



Neutral Citation Number: [2022] EWHC 4 (Ch)

Sale of land – Stakeholder - Off-plan fractional residential development scheme – Buyers’ deposits held by seller’s solicitor to order of buyer company established to protect buyers’ interests – Authority to release deposits – Construction of stakeholder contract – Estoppel by convention

Whether claim for breach of stakeholder contract sounding in debt or damages – Measure of damages

Contribution between stakeholder and buyers’ solicitors

Case No: BL-2019-MAN-000092

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

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

Date: Monday, 10 January 2022

Before :

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

Between :

Various North Point Pall Mall Purchasers

Claimants

- and -

174 Law Solicitors Limited

Defendant

- and -

Key Manchester Limited
(formerly Amie Tsang and Company Limited)

Part 20 Defendant

Mr David McIlroy (instructed by Penningtons Manches Cooper LLP) for the Claimants

Mr Michael Bowmer (instructed by **DAC Beachcroft LLP**) for the **Defendant, 174 Law Solicitors Limited**

Mr Glenn Campbell (instructed by **Caytons Law LLP**) for the **Part 20 Defendant, Key Manchester Limited**

Hearing dates: 16-19, 22-25, 29 and 30 November 2021

The following cases are referred to in the judgment:

Arnold v Britton [2015] UKSC 36, [2015] AC 1619
Bristol Alliance Nominee No 1 Ltd v Bennett [2013] EWCA Civ 1626, [2014] 1 EGLR 9
Burrough v Skinner (1770) 5 Burr 2639
C F Partners (UK) LLP v Barclays Bank Plc [2014] EWHC 3049 (Ch)
Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corporation [2020] UKPC 23, [2021] 1 WLR 5741
Gribbon v Lutton [2001] EWCA Civ 1956, [2002] QB 902
Hastingwood Property Ltd v Saunders Bearman Anselm [1991] Ch 114
Howkins & Harrison v Tyler [2001] PNLR 27, CA
Manzanilla Ltd v Corton Property & Investments Ltd unrep., 13 Nov 1996, CA
Potters v Loppert [1973] Ch 399
Rabiu v Marlbray Ltd [2016] EWCA Civ 476, [2016] 1 WLR 5147
Rockeagle Ltd v Alsop Wilkinson [1992] Ch 47, CA
Royal Brompton NHS Trust v Hammond [2002] UKHL 14, [2002] 1 WLR 1397
Sharma v Simposh Ltd [2011] EWCA Civ 1383, [2013] Ch 23
Tinkler v Revenue and Customs Commissioners [2021] UKSC 39, [2021] 3 WLR 697
Various Claimants v Giambrone & Law [2017] EWCA Civ 1193, [2018] PNLR 2
Verschures Creameries Ltd v Hull and Netherlands Steamship Co Ltd [1921] 2 KB 608, CA

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.

.....
HIS HONOUR JUDGE HODGE QC

Judge Hodge QC:

1. This judgment is structured under ten chapter headings as follows:

- I: Introduction and overview
- II: The trial
- III: The witnesses
- IV: The Agreement for Sale
- V: The law on stakeholder contracts
- VI: Analysis of the stakeholder contract
- VII: The narrative of events
- VIII: Conclusions on the claim
- IX: The claim for contribution
- X: Disposal.

However, I have divided the judgment in this way for structural reasons only and I would emphasise that the contents of each chapter have contributed to the court's overall assessment of the evidence and the arguments and have been taken fully into account when arriving at its conclusions. In order to produce a comprehensible judgment of reasonable length, I have not addressed all of the many points that were raised during the course of the evidence and the submissions. This does not mean that they have been overlooked but merely that I did not consider them to be of material assistance in determining the real issues in the case.

I: Introduction and overview

2. In this case, the court has to consider the duties of a stakeholder in relation to the release of substantial deposits which it had received from the purchasers of residential units in an 'off-plan' development who were substantially funding the construction costs in the unusual, quadripartite, situation where those deposits were held to the order of neither the purchaser nor the seller but rather to the order of a buyer company ostensibly established to protect the purchasers' interests. The court must also consider a claim for contribution from the stakeholder against the solicitors who had been retained by the claimants on their respective purchases of units in the development.
3. This is my considered judgment following the trial of the six claims (brought by eight claimants) that remain outstanding following the settlement of the majority of the claims which had originally been brought by 138 claimants represented by Penningtons Manches Cooper LLP (PMC) on 14 October 2019 in respect of three residential developments at North Point Pall Mall and Baltic House in Liverpool and Angelgate in Manchester. This trial is concerned only with the North Point development. As a result of various case management orders, the court had

determined that these claims should be managed alongside other claims, brought by other claimant purchasers, represented by other solicitors' practices, on a development-by-development basis. Thus, at the time of the case management hearings that took place before me on 6 and 9 November 2020 and 7 January 2021, the court was managing claims across no less than four developments, brought by seven different groupings of claimants represented by a further two solicitors' practices, Walker Morris LLP and Elysium Law Richard Gray Limited, in addition to PMC.

4. Happily, the bulk of these claims have now settled. The terms of settlement encompass (amongst others) claims brought by 11 purchasers of seven residential units at North Point against the solicitors' practice of Amie Tsang and Company Limited (ATC), which changed its name to Key Manchester Limited on 16 April 2018, and which had acted for those buyers on their respective purchases. Eight of the buyers of six of the units at North Point had also brought claims against another solicitors' practice, 174 Law Solicitors Limited (174). On or about 20 November 2015, 174 had taken over from a third solicitors' practice, Wirral Solicitors Limited, trading as David Roberts & Co (DRC), the role of acting for the developer (and seller) of the units which were being constructed at North Point. These eight claimants allege that, having received the buyers' deposits as stakeholder, 174 proceeded to release them to the seller, in breach of the terms on which it was required to hold those deposits. It is that discrete aspect of the claims which forms the subject-matter of this trial, which took place before me, by way of a hybrid hearing, over ten court days between Tuesday 16 and Tuesday 30 November 2021. Whilst it denies any liability to the remaining claimants, 174 brings a claim for contribution against ATC. At trial, the claimants were represented by Mr David McIlroy, 174 by Mr Michael Bowmer, and ATC by Mr Glenn Campbell (all of counsel). No claim has been brought against 174 by any of the buyers who had instructed a fourth solicitors' practice, which had traded as Oliver & Co, on their respective purchases; and no claim has been brought against 174 by any of the claimants who were represented in the wider litigation by solicitors other than PMC.
5. North Point was an ambitious development of some 426 residential and live-work units at a brown-field city centre site at 70-90 Pall Mall, Liverpool. The development was being constructed by North Point (Pall Mall) Limited (NPPM) which was a special purpose vehicle established by its parent company, North Point Global Limited (NPG), to carry out the development. North Point was sold off-plan, predominantly to overseas investors who intended to let the units out once the development was completed. At the time they contracted to purchase units in the development, all of the present claimants were resident in Hong Kong (although, in January 2017, two of them were attracted to move permanently to live in Crosby, in North Liverpool). The principal of ATC, Ms Amie Tsang, is a solicitor who speaks fluent Cantonese. The development adopted a fractional sales model, whereby significantly larger deposits than usual were paid (typically 50 to 80% of the purchase price) and the deposits were then to be used to fund the development. This development model had gained in popularity after the 'credit crunch' towards the end of the first decade of this century and, by 2015, it was an established, albeit risky, form of property investment. Sadly those risks came to pass in relation to North Point. The construction of the development had started in June 2015 but it came to a standstill in or around July 2017. LPA receivers were appointed in June 2018; and the

site was eventually sold without any of the units ever having been constructed. The buyers' deposits had all been spent on marketing fees and other costs and the uncompleted works of development. Each of the buyers lost all of their investment. The remaining claimants now sue 174 for breach of the stakeholder contract which came into existence when they each entered into their individual, common-form sale agreement with the developer.

6. The typical stakeholder contract is a tripartite agreement, under which the stakeholder holds moneys to which one party has rights (in the present case, the claimants as purchasers) until a triggering event occurs, and then the stakeholder transfers the moneys to the second party (in the present case, the seller). In the present case, as well as the triggering event, there was a precondition that the claimants' interests should be protected by the registration of a first legal charge in the name of a buyer company, limited by guarantee, which had ostensibly been established to protect the buyers' interests. (Under the sale agreement, each of the purchasers had been entitled to become a member of the buyer company). Put simply, the claimants' case is that as that precondition was never satisfied, 174, as stakeholder, never had their authority to release their funds to the seller; and their claims centre upon one particular set of contractual wording. The eight remaining claimants are suing 174 for the breach of six of the stakeholder contracts. Although the present claims are brought by the buyers of only six of the units at North Point, if their claims are upheld the implications for 174 are very significant indeed since it released funds which it received as stakeholder from the purchasers of many other units at North Point on exchange of their respective sale agreements, both before and after 18 May 2016 (which is the last date on which any payment away of the present claimants' moneys was made). A second cohort of claimants, also represented by PMC, have very recently issued a further, similar claim in which the total sums involved are substantial.
7. The claimants say that the question before the court is a narrow one. The court is not being asked to make any ruling of general importance for off-plan development schemes in general but simply to give effect to the wording of six particular, standard-form bespoke contracts, drafted by conveyancing solicitors, to which other conveyancing solicitors failed to give effect. In summary, the claimants' case is that: (1) Each of the claimants, and not merely the buyer company, was a party to, and entitled to enforce, the stakeholder contract which was in place to protect their respective deposits. (2) Each agreement for sale specified that it was a pre-condition of any deposit being released that the buyer company should have held a charge over the development which had been registered as a first legal charge. (3) 174 released each claimant's deposit in breach of the stakeholder contract since no first legal charge was ever in place or registered in favour of the buyer company. (4) 174 is therefore indebted to the claimants or, alternatively, is liable in damages, for the lost deposits. In his closing reply, Mr McIlroy emphasised that the primary claim is in debt and that the claim for damages is advanced in the alternative. (5) The terms of an October 2015 exchange of emails, and of an agreement allegedly reached at a later meeting on 18 December 2015, between the solicitors who were acting on the sale and purchase of units in the development (and which are now relied upon by 174 as justifying the release of the deposits) are incapable of altering that position. They occurred between persons other than all the parties to the present claim, and so they cannot bind the claimants; and, in any event, they would be nullified by the terms of s.

2 of the Law of Property (Miscellaneous Provisions) Act 1989. (6) 174's defence of estoppel by convention cannot succeed because the necessary ingredients of such an estoppel are absent; and, in any event, it would be unjust in all the circumstances of this case to prevent the claimants' reliance upon their strict contractual rights.

8. 174 contend that the court should not entertain this unwarranted claim against it, not least in circumstances where all of the claimants' former solicitors have accepted liability and have entered into a settlement agreement to repay the sums the claimants had invested in the development. 174 emphasise that the claimants' investment was unusual, and inherently risky, to the knowledge of those who had invested their money in the purchase of units in the development since it had involved the payment of substantial deposits, of between 50% and 80% of the purchase price of the units, together with the purchasers' agreement that the deposits should be used to fund the development. 174 point out that they never acted for any of the purchasers and that they never advised any of them; rather, the claimants dealt at all times with ATC, the solicitor's practice which they had selected, and appointed, to represent them in relation to their investment in the development. In any event, the facts of this case show that the moneys which were released by 174 were released strictly against professional certificates, issued by construction and project managers, in circumstances where the claimants, through their own solicitor, knew full well of the title position, and where their own solicitor, acting for them as purchasers, as well as one of the directors of the buyer company which had been set up to protect their interests (and to whose order the deposits were held), had specifically agreed to the release of the deposits. The same is true of those buyers who had retained Oliver & Co to act on their behalf. 174 says that this explains why none of the purchasers who have instructed solicitors other than PMC have seen fit to bring any claims against 174. 174 objects that, even on the claimants' own case, their claims to recover all of the moneys which they invested in the development seeks to put them into a better position than they would ever have been in. This is because: (1) the purchasers had expressly agreed that the moneys they had invested could be used to fund the ongoing costs of the development; (2) 174 never advised them, and it never warranted, that the development would be successful, and so 174 was not, and could not be held, responsible for the claimants' decisions to proceed, or for the success or the failure of the development; (3) on the claimants' own case, 174 should not have released funds without a first ranking legal charge (even though their own solicitor had agreed to the release of the deposits) but the development ultimately failed for all sorts of reasons, in particular because the development was clearly under-funded; and therefore (4) even with the benefit of a first ranking legal charge, the claimants would have lost all of their money.
9. If and to the extent that the court decides that 174 is liable for breach of contract, and is bound to pay compensation to the claimants, then 174 claims contribution from ATC under the Civil Liability (Contribution) Act 1978. 174 served a notice of additional claim on ATC at the same time as serving its defence. ATC has never filed any response to that notice (although Mr Campbell submits that there is no provision entitling, still less obliging, the recipient of such a notice to do so). If (contrary to 174's case) the court were to decide that 174 is liable to the claimants, 174's position is that it has a clear and solid basis to recover an indemnity, or at least a very substantial contribution, from ATC.

10. ATC contend that 174 is not liable to the claimants for paying away the deposits because the payments made by 174 were consistent with their obligations as stakeholder and there is therefore no basis for any 1978 Act claim against ATC. Even if 174 were liable to the claimants, it cannot establish that ATC was also liable to the claimants because ATC did not breach any duty to give reasonable and appropriate advice to the claimants so there is no basis for any 1978 Act claim. Even if ATC were liable to the claimants, it is not liable in respect of the 'same damage', thereby precluding any 1978 Act liability. If ATC were liable to pay any 1978 Act contribution to 174, ATC contends that the assessment can, and should, reflect the respective levels of fault of the parties; and that any award should be limited accordingly.

II: The trial

11. After one day's pre-reading, assisted by written opening skeleton arguments from all three counsel, the trial commenced remotely on Tuesday 16 November. The trial documentation was contained within six electronic bundles, to which a number of supplemental bundles were added during the course of the trial. By the end of the trial, there were over 13,000 pages of documents. In addition, there were some four bundles of authorities, extending to some 1,600 pages. Apart from Days 5 to 7, when judge, counsel and witnesses all attended in person in Court 42 of the Manchester Civil Justice Centre, the trial was conducted entirely remotely by Teams; and a remotely prepared transcript was made available to the parties and the court at the end of each court day. Because all but two of the claimants are resident in Hong Kong, the court aimed to sit at 9.30 GMT each morning in the hope (not always fulfilled) of rising by 3.30 each afternoon.
12. On the morning of Day 1, I allowed an application by 174, opposed in part by Mr McIlroy for the claimants, to adduce in evidence second witness statements from Mr David Hayhurst, formerly a solicitor with 174, who was the principal fee-earner acting for the seller on the North Point development, and from Ms Helen Pittard, a solicitor who was one of the original founding directors of 174 and who had been responsible for establishing the IT infrastructure and work-flow processes that had been required to support 174's role as the solicitor acting for the seller of the development. Mr McIlroy then spent the rest of that morning taking me through the documents.
13. The only witness evidence adduced in support of the claims came from the claimants themselves. Ms Au Yeung gave evidence on the afternoon of Day 1 and her husband on the morning of Day 2. Both did so from their home in Crosby, with the remote assistance of an interpreter. The remaining live witnesses gave evidence from the offices of a solicitors' practice in Hong Kong. Ms Zeng gave evidence, through a remote interpreter, on the morning of Day 2. I was told that Ms Zeng's husband, Mr Li, was on a business trip to mainland China and was not available to give evidence, even remotely. His witness statement was therefore admitted as hearsay evidence although I attach little weight to it because there was no adequate explanation as to why Mr Li had chosen to make himself unavailable to be cross-examined when the trial had been fixed for the best part of the previous 11 months. This was particularly unfortunate as it appeared, from her evidence, that Ms Zeng had more or less left everything to her husband and that she had little personal knowledge of the sale documentation. The last witness to give evidence on Day 2 was Mr Yee, who gave

evidence mainly in English and without the assistance of the interpreter. On Day 3 I heard (mainly without the assistance of the interpreter) from Ms Cheng and her younger brother, Mr Cheng who had worked for the estate agency, Hong Kong Homes Ltd, which had been involved in marketing the development. Finally I heard from Ms Athena Choi, who was clearly intelligent and articulate, and who possessed a good command of the English language.

