


**Michaelmas Term**
[2026] UKPC 42
**Privy Council Appeal No 0095 of 2024**

# JUDGMENT

# Replay Destinations (Bahamas) Ltd (Appellant) *v* Royal Ltd and another (Respondents) (Bahamas)

## From the Court of Appeal of the Commonwealth of The Bahamas

before

**Lord Briggs**
**Lord Burrows**
**Lady Rose**

**JUDGMENT GIVEN ON**
**19 November 2026**

**Heard on 27 October 2026**

*Appellant*
Raynard Rigby KC
Shaquille Dean
LaRissa Rolle
(Instructed by Jenner & Block London LLP)

*Respondent*
Gail Lockhart Charles KC
Tatyanna Maynard
(Instructed by Sinclair Gibson LLP)

**LORD BURROWS:**

## 1. Introduction

1. This is the second judgment of the Board on an appeal brought by Replay Destinations (Bahamas) Ltd ("Replay") against a decision of the Court of Appeal of the Commonwealth of the Bahamas upholding a decision of the Supreme Court in favour of the respondents, Royal Ltd ("Royal") and Ocean Club Luxury Estates Ltd ("Ocean Club"). The dispute concerns a contract for the sale of an apartment unit, to be built incorporating the design plans of the purchaser, on Paradise Island. The seller was Replay and the purchaser was Royal. Royal subsequently assigned its rights under the contract to Ocean Club (but that assignment is of no consequence to the matters to be decided).

2. The dispute on the appeal concerns a deposit of US$774,590.53 which was paid to the seller by the purchaser when the contract was made. The Supreme Court (Stewart J, 2020/CLE/gen/00001, 28 April 2023) held that the purchaser, who had commenced proceedings to recover damages for breach of contract, was entitled to the return of the deposit (but otherwise was not entitled to damages). That decision was upheld by the Court of Appeal (SCCivApp No 102 of 2023, 27 March 2024; Sir Michael Barnett P, with whom Isaacs JA and Crane-Scott JA agreed). The seller now appeals to the Board arguing that it is entitled to keep the deposit.

3. The first judgment of the Board, which was given on 13 December 2025 following a case management hearing (Privy Council Appeal No 95 of 2024), was essentially concerned with whether there was a concurrent finding of fact that the seller had been in breach of its contractual obligation to verify onsite measurements. The Board decided that there was such a concurrent finding. The Court of Appeal had accepted, rather than rejected, the trial judge's finding that there had been that breach of contract by the seller. Given the practice of the Board (see, eg, *Devi v Roy* [1946] AC 508) that concurrent findings of fact cannot be challenged on an appeal to the Board, subject to exceptional circumstances that were not here in play, it was not open to the seller to challenge that finding on the appeal to the Board. Hence the direction made was that this appeal must be confined to the point of law as to whether the seller could retain the deposit, applying clauses 14 and 15 of the contract, even though the seller was itself in breach by failing to verify onsite measurements. It is therefore with that short point of law, dealing with the interpretation of the contract, that this appeal and this judgment is concerned.

4. The contract of sale was entered into in March 2017. It incorporated an Addendum which required the seller to build the unit to what was described as "White Box Completion" and in accordance with final design plans provided by the purchaser by 30 April 2017. This was therefore a design and build contract rather than a straightforward contract for the sale of land. After many months of communications between the parties

("back and forth" as the trial judge described it at para 112), on 12 September 2018 the seller, purporting to act under clause 14 of the contract, served a notice of default on the purchaser requiring the purchaser to deliver properly coordinated final design plans within ten days. On 4 October 2018, the seller issued a notice terminating the agreement and retained the deposit. On 6 December 2018, the purchaser for its part, and purporting to act under clause 15, served a "notice to complete" (ie a notice of default) on the seller requiring it to comply with its contractual obligations, for example by verifying onsite measurements. On 16 January 2020 the purchaser commenced legal proceedings claiming damages for breach of contract. As has been said at para 2 above, it was held by Stewart J, and upheld by the Court of Appeal, that, while not entitled to damages, the purchaser was entitled to the return of the deposit.

**2. The seller and purchaser were both in breach of contract**

5. It is important to clarify that Stewart J had found not merely that the seller was in breach of contract but that the purchaser was also in breach by not providing final design plans.

6. Stewart J said at para 2:

> "There were breaches of the terms of the contract by each of the parties."

Similarly at para 9, she said:

> "Both parties were in breach of the sales agreement …"

At para 116 she said this:

> "the [purchaser] did not provide any final design plans based on the corrected measurements sent to them."

Later at para 119, she said:

> "I made the following findings. The [purchaser] did not provide a Final Approved Design Plan. There were inaccuracies with the initial on-site measurements required to be provided by the [seller]. After revision of measurements no final plans were provided to the [seller]."

7. In the Court of Appeal, Sir Michael Barnett P recognised at para 3 that "the judge held that both the seller and the purchaser were in breach of the sales agreement and [the] addendum … to it" and, at para 4, that "the purchaser has not sought to challenge the judgment". Later at para 16 he said: "It must be recalled that … there was no respondent's notice in this appeal by the purchaser."

