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[2026] EWHC 1168 (Ch)

Case No: BL-2023-001216

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18/05/2026

Before :

MR JUSTICE RICHARDS

Between :

(1) MR KRISTIAN SIEM
(2) CHAPTERS PROPERTY LONDON LIMITED
(3) MR STEVEN WAKE

Claimants

- and -

WOMBLE BOND DICKINSON (UK) LLP

Defendant

**Adam Chichester-Clark and Katharine Bailey (instructed by Winston Taylor International
LLP) for the Claimants**

**Mark Simpson KC, Daniel Edmonds and Wee-An Tan (instructed by Reynolds Porter
Chamberlain LLP) for the Defendant**

Hearing dates: 19 February – 11 March 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 18 May 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Approved Judgment**Mr Justice Richards:**

1. The Claimants (**Mr Siem, Chapters** and **Mr Wake** respectively) seek damages from the Defendant (**WBD**) for professional negligence. At a very high level, the Claimants say that WBD's negligence caused them to lose an opportunity to earn significant profits from a proposed redevelopment (the **Redevelopment**) of a property (the **Property**) in a desirable and expensive part of London. WBD defends the claim.
2. The claim involves a significant dispute of fact. It is not, for example, even agreed whether WBD owed Mr Siem any duties at all. Central issues such as what instructions WBD were given, and what advice they gave, at various junctures are similarly disputed. Given the nature of the dispute between the parties, I will order this judgment as follows:
 - i) Part A contains a narrative of key events that is intended to be neutral in most respects.
 - ii) That will put in context findings of primary fact on the key issues in dispute in Part B.
 - iii) Part C sets out the legal principles applicable to the claim for professional negligence and four central issues that must be addressed. These principles were not controversial.
 - iv) Part D considers whether WBD breached their duty, on the assumption that the same duty was owed to all three Claimants. The issue of breach is taken out of its natural order since, in my judgment, there was no breach of duty even on assumptions most favourable to the Claimants and so this issue provides the clearest reason why the claims must fail.
 - v) Part E contains findings on the issue of factual causation. Strictly this issue does not arise given my conclusion on the issue of breach, but I consider it appropriate to make some factual findings given that I heard a good deal of evidence on the topic.
 - vi) Part F deals with two issues on the question of whether the Redevelopment would have secured planning permission. Again, this issue does not arise given my findings on breach, but I consider some findings to be appropriate given the amount of evidence I heard on planning issues.
 - vii) Part G deals with the question whether WBD owed any duty to either Mr Siem or to Chapters. Given that this issue does not arise, I limit myself to evaluative factual conclusions.
 - viii) Part H deals with other miscellaneous issues.
3. One of WBD's two factual witnesses at trial was Mr Drewett, a partner at WBD at material times. He has previously been the High Sheriff of Somerset. In that capacity, Mr Drewett had invited both me and Mrs Justice Cutts to a dinner at his home in 2023 when we were both on circuit in Bristol. As far as I can remember, also present at that dinner were Mr Drewett's wife, two personal friends of his and Mrs Justice Cutts's clerk.

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4. At the Pre-Trial Review, I was aware that a “Mr Drewett” would be giving evidence. However, since I had not met him before the dinner at his home and had not met him since, I did not recognise the name and so did not make the connection with the High Sheriff of Somerset whose home I had visited. I did not, therefore, mention the dinner either at or following the Pre-Trial Review. It was, however, noticed by WBD’s solicitors (no doubt because Mr Drewett told them) who drew it to the attention of the Claimants whereupon I too was informed. Having been informed, I arranged for my clerk to send all parties an email on 10 February 2026 that set out what I remembered about the dinner and its circumstances. I confirmed that I did not know Mr Drewett before the dinner and had not met him since. I invited either side to make an application for recusal if they wished to.
5. In the event no party asked that I recuse myself. I explained to the parties that I considered I could properly hear the trial without any actual bias or without any appearance of bias and neither side has sought to dissuade me from that view.

PART A – NEUTRAL NARRATIVE**Overview of the Property, its ownership and the proposed Redevelopment**

6. The Property is located in a conservation area (the **Conservation Area**) in a prestigious part of the Royal London Borough of Kensington and Chelsea (the **Borough**). It was constructed in the 1970s in a modern style which could be described as either “brutalist” or “cubist” depending on one’s perspective. Its architectural style is distinctive and different from that of some of its more immediate neighbours in the Conservation Area which date from the 19th century. That said, the Conservation Area includes other modern buildings.
7. The Property is divided into three large flats each of which is held under a long lease. The leasehold interest in the ground floor of the Property (the **Ground Floor Flat** or **No 30**) is owned by Mr Siem. Above the ground floor are two further leasehold flats (**No 30a** and **No 30b**). No 30a and No 30b have been connected to make a single large flat (the **Upper Floor Flat**). The leasehold interests that comprise the Upper Floor Flat were, at material times, registered in the name of a company incorporated in the Cayman Islands, Somerset Properties Limited (**SPL**).
8. The freehold title to the Property as a whole is held by 30 Hyde Park Gate Limited (**30 HPG**). In a familiar arrangement, the shares in 30 HPG were held by those holding a leasehold interest in the flats at the Property, so Mr Siem held one of two shares in 30 HPG in his capacity as leaseholder of the Ground Floor Flat and SPL held the other share in its capacity as leaseholder of the Upper Floor Flat.
9. The shares in SPL were owned by another company incorporated in the Cayman Islands, Buchanan Limited (**Buchanan**). The shares in Buchanan, and so the indirect interest that it held in the Upper Floor Flat, were assets of a family trust (the **Trust**) established for the benefit of a wealthy businessman (**Mr Promphan**) and his family. The trustee of the Trust was Cititrust Singapore Limited (**Cititrust**), a company registered in Singapore, which was a member of the Citibank group and carried on business as a professional trustee company.

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10. Mr Wake, a property developer and former architect, considered the Property to have real development potential. He wanted to acquire both the Ground Floor Flat and the Upper Floor Flat, demolish the whole Property and construct a new building containing around 15 flats constructed to a high specification. This would not be a straightforward endeavour, not least because he did not himself have the £40m that would be necessary to acquire the Ground Floor Flat and the Upper Floor Flat. Moreover, the Redevelopment would require planning permission which would not be entirely straightforward to obtain given that it envisaged demolition of a building located in the Conservation Area. A still further complication, at least initially, was a perception that the Redevelopment would need to have access from a mews (the **Mews**) that was adjacent to the existing property. However, since flats in this area of London could be expected to sell for a price of over £3,000 per square foot, Mr Wake considered the proposal to have significant profit potential.
11. Initially, Mr Wake sought to effect the Redevelopment via a joint venture between a family office known as **Genesta** and an entity controlled by Mr Wake, Chapters Hurtwood Limited (**Chapters Hurtwood**) which Mr Wake owned and used as a vehicle for his property development activities. The idea in essence was that Genesta would provide finance for the acquisition of the Ground Floor Flat and the Upper Floor Flat, private equity would provide funding for the development, Mr Wake would provide the property development expertise and the various participants in that endeavour would share the profits generated from the Redevelopment.
12. In April 2017, Chapters Hurtwood through its then solicitors (**Wilkinsons**) made an offer to acquire the Upper Floor Flat for £19m and the Ground Floor Flat for £21m. Cititrust was interested in selling the Upper Floor Flat at that price. However, Mr Siem preferred to have a stake in the proposed Redevelopment rather than selling the Ground Floor Flat for a fixed sum. Following a meeting on 22 May 2017, Mr Siem suggested that Mr Wake abandon the proposed joint venture with Genesta and embark on a joint venture with him instead.
13. Initially it was thought that the joint venture between Mr Wake and Mr Siem would be conducted through a special purpose company (**SPV**) in which Mr Siem and Mr Wake would own 50% of the shares. Mr Wake would provide the property development expertise. Mr Siem would provide the SPV with the funding necessary to acquire the Upper Floor Flat for £19m and Mr Siem would contribute the Ground Floor Flat to the SPV. Once the SPV held the Ground Floor Flat and the Upper Floor Flat, Mr Siem would also provide funding to enable the Redevelopment to take place. Mr Siem would also ultimately acquire the penthouse flat in the Redevelopment.
14. It was proposed that Mr Wake and Mr Siem would enter into a Development Management Agreement (**DMA**) to allocate between themselves the risks and rewards of this arrangement.
15. Mr Wake was amenable to this kind of arrangement. He abandoned the joint venture proposed with Genesta and, following Mr Siem's confirmation on 4 June 2017 that he was interested in the kind of joint venture summarised above, Mr Wake started working with Mr Siem rather than Genesta.

Approved Judgment**The engagement of WBD**

16. Initially Wilkinsons continued to act even though Mr Wake's joint venture partner was Mr Siem rather than Genesta. By 21 June 2017, Wilkinsons had sent a draft share purchase agreement (**SPA**) for the sale of the shares in SPL to Withers LLP (**Withers**) who were the solicitors acting for Cititrust.
17. However, Mr Wake had a good relationship with Mr Drewett, a partner at WBD who specialised in real estate matters, having instructed him previously when Mr Drewett was a partner at Osborne Clarke LLP. Because of that relationship, Mr Wake had kept Mr Drewett updated on the proposed transaction even though WBD were not formally instructed on it. Mr Siem also had a long-standing relationship with Mr Howard Freeman, a partner at Freemans Law LLP t/a Freemans Solicitors (**Freemans**) who had handled his real estate work in England and Wales for decades. Given that both Mr Siem and Mr Wake had strong relationships with other law firms, Wilkinsons were unable to keep the instructions.
18. A central area of dispute in this case relates to the fundamental question of whether WBD owed any duties to Mr Siem at all. Certainly WBD never entered into any engagement letter with Mr Siem, even though they did enter into an engagement letter with Mr Wake on 9 August 2017 (the **Engagement Letter**). Mr Drewett sent that engagement letter to Mr Wake by post on 9 August 2017 together with a separate document entitled "Terms of Business". The Engagement Letter stated that "in accordance with our usual practice our liability on the Matter is limited to £10 million. Please read paragraph 21 of our terms of business for more details". Paragraph 21 of those terms of business purported to exclude all liability for any loss of profits and the effectiveness or otherwise of that clause is in dispute.
19. It is common ground that WBD was acting for Mr Wake (and not for Mr Siem) on matters connected with the DMA. WBD could scarcely act for Mr Siem on that arrangement because there would be a clear conflict between his interests and those of Mr Wake. However, there the common ground between the parties on this issue ends and the question of who WBD were acting for was complicated by the following matters which will be addressed in detail later in this judgment:
 - i) WBD took over the task of agreeing the SPA with Withers. Thus, from August 2017 to January 2018, WBD were closely involved in drafting and negotiating terms of an SPA with Withers. When drafting and negotiating that SPA, WBD were clearly approaching matters from the perspective of a buyer of the SPL shares, with Withers representing the interests of Cititrust as seller, or indirect seller through Buchanan, of those shares.
 - ii) However, the parties are not agreed on whose interests precisely WBD were representing in that exercise. There is a factual disagreement as to what WBD were told about who was to be the buyer of the SPL shares.
 - iii) WBD contemplated at various stages that they might need to take on Mr Siem as a client in order to continue to act for the "buyer" on the SPA. On 5 September 2017 Mr Fitzpatrick emailed Mr Freeman to canvass the possibility that WBD might take Mr Siem on as a client. WBD's position is that they did not receive any confirmation until 26 December 2017 that Mr Siem wanted WBD to act for him.

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Mr Siem disagrees. Further discussions as to whether WBD were acting for Mr Siem took place between 26 December 2017 and 3 January 2018.

- iv) Still further complication comes from the fact that Mr Siem had asked Freemans to do some work on SPA matters and WBD argue that it was Freemans, rather than them, who had the duty of looking after Mr Siem's interests in connection with the SPA.
20. WBD did not enter into any express retainer with Chapters either. A similar issue arises as to whether WBD owed any duties to Chapters.

Warranties, “tracing provisions” and other protections

21. All parties recognise that the buyer of the SPL shares, whoever that was to be, would be acquiring a company with a history. It would need contractual protection, in the form of warranties or indemnities (to which I will refer together as **warranties** by way of shorthand), that protected against the risk that SPL had unwelcome, or unknown, liabilities.
22. Like all contractual promises, warranties could be worthless if the person giving them had insufficient assets to meet claims arising. In this case the warranties were to be given by Cititrust which was part of a large financial services group. However, a professional trustee such as Cititrust might be expected to include a **limited recourse provision** that limited its liability under warranties by reference to the extent of the assets of the Trust. That would be an area of risk for a buyer since, if Cititrust distributed the proceeds of sale of the SPL shares to beneficiaries of the Trust, as it might be expected to do, Trust assets would be diminished and a limited recourse provision might preclude or reduce a buyer's ability to recover damages for breach of warranty.
23. A buyer could seek to address this risk by removing any limited recourse provision. That would give it full recourse to all of Cititrust's assets if it made a successful warranty claim. However, a blunt approach such as this would be problematic for Cititrust. Without a limited recourse provision, if it distributed the proceeds of sale to beneficiaries of the Trust, it would have to use its own assets to meet any claims under warranties even though those claims arose in connection with Cititrust's role as trustee of the Trust. Cititrust would be reluctant to take this risk. However, if that reluctance could be overcome Cititrust could mitigate its risk by taking a counter-indemnity from a person with substantial assets (such as Mr Promphan).
24. A buyer would have a number of possible ways of mitigating its own risk if it were prepared to accept that Cititrust should benefit from a limited recourse provision. In no particular order:
- i) It could require a creditworthy person (such as Mr Promphan) to guarantee Cititrust's obligations.
 - ii) It could include a contractual provision that prohibited Cititrust from making any distribution of the sale proceeds to a beneficiary of the Trust unless that beneficiary gave warranties and indemnities direct to the buyer. Withers referred to this approach as “**tracing provisions**”. While WBD's witnesses did not necessarily adopt that term, it was used extensively at trial and so I will use it too. Tracing

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provisions would permit distributions to be made, provided “direct” warranties were given by beneficiaries receiving those distributions (**receiving beneficiaries**). Tracing provisions would thus require a buyer to bring warranty claims against receiving beneficiaries. That might be straightforward if, for example, there was a small number of receiving beneficiaries located in a single jurisdiction. However, bringing warranty claims against receiving beneficiaries might be less straightforward (and so tracing provisions would be correspondingly less palatable) if they were not all close family members and so might have disparate interests. Tracing provisions might become less palatable still if the receiving beneficiaries were located in multiple jurisdictions. It is therefore common ground that the palatability or otherwise of tracing provisions as a solution would depend in part on the characteristics and place of residence of beneficiaries of the Trust.

- iii) It could include “**retention provisions**” that provided for part of the purchase price Cititrust received to be held back and held in an escrow account for a period. That would mean that a buyer could have recourse to a pool of cash if warranty claims needed to be made during that period. Of course, the level of protection actually afforded by retention provisions would depend on both the length of the retention period and the amount retained.
 - iv) It could require Cititrust to give a “**Non-Distribution Undertaking**” to the effect that it would not distribute the sale proceeds for a period.
 - v) It could purchase insurance covering against the risk of breach of warranties or indemnities in the SPA.
25. The Claimants assert that WBD were negligent in the advice that they gave on the above methods of mitigating risk. They also assert that WBD were negligent in choosing, in negotiations with Withers, to press for a retention provision.

The progress of negotiations between WBD and Withers between August and October 2017

26. The negotiations between WBD and Withers on the SPA involved a dialogue between competing interests. At a high level, Withers were representing the interests of a **Selling Side** consisting of Cititrust, Mr Promphan and the beneficiaries of the Trust. Without at this stage expressing a view on whose interests precisely WBD were representing, they were as a general matter representing the interests of a **Buying Side** that could conceptually include all or any of Mr Siem, Mr Wake and any SPV that they formed to acquire the shares in SPL.
27. The legal negotiations between WBD and Withers also raised commercial issues, for example, as to the date of completion. The Selling Side had appointed Mr Rory Penn of Van Han Limited (**Van Han**) to act as their property agent. Van Han would earn a fee if the transaction closed and so naturally sought to press both sides to agree commercial terms.
28. There is some dispute as to how urgent it really was to finalise the SPA. However, the Selling Side had from an early stage explained that they were targeting a completion date no later than 31 December 2017. As that deadline came closer, the Selling Side expressed frustration at the length of time the transaction was taking to complete.

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29. The partner leading the work on the SPA at WBD was Mr Fitzpatrick, primarily assisted by Ms Sammy Hill and Mr Alex Fergus. Mr Fitzpatrick's counterpart at Withers was Mr Lynch. A travelling draft of the SPA passed between Withers and WBD as follows:
- i) On 8 August 2017, Withers sent WBD a version of the SPA that included a limited recourse provision limiting Cititrust's liability under warranties by reference to Trust assets. That approach therefore gave rise to the issue described in paragraph 22 above. Withers also re-sent an apparently identical draft SPA on 21 August 2017, but I will refer to this version of the SPA as being the draft of 8 August 2017.
 - ii) On 8 September 2017, Mr Fitzpatrick and Mr Lynch spoke over the telephone for the first time about the SPA, having previously corresponded by email in relation to the SPA. There is a dispute about what was said on that call, but the Claimants say that Mr Lynch made an offer of a Non-Distribution Undertaking during the call.
 - iii) On 13 September 2017, WBD sent Withers a response to that draft SPA that deleted the limited recourse provision. That approach sought to deal with the Buying Side's risk described in paragraph 22, but in doing so it imposed on Cititrust the risk described in paragraph 23 above.
 - iv) On 18 September 2017, Withers sent WBD a draft SPA that reinstated the limited recourse provision. Withers sought to address the risk set out in paragraph 22 by including tracing provisions.
 - v) On 6 October 2017, WBD sent Withers a marked-up SPA that, in addition to tracing provisions, contained a retention provision requiring £1m to be retained for a period of 12 months to cover potential warranty claims. WBD also articulated the Buying Side's position on other issues that would prove to be contentious. For example:
 - a) The Buying Side's ideal position was that the Redevelopment could be accessed from the Mews. However, it was not clear that the necessary rights of way were in place to accommodate the kind of access that was proposed. WBD explained that the Buying Side's position was that the SPA would not be signed until the issue with Mews access was resolved.
 - b) WBD also explained that the Buying Side's proposal was for completion to take place six months after exchange. That position was completely incompatible with the Selling Side's request for completion by 31 December 2017.
30. The retention provision that WBD included in the draft SPA of 6 October 2017 proved to be objectionable to the Selling Side. The Claimants accept that the retention provision was included following a telephone discussion between Mr Wake and Mr Fitzpatrick on 22 September 2017 about the appropriate response to Withers' draft SPA of 18 September 2017. Accounts of what was discussed on that call vary. The Claimants' case is that Mr Fitzpatrick negligently advised that, without a retention provision, the Buying Side would be "stuffed". WBD denies that. Overall, the Claimants say that WBD was negligent in including that retention provision in the draft SPA.

Approved Judgment**Events leading to the Selling Side instructing Withers to “down tools” on 3 November 2017**

31. On 19 October 2017, Mr Wake took a telephone call from the Selling Side’s property agent, Mr Penn. Mr Wake’s contemporaneous note of that call recorded that Mr Penn told him that the Selling Side was “pissed off” about the delay in finalising the SPA and that the retention clause was a “deal breaker” that would cause the Selling Side to “walk if not sorted”.
32. Following this call, Mr Wake called Mr Drewett. Both Mr Wake and Mr Drewett made a note of the call, but their notes are different. Mr Wake says that during the call he instructed Mr Drewett to ensure that WBD got in touch with Withers to (i) resolve the issue of retention, at least to make sure that it would not cause the deal to collapse and (ii) tell Withers that the Buying Side would drop the insistence on a 6-month delay between exchange of contracts and completion. WBD say that no such instructions were given and the outcome of the call was simply that WBD would check if Withers had provided a formal articulation of the Selling Side’s position in a revised draft of the SPA.
33. Following the call between Mr Wake and Mr Drewett, WBD did not get in touch with Withers about either the retention issue or the issue as to the date of completion. The Claimants’ case is that Mr Wake believed his instructions to Mr Drewett had been carried out and that the absence of any communication from Withers to the effect that the retention provision was a deal-breaker meant that Mr Penn had simply been “testing the water”.
34. On 3 November 2017, Mr Fitzpatrick discovered, during a conversation with Mr Lynch, that the Selling Side had instructed Withers to “down tools” on the deal. There is a disagreement as to what caused the Selling Side to take that position. The Claimants assert that the Selling Side did so because they regarded the inclusion of a retention clause as a deal-breaker and, because WBD ignored the instructions that Mr Wake gave Mr Drewett on their call of 19 October 2017, the Selling Side was never placated. The Claimants’ primary case (the **Primary Counterfactual**) is that if WBD had not (i) negligently required a retention clause that was unnecessary, rather than an alternative form of warranty protection or (ii) negligently failed to comply with Mr Wake’s instructions given on 19 October 2017, an SPA would have been entered into substantially on the terms of the draft SPA circulated on 18 September 2017 or on substantially the same terms as were being proposed in drafts circulating prior to 19 October 2017.

Attempts to revive the transaction

35. The parties are not agreed as to whether the transaction was capable of being revived after 3 November 2017. However, Mr Penn, the Selling Side’s real estate agent, and Mr Wake spearheaded attempts to do so.
36. Mr Wake initially assumed that the Selling Side had pulled out of the transaction because of Mr Siem’s insistence that exchange of contracts be conditional on resolving the issue of access to the Redevelopment via the Mews. He suggested to Mr Siem that this point be dropped as mews access was not essential and on 5 November 2017, Mr Siem agreed.

