Neutral Citation Number: [2023] EWCA Civ 13

Case No: CA-2022-000151

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS IN MANCHESTER BUSINESS LIST (ChD)
His Honour Judge Hodge KC (sitting as a Judge of the High Court)
[2022] EWHC 4 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/01/2023

Before:

LORD JUSTICE NEWEY
LORD JUSTICE WARBY
and
SIR CHRISTOPHER FLOYD

- -

Between:

YEE SHI YIN and others	**Claimants/ Appellants**
- and -	
174 LAW SOLICITORS LIMITED	**Defendants/ Respondents**

- -
- -

David McIlroy and Lloyd Maynard (instructed by **Penningtons Manches Cooper LLP**) for the **Appellants**
Jonathan Seitler KC and Michael Bowmer (instructed by **DAC Beachcroft LLP**) for the **Respondents**

Hearing dates: 7 & 8 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. This appeal arises from a failed development. The development ("the Development") was undertaken by North Point (Pall Mall) Limited ("the Developer") and was to have comprised some 366 residential and live-work units at 70-90 Pall Mall, Liverpool. A fractional sales model was adopted under which buyers would pay larger than usual deposits (typically between 50% and 80% of the purchase price) and these would be used to fund the project. Sales were predominantly to overseas investors who intended to let the properties once they had been completed.

2. The appellants, who were all resident in Hong Kong at the time, were amongst those who agreed to buy. In accordance with the contracts into which they entered, they paid deposits to the respondents, 174 Law Solicitors Limited ("174"), who were by then the Developer's solicitors, to be held by 174 as stakeholders. The appellants' case in these proceedings is that 174 released the deposits when they should not have done and, hence, are liable for them.

3. The appellants' solicitors were Amie Tsang and Company Limited ("ATC") (whose name was changed to Key Manchester Limited in 2018), the principal of which was Ms Amie Tsang, who speaks fluent Cantonese. Other purchasers were represented by Oliver & Co, solicitors, where Mr David Sewell worked.

4. The contractual arrangements with buyers provided for the involvement of North Point Buyers (Pall Mall) Limited ("the Buyer Company"), a company limited by guarantee which had been set up to protect buyers' interests. From 15 October 2015, its directors included Ms Tsang and Mr Sewell. More surprisingly, Mr David Roberts of Wirral Solicitors Limited, trading as David Roberts & Co ("DRC"), who acted for the Developer, was at first also a director. He was replaced in that role by Mr David Hayhurst, who was a solicitor with 174, which had taken over from DRC as the Developer's solicitors.

5. The Developer purchased the site with the assistance of a loan from Bridging Finance Limited ("BFL"). The initial borrowing was repaid, but the Developer took out a new loan secured by a legal charge and debenture in favour of BFL dated 18 August 2015.

6. In an email to BFL of 6 August 2015, Mr Roberts observed that "[w]e need to agree a first legal charge in favour of the Buyers upon completion", the report to buyers having "advised that upon completion of their contracts they will have a first legal charge". However, a legal charge in favour of the Buyer Company was not executed until 1 October 2015 and, as was appreciated by all the solicitors involved, always ranked as a second legal charge. On 23 September 2015, Mr Roberts said in an email to the Developer, "we all appear to have dropped the ball here so let us try and get everything back on track".

7. It was against this background that Mr Sewell met Mr Peter McInnes of the Developer on 19 October 2015 and devised what became known as the October "work-around". This was described as follows in an email which Mr Sewell sent that day:

> "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."

8. Ms Tsang and Mr Roberts, among others, agreed to this "work-around", which then formed the basis on which buyers' deposits were in future released to the Developer by its solicitors (initially DRC and later 174). For her part, Ms Tsang confirmed her assent in an email timed at 13.58 on 20 October 2015. His Honour Judge Hodge KC ("the Judge") concluded in paragraph 79 of his judgment that, although Mr Sewell had sought the ratification of his proposals by Ms Tsang and Mr Roberts as the other two directors of the Buyer Company at the time, Ms Tsang and Mr Sewell each acted

in a dual capacity and approved what was proposed both as a director of the Buyer Company and as a solicitor acting on behalf of buyers.

9. It was on about 20 November 2015 that 174 replaced DRC as the Developer's solicitors. At that stage, DRC transferred to 174 the money which they had been holding in respect of deposits paid by buyers.

10. The first of the appellants to exchange contracts for the purchase of a unit in the Development did so on 17 December 2015. The other appellants exchanged contracts on, respectively, 10 March 2016, 31 March 2016 and 25 April 2016.

11. Following a meeting attended by, among others, Mr Hayhurst, Ms Tsang and Mr Sewell on 18 December 2015, 174 released some £1.28 million to the Developer. Further sums were released to the Developer by 174 periodically over the next five months or so.

