COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp No. 102 of 2023

BETWEEN

REPLAY DESTINATIONS (BAHAMAS) LTD

Appellant

AND

ROYAL LIMITED

OCEAN CLUB LUXURY ESTATES LIMITED

Respondents

BEFORE: **The Honourable Sir Michael Barnett, President, Kt**
The Honourable Mr. Justice Isaacs, JA
The Honourable Madam Justice Crane-Scott, JA

APPEARANCES: **Mr. Raynard Rigby, QC, with Ms. Asha Lewis, Counsel for the Appellant**
Ms. Gail Lockhart-Charles, KC, with Ms. Syann Thompson, Counsel for the Respondents

DATES: **23 January 2024; 27 March 2024**

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Civil Appeal – Contract – Breach of contract - Agreement for sale – Whether there was a breach of the agreement – Forfeit of Deposit – Notice to Terminate -Whether the judge was plainly wrong

The parties agreed to the sale/purchase of a condominium unit which was being constructed by the seller/appellant and the purchaser/respondents paid a substantial deposit to the appellant. There was a dispute as to design plans and approval of same between the parties. The respondents filed suit in the Supreme Court for breach of the agreement and sought the return of its deposit. The judge found that both the seller and the purchaser were in breach of the sales agreement and an addendum made to it. The judge ordered that the deposit be returned to the purchaser and that each party bear their own costs of the action. The seller has appealed the decision having 29 grounds of appeal, they seek to an order that they be allowed to keep the respondents' deposit. The Court heard the parties and reserved its decision.

Held: the appeal is dismissed; the judgment of the trial judge requiring the appellant to refund the deposit is affirmed. The appellant shall pay the costs of this appeal to be taxed if not agreed.

As the judge found that the seller was in breach of its obligation to verify corrected measurements the seller was not entitled to give notice to terminate the agreement. In the result, the seller was not entitled to forfeit the deposit and the judge was right to require the seller to return the deposit.

Oakglade Investments Ltd v Dhand [2012] EWCA Civ 286 considered
Quadrangle Development and Construction Co Ltd v. Jenner [1974] 1 WLR 68 considered

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JUDGMENT

Judgment delivered by The Honourable Sir Michael Barnett, P:

1. This appeal arises out of a dispute between a purchaser and a seller in relation to the sale of an apartment unit. The seller agreed to sell and the purchaser agreed to buy a unit on Paradise Island being built by the seller. A dispute arose and the seller purported to terminate the sales agreement and forfeit the purchaser's deposit. The purchaser commenced an action in the Supreme Court asserting that the seller breached the agreement and claimed damages for breach of contract, which included a demand for the return of the deposit.

2. The seller filed a defence rejecting the purchaser's claim. It did not itself file a counterclaim claiming a right to terminate.

3. After a trial, the judge held that both the seller and the purchaser were in breach of the sales agreement and an addendum made to it. The judge ordered that the deposit be returned to the purchaser and that each party bear their own costs of the action.

4. The seller has appealed that decision. It seeks an order that it be allowed to keep the deposit. The purchaser has not sought to challenge the judgment, notwithstanding that it claimed more than the return of the deposit in its writ.

5. For reasons which are set out in this judgment I am satisfied that the appeal must be dismissed and that the judgment should be affirmed.