14. On Day 4 I began hearing 174's witness evidence, beginning (remotely) with Mr David Hayhurst for a little over five hours. Since 174's next three witnesses were all attending in response to witness summonses, and because (although 174 had served witness summaries for each of them) their evidence would have to be elicited in chief by non-leading questions in the traditional manner in which trials used to be conducted before the advent of witness statements, at the pre-trial review I had directed that all three witnesses should give their evidence live in the court room. On Day 5 I heard (for a little under six hours) from Mr David Sewell (of Oliver & Co) who, with ATC, had acted for the purchasers of units at the North Point development (and also units at Baltic House) and who had also acted for the sellers of units at two other NPG group developments (New China Town and Berry House). On Day 6 I heard from Ms Amie Tsang for about 5 ½ hours. On Day 7 I heard, for a little under three hours, from Mr Craig Griffiths, a director of the developer (NPPM) and its parent company, NPG, who had been involved on the financial side of the development, seeking, in particular, to ensure the cash-flow needed to carry out the construction works. Prior to entering the witness box, Mr Griffiths had produced a witness statement dated 18 November 2021. Although, during his examination-in-chief, Mr Bowmer was astute not to introduce this witness statement into evidence, at the beginning of his cross-examination Mr McIlroy secured Mr Griffiths's confirmation that its contents were true and that he wished the court to take his witness statement into account as part of his evidence to the court. On Day 8 I heard (remotely) from Ms Pittard for a little under two hours. That concluded 174's evidence. ATC called no evidence. Indeed, before the pre-trial review which had taken place before me on 24 September 2021, ATC's solicitors had indicated (in correspondence) that their client would not be proposing to adduce witness evidence and would be taking no part in the trial; and Mr Campbell was only instructed to appear for ATC at the trial about a week before it started.
15. The court did not sit on Friday 26 November in order to assist the parties' counsel in preparing written closing submissions which were sent to me by email, in the case of Mr McIlroy, at 5.35 on the evening of Saturday 27 November and, in the case of Mr Campbell and Mr Bowmer, at 10.24 and 10.30 respectively on the evening of Sunday 28 November. I heard oral closing submissions on Days 9 and 10 of the trial in the following order: Mr McIlroy, Mr Bowmer, Mr Campbell, Mr Bowmer and Mr McIlroy. I adjourned to consider my judgment at about 4.00 pm on Tuesday 30 November. Since then, I have raised one query on the evidence (relating to the identity of the seller's solicitor named in one of the six sale agreements) which was satisfactorily resolved by Mr McIlroy and Mr Bowmer by email. The preparation of this judgment has taken rather longer than I had anticipated due to the need for me to consider the transcripts of the evidence and re-read the written submissions as well as re-visiting many of the documents in the case.

III: The witness evidence

16. In closing, Mr Campbell reminded me that the majority of the claimants had been tendered with translated witness statements, and on the basis that they needed the assistance of an interpreter to give evidence; and that all of the claimants (and two of 174's five witnesses) had given evidence remotely by video-link. In assessing and evaluating the evidence, he invited me to take account of the potential limitations of online testimony and, in the case of evidence offered through an interpreter, the inevitable downsides of such evidence. I have borne these observations in mind.
17. With the notable exceptions of Mr Yee and Ms Choi, who were clearly honest and doing their best to assist the court in answering questions in cross-examination, I did not find any of the other claimants to be satisfactory or reliable witnesses. As Mr Bowmer pointed out in his written closing, each of the claimants' witness statements tended to take the form of a standard template, using in large measure the same standard form of words, and repeating more or less exactly the same content. (Indeed, this was implicitly recognised by Mr McIlroy in his preliminary reading list when he invited me to read only two of the claimants' witness statements on the footing that "the other statements of the claimants are very similar in content".) With the two exceptions noted above, this tended to carry over into the claimants' answers in cross-examination, where they appeared to be giving pre-planned answers to questions, rather than providing their clear, and genuine, recollections of events, and seemed to be anxious to seek to advance their own common agenda. Ms Zeng was a voluble witness whose lengthy answers were wholly disproportionate to any evidence that she could actually provide to the court. Ms Cheng had a poor recollection of events and her evidence was confused and very difficult to follow. Mr McIlroy submits that the claimants have more reason to have a distinct recollection of their meetings with Ms Tsang than she does. However, I am satisfied that these five claimants were not speaking to any genuine recollection of events. Moreover, none of the claimants seemed to display any real or genuine understanding of the precise mechanics of their purchase transactions or of the true position regarding the (limited) protection intended to be afforded by the legal charge in favour of the buyer company.
18. Having said that, whatever their recollection of events, little real assistance can be derived from the evidence of any of the claimants in determining the real issues in this case for the simple reason that the claimants have little, if any, relevant evidence to give. It was this point that I had sought to convey at the beginning of Day 2 of the trial when I observed that I had reviewed my notes of the evidence overnight, and indicated that I was not sure how much useful evidence I had derived from the cross-examination of the previous day's witness, and invited the parties' representatives to bear that in mind. In his written closing, Mr Bowmer acknowledged that the evidence of the claimants was of less significance to the primary issues that the court had to decide. Nonetheless, and notwithstanding the unsatisfactory manner in which some of the claimants gave their evidence, Mr Bowmer rightly drew attention to some important common themes which had run across the claimants' evidence: (1) The claimants had all been aware that their deposits were going to be released to the seller and used to fund the construction of the development. Mr McIlroy accepts that the buyers had been assured that the developer had already bought the land and that their funds would be used to fund the construction work. (2) The claimants were all aware (a) of the existence of the buyer company, (b) (once such was the case) that Ms Tsang was a director of the buyer company, and (c) that the buyer company would have control over, and the authority to agree to the release

of, the deposits. (3) The claimants were aware that the deposits would be released against supervisor certificates. Mr McIlroy accepts that the buyers understood that their funds would be looked after by the parties' solicitors, who would assess the surveyors' certificates and decide whether funds should be released. I find that there were two further points upon which the claimants were all agreed: First, that they had all relied upon Ms Tsang throughout, including after the period after they had exchanged contracts, and that they had expected her to keep them informed and up-to-date with any advice, and to seek instructions about any matters concerning their investment. They also agreed that their retainer with ATC was ongoing and had not been terminated until long after the release of their respective deposits, when they had received the common-form email sent out by ATC on 16 November 2017 terminating her practice's retainer and ceasing to act for the claimants. Second, the claimants all agreed that Ms Tsang had not informed them of, and had given them no advice about, the existence, or the implications, of the charge in favour of Bridging Finance Limited (BFL) which the developer had taken out in order to finance its original purchase of the development; nor had Ms Tsang obtained the claimants' express instructions relating to the release of their funds after they had exchanged contracts and following the issue of any supervisor's certificates. Mr Bowmer says that this is not surprising as Ms Tsang candidly and fully accepts that she did not give any advice on such matters or seek her clients' instructions in relation thereto.

19. In his written closing, Mr Bowmer rightly criticised the claimants for choosing to tender no evidence from anyone who could speak to the actual factual issues arising for determination at this trial whereas 174 had called evidence from Mr Hayhurst and Ms Pittard and had summoned Mr David Sewell (of Oliver & Co), Ms Amie Tsang, and Mr Craig Griffiths (a director of the developer and its parent company who had been involved on the financial side of the development) to give oral evidence.
20. Mr Campbell, in his written closing, pointed out that each of 174's witnesses had been cross-examined at length yet none of them had been materially shaken on any relevant factual issue. All were witnesses of patent honesty, who had been trying their best to assist the court about the matters requiring its determination. Despite suggestions to the contrary in Mr McIlroy's opening skeleton argument, he has not suggested that any of 174's witnesses have been involved in any dishonest or improper activity, or that they were, in any sense, engaged as players in "a somewhat incestuous team" assembled by the developer of North Point. Whilst I accept that this was the case, nevertheless I accept Mr McIlroy's criticism that, as is only understandable some five or six years after the event, especially in the case of busy professionals who have dealt with many similar matters, none of Mr Hayhurst, Mr Sewell or Ms Tsang had any clear recollection of events unaided by the contemporary documents.
21. Mr David Hayhurst is in his mid-60s and he no longer practises as a solicitor (having qualified in 1980). I find that he was a competent solicitor who was doing his best to assist the court: a frequent answer to questions in cross-examination was "fair comment". I agree with Mr Bowmer's assessment of Mr Hayhurst as "a patently and transparently honest witness" who would not do something for fear of losing a client, who would walk away if he felt uncomfortable, and who would not be bullied to do something he was not willing to do. He was clearly not in the pocket of NPPM and NPG. Thus, he would not allow any more money to be drawn down from the stakeholder funds than was justified under the relevant supervisor's certificates

(keeping back any funds that were not supported by a certificate); and on 10 March 2016 he ticked Mr Griffiths off when he had directed a request for the release of funds directly to Ms Susan Todd (in 174's accounts department) without first seeking the authority of one of 174's directors.

22. Mr David Sewell is in his late sixties, having qualified as a solicitor in 1976. Unsurprisingly (since Oliver & Co had settled the claims against its practice at a relatively early stage in this overall litigation) Mr Sewell had had little opportunity to consider the papers before he gave his evidence and at times he struggled to do so, at one point candidly admitting that he was confused. Despite labouring under this disadvantage, I find that Mr Sewell was a competent and honest solicitor who was genuinely doing his best to assist the court. Mr Sewell accepted that he had consented to act as a director of the buyer company and that it was he who had come up with the 'work-around' which was devised to address the issue of the priority of the charges over the development land (and which I shall explain later in this judgment) and that he had agreed this with Ms Tsang. He had seen this 'work-around' as being in his clients' best interests and as putting them in an equivalent position to the one they would have been in had there first been a first legal charge in favour of the buyer company and then a deed of priority in favour of BFL. Mr Sewell recognised that he had held two relevant positions, one as a director of the buyer company and one as the solicitor to certain of the buyers. However, his evidence was that he had thought that he had been authorising the release of funds in his capacity as the solicitor to those buyers who were represented by Oliver & Company, rather than as a director of the buyer company. Mr Bowmer submits that this is a misapprehension that is not supported by the contemporaneous documentation; this, so Mr Bowmer submits, could not realistically be clearer in demonstrating that Mr Sewell's consent had been sought, and given, in his capacity as a director of the buyer company.
23. Ms Amie Tsang is in her mid-fifties, having qualified as a solicitor in 1994. Based upon my own assessment of Ms Tsang's evidence, and her demeanour in the physical witness box, I cannot accept any of the criticisms directed at her by any of the claimants, or by Mr McIlroy, that Ms Tsang had ever sought to minimise the risks involved in buying into this development to her clients. I found Ms Tsang to be a competent, thoughtful, open, careful and honest solicitor, who did not obfuscate or speculate in her evidence when she was in any doubt about her recollection. It was not suggested, or put to Ms Tsang, that she had behaved in any way improperly or dishonestly, or that she was a party to any sort of incestuous conspiracy to promote the development to the disadvantage of any of her clients (although I recognise that, because of outstanding professional indemnity insurance coverage issues, it would have been contrary to the interests of any of the parties to this trial to have sought to impugn Ms Tsang's integrity or honesty). On the basis of what I have seen of her at this trial, I am satisfied that Ms Tsang would never consciously or deliberately have failed to act in the best interests of any of her clients simply in order to conclude a sale or to secure further instructions. Ms Tsang had put her warning about the risks of investing in an 'off-plan' purchase lower down, and in a slightly less prominent position, in her standard-form reports to her clients than Oliver & Co (upon whose template report she had modelled her own) had done; but I accept Ms Tsang's explanation for this (which was that she had wished to avoid what the Hong Kong-based estate agent had told her would create bad 'feng shui'). I find that this was consistent with Ms Tsang appreciating the cultural sensitivities of, and wanting to do

the right thing by, her Chinese clients by making sure that they viewed her report in a positive light. I am satisfied that Ms Tsang never told any of the claimants that the buyers would have any priority over the development site in the sense that, should the development fail, the land would be sold and the buyers would be repaid their deposits. I am satisfied that Ms Tsang's advice was limited to assuring the buyers that the legal charge in favour of the buyer company would give a "measure of protection" to their investments.

24. Mr McIlroy invited me to find that Ms Tsang had given the claimants a pattern of assurances relating to three matters: First, that the developer had already purchased the land and that the buyers' funds would be used to finance the ongoing construction work. I accept that Ms Tsang had told the buyers this, although she had also made it clear to them that their funds would be released to fund marketing expenses and commissions. Second, that the buyers' funds would be looked after by the solicitors acting for the buyers and the seller, who would assess the surveyors' certificates and decide whether buyers' funds could be released. This is an over-simplification because it ignores the fact that Ms Tsang also explained the role played by the buyer company; although since the solicitors for the buyers and for the seller were appointed as directors of the buyer company, the effect is broadly the same. Third, that the buyers would have priority over the development site, so that if the development failed the land would be sold and they would be repaid their deposits. This I do not accept; as previously stated, Ms Tsang's advice was limited to assuring the buyers that the legal charge in favour of the buyer company would give a "measure of protection" to their investments. I reject Mr McIlroy's invitation to prefer the claimants' recollection to that of Ms Tsang.
25. During the course of her evidence Ms Tsang confirmed that Mr Sewell's 'work-around' had dealt adequately with the issue of the priority of the charges over the development land and she had therefore agreed to it as a director of the buyer company. She also agreed with the defences previously signed by her as true on behalf of ATC to the effect that the buyers' funds had been held to the order of the buyer company and had been released against certificates without requiring the express and specific approval of the buyer company each time. However, there is an issue as to precisely when this was actually agreed which I shall need to resolve. Unlike Mr Sewell, Ms Tsang stated that she considered that she had been acting in her capacity as a director of the buyer company rather than as the buyers' solicitor.
26. Mr Craig Griffiths was a competent professional, and an honest witness, who was clearly doing his best to assist the court. As Mr Bowmer notes, Mr Griffiths explained the roles of Mr Garcia, Lee Spencer, Peter McInnes and Sam Beilin within the NPG Group and its development projects, and he gave his honest assessment of David Choules and Elizabeth Slessor as professionals discharging their roles as quantity surveyors and construction project managers. Mr Griffiths also explained his own role in receiving supervisor's certificates, requesting drawdowns on behalf of the developer, and controlling the cash flow. He explained that he had seen nothing untoward in this and that he could recall no contention about the manner in which he had requested drawdowns on behalf of NPPM from 174 following the issue of each certificate, and the way in which 174 had released funds against those certificates. Mr Griffiths also accepted, on the basis of the contemporaneous documentary evidence,

that he had been at the professionals' meeting on 18 December 2015 although he had no personal recollection of that meeting.

27. Ms Helen Pittard qualified as a solicitor in 1995 and she remains in practice. She was an exemplary witness who was patently honest and gave her evidence carefully and precisely, refusing to speculate. She seems to possess a good sense of humour, as illustrated by her email to Oliver & Co of 27 November 2015 (timed at 15.35). Mr Bowmer submits that three points stand out from her evidence: first, that her concern was to do things properly; secondly, that her role was in organising the IT and document management systems; and thirdly, that she gave clearly honest evidence about attending legal services meetings and, in particular, that after she had left the meeting on 18 December 2015 she had had a 'de-brief' with Mr Hayhurst in which he had stressed the importance of having reached agreement on the release of stakeholder funds. There was nothing remotely contentious or difficult about Ms Pittard's evidence; and her explanation of how she had made notes on her i-Pad of points relevant to her role, as a personal aide-memoire rather than as formal attendance note of everything that had been said, was sensible and entirely plausible. Mr Bowmer submits that this explains the absence, in her i-Pad note, of any formal record of the agreement reached at the 18 December 2015 meeting. On Ms Pittard's evidence, such legal considerations had been the concern of Mr Hayhurst and others; her own concern was with the efficient management of the systems designed to manage the workflow coming in to 174 as the sellers' solicitor. I entirely accept Ms Pittard's evidence; but I find that it does not help me to determine precisely what was agreed at the 18 December 2015 meeting.

IV: The Agreement for Sale

28. It is unnecessary for me to consider the provisions of the standard-form agreement for sale between NPPM as seller and each of the purchasers of units at North Point in any detail. Suffice it to say that on exchange of contracts, each purchaser paid a deposit to the seller's solicitor, who was to hold the same in accordance with the terms of the relevant agreement for sale. In the events that have happened, as a result of the failure of the development, the seller became obliged to repay the amount of their respective deposits to each of the purchasers, together with accrued interest, within 10 working days from the date when that buyer (or those buyers) gave notice to terminate the relevant sale agreement. However, this case is not concerned with the liability of the seller to repay the deposits but rather with the position of the seller's solicitor, 174, which had received their deposit from each of the claimants on exchange of contracts and had subsequently accounted for that deposit to NPPM as the seller. The real issue in this case is whether 174 acted lawfully in doing so; and the determination of this issue requires the court to consider the provisions of the sale agreement which governed the entitlement of the seller's solicitor to release the deposit. These are contained in clause 5, which provides as follows:

5.0 DEPOSIT RELEASE

5.1 The Deposit together with the Instalment Payments shall be paid to the Seller's Solicitor to be held as Stakeholder to the order of the Company and released by the Seller's Solicitor in the manner and on the terms;

5.1.2 to pay the following items:

5.1.2.1 all sums as are required:

to enable the Setter to purchase the Development, and to repay any money loaned to the Seller to enable the Seller to purchase the Development as they fall due for payment, and

to pay professional fees incidental to the purchase of the Development and exchange of this Agreement, and

pay all costs and professional fees incidental to the incorporation and registration of the Company and the Management Company, preparation and filing of accounts, returns and all Companies House and HMRC requirements.