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37. Initially Mr Siem stood firm on the issue of the 6-month interval between exchange and completion, writing in an email to Mr Wake of 7 November 2017 that, while he was prepared to countenance an exchange of contracts on 20 November 2017, he still required a 6-month interval between exchange and completion.
38. On 19 November 2017, Mr Penn emailed Mr Siem to communicate his understanding of the Selling Side's position as articulated by Mr Promphan namely "NO retention clauses" and a final completion date no later than 31 March 2018. That represented a softening of the Selling Side's position on completion since, up to then, they had been insisting on completion by 31 December 2017.
39. On 22 November 2017, Mr Freeman confirmed that Mr Siem was content to agree to completion by 31 March 2018. That dealt with one issue of contention and WBD and Withers set about seeking to agree a mutually acceptable position on warranty and indemnity protections.
40. Initially, on 27 and 28 November 2017, Mr Fitzpatrick pursued a suggestion that Mr Promphan should "stand behind" the warranties (by providing a guarantee) or that Cititrust should stand behind them (by providing warranties that were not limited by reference to assets of the Trust). The latter course could theoretically leave Cititrust exposed if a warranty claim were made at a time when it had distributed all of the sale proceeds to beneficiaries of the Trust, but Mr Fitzpatrick suggested that Cititrust could control its risk in that regard by not distributing all of the sale proceeds. The Claimants say that Mr Fitzpatrick's reference in an email of 7 December 2017 to his understanding that Mr Lynch "may have mentioned something similar when we first spoke" supports their contention that Withers had offered a non-distribution undertaking in September 2017 (see paragraph 29.ii) above).
41. By 18 December 2017, Withers and WBD had agreed, between lawyers, that the interests of the Selling Side and the Buying Side could be accommodated by Cititrust giving a Non-Distribution Undertaking to the effect that none of the proceeds of sale of the SPL shares would be distributed to beneficiaries of the Trust during the 12-month period after completion when claims under warranties could be made.
42. Even though agreement had been reached on all the contentious issues between the Buying Side and the Selling Side, the SPA was not signed before Christmas 2017. On 3 January 2018, the second working day after the Christmas break, Mr Fitzpatrick sent an email to Mr Siem, Mr Freeman, Mr Wake and Mr Drewett. The context and contents of this email will be analysed later in this judgment, but by way of overview it contained some summary of the progress of discussions between WBD and Withers on the retention issue. The Claimants characterise the email as a further instance of negligence asserting that the summary was incomplete, selective and inaccurate particularly because it failed to disclose WBD's earlier negligence relating to the retention issue. WBD do not accept that characterisation.

Mr Siem's withdrawal from the transaction in January 2018

43. On 5 January 2018, Mr Fitzpatrick sent Withers an amended draft SPA in what he said he hoped was an agreed form.

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44. However, that SPA was never signed. On 7 January 2018 Mr Siem sent an email to Mr Wake copied to various addressees at WBD and Freemans. In that email, Mr Siem expressed concerns at what he saw as Mr Wake’s inability to control advisers’ costs. Mr Siem expressed doubts as to whether Mr Wake had the necessary experience to “work with the right priority and with crisp instructions to advisers” and said that those doubts caused him concerns as to whether Mr Wake would be able to manage the Redevelopment. On 8 January 2018, Mr Siem sent a further email saying that he was withdrawing from the transaction.
45. The reasons for Mr Siem’s withdrawal are hotly disputed:
- i) The Claimants’ case is that WBD’s negligent email of 3 January 2018, by failing to disclose their own negligence on the issue of warranty retention provisions, had caused Mr Siem, wrongly, to believe that Mr Wake was to blame for the problems with the transaction. As an alternative to the Primary Counterfactual summarised in paragraph 34 above, the Claimants plead an “**Alternative Counterfactual**” to the effect that, but for WBD’s negligence, Mr Siem would have entered into an SPA on the terms of the draft dated 5 January 2018.
 - ii) WBD say that Mr Siem’s withdrawal had nothing to do with Mr Fitzpatrick’s email of 3 January 2018 and everything to do with Mr Siem’s perception that the £19m purchase price was excessive.
46. Relatedly, the Claimants characterise Mr Siem’s withdrawal from the transaction on 8 January 2018 as temporary. They say that Mr Siem and Mr Wake quickly sorted out their differences following discussions during which they realised that the difficulties had been caused by WBD’s negligence, rather than Mr Wake’s inability to instruct advisers to progress the transaction efficiently.

PART B – FINDINGS OF PRIMARY FACT ON TOPICS IN DISPUTE**Impressions of factual witnesses**

47. I had factual witness evidence from Mr Siem and Mr Wake (for the Claimants) and from Mr Fitzpatrick and Mr Drewett (for the Defendants). All of these witnesses were cross-examined.
48. Mr Siem was an honest witness. He is a busy and wealthy man with lots of demands on his time. He therefore, quite understandably, relied on others to deal with much of the detail of the transaction. He was not, therefore, on top of all the fine details of the transaction. He had not seen, for example, disclosure given relatively recently before the trial of documents that cast some light on Freemans’ role and, quite understandably, his recollections about what Mr Freeman was doing were not entirely consistent with that documentation. That said, I was impressed by the extent to which Mr Siem was familiar with a good amount of the detail. He was clear on what he could, and could not, remember and was quite clearly seeking to assist the court with his evidence.
49. Mr Drewett and Mr Fitzpatrick were also honest witnesses seeking to assist the court with their evidence. While the Claimants invited me to reject their account of what they recalled happening on various telephone conversations, there was no suggestion that

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either Mr Drewett or Mr Fitzpatrick were giving deliberately untrue evidence and they quite clearly were not.

50. In closing, significant challenges were made to Mr Wake's credibility as a witness on two grounds:
- i) It became clear during Mr Siem's oral evidence that there was an agreement between him and Mr Wake to share in the risks and rewards of this litigation. I gave a ruling during the trial that Mr Wake could be asked three limited questions on the detail of that agreement in cross-examination. In answers to those questions, Mr Wake confirmed that this agreement provided for Mr Siem to fund all but £143,000 of the costs of the litigation and to pay the entirety of any costs award made against the Claimants if the claim fails. If the claim succeeds and the Claimants are awarded any damages then Mr Siem would first recover 2.77 times the costs he had funded. Any balance remaining would be split in a 70:30 ratio between Mr Siem and Mr Wake. (Mr Wake's answer suggested that this sharing was on the basis of aggregating recoveries so that he could conceivably obtain a share of damages if his claim failed, but Mr Siem's claim succeeded.) WBD characterise this arrangement as offering Mr Wake the prospect of a life-changing "win bonus" should the claim succeed.
 - ii) Mr Wake has, in proceedings that WBD brought against him (the **Costs Proceedings**) for their unpaid bill for advice on the transaction, taken a position, backed up by pleadings signed with a statement of truth, that is inconsistent with his approach in these proceedings to the scope of his retainer with WBD.
51. Mr Wake's claim is for around £7m. Mr Siem's is for around £43m. Mr Siem is said to have spent some £3.157m in costs. Therefore, the arithmetic of the agreement described in paragraph 50.i) is that, if the claims succeed in full, Mr Wake would receive £12.38m in respect of his £7m claim and £143,000 contribution to costs. I agree that this would be a large amount of money for Mr Wake. It certainly has the potential to affect his evidence.
52. Mr Wake argues that it is tendentious to describe the arrangement as a "win bonus", characterising it simply as a "litigation funding agreement". I do not accept that characterisation. The essence of a litigation funding agreement is that a litigant pays away part of their damages if the claim succeeds, receiving less than they might otherwise have done in return for benefiting from the protection that litigation funding provides. However, here if the claim succeeds in its totality, Mr Wake would receive an enhanced return rather than a lower return, a different economic profile from that arising under a litigation funding agreement.
53. I agree with Mr Wake that he can only expect that enhanced return if the Claimants obtain a good portion of the sums claimed as damages. For example, if all claims succeed but produce damages of £32,544,980, less than the total claimed, Mr Siem would first take £8,744,890 as his multiple of costs. Mr Wake would obtain 30% of the balance remaining of £23,810,090 which would be around £7,143,000 being the amount of his own claim plus his £143,000 contribution to costs. Therefore, I agree with Mr Wake that total recovery would need to be more than £32,544,980 for him to receive any "bonus" at all and would need to be much higher than that for the bonus to be described as "life-changing".

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54. In my judgment, that diminishes the force of WBD’s point in paragraph 50.i), but it does not eliminate it. I agree that the quantum of any successful claim will depend to a significant extent on evidence of planning and valuation experts rather than on Mr Wake’s evidence. However, Mr Wake’s evidence is crucial in getting the claim off the ground. It was only Mr Wake who had first-hand discussions with WBD about what protection should be sought in relation to warranty claims. Therefore, only he can give evidence on issues such as whether he was told that there were tracing provisions in Withers’ draft SPA of 18 September 2017. Only Mr Wake can give evidence as to what instructions he gave Mr Drewett during their call of 19 October 2017. Mr Wake’s assertions on matters such as these are central to there being any claim at all. I agree with WBD that Mr Wake has a financial incentive to “talk up” his evidence on matters such as this.
55. I am less concerned by the point made in paragraph 50.ii). Mr Wake was defending himself as a litigant in person in the Costs Proceedings. In those proceedings he took the position that Mr Siem, rather than he, was liable for WBD’s fees. In correspondence following Mr Siem’s email to WBD of 26 December 2017 (referred to in paragraphs 157 to 161 below), Mr Fitzpatrick could reasonably be interpreted as suggesting that WBD would be looking to Mr Siem for their fees. A litigant in person such as Mr Wake would not necessarily realise that there could still be a contract in place between him and WBD despite this statement. The fact that subsequently and with the benefit of professional advice, Mr Wake considered that there was a contract between him and WBD, and that WBD had breached it, while certainly inconsistent with his position in the Costs Proceedings, does not cause me to doubt Mr Wake’s reliability as a witness.
56. Overall, I have concluded that Mr Wake was an unreliable witness in certain respects. Even without his agreement with Mr Siem, I would have found aspects of his evidence implausible. For example, as explained in paragraphs 84 to 86 below, I would have regarded it as implausible that Mr Fitzpatrick failed to mention the existence of tracing provisions in the draft SPA of 18 September 2017 on a call whose whole purpose was to discuss that draft. I similarly would have regarded it as implausible that Mr Wake instructed Mr Drewett to concede on the issue of the 6-month delay between exchange and completion (see paragraph 111 below). The existence of Mr Wake’s agreement with Mr Siem has not caused me to find unreliability where I would not otherwise have done so. Rather it provides some further context in explaining why that unreliability may have arisen.
57. I stress that, in reaching this conclusion, I am not finding that Mr Wake deliberately lied in his evidence. The tendency of witnesses, in long-running litigation, to recall events to suit their own internal narrative is not necessarily a product of those witnesses telling conscious untruths. Mr Wake, even without his agreement with Mr Siem could, in my judgment, have fallen victim to that tendency. His agreement with Mr Siem simply demonstrates that there is a further reason why it might have suited Mr Wake’s internal narrative to recall events in a particular way.

How urgent was the transaction really?

58. Mr Wake originally presented the transaction to Mr Drewett as urgent: on 2 August 2017, he indicated that the intention was that the purchase of the Upper Floor Flat would complete in just two weeks. At various points in the trial, the Claimants have emphasised that the transaction was urgent as part of their submissions as to how WBD should have

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acted. However, a quite striking feature of the transaction is that although principals made various statements about urgency at various junctures, many of their own actions were inconsistent with urgency.

59. So, for example, on 30 August 2017, Mr Lynch sent an email to Mr Fitzpatrick articulating the Selling Side's "frustration that what ought to have been a simple 4 week deal is now effectively being renegotiated some four months on from agreeing the memorandum of sale". On 3 January 2018, Mr Siem was angrily describing the transaction as "the simplest transaction I have done in the last year". Mr Siem's oral evidence was full of suggestions that the transaction could and should have been concluded in a matter of days, or a small number of weeks.
60. Yet none of the principals sought to impose any real urgency on their advisers. WBD received a draft SPA from Withers on 8 August 2017, but the process of taking instructions from the Buying Side was protracted and they did not respond with comments on that draft until over a month later on 13 September 2017. When WBD emailed a draft SPA to Freemans on 22 September 2017, Freemans did not respond with comments until after a conference call on 3 October 2017. When WBD sent Withers a revised draft of the SPA on 6 October 2017, they heard nothing back until 3 November 2017 when it became clear that Withers had been asked to down tools.
61. In cross-examination, Mr Siem gave an insight into his approach to negotiations. He agreed that it would be natural to ask for more than he would be prepared to accept and to "put [a proposal] out there" because "maybe it flies... Maybe it does not. Maybe it hits the deck". He deployed that approach in this transaction and while it was a potentially successful strategy when it came to winning points, it was not the approach of someone seeking to resolve negotiations rapidly so that the SPA could be completed urgently in a compressed timescale. Mr Siem was instrumental in a response being sent to the Selling Side on 6 October 2017 to the effect that (i) there would be no exchange at all until the issue of Mews access was resolved and (ii) there would then be a 6-month interval between exchange and completion (see paragraph 29.v) above). Mr Siem did so at a time when he realised that the Selling Side's position was that completion should take place by 31 December 2017. Mr Siem was, therefore, in October 2017 riding roughshod over a fundamental position of the Selling Side. He was entitled to do so, as part of a hard-nosed commercial negotiation but his actions at this time were scarcely those of someone who was seeking to agree a deal rapidly.
62. A further example of Mr Siem's willingness to press for maximum advantage in the negotiation could be seen on 26 December 2017. By that stage, it appeared as though the parties had reached agreement on fundamental issues on date of completion and warranty protection that had nearly caused the transaction to abort. Yet, even in those circumstances, Mr Siem was content to table a request that the Selling Side warrant that all appliances were in working order.
63. Throughout the transaction, Mr Siem perceived that he was offering what he described as a "rich price" for the Upper Floor Flat. One of his first acts on becoming involved in the transaction was to seek to renegotiate that price downwards, but the Selling Side were unwilling to agree to any reduction. Having failed to renegotiate the price, Mr Siem perceived that he could recapture some of the price through bargaining on contractual terms. His pressure for a 6-month interval between exchange and completion was an example of this. If Mr Siem could defer for 6 months the point at which he had to pay

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the Selling Side the £19m sale price then he would obviously retain the return that could be generated on £19m in the interim. Moreover, since work on the proposed Redevelopment (such as preparing applications for planning permission) could sensibly be undertaken in that 6-month period, there would be no corresponding loss of time in bringing the Redevelopment to a conclusion.

64. Mr Siem's wish to recapture some of the "rich" price that he was paying and his approach to the negotiation generally were, therefore, in conflict with the transaction being negotiated and completed in a short timescale.
65. From the Selling Side's perspective, the transaction was only "urgent" in the sense that they wanted it to complete before they became liable to pay an amount in respect of the Annual Tax on Enveloped Dwellings (**ATED**). That drove the Selling Side to communicate a wish to complete the transaction by 31 December 2017, although as will be seen, once it became clear that there would be real difficulties in meeting that deadline, the Selling Side was prepared to allow completion to slip until 31 March 2018.
66. However, there were human factors in play as well. Although the transaction was not really as urgent as the Selling Side or Buying Side sometimes suggested, both sides came to be sensitive to perceived "delays" said to be caused by the other side, even if they were tolerant of their own contributions to delay. Over time, this led to a feeling, on both sides, that the transaction was simply taking "too long" which came to foster a sense of weariness with it from mid-October onwards.

To what extent was a possible Non-Distribution Undertaking discussed during the call of 8 September 2017 between Mr Fitzpatrick and Mr Lynch?

67. As noted in paragraph 29.ii) this was the first time that Mr Fitzpatrick and Mr Lynch spoke to each other about this transaction. The purpose of the call was to address a list of 12 "points of principle" that Mr Fitzpatrick had sent to Mr Lynch by email on 22 August 2017 by way of initial response to the SPA that Withers had sent on 8 August. The call had taken some time to set up because Mr Lynch had been out of the office and he and Mr Fitzpatrick missed each other when they tried to call. Mr Fitzpatrick did not keep a note of the conversation. It is not known if Mr Lynch made a note but if he did, it is not available to the court. I conclude from records I was shown of WBD's time-recording system, that the call lasted 48 minutes and that all 12 points of principle were discussed in that time.
68. It is common ground that, during their call, Mr Lynch and Mr Fitzpatrick discussed the risks to the Buying Side arising out of the Selling Side's wish, set out in the draft SPA of 22 August 2017, to include a limited recourse provision (i.e. the point summarised in paragraph 22 above). That was one of Mr Fitzpatrick's "points of principle". The Claimants' pleaded case is that a number of solutions to that issue were addressed, including (i) tracing provisions, (ii) that Citibank might provide a guarantee of obligations under the warranties or (iii) the provision of a Non-Distribution Undertaking. The Defendant denies that either a guarantee or a Non-Distribution Undertaking was even discussed.
69. It is fair to say that the Claimants' position on what was said about a Non-Distribution Undertaking on that call has varied. At some points in their closing submissions, they suggest that Mr Lynch put a Non-Distribution Undertaking "on the table" during that

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call, or said that a Non-Distribution Undertaking would be “available”. Yet their Amended Particulars of Claim (APOC) asserts only that a Non-Distribution Undertaking was raised as a “possible solution”.

70. In my judgment, the call on 8 September was largely exploratory in nature. Mr Lynch had, in an email to Mr Fitzpatrick of 30 August 2017, expressed his client’s “frustration” that “what ought to have been a simple 4 week deal is now effectively being renegotiated”. He had also signalled that the Selling Side would only consider “minor changes” to the SPA that Wilkinsons had prepared. However, in reality, as that same email effectively confirmed, the Selling Side wanted to “gauge the extent” of Mr Fitzpatrick’s points of principle before rejecting them out of hand. I accept Mr Fitzpatrick’s evidence that Mr Lynch was in “listening mode” during that call.
71. Mr Fitzpatrick also had issues he wished to explore. He wanted to obtain information on who the beneficiaries of the Trust were. Enforcing warranties against a small cohesive group of close family members would be easier than enforcing against a large number of distant relatives in multiple jurisdictions.
72. Given the exploratory nature of that call, the number of items on the agenda, and the relatively short space of time spent discussing all those items, I do not consider that Mr Lynch would have offered a Non-Distribution Undertaking. Even though the Selling Side were not sticking to their insistence that they were prepared only to consider “minor” changes to the Wilkinsons SPA, it would still have been too great a concession to be made during an exploratory call. Moreover, if Mr Lynch had offered a Non-Distribution Undertaking, Mr Fitzpatrick would have jumped at it since it offered such robust protection and none of the later negotiation on this issue would have been necessary.
73. Rather than offering a Non-Distribution Undertaking, in my judgment Mr Lynch acknowledged, in general terms, the validity of the Buying Side’s concerns about a limited recourse provision. That resulted in a general discussion about possible approaches to addressing that concern. I am quite prepared to accept that the general concept of fettering Cititrust’s ability to make distributions was discussed since both Mr Lynch and Mr Fitzpatrick realised that such fetters could alleviate the concern. However, any such discussion would necessarily have been wide-ranging and general not least since Mr Lynch was not in any position to provide Mr Fitzpatrick with information on the beneficiaries of the Trust. Relatedly, the concept of fettering Cititrust’s ability to make distributions is at the heart of (i) tracing provisions (which preclude distributions unless beneficiaries give direct warranties) (ii) a Non-Distribution Undertaking (which imposes an absolute prohibition, at least for a period) and (iii) retention provisions which, in practice will preclude distributions while funds are retained. Therefore, a general discussion about fettering Cititrust’s ability to make distributions could be had without landing on any particular way of dealing with the problem discussed in paragraph 22.
74. The Claimants suggest that some light is shed on the 8 September call by the contents of a later email exchange between Mr Fitzpatrick and Mr Lynch on 7 December 2017. That email exchange was sent in the very different circumstances that existed after the Selling Side had threatened to walk away from the transaction and both sides were seeking alternatives to a retention provision. In his email, Mr Fitzpatrick wrote:

I understand that Mr [Promphan] is prepared to stand behind the warranties but would prefer to keep his name off the paperwork.

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That being the case, we were wondering whether Citibank itself should stand behind the warranties absolutely (i.e. without the limitation of liability with a counter-indemnity behind the scenes to Citibank). Also, Citibank could manage the risk to a large extent by not distributing all of the sale proceeds. If I recall correctly, you may have mentioned something similar when we first spoke. [emphasis added]

75. The Claimants argue that the reference to “when we first spoke” is to 8 September 2017 and this email demonstrates that a Non-Distribution Undertaking and a Citibank guarantee were discussed on 8 September. Mr Fitzpatrick’s evidence is that he was referring back to conversations on 27 and 28 November 2017 in which he and Mr Lynch “first spoke” about a similar proposal as part of attempts to get around the issue with the retention provisions.
76. I have reached the clear conclusion that the reference to “Citibank” in this email is a mistake and Mr Fitzpatrick meant Cititrust in its capacity as trustee of the Trust. It would simply make no sense to talk of “Citibank standing behind the warranties absolutely” since the only entity giving any warranties pursuant to the SPA would be Cititrust. Once that is appreciated, it is clear that Mr Fitzpatrick’s proposal is of an arrangement under which (i) Cititrust gives “absolute” warranties (without any limited recourse provision), thereby benefiting the Buying Side by addressing the problem summarised in paragraph 22 above and (ii) Cititrust obtains a counter-indemnity from Mr Promphan protecting it against the risk of having no assets with which to meet a warranty claim. The reference to Cititrust not distributing all of the sale proceeds is not to a contractual obligation that restrains Cititrust from doing so, but rather to a practical manner in which Cititrust could manage its risk. I do not, therefore, consider that the email of 7 December is even referring to a Non-Distribution Undertaking, which itself points against the conclusion that it is referring to a Non-Distribution Undertaking that was discussed on 8 September 2017.
77. It is, of course, possible that the reference to when Mr Lynch and Mr Fitzpatrick “first spoke” is to their call on 8 September 2017. That is a perfectly realistic reading of the email. However, on balance I consider that Mr Fitzpatrick’s interpretation is to be preferred even though it is linguistically less natural. Mr Fitzpatrick and Mr Lynch had indeed spoken on 27 and 28 November. Mr Fitzpatrick’s (very brief) manuscript notes of those calls are consistent with a solution that involves some sort of “guarantee” of warranty obligations. Of course, the proposal in the email was of an indemnity, from Mr Promphan, rather than a guarantee. However, it was similar in nature. I conclude that something similar to it was indeed discussed during the calls on 27 and 28 November and Mr Fitzpatrick was referring back to those calls, rather than to the initial and exploratory call on 8 September.
78. There was much discussion at trial about the fact that WBD amended its Defence, shortly before trial, to include a specific denial as to whether a Non-Distribution Undertaking was discussed on 8 September. A number of detailed and forensic points were made about the pleadings in this regard. That discussion has shed little light on the question. Ultimately WBD did amend its Defence. Mr Fitzpatrick gave evidence that, to the best of his recollection, a Non-Distribution Undertaking was not discussed. It was not suggested that the amendment to the pleadings was indicative of him lying to support

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WBD's case and instead it was simply put to him that his recollection was faulty. For the reasons above, I have accepted Mr Fitzpatrick's evidence on this point.