Background

6. The parties agreed the following facts.

> **"STATEMENT OF FACTS**
>
> **1. By a written Agreement for Sale and Addendum between the Defendant as Seller and the First Plaintiff as Purchaser and executed by the parties respectively on 4th and 8th March, 2017 ("the Agreement") the Defendant agreed to sell and the Plaintiff agreed to purchase the property known as Unit 903 in One Ocean Condominium, Paradise Island, The Bahamas ("the Unit") upon the terms and conditions contained in the Agreement.**
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> **2. In pursuance of the Agreement the Plaintiff paid the deposit in the sum of $774,590.53.**
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> **3. The Agreement contained several critical clauses, which addressed the parties' contractual duty and obligations in respect of the completion of the Unit and the sale thereof and which they were bond to comply with. The clauses (in part) are:**
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> **THE STATEMENT SETS OUT A NUMBER OF CLAUSES THAT ARE NOT NECESSARY TO RECITE AS THEY ARE RECITED LATER IN THE JUDGMENT**
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> **4. On 12th September 2018 the Defendant delivered to the Plaintiff a Default Notice requiring the Plaintiff to deliver properly coordinated Final Approved Design Plans within 10 days from the date of the Notice.**
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> **5. The Defendant issued a Termination Notice dated 4th October, 2018 to the Plaintiff that purported to terminate the Agreement occasioned by the Plaintiff's breach and also purported to retain the Deposit paid thereunder as liquidated damages. The Notice alleged that the Plaintiff was in breach of the Agreement, as follows:**
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> > **Consequent upon repeated defaults by Purchaser of Section 2D Addendum One to the Agreement for Sale, Seller has right to terminate the said Agreement for Sale, for the following (inter alia) reasons.**
> >
> > **(i) Despite the best efforts to modify and adjust the existing field condition and efforts by all of Replays MEP design team and the clear agreement in Exhibit 1 to Addendum to Agreement for Sale that the interior metal**

frame ceiling assumes flat configuration, Purchaser continued to design curved and coffered ceilings that could not fit into the space provided and instead Purchaser insisted that Seller provide further dimension details to accommodate a curved and coffered ceiling.

(ii) Purchaser's unwillingness to have his architect and visit the building to finalize the Final Design Plan conflicts with basic industry practice and calls into question Purchaser's intent to complete the construction and acquisition of the unit.

(iii) Purchaser's drawings are no more than glorified furniture plans. The only constructible portion of the plans relate to mechanical and electrical shop drawings produced by Seller's engineers. Purchaser has been made aware of this design impasse for over three months and has made no attempt to resolve issues to enable continued construction of the unit. Purchaser's plans are uncoordinated, without industry standard version date references, and cannot be constructed within the space available in Unit 903.

(iv) Rather than finding simple design solutions to the outstanding issues, Purchaser continues to raise inconsequential obstacles for resolution by Seller in a blatant attempt to delay Seller's ability to complete construction of the unit. This is in contrast to the cooperation ceded to Purchaser in granting access to Seller's suppliers and designers to modify and change the design to the windows and glazing system, electrics, air conditioning and structural elements within the Unit over the past 12 months. A level of cooperation and professionalism that has not been reciprocated by Purchaser and in turn has hindered the works to the current stalemate that presently exists.

(v) Purchaser requested that Seller install, beyond the improvements required for the white box: curved and coffered ceilings, additional plywood backing, alternative light fixtures, modifications to the air conditioning system, concrete stair, and floor tiles. Purchaser continues to raise minor issues to delay execution of the Second Addendum and pay a deposit

relating to the above modifications, thereby further delaying Seller's ability to complete the construction.

(vi) Purchaser is in default of Section 20 of the Agreement for Sale, which provides that "Time is of the essence of this Agreement"

6. The Defendant maintained that it was entitled to treat the Agreement as terminated in strict accordance with its terms and to retain the Deposit paid thereunder as liquidated damages. The Plaintiff maintained that the Defendant was in breach of the Agreement.

7. The Plaintiff for its part served a Notice to Complete dated 6 December, 2018 identifying breaches it says were committed by the Defendant as follows:

AND WHEREAS: The Seller has substantially failed to comply with the terms and conditions of the Agreement for Sale and the Addendum as follows:

· Pursuant to Article 3A of the Addendum, the Seller is obliged to verify all on-site measurements in order to allow the Purchaser's Conceptual Design Plans to be incorporated into the Final Approved Design Plan, in accordance with which the Seller is contracted to deliver the unit to a "White Box" condition as defined in the contract. The Purchaser has repeatedly submitted Conceptual Design Plans, only to be told several months later that amendments to the aforementioned plans are required as either the on-site measurements supplied by the Seller and relied on by the Purchaser were inaccurate or there were inaccuracies in the HVAC, Plumbing, Electrical, Structural Engineering plans also provided by the Seller and relied on by the Purchaser, resulting in the Seller not being able to build the submitted plans within the available space. The Purchaser has repeatedly requested a final, full and complete set of up-to-date comprehensive measurements of the unit to be supplied and verified as part of the Seller's aforementioned duty. The Seller has thus far failed and / or refused to discharge the aforementioned duty, thereby preventing the Purchaser from once again revising the Purchaser's Conceptual Design Plans for incorporation by the Seller into the Final Approved Design Plans.

