have considerable difficulty in analysing the Claimant’s case in terms of the law as summarised above. It is accepted that no express instructions were given by Mr Hodgson to issue proceedings against the Third Parties.

1. Thus the duty to found the obligation on Mr Apley to give the advice is said to be implied. The nature and extent of that implied duty can only be gathered from the Terms of Business and the course of events, as outlined above.

1. Whilst the description of the retainer was very wide (*“Various different issues in connection with your construction dispute”*), this did not impose on Mr Apley an express, let alone an implied, duty to consider and advise upon each and every matter which Mr Hodgson from time to time referred to in his emails sent or copied to Mr Apley which might be said to relate to the “*construction dispute*”. Indeed, as I have found above, Mr Apley’s retainer was defined by matters drawn to Mr Apley’s attention on which Mr Hodgson wanted his advice. The fact that Mr Hodgson expressed a view about these claims to Mr Apley did not give rise to an implied duty to consider that opinion, let alone the wisdom or otherwise of commencing proceedings. That was simply not the nature of Mr Apley’s retainer or how Mr

Hodgson chose to use Mr Apley’s services. By way of example, one of Mr Hodgson’s emails (dated 30th March 2008) set out what he believed were the limitation dates in relation to possible actions against seven different parties. Whilst Mr Apley asked for further details about the Challinors and Bigwoods claims, the reply from Mr Hodgson was brief in the extreme and he did not thereafter ask Mr

Apley for his advice or provide the sort of details which might have enabled Mr

Apley to advise. At most it might be said that Mr Apley should have reverted to Mr Hodgson stating that either that he did not have enough information or that the claims were or were not cost-effective.

1. Indeed Mr Hodgson “floated” a large number of possible claims in his various communications, because he was disorganised and lacked focus. Whilst this was characteristic of Mr Hodgson, and no doubt should have been taken into account when Mr Apley did give his advice, it cannot have required Mr Apley to consider and advise upon all these matters, unbidden.

1. In truth what was required was to bring matters into focus, by identifying the possible claims, considering the merits and concentrating on those which had a good chance of success and were likely to give rise to significant recovery. This clearly occurred at the conference with Mr Aeberli (with Mr Apley in attendance) on 23rd March 2007 but it is noticeable that of the three Third Parties, only claims against Rhodes were considered but dismissed on the basis that such a claim was not worth pursuing. Mr Hodgson did not request another such review and such discussions as may have taken place at the mediation in December 2007 were informal and did not lead to any instructions being given.

1. Thus insofar as it is being argued that it was implied term of Mr Apley’s engagement to give advice to issue proceedings against the third parties, I reject that argument.

Such an implication cannot arise out of the Terms of Business nor the circumstances that arose thereafter and in particular between November 2007 and May 2008.

1. Furthermore, whilst I believe Mr Apley tended to understate the amount he knew about the Third Parties, I accept that either he or Counsel instructed by him, would have had to consider the merits of the claims against the Third Parties (possibly with the assistance of experts) before advising on the issue of proceedings. No solicitor, acting properly, would advise on the issue of proceedings without considering the merits. I do not accept it is a concomitant duty of the duty alleged, to consider the merits of the potential claims. It is a separate exercise which would require express instructions from the client. Mr Hodgson was well aware of this requirement, as can be seen from the advice given to him by Mr Aeberli in his email to Mr Hodgson of

13th March 2007.

1. Insofar as Mr Apley came under a duty to inform or warn Mr Hodgson of risks or potential risks or bring to his attention matters of importance, that duty was discharged. As regards the importance of limitation, this was set out in the exchange of emails on 14th and 15th November 2005. It is evident that Mr Hodgson appreciated the significance of limitation since he highlighted the relevant dates in his email dated 30th March 2008. In that connection it is to be noted that there is no criticism of the advice given by Mr Apley on limitation on 14th and 15th November 2005 nor is it suggested that Mr Apley should have corrected the limitation dates that Mr Hodgson set out in his email of 30th March 2008.

1. Furthermore it is quite apparent that Mr Hodgson had his own views about the merits or otherwise of his claims; his note of 5th October 2005 illustrates that. Mr Apley was

clearly aware of this and knew that Mr Hodgson had in mind a number of potential claims. He had no need to advise Mr Hodgson to issue proceedings against any party, let alone the Third Parties. Mr Hodgson was fully aware of the need to issue proceedings within the limitation period in order to make any recovery against the

Third Parties. Mr Apley cannot have come under a duty to warn or inform Mr Hodgson when he (Mr Apley) knew that Mr Hodgson was fully informed of the importance of issuing proceedings against the Third Parties within the relevant limitation periods, if he considered the claims were meritorious.

1. In truth, whilst Mr Hodgson no doubt had in mind possible proceedings against a number of parties, including the Third Parties, he did not instruct Mr Apley to consider those claims, let alone ask him to give advice to issue proceedings against the Third Parties, because he could not afford to pay for such advice or to meet the cost of issuing proceedings. The Voluntary Particulars provided by Mr Hodgson make particular reference to the role played by Mr Apley in obtaining monies from the NHBC arbitration (albeit his role was limited). As set out above, Mr Hodgson thought that Mr Apley should have advised him to stay the arbitration to enable him to meet the costs of proceeding against the Third Parties. This allegation is not pleaded and implicitly supports the fact that Mr Hodgson simply could not pay for proceedings to be issued against the Third Parties. Assuming a stay of the arbitration was possible, the allegation presupposes that Mr Apley should have appreciated that it would take many months or even years to obtain payment from the NHBC arbitration and secondly that Mr Apley should have appreciated that Mr Hodgson was better off devoting his resources pursuing the Third Parties rather than in seeking recovery in the NHBC arbitration. No evidence has been called to support either of these underlying assumptions and on the evidence that is available neither assumption is

justified.

Disposal

1. Whilst I have considerable sympathy for Mr Hodgson, his claim must fail. The

Defendant was not under a duty between November 2007 and May 2008 to advise the

Claimant to issue proceedings against any or all of John Falconer Associates and the

Rhodes Partnership and C P Bigwood and/or Bigwoods.

1. Thus the action is dismissed.