12. Construction of the Development, which had started in June 2015, came to a standstill in about July 2017. Law of Property Act receivers were appointed in June 2018, and the site was eventually sold without any of the units having been built. The buyers' deposits had all been spent on marketing fees, other costs and the unfinished works. Nothing was repaid to them.

13. The appellants, among others, brought proceedings against both ATC and 174. The claims against ATC were settled, but those against 174 came on for trial before the Judge, sitting as a Judge of the High Court, in November 2021. In the judgment now under appeal, given on 10 January 2022, the Judge dismissed the claims. The Judge concluded in paragraph 98 of his judgment that "[o]n the true interpretation of the Agreement for Sale [i.e. the agreement by which each appellant agreed to buy a unit in the Development] and the resulting stakeholder contract, … 174 was not in breach of its contractual obligations as stakeholder in paying any of the buyers' funds over to [the Developer]". In the alternative, the Judge considered that the appellants were estopped by convention from complaining that there had been any breach by 174 of their duties as stakeholders. In that connection, the Judge said in paragraph 107:

> "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."

14. The appellants now challenge the Judge's decision in this Court. They take issue both with his interpretation of the sale agreements and with the finding of estoppel by convention.

Stakeholder contracts

15. As Millett LJ explained in *Manzanilla Ltd v Corton Property and Investments Ltd* (Court of Appeal, unreported, 13 November 1996) ("*Manzanilla*"), "Where a stakeholder is involved, there are normally two separate contracts to be considered." Millett LJ continued:

> "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."

16. Millett LJ likened the relationship between a stakeholder and a depositor to that between a banker and his customer. The former relationship, Millett LJ explained, "is contractual, not fiduciary", "is that of debtor and creditor, and is closely analogous to the relationship between a banker and his customer". The deposit "by itself creates the relationship of creditor and debtor between the depositors and the stakeholder", but "[a]dditional 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". "Until the event happens," Millett LJ said, "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". In this connection, Millett LJ cited by way of authority *Rockeagle Ltd v Alsop Wilkinson* [1992] Ch 47.

17. Another member of the Court, Waller LJ, noted in *Manzanilla* that "the proper inference appears to be that [the vendors' solicitors] agreed to [act as stakeholders] on the terms set out in the contracts of sale".

The contracts in the present case

The sale agreements

18. The agreements for the sale of units in the Development were in standard form. The key provision of each agreement for the purposes of this appeal is clause 5. That stated 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 Seller to purchase the Estate, and to repay any money loaned to the Seller to enable the Seller to purchase the Estate as they fall due for payment, and

to pay professional fees incidental to the purchase of the Estate 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 Estate

5.1.2.3 all commissions fees and payments incidental to the program of works to develop the Estate 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"

19. The "Seller" was the Developer, the "Company" was the Buyer Company and the "Legal Charge" was "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". By the time the appellants agreed to buy units in the Development, the "Seller's Solicitor" was identified as 174. In earlier contracts, the "Seller's Solicitor" had been given as DRC.

20. The Judge concluded in paragraph 51 of his judgment that the reference in clause 5.3 of the sale agreements to "the terms herein set" "must refer to the terms of clause 5 as a whole because sub-clause 5.3 does not set out any terms", and there was no dispute about that before us.

21. It is also relevant to note clause 24.1, which reads:

> "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."

The stakeholder contracts

22. Echoing Waller LJ in *Manzanilla*, the Judge proceeded on the basis that it is to be inferred that, "when 174 received each of the deposits, it agreed to do so on the terms set out in the relevant agreement for sale": see paragraph 43 of the judgment.

23. While stakeholder contracts are usually, as Millett LJ noted, tripartite, the Judge concluded that in the present case there was a quadripartite contract. The parties to the stakeholder contracts, the Judge held, included the individual buyers as well as the Buyer Company, the Developer and the Developer's solicitors. The Judge said in paragraph 47 of his judgment:

> "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."

24. There is no challenge to the Judge's conclusions in this respect.

The contractual issue

Introductory

25. Interpretation of a contract involves assessment of "the objective meaning of the language which the parties have chosen to express their agreement" (to quote Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, at paragraph 10) or, in the words of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912, "ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".

26. The interpretation of the sale agreements at issue in the present case is made harder by the fact that they cannot be said to be well drafted. As was observed by Mr Jonathan Seitler KC, who appeared for the respondents with Mr Michael Bowmer, the Judge was faced with a difficult task.

The Judge's approach

27. The Judge dealt with the interpretation of clause 5 of the sale agreements in paragraph 61 of his judgment. He said there:

> "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 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 [the Developer] 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."

28. Expanding on the last of these points, the Judge said this in paragraph 62:

> "[Counsel for the claimants] 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."