5.1.2.2 all commissions professional fees and other payments reasonably ancillary to the marketing and sale of the properties on the Development

5.1.2.3 all commissions fees and payments incidental to the program of works to develop the Development and the buildings thereon including the building in which the Property forms part and certified in certificates issued by the Supervisor such payments to be made within 5 working days of receipt of a copy of the Supervisor's Certificate

5.2 Save for payments certified under clause 5.1.2.3 the payments shall be made on the production of the relevant invoice, account, fee note or voucher and the Buyer acknowledges that the Seller's Solicitor shall not be required to enquire into or verify the accuracy appropriateness or authenticity of same or the certificates issued by the supervisor SAVE and it is agreed that any payment pursuant to this Clause shall not be made until the transfer of the Property to the Seller has been completed and evidence of the registration of such transaction and of the Legal Charge as a first Legal Charge (or that such registrations are pending) is produced to the Buyer or his solicitor or agent

5.3 The Buyer hereby irrevocably authorises the making of the payments referred to in Clause 5 on the terms herein set

5.4 If during the course of the construction of the Development the Seller requires additional funds to enable the continuation of the Sellers Works and being unable to raise such funds from Buyers but is able to finance those costs from a third party lender then in such case the Company will consent to the creation of a prior legal charge with priority limited to the monies thereby secured in favour of such lender upon the following terms:

5.4.1 Such funds as are raised are paid direct to the Sellers Solicitors and retained and released in accordance with the provisions of this Agreement

5.4.2 the terms of such loan are approved by the Company

5.4.3 such loan does not delay restrict or prevent the completion of the sale of the Property to the Buyer in accordance with the terms of this Agreement

29. In the sale agreements which the claimants entered into, the 'Seller's Solicitor' is defined as 174. Earlier versions of the agreement for sale had named the Seller's

Solicitor as DRC; and the agreements signed by Ms Au Yeung and by Mr Wong named DRC as the seller's solicitor. This appears to have been because their draft contracts had been sent out whilst DRC were still acting for NPPM. When it came to exchange of contracts, in Ms Au Yeung's case (on 23 November 2015), the counterpart signed on behalf of NPPM named 174 as the seller's solicitor; and the counterpart signed by Ms Au Yeung was corrected in manuscript to name 174 as the seller's solicitor. In Mr Wong's case (on 23 December 2015), the counterpart signed on behalf of NPPM named 174 as the seller's solicitor; but the copy signed by Mr Wong does not appear to have been amended in manuscript to correct the change in the identity of the seller's solicitor to 174. There is no dispute that the exchanges of contracts took place on those dates, and at the times shown on the cover sheet of each relevant sale agreement; and that the deposits were paid to 174. It is, I believe, common ground (and, if not, I so find) that the reference in Mr Wong's contract to DRC is an obvious error which should be corrected by applying the principles of 'common law rectification' by which an obvious error can be corrected through a process of construction on the basis both that it is obvious on the face of the document that it contains an error and that it is clear what correction falls to be made.

30. The 'Company' is defined as North Point Buyers (Pall Mall) Limited. The 'Supervisor' is defined as "a professionally qualified person or firm who is appointed by the Seller as the employers agent in connection with the supervision of the Seller's Works and certification of payments due in respect of the Development and its construction"; and 'Supervisor's Certificate' as "a certificate in writing issued by the Supervisor pursuant to the terms of this contract and the terms of the Building Contract". 'Legal Charge' is defined as "a legal charge made between the Seller and the Company over the Development to secure the rights of the Company over the Development and the obligations of the Seller to the Buyer in this Agreement".
31. It is necessary for me to refer to two further features of the Agreement for Sale. First, clause 24.1 of each sale agreement provides that: "This Agreement and any documents annexed to it constitute the entire agreement and understanding of the parties and supersede any previous agreement between them relating to the subject matter of this Agreement." Secondly, each agreement for sale was signed by Mr Hayhurst expressly "for and on behalf of the Seller, the Company and the Management Company and the Supervisor as their duly authorised Attorney".
32. Before I proceed to analyse the meaning and effect of clause 5, and the resulting stakeholder contract, it is first necessary for me to consider the law relating to stakeholder contracts.

V: The law on stakeholder contracts

33. All three counsel referred me to a number of authorities on the law on stakeholder contracts. Mr McIlroy took me back to the start of Trinity Term 251 years ago and the decision of the Court of King's Bench in *Burrough v Skinner* (1770) 5 Burr 2639; but I find it convenient to begin with *Potters v Loppert* [1973] Ch 399. This is a case notable both for the distinguished counsel who appeared for the parties (Jeremiah Harman Q.C. and Oliver Lodge for the plaintiffs; Nicolas Browne-Wilkinson Q.C. and Richard Scott for the defendant) and for Sir John Pennycuik V-C's influential analysis of the juridical basis of the duty of a stakeholder to deal with the deposit paid on the sale of land according to the event stipulated in the relevant contract. In an

influential passage (at 406D-E), which has been adopted in subsequent cases, the Vice-Chancellor said:

“Turning now to authority, it is to my mind conclusive that, apart from agreement to the contrary, a contract deposit paid to a stakeholder is not paid to him as trustee, but upon a contractual or quasi-contractual liability with the consequence that the stakeholder is not accountable for profit upon it.”

34. This analysis has been approved and adopted in later cases. In *Hastingwood Property Ltd v Saunders Bearman Anselm* [1991] Ch 114, Mr Edward Nugee QC (sitting as a deputy judge of the Chancery Division) said (at 123H–124A):

“It seems clear to me that, in the common case of a deposit paid to a stakeholder on the signing of a contract for the sale of land, if the stakeholder repays the deposit to the purchaser in the belief that the contract is at an end the remedy of the vendor who claims to be entitled to forfeit the deposit is, so far as the stakeholder is concerned, limited to an action to recover the amount of the deposit, which will be an action in contract or, more usually, an action for money had and received.”

35. In *Rockeagle Ltd v Alsop Wilkinson* [1992] Ch 47, the Court of Appeal decided that since the terms of the tripartite contract between a stakeholder, a vendor and a purchaser required the stakeholder to hold the deposit on behalf of both parties pending completion and thereafter to pay it over to the party entitled to receive it, a term should be implied that, on the parties' joint instruction, the stakeholder was obliged to transfer the deposit to a different stakeholder. It followed that a solicitor receiving a deposit paid on exchange of contracts for the sale of land as stakeholder acquired no contingent security for any money that might be owed to him by his client, being either the vendor or the purchaser. In the course of a judgment concurring with Staughton LJ, Farquharson LJ (at 52E-53B) said that it was clear from the authorities, and in particular from *Potters v. Loppert* [1973] Ch. 399, “that the duties and authority of a stakeholder lie in contract or quasi-contract and not as trustee”. There was a right on the part of the contracting parties to require the surrender of the stake from the stakeholder, and to terminate their authority, before either of the events specified in the contract should take place. There must be implied a term in the contract made between the original parties and the stakeholder that they could, should they so desire, withdraw their authority to hold the deposit and direct the stakeholder to apply the money in the way that both the original parties might agree. As the next authority demonstrates, however, the position is different after the event on which the stake is to be repaid has already happened. (Lord Donaldson of Lymington MR agreed with both judgments.)

36. The leading modern Court of Appeal authority on the law governing stakeholder contracts is the decision of the Court of Appeal (Butler-Sloss, Millett and Waller LJJ) in *Manzanilla Ltd v Corton Property & Investments Ltd*, decided on 13 November 1996. Millett LJ began his leading judgment by stating that: “This appeal raises a question of general importance concerning the position of a stakeholder.” It is, perhaps, therefore surprising that the case has never been reported. The reason is probably because the Court of Appeal’s judgment merely allowed an appeal from a decision of Mr Anthony Grabiner QC (sitting as a deputy judge of the Chancery Division) on an application for summary judgment, and the Court merely gave the

appellant solicitors (formerly representing the sellers) unconditional leave to defend the claim brought against them by the purchaser for the repayment of certain deposits paid on the exchange of five contracts for the sale of land with three sellers. The question (which the Court of Appeal answered in the negative) was whether the stakeholder's former clients, the sellers, were free to dispose of the stake without the stakeholder's consent at any time before actual payment, even though the event on which the stake was to be repaid had already happened.

37. In his leading judgment in *Manzanilla*, Millett LJ considered the position of a stakeholder:

“A stakeholder is a person who receives a deposit of money from two parties and undertakes to repay it to one or other of them in accordance with a specified event. The stakeholder qua stakeholder has no interest in the outcome and is indifferent as to which of his principals should ultimately become entitled to be paid. As stakeholder his only interest is obtaining a good discharge for the money
...

Where a stakeholder is involved, there are normally two separate contracts to be considered. There is first the bilateral contract between the two principals which contemplates two possible alternative future events and by which the parties agree to pay a sum of money to a stakeholder to abide the happening of one or other of them. In the present case it consisted of a series of written contracts for the sale of land, and the relevant events were the failure of the contracts by the repudiatory breach of one party or the other. The second contract is the tripartite contract which results from the deposit of the money with the stakeholder on terms that he is to keep it until one or other of the relevant events happens and then pay it to one or other of the parties accordingly. The stakeholder is a party to the second contract but not the first. His rights and obligations are not normally expressly spelled out. They are implicit in the transaction itself, and must be discovered, not by implying terms, but by analysing the relationship of the parties which arises from the deposit of the money.

The following propositions emerge from the authorities:

(1) The relationship between the stakeholder and the depositors is contractual, not fiduciary. The money is not trust money; the stakeholder is not a trustee or agent; he is a principal who owes contractual obligations to the depositors: *Potters v Loppert* [1973] Ch. 399, 406; *Hastingwood Ltd. v Saunders Bearman* [1991] Ch. 114, 123. The underlying relationship is that of debtor and creditor, and is closely analogous to the relationship between a banker and his customer.

(2) Until the specified event occurs, the stakeholder is entitled to retain the interest on the money. This is usually described as his reward for holding the money: see *Harington v Hoggart* (1830) 1 B & Ad 577. This right may be excluded by special arrangement, and was excluded in the present case.

(3) Until the event happens the stakeholder holds the money to the order of both depositors and is bound to pay it (strictly speaking an equivalent sum) to them or as they may jointly direct: *Rockeagle v Alsop Wilkinson* [1992] Ch. 47.

(4) Subject to the above, the stakeholder is bound to await the happening of the event and then to pay the money to one or other of the parties according to the event. The money is payable to the party entitled on demand, and if the stakeholder fails to pay in accordance with a proper demand he is liable for interest from the date of the demand: *Lee v Munn* (1817) 8 Taunt. 45; *Gaby v Driver* (1828) 2 Y & J 549.

(5) If the occurrence of the event is disputed, the stakeholder cannot safely pay either party, for if he mistakenly pays the party not entitled, the payment will not discharge his liability to the other. In these circumstances he may (i) interplead and pay the money into Court; (ii) retain the money pending the resolution of the dispute; or (iii) take the risk of paying one party. The choice is entirely his.

(6) If he takes the second course, he may notify the parties that he is content to abide the outcome of the dispute. There is then no need to join him in any proceedings which are taken to resolve it. If he is not joined, the Court cannot order the money to be paid to the successful party. All it can do is to declare that the successful party is entitled to give a good receipt for the money: see *Smith v Hamilton* [1951] Ch. 175.

(7) If the stakeholder is not content to abide the outcome of the proceedings, he may be joined in order to bind him. This was done in the present case, albeit on the application of the stakeholder.”

38. Later in his judgment, Millett LJ emphasised that: “The identification of the determining event is a matter of the construction of the contract.” Later still he considered the proper analysis of the contractual relationships to which the deposit gave rise:

“In my judgment, the deposit by itself creates the relationship of creditor and debtor between the depositors and the stakeholder. This is the underlying relationship of the parties. Additional rights and obligations are superimposed by the mandate which is given by the parties to the stakeholder to pay the money to one or other of the parties according to the happening of a specified event.”

39. Waller LJ began his concurring judgment by recognising that, as one would expect, the vendors' solicitors had not been parties to the contracts of sale made between the vendors and the purchaser but they had agreed to act as stakeholders and the proper inference appeared to be that they had agreed to do so on the terms set out in the contracts of sale.

40. Sitting as a judge of the Court of Appeal in *Gribbon v Lutton* [2001] EWCA Civ 1956, [2002] QB 902, Laddie J relied upon Millett LJ's analysis in *Manzanilla* (at [11]–[13]) as supporting “the necessity for distinguishing between the vendor/purchaser contract on the one hand and the tripartite contract on the other”. Emphasising that “the tripartite contract does not define entitlement between vendor and purchaser but responds to an entitlement determined elsewhere”, Laddie J said that the starting point in identifying the entitlement to the deposit

“... is a determination of the nature of the relationship between the stakeholder and the parties who have an interest in the deposit. Since this case relates to the

proposed purchase of land, it is convenient to refer to the parties as the vendor, the purchaser and the stakeholder. It is important to bear in mind that in a normal case there exist two distinct contracts. The first is the contract between the vendor and purchaser which determines when and to whom the deposit will be paid. The second is the contract between the vendor and purchaser on the one hand and the stakeholder on the other. Since in the type of situation being considered here there are three parties, this latter contract has been referred to in the authorities as tripartite. The scope and purpose of the tripartite contract is very limited. It provides that the stakeholder shall keep the deposit pending a triggering event and then shall pay in response to that event. It is no part of the function of the tripartite agreement to create the triggering event. The matter can be put another way: the vendor/purchaser contract determines who is entitled to the deposit after the triggering event, the tripartite agreement provides that the stakeholder must deal with the deposit in accordance with the entitlement to it defined by the vendor/purchaser contract and, until the triggering event, he must retain it in accordance with the joint instructions of the vendor and purchaser. Therefore the tripartite contract does not create either the vendor's or purchaser's entitlement to the stake, but gives effect to the entitlement as between them which is determined by the vendor/purchaser contract. Although the two contracts may be entered into at the same time, that need not be so."

41. Although in *Sharma v Simposh Ltd* [2011] EWCA Civ 1383, [2013] Ch 23 Toulson LJ (with the agreement of Laws and Black LJJ) disagreed with a later part of Laddie J's judgment, relating to the consequences which might flow when a purchaser paid a deposit to a stakeholder in advance of entering into a legally binding contract with the vendor, in my judgment this does not derogate in any way from the validity of Laddie J's analysis, which seems to have attracted the approval of Gloster LJ (with the agreement of Jackson and McFarlane LJJ) in *Rabiu v Marlbray Ltd* [2016] EWCA Civ 476, [2016] 1 WLR 5147 at [99].
42. Millett LJ's statement of the applicable principles in *Manzanilla* was also cited with approval by Rimer LJ (with the agreement of Kitchin and Christopher Clarke LJJ) in *Bristol Alliance Nominee No 1 Ltd v Bennett* [2013] EWCA Civ 1626, [2014] 1 EGLR 9 at [24] in the context of an escrow account held by solicitors. Confirming that the correct analysis was that the solicitors held the escrow money as stakeholders, and not as trustees, upon the basis of a tripartite contract between them, the tenant company and its landlord, Rimer LJ said that, pending the arising of an event in which the money was payable to one or other of the company and its landlord, the money was held by the solicitors to the order of both parties, and they were bound to pay an equivalent sum to them, or as they might jointly direct.

VI: Analysis of the stakeholder contract

43. In analysing the stakeholder contract, the starting-point is to identify the parties to that contract and then, having done so, to identify its terms, express and implied. 174 was not a party to any of the sale agreements made between NPPM, as seller, and the claimants, as purchasers; but, as Waller LJ recognised in his concurring judgment in *Manzanilla*, the appropriate inference is that, when 174 received each of the deposits, it agreed to do so on the terms set out in the relevant agreement for sale. As Laddie J recognised in *Gribbon v Lutton*, it is the relevant sale agreement which determines the entitlement to the buyer's deposit. It is common ground that NPPM is a party to the

stakeholder contract because it has a contingent entitlement to receive the deposit. Who else is a party to the stakeholder contract?

44. Mr McIlroy contends that the buyer is also a party to each stakeholder contract, or alternatively both the buyer and the buyer company. In his oral closing, he submitted that the effect of the authorities is that one must look at the contractual relationship between the parties to a stakeholder contract that is established principally by the bilateral contract between the parties to the main transaction: in this case, the agreements for sale. In analysing the agreements for sale, the court should apply the normal principles of contractual interpretation. The court must look to identify the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to have been using the language of the contract to mean. It is an objective exercise, viewed from the position of the reasonable person with the knowledge available to the parties. The parties to the agreement for sale are, on the one hand, the seller and, on the other hand, the various claimants. The meaning has to be assessed in the light of the natural and ordinary meaning of clause 5, any other relevant provisions of the agreement for sale, the overall purpose of the clause, the background documents, the facts and circumstances known or assumed by the parties at the time the sale agreements were entered into, and commercial common sense; but disregarding subjective evidence of any party's intentions. When one looks at clause 18 of the agreements for sale, one finds that the buyers' funds are to be returned to them if the buyers terminate the agreements. The buyer company is simply an agent for a disclosed principal; and it is the buyers, as principals, who remain the parties to the agreements for sale, and to the resulting stakeholder contracts. The only alternative construction that would make any sense would be that the buyer company was a party to the stakeholder contract in addition to, but not to the exclusion of, its principals.
45. Mr Bowmer contends that only the buyer company is a party to the stakeholder contract and that the buyers therefore have no standing to sue upon it. The stakeholder contract functions perfectly well commercially without the buyers being a party to it; and, in fact, there are very good practical reasons why the buyers should not be regarded as parties to the stakeholder agreement because that would create the risk of having conflicting instructions from the buyer company and each individual buyer, which simply would not work. The stakeholder is entitled to look to a single voice; and that voice is the voice of the buyer company. The stakeholder cannot be expected to look to hundreds of different buyers for instructions. The wording of clause 5 recognises that the buyer company has the right to enforce the rights and obligations under the stakeholder agreement.
46. These competing submissions are more fully developed in the written opening skeleton arguments and in counsel's written closing notes, all of which I have re-read during the course of preparing this written judgment.
47. I reject Mr Bowmer's contention that this was a tripartite agreement between the seller (NPPM), the stakeholder (174), and the buyer company. I prefer Mr McIlroy's alternative contention that this was a quadripartite agreement, involving the individual buyers as well as the buyer company. Naturally, the buyers are parties to their respective sale agreements; and I remind myself that, although not named as a party to any of the agreements for sale, Mr Hayhurst purported to sign each sale agreement

expressly on behalf of the buyer company (as well as on behalf of others) as their duly authorised attorney. The individual buyers provide the deposits; and they have a contingent right to their return if they become entitled to exercise the contractual mechanism for terminating the sale agreements should the seller fail to achieve practical completion of the development by the longstop date. True it is that the buyers' deposits are paid to, and held by, the seller's solicitors, as stakeholder, to the order of the buyer company, in accordance with the terms of clause 5 of the sale agreements; but the individual buyers have an interest in seeing that those terms are properly observed. They must therefore have the necessary entitlement, and standing, as parties to the stakeholder contract, to enforce its terms. If the stakeholder were to release the deposit of an individual buyer without the authority of the buyer company, it cannot have been the intention of the parties to the agreements for sale that only the buyer company, and not that particular purchaser, should have the necessary standing to step in and sue the stakeholder. Mr Bowmer's "very good practical reasons" for excluding the buyer as a party to the stakeholder contract seem to me to conflate and confuse the identities of the person – the buyer company, to the exclusion of the buyers – which may give instructions for the release of the deposit with the persons – which includes the buyer – who may enforce the terms of the stakeholder contract. For the court to hold – as I do – that the buyer is a party to the stakeholder contract does not mean that the buyer is entitled to give instructions for the release of their deposit, because that is a role assigned, by clause 5 of the sale agreement, to the buyer company alone.