· By declining to provide a final full set of up-to-date comprehensive measurements via a measured survey of the unit and providing incorrect and incomplete measurements, the Seller has made it necessary for the Purchaser to revise its Conceptual Design Plans twice incurring additional and unnecessary expense and causing considerable delay.

· Following the Purchaser's submission of its revised Conceptual Design Plans on the 1st of December 2017 the Seller implicitly accepted those plans as suitable for incorporation by the Seller into the Final Approved Design Plans and therefore a complete discharge of the Purchaser's obligations in that regard, by proceeding to instruct plumbing, electrical, structural and HVAC engineers to design the supply systems for the unit based on the Purchaser's Conceptual Design Plans. Furthermore, the Seller commenced installation works on-site based upon the Conceptual Design Plans and signed off on plumbing, electrical, structural and HVAC engineers plans that had been prepared. However, the on-site measurements provided by the Seller proved once again to be incorrect and the Seller advised once again that the Conceptual Design Plans would need to be amended as a result. Given the history of this aspect of the contract, the Purchaser has declined to have amended plans prepared in the absence of comprehensive accurate measurements being supplied by way of a measured survey of the site, which the Seller has refused to provide.

THEREFORE TAKE NOTICE THAT pursuant to Article 15 of the Agreement for Sale, the Purchaser hereby demands that the Seller comply with and discharge its obligations under the Agreement for Sale and the Addendum within Ten (10) days of the date hereof as follows:

· By providing the Purchaser with a detailed, comprehensive accurate measured survey of the unit "as built" with full details of all supplies and allowing the Purchaser at least Twenty One (21) days after provision of the measured survey to submit its Revised Conceptual Design Plans.

· By preparing, within Twenty One (21) days after the submission of the Revised Conceptual Design Plans, the Final Approved Design Plans and providing them to the Purchaser within Seven (7) days thereafter along with a detailed "Milestone Schedule" as provided for in Article 2E of the Addendum, having consulted all suppliers and contractors for both the Seller and Purchaser and ensuring that such "Milestone Schedule" is both realistic and achievable.

· By providing to the Purchaser, no later than the provision of the Milestone Schedule, a copy of a Certificate of Insurance evidencing the Seller's purchase of insurance coverage as provided for in Article 2C of the Addendum.

· By proceeding with all possible speed thereafter to complete the construction of the unit and discharge all of its duties and obligations under the Agreement for Sale and the Addendum.

AND FURTHER TAKE NOTICE THAT if the Seller fails to comply with this Notice to Complete within the time period specified, the Purchaser will serve a further notice terminating the Agreement for Sale and the Addendum in accordance with Article 15 thereof and demanding the refund of its deposit, claiming compensation for all additional costs and expenses incurred due to the Seller's defaults while reserving all of its other rights and claims against the Seller."

7. The parties identified the following issues as issues to be determined by the court.

STATEMENT OF ISSUES

1. Whether the Plaintiff provided the Defendant with the Final Approved Design Plans by 31st March 31, 2017 (or at all) as defined by and in accordance with clause 2D of the Agreement?

2. Whether the Plans provided by the Plaintiff was constructible (or of a construction character) or could lead to the completion of the White Box?

3. Whether the Plaintiffs failed to produce or deliver the Final Approved Design Plans and if so whether this failure caused the "White Box" to be incapable of completion?

4. Whether the Plaintiffs failed to produce or deliver the Final Approved Design Plans and if so, whether this failure amounted to a breach of clause 2D of the Agreement?

5. Whether the Default and Termination Notices issued by the Defendant were issued in accordance with the terms of the Agreement?