29. The Judge thus considered that:

    i) 174 were not entitled to release money otherwise than to pay items specified in clause 5.1.2. Authorisation by the Buyer Company of a payment would not of itself allow 174 to make it; but

    ii) It was for ATC, not 174, to satisfy themselves that the proviso to clause 5.2 was met.

30. Approaching matters on that basis, the Judge found that the "work-around" "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, [the Developer]": see paragraph 94. "So far as 174 was concerned," the Judge said, "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", and "it was not for the stakeholder to gainsay that understanding and agreement". 174 had not, accordingly, acted in breach of contract when they released sums to the Developer.

The parties' submissions in outline

31. Mr David McIlroy, who appeared for the appellants with Mr Lloyd Maynard, took issue with the Judge's interpretation of clause 5 of the sale agreements. Construed properly, Mr McIlroy submitted, clause 5.2 of the sale agreements made it a pre-condition of any release of money that the legal charge in favour of the Buyer Company had been registered as a first legal charge (or an application for such registration was pending) and that evidence of that had been produced to the buyer or his solicitor or agent. None of that happened, Mr McIlroy said. To the contrary, the solicitors involved all understood that the Buyer Company's legal charge ranked behind the legal charge in favour of BFL and so was only a second charge. 174's release of money to the Developer was thus, Mr McIlroy argued, in breach of contract.

32. For his part, Mr Seitler supported the Judge's approach. In the alternative, he relied on the words "to the order of the Company" early in clause 5.1 of the sale agreements. These, he said, meant that (contrary to the Judge's view) the Buyer Company could authorise 174 to release funds otherwise than "in the manner and on the terms" specified in the remainder of clause 5.1 and clause 5.2. The normal position is that joint depositors can give instructions to a stakeholder to change the way in which the stake is held, by whom it is held or even to release it. In the present case, so Mr Seitler submitted, the buyers appointed the Buyer Company to perform that role and, the Buyer Company having sanctioned the "work-around", 174 were entitled (not to say, bound) to release money as they did.

Assessment of the Judge's approach to clause 5.2

33. The proviso to clause 5.2 of the sale agreements provided that "any payment … shall not be made until … evidence of the registration … 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". In the event, no such evidence was produced to any of the appellants or to any solicitor or agent of any of them. There could not be since the "Legal Charge" (i.e. the legal charge in favour of the Buyer Company) was never registered as a first legal charge and no such registration was ever pending. In fact, the "work-around" expressly provided for money to be released "[n]otwithstanding the

fact that the Buyer Company Charge will sit on the register as a second charge". The appellants' solicitor (namely, Ms Tsang), like Mr Sewell and Mr Roberts, was well aware that the Buyer Company's legal charge had not been, and was not being, registered as a first legal charge, and Mr Hayhurst did not think otherwise. In paragraph 127 of his judgment, the Judge found that 174 "effected the several releases of the buyers' funds … knowing that the pre-condition of a first legal charge in favour of the buyer company had never been satisfied" and "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)".

34. In the circumstances, I do not, with respect, agree with the Judge that the proviso to clause 5.2 was satisfied or that 174 were entitled to take it to have been. The proviso was not couched in terms of the buyers' solicitors determining that there was sufficient evidence of the Buyer Company's legal charge being registered as a first legal charge. Still less did clause 5.2 state that it was good enough for 174 to consider that the buyers' solicitors had so determined. On its face, clause 5.2 required evidence of the registration of the Buyer Company's legal charge as a first legal charge (or that such registration was pending) to be produced, and the simple fact is that none was (or could be). In any event, it is not the case that the buyers' solicitors determined there to be sufficient evidence of the Buyer Company's legal charge being registered as a first legal charge or that 174 considered them to have done so. The buyers' solicitors agreed to go ahead *without* registration of the Buyer Company's legal charge as a first legal charge, not that there was sufficient evidence of such registration, and there was no reason for 174 to think that the buyers' solicitors believed there to be *any*, let alone sufficient, evidence of registration as a first legal charge. Like Ms Tsang and Mr Sewell, Mr Hayhurst of 174 knew that there was no such evidence.

174's alternative case

35. Clause 5.1 of the sale agreements provided for deposits to "be paid to the Seller's Solicitor to be held as Stakeholder to the order of the Company" before going on "and released by the Seller's Solicitor in the manner and on the terms …". Does the reference to deposits being held "to the order of the Company" imply that the Buyer Company could authorise 174 to release funds without the terms set out in clauses 5.1.2 and 5.2 being satisfied?