48. During the course of Mr McIlroy's oral closing (at Day 9, pages 33-34), I observed that a quadripartite, rather than a tripartite, agreement, including both the individual buyer and the buyer company, seemed to me to be the natural and true analysis. The dialogue proceeded as follows (correcting obvious transcription errors):

JUDGE HODGE QC: ... The deposit is paid to the seller's solicitor, 174, and is held to the order of the buyer company. Just as the solicitors for the seller were not a party to the sale agreement yet form part of the stakeholder agreement, the buyer company, which is not a party to the agreement for sale, also forms part of the stakeholder contract.

MR McILROY: And, my Lord, I have no difficulty with that. If that is your Lordship's analysis on behalf of the claimants, I am content with that analysis.

JUDGE HODGE QC: That seems to me to be the natural conclusion to draw. Had the stake not been held to the order of the buyer company, then the buyer company would have had no involvement. But given the unusual fact that this was a development being sold to a massive number of purchasers, they decided to introduce a buyer company in order to simplify the process of release of the stake.

MR McILROY: My Lord, yes. I mean, that makes sense. The buyer company is clearly there, in our submission, to enable collective decision-making to be made on behalf of buyers, but its authority is the authority that is located within the terms of clause 5 of the agreement for sale.

49. During the course of Mr Bowmer's oral closing (at Day 10, pages 42-44), I observed that whilst I fully accepted that only the buyer company might be entitled to give instructions to release the deposit, and to look for a receipt, there were other aspects

of the stakeholder agreement where it might be legally convenient, and indeed necessary, for the buyer, individually, to be able to take action to enforce its terms. Whilst he maintained that recovery in relation to the stakeholder fund was entrusted to the buyer company, and that there was no legal necessity for the buyer to be a party to the stakeholder contract as well, Mr Bowmer was prepared to recognise that, once the longstop date had passed, and the buyer had served notice terminating the sale agreement and was seeking to recover their deposit, there might be some ‘carve-out role’ whereby the buyer was to be regarded as a party to the stakeholder agreement; but he submitted that it had to be limited in that sort of way. Mr Bowmer insisted that there could not be a situation where the buyer company had been entrusted to give instructions to the stakeholder yet the buyer could suddenly step in and say: ”No, no, it doesn’t work like that”. Mr Bowmer maintained that that could not be right. I agree with Mr Bowmer that the deposits were held to the order of the buyer company, and not the buyers; but treating the buyers as a party to the stakeholder contract, entitled to enforce the same according to its terms, does not affect that position.

50. I therefore hold that each of the buyers was a party to a series of quadripartite stakeholder contracts and was entitled to enforce the same according to their terms.
51. That brings me to the next question, which is how the terms of clause 5 of the sale agreements, governing the release of the buyers’ deposits, fall to be interpreted. Mr Bowmer submits that the key provision is the direction in clause 5.1 that the deposits are to be held by the seller’s solicitor, as stakeholder, to the order of the buyer company. Alternatively, he submits that ATC had a role to play as the buyers’ solicitor. Mr McIlroy submits that what is key to clause 5 is that the authority of the buyer company is limited by the words in sub-clause 5.1 that the deposit is to be held by the stakeholder to the order of the buyer company, and released by the seller’s solicitor “in the manner and on the terms” set out below. This said is said to be reinforced by the terms of sub-clause 5.3, whereby the buyer irrevocably authorises the making of the payments referred to in clause 5 “on the terms herein set”, with the word “out” clearly missing and to be inserted at the end. I accept Mr McIlroy’s submission that that must refer to the terms of clause 5 as a whole because sub-clause 5.3 itself does not set out any terms.
52. In this connection I was inevitably taken to the decision of the Supreme Court in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 which was concerned with the true meaning and effect of the service charge provisions in the leases of a number of chalets in a caravan park. This authority is said to be of particular relevance to the present case since it considers the extent to which it is open to the court to depart from the natural meaning of a clause in a contract in order to prevent a commercially absurd result. In the course of identifying (at [17-23]) seven factors relevant to the interpretation of contractual provisions (of which the seventh was specific to service charge provisions), Lord Neuberger of Abbotsbury PSC emphasised (amongst other matters) that: (1) the reliance placed in some of the authorities on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is being construed; (2) whilst commercial common sense is a very important factor to take into account when interpreting a contract, the court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of the wisdom of hindsight; and

(3) when interpreting a contract, a judge should avoid re-writing it in an attempt to assist an unwise party or penalise an astute party.

53. Mr McIlroy accepts that the buyers conferred authority on the buyer company by signing the agreements for sale. This case is about the extent of that authority. Was it unlimited, as Mr Bowmer suggests, or was it limited by the detailed provisions of clause 5, as the claimants say? Mr McIlroy refutes any suggestion that his case is that 174 could never act on any instructions from the buyer company. The claimants accept that 174 could act on instructions from the buyer company to release funds against certificates; but Mr McIlroy submits that they could only do so if the pre-conditions set out in clause 5 had been met. Mr McIlroy submits that the subparagraphs of sub-clause 5.1 identify, and limit, the purposes for which funds may be released. The intention and effect of sub-clause 5.3 is clear. On the one hand, the stakeholder and the seller have the certainty that so long as they comply with the terms of clause 5, the buyers may not countermand the payments made. On the other hand, the buyers' irrevocable authority is limited to payments made in accordance with the terms of clause 5. The ordinary and natural meaning to be given to clause 5 is that the authority conferred upon the buyer company was limited by the terms of clause 5; and those terms required a first legal charge to be registered, and they also required the provisions of clause 5.4 to be satisfied if that first legal charge was being subordinated. There was no general authority to disapply those conditions so long as the same result was achieved and the buyers ended up in the same position at the end.
54. Mr McIlroy submits that under clause 5 the buyer company has at least three important roles to play. First, it was the buyer company which was to take the collective decision to approve the release of funds against supervisor's certificates provided the pre-conditions in clause 5 had been met. That was its role under clause 5.1. Secondly, it was the buyer company which was to approve the terms of any loans to the developer which might be required in the event that the buyers were unwilling or unable to provide sufficient funds to enable the development to proceed to completion. That was its role under clause 5.4. Thirdly, it was the buyer company which was to hold the legal charge over the development. Those three functions of the buyer company (receiving and reviewing the certificates, approving any subsequent loans that might prove necessary, and holding the legal charge) all work sensibly within the context of a stakeholder contract analysed as a quadripartite agreement. So the claimants' construction gives effect and meaning to the whole of clause 5.
55. Mr McIlroy submits that, in contrast to his own submissions, Mr Bowmer's construction eviscerates clause 5 by taking a blue pencil to most of its provisions. This is because: (1) Mr Bowmer proposes a construction under which the buyer company has a general authority to release the buyers' funds regardless of whether the pre-conditions in the second half of clause 5.2 are met, and regardless of whether the requirements of clause 5.4 are met. So, on his construction, if the buyer company has a general authority, the second half of clause 5.2 is deleted and all of clause 5.4 is removed at a stroke. But (2) neither do clause 5.1 or clause 5.3 survive the attack of Mr Bowmer's killer blue pencil. Mr McIlroy submits that it is telling that in Mr Bowmer's reconstruction of clause 5.1, the concluding words before the semicolon, "in the manner and on the terms", do no work at all. Those words are clearly included in order to set boundaries to the buyer company's authority. The buyer company was intended to have authority to operate within the terms set out by clause 5, and not to

override those terms. So (3) the same is true for clause 5.3. It is true that clause 5.3 provides that the buyers are giving an irrevocable authority, but it is not *carte blanche* given to the buyer company; it is authority given for the making of the payments referred to in clause 5.3 “on the terms herein set”. That must refer to the terms throughout the whole of clause 5, both because there are no terms in sub-clause 5.3 itself and because “Clause 5” (capitalised) is what is expressly referred to in clause 5.3. So if clause 5.4 and the second half of clause 5.2 can be dispensed with unilaterally by the buyer company, then the concluding words of both clauses 5.1 and 5.3, which refer to the terms of clause 5 as a whole, are rendered meaningless.

56. Mr McIlroy contends that effectively what Mr Bowmer proposes is that the entirety of clause 5 should be reduced to two clauses, the first of which would read: “The Deposit together with the instalment payments shall be paid to the Seller’s Solicitor to be held as Stakeholder to the order of the [buyer] Company” full stop; and the second of which would read: “The Buyer hereby irrevocably authorises the making of the payments ordered by the [buyer] Company” full stop. And even that latter clause, regarding irrevocable authorisation, might be regarded as simply belt-and-braces. Mr McIlroy submits that that is not a proper interpretation of clause 5; rather, it is a re-writing of clause 5, with the benefit of hindsight to fit the events which have in fact occurred. Mr Bowmer described the October ‘work-around’, from which everything is said by the defendants to flow, as a *de facto*, rather than a *de jure*, way of going about it. That admission reflects the reality, as indeed does the adoption by the witnesses of the description of what was done as a ‘work-around’. Mr Sewell proposed, and Ms Tsang agreed to, a way of doing things which did not truly reflect the provisions of the agreements for sale. In a court of law, when dealing with a written agreement for the sale of an estate in land, and in a contract where certainty is at a premium, there is said to be no room for the court to sanction such an approach. Clause 5.4 contains a set of contractual terms, and not a menu of factors that the buyer company might use when exercising an unlimited discretion. Mr McIlroy submits that a reconstruction of clause 5 to fit the facts, as opposed to the legal position, is impermissible. Mr Bowmer’s construction sweeps away many of the protections the buyers were supposed to have in respect of their funds. The buyer company, ostensibly established for their protection, in fact becomes a mechanism by which their funds can be released to the seller as easily as if the buyer company did not exist at all.
57. In terms of the agreements for sale, Mr McIlroy contends that ATC had no authority in respect of the buyers’ funds once they had been released to the seller’s solicitors upon exchange of contracts. ATC’s role and function in relation to those funds was to receive them into its client account and then to pay them out on exchange of contracts. Once it had done that, the buyers’ funds had passed beyond ATC’s control as solicitors, and ATC simply had no further authority to deal with them.
58. Mr Bowmer emphasises the primacy of the contractual direction that 174, as stakeholder, was to hold the buyers’ deposits “to the order of” the buyer company, thereby conferring express authority on the buyer company in relation to the release of the buyers’ deposits. Alternatively, Mr Bowmer relies upon the authority of ATC, as the buyers’ solicitors, to approve any arrangements that the parties’ solicitors agreed regarding the release of the buyers’ deposits. Mr Bowmer did not dispute that solicitors have no usual authority to conclude a contract (except in the context of

settling litigation), and that the buyers had not held their solicitors out as having ostensible authority to do so, save to the extent that such authority was actually conferred by the terms of the sale agreements. However, Mr Bowmer submits that this is a case of implied actual authority on the part of ATC, either as incidental to its role as the solicitor acting for buyers, who had paid their deposits to a stakeholder to abide the completion of the development and their purchase of units therein, or as implied from the circumstances of the case.

59. As to incidental authority, Mr Bowmer submits that ATC was expressly retained to act on behalf of the buyers on the purchase of their individual units at North Point, not just up to the point of exchange of contracts, but all the way through to practical completion of the development, and the completion and registration of their individual purchases. It was incidental to those express instructions that ATC should have authority to communicate with 174, as the seller's solicitors, and also as stakeholder, in relation to matters relevant to the completion of the development, and the sale of the buyers' units. So, Mr Bowmer submits, communications regarding the release and use of the deposits to fund work on the construction of the development fall into the category of incidental authority.
60. Alternatively, ATC had implied authority, arising from the circumstances of the case, which extended to the parties' common understanding that the deposits paid to 174 on exchange of contracts should be used to pay for the ongoing construction of the North Point development. Evidently there might have to be discussions about this. The buyers instructing ATC had been located outside the jurisdiction, and one of the reasons for the purchasers to retain solicitors within the jurisdiction was to enable such discussions to take place; and the purchasers had also authorised Ms Tsang and ATC to accept any notices from the Land Registry. So Mr Bowmer's alternative analysis is that ATC was entitled to give, and had given, the necessary authority to 174 in relation to the release of the funds. Mr Bowmer's primary case is that it was the buyer company which had the necessary authority; but Mr Bowmer relies upon this as an alternative analysis. In reality what was happening was that Ms Tsang, as the principal or director of ATC, was looking over her own shoulder, metaphorically, as the purchasers' solicitor whilst she was taking all these decisions as a director of the buyer company; and the facts are equally capable of being analysed in terms of ATC giving the authority.
61. I am in broad agreement with Mr McIlroy's submissions as to the true meaning and effect of clause 5 of the sale agreements. Although 174 held the purchasers' deposits to the order of the buyer company, the clear wording of clause 5 was to impose constraints upon the stakeholder's entitlement to release those deposits, even if authorised to do so by the buyer company. They could only be released to pay the items set out in sub-clause 5.1.2, and then only after: (1) the transfer of the property to the seller has been completed, and (2) evidence of the registration (a) of such transfer and (b) of the Legal Charge in favour of the buyer company as a first legal charge (or that such registrations were pending) had been produced to the buyer or his solicitor or agent. So far as the purpose for which 174 might release the buyers' deposits is concerned, clause 5 makes it clear that payments under sub-clauses 5.1.2.1 and 5.1.2.2 were to be made on the production of the relevant invoice, etc whilst those under sub-clause 5.1.2.3 were to be made against receipt of a copy of the supervisor's certificate, and 174 was not required to enquire into or verify the accuracy, etc of the same. In my

judgment, on the clear wording of the saving provision at the end of clause 5.2, it was ATC, as the buyers' solicitor, which had the express authority to determine whether sufficient evidence of the registration of the transfer of North Point to NPPM and of a first legal charge in favour of the buyer company (or that such registrations were pending) had been produced. This was not a matter about which 174 had independently to satisfy itself. At the end of Mr McIlroy's closing reply (at Day 10, pages 172-3), I asked about the saving provision at the end of clause 5.2:

JUDGE HODGE QC: Under clause 5.1 the deposit is held by the seller's solicitor as stakeholder to the buyer company's order and is to be released by the stakeholder in the manner and on the terms set out in clause 5. There is the saving provision at the end of clause 5.2 that: "... any such payment is only to be made after the transfer of the property to the seller has been completed [which was fulfilled] and evidence of the registration of such transaction and of the legal charge as the first legal charge is produced to the buyer or his solicitor or agent." As you have pointed out, the buyer company has no role to play in that aspect of the pre-conditions, so is it not sufficient for the buyer company to rely upon the fact that Mr Sewell for Oliver & Co and - as is relevant here - Ms Tsang for what is now Key Manchester Ltd have been agreeing to the release of these monies?

MR McILROY: Well, my Lord, the answer to that question is it is actually not about the buyer company, it is about 174. You know, the obligation here is an obligation on 174 not to make payments. Insofar as 174 is concerned, in my submission it has to satisfy itself that the legal charge has been registered as first legal charge.

JUDGE HODGE QC: So that is the answer to the point?

MR McILROY: Yes. Yes, my Lord, it is.

62. Mr McIlroy was quite right to point out that it was 174, and not the buyer company, that was authorised to release the deposits; but I do not agree that it was for 174 to satisfy itself as to the registration of the first legal charge. In my judgment, on the wording of the saving provision in clause 5.2, it was sufficient for ATC, as the buyers' solicitor, to do so. Once ATC was satisfied with the registration of the Legal Charge in favour of the buyer company as a first legal charge, in my judgment 174 was authorised to release the buyers' deposits against appropriate invoices and supervisors' certificates, etc.
63. Clause 5.4 of the Agreement for Sale is silent as to the identity of the person or persons who have to satisfy themselves that circumstances exist which warrant the creation of a prior legal charge and that the conditions set out in sub-clauses 5.4.1 to 5.4.3 are satisfied. On the true construction of the sub-clause, it seems to me that it must be for the buyer company to satisfy itself that circumstances exist which warrant the creation of a prior legal charge since it is the buyer company which is to consent to the creation of such charge. It is also explicitly stated in sub-clause 5.4.2 that it is the buyer company which has to approve the terms of the loan. It seems to me to be implicit in sub-clause 5.4.3 that it must be for the buyers, or for their solicitors – in the circumstances of the present claims, ATC - to determine whether the loan will delay, restrict or prevent the completion of the sale of the relevant residential unit to the buyer. Since the funds raised on the security of the prior legal charge are to be paid

direct to the seller's solicitors, and retained and released in accordance with the terms of the sale agreement, it seems to me that it must have been for 174 to determine whether those particular requirements were satisfied; but on the basis that it was sufficient for this purpose if: (1) the buyer company was satisfied that circumstances existed which had warranted the creation of the prior legal charge; and (2) ATC, as the claimants' solicitor, was satisfied as to the registration of the subordinated legal charge in favour of the buyer company and that the loan would not delay, restrict or prevent the completion of the sale of the relevant residential unit to the buyer. In my judgment, the obligations resting upon 174 were no more extensive than those. It was not for 174 to satisfy itself as to the existence or registration of a first legal charge in favour of the buyer company; in the context of these claimants, that was a matter to which it was entitled to look to the judgment of ATC. Nor was it for 174 to satisfy itself as to the propriety of any prior legal charge created in accordance with the provisions of clause 5.4: in the context of these claimants, that was a matter to which 174 was entitled to look to the judgments of the buyer company and of ATC.