6. Whether in circumstances the Defendant was entitled to terminate the Agreement?

7. Whether the Defendant breached the Agreement as particularized in the Plaintiff's' Notice to Complete or at all.

8. Whether the Plaintiffs cause of action is maintainable in the factual circumstances?

9. Whether the Deposit was liquidated damages (payable to the Defendant for the breach) or should the Deposit be returned to the Plaintiff?

10. Whether the Plaintiff has suffered loss and damages in the sum of $3,081,375.67 or otherwise?

8. At the trial each party called witnesses who were cross examined.

9. The trial judge gave an oral judgement 29 April, 2023. There is no transcript of that oral judgment. But in her full reasoned judgment delivered on the 30 June, 2023, she sets out what she said was the oral judgment. She said:

"1. The Court gave its oral judgment on the 28th April 2023 and stated that expanded reasons in writing would be provided, which it now does.

2. By the courts oral judgment the court found that upon its interpretation of the relevant clauses of the agreement for sale and review of the related correspondence that there was a major disconnect and breakdown in communication by the parties. This was evidenced by the continuous resending of plans and drawings. There were breaches of the terms of the contract by each of the parties.

3. There was a lack of communication claimed by the Plaintiff who alleged that the Defendant did is (sic)not tell them that the plans were inadequate. The Defendant claimed otherwise.

4. A milestone schedule was provided but due to the numerous changes which had to be made to it as a result of the changes

made to the design plans, a final milestone schedule could not be provided.

5. The Plaintiff did not provide final approved plans as they could not proceed with the onsite measurements required to be provided by the Defendant.

6. Clarity was never gained by either party as to their respective concerns and obligations.

7. Although the Defendant attempted to bring finality to the issues, the duties of each of the parties got lost. The Defendant was not entitled to keep the full sum of the Plaintiffs deposit.

8. By Clauses 14 and 15 of the agreement, both parties waived their right to monetary damages.

9. Both parties were in breach of the sales agreement and by virtue of Clauses 14 and 15, the Defendant must return the Plaintiff's deposit and the Defendant retains ownership of the unit.

10. There was no order as to costs as both parties were in breach."

10. In her fully reasoned judgment, the judge identified the issues for determination differently than in the agreed statement of issues. She said:

> **"17.The Plaintiffs [Purchasers] contended that the two key issues which had to be determined were: -**
>
> **17.1 Whether the Plaintiff [Purchaser] complied with its obligations to supply final design plans under the Agreement for Sale?; and**
>
> **17.2 Whether the Defendant [Seller] was entitled to terminate the contract on account of the Plaintiff's [Sellers] failure to supply such plans?**
>
> **18. The Defendant [Seller] contended that the chief issue which the Court had to determine was the parties' intention with respect to the terms of the Agreement for Sale and the Addendum and to interpret the material clauses contained therein."**

11. The judge then summarized the evidence and set out the various submissions of the parties. I do not propose to record them in this judgment. She then gave her expanded reasons for her decision. She said:

“101. The Plaintiffs’ claim against the Defendant is for damages resulting from a breach of a contractual agreement with respect to the sale and purchase of a condominium unit. They claim that the breach occurred when the Defendant failed to complete its obligations pursuant to the Sales Agreement and notwithstanding issued a Notice to Complete. In turn, the Defendant’s assert that by the Plaintiffs’ inaction they were unable to complete their obligations.

102. The parties’ both provided varying interpretations of the Sales Agreement which tasked the Court with applying principles of interpretation

White Box

103. While the Agreement for Sale spoke to the completion of the White Box, Clause 2 of the Addendum to the Agreement of Sale made it clear that the completion of the White Box should be based on the stipulations contained in the Addendum. Moreover, Clause 1 of the Addendum stated that where there any inconsistencies between the two documents the terms and provisions of the Addendum would prevail. Clauses 1 and 2: -