79. I conclude that a Non-Distribution Undertaking was neither tabled nor offered during the call on 8 September 2017. Rather, there was a general discussion of possible options of the kind I have summarised in paragraph 73 above. In the course of that general discussion, it is possible that either Mr Lynch or Mr Fitzpatrick mentioned the concept of a Non-Distribution Undertaking, but that was only as part of a survey of possible solutions in the course of exploratory discussions. Mr Lynch would have given no indication that a Non-Distribution Undertaking would, or even might, be acceptable.

What advice did WBD give on the need for retention provisions prior to preparing the draft SPA of 6 October 2017?

80. On 22 August 2017, as part of the process of taking instructions from Mr Wake on WBD's response to the 8 August draft SPA, Mr Fitzpatrick sent Mr Wake a long email setting out issues arising from that draft. That email consisted of over 20 bullet points, one of which read:

the seller has sought to limit its liability under the warranties etc to the trust assets from time to time: if the trustee has distributed the consideration, then the warranties may largely be worthless and we will need to consider whether we can or should protect against that (for example by having a prohibition on distributions unless the beneficiary provides replacement warranties, etc)

81. Later in the same email, Mr Fitzpatrick noted that:

the SPA contains an apportionments clause: for utilities, [council tax] and the ATED - please can we discuss how this is to work: if there is a risk that some liabilities will only be known after closing, query whether we should hold back part of the cash.

82. By that email, therefore, Mr Fitzpatrick (i) alerted Mr Wake to the problem raised by a limited recourse provision, (ii) suggested tracing provisions as a possible solution to it and (iii) suggested a form of retention to deal with certain specific liabilities if those would only be known after completion. Mr Wake sent an email back saying, "good point" in response to the point on the limited recourse provision and responding also to Mr Fitzpatrick's other points. The points coming out of this email between Mr Wake and Mr Fitzpatrick formed the basis of Mr Fitzpatrick's email of 22 August to Mr Lynch setting out "points of principle" discussed in paragraph 67.
83. On 22 September 2017 there was a telephone call between Mr Wake and Mr Fitzpatrick. By this time, WBD had received Withers' draft SPA of 18 September which (i) rejected WBD's request for deletion of the limited recourse provision but (ii) offered tracing provisions to mitigate the effect of this on the Buying Side. Mr Wake kept a note of their conversation, but Mr Fitzpatrick did not and I was shown a copy of both Mr Wake's handwritten note and an (unagreed) transcript of it.
84. Mr Wake's evidence is that during this call, Mr Fitzpatrick did not advise him that the 18 September draft SPA that WBD had prepared contained tracing provisions. Mr

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Fitzpatrick’s evidence is that he “would have discussed the Seller’s proposed tracing provisions because they were prominent in [Withers’] mark-up (and would have been at the forefront of my mind).”

85. I prefer Mr Fitzpatrick’s evidence. I recognise that, without his own attendance note, Mr Fitzpatrick can only reason by reference to what “would have” happened. However, the whole purpose of the call was to discuss how to respond to the draft SPA that Withers had provided. I regard Mr Wake’s evidence that Mr Fitzpatrick did not mention the tracing provisions in the draft SPA as implausible as it is difficult to see how there could be any meaningful discussion of the draft SPA without a discussion of what was in it. Nor is it realistic to suppose that discussion of the contents of the draft SPA somehow omitted consideration of the tracing provisions. Those provisions were extensive and accounted for many of the amendments that Withers had made. Indeed Mr Wake was himself copied on Withers’ circulation of the draft SPA on 18 September.
86. Mr Wake’s note is not actually inconsistent with there having been a discussion of the tracing provisions that Withers had included in the 18 September draft. Mr Wake’s note included the line “warranties – enforcement in Singapore – problem”. That is not inconsistent with the tracing provisions in the draft being discussed and Mr Fitzpatrick expressing the view that they offered insufficient protection, hence the “problem”.
87. The Claimants’ case is that during this call, Mr Fitzpatrick did not mention the possibility of a Non-Distribution Undertaking. I accept that. However, the reason Mr Fitzpatrick did not mention this possibility is that a Non-Distribution Undertaking had been neither tabled, offered or mentioned, except possibly in general terms during his call of 8 September 2017 with Mr Lynch (see paragraph 79 above).
88. The Claimants’ case is also that during the call with Mr Wake, Mr Fitzpatrick advised that the only “viable remedy” to the warranty issue was to insist on a £1 million retention to cover warranty claims. That case is supported by reference to Mr Wake’s reading of his note of the call which, so far as material, is as follows:

Citi trust Singapore
 Mr Prompham – Trust Citi
 warranties – enforcement in Singapore – problem
 Safeguard cash – warranties period – 1 year useless
 Retention – contract retention similar to Building Contract JCT
 12 month Retention Period – released by solicitor – safe viable
 simple/neat – Solution – *[no other] viable*
 Problem with Singapore based owner no other remedy
 Withers can hold £1 million escrow
 Stuffed otherwise

89. The parties do not agree that the words “no other viable”, in italics in the quote above have been correctly transposed from Mr Wake’s note. WBD suggests that the words should be read as “to alleviate [problem with Singapore based owner]”. I have had no evidence from an expert graphologist. My own view is that the phrase in Mr Wake’s note is illegible as a whole, but I do conclude on a balance of probabilities that it includes the word “viable” since the shape of the word is similar to a reasonably clear use of the word “viable” in the line above.

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90. Mr Wake's note picks out phrases but does not explain what lay behind them. For example, the Claimants place much emphasis on the phrase "stuffed otherwise" as suggesting that, unless the SPA included a retention provision, the Buying Side would be "stuffed". In closing submissions, they asserted that the phrasing demonstrated that Mr Fitzpatrick was advising on the "commercial wisdom" of the SPA and advising that it would be unwise to enter into an SPA that contained no retention provision. I accept that this analysis is consistent with the phrase "stuffed otherwise".
91. However, it is by no means the only advice that is consistent with that phrase. For example, Mr Fitzpatrick could quite easily have said that if the Buying Side did not include a retention and contented themselves only with tracing provisions they could be "stuffed" if it turned out to be excessively difficult to pursue warranty claims against multiple beneficiaries of the Trust in multiple jurisdictions. It is important, therefore, to recognise that the Claimants' interpretation of Mr Wake's brief note is not the only one possible. Competing interpretations of that note have to be considered both in the light of the note itself, read as a whole, and surrounding circumstances.
92. I am quite unable to accept that Mr Fitzpatrick said that, as a matter of principle, only retention provisions were a viable solution to the risks the Buying Side were facing in enforcing warranties. He was an experienced corporate lawyer. He knew well that there was a variety of means of dealing with the issue. Some of those might involve more risk to the Buying Side and some might involve more risk to the Selling Side. Therefore, Mr Fitzpatrick would not have thought that there was only one "viable" solution not least because a negotiation, of precisely the kind he was conducting, would be necessary to land on the solution that suited all parties' interests. Nor would he have thought that it would be commercially foolish for the Buying Side to enter into an SPA that contained no retention, again precisely because there were other ways of dealing with the risk.
93. I am more prepared to accept that Mr Fitzpatrick expressed some conclusions on what approach might be "viable", not as a matter of principle but rather in the context of the negotiation as it then stood. The background was that Withers had initially suggested only a limited recourse provision: a hard-line position that left the Buying Side exposed if Cititrust distributed sale proceeds to beneficiaries. WBD had responded with their own hard-line position: a deletion of the limited recourse provision that would have left Cititrust exposed if it distributed sale proceeds. Withers had now reverted with tracing provisions which sought to bridge the gap, but which Mr Fitzpatrick still considered to be unacceptable, without more, given his lack of knowledge about beneficiaries of the Trust. In those circumstances, as Mr Fitzpatrick acknowledged in cross-examination, a further hard-line response from WBD such as continuing to insist on the removal of the limited recourse provision, was likely to be unacceptable to the Selling Side. As Mr Fitzpatrick put it in cross-examination "[it] seemed to me a good idea to suggest something different".
94. The "something different" on which Mr Fitzpatrick alighted was to accept a limited recourse provision, take the tracing provisions that Withers had offered, but ask, in addition, for a retention provision. Mr Fitzpatrick said that this would be "simple/neat" partly because he thought, wrongly as it turned out, that it would be acceptable to the Selling Side. What Mr Wake recorded as "no other remedy" was Mr Fitzpatrick's view that, given the course negotiations had taken to date, he could not think of anything else that would resolve the difference between the Selling Side and the Buying Side on the issue in a mutually acceptable way. The retention idea was "viable", in the words of Mr

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Wake's note, because Mr Fitzpatrick thought it would be acceptable and break the deadlock.

95. This analysis leads me to conclude that Mr Fitzpatrick did indeed advise that the buying side risked being “stuffed” if they had tracing provisions but no retention and that is why Mr Wake wrote down “stuffed otherwise”. However, Mr Fitzpatrick was conveying the message summarised in paragraph 91 above when he used this phrase.
96. There remained the question of how much retention to ask for. In theory, the Buying Side could have made a hard-line request for a retention of the full purchase price of £19m for a period. However, Mr Fitzpatrick would have considered such an approach to be unrealistic (or “unviable”) given the progress of the negotiations to date. The £1m retention figure that emerged may have been suggested either by Mr Wake or by Mr Fitzpatrick. Whoever first suggested it, it was recognised that it was not a precise figure, designed to guard against specific known risks, but rather a figure that was sufficiently high to offer the Buying Side some protection, but not so high as to antagonise the Selling Side.
97. It was suggested that Mr Fitzpatrick had an ulterior motive for suggesting, in strong terms, that the Buying Side include a retention provision. That ulterior motive was said to consist of Mr Fitzpatrick's awareness that WBD had not conducted appropriate due diligence and so wished to protect themselves against criticism, and perhaps legal action, from Mr Siem if he made claims under the warranties in relation to liabilities that WBD should have identified as part of their due diligence. I am quite unable to accept that. There was little, if any, reference in WBD's internal emails to which I was taken to due diligence, still less to a concern that WBD had not done sufficient work on due diligence.
98. Following the call on 22 September, Mr Fitzpatrick marked up the draft SPA and sent it to Mr Freeman for comment. Mr Freeman did not respond until 4 October 2017.
99. There was some dispute as to whether the advice that Mr Fitzpatrick gave to Mr Wake on the 22 September 2017 call was relayed to Mr Siem. On 2 October 2017, Mr Freeman's personal assistant sent Mr Siem an email that was to serve as an agenda for points to be discussed on a call between Mr Freeman and Mr Siem the next day. One of the points mentioned in that email was WBD's suggestion of a retention. Mr Siem wrote in response to that email that it was “news to me”. Since Mr Siem was not aware of the issue until around 2 October 2017, I do not consider that WBD's advice given on 22 September 2017 would have been relayed to him. Indeed, that advice could only have been relayed by Mr Wake (since Mr Siem was not in direct contact with WBD) and Mr Wake accepted in cross-examination that he had no recollection of discussing the issue of retention with him before 3 October 2017.
100. There was also some dispute as to whether it was even open to WBD, given their pleaded case in paragraph 67.2.4 of their Re-Amended Defence, to assert that the advice was not relayed to Mr Siem. I do not consider that anything turns on this issue. As will be seen, the claims fail for reasons unconnected with Mr Siem's knowledge of the advice that WBD gave on 22 September 2017. However, for completeness, I do not accept the Claimants' point based on paragraph 67.2.4. All that paragraph states is that WBD had no duty to update Mr Siem on the contents of a different telephone call, between Mr Wake and Mr Drewett, on 19 October 2017 because “Mr Wake and Mr Siem were prospective business partners, in regular contact, and could be reasonably expected to

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(and did) keep each other informed of matters ... in respect of the transaction”. This was not a blanket admission that Mr Wake necessarily relayed everything that WBD said to him to Mr Siem.

What was discussed during Mr Wake’s calls with Mr Penn and Mr Drewett on 19 October 2017?

Mr Wake’s earlier call with Mr Penn on 19 October 2017

101. On 19 October 2017, Mr Penn called Mr Wake. Mr Wake made a note of the call. I conclude that, during that call, Mr Penn told Mr Wake that he understood from Mr Brennan of Cititrust that Mr Promphan was “pissed off” at the length of time it was taking to conclude the contract. Mr Penn also said that the proposed retention clause that WBD had included in the draft SPA of 6 October 2017 was a “deal breaker” for Mr Promphan and that the Selling Side would “walk if not sorted”. (I conclude that Mr Penn was conveying a message that what needed to be “sorted” was both the length of time in agreeing a contract and the issue of retention.) That message came as a shock to Mr Wake as he wrote “WTF!” in his note. Mr Wake’s note also recorded “BD/Tom speak to Withers to sort out ASAP”. Mr Wake’s evidence, which I accept, was that this was a suggestion that he made, rather than a demand from Mr Penn.
102. Mr Penn also relayed the Selling Side’s position that exchange and completion had to take place by the end of 2017. That amounted to a wholesale rejection of the Buying Side’s proposal for a much more leisurely timetable described in paragraph 29.v) above.

Mr Wake’s call with Mr Drewett on 19 October 2017

103. After his discussion with Mr Penn, Mr Wake called Mr Drewett. Both Mr Wake and Mr Drewett made notes of this conversation but their records of what was said diverge.
104. There was some dispute as to whether Mr Wake called Mr Drewett “in a slight panic”. Having seen Mr Wake giving evidence, he struck me as someone who remains cool in stressful situations. Moreover Mr Wake and Mr Drewett were speaking over the phone rather than in person. I am sure that Mr Wake was feeling somewhat tense at having received unwelcome news about the progress of a deal that was important to him. However, I do not consider that Mr Drewett would have necessarily detected that.
105. The Claimants’ case as advanced in closing in the light of Mr Wake’s evidence is that the outcome of the call was that Mr Wake “instructed Mr Drewett to have Mr Fitzpatrick contact Withers urgently to: (i) resolve the retention issue, at least to make sure it was not going to cause the deal’s collapse and (ii) agree to Mr Promphan’s requirement that completion take place by year end”. That was somewhat different from their pleaded case in paragraph 72.1 of their APOC that Mr Wake instructed WBD to “contact Withers urgently ... with a view to resolving any of Mr Promphan’s objections and/or avoiding the transaction’s collapse”.
106. WBD’s case is that the outcome of the call was that WBD would simply check in with Withers to see what position they had been instructed to take in negotiating the legal documentation so that discussions on this issue took place between lawyers without being refracted through the prism of Mr Penn who was acting effectively as an estate agent.

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107. Mr Wake's version of events is not inconsistent with his note of the call, in which he wrote:

Tom sort with Lynch – if deadlocked, Kristian
 Speak to P
 Need to say what Lynch says!
 Completion 31 Dec
Rory update.

108. WBD's version of events is consistent with Mr Drewett's note which simply records "Citibank" (a common mistake made by many throughout this transaction: Mr Drewett meant "Cititrust") as being "concerned" about the completion date, "refusing retention" and "moaning re time taken". Mr Drewett's note concludes "We need to see Withers response on this" which is consistent with a similar record in Mr Wake's note.
109. Following his call with Mr Wake, Mr Drewett sent Mr Fitzpatrick an email in the following terms:

Steve was asking if we'd heard back from Mark Lynch
 Main sticking points for seller seem to be completion (31.12.17)
 still required and no retention.
 The latter seems most difficult, but talking to Steve we have a
 £2.83m SDLT saving by buying the company, so may be there
 is a bit of flex.
 Obviously down to Kristian, and I suggested that he might need
 to talk to the seller if we have deadlock here.
 Can you say if you've heard from Mark, as Steve needs to go
 back to the agent.

110. Mr Fitzpatrick responded to this email to say that he had not heard anything back from Mr Lynch since sending the SPA on 6 October. Mr Drewett relayed that information to Mr Wake who was evidently satisfied and reassured as he responded:

Thanks, Robert: Sounds like VanHan just testing the water!!

111. I do not accept Mr Wake's account of the conversation that I have summarised in paragraph 105 above for the following reasons:

- i) Mr Wake's evidence is that he responded as summarised in paragraph 110 above because he thought that WBD had accepted the principle of completion by 31 December and indicated that the Buying Side would be "flexible" on the question of the retention. I do not accept that. If Mr Wake had required WBD to contact Withers and indicate flexibility on the retention issue and concede the issue of completion, he would not have been reassured, or even satisfied, by a simple confirmation that nothing further had been heard from Withers since 6 October 2017.
- ii) On 6 November 2017, Mr Wake received a text message from Mr Penn that made it clear that the Selling Side would be interested in reviving the transaction provided that the Buying Side agreed to completion by 31 December and "dropping the £1m retention". The Selling Side could scarcely have been making those demands if the issue of completion had already been conceded. The Selling Side's demands would

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also have sat oddly with any prior communication from Mr Fitzpatrick to Mr Lynch that the Buying Side was prepared to offer “flexibility” on the question of retention. If the conversation on 19 October 2017 had ended as Mr Wake suggested then Mr Penn’s text message provided Mr Wake with an obvious prompt to ask whether WBD had carried out his instructions. Yet Mr Wake did not contact WBD to ask this question.

- iii) Mr Siem rather than Mr Wake was providing the finance and a concession on the deadline for completion would require Mr Siem to find £19m by the end of the year. Mr Wake had no authority to offer that concession. Mr Siem accepted in cross-examination that he would have been “extremely annoyed” if Mr Wake had committed him to a completion date of 31 December 2017 without consulting him.
 - iv) I can accept that, *in extremis*, if Mr Wake felt that it was extremely important to concede the question of the completion date immediately, he might have instructed WBD to offer that concession but immediately tried to have Mr Siem ratify that decision. Yet between 19 October and 3 November 2017, Mr Wake sought no such ratification. Indeed, even on 6 November 2017, after both Mr Wake and Mr Siem were aware that the Selling Side had told Withers to “down tools”, there was a telephone conversation between Mr Wake and Mr Drewett in which Mr Wake confirmed that Mr Siem was still insisting on 6 months between exchange and completion.
 - v) In all the circumstances, I regard it as implausible that Mr Wake would have taken it upon himself to instruct WBD to concede on the issue of the 6-month delay between exchange and completion. That, in my judgment, significantly undermines Mr Wake’s account of what took place during the call.
112. The Claimants suggest that an email from Mr Wake to Mr Siem of 3 November 2017 is inconsistent with this line of reasoning. In that email, Mr Wake updated Mr Siem on his discovery that Withers had been instructed to down tools. He surmised that the reason for this was the Buying Side’s stipulation that exchange be conditional on resolving the issue of Mews access (see paragraph 29.v)a) above). He recommended that the Buying Side drop this point. The Claimants point to this email as demonstrating that Mr Wake must have been proceeding on the basis that WBD had conveyed to Withers that (i) the Buying Side would be flexible on retention and (ii) that completion by 31 December 2017 was agreed as otherwise his first instinct would have been to assume that the Selling Side’s problem was with the retention provision and the completion date. There is something in that point, but not enough to outweigh the cumulative force of the indications summarised in paragraph 111 above. In my judgment, Mr Wake’s instinctive reaction is not inconsistent with him believing, from the fact that Withers had never sent a lawyers’ communication resisting the £1m retention or the completion date that Van Han had indeed been “testing the water”. That in turn is consistent with Mr Wake assuming that the real problem lay elsewhere when the Selling Side instructed Withers to down tools.
113. Having rejected Mr Wake’s account of the conversation, I conclude that Mr Drewett’s is more likely to be correct. I am prepared to accept that, at the beginning of the conversation, Mr Wake might have been suggesting that WBD should call up Withers and concede points. However, during the course of the conversation a consensus in favour of a more measured response emerged and it was decided that before conceding

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anything, WBD would ascertain whether there had been any lawyer's communication from Withers suggesting that retention (or completion date) were "deal breakers". That is why Mr Drewett emailed Mr Fitzpatrick in the terms set out in paragraph 109 above.

114. There was some suggestion in the Claimants' closing submissions that Mr Drewett's professional pride was piqued during his conversation and he objected to the request that WBD call up Withers at the behest of the Selling Side's estate agent. I do not accept that. It was not pride that made Mr Drewett suggest a more measured response. Rather it was a genuine and reasonable concern that, if points were to be conceded, that should be following a considered negotiation, rather than as a knee-jerk response to a telephone call from Mr Penn.

Why did the Selling Side instruct Withers to down tools?