64. I consider such a conclusion to be consistent both with the legitimate commercial expectations of the parties to the sale agreement and also with the justice of the case: (1) In a situation involving potentially many hundreds of mainly offshore-based purchasers, with little or no knowledge of English conveyancing law or procedures, and with limited, if any, command of or fluency in the English language, it was commercially sensible to look to the buyer company to speak with a single voice on behalf of the buyers, and to the buyers' solicitors to communicate with the seller's solicitor on their clients' behalf. (2) In any matter involving the exercise of professional legal skill, expertise and judgment for the protection of the buyers' interests, it was commercially appropriate and sensible for their own solicitors, rather than for the seller's solicitor, to determine whether the pre-conditions in clause 5 of the sale agreements were satisfied.
65. That leaves one further issue concerning the true meaning and effect of clause 5 and the consequences of any breach of its terms. If the court were to find that 174 had released the buyers' deposits in breach of the terms of the stakeholder's agreement, does the resulting liability sound in debt or in damages; and, if the latter, what is the appropriate measure of loss?
66. In this context, I was referred to the leading judgment of Jackson LJ in *Various Claimants v Giambrone & Law* [2017] EWCA Civ 1193, [2018] PNLR 2. That case did not involve any claim arising out of a stakeholder relationship. The trial judge (Foskett J) had found that in all the circumstances of the case it had been a breach of trust for Giambrone, the claimants' lawyers, to have paid out their deposits to the promoters and developers of a disastrous 'holiday homes' venture; and, on appeal, Giambrone did not challenge that finding: see [46]. The principal issues on the appeal were whether the claimants were entitled to equitable compensation for their lost deposits from their own lawyers (who did not hold them as stakeholders), and whether the losses suffered were within the scope of the lawyers' duties: see [2]. At [84] Jackson LJ stated that the actual breach with which the court was concerned was paying out sums of money in circumstances where those payments were breaches of trust and breaches of contract. He identified the loss which the lawyers' breaches had caused as the disappearance of the deposit monies. The claimants had never been able to get those monies back; and that was a direct loss, which the 'SAAMCO cap' did not

shut out. However, Jackson LJ had previously (at [59]-[64]) identified the duty which had been breached, or the content of the obligation which had not been performed, as the receipt of the deposits from the purchasers and the holding of those moneys, as custodians, until the developers had provided compliant guarantees. In the circumstances which had unfolded in that case, Jackson LJ characterised the solicitors' obligation as an obligation to act as custodians of the deposit monies indefinitely. Compliant guarantees had never appeared so Giambrone should have remained as custodians of the deposit monies until the preliminary contracts were rescinded, and then paid those monies back to their clients. Giambrone's breach of contract had consisted in wrongfully paying out deposit monies which it had undertaken to keep safe. The contractual measure of damages was the amount of the deposits because those monies had vanished. The case was one where equitable compensation and contractual damages ran in tandem.

67. Mr McIlroy's primary submission is that any liability on the part of 174 sounds in debt rather than damages. He naturally relies upon Millett LJ's analysis in *Manzanilla* (cited above) and, in particular, upon the statement in the first of his numbered propositions that: "The underlying relationship is that of debtor and creditor, and is closely analogous to the relationship between a banker and his customer." If 174 released the buyers' deposits in breach of the terms of the stakeholder's agreement, and thus without the buyers' authority, then 174 is liable to account to each buyer for a corresponding sum. Mr McIlroy relies upon the legal characterisation of a debt as a definite sum of money which is fixed by the agreement of the parties as payable by one to the other upon the occurrence of some specified event or condition. Alternatively, Mr McIlroy submits that if the claim does not lie in debt, but sounds in damages for breach of contract, then the contractual measure of damages is, in each case, the amount of the lost deposit because the moneys represented by those deposits have been wrongly paid away to the seller. In support of this alternative argument, he relies upon the analysis of Jackson LJ in *Giambrone*.
68. Mr Bowmer submits that this is too simplistic a view. He relies upon the statement of Mr Nugee QC in *Hastingwood* (also cited above) that "an action to recover the amount of the deposit ... will be an action in contract or, more usually, an action for money had and received." He submits that this is a claim for breach of contract; and that damages for such breach should be quantified in accordance with normal principles governing the assessment of damages for breach of contract. Here the promise, or the mischief underlying the claim, is the failure to observe the pre-condition for the release of the claimants' funds. Mr Bowmer submits that any breach of the terms of the stakeholder contract does not necessarily have to be analysed exclusively by reference to a debtor/creditor relationship. On the contrary, in this case everyone understood and expected that the buyers' funds would be released in order to complete the development. The real complaint is not about the release of the money; it is about the release of the money without the pre-condition being satisfied. This is a substantial point of legal significance which cannot be brushed aside and needs to be confronted.
69. Mr Bowmer submits that *Giambrone*, which did not involve the position of a stakeholder, is not a helpful case of any general application, still less is it of any use when trying to untangle the rights and obligations arising under, and the consequences flowing from, a complex stakeholder agreement like the present contract. Passively

holding a fund to await the outcome of a contract is said to be a long way from the present case, where the obligation was essentially to steward a fund that was to be used to build out a development, and where the complaint is that the stakeholder failed to ensure that the buyers had a first legal charge by way of security. To characterise this as a debt claim, and nothing else, is said to obscure the legal reality here. The buyers intended, and accepted, that their moneys could be used in the construction of the development. Their complaint is that that was fine so long as they had a first legal charge. If one reaches this point in the case, that is what their complaint amounts to. Mr Bowmer submits that it would be monstrous for the law to reward the buyers by holding that, even though they could only ever have recovered 9 or 10 pence in the pound if everything had been done properly, they can now recover back the full amount of their deposits from the stakeholder, particularly where the stakeholder had made no charge whatsoever for its services. It would be even more monstrous if the court were to hold that the solicitor who had acted for the buyers - that is ATC - and who knew that the buyers' funds were being released without the security of a first legal charge, and who had never advised the buyers or sought their instructions in that regard, should be able to argue that they are only responsible for those more limited losses. Mr Bowmer submits that this is a point of real legal significance which has not yet been grappled with in the authorities on stakeholder law. He contends that this is a case in which the court should decide that the claimants, if they get to this point in the analysis, should be restricted to their expectation loss, which would involve putting the buyers in the position they would have been in if the stakeholder contract had been performed and they had received the benefit of a first legal charge.

70. I accept Mr Bowmer's submission that this is not the paradigm case of a stakeholder contract, where the stakeholder is faced with the binary choice of paying a deposit over to the seller or returning it to the buyer, depending upon whether or not the contract of sale completes. This stakeholder contract was much more complex, and the stakeholder's duties far more nuanced, than that. All the modern authorities agree that the foundation of the stakeholder's liability lies in contract, and is not founded upon any trust, so the decision in *Giambrone* is of limited direct assistance. However, it is clear that Jackson LJ regarded the contractual measure of damages in that case to be the amount of the purchasers' deposits because those monies had vanished, and that he viewed equitable compensation and contractual damages as running in tandem. Mr McIlroy's attempted characterisation of 174's liability as sounding in debt, rather than damages, seems to me rather to be putting the cart before the horse because, as Jackson LJ recognised in *Giambrone*, the first task must be to identify the duty which 174 has allegedly breached, or the content of the obligation which it has allegedly failed to perform.
71. In my judgment, this case is similar to *Giambrone*. There was no duty upon 174 to procure a first legal charge over the development in favour of the buyer company. Had there been, then it would have been necessary to consider the loss suffered by the buyers from 174's failure to do so. Rather, so far as material to the present case, 174's legal obligation was to retain the buyers' deposit moneys until the pre-condition in clause 5.2 had been satisfied by the production to the buyers, or their solicitors or agents, of evidence of the registration of such legal charge as a first legal charge (or that such registration was pending). If 174 was in breach of that obligation, then the contractual measure of damages is the amount of the lost deposits because, on this

hypothesis, they have been released when they should have been retained. Since that amount is readily quantifiable as an ascertained and liquidated sum, any resulting liability can be characterised as a debt due to each of the buyers in the amount of their respective deposits; but since such liability derives from a breach of the stakeholder contract, in my judgment it can also properly be characterised as the damages resulting from that breach.

VII: The narrative of events

72. In closing, Mr Campbell reminded me of recent judicial observations emphasising the fallibility of human memory and the need to assess witness evidence in its proper place alongside both the contemporaneous documentary evidence, and also evidence upon which undoubted or probable reliance can properly be placed. I recognise that in a case where the facts are not likely to be primarily found in contemporaneous documents, the assessment of credibility can quite properly include the impression made upon the court by the witnesses, with due allowance being made for the pressures that may arise from the process of giving evidence. In the present case, however, there is a mass of contemporary documentary evidence; and no-one has suggested that it is an unreliable indicator of what was happening at the time, or that any documents have deliberately been produced with a view to giving a false picture of events. I am satisfied that the documents in this case provide a reliable narrative of events, and that the documentary evidence should provide my first, and principal, port of call, ahead of unaided memory. That does not mean that I should disregard the recollections of witnesses where I find them to be honest and reliable (as I find, on the whole, to be the case with all of 174's witnesses). But where such recollection derives no direct support from the contemporary documents, I must weigh it carefully against those documents and the inherent probabilities. I bear in mind Mr McIlroy's warning that the witness statements in the case are dated more than five years after the events in question and that memories will inevitably have faded. I also bear in mind Mr Bowmer's point that the present case is unusual in that the claimants have called no witness evidence to contradict the evidence called by his client.
73. Since the history of events reliably appears from the documents, and has been fully set out in counsel's skeleton arguments and written closing notes and in their supporting chronologies, I shall provide only sufficient detail to explain my conclusions and my reasoning. Any gaps can be filled in by reference to the many contemporary documents.
74. NPPM purchased the land for the North Point development in or around early July 2015 with the assistance of a loan of some £1.12 million from BFL, secured by a first legal charge and debenture in its favour. The first agreements for sale (on some 32 units) were exchanged on or about 7 August 2015, using a template devised by DRC. The deposit moneys were apparently used to redeem the borrowing from BFL which (with interest and an exit fee) required a redemption payment of some £1.143 million. However, almost immediately thereafter, NPPM took out a new loan from BFL for £1 million, which was secured by a fresh legal charge and debenture dated 18 August 2015. These were registered at Companies House on 21 August and at the Land Registry on 28 August 2015. In answer to a question from the bench early in the course of his closing submissions (at Day 9, pages 3-6), Mr McIlroy accepted that it looked as though there had been an actual repayment of the original BFL loan and then a re-drawing, although he submitted that the funds were simply being "re-

cycled”. I consider that it is irrelevant whether the original BFL loan was actually repaid or not because this re-mortgage had been effected some three months before either 174 or any of the claimants ever appeared on the scene and none of the claimants’ funds were ever involved.

75. The reasons for this re-financing were explained in an email from Mr David Roberts (of DRC) to BFL’s solicitor (timed at 09.24 on 6 August):

“I understand our respective clients have been discussing the loan from Bridging Finance secured on the above property. It will be necessary in the short term for such a loan to be continued although for reasons unconnected with your client the legal arrangement will have to be slightly altered.

We are about to proceed to exchange on the first tranche (32 units with one firm). When the unit sale contracts were first designed and submitted some months ago they gave a first legal charge to the Buyers as security for the funds released on exchange. I think you are familiar with the overall structure of this investor led development financing.

These 32 units will release approximately £1.8m on exchange. In order to purchase the site the Developer agreed to part finance the acquisition with a loan from Bridging Finance Limited which is registered against the property. Reservations have been taken on 165 units and the solicitors have signed agreements on 55 units. They are returning to Hong Kong next week and by the end of the month we should have exchanged on around 100 units in total.

We need to agree a first legal charge in favour of the Buyers upon completion and we are suggesting at the same time a Deed of Priority with Bridging Finance for a legal charge so that upon completion of registration Bridging Finance end up with a second legal charge (however the deed of priority will mean that it actually has priority over the Buyers Company's first legal charge). You may well ask why this has to be done this way!

In the report to Buyers they are advised that upon completion of their contracts they will have a first legal charge. The contracts permit the Developer to borrow additional funds during the construction process if it is basically in the interest of the Buyers to do so and the money goes into the Buyers Stakeholder account - which it will — to continue the build. The construction commenced 2 weeks ago and planning was granted this week. This mechanism is required in order to satisfy the terms as explained to the Buyers as otherwise the solicitors would have to go back to their clients and explain the change in their having a second legal charge on exchange. This is inadvisable and on the advice of the selling agents will only spook the Buyers. It is feared that some will not want to proceed and would put us back months.

There will be a discharge of the existing legal charge and a contemporaneous grant of a new legal charge together with a charge in favour of the Buyers Company with a deed of priority. That is the proposal and we assume that this should not present any problem. We have renewed all of the searches on Pall Mall if you wish to see copies and we can send you up to date register entries

when you are ready to proceed. Your client can discuss with Peter McInnes the timetable for repayment of the bridging loan direct.

We await hearing from you.”

76. Unfortunately, the intended charge in favour of the buyer company was never registered as a first legal charge as anticipated, apparently because of confusion as to who was responsible for creating the legal charge in favour of the buyer company and effecting the registration. Mr Roberts recorded his frustration in an email to Sam Beilin timed at 10.06 am on 23 September 2015. In fact, a legal charge in favour of the buyer company was only executed on 1 October 2015 and registered at the Land Registry on 18 October 2015. This has always ranked as a second legal charge, as was appreciated by all of the solicitors involved. Mr McIlroy has referred to this failure to create and register a first legal charge in favour of the buyer company, followed by a deed of priority in favour of BFL, as “the debacle”. It is the cause of the present litigation. None of the buyers (including the claimants) were ever told that the buyer company’s legal charge was not, and never had been, a first legal charge.
77. I find that NPPM would have been willing to alter the wording of future sale agreements to remove the reference to the registration of the buyer company’s legal charge as a first legal charge but Mr Sewell advised the seller against this on the basis that the first legal charge was an important “selling point” for potential buyers, some of whom might have been dissuaded from purchasing if references to a first legal charge had been removed. It was this ‘debacle’, and Mr Roberts’s continuing insistence that the buyer company needed a first legal charge, and that the requirements of clause 5.4 had not been complied with in relation to the loan from BFL so that DRC was unable to release any further funds to the seller, that was the, or a substantial, reason for the breakdown in the relationship between the Seller and DRC.
78. It was against this background that Mr Sewell met with Mr McInnes on 19 October 2015 and devised what became known as the October ‘work-around’. This was described in an email from Mr Sewell to Mr Beilin (and copied to Mr McInnes, Mr Roberts and Ms Tsang) as follows:

“It is apparent that the release of funds is currently blocked by reason of a mix up over the securitisation of the titles. I am aware of the fact that it is in everybody’s interest to resolve this without delay and for this reason I have the following on proposals:

1. David Roberts will forthwith make application to the Land Registry to register the Buyer Company Charge

2. Notwithstanding the fact that the Buyer Company Charge will sit on the register as a second charge, the Buyer Company will permit release of funds on the following conditions:

(i) That North Point Buyers (Pall Mall) Limited have confirmation that all funds so far released by Bridging Finance Limited have been used exclusively for purposes set out in Clause 5 of the unit sale agreements

(ii) That North Point Buyers (Pall Mall) Limited receive confirmation from Bridging Finance Limited that:

(a) The securitisation of the Pall Mall titles by North Point (Pall Mall) Limited is, and will continue to be, limited to funds drawn down by North Point (Pall Mall) Limited exclusively for the purposes set out in Clause 5 of the Pall Mall Unit purchase Agreements

(b) That all funds drawn down in the future by reason of such security will be paid into the North Point Buyers (Pall Mall) Limited stakeholder account held by David Roberts & Co

(c) That North Point (Pall Mall) Limited has no guarantee to Bridging Finance Limited nor will Bridging Finance Limited seek such a guarantee in the future for any borrowing relating to any other Development such that their securitisation of the Pall Mall titles is ring fence to such titles.

(iii) That David Roberts and Aimee Tsang in their capacity as a Directors of North Point Buyers (Pall Mall) Limited ratify these proposals.”