> **1. Inconsistencies. In the event of any inconsistencies between the terms and provisions of the Contract and this Addendum, the terms of this Addendum shall control and take precedence. Subject to the foregoing, the Contract and this Addendum are collectively referred to herein as the "Agreement."**
>
> **2. White Box Purchase. Purchaser and Seller hereby acknowledge and agree that, notwithstanding any provision in the Contract and any addenda or exhibits attached thereto to the contrary, and in consideration of the Purchase Price asset forth in the Contract, Seller is selling to Purchaser, and Purchaser is purchasing from Seller, the Unit constructed substantially in a "White Box" condition whereby the Seller will complete all of the works detailed on Exhibit 1 ("White Box Completion”) and in accordance with the Final Approved Design Plan, a draft of which is attached hereto as Exhibit 2. The MEP installations identified on Exhibit 1 to be installed at "White Box” may require changes to Common Element supply and drain risers and structural elements. Seller may need to obtain Association and/or third party owner**

access and approval to complete these Common Element changes. Certain features depicted in conceptual marketing materials delivered to Purchaser prior to execution of the Agreement are options not included in "White Box" contract.

D. By March 31, 2017, Purchaser shall provide design plans to Seller and further by April 30, 2017 Purchaser shall complete and submit to Seller its final customized design plans and specifications for the interior and exterior of the Unit approved by the Association with the consent of any third party as necessary consistent with this Addendum and the Conceptual Plan (defined in Section 3 below) (the "Final Approved Design Plan"), together with full details of any items required inorder to complete the "White Box".

F. Except as otherwise provided herein, the total cost of all "White Box" materials, works, shipment costs and duties shall be paid for by the Seller for which the Seller will take full responsibility for such items.

104. Accordingly, the Plaintiffs as the Purchaser were required to provide any and all design plans necessary for the completion of the White Box. This included providing the design plans to the Defendant by 31 March 2017 and the final customized design plans and specifications for the interior and exterior of the Condo as approved by the Condominium Association and any necessary third party along with what was known as the Conceptual Plan.

105. By Clause 3 of the Addendum, the Conceptual Plan was the Plaintiffs' conceptual design plans for the Condo which depicted the proposed MEP installation location in the Condo and would have to have the features depicted in Clause 2(H) a-d were:-

"(a) to fit within the measured Unit's space,

(b) be operationally functional,

(c) code compliant, and

(d) not to adversely affect aesthetics, longevity or useful life of existing Common Area installations

Once these requirements were met by the Defendant / Seller, as a Association Board member, agreed to vote in favor of such elements of the Draft Design Plan. If the Draft Design Plan did

not meet requirements (a) - (d), the Draft Design Plan would have to be revised before seeking Association approval and incorporation into the Final Approved Design Plan and permit application. 106.In addition to the above, the Plaintiffs as the Purchasers were also required to provide full details of any items required in order to complete the "White Box". The Plaintiffs submitted that they provided the necessary documents for the construction of the White Box within the specified time. The Defendant submitted that the Plaintiff did not submit all of the necessary documents required under the Sales Agreement in order for them to complete the White Box and when they did submit them it was not in the time specified in the Addendum.

107. The Plaintiffs also stated that if the documents submitted were not sufficient or adequate the Defendant did not inform them of the inefficiencies and did not advise them of what more would have been required. By Clause 2 of the Addendum the works detailed on Exhibit 1 constitute the White box completion. The Plaintiffs stated that they sent the required documents prior to 30th April 2017 as seen by the email from Paul Rothschild to Graeme Moran dated 16th March 2017.

108. The exhibits to the email were entitled 'Draft White Box Plans and Draft Conceptual Plans. By email dated 27th April 2017 the Plaintiffs sent electrical plans, plumbing plans and HVAC. Subsequent emails sent showed that there were issues with the plans sent by the Plaintiffs which in turn saw the Defendant providing them with plans in an attempt to facilitate getting the work done. While the Defendant had to ensure that the drawings and plans were correct and approve them for construction it was not their duty under the Sales Agreement to provide them but the Plaintiffs. The Plaintiffs did send drawings, but the Defendant who was responsible for construction determined that they were not adequate or final plans