115. I have concluded that the Selling Side instructed Withers to down tools because (i) they objected to the Buying Side's proposal that contracts would not even be exchanged until the issue of Mews access had been resolved, (ii) they objected to the six-month delay between exchange and completion and (iii) they objected to the retention provision that the Buying Side had requested.
116. Given the nature of the claim against WBD, it is inevitable that the issue of the retention has assumed prominence. However, it is important not to under-estimate the significance of the Buying Side's position on completion which would have been vexing indeed to the Selling Side. The completion date was the first point mentioned in Mr Penn's text message of 6 November 2017, demonstrating its significance. As I have explained, the Buying Side's position on completion date rode roughshod over the Selling Side's demands so as to create annoyance. In addition, by October 2017, weariness with the transaction was setting in on both sides. A suggestion that the transaction would take much longer to reach completion would have been received badly in those circumstances.

When, if at all, were WBD told that Mr Siem was to be the purchaser of the SPL shares?

117. WBD argue that, given the Claimants' pleaded case, it is only open to them to assert that WBD knew Mr Siem was to be the purchaser on or around 17 August 2017. As will be seen, I do not consider I need to resolve that pleading issue and I will simply make findings based on the evidence I have been shown.
118. The identity of the purchaser depended on a number of factors. One of those was tax. On the face of matters, the Redevelopment involved multiple purchases of land, all or any of which could attract stamp duty land tax (SDLT) at high rates. It was hoped and expected that there would be no SDLT charge on purchase of the SPL shares (since shares were being purchased rather than an interest in land). However, it remained possible that an SDLT charge might arise on (i) any contribution of the Ground Floor Flat into a joint venture vehicle, (ii) any contribution of the Upper Floor Flat into a joint venture vehicle (if it needed to be transferred out of SPL) and (iii) Mr Siem's own proposed acquisition of the penthouse flat in the Redevelopment. Thinking on whether it might be possible to mitigate all or any of these charges developed with one variable being the identity of the purchaser of the SPL shares.

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119. The engagement letter that Mr Wake signed with WBD on 9 August 2017 envisaged that the entity purchasing the SPL shares would be a new SPV whose shares were owned by Mr Siem and Mr Wake. WBD therefore realised on this date that Mr Siem had an interest in the transaction as a whole, but there was no suggestion that WBD would be acting for him personally.
120. On 16 August 2017, Mr Wake sent Mr Fitzpatrick and Ms Hill an email. In his email Mr Wake explained that Mr Siem had told him that an SDLT efficiency should be achievable if Mr Siem acquired the SPL shares in his “personal capacity”. Mr Wake explained that the proposal did, however, have to be run past Smith & Williamson, Mr Siem’s tax advisers “for specific review including any implications on the overall deal”. In response, Ms Hill pertinently wrote:
- With respect to the SPA, we had understood that we were to review on behalf of Newco [i.e. the SPV]. However, your email below suggests that Kristian will be entering into the SPA relating to SPL – is that correct? If so, will Kristian’s lawyers be reviewing in the first instance?
121. Mr Wake replied on the same day confirming that WBD were to continue to act on the purchase of SPL. That did not answer Ms Hill’s question: she was asking who WBD were acting for, not whether they were acting. However, Mr Wake also said:
- But I guess you are now requiring KYC [know your client] and DD [due diligence] on Kristian....? I had asked Howard Freeman to write to you yesterday as to confirmation.
122. In my judgment, a fair reading of this email exchange is that WBD were told that Mr Siem would be purchasing the SPL shares in his own name unless the tax advice to be commissioned from Smith & Williamson suggested a different outcome. That was why Mr Wake assumed that WBD would need to do “KYC and DD on Kristian”. Of course, this email could not bind WBD into a retainer with Mr Siem. Mr Wake had no authority to contract on Mr Siem’s behalf and, even if he did, he could not force WBD to enter into a contract with Mr Siem. However, Mr Wake’s email asked WBD to operate on the working assumption that Mr Siem was, absent tax advice to the contrary, to be the purchaser.
123. WBD argue that this cannot have been the message communicated by Mr Wake’s email since Mr Siem accepted in cross-examination that throughout the month of September 2017, the tax position remained uncertain. In effect they argue that Mr Wake could not give WBD any more certainty as to who the purchaser would be than Mr Siem was himself obtaining from his own advisers. I do not accept that. Mr Wake told WBD on 16 or 17 August 2017 to operate on a working assumption. WBD were not being asked to provide tax advice and so were not asked to validate or test the assumption. If the assumption needed to be changed, WBD would be instructed accordingly.
124. The messages and instructions referred to above were conveyed by Mr Wake. As at 17 August 2017, WBD had no professional relationship with Mr Siem. They had not discussed the transaction, or their role in it, directly with him. The first direct interaction between WBD and Mr Siem came on 4 September 2017 when Mr Siem joined a conference call (together with Mr Freeman) with WBD. Even by 5 October 2017, Mr

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Siem was saying, in an email exchange with Mr Penn that he had “no contact with [WBD]”. The first time that Mr Siem got in touch with WBD direct to discuss the SPA was on 26 December 2017 (see paragraph 157 below).

125. WBD received and understood the message that Mr Wake had given them. An email of 5 September 2017 from Mr Fitzpatrick to Mr Wake showed WBD considering the implications of it for their professional obligation to deal with conflicts of interest. Mr Fitzpatrick wrote:

On the basis that Kristian is buying SPL in his name and only transferring to the SPV once [planning consent] has been obtained it is difficult to see how we can act on the initial acquisition (unless perhaps Kristian were to become a [WBD] client) and we think on reflection that Howard’s firm ought to act on that aspect.

126. I do not accept that, by starting this paragraph with the phrase “on the basis that...” Mr Fitzpatrick was suggesting that there was anything further to be confirmed. Rather, he was reflecting on the practical implications of the working assumption on which he was asked to operate. Mr Wake replied confirming, again, his understanding that Mr Siem wanted WBD to act on the acquisition of the SPL shares and suggesting, again, that WBD obtain KYC information on Mr Siem.
127. WBD took up that suggestion. On 5 September 2017, Mr Fitzpatrick emailed Mr Freeman. He explained that WBD considered that they could not act on the acquisition of the SPL shares unless Kristian became a WBD client. He recorded his understanding that both Mr Wake and Mr Siem wanted WBD to act on the acquisition, but asked for confirmation. If that confirmation was forthcoming Mr Fitzpatrick said that he would copy Mr Siem, Mr Wake and Mr Freeman in on all correspondence. He concluded his email by writing:

If we are acting for Kristian, please provide KYC info and we can produce an engagement letter.

128. Mr Freeman never replied to this email and WBD did not chase him up.

Whose interests were WBD representing in their negotiations with Withers on the SPA?

129. WBD presented themselves to Withers as acting for “the buyer” of the SPL shares. The precise identity of that “buyer” did not matter greatly to Withers although obviously ultimately the identity of that buyer would need to be confirmed so that the SPA could be executed by that buying entity.
130. Similarly, WBD did not consider it mattered to them greatly who precisely the buyer was when negotiating the SPA. The comments that they were making on the draft SPA were largely the sort of comments that any buyer of shares might wish to make. That said, they continued to operate on the working assumption that Mr Siem would ultimately be the buyer as Mr Wake had requested them to do on 16/17 August 2017. From 6 October 2017, travelling drafts of the SPA referenced Mr Siem as the buyer of the SPL shares.

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131. If WBD had perceived that there was any conflict of interest between Mr Siem and Mr Wake in relation to the SPA they would have reflected more deeply on whose interests they were representing when negotiating the SPA. However, they never considered there was a conflict and so, for a while, were untroubled by the fact that they had been asked to operate on the assumption that Mr Siem was the buyer (which meant that they were protecting the interests of Mr Siem when negotiating the SPA) even though Mr Freeman had not replied to their email of 5 September 2017. In an internal email he sent Mr Fitzpatrick on 27 September 2017, Mr Drewett referred to Mr Siem as “the client” when discussing the SPA. Mr Fitzpatrick seemed to prefer to refer to Mr Siem as “the buyer” when writing to Withers at this time, no doubt because, having been the author of the email to Mr Freeman of 5 September, Mr Fitzpatrick realised that there was no engagement yet in place with Mr Siem. However, I do not consider that these differences in the way they referred to Mr Siem altered the conclusion that, when negotiating the SPA, WBD considered themselves to be having Mr Siem’s interests in mind. Indeed, on 2 January 2018, Mr Fitzpatrick was quite content to say to Mr Siem’s representative in the Cayman Islands that WBD were “advising Kristian on the purchase of a Cayman company”.
132. That said, WBD realised that Freemans were also looking out for Mr Siem’s interests in relation to the SPA. That is why, for example, on 22 September 2017, WBD sent Mr Freeman the then current draft of the SPA asking for confirmation that he was happy with the approach that WBD were taking. That was not mere lip-service to Mr Freeman’s role. When Mr Freeman was slow to respond, WBD chased him for a response on 26 September 2017. Ultimately Mr Freeman’s continued non-response held up the sending of a revised draft SPA to Withers, demonstrating how important WBD and Mr Siem considered Mr Freeman’s input to be.

What was Freemans’ role?

133. Freemans were acting for Mr Siem personally on matters relating to his joint venture with Mr Wake. It followed that, when it came to drafting and negotiating legal aspects of the DMA, Freemans were acting for Mr Siem and WBD were acting at least for Mr Wake (with the question whether they were acting for Chapters being in dispute).
134. Freemans did not take the lead on drafting the SPA. WBD performed all of the drafting on behalf of the Buying Side. Negotiations on legal aspects of the SPA took place exclusively between WBD and Withers.
135. The Claimants’ case is that Freemans had a “watching brief” in relation to the drafting and negotiation of the SPA pursuant to which their role was to pass on Mr Siem’s instructions to WBD. I do not accept that. Mr Freeman was doing more for Mr Siem. I have concluded that a more accurate description of Freemans’ role in relation to the SPA is as follows (and that WBD knew Freemans was fulfilling that role):
- i) Mr Siem was content to leave the day-to-day business of drafting the SPA and liaising with Withers to WBD. That is why Freemans did not, at any point in the transaction, communicate directly with Withers.
 - ii) However, Mr Siem did not know WBD and was not prepared to repose all his trust in them on the SPA. Mr Siem engaged Mr Freeman to keep on top of the travelling drafts of the SPA, and engage with WBD as necessary, with a view to identifying

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what he saw as the central issues emerging from that SPA that affected Mr Siem personally.

- iii) Having identified those central issues, Mr Freeman was to advise Mr Siem on their nature and how they might be dealt with.
 - iv) Mr Freeman was also to answer any questions that Mr Siem had on the SPA.
 - v) Mr Freeman was to convey Mr Siem's instructions on matters they discussed to WBD.
136. Mr Siem drove this arrangement precisely so that he could obtain advice from Mr Freeman (whom he knew and trusted) without having to rely on WBD, who he scarcely knew. Throughout the transaction, Mr Siem was concerned to reduce fees. He thought that his arrangement would, at least, not increase fees unduly since he was not asking Mr Freeman to duplicate WBD's work completely. However, there was a lacuna in the arrangement from Mr Siem's perspective. A significant point might arise on the SPA that Mr Freeman did not identify as significant, either because he did not notice the point, or because he did not have enough knowledge of the wider transaction to appreciate its significance. In that case, Mr Siem would obtain no advice either from WBD (because Mr Siem was not expecting to take advice from WBD) or from Mr Freeman (because he did not notice the point).
137. The formulation of Freemans' role set out in paragraph 135 is consistent with early emails on the topic before there was any suggestion that the overlap between Freemans' role and that of WBD would be contentious. On 17 August 2017, Mr Wake sent Mr Freeman an email, copied to Mr Siem, suggesting that since it was believed, optimistically as it turned out, that WBD were "on the verge of finalising contracts", they should continue to act "albeit under [Freemans] authorisation so as to avoid any costs duplication". I recognise that having both WBD and Freemans thinking about how a buyer of SPL shares might suitably be protected would involve some "costs duplication". However, so would instructing a lawyer to act as a mere post-box for Mr Siem's instructions. On balance, I consider that the concept of "authorisation" is consistent with more than the mere conveying of instructions. It is also consistent with how Freemans acted in practice.
138. WBD's awareness of Mr Freeman's role is demonstrated by their actions in accommodating it (see for example their actions in forwarding the draft SPA of 22 September 2017 to Mr Freeman for comment and waiting for his response). Moreover, Mr Freeman's role on the transaction, as being something more than a mere post-box for relaying instructions, was known to the Selling Side and, since known by them must also have been known and appreciated by WBD. When Mr Penn wanted to chase up provision of a revised draft SPA to Withers he sent Mr Siem an email asking whether "Howard/Bond Dickinson could update Withers on timing ...". When emailing Mr Siem on 20 November 2017 as part of his efforts to resurrect the transaction, Mr Penn expressed the hope that "[WBD] and Howard can get comfortable that the SPV has been well managed and that the tracing provisions give you comfort". If Freemans were just acting as a post-box, they could have nothing useful to add to the issues that Mr Penn raised.
139. Mr Siem and Mr Freeman's actions were also consistent with the description of Freemans' role as set out in paragraph 135. Mr Siem accepted that whenever he wanted

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to discuss an issue arising out of the SPA, he contacted Mr Freeman to do so, rather than WBD. I was shown an undated manuscript note prepared by Mr Freeman and have concluded that it was prepared on or around 3 October 2017 either during, or as preparation for, a telephone call that Mr Freeman had to discuss the draft SPA that WBD had sent to him on 22 September 2017. The note shows that Mr Freeman went through various clauses referred to in the note. It also shows that he advised on the proposal to hold a £1m retention and the conclusion that the retention should be held for 18 months.

140. In a similar vein Mr Siem forwarded to Mr Freeman the email that Mr Penn had sent on 20 November 2017, referred to in paragraph 138 above, outlining the Selling Side's demands together with the message "Decision time is here, any comments?" That led to a call on 21 November between Mr Siem and Mr Freeman at which, I infer, Mr Freeman gave legal advice on aspects of the Selling Side's proposals.
141. In advance of that call, Mr Freeman sent an email on 21 November 2017 which emphasised that, "in an ideal world", there would be a retention. The Claimants suggest that this email was not in the nature of "advice" because that email did not mention that there were tracing provisions in the SPA and so would not have equipped Mr Siem to decide between the relative merits of tracing provisions and a retention. I do not accept that. Mr Freeman's email refers to the difficulties in "tracing" assets and advises positively that "in an ideal world" a retention provision would provide meaningful additional protection. He knew that there was a debate between the Selling Side and the Buying Side on the question of whether there should be a retention or whether, as the Selling Side argued, tracing provisions were enough. Mr Freeman was clearly giving advice on this issue.
142. Indeed Mr Freeman was providing independent judgment when giving his advice. His email of 21 November 2017 recommended continuing to press for a retention. He must have softened his position during the call itself because, following that call, Mr Freeman wrote to WBD explaining that, having discussed some of the main outstanding points on the SPA with Mr Siem (who Mr Freeman described as "my client"), Mr Siem was prepared to make certain concessions. One such concession was dropping the request for a retention provided that warranties in the SPA were given "by the ultimate beneficial owner in an individual capacity so that my client can take action against him if required". Mr Freeman started his email by writing:

First, I think it is important to point out that your firm is acting for the Buyer in this matter and we do not accept any liability in respect of advice given regarding the SPA.

143. WBD did not contradict Mr Freeman's statement by way of an email response to him. I do not regard that as particularly significant. The transaction was not going well. WBD could quite reasonably form the view that Freeman's liability or otherwise would not be determined by anything that WBD said in response and their efforts were better deployed in trying to find a way around the retention issue rather than engaging in an email debate on liability issues with Mr Freeman. That said, WBD can be criticised for not taking the opportunity, prompted by Mr Freeman's email, to clarify what they saw as their own liability (as distinct from that of Mr Freeman) to Mr Siem.
144. However, the Claimants argue that Mr Freeman's email is, on the face of it, inconsistent with my conclusion summarised in paragraph 135 as it suggests that Mr Freeman may

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have thought his role was more limited than I have found. Moreover, Mr Freeman was not just telling WBD that they owed duties to Mr Siem. He was saying the same thing to Mr Siem himself. In an email of 21 November 2017 that he sent to Mr Siem, Mr Freeman gave some advice to the effect that, “in an ideal world” there should be a retention to deal with the risk of warranty claims. He then went on to explain what he considered to be the main areas of concern that could lead to a claim under the warranties such as “issues that arise in respect of the tax or financial affairs of the company”. When making that observation, Mr Freeman wrote:

In this regard (and please remember that Bond Dickinson are advising in respect of the share sale and purchase agreement) I would strongly recommend that your accountants [advise] in respect of any tax accounting and financial warranties...

145. Without hearing from Mr Freeman, it is difficult to be certain about what he had in mind when sending this email. However, Mr Freeman does not claim that only WBD were advising on the SPA. His email is not, therefore, inconsistent with Freeman's also having some role on SPA matters. On balance, I consider Mr Freeman's email to be prompted by his growing awareness of something like the lacuna that I have summarised in paragraph 136. Mr Freeman was realising that the importance or otherwise of insisting on a retention would depend on the likelihood of claims under the warranties. He was not close enough to the detail of the SPA to be able to evaluate the likelihood of such claims. Yet nevertheless, Mr Siem was asking for his advice on the retention issue. Mr Freeman was seeking to make WBD, rather than Freeman's, liable if he gave what might seem, with hindsight, and better knowledge, to be incorrect advice.
146. That introduces a further point. The Claimants could have asked Mr Freeman to give evidence on exactly what work he was doing for Mr Siem, but have not done so. No explanation has been given as to why they have not done so. I infer from this that Mr Freeman's evidence would not have supported the proposition that his role was only to pass on Mr Siem's instructions to WBD.
147. Mr Freeman's email prompted WBD to renew their attempts to obtain KYC information on Mr Siem which had not been progressed since their email of 5 September 2017 to Mr Freeman, and his lack of a response to it (see paragraph 125 above). Following enquiries with Mr Siem's personal assistant, WBD obtained KYC information on 27 November 2017. However, WBD's internal processes mandated a particular procedure to be followed if a person was to be taken on as a client of the firm. That procedure was not carried through to a conclusion with the result that Mr Siem was never recorded on WBD's systems as a client. Nor was any engagement letter ever issued to him.

What were WBD told about Chapters?

148. Mr Drewett had acted for Mr Wake on previous engagements. He knew Mr Wake would frequently operate through an SPV whose name included the word “Chapters”. He regarded such SPVs and Chapters Property London Limited as being an emanation of Mr Wake.
149. Mr Wake spoke to Mr Drewett before he signed the Engagement Letter. In June and July 2017, the structure Mr Wake had in mind involved Chapters Hurtwood and Genesta as described in paragraph 11 above. However, by the time of the Engagement Letter, the

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structure had moved on. The Engagement Letter contemplated that the SPV would acquire the SPL shares and enter into a DMA with Chapters Property London Limited “to manage the process of securing planning permission...”

150. Attached to the Engagement Letter was a schedule entitled “Scope of Services”. Chapters was mentioned in paragraph (f) of that Scope of Services with WBD acknowledging that it would provide legal input associated with “a development agreement with [Chapters] for Chapters to manage the process of securing planning permission for the demolition of 30 Hyde Park Gate and the construction of up to 15 flats on the site”.
151. Thus, the structure reflected in the Engagement Letter and Scope of Services assumed that Chapters would earn a fee from its work done on securing planning permission but that profits arising from the Redevelopment would accrue to the SPV, in which Mr Siem and Mr Wake would be 50-50 shareholders. That structure would have required a shareholders’ agreement between Mr Siem and Mr Wake and the Engagement Letter referred to that document.
152. The Engagement Letter referred to Chapters’ involvement in the transaction. However, it did not name Chapters as a client and indeed stated expressly that Mr Wake was WBD’s client.
153. However, the structure that was reflected in the Engagement Letter evolved once it was contemplated that Mr Siem would purchase the SPL shares in his own name rather than in an SPV. That revised structure would mean that profits arising from the Redevelopment would not necessarily accrue to an SPV in which Mr Wake had an interest. Rather, they would naturally accrue to Mr Siem. A mechanism was needed to ensure that Mr Siem accounted for Mr Wake’s share of profits arising on the Redevelopment since the combination of the SPV and shareholders’ agreement would no longer do so. On or around 4 October 2017, Mr Freeman told WBD that Mr Wake’s profit share would be dealt with by means of “waterfall” provisions under the DMA under which Mr Siem paid over items of profit as and when Mr Wake became entitled to them. Waterfall provisions appeared in a version of the draft DMA prepared on 20 October 2017.
154. The decision was taken to include these “waterfall” provisions in the DMA with Freemans preparing the first draft containing such provisions on 20 October 2017. Since the recipient of payments under the DMA (on Mr Wake’s side) was Chapters, this meant that from early October 2017, both WBD and Mr Wake realised that Chapters would benefit not just from a fee for project-managing the arrangement but would also become the vehicle for receiving Mr Wake’s share of the total profits arising on the Redevelopment.
155. This change meant that the DMA acquired a dimension that it had not had previously and so required WBD to consider the waterfall provisions to ensure that they operated correctly and did indeed result in Chapters obtaining Mr Wake’s appropriate share of the profit. However, it was not the case that the change in structure resulted in Chapters newly becoming party to the DMA. It had always been party to the DMA for the purposes of assuming obligations to project manage and receiving a fee for doing so. The structural change meant that Chapters’ entitlement became more significant.

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156. No amendment was made to the Engagement Letter to reflect this change of structure. Neither WBD nor Mr Wake suggested that any change was necessary. WBD did not issue any engagement letter to Chapters.

Was Mr Fitzpatrick's email of 3 January 2018 incomplete, selective or inaccurate?