79. All concerned (including BFL) agreed to this ‘work-around’, which then formed the basis upon which future buyers’ deposits were released to NPPM by the seller’s solicitor, initially DRC and then 174. In the case of Ms Tsang, she did so by email dated 20 October (timed at 13.58). Although Mr Sewell had sought the ratification of these proposals by Mr Roberts and Ms Tsang in their capacity as the other two directors of the buyer company at the time the ‘work-around’ was agreed, in my judgment it is implicit in Ms Tsang’s confirmation of her agreement to Mr Sewell’s suggestion that she was also approving the same in her capacity as the solicitor for all of the buyers for whom ATC was acting, both then and in the future. That is because her appointment as a director of the buyer company was entirely attributable to her role as the solicitor for the buyers of some of the units within the North Point development, whose interests the buyer company had been established to protect. As Mr Hayhurst explains (at paragraph 68 of his first witness statement), Mr Sewell and Ms Tsang were fulfilling a “unified role”, acting both as representatives of the buyers for whom they were acting and as directors of the nominated buyers company. A more precise description is that the two solicitors were fulfilling a ‘composite’ role. Mr Sewell stated in evidence that he was giving his agreement in his capacity as his clients’ solicitor whereas Ms Tsang had thought that she was doing so in her capacity as a director of the buyer company. In my judgment, the true analysis is that they were each acting in a dual capacity; and that their agreement extended to all of the purchasers of units at North Point by whom they were instructed, whether then or in the future.

80. It is important to note that all of this had been agreed and was in place before:

(1) 174 were appointed to act as the seller’s solicitors (in place of DRC) following a recommendation from Mr Sewell and Kay Cook of Oliver & Co and an evening meeting (which effectively took the form of a minor beauty parade) on 10 November 2015; and

(2) the first of the claimants exchanged contracts to purchase any of the units at North Point (on 23 November 2015) and thus before 174 first released any of the claimants' deposits to NPPM (on 18 December 2015).

81. As soon as 174 were instructed, they were under immediate pressure from the seller to exchange contracts on sales which DRC had not progressed and to release funds to the seller. Mr McIlroy invites me to find that 174 did not have the time or the capacity to have reviewed the actions of DRC (which included the October 'work-around') and that I should be dubious about Mr Hayhurst's claim that he had looked at the emails relating to this. However, I accept the evidence that Mr Hayhurst gives at paragraphs 64 to 81 of his first witness statement about his knowledge of what had been agreed in October 2015 and of the build-up to the December 18 meeting. On the balance of probabilities I find that Mr Hayhurst's meeting with Ms Tsang at the Doubletree Hotel by the Hoole roundabout in Chester, to which Mr Hayhurst speaks at paragraph 75 of his witness statement, took place on Friday 20 November 2015 because that is their only documented meeting at this time; but I accept his account of what was discussed at that meeting, which is consistent both with the inherent probabilities and with what Mr Hayhurst said and did at the time. Although he was challenged about this in cross-examination, Mr Hayhurst stood firm (at Day 4, page 134): "I do have a distinct recollection of meeting with Amie Tsang at the Doubletree Hilton at breakfast time and I do recall going into that meeting with it in my mind that I needed clarity about the position that she and David Sewell agreed to the arrangements that I had inherited and that moving forward I would be paying the monies out on the strength of the supervisor's certificate on the title as established when my retainer commenced." I accept this evidence, including Mr Hayhurst's understanding and belief that Mr Sewell and Ms Tsang "... were content with the model as established, and agreed with the arrangement whereby the bridging finance would continue to have the first legal charge and the nominee buyers company would have the second legal charge, and that matters had proceeded on that basis".
82. Mr McIlroy submits that Mr Hayhurst had simply failed to appreciate that the buyer company's legal charge was not a first legal charge. He refers to, and relies upon, an email sent to NPPM as late as 11 May 2016, supplying due diligence for an agent engaged in marketing North Point, in which Mr Hayhurst stated: "Buyers have the protection of a first legal charge secured against the parent title, already in place and shown in the attached office copy entries ...". Mr Hayhurst was asked about this in cross-examination (on Day 4, pages 115-117) and his response was that: "That is simply effectively a typographical error on my part. It should have correctly referred to a legal charge, rather than a first legal charge." Mr Hayhurst denied Mr McIlroy's suggestion that this had accurately reflected Mr Hayhurst's understanding at the time. In response to my question: "... how did you come to say that it was a first legal charge? Mr Hayhurst answered: "A simple error, I think my fingers must have got carried away and put in the 'first'. Certainly in my mind, it was a legal charge and it was not a first legal charge. As you correctly say, my Lord, it was self-evident from the priority in the register that it was a charge that ranked second in priority to the first legal charge. It was a simple error on my part." I accept Mr Hayhurst's explanation, despite Mr McIlroy's description of it as "not credible". I do not accept that Mr Hayhurst had simply failed to spot the existence of BFL's first legal charge. Had this been the case, I am sure that Mr Hayhurst would simply have owned up to his

mistake. However, even if I am wrong about this, for reasons I will explain, I consider that this has little impact on the outcome of the case.

83. I now turn to the meeting that took place at 9.00 am on 18 December at the offices of Oliver & Co in Chester. The previous afternoon (at 16:39) Mr Hayhurst had sent an email attaching copy interim certificates issued in relation to the North Point and Baltic House developments and requesting: “At the meeting tomorrow can we please discuss/confirm my authority to release to my client funding from the stakeholder account applicable to NP Pall Mall.” Similarly, when Ms Cook circulated an agenda by email on 17 December 2015 (at 17:08) which was sent to (amongst others) Mr Hayhurst and Ms Tsang asking if there were any further items to be added to the agenda, Mr Hayhurst responded (at 17:22) stating, in relation to North Point, that he wished to add: “2. The position regarding stakeholder accounts particularly with reference to the interim certificate issued this week in relation to NP Pall Mall.” In the light of these emails, and the fact that some £1.28 million was released to NPPM on the afternoon of 18 December 2015, it is, I think, common ground – and if not I so find – that the release of funds was clearly discussed at this meeting, which was attended by Mr Hayhurst and Ms Pittard, Mr Sewell and Ms Cook, Ms Tsang and Mr Griffiths. What is in issue is whether, as Mr Hayhurst asserts, 174 was given a general authority to release buyers’ funds against supervisor’s certificates going forwards or, as Mr McIlroy contends, a more limited authority confined to the funds that were released that afternoon.

84. I have no doubt that Mr Hayhurst now genuinely recalls that a general authority, going forwards, was agreed at the meeting on 18 December; but, for the reasons advanced by Mr McIlroy, I am satisfied, on the balance of probabilities, that this position was not reached until the later meeting of 9 March 2016 (as Mr McIlroy contends). My reasons are as follows:

(1) Only Mr Hayhurst claimed to have a clear recollection that he was given a general authority to release buyers’ funds against supervisor’s certificates going forwards. His recollection was not independently verified by Mr Sewell, Ms Tsang, Mr Griffiths (who could not even remember attending the meeting) or Ms Pittard. The accuracy of such recollection is inherently unlikely given the patchiness of Mr Hayhurst’s recollection of other meetings and events and the fact that it was not mentioned until a relatively late stage in this litigation (when the claimants were threatening an application for summary judgment). When challenged in cross-examination (at Day 4, pages 145-6) Mr Hayhurst maintained that he was “... in no doubt at all that at the December meeting it was understood that I was at liberty to pay out on the strength of the supervisor’s certificates. It’s why I sent the email before the meeting, to have that clearly established.” I accept that evidence, insofar as it relates to the certificates that were extant at the date of the 18 December, but not in relation to future certificates.

(2) If this meeting had the significance that Mr Hayhurst now claims for it, either he or Ms Pittard would have made some note of this key point at, or immediately after, the meeting. It is striking that whereas Mr Hayhurst himself made a clear note of the later meeting of 9 March 2016, recording what was decided about the process for the future release of stakeholder funds, he did not do so in relation to the 18 December meeting; Ms Pittard’s notes of the meeting of 18 December contains nothing from which it can be inferred that any decision at all was made on the point. Whilst I accept that Ms Pittard’s notes were made on her i-Pad for her personal use, since she was

concerned with matters of due process going forwards, I would have expected her to have recorded any agreement about such an important matter.

(3) Such a general authority is contradicted by the lack of any supportive contemporaneous documentation in the form of any attendance note, follow-up email or any other record of an alleged agreement on this important issue.

(4) On the contrary, such a general authority is positively contradicted by the contemporaneous documentation. In an email (timed at 18.30) on 5 February 2016 sent to Mr Sewell, Ms Cook, Mr Hayhurst and Sam Beilin (amongst others) Ms Tsang said that she wanted "... to raise the point about Directorships. It was my understanding that all Directors agree release and not the majority. Please clarify this point as I believe all Directors should agree." This email provoked a plethora of email responses which were highly critical of Ms Tsang, including one from Mr Hayhurst (timed at 14.43 on 6 February) criticising her "... lack of awareness of Company law and corporate management generally" and complaining of "... her consistent failure to act as a team player and more particularly the potential for future challenge from her regarding our past/future conduct of the stakeholder funds". As Mr McIlroy points out, if, as Mr Hayhurst now suggests, it had been expressly agreed at the meeting on 18 December that the directors of the buyer company had given a general authority to 174 to release the buyers' funds against certificates, then:

(a) Either Mr Hayhurst or Mr Sewell (or both of them) would have made this obvious point in response to Ms Tsang. Instead, the meeting of 18 December 2015 is neither mentioned in the internal communications between the recipients of Ms Tsang's email nor in Mr Sewell's response to Ms Tsang.

(b) Those communications would not have focussed on the question of the practicability of unanimous, as opposed to majority, decision-making by the directors of the buyer company. Such a debate would have been sterile if a general, continuing authority had already been given.

(c) Mr Hayhurst's note of the 9 March meeting would not have recorded: "7. Stakeholder accounts – agreed in principle that we simply act on the strength of the external certificates issued without the need for consent on the part of Stakeholder Company Directors." Mr Hayhurst would not have used the phrase "agreed in principle" if he had truly held the belief that there was already in place a standing legal authority for the release of funds without reference to the buyer company which was merely being confirmed.

(d) Nor would Mr Hayhurst have described the agreement reached at the meeting on 9 March 2016 as a "quantum leap forward" in his email to Mr Griffiths (copied, significantly, to Ms Pittard) of 10 March 2016 (timed at 18:33) when stating that: "... it was a quantum leap forward to secure Amie's agreement that monies can be paid out on issue of certificates [without consent of buyer solicitor/stakeholder company directors]".

I find that what was agreed, and for the first time, at the meeting on 9 March 2016 was a general authority entitling 174 lawfully to release the buyers' deposit moneys to NPPM, consistently with the terms of clause 5 of the agreements for sale, simply on the strength of certificates issued by the supervisor, without the need for any express

consent on the part of the directors of the buyer company (referred to in Mr Hayhurst's note as the "Stakeholder Company"). Although it was never said in terms that 174 could do so even though there was only a second legal charge in place in favour of the buyer company, it was clearly implicit, and understood by all concerned, that by authorising 174 to release funds against supervisor's certificates, Ms Tsang (and Mr Sewell), as the directors of the buyer company, and also as the buyers' solicitors, were confirming to 174 that they regarded the preconditions to the release of funds to NPPM, contained within clause 5 of the agreements for sale, as having been satisfied.

85. Mr McIlroy objects that 174 has not pleaded that it ever acted in reliance on any agreement reached at the 9 March 2016 meeting when releasing buyers' funds to NPPM, confining its pleaded case to the October 2015 'work-around' and the agreement allegedly concluded at the meeting on 18 December 2015. However, it is the claimants who have alleged that any general authority to release buyers' funds against supervisors' certificates going forward must have been reached at the 9 March meeting rather than at the earlier meeting on 18 December. In my judgment, it is open to 174 to rely upon an agreement reached at this later date.
86. I reject Mr McIlroy's suggestion that Mr Hayhurst has deliberately reconstructed events at the 18 December 2015 meeting in his own mind in a way which is favourable to 174's own interests or to suit a legal case advanced on 174's behalf; but I accept Mr McIlroy's alternative explanation that Mr Hayhurst is genuinely confused about the order of events and his dates. I find that the decision that Mr Hayhurst now says was made at the meeting on 18 December 2015 was in fact an agreement in principle reached at the meeting on 9 March 2016, as recorded in his contemporaneous note of that meeting. This was the equivalent of a joint authority from Mr Sewell of Oliver & Co, and from Ms Tsang of ATC, to Mr Hayhurst of 174 as to how the buyers' funds were to be dealt with, going forward. In my judgment, such authority was given, and was objectively understood to be given, in their joint capacities as directors of the buyer company and also as solicitors for the buyers. This was because the appointments of Mr Sewell and Ms Tsang as directors of the buyer company were entirely attributable to their roles as the solicitors for the buyers for whom they were respectively acting.
87. However, I do not consider that this issue bears the importance attributed to it by Mr McIlroy for two reasons: First, even though I have found that no general authority was given at the 18 December 2015 meeting to release buyers' funds against supervisor's certificates going forwards, I am satisfied that the general authority which I find was later given at the 9 March 2016 meeting implicitly ratified any and all intervening releases of buyers' funds to NPPM, namely those on 2 and 15 February 2016, even though they had been released without any specific authority at the time beyond the appropriate supervisor's certificate. Second, I have no doubt at all that the general authority given at the 9 March meeting would have resulted in the release of all the buyers' funds held by 174 at the time when the next release of buyers' funds took place on 16 March 2016 because supervisor's certificates already existed authorising the release of all such funds as might have been retained by 174. Thus, had any buyers' deposits released in the interval between 18 December 2015 and 9 March 2016, albeit without any specific authority beyond the appropriate supervisor's certificates, not been released to NPPM, and had they still been retained

by 174, then they would have been released to NPPM with the next release of buyers' funds on 16 March 2016. I note that there was never any complaint from either Oliver & Co or ATC that 174 had released buyers' funds on 2 or 15 February 2016 without any proper authority.

88. One further aspect of the 18 December meeting was common ground between the parties: that there was no discussion about the release of buyers' funds without there being a first legal charge in place in favour of the buyer company. At paragraph 92 of his first witness statement, Mr Hayhurst accepted that this was the case, on the basis that: "... agreement to release monies without there being a first legal charge in place for the buyer nominee company was something that had already been agreed and I had inherited that position, that we would be paying out money in such circumstances. It was never suggested to me that monies could not be paid out of the stakeholder account because the nominee buyers company did not have a first legal charge." Mr Hayhurst confirmed this in cross-examination (at Day 4, page 143). I accept that evidence.
89. I note that by the time of the 18 December 2015 meeting: (1) ATC: (a) had already exchanged contracts for the purchase of Unit D105 by Ms Au Yeung and Unit A702 by Ms Zeng and Mr Li and already held their deposit moneys; and (b) had been instructed by Mr Wong and Ms Choi (who had reserved their units and paid a reservation fee); and (2) Mr Yee, Ms Cheng and Mr Cheng had reserved their units and had paid a non-refundable reservation fee to the seller's agents. By the time of the 9 March 2016 meeting, Mr Yee, Ms Cheng and Mr Cheng (and thus all of eight of the claimants) had retained ATC to act as their solicitors.
90. I can deal with the factual position regarding the release of the claimants' funds quite shortly since this is clear from the documents and is not in dispute. Ms Au Yeung exchanged contracts on the purchase of Unit D105 on 23 November 2015. Ms Zeng and Mr Li exchanged contracts on the purchase of Unit A702 on 17 December 2015. I find that 174 released their deposits to NPPM on 18 December 2015 against interim certificate no 5 (dated 9 December), after having received the agreement and the authority of Mr Sewell and Ms Tsang to do so at the meeting earlier that day.
91. Mr Wong exchanged contracts for the purchase of Unit D006 on 23 December 2015. The next interim certificates to be issued by the supervisor to 174 were interim certificates no 6 (dated 29 January 2016) and no 7 (dated 12 February 2016). Acting in reliance upon these certificates, 174 (acting by Mr Hayhurst) released £717,766.35 to NPPM on 2 February and a further £494,670.43 on 15 February 2016. Mr Hayhurst did so without the express authority of Ms Tsang, but acting in the belief that he had a general authority to release buyers' funds to NPPM against appropriate supervisor's certificates. I find that Mr Wong's deposit was released to NPPM as part of one or other of these two releases of buyers' funds. I also find that had Mr Wong's deposit not been released to NPPM in February, but had been retained by 174, then it would have been released to NPPM with the next release of buyers' funds on 16 March 2016.
92. Mr Yee exchanged contracts on the purchase of Unit A1304 on 10 March 2016. Interim certificate no 8 was released to 174 on 15 March 2016. On the following day 174 released all of the funds it was then holding on behalf of buyers, in the sum of £1,361,546 (leaving £315,630.94 certified but unpaid) against certificate no 8 and

with the express authority of Mr Sewell and Ms Tsang which had been conferred on Mr Hayhurst at the meeting on 9 March 2016. I find that this included Mr Yee's deposit (and would have included Mr Wong's deposit had that not already been released to NPPM). Ms Choi exchanged contracts on the purchase of Unit E907 on 31 March 2016. Her deposit was released to NPPM on 20 April 2016 against interim certificate no 9 (dated 14 April 2016) and in reliance on the authority conferred on Mr Hayhurst by Mr Sewell and Ms Tsang at the meeting on 9 March 2016. The last of the claimants, Ms Cheng and Mr Cheng, exchanged contracts on the purchase of Unit A306 on 25 April 2016. Their deposit was released to NPPM on 18 May 2016 against interim certificate no 10 (dated 13 May 2016) and also in reliance on the authority conferred on Mr Hayhurst by Mr Sewell and Ms Tsang at the meeting on 9 March 2016. As at 18 May 2016, 174 held nothing by way of buyers' funds and £680,008.95 had been certified but was unpaid.