109. By emails dated 3 October 2017 and 3th November 2017 the Plaintiffs outlined their frustration with the delay incompletion of the construction. By the 28th November 2017 email from Mr. Rothschild to Mr Moran and Maxiann Forbes, he outlined his version of the meeting held a day prior. He was to provide updated drawings subject to minor alterations and co-ordination. The Defendant was to organize meetings with inter alia structural engineers, the air conditioning company,

plumbers, electricians scan the signed off drawings and email them to Mr. Rothschild, survey floors, look at the storm drains to avoid possible conflicts with HVAC & STRUCTURAL, check on HVAC & PLUMBING drawings, complete draft fire sprinkler drawings, inter alia. This was confirmed by the Meeting Minutes dated 28th November 2017. This meeting obviously was an attempt to salvage the sale, obtain drawings which the Defendant could use and obtain the additional drawings for the services. By this meeting, it is apparent that obligations were outstanding by each party. They each blamed each other for the non-compliance with the terms of the agreement. If the measurements were inconsistent as the Plaintiffs maintain. A site visit would have remedied this. There was no site visit and the Defendant maintained that the measurements were correct.

110. On 17th December 2017, by email, Mr. Rothschild sent the latest Architectural Drawings By email dated 14th December 2017 there seemed to be more progress than had been seen in the previous 3 months. However, by email dated 24th March 2018 from Mr. Rothschild to Mr. Snyed and Mr. Moran, there were still several outstanding items which needed to be received, reviewed, agreed and/or signed off on inclusive of items which would make up the Conceptual and Final Design Plans for the White Box construction.

111. On 29th March 2018 by response email Mr. Moran advised Mr. Rothschild that the bulk of his concerns related to administrative matters such as costing, change orders, consultant signoff and inspections that would normally be completed in parallel to the White Box construction which commenced when the Roof & Glazing Works commenced onsite. Thereafter, on 6th April 2018 Mr. Rothschild sent PDF shop designs for the Glass Walls & Glass Sliding Doors and asked for them to be reviewed along with the White Box co-ordination/construction drawings.

112. After several more months of back and forth between the parties, the White Box was still not completed and the Default Notice was issued on 12th September 2018 on the basis that the Plaintiff's proposed final design plans did not fit into the available space within the Condo which had been relayed to the Plaintiffs who had then failed to provide the Final Design Plans more than sixteen months after the 30th April 2017.

113. The Default Notice gave the Plaintiffs ten days' notice to comply, failing which, the Agreement would be terminated and the deposit would be retained as liquidated damages. Thereafter, after more back and forth between the parties' counsel the Defendant issued the Termination Notice dated 4th October 2018 and the Plaintiffs issued a Notice to Complete dated 6th December 2018 which the Defendant's Counsel acknowledged would not be honored.

114. Counsel for the Plaintiffs allege that one of the reasons the correct plans could not be provided was due to the failure of the Defendant to provide on-site measurements. However at trial the Plaintiff's witnesses confirmed that the Defendant did provide on-site measurements which were inaccurate which the Defendant denies. Clause 3A of the Addendum states: -

> **"Seller will verify on site measurements and inform Purchaser of any necessary revisions required prior to making any changes or incurring any costs, both of which require sign off by Purchaser."**

115. The Court's interpretation of this clause is that the Defendant was required to verify on site measurements for the Plaintiffs and where revisions were made after the verification, inform the Plaintiffs before changes were made and costs were incurred as a result of those changes. The Plaintiffs were required to sign off on these changes as they were incurring costs. There was no evidence that the Defendant obtained the sign off on the changes before making the changes to the measurements.

116. Having reviewed these emails and other email it is apparent that there was a major disconnect between the parties as was apparent from the continuous resending of plans and drawings as well as from the meeting held in November of 2017 where the varied obligations were spelt out which included the production of a final design plan. The Plaintiffs would specifically ask the Defendant to confirm site measurements and the evidence showed that incorrect measurements were initially sent requiring new measurements. Despite this, the Plaintiff did not provide any final plans based on the corrected measurements sent to them.

117. As for the production of a Milestone Schedule, Clause 2E provides:-

"E. Seller shall provide Purchaser within seven (7) days after mutual execution and delivery of counterparts to the Agreement, a Milestone Schedule in keeping with the Agreement, identifying time lines of what works will be completed when and by which date any Purchaser designs or materials need to be completed or physically at the Unit in order to complete such work. Time shall be of the essence and failure to meet critical path deadlines may result in additional cost and delay in completion of the Unit. The Milestone Schedule is subject to change consistent with the Final Approved Design Plan.