157. On 26 December 2017, Mr Siem sent an email to Mr Drewett, copied to Mr Wake and Mr Freeman. This was the first time that Mr Siem had sent an email directly to WBD. Mr Siem's email referred to a draft of the SPA that he said he had received for the first time on 22 December 2017. (In fact, Mr Siem was wrong about this. He had been sent WBD's mark-up of 6 October 2017 at around the time WBD sent that document to Withers.)
158. In that email, Mr Siem made some specific comments on Clauses 8.11 and 8.17 of the draft. He suggested that the SPA did not include warranties on the state of the property "as normally described in an agreement to purchase a property directly". He suggested that this was a shortcoming in the document since, if planning permission for the Redevelopment was not forthcoming, Mr Siem might need to find a tenant for the Upper Floor Flat instead and asked that the Selling Side should give a confirmation that all fixtures in the property were included in the sale and that all motors and machinery were in working order. Mr Siem also wrote:

Please confirm that you represent me in this purchase and provide a reasonable estimate for your fee in this regard...

159. On 2 January 2018, his first working day back after the Christmas break, Mr Fitzpatrick replied to Mr Siem's email. In response to Mr Siem's request for confirmation that WBD were acting for him, Mr Fitzpatrick wrote:

I understand that Robert has collected KYC information from you already so we will open a file in your name and send you an engagement letter. With regard to fees, we presume that the work carried out to date on the SPA for the benefit of the buyer (which you will recall was originally to be an SPV held 50:50 by you and Steven) is still to be billed to the buyer (which is now you) and will let you have a note of those costs to confirm.

As you are aware, Robert and I are continuing to act for Steven and CPL with regard to the DMA and overall structure. We are therefore assuming that you will be retaining Howard's firm to provide you with the advice deemed appropriate with regard to aspects other than the SPA since we would have a conflict of interest in providing any such advice...

160. Mr Fitzpatrick then included an explanation of certain clauses in the SPA of which he specifically wanted to make Mr Siem aware. He wrote as follows in relation to the question of a retention:

We had previously sought a £1m retention to provide security for claims which is being resisted on the basis that we have an

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undertaking from Cititrust (Singapore) not to distribute the trust funds.

161. In relation to Mr Siem’s specific point about the need for confirmation that machinery and motors were in working order, Mr Fitzpatrick suggested reinstating a request for a warranty on appliances or electrical or mechanical equipment which WBD had included in an earlier draft, but Withers had deleted when responding.
162. In closing submissions the Claimants characterised Mr Fitzpatrick’s email of 2 January 2018 as presenting “historic matters as current” and as being designed to paper the record with a suggestion that WBD had not been acting for Mr Siem all along. WBD object to this as an unpleaded, and serious, allegation that Mr Fitzpatrick was seeking to deceive, but I will deal with it as I consider the allegation can simply be rejected. Mr Fitzpatrick had been shown an email in which Mr Siem was saying that he had not seen a draft of the SPA before and was making detailed points on it. In the same email, Mr Siem was asking for confirmation that WBD were acting for him. It was natural, and conscientious, for Mr Fitzpatrick to point out what he considered to be salient and important features of the SPA in those circumstances.
163. The Claimants take exception to Mr Fitzpatrick’s statement that he was assuming that Mr Siem “will be retaining” (future tense) Freemans to deal with non-SPA matters when he was well aware that Mr Siem had been taking advice from Freemans all along in connection with the DMA. In a similar vein, they object to the statement that the £1m retention “is being resisted” (present tense) when Mr Fitzpatrick would have been aware that the Buying Side’s request for a retention had been completely dropped and replaced by a proposed Non-Distribution Undertaking (see paragraph 41 above).
164. I am quite unable to detect any of the underhand intent to Mr Fitzpatrick’s email of 2 January that the Claimants allege. I accept Mr Fitzpatrick’s account that on his first day back at work after the Christmas break he was, in his words, “working a million miles an hour”. His email would have been written in those circumstances and he would not have weighed his every word. The statement that he assumed Mr Siem would be “retaining” Freemans can quite easily be read as a reference to Mr Siem continuing to instruct Mr Freeman, rather than as instructing him for the first time. It was not quite accurate to say that the £1m retention “is being resisted”, as the £1m retention was no longer being pursued. However, that is explicable by the email being written in haste on a busy working day and I reject the assertion that it was part of a practised deception.
165. Mr Siem replied on 3 January 2018. He resisted Mr Fitzpatrick’s suggestion that he should be liable for historic fees writing:
- I am not sure I am prepared to pick up any legal costs from the past, but let me know the amount before I decide. Also, let me know your billing rate going forward with an estimate for the total cost of this share transaction. Also confirm that VAT does not apply.
166. I interpret Mr Siem’s statement in the first sentence as asserting that it was open to doubt whether he had any liability to WBD for costs incurred “in the past” (i.e. prior to 26 December 2017) but that whether he would assert that strict position would be informed by the level of costs involved. That can be contrasted with the position on future costs

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for which Mr Siem assumed that he would be liable, hence his request for information on billing rates and an estimate.

167. Mr Siem had evidently asked Mr Sasto, a partner at Freemans, to look at the draft SPA because he cut and paste into his email the following observation from Mr Sasto:

I have seen and had a very quick look at the Share Sale Agreement sent to you by Tom Fitzpatrick pursuant to his email 2nd January 2018 (16.08).

You are of course looking to Tom Fitzpatrick of Womble Bond Dickinson to act for you in this connection. That said, I cannot see in the document any of the retention provisions and indeed it seems to me that the limitation of liability of the Seller pursuant to clause 8.15 for breach of warranties and covenants is very restrictive.

I also cannot see anywhere that the risk in the property will remain with the Seller until actual completion. I believe that this was discussed at our meeting a month or so ago with Steven Wake.

168. Mr Fitzpatrick replied by his email of 3 January 2018. He responded to Mr Siem's position on costs promising to get back to him with a figure for historic costs incurred on the SPA. He promised a confirmation on the VAT position and gave details on charge-out rates.
169. He also gave a lengthy account of the background to the £1m retention provision that included extracts from, or summaries of, emails involving Mr Wake and Mr Freeman on the topic. That summary started with WBD's inclusion of a retention provision in the draft SPA of 6 October and the statement that the retention provision "has always been resisted by the Sellers". The summary then referred to the Selling Side downing tools on 3 November, their suggestion on 9 November that they remained willing to consider the deal on the basis of a 31 December 2017 completion and no retention. There was then an account of discussions between 22 November 2017 and 18 December 2017 during which alternatives to retention were explored. That summary culminated with a quote from an email from Withers in which Mr Lynch proposed a Non-Distribution Undertaking as a means of resolving the debate. It recorded Mr Wake's agreement that such an undertaking would be sufficient but offered a discussion if WBD had misunderstood Mr Siem's position.
170. That email drew a response from Mr Siem written all in block capitals. Mr Siem suggested in cross-examination that the email was not necessarily indicating annoyance and that he might have written it in block capitals because he did not notice until part-way through that the "CAPS lock" button was engaged and he did not want to go back and type the email again. In my judgment, Mr Siem's email clearly did indicate annoyance. That is apparent from the very start of it:

DEAR TOM SW AND I JUST TRIED TO REACH YOU BY PHONE. WE DO NOT NEED LAWYERS WRITING HISTORY TO EACH OTHER AT OUR COST. THIS PROCESS IS GETTING OUT OF HAND...

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171. Mr Siem’s annoyance at Mr Fitzpatrick’s email of 3 January 2018 was, at the time, based on its length and, relatedly, the cost he considered had been incurred in writing it. The Claimants’ case in closing contains more serious criticisms:
- i) Mr Fitzpatrick failed to mention that Mr Lynch had referred to the possibility of providing a Non-Distribution Undertaking in their conversation on 8 September 2017. In that regard Mr Fitzpatrick failed, when quoting his own email to Mr Lynch of 7 December 2017, to include the critical words “If I recall correctly you may have mentioned something similar when we first spoke” (see paragraph 74 above). That omission is said to have deprived Mr Siem of the knowledge that (i) Mr Siem could have done the transaction in September 2017 and (ii) the Selling Side had instructed Withers to down tools on 3 November 2017 because of WBD’s insistence on a £1m retention clause rather than because of Mr Wake’s inability to manage the transaction.
 - ii) Mr Fitzpatrick did not explain that WBD had failed to carry out Mr Wake’s instructions given during his telephone conversation with Mr Drewett on 19 October 2017. If Mr Fitzpatrick had mentioned this fact then Mr Siem would have realised that the Selling Side’s withdrawal from the transaction in November 2017 was not attributable to their intransigence or Mr Wake’s inability to manage the transaction.
172. I do not accept either criticism of Mr Fitzpatrick’s email of 3 January 2018 set out in paragraph 171:
- i) As I have concluded, Mr Lynch did not say to Mr Fitzpatrick that a Non-Distribution Undertaking was available during their call on 8 September 2017 (see paragraphs 67 to 79 above).
 - ii) WBD had not failed to carry out Mr Wake’s instructions following the call on 19 October 2017 (see paragraphs 111 to 113 above).
173. On the contrary, I consider that Mr Fitzpatrick’s email was a diligent and genuine attempt to summarise the history. He did not do so to earn fees from writing an unnecessarily long email as Mr Siem suspected. Rather, by giving a full explanation of why the retention provision was no longer in the SPA, he wanted to forestall any possibility that Mr Sasto’s email might lead to any revival of interest in a retention provision. That would have been undesirable given that agreement had so recently been reached on a Non-Distribution Undertaking instead.

Why did Mr Siem withdraw from the transaction in early January 2018?

174. On 7 or 8 January 2018, all parties agree that the transaction was “oven ready” (to use Mr Penn’s words at the time). There were no outstanding commercial or legal debates about either the SPA or the DMA.
175. Mr Siem wrote two contemporaneous emails, on 7 and 8 January 2018, that set out reasons for withdrawing from the transaction. Those reasons can be summarised as (i) a lack of confidence in Mr Wake’s ability to manage the Redevelopment which was important given Mr Siem’s own lack of experience in property development (ii) what Mr Siem perceived as Mr Promphan’s “uncooperative attitude” and the inefficiencies of the

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process to date and (iii) Mr Siem's perception that the market was "going from bad to worse".

176. As I have explained, Mr Siem struck me as a straightforward and direct businessman who was hard-nosed and assertive in his business dealings. He had no reason to varnish his reasons for withdrawing from the transaction in contemporaneous emails in which he was speaking frankly. I accept that the emails of 7 and 8 January 2018 accurately reflect Mr Siem's subjective reasons for withdrawing from the transaction.
177. In closing submissions, WBD argued that Mr Siem withdrew from the transaction "primarily because of price". I broadly accept that, subject to the qualification that it was not absolute price that concerned Mr Siem, but rather the effect of that price on the relationship between risk and reward that Mr Siem explained in his cross-examination. Mr Siem had realised all along that he was paying a "rich price" for the Upper Floor Flat (see paragraph 63). He was content to pay that rich price (although he sought to recoup some of it in negotiations on contractual terms such as the 6-month delay between exchange and completion) provided he considered that the prospect of reward from a successful Redevelopment compensated for the risk that he was overpaying. By January 2018, the transaction had gone on for nearly 6 months without closing and during that period Mr Siem perceived that the property market had fallen. That increased the risk that he was overpaying for the Upper Floor Flat and also called into question how much profit could be made from the Redevelopment. At the same time, he had come to blame Mr Wake for some of the delays in bringing the transaction to a close. He also felt that Mr Wake had been unable to control advisers' costs, or communicate sufficiently clearly with them, which did not augur well for Mr Wake's successful management of the Redevelopment and hence the ability to secure reward from the Redevelopment. In short, Mr Siem perceived that risk had increased and the likelihood of reward had decreased and it was the combination of those factors that caused him to withdraw in early January 2018.
178. Mr Wake said, at paragraph 137 of his First Witness Statement, that Mr Siem's doubts about his ability to project manage the transaction were quickly allayed after Mr Wake explained that the difficulties in closing the transaction all stemmed from WBD's shortcomings. Mr Siem was less convinced of this when cross-examined, saying that "you do not sort out in an hour your lack of faith in the project management". However, Mr Siem's own witness evidence was that, by 23 January 2018, he and Mr Wake "agreed to continue the joint venture and to re-engage with negotiations with Mr Promphan" and I conclude from this that his reservations about Mr Wake's abilities were substantially allayed.
179. Mr Siem and Mr Wake did indeed seek to interest Mr Promphan in a sale of the Upper Floor Flat after 8 January 2018. However, where certain terms were offered, they were on less advantageous terms (for the Selling Side) than an unconditional agreement to pay £19m. So, for example, in February 2018, the offer was of £12.5m with an extra £6.5m contingent on the Redevelopment being successfully completed. I conclude from an email of 8 February 2020 that Mr Wake sent to Mr Siem that an offer of £13m was made in July 2018 (since Mr Wake's email refers to that offer). On 12 February 2020, Mr Siem sent Mr Promphan a letter offering £10.5m. On 7 November 2020, Mr Wake (through Chapters) made an offer of £16m.

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180. Mr Wake suggested in his evidence that on 28 January 2021, he offered Mr Promphan £19m for the Upper Floor Flat. I do not accept that. The letter relied on was short on detail. It suggested Mr Promphan’s “potential participation in the proposed development in some mutually beneficial form”. While it also suggested the possibility of “simply reverting to the currently agreed terms based on a straight outright purchase of [SPL]”, it was (perhaps deliberately) silent as to the price that would be paid for that purchase.
181. WBD point to the lower offers as reinforcing their conclusion that Mr Siem withdrew from the transaction in January 2018 only because of considerations of price. As I have explained, that is broadly, but not entirely, right. Mr Siem withdrew from the transaction in January 2018 because of the interplay between risk and reward that he perceived at the time. By 23 January 2018 his concerns about Mr Wake’s ability had been substantially allayed. The succession of lower offers simply reflects Mr Siem’s perception of the price he would be prepared to pay for the Upper Floor Flat at the time he made those offers. So, for example, the offer in February 2018 sought to transfer some risk onto the Selling Side (who would only receive the additional £6.5m if the Redevelopment proceeded successfully). The lower offers made thereafter reflected Mr Siem’s perception that the property market was falling.

Factual findings relevant to the exclusion and limitation clauses

182. There was some dispute as to whether Mr Wake knew, or should have known, about the exclusion and limitation clauses that the Engagement Letter sought to incorporate. I make the following factual findings in this regard:
- i) Mr Wake was, at the time, an experienced businessman. He realised that law firms would frequently seek to limit their liability by reference to a particular sum. He had direct experience of that with Mr Drewett. When Mr Drewett was still working at Osborne Clarke LLP, Mr Wake had instructed him and the applicable engagement letter limited liability to £150m.
 - ii) Mr Wake did not actually carry out a detailed review of the Engagement Letter when he received it. However, a reasonable reader of the Engagement Letter would have noticed the cross reference to paragraph 21 of WBD’s terms of business under the heading “Limitation of liability”. Mr Drewett provided those terms of business together with the Engagement Letter and in the same envelope. A reasonable reader of paragraph 21 of the terms of business would understand that they sought to exclude liability for loss of profit even where caused by WBD’s negligence.
 - iii) WBD, through Mr Drewett and Mr Fitzpatrick, knew that a significant component of the benefit that Mr Wake (and Chapters after the change in structure referred to in paragraphs 154 to 155) expected to receive from the transaction consisted of a share of profits arising from the Redevelopment. Accordingly, had Mr Wake read the Engagement Letter and terms of business reasonably carefully, he, Chapters and WBD would have realised that the Engagement Letter sought to exclude any liability in negligence for loss of the substantial benefit that Chapters and Mr Wake were seeking from the transaction.
 - iv) As an experienced businessman, Mr Wake would have realised that some negotiation of the terms of the Engagement Letter might be possible. He did not seek to negotiate the terms of the exclusion and liability cap because he did not

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read the Engagement Letter or terms of business in sufficient detail to appreciate their effect.

- v) All of Mr Wake, Chapters and WBD appreciated that WBD carried professional indemnity insurance that provided some cover to WBD against claims for professional negligence. I make no finding as to the level of WBD's insurance cover because I have no evidence on that issue.

183. The Claimants submitted an RFI requesting information and disclosure on the level of WBD's professional indemnity insurance, but WBD declined to provide it, asserting that the request was for evidence. I consider WBD's position on that to be correct and the real question is whether the material in question was disclosable having regard to the Disclosure Review Document (**DRD**).

184. The Claimants asserted in their written closings that the level of insurance cover was disclosable having regard to the fact that WBD was required to give Model D disclosure on Issue 1 of the DRD namely "What were the terms of the Defendant's engagement in respect of the Redevelopment?" I reject the Claimants' argument that the provision of information on the limits of WBD's professional indemnity cover falls within the term of that issue. I am not, therefore, satisfied that WBD have failed to give disclosure on the issue that is required and I therefore decline the Claimants' request that I make any inference as to the level of WBD's insurance cover.

PART C – LEGAL PRINCIPLES APPLICABLE TO THE CLAIM FOR PROFESSIONAL NEGLIGENCE

185. There was little dispute between the parties on the legal principles and the parties agreed that a determination of the claims will require an analysis of the following issues:

- i) *The nature and extent of WBD's duties to each Claimant* – It was common ground that WBD, having entered into the Engagement Letter with Mr Wake owed duties to him. However, in the absence of any express retainer, WBD argue that they owe no duty to either Mr Siem or to Chapters so that their claims necessarily fail. Even if they are found to owe some duty to Mr Siem or Chapters, WBD argue that the duty owed is more limited in extent than the corresponding duty owed to Mr Wake.
- ii) *Whether WBD breached their duties* – The Claimants plead four specific breaches of duty and WBD deny all of them.
- iii) *Factual causation* – The Claimants advance two cases, in the alternative, as to what would have happened if WBD had not breached their duties. As regards the first three breaches, they rely on their Primary Counterfactual described in paragraph 34. They also rely on the Alternative Counterfactual described in paragraph 45. The Claimants assert that they would have obtained various benefits under each of these counterfactuals including, but not limited to, a real and substantial chance of the Redevelopment being concluded successfully. WBD deny that any loss was caused by the asserted breaches for a variety of reasons.
- iv) *Quantum* – If the Claimants succeed in establishing that WBD's breach of duties caused them loss, it will then be necessary to quantify that loss. The parties were not agreed on whether I should determine the issue of quantum now. The

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Claimants' position was that I should make factual findings on certain key issues and order a separate enquiry as to damages should the other elements of the claim succeed. WBD's position is that I should determine the issue of quantum now and conclude that the Claimants have suffered no loss.

186. Some complication arises from the fact that the Engagement Letter contained the provisions summarised in paragraph 18 above that were expressed both (i) to limit liability by reference to an overall cap and (ii) to exclude liability for loss of profit. A question arises as to whether these provisions are enforceable against Mr Wake. However, it is common ground that this is a question that affects Mr Wake only. Since WBD entered into no express retainer with either Mr Siem or Chapters, no contractual limitation or exclusion of liability affects their claims.
187. The Claimants' closing submissions anticipated that there might be some debate as to the scope of duty, namely the question whether, when assessing recoverability of damages, WBD's duty included taking care to protect the Claimants against the risks that led to the claimed losses or, to borrow Lord Sumption's formulation in *Manchester Building Society v Grant Thornton UK LLP* [2022] AC 783 whether the recoverable loss flows "from the right thing".
188. However, in the event, there was no such dispute. Apart from relying on the limitation and exclusion clauses referred to in paragraph 186 above, WBD do not argue that the Claimants cannot recover the losses claimed because the scope of their duty does not extend to protecting against those kinds of loss.
189. That said, WBD do argue that if, contrary to their primary position, they did owe some duties to Mr Siem and to Chapters even in the absence of an express retainer, the duties they owed were more limited in extent than the duties owed to Mr Wake. They refer to this as a debate about the extent of their duties rather than the question whether, when assessing recoverability of damages, the scope of their duty extended to protecting against the loss claimed.
190. In his concurring judgment in *Recovery Partners GP Ltd v Rukhadze* [2025] UKSC 10, [2025] 2 WLR 529 Lord Leggatt clarified the proper approach to the construction of counterfactuals at [162]-[163]:

162. When a claimant's right to claim compensation depends on proving a causal connection between a breach of a duty owed by the defendant and harm suffered by the claimant, the law uses counterfactual reasoning to determine whether the necessary causal connection has been shown. A comparison is made between what actually happened and what would have happened if the breach had not occurred. The purpose of the comparison is to identify with precision those consequences, if any, of the defendant's conduct for which the defendant should (subject to any further limiting factors) be held responsible.

163. It is worth spelling out in a little more detail what the exercise involves. The first step is to identify the specific duty of which the defendant was in breach and the particular conduct which constituted the breach. The next step is to construct a

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hypothetical scenario in which the defendant's conduct is changed to the minimum extent necessary to achieve compliance with the duty. The court then considers what harm, if any, the claimant would have suffered in that scenario.

191. In constructing the counterfactual, the court should take account of post-breach events that occurred in the “real” world which may assist in establishing an accurate assessment of the claimant’s loss, rather than speculating or hazarding guesses (*Curwen v James* [1963] 1 WLR 748 at p753; *Dudarec v Andrews* [2006] 1 WLR 3002 at [50]).
192. I did not understand the parties to be in dispute as to the relevant standard of proof to be applied. The burden is on the Claimants to prove, on the balance of probabilities, the steps they would themselves have taken upon receipt of competent advice in the counterfactual (see *Perry v Raleys* [2019] 2 WLR 636 at [20]). The balance of probabilities also applies where the hypothetical actions of WBD are in issue (see *PCP Capital Partners LLP v Barclays Bank Plc* [2021] EWHC 307 at [551]-[553]). This is an “all or nothing” test (*Palliser Limited v Fate Limited (In Liquidation) & Others* [2019] EWHC 43 (QB) at [27]).
193. To the extent that the Claimants’ assertion that WBD’s actions caused them to lose a beneficial outcome that depends upon what others (that is, third parties to the litigation) would have done, it is necessary to perform a loss of chance evaluation ([20] of *Perry*). That requires a consideration of whether there was “a real and substantial chance” that the third party would have conferred the benefit in question ([34] of *Perry*). This requires an evaluation of the prospect of success which involves a probabilistic assessment of the magnitude of the chance that has been lost.