36. Mr McIlroy said not. For the reference to the stakeholder holding "to the order of the Company" to be seen as providing an alternative to release "in the manner and on the terms" set out later in clause 5, the word "also" would have to be read into clause 5.1 between "to the order of the Company and" and "released by the Seller's Solicitor in the manner and on the terms", and no such interpolation is warranted, Mr McIlroy argued. Further, deeming the Buyer Company to be able to authorise the release of money unilaterally, without regard to the detailed requirements laid down in clauses 5.1.2 and 5.2, would, Mr McIlroy submitted, flout business common sense: the Buyer Company could demand that 174 release funds as it might direct even though they were needed for the Development, and that in circumstances where the buyers had, by clause 5.3, "irrevocably" authorised the making of the payments "referred to in Clause 5 on the terms herein set out". Clause 5 should rather, Mr McIlroy contended, be

interpreted as meaning that 174 were entitled to release money only as laid down in clauses 5.1.2 and 5.2.

37. On the other hand, Mr McIlroy's construction of clause 5.1 might be said to ignore some of "the language which the parties [chose] to express their agreement" (to quote Lord Hodge in *Wood v Capita Insurance Services Ltd*). Clause 5.1 specifically stated that 174 were to hold "to the order of the Company", suggesting that the Buyer Company was to be able to give 174 instructions in relation to the funds. On Mr McIlroy's interpretation of the provision, however, the words "to the order of the Company" appear to be without significance.

38. Mr McIlroy's construction could, moreover, have occasioned considerable difficulty. Suppose, for example, that the Developer had once again wished to change its solicitors and, hence, the stakeholders. It would seem that 174 could not have passed to their successors the deposits that they held unless this was agreed by *all* the other parties to the material quadripartite stakeholder contracts: by not only the Developer and the Buyer Company but by *every* relevant individual buyer. Clause 5 would have been of no assistance since (a) the requirements of clauses 5.1.2 and 5.2 would not have been met and (b) authorisation by the Buyer Company, on the basis that clause 5.1 provided for the money to be held to its order, would not have sufficed. Of course, 174 had previously taken over from DRC both as the Developer's solicitors and as stakeholders. Since up to that point sale agreements which otherwise corresponded to those into which the appellants entered provided for deposits to be held by DRC, it is hard to see how, consistently with Mr McIlroy's submissions, it was possible for 174 to replace DRC as the stakeholders.

39. More generally, Mr Seitler's interpretation of clause 5.1 can be said to have commercial logic. In broad terms, clause 5 would have established circumstances in which the Developer could *insist* on money being paid out to it while catering for other, potentially unforeseen, circumstances in which it might be appropriate for funds to be withdrawn without obtaining the consent of every buyer. Viewed in this way, the buyer's irrevocable authorisation in clause 5.3 of "the payments referred to in Clause 5 on the terms herein set" confirmed the Developer's ability to require deposits to be released to it where the conditions set in clauses 5.1.2 and 5.2 were fulfilled. In other situations, money could be released on the instructions of the Buyer Company.

40. As for Mr McIlroy's submission that an arrangement under which the Buyer Company could unilaterally have demanded that funds be released would have offended business common sense, the likelihood is, I think, that the Buyer Company's ability to direct withdrawals was not untrammelled. In the first place, it may be that, if the requirements of clauses 5.1.2 and 5.2 were not met, withdrawals had to have the assent of the Developer as well as that of the Buyer Company. As mentioned in paragraph 16 above, a stakeholder usually "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". In the present case, the depositors included "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": see paragraph 64 of the judgment. In the circumstances, there was obviously a case for substituting the Buyer Company for the

buyers, and the words "to the order of the Company" may have been intended to do no more than that: 174 were to hold for the Developer and *the Buyer Company* rather than for the Developer and the *many purchasers*. If that is right, withdrawals outside the terms of clauses 5.1.2 and 5.2 would have needed the consent of both the Developer and the Buyer Company. Alternatively, there may have been an implied constraint on the Buyer Company's power to authorise withdrawals. It might, perhaps, be inferred that the Buyer Company was not to be able to sanction the release of funds otherwise than in accordance with clauses 5.1.2 and 5.2 without the consent of the Developer unless and until it could be seen that the money would not be needed for items listed in clause 5.1.2. That would accord with the buyers having "irrevocably" authorised such payments in clause 5.3.

41. In all the circumstances, the better view, I think, is that withdrawals outside the terms of clauses 5.1.2 and 5.2 could be authorised either by the Buyer Company alone or at any rate by the Buyer Company and the Developer together; there was no need to obtain the consent of individual buyers. That being so, the appellants can have no complaint about 174 releasing money to the Developer. The Buyer Company and the Developer both agreed to this.

Conclusion

42. I agree with the Judge that 174 did not commit any breach of contract, from which it follows that the Judge was right to dismiss the claims.

Estoppel by convention

43. Given my conclusions on the contractual issue, I do not need to address estoppel by convention.

Overall conclusion

44. I would dismiss the appeal, albeit for reasons which differ somewhat from those of the Judge.

Lord Justice Warby:

45. I agree.

Sir Christopher Floyd:

46. I also agree.