8. The essential issue on that appeal, therefore, was whether the seller had been in breach of contract at all; and the Court of Appeal decided that the trial judge had found, and was not plainly wrong to have found, that the seller had been in breach by not verifying the onsite measurements.

9. It is therefore not open to the purchasers on this appeal to deny that the purchasers were in breach by not providing final design plans. It is not open to them to argue, for example, that their failure to provide the final plans was not a breach because it was caused by the seller's breach in not verifying onsite measurements. Nor can they argue that they were not in breach because the verification of onsite measurements was a condition precedent to their providing final design plans. It is not open to them to make those arguments because the trial judge found that they were in breach by not providing final design plans and any challenge to that finding should have been raised, if at all, before the Court of Appeal and was not.

**3. Clauses 14 and 15 of the contract**

10. Clause 14 which is headed "Seller's Remedies" reads as follows:

> "If Purchaser fails to perform any of the obligations required hereunder as and when due prior to the Closing Date Seller may deliver to Purchaser a written notice demanding that Purchaser comply with the terms hereof within Ten (10) days following Purchaser's receipt of the notice. If Purchaser has not complied upon the expiration of the Ten (10) day period, Seller may deliver to Purchaser a written notice terminating this Agreement. Upon delivery of a written notice terminating this Agreement and upon expiration of the notice period [of 10 days], Seller's obligations hereunder shall terminate automatically, and, *subject to applicable law*, Seller will retain as liquidated damages (and not as a penalty and except as provided below as Seller's sole remedy) the Deposit, and any other portion of the Purchase Price paid to Winter Borghardt on behalf of Seller as Seller's sole remedy. In such event, this Agreement shall thereon be terminated and cancelled and all rights and obligations of the parties under this Agreement that

> do not expressly survive the termination of this Agreement shall terminate and be null and void. Notwithstanding anything to the contrary, any action by Purchaser which results in an encumbrance or claim against the title to the Unit shall be excluded from the aforementioned limitation of damages, and Seller shall have the absolute right to bring any action at law or in equity if any lien, charge, or other encumbrance on the Unit results directly or indirectly from Purchaser's actions; the foregoing shall survive termination of this Agreement. Neither Purchaser nor Seller shall have any right to monetary damages except as specifically set forth in this Clause and Clause 15." (emphasis added).

11. Clause 15 which is headed "Purchaser's Remedies" is as follows:

> "If Seller fails to comply substantially with the terms and conditions of this Agreement and fails to perform any of the obligations required hereunder as and when due prior to the Closing Date *and Purchaser has complied therewith*, Purchaser may deliver to Seller a written notice demanding that Seller comply with this Agreement within Ten (10) days following Seller's receipt of the notice. If Seller has not complied upon the expiration of the Ten (10) day period, Purchaser may deliver to Seller a written notice terminating the Agreement. Upon delivery of a written notice terminating the Agreement, Seller shall refund to Purchaser the Deposit and any other portion of the Purchase Price paid up to the date of termination without interest or any other costs or compensation to Winter Borghardt by Purchaser if Winter Borghardt has not already delivered it to Seller in accordance with this Agreement, as Purchaser's sole remedy, and this Agreement shall thereupon be terminated and canceled and all rights and obligations of the parties under this Agreement that do not expressly survive the termination of this Agreement shall terminate and be null and void. Purchaser hereby waives all other remedies, including specific performance, actual and consequential damages, except as provided below. Neither Purchaser nor Seller shall have any right to monetary damages except as specifically set forth in this Clause and Clause 14." (emphasis added).

12. Applying the standard objective and contextual approach to contractual interpretation, the straightforward position appears to be as follows:

(i) Under clause 14, the seller served valid notices of default and then of termination on the purchaser. As found by the trial judge, the default of the purchaser was the failure to provide final design plans. There is no express requirement that the seller must not itself be in breach before it can serve valid notices of default or termination. The contract was therefore validly terminated by the seller (ten days after 4 October 2018) for repudiatory breach by the purchaser. The seller's (sole) remedy is the forfeiture of the deposit.

(ii) Under clause 15, the purchaser could only serve valid notices of default and then termination on the seller if the purchaser was not itself in breach ("and Purchaser has complied therewith"). It could not satisfy that requirement because of its own breach in failing to provide the final design plans. While the purchaser purported to serve a default notice on 6 December 2018, that could, in any event, have no legal effect because the contract had already been terminated by the seller for the purchaser's repudiatory breach. Furthermore, the purchaser did not go on to serve any notice of termination. The purchaser therefore had no right under clause 15 to the refund of the deposit.

13. To overcome that apparently straightforward application of clauses 14 and 15, the principal submission of Gail Lockhart Charles KC, counsel for the purchaser, focuses on the words "subject to applicable law" in clause 14. The Board now turns to examine that submission.

## 4. "Subject to applicable law": is it a bar to termination by the seller that the seller is itself in breach of contract?