PART D - BREACH OF DUTY

194. I start by considering the issue of breach of duty. Ordinarily, that would not be the best place to start and it would be more appropriate to address first the disputed issues as to (i) whether WBD owed any duty to Mr Siem and Chapters at all and (ii) the extent of any such duty that was owed.
195. However, I have come to the clear conclusion that even if WBD owed the duties to Mr Siem and Chapters of the kind that the Claimants allege, WBD did not breach those duties and nor did they breach the undisputed duty owed to Mr Wake. In those circumstances, it seems to me that the issue of breach of duty represents the clearest “route to verdict” in the circumstances of this case and I will start my analysis with this issue. I do so on the assumptions that WBD owed all Claimants the duty to exercise reasonable care, skill and diligence that would be expected of a reasonably competent solicitor with expertise in acquisitions of shares in companies that hold real estate assets in the following areas:
- i) negotiating and drafting the SPA and providing all material information to the Claimants on the progress of those negotiations;
 - ii) giving advice to the Claimants in relation to the terms of the SPA, including but not limited to, the extent of warranty protection that should be sought in the SPA;
 - iii) when taking and implementing instructions from the Claimants.

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196. That summary is drawn from paragraphs 55 and 56 of the Claimants' APOC. I did not understand it to be disputed that WBD owed those duties to Mr Wake pursuant to their express retainer with him. WBD certainly do not accept that they owe these duties to Mr Siem or to Chapters, but the analysis in this section proceeds on the assumption that they do, without deciding the point.

Breaches 1 and 2

197. In their APOC, the Claimants relied on four breaches of duty. In their closing submissions, the Claimants dealt together with the first two breaches (pleaded in paragraphs 65 to 71 of the APOC) under the heading "advice on warranty protection". I am content to deal with these two breaches together as the Claimants have done.

198. The allegations that the Claimants pursue in their closing submissions can be summarised as follows:

- i) During his call with Mr Wake on 22 September 2017, Mr Fitzpatrick did not reveal that a Non-Distribution Undertaking was "on the table" (paragraph 115 of the Claimants' written closings) or "discussed" (paragraph 113 of their written closings) as a form of warranty protection following Mr Fitzpatrick's call with Mr Lynch on 8 September 2017. Nor did he advise that tracing provisions were already included within the 18 September draft and that those tracing provisions might have constituted commercially acceptable security for any future breach of warranty. Nor did he advise that there was a range of other possible options including a guarantee from Citibank or the provision of warranties by Mr Promphan personally.
 - ii) Instead, Mr Fitzpatrick advised that the Buying Side would be "stuffed" unless they required the Selling Side to agree to a £1m retention.
 - iii) That advice was negligently given because it was not legal advice that could assist the Buying Side to determine what course of action they wished to take. Rather, it involved WBD giving negligent commercial advice that the Buying Side should not enter into the SPA without a £1m retention. Moreover, Mr Fitzpatrick negligently failed to appreciate that a £1m retention clause would almost inevitably be unacceptable to the Selling Side since the £1m figure was arbitrarily chosen and there was no identifiable and specific risk of a claim under the warranties that could justify such a retention. He negligently failed to realise that the introduction of a substantive new term such as the £1m retention was liable to risk or increase the risk that the Selling Side would withdraw from the transaction which Mr Fitzpatrick knew to be particularly sensitive.
 - iv) Mr Fitzpatrick suggested the £1m retention for the ulterior purpose summarised in paragraph 97 above.
199. A number of factual premises underpinning the allegation set out in paragraph 198.i) have not been established:
- i) Mr Lynch did not put a Non-Distribution Undertaking "on the table" during their call on 8 September 2017 (see paragraph 79 above).

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- ii) Nor was there any “discussion” of a Non-Distribution Undertaking beyond the general discussion described in paragraph 79. A solicitor in Mr Fitzpatrick’s position could quite reasonably conclude that that exploratory discussion contained no sufficiently firm proposal to warrant being relayed to Mr Wake.
 - iii) Mr Fitzpatrick did tell Mr Wake that tracing provisions were included in the draft SPA of 18 September 2017 (see paragraphs 85 and 86 above).
200. Mr Fitzpatrick had identified the problems with tracing provisions that I have summarised in paragraph 24.ii) above. He had not been given any information about the identity of beneficiaries of the Trust that was sufficient to dispel those concerns. A reasonable solicitor advising on this kind of transaction could form the view that the tracing provisions were not commercially acceptable security. Indeed, Mr Freeman independently reached the same conclusion as Mr Fitzpatrick, that a retention was desirable in addition to the tracing provisions that Withers had offered. Mr Siem and Mr Freeman discussed the issue of whether to ask for a retention during a telephone call of 3 October 2017. Following that call, Mr Freeman emailed Mr Fitzpatrick on 4 October 2017 to confirm that Mr Siem required a £1m retention and indeed required that it should apply for a period of 18 months rather than the 12 months that WBD had suggested. I infer that during their call on 3 October 2017, Mr Freeman advised in similar terms to those set out in his email to Mr Siem of 21 November 2017 in which he described the “ideal” position in the following passage:
- So far as the retention is concerned then whilst the solicitors acting for the seller of the shares states that you can always and trace assets should a claim occur clearly this would not be a simple operation and there is no guarantee that you would recover any such monies. Accordingly in an ideal world the retention should be held back. I must confess that save in respect of service charge situations it is often unusual for a retention to be held back in respect of such claims but I must of course caution you that in the event that there was a claim there would be a risk that you would not be able to recover the monies.
201. In closing submissions on behalf of the Claimants, it was suggested that it was inappropriate to suggest a retention in respect of possible claims under the warranties that had not even been identified. I do not accept that. The whole point of the warranties was to protect the buyer against certain liabilities that SPL might have. The rationale of a retention is that it preserves a cash fund that can be used to pay warranty claims. That rationale exists just as much in relation to potential liabilities that have been identified as it does in relation to liabilities that have not even been identified generically, or “unknown unknowns” as Mr Simpson KC put it in his submissions. I do not consider that there is any professional consensus that displaces this common-sense proposition and indeed Mr Freeman’s email that I have quoted in paragraph 200 above does not suggest that a retention would be inappropriate, saying at most that it would be “unusual”.
202. The Claimants are correct to say that Mr Fitzpatrick did not advise on the possibility of asking for a guarantee from Citibank or for Mr Promphan to provide warranties personally. However, in my judgment, that involved no breach of duty. Given the state of negotiations with Withers, he was looking for a reasonable compromise that would resolve the ongoing debate between the Buying Side and the Selling Side that would

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enable the transaction to be concluded. He was not obliged to survey every possibility and was entitled to use his professional judgment to decide which approach to recommend in the context of the negotiations as they then stood. Moreover, a reasonable solicitor could conclude that a retention provision was a more proportionate way of addressing the Buying Side's concerns than a request for a guarantee (or indeed a Non-Distribution Undertaking). A request for a guarantee could quite reasonably be regarded as a more onerous request than a request for a temporary retention of just 5% of the purchase price. In a similar vein, a Non-Distribution Undertaking could reasonably be considered more onerous than a retention since it would preclude distribution of the whole purchase price rather than just 5% of it.

203. For all those reasons I reject the allegation set out in paragraph 198.i) above. I also reject the allegation in paragraph 198.ii) above. I have explained in paragraphs 90 to 95 above the advice that Mr Fitzpatrick gave that led to Mr Wake writing "stuffed otherwise" in his note of 22 September 2017. I do not consider that advice to involve any breach of duty. It was reasonable and accurate advice as to consequences that the Buying Side might suffer if they settled for the tracing provisions that the Selling Side had offered without also asking for a retention.
204. I do not accept the allegation summarised in paragraph 198.iii) above. The suggestion of a retention was ostensibly quite measured and involved just £1m out of a £19m purchase price. It was not obviously an unreasonable request to make. Mr Fitzpatrick was not obliged to foresee that the Selling Side would react so negatively to the suggestion. Indeed, there was something mercurial about the Selling Side's position on this issue. They expressed indignation at the suggestion of a retention of £1m for 12 months but ultimately were prepared to agree to a Non-Distribution Undertaking which would result in the entire £19m purchase price not being available to beneficiaries of the Trust for the same period. Nor do I accept the allegation that the £1m was impermissibly arbitrary. There was nothing wrong with Mr Fitzpatrick suggesting a figure that, in his professional judgment, offered meaningful protection to the Buying Side without unduly prejudicing the legitimate interests of the Selling Side. That conclusion is emphasised by the fact that Mr Freeman evidently agreed with Mr Fitzpatrick's professional judgment.
205. Given the points I have made in paragraphs 58 to 64 above, Mr Fitzpatrick could quite reasonably conclude that requesting a retention would not disturb the trajectory of the transaction which was not as "urgent" as it is now suggested to be.
206. I have already, in paragraph 97 above, explained why I do not accept the allegation of an ulterior motive summarised in paragraph 198.iv).
207. I therefore dismiss the Claimants' claims based on Breaches 1 and 2.

Breach 3

208. Breach 3 asserted WBD's failure to carry out instructions given during the call between Mr Wake and Mr Drewett on 19 October 2017. I have found in paragraphs 103 to 113 that there was no such failure and, accordingly, the claim based on Breach 3 is dismissed.

Approved Judgment**Breach 4**

209. The Claimants' case on Breach 4 is based on the proposition that Mr Fitzpatrick's email of 3 January 2018 was incomplete, selective and/or inaccurate in the sense summarised in paragraph 171 above. I have rejected both that allegation and the allegations described in paragraphs 162 to 173 based on the chain of correspondence of which Mr Fitzpatrick's email formed part. The claim based on Breach 4 is accordingly dismissed.

PART E – FACTUAL CAUSATION

210. The conclusions that I have reached on the alleged breaches of duty necessarily mean that all claims against WBD fail. I will, however, make some further factual findings as to what the Claimants would have done but for the acts of WBD that are said to be negligent. That will involve me evaluating whether the Claimants have established either their Primary Counterfactual (on which they rely in relation to Breaches 1 to 3) or their Alternative Counterfactual (on which they rely, at least in their pleaded case, in relation to Breach 4).

The Primary Counterfactual

211. In this section, I assume, contrary to my earlier findings, that WBD did indeed commit all or any of Breaches 1 to 3. In those circumstances, the Claimants' Primary Counterfactual, as advanced in closing submissions, was that Mr Siem would have entered into the SPA probably prior to 19 October 2017, but certainly no later than 3 November 2017, on the terms of the draft current at 18 September or on "substantially the same terms" namely:

- i) On the basis of the tracing provisions that were included in that draft or alternatively either (i) on the basis of the Non-Distribution Undertaking to which Mr Siem subsequently agreed or (ii) on the basis of a "Citibank guarantee".
- ii) On the basis of a completion date of 31 December 2017 or, alternatively, 31 March 2018 which the parties subsequently agreed.

212. WBD make the understandable point that the draft SPA current at 18 September contained only tracing provisions and that an SPA that contained a Non-Distribution Undertaking (or Citibank guarantee) instead would not be "substantially similar" to that draft. However, I will not focus on a linguistic analysis of the Claimants' pleaded case and will instead consider the substance of the case summarised in paragraph 211 above.

213. That formulation involves assertions as to how both the Buying Side and the Selling Side would have behaved. Almost all of the submissions and evidence that I heard on this issue focused on the actions, or assumed counterfactual actions, of the Buying Side. Little if anything was said on how the Selling Side would have acted in the absence of Breaches 1 to 3. I will, therefore, proceed on the basis that if Mr Siem had been prepared to agree to the matters set out in paragraph 211, there is, at the very least, a real and substantial chance that the Selling Side would have been prepared to agree to those matters as well.

214. I am quite unable to accept that, absent Breaches 1 to 3, Mr Siem would have been prepared to accept the tracing provisions in the 18 September draft SPA. Ultimately, the Claimants' allegation in relation to Breaches 1 and 2 was that WBD should have advised

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that the tracing provisions “might be” commercially acceptable security. Yet even if WBD had given that advice, Mr Freeman would still have been giving Mr Siem advice that tracing provisions were not sufficient (see paragraph 200 above). Mr Siem trusted Mr Freeman, who had advised him on property matters for decades. Mr Siem would have listened to that advice and would not have been prepared to accept tracing provisions alone. Moreover, Mr Siem was a tough negotiator and would not readily have settled for tracing provisions that Mr Freeman would have regarded as inadequate.

215. Nor am I prepared to accept that Mr Siem would have transacted on the basis of a “Citibank guarantee”. Indeed, I am not satisfied that there was any realistic possibility of Citibank (a separate legal entity from Cititrust) being prepared to offer a guarantee. I accept Mr Fitzpatrick’s evidence that, at no point in his discussions with Mr Lynch, did Mr Lynch suggest that he had any instructions to offer a guarantee from Citibank.
216. However, if contrary to my findings on Breaches 1 and 2, it was negligent for WBD to suggest a retention, in the counterfactual world without such negligence, they would in due course have suggested a Non-Distribution Undertaking which would, ultimately, have been acceptable to both the Selling Side and the Buying Side, just as it was in November/December 2017.
217. WBD submit that Mr Siem would not have been prepared to sign an SPA in the timescales that the Claimants envisage because of the number of terms outstanding on the DMA at that point. I agree with the premise of WBD’s argument that in practice the SPA had to be signed at the same time as the DMA. There was no point in Mr Siem agreeing to purchase the shares in SPL unless he knew he had an agreement in place to enable the Redevelopment to proceed. Similarly, the DMA would have been pointless unless Mr Siem was sure that he could acquire the shares in SPL and so acquire the raw material necessary for the Redevelopment to proceed.
218. However, I accept the evidence that Mr Siem gave in cross-examination to the effect that, if the terms of the SPA had been substantially finalised in September 2017, he and Mr Wake could have adopted a reasonably compressed timescale for agreeing outstanding issues. Overall I have concluded that work on the DMA expanded to fill the time available, which was quite substantial given the protracted timescale over which the SPA was negotiated. If the time available to agree the SPA had been shortened, less work would have been done, or needed on the DMA. Indeed that is precisely what happened in the “real”, rather than the counterfactual world. Once outstanding issues on the SPA had been resolved, there was real pressure to agree the terms of the DMA. As Mr Drewett vividly explained in his witness statement, as at 3 January 2018 a good number of points remained unresolved on the DMA. At Mr Siem’s insistence a conference call took place on 4 January 2018 to resolve “all outstanding issues”. While Mr Drewett thought that “optimistic”, in fact almost all outstanding issues were resolved on that call (with Mr Wake making significant concessions which Mr Drewett and Mr Fitzpatrick considered unwise). On 5 January 2018 the DMA was substantially agreed, on terms that were materially in Mr Siem’s favour. I consider that would have been much the same outcome if the DMA needed to be finalised in September 2017 rather than January 2018.
219. The same analysis applies to WBD’s point that the DMA could not have been agreed in the Claimants’ suggested timescales because tax advice was still outstanding as at 3 November 2017. In January 2018, final tax advice had not been obtained either, but neither Mr Wake nor Mr Siem considered that to be an impediment to finalising either

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the DMA or the SPA. Indeed, but for the reasons that Mr Siem gave for withdrawing from the transaction in early January 2018, none of which related to missing tax advice, he would have been prepared to enter into the SPA. I have concluded that Mr Wake would have been similarly willing to enter into the DMA and accordingly I do not consider the absence of tax advice would have precluded the transaction from being concluded in September 2017.

220. However, in my judgment, WBD are correct to point out that, behind the Claimants' case on the Primary Counterfactual, is an assumption that Mr Siem would have been prepared to compromise on the question of Mews access and completion date no later than 3 November 2017. The Claimants suggest that assumption is warranted because ultimately Mr Siem was prepared to compromise on both issues and therefore their Primary Counterfactual simply proceeds on the basis that he would have reached the same compromise in the counterfactual world as was reached in the actual.
221. Although the Claimants alight on 3 November as a deadline for the purposes of their case on the Primary Counterfactual, that would not have been a real deadline to which all parties would have been working. Mr Siem was a tenacious and effective negotiator. As I have explained in paragraphs 63 to 64 above, he attached significance to the point that there be a 6-month interval between exchange and completion. He regarded that as a means of recapturing some of the "rich" price that he was paying for the Upper Floor Flat. Even when the Selling Side had threatened to walk away from the deal, Mr Siem continued to insist on that provision for a period (see paragraphs 37 to 39 above). Mr Siem did compromise, but only after the Selling Side offered a significant concession of their own, namely a deadline for completion of 31 March 2018. Ultimately that translated into Mr Siem getting just under half of the six months he sought as, until he withdrew from the transaction, it was envisaged that the SPA would be signed in early January 2018 with completion no later than 31 March 2018.
222. I consider that the same kind of crisis, and concessions from the Selling Side, would have been necessary in the counterfactual world to prompt Mr Siem to relax his insistence on the six-month delay between exchange and completion. I do not, therefore, accept the Claimants' formulation of the Primary Counterfactual insofar as it posits a smooth journey from the draft SPA of 18 September 2018 to an agreement on a 31 December 2017 (or even a 31 March 2018) completion date. It is more likely, in my judgment, that Mr Siem would have held out for a six-month delay between exchange and completion for a good period after receiving the 18 September draft SPA.
223. Eventually that continued holding out would have prompted the same kind of reaction from the Selling Side who would have threatened to walk away from the transaction unless Mr Siem agreed to a completion by 31 December 2017. Moreover, the timescale for that flashpoint in the counterfactual world would have been similar to the timescale in the actual world:
 - i) Even if WBD had advised on 22 September 2017 that the Buying Side should seek a Non-Distribution Undertaking, Mr Freeman would still have needed to review the draft SPA and he would have been just as slow in doing so as he was in the actual world. Withers would still have received an SPA on 6 October 2017 that rode roughshod over the Buying Side's position on completion that I have described in paragraph 29.v) above.

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- ii) Even without the retention suggestion, the Buying Side’s position on completion would still have been perceived as a “deal-breaker”. In the actual world, it took the Selling Side until 19 October 2017 to give a firm message to the Buying Side that the terms proposed were unacceptable. I see no reason why they would have given that message any earlier in the counterfactual world.
 - iii) In the counterfactual world, there would have been no crossed wires arising out of the call between Mr Wake and Mr Drewett on 19 October 2017: the Buying Side would have received and heard a message that its position was unacceptable.
 - iv) However, given Mr Siem’s approach to the negotiation, I do not accept that he would have given way on these issues immediately. I conclude that he would have conceded on the question of Mews access reasonably quickly, just as he did in the actual world. However, the completion date point was of real significance to Mr Siem as he saw it as enabling him to recapture some of the “rich” price he was paying. In the actual world, even when Mr Siem knew, from around 3 November 2017, that the question of completion date was a real problem for the Selling Side, and even though the Selling Side had told Withers to down tools, it still took Mr Siem some 19 days to concede the point. Therefore, the Selling Side’s “deal breaker” message delivered on 19 October 2017 would not have been met with capitulation prior to 3 November 2017 either.
224. The Claimants argued that, in the counterfactual, negotiations between the Buying Side and the Selling Side would have proceeded in an atmosphere of greater calm. I do not consider that would have made any great difference. With Mr Siem continuing to insist on a six-month interval between exchange and completion, it is more likely than not that, on 3 November 2017, the Selling Side would have instructed Withers to down tools, just as they did in the actual world.
225. The Claimants have not, therefore, established the Primary Counterfactual since, even absent Breaches 1 to 3, the SPA would not have been signed on or prior to 3 November 2017.
226. I acknowledge that it is possible that Mr Siem could have agreed to sign an SPA after 3 November in around mid- to late- November. That is not the Claimants’ pleaded case and I need not deal with it. For completeness I simply note that, even by the middle of November 2017, the transaction would still have been going on for a long time and Mr Siem’s appetite for it was dwindling. He would still have been as concerned about the interplay between risk and reward as he was, in the actual world, at the beginning of January 2018. I was not shown any event or events that occurred between the middle of November 2017 and early January 2018 that had a particular and adverse impact on the property market. Therefore, most of the raw material that Mr Siem had, in the actual world, to prompt him to be concerned about the direction of the property market in early January 2018 would have been available to him in the middle of November 2017.
227. Moreover, he would still have had concerns about Mr Wake’s abilities. To an extent those concerns were unfair since, as I have explained in paragraphs 61 to 64 above, the protracted nature of the negotiations on the SPA was in part attributable to Mr Siem’s own negotiating stance. Some of the delay was also attributable to Mr Freeman’s lack of responsiveness (see, for example, the delay between 22 September 2017 and 3 October 2017 in reviewing the draft SPA). However, unfair or not, Mr Siem would still have had

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those concerns at the end of November 2017 just as he had them at the beginning of January 2018. In my judgment, Mr Siem would have decided not to sign a transaction in mid- to late- November 2017.

The Alternative Counterfactual

228. In paragraph 86 of their APOC, the Claimants asserted that their Alternative Counterfactual set out what would have happened in the absence of Breach 4 only. In paragraph 150 of their written closing arguments, the Claimants impermissibly sought to rely on the Alternative Counterfactual as setting out what would have happened in the absence of all or any of Breaches 1 to 4. While WBD mentioned the expansion of the Claimants' pleaded case, they did not object to it being advanced in closing.
229. I reject the pleaded case, based on Breach 4 only, for the simple reason that in his cross-examination, Mr Siem accepted that the email of 3 January 2018, on which the allegation of Breach 4 was based, was a "competent and thorough summary". Mr Siem was not aware that it had even been alleged that this email was an operative cause of his refusal to sign an "oven ready" transaction in January 2018. That acceptance in my judgment fundamentally undermines any case that Mr Siem's decision to withdraw from the transaction was affected in any way by the contents of Mr Fitzpatrick's email of 3 January 2018. I have, in paragraph 177 explained my conclusions as to why Mr Siem withdrew and his reasons for doing so similarly had nothing to do with Mr Fitzpatrick's email.
230. I also reject the expanded case, to the effect that Breaches 1 to 3 resulted in Mr Siem declining to implement the transaction in January 2018 for reasons that are essentially the same as those set out in the section above dealing with the Primary Counterfactual.