118. From the evidence provided by both parties, a Milestone Schedule was produced however, it is apparent that due to the numerous changes which had to be made to the design plan a final Milestone Schedule could not have been provided. As the Milestone Schedule was subject to change consistent with the Final Approved Design Plan, it was obvious that as there was no Final Approved Design plan there could not be a final Milestone Schedule.

119. In light of the foregoing, I made the following findings. The Plaintiffs did not provide a Final Approved Design Plan. There were inaccuracies with the initial on-site measurements required to be provided by the Defendant. After revision of measurements no final plans were provided to the Plaintiff. While both parties made attempts to complete the construction under the Sales Agreement, clarity was never gained by either party on their respective concerns, and on the specific obligations of each party. While the Defendant attempted to bring finality to the issues, they were not entitled to keep the Plaintiffs deposit for the reasons I stated in the judgment.

120. Clause 2F provides:-

"Except as otherwise provided herein, the total cost of all "White Box" materials, works, shipment costs and duties shall be paid for by the Seller for which the Seller will take full responsibility for such items."

121. The Defendant stated that they had begun construction of the White Box despite not being able to come to an agreement on the plans and drawings. The above clause places the responsibility for the purchase and construction costs of the White Box on the Defendant.

122. The Agreement for Sale speaks definitively to the parties remedies. Clause 14. Seller's Remedies states:-

> **"14. Seller's Remedies.**
>
> **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 contemplated in Clause 5, 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 Borghordt 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 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."**
>
> **Clause 15. Purchaser's Remedies states:-**
>
> **"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 (10) day period, Purchaser may deliver to Seller 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 Selier 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."

By Clause 14 and Clause 15 both parties waived their right to monetary damages if there was a breach of the Sales Agreement. Clause 15 goes a step further by stating that the Purchaser/Plaintiffs waive actual and consequential damages.

125. There was no ambiguity in these provisions so as to invoke a more stringent interpretation rule.

126. Accordingly, I had held that both parties were in breach of the Sales Agreement which led to a delay in completion of the Agreement for Sale and based on Clauses 14 and 15, as both parties were at fault, both parties are left with no recourse for damages under the Agreement of Sale. Therefore, I make no order as to damages. Their remedies are set out in these two clauses."

12. The seller has appealed that decision. As I said earlier, there is no respondent's notice seeking to affirm the judgment on other grounds. The seller has proffered 29 grounds of appeal. It is not necessary to list them all as in my judgment, they can be summarized in one ground which is set out in paragraphs 12 to 15 of the appellants written submissions:

"**12. The findings of fact made by the Learned Judge went against the Respondents and their pleaded case set out in the Writ of Summons, wit (sic) the Learned Judge did not find that**

the Appellant breached the Agreement as was specifically alleged by the Respondents.

13. The findings made by the Learned Judge are vital for this Court to assess whether the ultimate decision by the Learned Judge on the right of the Respondents to have its deposits and not to pay the Appellant's cost was reasonable in all of the circumstances.

14. The findings made by the Learned Judge were such that the only reasonable and logical conclusion to flow therefrom was to recognize the right of the Appellant to retain the deposit occasioned by the breaches committed by the Respondents.

15. The fundamental error committed by the Learned Judge was to essentially ignore her earlier findings when considering the issue of the remedies available to the parties under the Agreement for Sale."

13. In short, the gravamen of the appeal is that the purchaser did not prove and the court did not find that the seller was in breach of the agreement for sale and addendum as alleged in the statement of claim. Therefore it says that the purchaser is not entitled to the return of the deposit as ordered by the court.

14. The purchaser's pleaded case was as follows:

"7. In compliance with clause 2D of the Contract the Purchaser duly provided the Seller with the design plans by March 31, 2017 and the Purchaser duly completed and submitted to the Seller its final customized design plans and specifications the "Final Approved Design Plan" as defined by and in accordance with clause 2D.