14. Ms Charles submits that the general law is that a party which is not itself ready, willing and able to perform its own outstanding obligations cannot validly serve an effective notice of default and then of termination for the other party's default. She argues that the phrase "subject to applicable law" in clause 14 incorporates that general principle of law; and that that general principle of law is supported by the two cases referred to by Sir Michael Barnett P in the Court of Appeal, at para 29, namely *Quadrangle Development and Construction Co Ltd v Jenner* [1974] 1 WLR 68 ("*Quadrangle*"), at p 71 and *Dhand v Oakglade Investments Ltd* [2012] EWCA Civ 286; [2013] 1 All ER (Comm) 22 ("*Oakglade*"), at para 39.

15. The Board disagrees that that is a correct analysis of the general law on termination of a contract. There are often situations where both parties are alleging that the other is in repudiatory breach of contract. But if one of the parties (A) then decides to terminate the contract for the other's (B's) repudiatory breach, it is entitled to do so if it can establish B's repudiatory breach. A is not barred from doing so because of its own repudiatory

breach. Looked at from the perspective of B, if B elects not to accept a repudiatory breach by A as terminating the contract, the contract continues in existence.

16. This ties directly to the well-known obiter dicta of Asquith LJ in *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417, 421:

> "An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind."

17. That a party is normally not barred from terminating because of its own breach is directly supported by the following passage from *Chitty on Contracts*, 36th ed (2026), para 28-068, which was cited with approval in *DRC Distribution Ltd v Ulva Ltd* [2007] EWHC 1716 (QB) at paras 54–55:

> "unless the obligation of A to perform is a condition precedent to B's obligation to perform, the fact that A is in breach of contract should not act as a barrier to A's ability to terminate on the ground of B's breach."

18. This is not to cast any doubt on the two cases referred to by Sir Michael Barnett P. Both concerned contracts for the sale of land incorporating standard conditions of sale (albeit in the second they were the standard conditions for an auction sale).

19. In *Quadrangle*, the claimant purchaser served on the defendant vendor a 28-day notice to complete pursuant to the conditions of sale. The purchaser then failed to complete by the expiry of the notice period. By reason of the notice, time had become of the essence. The vendor sought to terminate the contract and to forfeit the deposit. The purchaser brought an action for specific performance. It was held that that action could not succeed because the notice making time of the essence was equally applicable to the purchaser as to the vendor so that the purchaser had to be ready and willing to complete the sale at the time of giving the notice and throughout the notice period (and here it was not).

20. In *Oakglade* the claimant purchaser and the defendant vendor had made agreements for the sale of land being sold at auction where the price depended on whether the reserve price had been reached or exceeded. The vendor sought to have the agreements completed at higher prices than had been agreed and served notices to complete. When the purchaser refused to do so, on the basis that the prices were not the agreed prices, the vendor purported to terminate the contracts and to forfeit the deposits. The purchaser was held entitled to recover the deposits. This was because the notices to complete were invalid because they did not relate to the contracts that had been agreed. In any event, and

relying on *Quadrangle*, the vendor could not rely on the notices to complete to put the purchaser in breach of contract because, at the time the notices to complete were served, the vendor was not ready and willing to complete the contracts that had actually been agreed.

21. Those two cases are plainly distinguishable from this case. They were concerned with contracts for the sale of land. The notices to complete were designed to make time of the essence for the performance of all the counterparty's obligations under the contract. In contrast, this case concerns what is more accurately classified as a design and build contract where the first notice is a default notice and the second is a termination notice. The default notice made time of the essence as regards the provision by the purchaser of the final design plans, but it was limited to that next step of the contract. The seller was not demanding payment of the balance of the purchase price and was not making time of the essence for completion of the whole project. Moreover, in both those earlier cases there were standard conditions which expressly required that the person giving the notice to complete must be "ready and willing" or "ready, willing and able" to complete. There was no equivalent requirement in clause 14.

22. There is a further significant problem facing Ms Charles. Her submission requires feeding the general law into the phrase "subject to applicable law" in clause 14. But those words, in the place where they appear, are not qualifying the right to terminate. Rather they are qualifying the consequences that follow termination ie the retention of the deposit by the seller and the fact that all other claims for damages are excluded. Put shortly, the focus of Ms Charles' submission on the seller's own breach as invalidating the notices given is not, applying clause 14, "subject to applicable law". There is therefore no requirement in clause 14 that the seller is not entitled to terminate the contract because of its own breach even if that were the general law (which, as has been made clear in paras 15–17 above, it is not).

23. It may be that "subject to applicable law" is concerned with equitable relief against forfeiture or with kinds of damage liability which cannot, by law, be excluded. But no submissions to that effect were made on behalf of the purchaser and it would therefore be inappropriate for the Board to say anything more about that.

24. It follows that, applying clause 14, the seller is entitled to forfeit the deposit.

## 5. Conclusion

25. The Board will humbly advise His Majesty that the appeal should be allowed.