Factual causation – conclusion

231. The Claimants have failed to establish either their Primary Counterfactual or the Alternative Counterfactual. For that reason, their claim would have failed even if they had succeeded in establishing any of Breaches 1 to 4.
232. WBD also note that the Claimants' pleaded case is to the effect that, in January 2018, Mr Siem could have signed an SPA if he had chosen to. WBD argue that this is fatal to the Claimants' claim based on the Primary Counterfactual alone. In short they argue that the claim could succeed only if the Claimants were able to establish the Alternative Counterfactual reasoning as follows:
- i) If the claim based on the Alternative Counterfactual fails, then Mr Siem's decision not to execute the transaction in January 2018 cannot be attributable to WBD's negligence.
 - ii) Therefore, if the case based on the Alternative Counterfactual fails, there would have been a transaction available to Mr Siem to sign in January 2018. Any loss said to have been suffered from the lost opportunity to implement the Redevelopment arose because Mr Siem turned down the opportunity in 2018 for reasons other than WBD's negligence. That loss, accordingly, was not caused by any negligence of WBD that led to a transaction not being signed by 3 November 2017 as pleaded in the Primary Counterfactual.

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- iii) Alternatively, by declining the opportunity to execute an “oven ready” transaction in January 2018, Mr Siem did not mitigate loss.
233. The Claimants argue that WBD is not entitled to advance the argument on mitigation as it was not adequately pleaded. I disagree. WBD had pleaded that the Claimants had failed to mitigate loss and it could not have come as any surprise to them that, at trial, the principal instance of the failure to mitigate relied upon was Mr Siem’s decision to withdraw from the “oven ready” transaction in January 2018.
234. I do not need to decide this issue and will not do so. I will simply express the factual conclusion that, in January 2018, Mr Siem was not aware of any possibility of suing WBD for negligence. He did not, therefore, make a decision to withdraw from the transaction and sue WBD instead. Mr Siem’s decision not to enter into the transaction in January 2018 was reasonable in the light of what he genuinely, and reasonably, perceived to be a falling market for prime real estate and the corresponding effect on the risk/reward analysis of the transaction.

PART F – WAS THERE A REAL AND SUBSTANTIAL CHANCE OF SECURING PLANNING PERMISSION FOR THE REDEVELOPMENT?

Introduction and pleading issues

235. The Claimants’ claim for damages is advanced on the basis that they had a real and substantial chance of securing planning permission for one of three Redevelopment schemes (Schemes A, B and C respectively). Scheme A was for a Redevelopment of 28,000 sq ft, Scheme B was of 31,000 sq ft and Scheme C was of 33,000 sq ft.
236. WBD countered by giving reasons as to why none of those Schemes would have secured planning permission which consisted primarily of arguments to the effect that they conflicted with planning policy, whether set out in the Consolidated Local Plan for the Borough of July 2015 (the **Local Plan**) or elsewhere.
237. Given my conclusion to the effect that WBD did not commit any of the breaches of duty alleged, I do not need to consider any of these issues. However, in order to make factual findings on as many issues as realistically possible, I will consider the following key objections that WBD have put forward:
- i) all of the proposed Schemes contravened the Borough’s policy on basement development;
 - ii) all of the proposed Schemes involved the demolition of a building located in a conservation area.
238. It is conceptually possible that a particular Scheme might not obtain planning permission but it would obtain planning permission if certain amendments were made. For example:
- i) All of Schemes A, B and C involved additional basement development. If WBD are correct that this would represent a straightforward “policy fail” that would preclude the grant of planning permission, revised proposals that omitted the basement might succeed in obtaining permission.

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- ii) In a similar vein, the Claimants suggest that, even if WBD are right, and Scheme C would not have obtained planning permission because it produced a building of excessive height, they could still have obtained planning permission without any loss of square footage by reducing the height of each individual storey and reducing the thickness of the floor/ceiling slab between storeys to deal with that objection.
 - iii) Less significantly, the Claimants were seeking planning permission for apartments each of which had a car-parking space in the basement. If WBD are right that this level of car-parking provision would be at odds with planning policy, it is quite possible to envisage amendments to the Schemes under which some apartments had a car-parking space but others did not.
239. That led to a pleading debate between the parties. The Claimants argue that, if the court concludes that any of Schemes A, B and C would have required substantial amendments to secure planning permission (such as those set out in paragraphs 238.i) and 238.ii) above), the court should order a further enquiry as to damage to assess the impact that such changes would have on the Claimants' claims based on loss of profit. WBD's position is that there is no case-management direction for a split trial and therefore the Claimants should have brought their entire case to the single trial. The loss of a basement, or a reduction in storey height or floor thickness could, WBD argue, have a significant impact on the profits that could be earned from the Redevelopment. In WBD's submission, the Claimants should not be given a further opportunity to advance a claim for smaller lost profits based on Redevelopment Schemes that have not been pleaded to date.
240. I broadly agree with WBD's position on this issue. There is no existing case-management direction for a split trial. Schemes A, B and C are specifically referenced in paragraph 82.2.3A of the APOC. By his order of 3 December 2024, Deputy Master Arkush gave the parties permission to adduce expert evidence as to those specific Schemes obtaining planning permission. Both sides have taken up that permission and both sides' experts have been extensively cross-examined on their expert reports. In my judgment, it is too late for the Claimants, if trial reveals significant defects in any of their pleaded Schemes, to advance a further fall-back Scheme as a basis for claiming damages for loss of profit. As is frequently observed, a trial is the first and last night of the show; it is not a dress rehearsal.
241. That is how I approach significant problems in the pleaded Schemes. If there are more minor problems (for example, planning permission might be granted for a Scheme with 9 car parking spaces but not for a Scheme with 15 car parking spaces), proportionality might suggest a different approach as Mr Edmonds realistically accepted when making his oral submissions for WBD. However, in the event that issue does not arise given my conclusion that the presence of additional basement development in all Schemes represented a fundamental reason why none of those Schemes would have secured planning permission.
242. I had expert evidence on planning matters from Dr Chris Miele, for the Claimants, and Mr Roger Hepher, for WBD. I considered that both experts complied with their duties under CPR 35 and were seeking to assist the court with their dispassionate opinion evidence on matters within their expertise.

Approved Judgment**Basements**Relevant features of the Existing Building and of Schemes A to C

243. The existing building at the site (the **Existing Building**) has a basement (the **Existing Basement**). The Existing Basement is entirely underground, has no windows, garden access or light wells. Parts of the Existing Basement (described as the “Lower Ground Floor” on a floor plan that I was shown) are used as a music room, gym sauna and staff room. I infer from this use that the Existing Basement has at least the depth of a normal habitable room (around 2 to 2.5 metres). At the same level as these facilities is an area (confusingly shown separately on that floor plan and described as a “basement” even though it is on the same level as, and is part of, the Existing Basement) that is used as a plant room and storage area.
244. The Existing Basement was constructed in or around 1978 at the same time as the Existing Building. Both the Existing Basement, and the Existing Building, were constructed pursuant to a planning permission that the Borough granted on 14 March 1978 under reference PJA/VW/77/1302/920.
245. Scheme A involved the creation of a “lower basement level”, below the Existing Basement, that would be used to provide car parking spaces, a private gym and other amenities.
246. Schemes B and C did not involve the creation of an additional basement level, but rather envisaged that the Existing Basement would be deepened so that it had a depth of around 6 metres. Some of that enlarged space would be used for car-parking with the remainder to be used for the provision of a “lower ground floor” flat. In essence, under Schemes B and C, the Existing Basement would be excavated to become a much deeper basement which would be used for purposes other than those for which the Existing Basement is currently used.

The Borough’s policy on basement development and the dispute as to the meaning of that policy

247. Policy CL 7 of the Local Plan reads as follows so far as material:

The Council will require all basement development to:

- a. not exceed a maximum of 50 per cent of each garden or open part of the site...
- b. not comprise more than one storey. Exceptions may be made on large sites.
- c. not add further basement floors where there is an extant or implemented planning permission for a basement or one built through the exercise of permitted development rights...

248. Paragraphs 34.3.46 to 34.3.72 provided some commentary on Policy CL 7. Paragraph 34.3.46 states that:

34.3.46 This policy applies to all new basement development. For the purposes of this policy, basement development is the construction or extension of one or more storeys of

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accommodation below the prevailing ground level of a site or property.

249. Paragraph 34.3.52 states that a “single storey” is one that cannot be subdivided in the future to create additional floors and so would generally be around 3 to 4 metres, floor to ceiling.

250. Paragraph 34.3.57 states:

34.3.57 Where a basement has already been implemented following the grant of planning permission or through the exercise of permitted development rights, the policy does not allow further basement floors or basement extensions that would exceed 50 per cent of the garden or open part of the site. This provision would not apply to a basement which forms part of the original property, or where a later addition, was constructed prior to 1st July 1948. This is to ensure consistency and fairness of approach.

251. Paragraph 34.3.57 provides some relaxation of the policy that does not appear in CL 7. The paragraph appears to be commenting on the policy in CL 7(a) and (c) since it refers to “further basement floors”, implemented planning permissions or permitted development rights, which are the province of CL 7(c) and the dimensions of the basement when compared with the garden or open part of the site which are the province of CL 7(a). It is less obviously directed at CL 7(b). In making this observation, I am not of course suggesting that paragraph 34.3.57 has nothing to say about the policy in CL 7(b).

252. Dr Miele and Mr Hepher agree on the following matters:

- i) The Existing Basement answers to the definition of a “basement” in the Local Plan.
- ii) The policy on basements is important. It was made to mitigate the effect of construction of new basements in a densely populated borough. Those effects are not just felt by the immediate neighbours of a property whose basement is being developed but by residents of the Borough as a whole in the form of increased traffic and noise. Therefore, as the Borough put it in paragraph 1.3 of a Supplementary Planning Document on basements published in April 2016:

In considering each application and appeal, it is therefore important not just to limit consideration to the properties either side of the application site or even the street, but apply the policy consistently. A ‘case by case’ analysis of each site negates the very basis of the policy, as such an approach fails to consider the cumulative impact that the policy is designed to mitigate.

- iii) Mr Hepher considered that a development that breached the policy on basements would have no real prospect of obtaining planning permission. Dr Miele did not expressly agree with this, but nor did he differ, accepting in cross-examination that if any of the Schemes breached the basements policy that would be a “pretty weighty policy fail”.

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- iv) None of the Schemes involved development of a “large site” for the purposes of CL 7(b).
253. I did not understand the Claimants to suggest in their closing arguments that there was any difference between the analysis of Scheme A or Schemes B and C. Perhaps there was some scope for a different analysis, as Mr Hepher recognised in paragraph 4.41 of his Supplemental Report. Scheme A might be said to engage the policy in both CL 7(b) and CL 7(c) on the basis that it, at least arguably, results in more than a single basement storey and “adds further basement floors”. Schemes B and C might be said to engage the policy in CL 7(b) on the basis that they, at least arguably, “comprise more than one storey” since they involve excavating to a depth of some 6 metres which is in excess of the limit of 3 or 4 metres specified in paragraph 34.3.52 of the Local Plan. It might be said that neither Scheme B nor Scheme C adds a “further basement floor” and so does not engage CL 7(c).
254. However, the Claimants do not rely on any such distinction by asserting, for example, that even if Scheme A breached the policy on basements, Scheme B or Scheme C would not. Their position in closing was that none of the Schemes breached the policy for essentially the same reasons.
255. Dr Miele dealt with basements in most detail in his Supplemental Expert Report which he prepared in response to Mr Hepher’s analysis on basements in his Expert Report. Dr Miele approached his analysis on the basis that the “thrust of the disagreement” between him and Mr Hepher was on CL 7(b) (i.e. whether the basement development comprised more than one storey). That was a reasonable assumption to make since Mr Hepher omitted CL 7(c) from his quotation of applicable policy in paragraph 6.31 of his Report suggesting that he did indeed regard CL 7(b) as the focus of his analysis.
256. However, events moved on somewhat. In Mr Hepher’s contribution to the Joint Expert Statement, summarising areas where they agreed or disagreed, Mr Hepher referred to the judgment of Hickinbottom J (as he then was) in *R (on the application of Ronald Kent) v Royal Borough of Kensington and Chelsea* [2016] EWHC 2809 (Admin) (**Kent**) in support of his conclusion that:
- Policy CL 7 provides that where there is a basement constructed after 1 July 1948 (as is the case here) a further basement is not allowed...
- The reference to a “further basement” in this section suggests a reference to CL 7(c) rather than CL 7(b).
257. In the event, much of the cross-examination of Dr Miele concerned CL 7(c) rather than CL 7(b). Much of the cross-examination of Mr Hepher concerned paragraph 34.3.57 of the Local Plan which, as I have noted in paragraph 251 above is most obviously directed at CL 7(a) and CL 7(c). Therefore, both sides’ cross-examinations were focused largely on something other than the area (CL 7(b)) in which the experts had expressed themselves to disagree in their reports and in Dr Miele’s Supplemental Expert Report. However, both sides seemed content with that approach and set out, in their closing submissions, clear and cogent articulations of their respective positions that drew on the debate as it had unfolded in cross-examination.

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258. The Claimants' primary position as advanced in closing draws on a definition of "original" in s2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the **Permitted Development Order**) as follows:

"original" means—

- (a) in relation to a building, other than a building which is Crown land, existing on 1st July 1948, as existing on that date;
- (b) in relation to a building, other than a building which is Crown land, built on or after 1st July 1948, as so built;

259. The Claimants argue that the Existing Basement forms part of the "original" building applying that definition as it was part of the Existing Building, which was built after 1 July 1948, "as so built". Therefore, the Existing Basement forms part of the "original property" for the purposes of paragraph 34.3.57 of the Local Plan. Accordingly, the exception set out in the second sentence of paragraph 34.3.57 of the Local Plan is engaged, with the result that the prohibition in the first sentence of that paragraph is disapplied.

260. The Claimants argue that this is consistent with a linguistic analysis of the second sentence of paragraph 34.3.57 of the Local Plan which provides an exception from the prohibition in the first sentence if either (i) there is an existing basement that formed part of the original property (whenever constructed) or (ii) the basement was built, before 1 July 1948, by way of addition to the original property. They submit that this achieves the policy objective of ensuring that properties originally constructed with a basement would not be unfairly ruled out for further extension.

261. I will consider WBD's objections to this analysis in more detail below, but one of their arguments is that this linguistic analysis of paragraph 34.3.57 of the Local Plan is wrong and that, for the exception in the second sentence of paragraph 34.3.57 to apply either (i) the basement must have formed part of an original building constructed prior to 1 July 1948 or (ii) the basement was built prior to 1 July 1948 by way of addition to an existing building.

Principles of construction

262. The dispute on this issue involves a construction of the Local Plan. I follow the approach to construction set out by the Court of Appeal in *R (Cherkley Campaign Ltd) v Mole Valley District Council* [2014] EWCA Civ 567. The Court at paragraph [27], guided by the principles in *Tesco Stores v Dundee City Council* [2012] UKSC 13, explained that:

in principle such policy statements should be interpreted objectively and in accordance with the language used, read as always in its proper context. But... they should not be construed as if they were statutory or contractual provisions. Development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and

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their judgments can only be challenged on the ground that it is irrational or perverse.

263. As the Court of Appeal held at [21] of the *Cherkley Campaign Ltd* judgment, “[t]he policy is what is contained in the box. The supporting text is an aid to the interpretation of the policy but is not itself policy”. I therefore approach matters on the basis that CL 7 sets out the policy with all the paragraphs 34.3.46 to 34.3.72 (including in particular paragraph 34.3.57) operating to explain that policy.

The Claimants’ analysis as advanced in Closing

264. In my judgment, the Claimants’ analysis as advanced in closing and summarised in paragraphs 259 and 260 is wrong.
265. The first difficulty with that analysis is that it relies on the word “original” in paragraph 34.3.57 of the Local Plan being given a technical meaning set out in the Permitted Development Order. Yet the Local Plan makes no provision to that effect. Paragraph 34.3.57 and the Permitted Development Order are dealing with different matters and there is no reason to assume that any technical meaning of “original” was intended in paragraph 34.3.57.
266. The second difficulty is that the Claimants’ analysis produces anomalous outcomes, that are at odds with the Borough’s policy on basements. Consider two hypothetical properties in the Borough. Property A was built, with planning permission, in 2015 and included a basement when it was built. Property B was built in 1990 and in 2015, planning permission was secured for the excavation of a basement which was duly implemented.
267. Assume that in 2020, the owners of both Property A and Property B apply for planning permission to add a second basement, below the existing basement. On the Claimants’ analysis:
- i) The basement development of Property A is compatible with the policy since Property A’s existing basement was part of the “original” property.
 - ii) The basement development of Property B is incompatible with the policy since its basement was added after 1 July 1948.
268. That outcome would be difficult to defend. Both Property A and Property B have, between 2015 and 2020, contributed the same inconvenience to residents of the Borough through their acts of building their existing basements. Yet, on the Claimants’ analysis, the owner of Property A is entitled to subject residents of the Borough to further inconvenience of precisely the same type, but the owner of Property B is not.
269. Moreover, the Claimants’ linguistic analysis of paragraph 34.3.57 that I have summarised in paragraph 260 is at odds with that previously adopted by the Borough and Hickinbottom J in *Kent*.
270. Paragraphs 22 to 23 of Hickinbottom J’s judgment in *Kent* dealt directly with planning policy on basements in the Borough following the intervention of the Examiner appointed

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to scrutinise that policy. Those paragraphs demonstrate the following evolution of the thinking in relation to the policy:

- i) CL 7(b) seeks to implement a “one storey” restriction on basement development.
- ii) However, if the policy stopped there, there would be scope for abuse. A property owner might add a one storey basement following the grant of planning permission or the exercise of permitted development rights. That property owner might subsequently then seek to add a further (one storey) basement and argue that since this “basement development” is for just a single storey, it is compatible with CL 7(b). CL 7(c) seeks to prevent any possibility of manipulating the system in that way by applying successively for single storey basements.
- iii) However, the Borough also wanted to address the position of (as the Examiner put it) “a property [that] already had an existing basement before the need for planning permission arose with the Planning Act 1947”. As a policy choice, the Borough wished to ensure that owners of such a property were not automatically precluded (by CL 7(c)) from applying to add a further basement level. That policy choice drove the exception in what was to become the second sentence to paragraph 34.3.57 of the Local Plan.
- iv) The Examiner therefore proposed the italicised wording below to give effect to the Borough’s proposed derogation:

Where a basement has already been implemented following the grant of planning permission or through the exercise of permitted development rights, the policy does not allow further basement floors or basement extensions that would exceed 50 per cent. of the garden or open part of the site. *This provision would not apply to a basement which forms part of the original property or to a later addition which were constructed prior to 1 July 1948.* This is to ensure consistency of approach.

- v) The Examiner explained that his wording would “make clear that both originally constructed and later added basements must have taken place before 1 July 1948”.

271. The extracts from the Examiner’s Report make it clear that (i) the italicised words were intended to relax the policy stated in CL 7(c), (ii) that those words would give effect to the policy choice summarised in paragraph 270.iii) and (iii) the Examiner at least believed those words to have the effect set out in paragraph 270.v). Thus, the Examiner’s italicised wording was quite clearly not intended to give effect to the Claimants’ interpretation that an exception applied to a property that, whenever it was built, originally had a basement.

272. The Claimants, however, argue that it was significant that the wording of the policy differed in important respects with the Examiner’s proposals. The final version of the relevant sentence (which I have marked so as to show changes from the Examiner’s proposed wording) was:

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This provision would not apply to a basement which forms part of the original property, or ~~where~~ ~~to~~ a later addition, ~~was~~ ~~which~~ ~~were~~ constructed prior to 1st ~~+~~ July 1948

273. I accept that linguistically, particularly given the addition of commas, it is possible to read this sentence as adopting a significant change to the wording the Examiner proposed so that any property originally constructed with a basement benefited from the exception. However, I am quite unable to accept that this is the intended or correct reading in context. If the wording were intended to achieve that result, it could only be because the Borough had changed the policy that the Examiner had recorded (see paragraphs 270.iii) and 270.v) above). Yet there is no hint in the Local Plan, or any other document I was shown, of any such seismic change in policy. The anomalies that I have highlighted in paragraphs 267 and 268 would make any such revised policy difficult to defend.
274. A planning officer considering Schemes A to C would have all these issues in mind. In my judgment, the Borough would reject the Claimants' interpretation of the policy on basements and would refuse planning permission for all of those Schemes. There is room for debate as to whether, given the linguistic points that the Claimants advance, there is nevertheless a "real and substantial" (even if low) chance that planning permission would be forthcoming despite the basement issue. There are inevitable difficulties in evaluating whether the chance is just below, or just above, the threshold of "real and substantial chance". In my judgment, the chance falls below that threshold since the linguistic points advanced, while tenable viewed entirely in isolation, are completely at odds with the wider evidence as to the intention of the policy.