VIII: Conclusions on the claim

93. I have already described the October 2015 'work-around', which formed the basis upon which all the buyers' deposits were released to NPPM by the seller's solicitor, initially DRC and later 174. Mr McIlroy submits that the entire agreement clause (clause 24.1) prevents the court from having regard to the October 'work-around', and the later December 2015 and March 2016 agreements, when interpreting the agreements for sale. To do so would be to override the contractual bargain, expressed in clause 24.1, that the terms of the agreements for sale constitute the entire agreement and understanding of the parties. Given the existence of that entire agreement, Mr McIlroy also submits that it is impossible to see how any oral agreement reached with Ms Tsang at the meetings in December 2015 and March 2016 (for which no consideration was given) can override the written terms of the agreements for sale.
94. I do not regard the 'work-around' as a purported variation of the stakeholder contract. In my judgment, it amounted to, and operated as, an expression of the satisfaction of both the buyer company and ATC (and also of Oliver & Co, through Mr Sewell) as to the propriety of the prior legal charge in favour of BFL for the purposes of satisfying the pre-conditions set out in clause 5 of the agreements for sale for the release of the buyers' funds to the seller, NPPM. The buyer company, and also the solicitors acting for the contracting purchasers (both present and future), were agreeing the basis upon which the provisions of the stakeholder contract regulating the release of the buyers' deposits were to be implemented and operated in practice for the purposes of funding the ongoing construction and other authorised costs of the North Point development going forwards. So far as 174 was concerned, the buyer company (by its directors) and the buyers' solicitors (with the actual authority of their clients, express or implied) were indicating their understanding to the seller's solicitors (first DRC and then 174) that they were authorised to release the buyers' funds against the appropriate certificates on the basis that this was in conformity with the terms of clause 5 of the agreements for sale and their agreement to such release. In my judgment, on the true construction of clause 5, it was not for the stakeholder to gainsay that understanding and agreement.
95. On this analysis, I do not consider that s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989, upon which Mr McIlroy also places reliance, has any application. Mr McIlroy recognises that this provision had no direct application to the stakeholder contract; but he relies upon the fact that the terms governing the release of

the deposit are to be found in the agreements for sale rather than the stakeholder contract. However, what everyone was doing was implementing and applying clause 5, rather than seeking to vary it.

96. Mr McIlroy submits that since the individual claimants were wholly unaware of the way in which the buyer company was supposed to operate, and the legal relationship between the buyer company and the individual buyers was incompletely and inadequately specified, the buyer company could only have such authority as was expressly granted to it by the buyers in their respective agreements for sale; but that is to ignore the actual authority that, in my judgment, they had expressly and impliedly conferred on their respective solicitors to deal with the progression of the development going forwards to completion. Mr McIlroy relies upon ATC's standard form letters to 174 which emphasised the limits on ATC's authority, making it clear that nothing which passed between it and the seller's solicitors prior to exchange of contracts could amount to a memorandum within the terms of s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989; but in my judgment this does not assist in identifying the authority conferred on ATC in the period after exchange of contracts. Mr McIlroy acknowledges that a solicitor has authority to negotiate a contract on behalf of his client but he rightly submits that it is not within the ordinary course of a solicitor's authority to conclude a contract on his client's behalf (otherwise than in the context of the settlement of pending litigation in which the solicitor is instructed). He submits that this want of authority extends to the variation of an existing contract; but as I have previously explained, I do not regard the October 'work-around' as operating by way of variation of the stakeholder contract.
97. I have previously made it clear that I do not accept Mr McIlroy's submission (founded upon Mr Hayhurst's email of 11 May 2016) that Mr Hayhurst had simply failed to appreciate that the buyer company's legal charge was not a first legal charge. But even if I am wrong about that, and Mr Hayhurst was labouring under a mistaken view as to the prior status of the buyer company's legal charge, I do not consider that this makes any difference to the outcome of this case. The fact remains that both the buyer company and the buyers' solicitors, acting – as I find – with the actual authority of their clients, had made it clear to 174 that it was entitled to release the buyers' funds to the seller in conformity with the provisions of clause 5 of the agreements for sale. In light of that finding, it does not seem to me to matter if (contrary to my finding) Mr Hayhurst had misunderstood the relative priorities of the two legal charges because, whatever the true factual position, he had been assured that 174 could properly release the buyers' funds to NPPM.
98. On the true interpretation of the Agreement for Sale and the resulting stakeholder contract, I therefore find that 174 was not in breach of its contractual obligations as stakeholder in paying any of the buyers' funds over to NPPM.
99. On this basis, it is strictly unnecessary for me to consider 174's alternative defence that the claimants must be regarded as estopped by convention from complaining that there has been any breach of the stakeholder agreement. Since this was argued before me, however, it is appropriate that I should address it, albeit briefly.
100. The law relating to estoppel by convention was authoritatively restated in the recent decision of the Supreme Court in *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39, [2021] 3 WLR 697, handed down on 30 July 2021. Lord Burrows

gave a judgment with which Lord Hodge, Lady Arden and Lady Rose agreed (with Lord Briggs giving a concurring judgment in which he also agreed with Lord Burrows). Although the case fell to be determined in the context of non-contractual dealings, Lord Burrows could see no good reason to confine the principles to such dealings; and having received no submissions to the contrary, I treat those principles as setting out a correct statement of the law on estoppel by convention for contractual, as well as non-contractual, dealings.

101. An estoppel by convention will arise where the following conditions are satisfied:

(1) there was a common assumption, of fact or of law, by the party raising the estoppel (C) and the party against whom the estoppel was raised (D) and it was made clear, by words or by conduct that could be said to have crossed the line between them, that they shared that common assumption;

(2) D had conveyed to C that D expected C to rely on the sharing of the common assumption such that D might be said to have assumed some element of responsibility for C's reliance on the common assumption;

(3) C had in fact relied on that common assumption rather than merely upon its own independent view of the matter;

(4) that reliance had occurred in connection with some subsequent mutual dealing between C and D; and

(5) C had thereby suffered some detriment, or D received some benefit, in such a way as to make it unconscionable for D to assert the true legal or factual position.

Underpinning the first three of these principles is the notion that C not only has been strengthened, or influenced, in its reliance on the common assumption by the knowledge that D was affirming it, but also that D must have intended, or expected, that this would be the effect on C of its affirmation of the common assumption, so that one could say that D had assumed some element of responsibility for C's reliance on the common assumption. Further, circumstances could arise where, even if all the other elements of estoppel by convention could be made out, the conduct of the party raising the estoppel would make it unconscionable for that party to rely on the doctrine. On the facts of *Tinkler*, the requirements expressed in those five principles had been satisfied; and there was nothing in the revenue's own conduct which made it unconscionable for them to rely on the doctrine. The taxpayer was therefore estopped from denying the validity of the revenue's inquiry into the taxpayer's fiscal affairs.

102. Applying those five principles to the present case, I am satisfied that there was a conventional understanding that 174 should be entitled to release the buyers' funds against the supervisor's certificates notwithstanding that the buyer company only enjoyed a legal charge which ranked behind the first legal charge in favour of BFL. I have already found that Ms Tsang (and Mr Sewell) had the authority of their respective purchasing clients to make the necessary communications required to bind those clients for the purpose of raising an estoppel by convention. I also find that all five principles identified by Lord Burrows in *Tinkler* are clearly satisfied on the evidence that was before me. I reject Mr McIlroy's submissions that: (1) no estoppel by convention has been established; (2) 174 did not rely on any such convention; and

(3) it would be unconscionable to give effect to the convention rather than to hold that the claimants may rely on their contractual rights.

103. So far as (1) is concerned, I find that there was a common assumption that crossed the line, in the form of communications (at the meetings on 18 December 2015 and 9 March 2016) between Ms Tsang (and Mr Sewell) as the directors of the buyer company, and also as the buyers' solicitors, (on the one hand) and 174 (on the other), that it was acceptable for 174 to release the buyers' deposits in the circumstances then prevailing. There was never any retraction of those assurances that this was acceptable; on the contrary they were affirmed. Principle (2) is also met in that Ms Tsang (and Mr Sewell) clearly expected and intended that their confirmation that the deposits could be released against the supervisor's certificates would influence 174 in what it did. The evidence shows, incontrovertibly, that they appreciated that 174 was looking to them for assurance that it could release the buyers' funds against such certificates. As for (3), 174 plainly did rely on that assurance, because it proceeded to release the buyers' funds on the basis of the assurances given by Ms Tsang (and Mr Sewell), rather than merely upon its own independent view of the matter. Principle (4) is satisfied because this all occurred in the course of a mutual course of dealing with the deposits between 174 as stakeholder (on the one hand) and the buyer company and ATC (and Oliver & Co) acting as the solicitors for the buyers (on the other). Finally, 174 clearly relied upon that understanding to its detriment, because it proceeded to release all the buyers' funds to NPPM. If it were to be required now to repay those funds to the claimants, that would obviously be a very significant detriment. I am satisfied that for all these purposes, Ms Tsang (and Mr Sewell), as the buyers' solicitors, and also as the directors of the buyer company, had the necessary actual authority, express or implied, from their respective buyer clients for the estoppel-raising conduct in question. Ms Tsang (and Mr Sewell) continued to act throughout as the solicitors for the buyers, and their retainer survived the exchange of contracts on their respective purchases and continued until completion (or the earlier express termination of their retainer). It was ongoing at the time each of the claimant's several deposits were released to NPPM.
104. Mr McIlroy submits that the first element of an estoppel by convention is not established because, although Mr Sewell, Ms Tsang and Mr Hayhurst each appear to have assumed that buyers' funds could be released against certificates issued by the supervisor, they came to this conclusion independently or, alternatively, if Mr Sewell and Ms Tsang did so on the same basis, Mr Hayhurst reached the same conclusion on his own, based upon his own (mis-)interpretation of the sale agreements rather than upon any words or conduct from Ms Tsang which "crossed the line". Mr McIlroy relies upon Mr Hayhurst's evidence at Day 4, page 24 (lines 13-15) and upon the fact that, even on Mr Hayhurst's own evidence, the fact that the buyer company's legal charge was a second legal charge was never discussed between himself and Ms Tsang. In my judgment, this submission proceeds on too narrow a view of the evidence, ignoring the importance that Mr Hayhurst clearly placed on the discussions and agreements reached at the meetings on 18 December 2015 and 9 March 2016, the earlier of which pre-dated the first release of funds by 174, and both of which were clearly instrumental in determining Mr Hayhurst's approach to the release of the buyers' funds. Likewise, and for the reasons stated above, I reject Mr McIlroy's further submissions that the other elements of an estoppel by convention have not been made out: Ms Tsang (and Mr Sewell) clearly assumed some level of

responsibility for the convention and 174 clearly acted to its detriment in reliance on the convention by releasing the buyers' deposits to NPPM in circumstances where it would be unjust to allow the buyers, as the clients of Ms Tsang (and Mr Sewell), to go back on the convention established by their solicitors.

105. Mr McIlroy submits that s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989 operates to render it unjust and unconscionable to permit 174 to rely upon any estoppel by convention. He acknowledges that the stakeholder contract is not itself a contract subject to the 1989 Act because it is not a contract for the sale or other disposition of an interest in land within the meaning of s. 2 (1); but it is a contract whose terms depend on the terms of the agreement for sale because the pre-conditions, and the triggering event for the release of the buyers' deposits are defined, not in the stakeholder contract, but in the agreements for sale. The agreement, arrangement, representation or convention on which 174 relies is one to vary the terms of the sale agreements, so as to waive the requirement for a first legal charge. That is an oral amendment to an agreement subject to the 1989 Act; and it would be inequitable for the court to give effect to such an informal arrangement, made without consideration, particularly when the persons entering into the arrangement are conveyancing solicitors, who are (or should be) aware of the terms of clause 5 of the sales agreements and of the 1989 Act and its effect. However, for the reasons I have already given, I do not view this estoppel-raising conduct as involving any variation of the agreement for sale, insofar as it purports to regulate and govern the release of the funds held by 174 pursuant to the stakeholder contract. Rather, the estoppel-raising conduct conferred authority on 174 to release the buyers' deposits by creating a shared, communicated assumption that the pre-conditions in clause 5.2 for such release had been satisfied.
106. I find that there is no unconscionable conduct on the part of 174 or Mr Hayhurst. They were fully entitled to proceed on the basis that Ms Tsang and Mr Sewell, as the buyers' solicitors and the directors of the buyer company, were duly discharging whatever duties they felt they owed both to the buyer company and also to their clients. I was referred to observations of Hildyard J in C F Partners (UK) LLP v Barclays Bank Plc [2014] EWHC 3049 (Ch) at [1133 (4)] to the effect that the defence of 'unclean hands' is "reserved for exceptional cases where those seeking to invoke it have put themselves beyond the pale by reason of serious immoral and deliberate misconduct such that the overall result of equitable intervention would not be an exercise but a denial of equity". I am satisfied that the claimants have adduced no evidence to support such a serious allegation. I find that it is unsustainable to suggest that Mr Hayhurst was guilty of any form of serious immoral or deliberate misconduct in circumstances where he had dealt with, and acted with the authority of, the very solicitors whom the buyers had chosen to retain to act on their behalf on their respective purchases of units within the North Point development. Against the background of such conduct on the part of the buyers' own solicitors, I do not consider that 174 failed to act in good faith in continuing to issue sale agreements in terms which (by including, within clause 5, the precondition of a first legal charge in favour of the buyer company) contradicted the approach that was being taken to the release of the buyers' deposits to NPPM. Given the involvement of the buyers' own solicitors, I do not accept Mr McIlroy's characterisation of the reference in clause 5 of the sale agreements to a "first Legal Charge" as "misleading" or of the October 2015 'work-around' as amounting to "a trick".

107. I therefore accept Mr Bowmer's alternative submission that the claimants' case must fail for this additional reason. 174 and the buyers, acting by Ms Tsang (and Mr Sewell), at all times conducted their mutual dealings on the basis of releasing the deposits against the supervisor's certificates notwithstanding the fact that, on the register of title to the development, BFL had a first-ranking legal charge. It would be grossly unfair for the claimants to be allowed now to go back on that shared and communicated assumption and to sue 174 for releasing their deposits in precisely the way that had been agreed.
108. On these alternative grounds, I find that these claims all fail and fall to be dismissed. The claimants are not entitled to the return of their deposits from 174. As such, it is unnecessary for me to consider the issue of interest. I therefore say no more than this: that as against 174, I would have awarded interest only from the date when each of the claimants served notice on 174, pursuant to the relevant sale agreement, requiring the return of their deposit. As to the rate of interest, since there was no evidence before the court from any of the claimants about any alternative investments they might have made with their funds, or any better, or different, way in which their moneys would have been applied, I would have been likely to have adopted the usual course of awarding a modest, commercial rate of interest, of between 1% and 2%, representing the historically low rates of interest applicable over the relevant period, to reflect the fact that the claimants had been kept out of their money.
109. I record that in his written closing, Mr McIlroy made it clear that the claimants would only rely on a quasi-contractual analysis if the court were to find that they were not parties to the stakeholder contract. In any event, on the facts of this case, Mr McIlroy did not seek to contend that a quasi-contractual analysis would result in any different outcome from a contractual analysis.
110. During the course of his closing submissions, Mr Bowmer sensibly abandoned his earlier objection that at the time when this claim was commenced, the claimants had not yet actually served any notices under their respective agreements for sale terminating such agreements and entitling them to the return of their deposits. Mr Bowmer recognised that the claimants had rectified this omission during the course of these proceedings so that they could, if they so wished, start fresh proceedings were the court to dismiss the present claims as an abuse of process and there was therefore no point in pressing this particular objection.
111. However, Mr Bowmer did persist in advancing an alternative abuse argument, to the effect that the claimants have been running mutually inconsistent cases against both ATC and 174; and in doing so, he received considerable support from Mr Campbell. Both counsel submitted that the claimants' case involved them in claiming that ATC had been negligent in permitting their funds to be released whilst also claiming that 174 had been in breach of contract in releasing those funds. Having pursued ATC to settlement, the claimants were to be taken to have elected to pursue the former cause of action against ATC, and thereby to have released any claim against 174. In this regard, Mr Bowmer adopted the submissions of Mr Campbell, who took me to a statement at para 14-042 of *Handley on Estoppel by Conduct and Election*, 2nd edn (2016), to the effect that where a claimant has alternative rights against different persons, and persists in seeking recourse from one of them, he will lose his rights against the other (as in the case of a contract made by an agent for an undisclosed principal). Mr Campbell also took me to the decision of a most distinguished

commercial Court of Appeal (Bankes, Scrutton and Atkin LJJ) in *Verschures Creameries Ltd v Hull and Netherlands Steamship Co Ltd* [1921] 2 KB 608. There, having obtained judgment against the consignee of goods for their price, the owner of the goods was held to be precluded from suing its forwarding agent for negligence and breach of duty in having delivered them to the wrong person on the basis that this would amount to both approbating and reprobating the same act. Although I was not taken to this authority, I note that the principle of waiver by election has recently been considered by the Privy Council in the case of *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corporation* [2020] UKPC 23, [2021] 1 WLR 5741 in the context of the question whether the continued performance of a contract resulted in the waiver of the right to claim a contractual right to relief from the future performance of obligations in certain circumstances. Their Lordships reiterated that the principle of waiver by election is only capable of applying where a choice has to be made between two alternative, and inconsistent (in the sense of mutually exclusive), courses of action, such that adopting one of them necessarily entails forsaking the other.