The demolition issue

275. All of the proposed redevelopment Schemes envisaged that the Existing Building, located in the Conservation Area, would be demolished.
276. There is no suggestion that the proposed demolition would result in any harm or loss to the significance of heritage assets. In those circumstances, the operative parts of Policy CL3 in the Local Plan required the planning authority to "resist" substantial demolition in the Conservation Area unless the Existing Building "makes no positive contribution to the character or appearance of the area".
277. The Existing Building has a striking appearance. It has been described as an example of "brutalist" architecture. It is mentioned in *Pevsner*, who describes it more as "cubist". The Existing Building will quite clearly not be to everyone's aesthetic taste.
278. Much of the Conservation Area is comprised of 19th century architecture. Some of the Existing Building's immediate neighbours are in that style. However, by no means all of the Conservation Area, or indeed the Existing Building's immediate neighbours, consist of 19th century architecture. Quite near the Existing Building is a functional office block dating from the post-war period.
279. There was a sharp difference of opinion between Dr Miele and Mr Hepher as to whether the Existing Building makes a positive contribution to the character or appearance of the area. In part that divergence of view reflected their different aesthetic perceptions. Dr Miele saw little aesthetic merit to the Existing Building and considered that it had an alien and intrusive presence in the street scene and so disrupts its otherwise uniform and

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attractive historic character. Mr Hepher described the Existing Building as “respectful” of its 19th century neighbours and agreed with a statement in the Queen’s Gate Conservation Area Appraisal of February 2020 (CAA 2020) that the Existing Building as a whole “sit[s] quietly in its historic context”.

280. In my judgment, there was little to choose between the experts’ competing analyses. The question whether the Existing Building makes a “positive contribution to the character or appearance of the area” is largely subjective. Unlike the issue on basements, therefore, it is difficult to say whether one expert was “right” and the other “wrong”. I considered that two points in particular suggested that Mr Hepher had slightly the better of the argument:
- i) A planning officer considering the issue in the context of a planning application in 2018 would have had available to them the 1989 Conservation Area Proposals Statement (CAPS 1989). That document commented specifically on the Existing Building, as making a “more positive contribution to the character of the Area” using the very language of CL3. The experts both agreed that CAPS 1989 would be a material consideration for a decision maker and had been referred to in planning decisions from 2015 and 2017.
 - ii) Planning permission had been given for the Existing Building at a time when the Conservation Area was in existence. A planning officer might consider that this lent at least some support to the argument that the Existing Building had at least some positive impact on the special character and interest of the Conservation Area.
281. That said, there was force in Dr Miele’s contrary view. CAPS 1989 would have been old in 2018. At that time the Borough was in the process of commissioning a 2017 Annual Monitoring Report to replace Conservation Area Proposals Statements which were described as out of date. CAA 2020 suggested that the Existing Building makes a “neutral” contribution to the special character and interest of the Conservation Area. Even though a planning officer would not have had CAA 2020 available when exercising a planning judgment in 2018, a planning officer could have perceived a direction of travel such that the Existing Building’s contribution to special character was lower than was thought in 1989, or when it was built.
282. Doing the best I can with the subjective nature of the question and the conflict of expert opinion before me, I conclude that there was a 60% chance that all of Schemes A to C would be refused planning permission because of the demolition that they proposed. That percentage, in my judgment, reflects the fact that the evidence that would actually have been available to a planning officer in 2018 points in favour of the Existing Building having at least some positive impact on the special character and interest of the Conservation Area. However, the percentage is much lower than 100% to recognise the force of Dr Miele’s contrary view.

Conclusion on planning issues

283. Other planning issues were canvassed in cross-examination and in closing. I do not need to consider those. In my judgment, on its own the basement issue was sufficient to deprive all of the Schemes of the necessary real or substantial chance of securing planning permission. However, even if the basement issue was not fatal on its own, the

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combination of that issue and the demolition issue meant that there was no real or substantial chance of any of the Schemes securing the necessary planning permission.

PART G – WHETHER WBD OWED ANY DUTY TO MR SIEM AND/OR CHAPTERS

284. I deal with this issue last since my conclusions in the remainder of this judgment necessarily mean that all claims fail even if WBD owed the duties to Mr Siem and to Chapters that are alleged (it not being controversial that they owe duties to Mr Wake).
285. Since there was no express retainer in place with either Mr Siem or with Chapters, WBD could owe them a duty only (i) in contract if a retainer could be implied or (ii) in tort under the doctrine of “assumption of responsibility”.

Legal principles

286. I did not detect there to be any dispute between the parties on the law.
287. As to the concept of implied retainer, I take the following summary of applicable principles from the judgment of Henshaw J in *Clifford Chance LLP and another v Societe Generale SA* [2023] EWHC 2682 (Ch).
- i) A retainer is simply a category of contract, namely a contract between a solicitor and a client. Therefore, for an implied retainer to be in place, all the conditions necessary to imply a contract must be satisfied. In particular, the implication of the contract must be necessary. “Necessity” is a high bar and involves something more than asking whether or not the parties would, or might, have acted as they did in the absence of a contract.
 - ii) It is necessary to consider whether an objective consideration of all the circumstances make the implication of a retainer so clear that the solicitor himself or herself ought to have realised it.
288. I take the following summary of principles applicable to the concept of assumption of responsibility in tort from Nugee J’s survey of applicable principles in *Ashraf v Lester Dominic Solicitors* [2023] EWCA Civ 4:
- i) The general rule is that a solicitor owes no duty to persons involved in a transaction who are not their clients. One reason for that general rule is that a solicitor might otherwise be exposed to a risk of a conflict of interest. However, that is not the only reason. A further reason is that, absent a retainer with a particular person, a solicitor will not have agreed to offer any service to that person ([53] and [54] of *Ashraf*).
 - ii) However, the law recognises exceptions to this general rule. So far as relevant to the present case, two such exceptions are:
 - a) Where the very purpose of a solicitor’s retainer with their client (A) is to confer a benefit on a particular third party (B). An obvious example of this situation is where a solicitor agrees to draw up a will for A in favour of a beneficiary B ([56] of *Ashraf*).

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- b) Where a third party has reasonably relied upon advice given by the solicitor in circumstances where the solicitor could reasonably have foreseen that the third party would do so ([58] of *Ashraf*).

289. In the case set out in paragraph 288.ii)b), the question is not whether it is merely foreseeable that loss would be caused to the third party from the solicitor's lack of care. Nor is proximity sufficient. In such a case it will also be necessary to balance the foreseeability that the third party will rely on the solicitor's advice against any other factors which would make the imposition of liability on the solicitor unreasonable or unfair ([64] of *Ashraf*).
290. The question whether there has been an assumption of responsibility and the extent of any such assumption must be judged objectively in context and without the benefit of hindsight ([60] of the judgment of Carr LJ (as she then was) in *Spire Property Development LLP v Withers LLP* [2023] 4 WLR 56).
291. At 587D to 588D of his judgment in *BCCI v Price Waterhouse (No. 2)* [1998] PNLR 564, Sir Brian Neill set out some factors that are relevant when deciding whether a solicitor has assumed responsibility for advice to a non-client. Those factors include:
- i) the precise relationship between the solicitor and the third party, such as whether there is a conflict between the third party's interests and those of the solicitor's client, or whether the client and third party are acting "on the same side of the fence";
 - ii) the precise circumstances in which the advice or information came into existence;
 - iii) the precise circumstances in which the advice or information was communicated to the third party, including the degree of reliance that the solicitor intended, or should reasonably have anticipated, would be placed on the accuracy of that advice;
 - iv) the presence or absence of other advisers on whom the third party would or could have relied; and
 - v) the opportunity, if any, given to the adviser to issue a disclaimer.

Mr SiemImplied retainer

292. Mr Siem deliberately and consciously put in place an arrangement that was designed to obviate any need for him to rely on WBD's advice on important matters relating to the SPA (see paragraph 136 above). He did so because he preferred to rely on the advice of Mr Freeman on such issues. WBD were quite aware of the importance that Mr Siem attached to Mr Freeman's advice (see paragraph 138 above) and so of the, relatively speaking, lower importance that Mr Siem attached to WBD's advice.
293. I note that, at all times after 16 or 17 August 2017, WBD were operating on the working assumption that Mr Siem was to be the buyer of the SPL shares under the SPA. Accordingly, WBD were operating on the basis that they were protecting Mr Siem's interests when they negotiated that SPA. Absent Mr Freeman's involvement in the transaction, and the arrangement that Mr Siem put in place specifically to avoid having

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to rely on WBD's advice, that might well have supported a case that a retainer should be implied between Mr Siem and WBD.

294. However, in all the circumstances, I would conclude that the test of "necessity" is not met so that no retainer should be implied between WBD and Mr Siem prior to 26 December 2017. The principal reason why implication of such a retainer is not "necessary" is because Mr Siem himself ensured that he had access to another source of advice on warranty issues and indeed secured that advice.
295. On 26 December 2017, Mr Siem invited WBD to act for him. He did so in circumstances where Mr Freeman had simply not responded to earlier overtures from WBD that would have led to an engagement letter being put in place with Mr Siem. Mr Siem's email was in the nature of an offer that could have led to a retainer. However, in practice, that offer did not actually lead to a retainer, partly because Mr Siem and WBD never reached agreement on fees and partly because Mr Siem's email was overtaken by events when he withdrew from the transaction. I see no reason why a short-lived offer from Mr Siem makes it "necessary" to imply the existence of a retainer even from 26 December 2017.
296. I acknowledge that this conclusion left Mr Siem exposed to the lacuna that I have identified in paragraph 136 in that he ran the risk of having no professional adviser who owed him duties in connection with at least certain points that could have arisen on a substantial transaction. I regard that as the unintended consequence of an arrangement that Mr Siem consciously put in place that he may, with hindsight, regard as unfortunate. However, it does not make it necessary to imply any retainer with WBD that dealt with warranty protection in the SPA. That is particularly the case given that warranty protection in the SPA did not fall within the scope of the lacuna that I have identified since Mr Siem sought, and obtained, advice from Mr Freeman on warranty issues.
297. In my judgment, at no point was there an implied retainer between WBD and Mr Siem for the provision of advice in relation to warranty protection in the SPA.
298. Since the Claimants' Breach 3 relies on the assertion that WBD failed to comply with instructions that Mr Wake gave to WBD pursuant to the Engagement Letter, it is also necessary to consider whether there was an implied retainer between Mr Siem and WBD to the effect that WBD would action instructions given by Mr Wake pursuant to their express retainer with him. In my judgment, no such implied retainer is "necessary". Mr Siem and WBD had not entered into a retainer. They were therefore content with the situation that the only operative retainer was that between Mr Wake and WBD. The arrangement between Mr Wake, Mr Siem and WBD would operate in a perfectly coherent fashion if WBD were obliged only to comply with Mr Wake's instructions pursuant to the Engagement Letter.

Assumption of responsibility

299. In my judgment, it was not reasonably foreseeable that Mr Siem would rely on WBD's advice in relation to the issue of the nature, and effectiveness, of warranty protection in the SPA. As noted above, Mr Siem had put in place a structure that he intended to obviate any need to rely on WBD's advice on matters that were identified as significant. Issues surrounding warranty protection, and the steps that should be taken to ensure that effective claims could be brought for breach of warranty were quite clearly identified as important and so to be the subject of advice by Mr Freeman.

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300. That issue did not fall within the scope of the lacuna that I have identified. Mr Freeman was asked to advise on the issue and did so. Given the arrangement that Mr Siem had put in place it was not foreseeable that Mr Siem would be relying on WBD's advice on this issue. On the contrary, he would be relying on Mr Freeman's advice.
301. I acknowledge that not all of the factors that I have summarised in paragraph 291 point in the same direction. Mr Wake, for example, was very broadly on the "same side of the fence" as Mr Siem when it came to warranty protection in the SPA. WBD would have done much better to issue a disclaimer confirming that they assumed no liability to Mr Siem for advice going to warranty protection. Because of their working assumption that Mr Siem would be the purchaser, WBD were actively looking out for his interests when negotiating the SPA. Those are indications of force.
302. However, I consider that those indications are outweighed by other considerations. Mr Siem put in place an arrangement designed to obviate the need to rely on WBD's advice. He drew on that arrangement to obtain advice, from Mr Freeman, on the nature of the protection he should seek. Looked at objectively, Mr Siem was relying on Mr Freeman's advice on the question of whether he should seek a retention, rely on tracing provisions or take some other approach in the SPA. For example, on 3 October 2017, Mr Siem discussed the retention provision with Mr Freeman. It was because of the outcome of that call that the SPA sent over to Withers contained a retention provision. It was not because of the advice that Mr Fitzpatrick gave to Mr Wake.
303. Moreover, all parties knew that Mr Siem would be relying on Mr Freeman's advice on this issue. It was precisely so that Mr Freeman could give his advice to Mr Siem that WBD sent Freeman's the draft SPA on 22 September 2017.
304. I am reinforced in that conclusion by other objective indications as to how the parties saw the relationship between Mr Siem and WBD at the time. I regard it as highly significant that, on each occasion on which Mr Siem felt he needed advice on the SPA, he turned to Mr Freeman to provide it rather than to WBD. I also consider that it is significant that Mr Wake did not relay to Mr Siem WBD's advice on the retention issue given during the call on 22 September (see paragraph 99 above). That too conveys a firm objective indication that, at the time, WBD's advice on the issue of retention would not influence Mr Siem's thinking greatly. Both indications point against the proposition that it was reasonably foreseeable that Mr Siem would rely on WBD's advice.
305. The email thread that followed Mr Siem's email to Mr Drewett of 26 December 2017 is also revealing. On that date, Mr Siem felt able to assert that he was not obliged to pay fees that had accrued up till then. He took that position before he was considering any legal action against WBD and it therefore provides an unvarnished insight into how he at least perceived the relationship in the light of circumstances prevailing at the time.
306. On balance, I would conclude, given a consideration of all the circumstances, that WBD did not assume responsibility to Mr Siem for advice given in connection with warranties in the SPA.
307. I see no reason why there was any greater assumption of responsibility after Mr Siem's email of 26 December 2017 than there was before, since Mr Siem's email of that date did not lead to any actual change in the relationship between him and WBD.

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308. That leaves the question whether, in relation to Breach 3, WBD assumed responsibility to Mr Siem for any loss that he might suffer in consequence of WBD's failure to act promptly on instructions that Mr Wake gave pursuant to the Engagement Letter. On balance, I conclude that WBD did assume such responsibility. As I have noted, from around 17 August 2017, WBD were operating under the working assumption that Mr Siem was to be the buyer. Their work in relation to the SPA was, therefore, done with Mr Siem's interests firmly in mind. While Mr Freeman was on hand to check that material provisions of the SPA adequately protected Mr Siem's interests, all parties realised that he would not be involved in the day-to-day business of progressing the drafting and negotiation of the SPA. Mr Freeman could scarcely check that WBD were correctly and diligently implementing Mr Wake's instructions when negotiating with Withers.
309. It follows, therefore, that it was reasonably foreseeable that Mr Siem was relying on WBD to comply with instructions given by Mr Wake to communicate matters to Withers. Therefore if, contrary to my conclusion, WBD had committed Breach 3, in my judgment WBD had assumed responsibility to Mr Siem in relation to the duty so breached.

ChaptersAssumption of responsibility

310. Chapters relies on the factors that I have mentioned in paragraphs 148 to 152 above as suggesting that, from the moment the Engagement Letter was signed, WBD assumed responsibility to it. I do not accept that.
311. The Engagement Letter certainly envisaged that Chapters would have a role in the transaction and would be party to a Development Management Agreement. I am quite prepared to accept that this supports a case that WBD could reasonably have foreseen that Chapters would rely on WBD's advice in relation to the DMA. However, I do not accept that this meant that WBD should reasonably have foreseen that Chapters would be relying on WBD's advice in relation to the SPA.
312. Certainly, Chapters might feel that it would not be in a position to obtain its fee for securing planning permission unless the SPV acquired the SPL shares as contemplated by the Engagement Letter. Thus, Chapters would certainly be affected if any negligence by WBD in negotiating the SPA meant that the purchase of SPL shares never took place. However, mere foreseeability of loss is not enough (see paragraph 289).
313. Moreover, under the structure contemplated by the Engagement Letter, Mr Wake would obtain his share of the profit arising on the Redevelopment through the SPV (with the benefit of a shareholders' agreement on which WBD would advise Mr Wake). Chapters' only source of profit would be a fee payable under the DMA. That, in my judgment emphasises that, under the structure contemplated by the Engagement Letter, WBD could reasonably have foreseen that Chapters would be relying on WBD to do a proper job on the DMA, but could not reasonably have foreseen that it was relying on WBD in connection with the SPA. For similar reasons, nor could WBD reasonably have foreseen that Chapters would be relying on them to carry out Mr Wake's instructions, given pursuant to the Engagement Letter, in relation to the negotiation of the terms of the SPA.

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314. The change in structure on 4 October 2017, referred to in paragraphs 153 to 155 was, as WBD knew, fundamental to Chapters. It meant that, to WBD's knowledge, Chapters stepped into Mr Wake's shoes as being the recipient of all profits generated from the Redevelopment. I do not regard the question of whether WBD assumed responsibility to Chapters from that date as straightforward. Since I do not need to determine it, I will not do so.
315. I will, however, express the conclusion that WBD could reasonably have foreseen after 4 October 2017 that Chapters would be relying on their advice relating to warranty protection in the SPA. Following the change in structure, all of Mr Wake's share of profits from the Redevelopment were being diverted to Chapters. Chapters was, to WBD's knowledge, a "one-man company" that was an emanation of Mr Wake. As the new intended beneficiary of Mr Wake's share of profits of the Redevelopment, it was reasonably foreseeable that Chapters would rely on WBD's advice concerning warranty protection in the SPA to the same extent as Mr Wake was relying on that advice before the structural change. The same analysis applies in relation to WBD's obligation to carry out Mr Wake's instructions (in relation to Breach 3).
316. The factors summarised in paragraph 291 also point in favour of it being reasonably foreseeable that Chapters would rely on WBD both to give advice on the question of warranty protection and to carry out Mr Wake's instructions given pursuant to the Engagement Letter when negotiating with Withers. Unlike Mr Siem, Chapters had no separate source of legal advice. Mr Wake and Chapters were very much "on the same side of the fence". It was open to WBD, following the change in structure, to disclaim any liability to Chapters, but they chose not to. Instead, they kept on doing work that was similar in nature to work that would have been for Mr Wake's benefit under the old structure, knowing that under the new structure, Chapters would benefit from profits arising on the Redevelopment rather than Mr Wake.
317. I will not go on to determine whether that foreseeable reliance results in an overall assumption of liability. It seems to me that the balancing exercise that I have summarised in paragraph 289 is to an extent bound up in an analysis of the effectiveness of the exclusion clause in the Engagement Letter which, as I explain below, I am not determining. If that exclusion clause is effective, it might be correspondingly less fair to impose liability on WBD. By contrast, if the exclusion clause is ineffective, it might be correspondingly more fair.

Implied retainer

318. I am prepared to accept, without deciding, that once the structure changed on 4 October 2017, it was "necessary" to imply a retainer between WBD and Chapters relating to the negotiation and drafting of the DMA. It would simply not make sense for WBD to owe duties in that regard only to Mr Wake personally, since the structure change meant that Chapters, rather than Mr Wake, was to obtain the profits derived from the Redevelopment. Unless WBD owed duties to Chapters in relation to the work on the DMA, they would be answerable to no-one for the quality of their work on that issue since Chapters, rather than Mr Wake, would suffer loss in consequence of negligent work on the DMA and so Mr Wake would not be able to sue in contract for any loss so occasioned.

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319. However, that does not make it “necessary” to imply any retainer between Chapters and WBD relating to work under the SPA. Certainly, Chapters could lose out on profits if WBD’s negligence caused the SPA not to be concluded. However, that does not make an implied retainer relating to work under the SPA “necessary”. The arrangement between Mr Wake, WBD and Chapters would operate perfectly coherently if WBD’s sole duty to Chapters related to the drafting and negotiation of the DMA.

PART H – OTHER ISSUES**The exclusion and limitation clauses**

320. As I understand it, this issue is relevant only to Mr Wake’s claim. (Any claim by Mr Siem and/or Chapters is not made pursuant to the Engagement Letter and so I do not understand WBD to argue that they are entitled to rely on the exclusion or limitation clauses in relation to claims made by Mr Siem and/or Chapters.)
321. Mr Wake’s claim is for less than £10m and so the clause limiting liability to £10m has no bearing on that claim.
322. Therefore, the focus of the debate is on the exclusion clause. Mr Wake makes two challenges to the enforceability of that clause. First, he raises points of construction, relating to an asserted conflict between WBD’s terms of business and the Engagement Letter. Second he argues that the exclusion clause is unfair and unreasonable having regard to the Unfair Contract Terms Act 1977.
323. I will not decide this point since I do not need to. However, I have sought to make factual findings in paragraphs 182 to 184 above that will enable the factual questions of reasonableness and fairness to be determined if necessary.

Quantum

324. Quantifying any loss that the Claimants suffered involves questions of property valuation. I had expert evidence on those issues from Mr Arun Nimba MRICS for the Claimants, and from Mr David Rusholme FRICS for WBD.
325. As a general matter, I considered that Mr Rusholme’s evidence was the more compelling. He is considerably more experienced than Mr Nimba having 39 years of post-qualification experience as compared to Mr Nimba’s six years. Mr Rusholme’s professional credentials were also more impressive: he is an FRICS, reflecting a higher level of professional attainment than does Mr Nimba’s MRICS. In cross-examination, Mr Nimba also accepted that he had mistakenly calculated what he considered to be the “marriage value” of the Ground Floor Flat and the Upper Floor Flat, that Mr Siem would have captured by purchasing the Upper Floor Flat, by reference to “gross external area” rather than “gross internal area”. Earlier in his cross-examination, Mr Nimba had agreed that such an approach would involve an “elementary error”.
326. Overall, I have decided that I should not address questions of quantum in any detail. The claims have all failed for a number of reasons and dealing with the expert evidence on quantum would unduly burden a judgment that is already long enough.

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Disposition

327. The Claimants' claims are all dismissed. There will now need to be an additional hearing to settle the form of order to give effect to this judgment and to deal with consequential matters such as costs. That hearing should take place no later than 18 June 2026.