112. In my judgment, the present case is not an instance of adopting contrary positions, or of blowing hot and cold, in relation to the same subject-matter, in order to suit the claimants' ends. Here the claimants' substantive rights and remedies against 174 and ATC are neither inconsistent nor alternative so both may be asserted and enjoyed. In relation to both ATC and 174, the claimants' complaint is the same: that each of them failed to ensure that their deposits were only released against the security of a first legal charge in favour of the buyer company. I accept Mr McIlroy's submission that his case is that both ATC and 174 acted in ways that were in breach of their respective duties to the claimants, and that there is no fundamental inconsistency between the two claims. This is a case of cumulative rights and remedies against different parties. The claimants are not obliged to choose between them; and they may pursue both parties to judgment, and then enforce their judgments, until their judgment debt has been fully satisfied. Had it been necessary for me to do so, I would have dismissed this further line of defence.

IX: The claim for contribution

113. Having dismissed the claimants' claim against 174, it is strictly unnecessary for me to consider the claim for contribution; but I proceed to do so in case any attempt is made to appeal my decision. Since the claimants are unaffected by the contribution claim, Mr McIlroy made no submissions in respect of it (save for saying that it was a breach both of 174's duties as stakeholder and of ATC's duties as the buyers' solicitor for them to have permitted the release of the buyers' funds in circumstances where no first legal charge had ever been registered in the name of the buyer company, and in breach of the requirements of clause 5 of the sale agreements). Instead, he left Mr Bowmer and Mr Campbell to advance their competing submissions on this further field of combat.
114. The principal governing provision is s. 1 (1) of the Civil Liability (Contribution) Act 1978, which provides that "... any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)". By s. 6 (1) of the 1978 Act, "A person is liable in respect of any damage for the purposes of this Act if the person who suffered it ... is entitled to recover compensation from him in respect of that

damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise).” It is also necessary to refer to s. 2 (1) whereby “... in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question”.

115. It was common ground that there were essentially three issues for the court. The first is whether ATC is (or, more precisely, was before the settlement of the claims against it) liable to the claimants. The second is whether ATC is liable for the same damage. The third is the question of apportionment. I must approach these three issues on the (counter-factual) hypothesis that I have found 174 to be liable to the claimants for breach of the stakeholder contracts in releasing their deposits to NPPM.
116. So far as the first condition is concerned, on this hypothesis I find that liability on the part of ATC is clearly established. Apart from the fact that ATC has effectively admitted liability by entering into settlement agreements with all eight claimants, Mr Bowmer submits that had I found 174 to be liable to the claimants for breach of contract in paying away the deposits in circumstances where the buyer company had not registered a first legal charge against the development, it is impossible to conceive how ATC could not also be liable. I accept that submission.
117. ATC’s reports to purchasers contained no advice concerning the registration of BFL’s legal charge or issues of priority; but Mr Bowmer relies not only upon advisory failings on the part of ATC when each of the claimants entered into their respective purchase itself but also upon ATC’s failures to advise in relation to the actual release of the deposit moneys after the agreements for sale had been exchanged. At all times, Ms Tsang well knew that even though the buyer company did not have a first legal charge over the development, deposits were being released to the seller. Indeed, Ms Tsang went further because she actually authorised their release. I find that the buyers were simply never advised that their deposits were being released without there being a first ranking legal charge in place; and that ATC never sought their authority for such release. ATC has admitted that it gave no specific legal advice about the priority of BFL’s first legal charge. It has advanced no positive case that it gave any advice to any of its clients about any release of their moneys; and the overall tenor of the evidence shows that no such advice was ever given. If 174 were held to have acted in breach of the stakeholder contract in releasing the claimants’ deposits without a first legal charge in favour of the buyer company, then a finding is inevitable that ATC were similarly in breach of their professional duties to their own clients in failing to secure that 174 retained those deposits, and for failing to alert its clients to what was going on and to seek their informed instructions in relation to such release, or otherwise failing to alert them to 174’s breach. Despite rigorous testing by Mr Bowmer in cross-examination, all seven of the claimants who gave evidence remained steadfast in maintaining that they would not have agreed to the release of their funds if Ms Tsang had come back to them for further instructions. Thus, the essential ingredients of the claimants’ cause of action against ATC - breach of duty, causation, and damage (in the form of the loss of the claimants’ deposits) - are all established.
118. I cannot accept Mr Campbell’s submission that it is important to distinguish between Ms Tsang’s capacity as a director of the buyer company and her role as the buyers’ solicitor because: (1) I have found that she was acting in a dual capacity; and, in any

event, (2) so long as her retainer for the buyers continued, she was bound to pass on to her clients any relevant knowledge which came to her attention in her capacity as a director of the buyer company (established to protect their interests), and otherwise to act upon it in the best interests of her clients.

119. Reference to one passage from Mr McIlroy's cross-examination of Ms Tsang (on Day 6, at pages 156-7) will suffice to illustrate her knowledge that the terms of clause 5 were not being observed to the letter:

Mr McIlroy: But would you accept now, having gone through that agreement in the way that we have just done, that the hoops that are supposed to be jumped through, the conditions that are supposed to be met in that clause [5.4] were not in fact met by the work-around?

Ms Tsang: I can't compare what happened before I became a director, but I felt that the work-around dealt with the position in a way that put the charges in the exact same position that it would have been had they registered the buyers' charge first and then done a deed of priority.

Q. So would it be fair to say implicit in that answer is that the buyers ended up in the same position as clause 5.4 anticipated but got there by a very different route, not the route anticipated in the contract?

A. Yes, it didn't -- yes.

Mr McIlroy: It will be a matter for his Lordship what he makes of that."

120. Turning to the second issue, it is clear from the decision of the House of Lords in *Royal Brompton NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 that the starting point for a claim for contribution under the 1978 Act is a finding that two or more persons have contributed, albeit in different ways, to the same harm or damage, whatever the legal basis of their liability: see per Lord Hope at [37], [46] and [47]. They must share a common liability to pay compensation for having inflicted the same damage. I am satisfied that, for present purposes, the relevant 'damage' is the loss of the claimants' investment in the North Point development, in the form of their deposits. On the hypothesis on which this issue is premised, both ATC and 174 have contributed to the loss of those deposits. 174's right to contribution from ATC depends upon the damage, loss or harm for which it is liable to compensate the claimants corresponding (even if only in part) with the damage, loss or harm for which ATC is also liable to compensate the claimants: compare Lord Bingham at [6]. In my judgment, that requirement is clearly satisfied in the present case.
121. The case of *Howkins & Harrison v Tyler* [2001] PNLR 27 concerned a negligent valuation of a secured loan. The mortgage lender had recovered judgment against the valuers, who then sought to recover contribution under s. 1 (1) of the Civil Liability (Contribution) Act 1978 from the defaulting borrowers. The Court of Appeal held that although a claim in debt might possibly amount to 'damage' within the meaning of s.1 (1) of the 1978 Act, the lender's right to sue the borrowers for the mortgage debt was not in respect of the 'same damage' (which remained repayable in full) as their right of action against the valuers for misvaluing the mortgage security. As Sir Richard Scott V-C, delivering the leading judgment, explained at [14], the 'damage' for which

the borrowers were liable was the non-payment to the lender of the sum of money contractually due whilst the ‘damage’ for which the valuers were liable was the damage to the lender in lending money that it would not otherwise have lent. Those respective formulations of the ‘damage’ carried the case outside the scope of s. 1 (1) of the 1978 Act. Mr Bowmer submits that in this case, 174 was in breach of a contractual obligation in paying away the buyers’ money only if a precondition was met whilst ATC was in breach of a contractual obligation (and tortious duty) to advise its clients in relation to the release of that money. It is all the same ‘damage’, and the fact that one might be characterised as a debt claim and the other as a claim for damages does not mean that the potential applicability of the 1978 Act is somehow magically made to disappear. On the claimants’ case, their claim is a liability to repay a sum of money founded upon the breach of a contractual obligation. It is not a mortgage debt but rather arises from 174’s (assumed) failure to appreciate that it was not entitled to release the money in all the circumstances; and it would be quite remarkable if this were a case where no contribution could be claimed from the buyers’ solicitors. I accept that submission. In my judgment, the damage suffered by a lender as a result of a borrower’s failure to repay a secured loan is qualitatively different from the damage caused to that lender by the loss of its security that flows from a negligent mortgage valuation. There is no corresponding qualitative difference in the present case.

122. I have already concluded that even if any liability on the part of 174 for the lost deposits can properly be characterised as a debt due to each of the buyers in the amount of their respective deposits, since such liability derives from a breach of the stakeholder contract, it can also properly be characterised as damages flowing from that breach. I am satisfied that the nature of the right of action against 174 for any breach of its duty as stakeholder is sufficiently broad to encompass a compensatory analysis justifying the application of the 1978 Act. In my judgment, an unduly restrictive approach to the characterisation of ‘damage’ for the purposes of the 1978 Act is to be avoided as tending to emasculate the operation of the Act. Standing back and applying the statutory language in a broad sense, the ‘damage’ suffered by the claimants in this case is clearly the unauthorised release, leading to the loss, of their funds. That is the same damage that the claimants have suffered as a result of any breach of duty on the part of both ATC and 174.
123. If one were to apply the ‘mutual discharge’ test suggested by Sir Richard Scott V-C in *Howkins* by way of a practical cross-check and ask whether, if ATC were to repay any of the moneys that the buyers have lost back to them, that would operate to reduce the amount they could recover from 174, the answer would obviously be in the affirmative. That is why the two claimants – Mr Wong and Ms Au Yeung – who have actually received very small sums from ATC by way of settlement of their respective claims have both given credit in these proceedings for what they have actually recovered from ATC. Whilst viewing the application of the statutory test as “the safest course”, in *Royal Brompton* (at [28]) Lord Steyn considered that the ‘mutual discharge’ test was “best regarded as a practical test to be used in considering the very statutory question whether two claims under consideration are for ‘the same damage’, with its usefulness varying depending on the circumstances of individual cases.”

124. As to apportionment, the amount of contribution should be such as may be found by the court to be “just and equitable having regard to the extent of that person’s responsibility for the damage”. As stated at paragraph 4-018 of *Jackson & Powell on Professional Liability* (9th edn):

“The court should have regard both to the culpability of the various parties and to the extent to which each party’s conduct ‘caused’ the damage in question. This includes consideration of each party’s ‘moral responsibility in the sense of culpability and organisational responsibility in the sense of where in the hierarchy of decision-making and in the organisational structure leading to the damage the contributing party was located’. The ‘just and equitable’ criterion is wide enough to enable the apportionment to take account of blameworthiness as well as causative potency, and even, to an extent, of non-causative matters, but the financial means of the party from whom contribution is sought have [been] held not to be relevant. However, the main factor to consider is each party’s responsibility for the damage.”

125. Applying those principles, Mr Bowmer submits that ATC was exclusively responsible for the loss of the claimants’ deposits, or at the very least very significantly more responsible than 174. It was ATC which had acted for the claimants; and it was Ms Tsang who had dealt with them, corresponding and physically meeting with them in Hong Kong; and it was she who had been responsible for advising them. Ms Tsang knew the true title position and had been in a position to establish the claimants’ specific instructions. On the footing that the claimants did not know the true position, the difficulty that confronts ATC is that Ms Tsang clearly did not explain the position to her clients, or give them any advice, but nonetheless she authorised 174 to release their deposits against the supervisor’s certificates. ATC was therefore responsible, not only for shortcomings in its advice, but also for the very release of the deposits. In contrast, 174 was in no position, and plainly could not be expected, to contact the claimants in Hong Kong. It was entirely reasonable for 174 to have relied upon Ms Tsang to communicate with her clients. Indeed, it would probably have been in breach of 174’s professional duties as solicitors to have contacted the purchasers directly. In such circumstances, Mr Bowmer submits that if the court were to hold that 174 should not have released the buyers’ deposits to NPPM, this is a case - unusually - in which it should have no hesitation whatsoever in ordering ATC to pay 100% or, alternatively, at least 80%, contribution to 174 because the scales are tipped conclusively against ATC in terms both of blameworthiness and also causative potency.
126. Save that I do not agree that the level of contribution should be as high as 100%, I accept Mr Bowmer’s submissions. I do not agree with Mr Campbell that the true blame for the loss of the deposits lies with Mr Hayhurst and with 174, as the stakeholder which had undertaken and accepted responsibility to pay away the buyers’ deposits only on permitted terms which, on this counter-factual hypothesis, were never actually fulfilled. Both in terms of blameworthiness, and also causative potency, I find that ATC must bear by far the greater share of the responsibility for the loss of the buyers’ deposits. I accept that Mr Hayhurst was entitled to rely upon Ms Tsang as the buyers’ chosen solicitor. It was she, and not Mr Hayhurst, who was close to her clients, and who had direct access to them. Mr Hayhurst was entitled to look to Ms Tsang for the necessary authority to release her clients’ funds in circumstances not strictly covered by the stakeholder contract, particularly since he

had appeared on the scene relatively late in the day, and at a time when there had been previous releases of buyers' funds to cover construction costs notwithstanding the priority enjoyed by BFL's first legal charge. Mr Hayhurst had no knowledge of what was, or what had been, going on behind the buyers' side of the curtain. He was entitled to assume that everything had been done correctly as regards ATC's clients, and he was not required to trouble himself about that side of things. I must take all of that into consideration, and reflect it in my apportionment. In terms of both causative potency, and also blameworthiness, I agree with Mr Bowmer that the finger points to ATC as the buyers' solicitor. Ms Tsang should have been looking to protect the interests of her clients yet instead she had given her consent to 174 to release their funds knowing (as Mr Hayhurst did not) that she had not even consulted her clients, that she had given them no relevant information or advice, and that she had not got their express instructions. Mr Hayhurst and 174 had inherited a pre-existing state of affairs which had been engineered with the active involvement of Ms Tsang. In the context of the marketing and sale of this particular development, I do not accept Mr Campbell's submission that Mr Hayhurst should be regarded as having materially more relevant knowledge and experience than Ms Tsang.

127. However, I cannot accept Mr Bowmer's implicit suggestion that this absolves 174 (and Mr Hayhurst) of all responsibility for the release, and the resulting total loss, of the buyers' funds. After all, it was 174 that effected the several releases of the buyers' funds; and it did so knowing that the pre-condition of a first legal charge in favour of the buyer company had never been satisfied. Further, 174 continued to proffer standard-form agreements for sale on behalf of the seller knowing that the pre-condition in clause 5.2 was strictly incapable of attainment (although the purchasers' solicitors, with the same knowledge, continued to approve such contracts on behalf of their clients). In my judgment, Mr Bowmer's alternative assessment of an 80% contribution represents the right, and the just, balance.
128. I have considered whether I should make any adjustment to this apportionment to reflect the different dates on which contracts were exchanged with the different claimants on the basis that a lesser liability should fall on ATC as time went on and as Mr Hayhurst had more opportunity to reflect on the contractual basis for the release of buyers' funds to the seller. In this connection, I have considered, in particular, whether I should order ATC to bear a greater share of the liability for the two deposits that were released immediately following the 18 December meeting, relatively soon after 174 came on the scene and had to hit the ground running, or a lesser responsibility for the contracts that were exchanged after that meeting, on the basis that 174 might have had occasion to reflect more upon the propriety of the actual terms of clause 5 of the standard-form sale agreements. However, I have rejected any such approach because: (1) no-one has ever suggested that I should draw any distinction between different claimants in terms of apportionment and (2) I do not consider that such considerations have any material bearing upon either blameworthiness or causative potency. Nothing changed with the passage of time.
129. In arriving at the figure of 80%, I have borne in mind that this may well result in a liability falling upon ATC in a sum greater than that which would strictly be recoverable in a claim for professional negligence by its own clients, as falling within the scope of the duty owed to that particular claimant. However, this is not a consideration which was raised in argument before me, at least in the context of the

issue of apportionment. Further, in the case of each of the six claimants (other than Mr Wong and Ms Au Yeung) whose claims were compromised by the global settlement agreement effected with ATC and its insurer dated 22 July 2021, ATC has agreed to pay sums in excess of the sums claimed from 174 (albeit the settlement sums include interest and costs). In all the circumstances, I do not consider that this consideration should feature as a factor affecting the amount of contribution which it would have been just and equitable for ATC to have contributed to any award of damages against 174.

X: Disposal

130. For the reasons I have given, I dismiss these claims. As a result, the claim for contribution also falls to be dismissed. At the formal hand-down of this judgment, I will hear submissions on costs and any consequential matters.
131. I should make it clear that in my judgment, the dismissal of these claims accords with the justice of the case. On the evidence, I am satisfied that the remedy of each claimant for the loss of its investment in the North Point development properly lies against their own former solicitors, and not the stakeholder, who at all times acted in accordance with the authority of those solicitors. The claimants have compromised their claims against their own former solicitors. They can look to those solicitor's insurers to satisfy the sums due to them under their respective compromise agreements or, to the extent that those insurers are lawfully entitled to decline indemnity cover, to the Solicitors Compensation Fund as the fund of last resort. As Mr Bowmer concluded in his written closing remarks, no party ever suggested at the time that the release of the claimants' funds to NPPM to fund the ongoing costs of the development was wrong and, indeed, no such suggestion was made for some time afterwards until this claim was finally first intimated in May 2019.
132. That concludes this reserved judgment.