8. The Seller has in breach of the Contract:

i. Failed to verify onsite measurements

ii. failed to provide a Milestone schedule

iii. failed to substantially complete the "WhiteBox" finish.

9. The Seller informed the Purchaser by Notice dated 4 October that it intended to terminate the contract and retain the Deposit paid thereunder as well as any portion of the purchase price paid thereunder by or on behalf of the Purchaser.

10. The said notice was served in circumstances where the Seller was not entitled to terminate the Contract, as the Purchaser had

complied with all of its obligations under the Contract, and the Seller was itself in breach, as described above.

11. By reason of the Defendant's service of the purported termination notice, the Defendant evinced an intention no longer to be bound by the Contract and repudiated it.

12. In the course of subsequent electronic mail and telephone communications and in a letter dated 28 May, 2018, the Purchaser accepted that repudiation.

13. By reason of the Defendant's breach of contract and repudiation of the Contract the Purchaser has suffered loss and damage:

PARTICULARS

a) Deposit paid $774,590.53

b) Cost of actual contractual obligations, wasted materials and labour on work in progress at the date of repudiation $1,806,785.14

c) Loss of profit $500,000.00

14. By reason of the facts and matters as aforesaid, the Second Plaintiff claims the sum of $3,081,375.67 from the Defendant."

15. The seller/appellant's case is that the purchaser/respondents having failed to prove that the seller:

> **"i. failed to verify onsite measurements**
>
> **ii. failed to provide a Milestone schedule**
>
> **iii. failed to substantially complete the "WhiteBox" finish"**

the purchaser's action ought simply to have been dismissed and the seller ought not to have been required to return the deposit.

16. The appellant's case is that it is not enough to say that both parties were in breach of the agreement. The purchaser must prove that the seller was in breach as alleged in the statement of claim. The seller submits that this was the case they were asked to meet. They say the court cannot decide the action otherwise than on its pleaded ground. It must be recalled that there was no counterclaim by the seller and there was no respondent's notice in this appeal by the purchaser.

17. It is therefore necessary to ascertain what the judge found with respect to each of the three alleged breaches listed above.

Verify Onsite measurements.

18. In her judgement the trial judge said:

> **"114. Counsel for the Plaintiffs allege that one of the reasons the correct plans could not be provided was due to the failure of the Defendant to provide on-site measurements. However at trial the Plaintiff's witnesses confirmed that the Defendant did provide on-site measurements which were inaccurate which the Defendant denies. Clause 3A of the Addendum states: -**
>
> **"Seller will verify on site measurements and inform Purchaser of any necessary revisions required prior to making any changes or incurring any costs, both of which require sign off by Purchaser."**
>
> **115. The Court's interpretation of this clause is that the Defendant was required to verify on site measurements for the Plaintiffs and where revisions were made after the verification, inform the Plaintiffs before changes were made and costs were incurred as a result of those changes. The Plaintiffs were required to sign off on these changes as they were incurring costs. There was no evidence that the Defendant obtained the sign off on the changes before making the changes to the measurements.**
>
> **116.Having reviewed these emails and other email it is apparent that there was a major disconnect between the parties as was apparent from the continuous resending of plans and drawings as well as from the meeting held in November of 2017 where the varied obligations were spelt out which included the production of a final design plan. The Plaintiffs would specifically ask the Defendant to confirm site measurements and the evidence showed that incorrect measurements were initially sent requiring new measurements. Despite this, the Plaintiff did not provide any final plans based on the corrected measurements sent to them."**

19. The respondents/purchasers' case is that the appeal is fundamentally flawed, it says in paragraph 7 of its submissions that:

> **"The Appellant cites paragraphs 116 - 118 of the Judgment regarding the learned judge's finding that that Royal did not provide a Final Approved Design Plan. However, the Appellant fails to draw paragraphs 114 and 115 to the attention of the Court of Appeal. These paragraphs, which are the lead up to**

what is said in 116 and 118, make it clear that the Court found that Replay, the Appellant, was in breach of the Agreement for Sale by failing to provide the onsite measurements as required and was further in breach by failing to obtain Royal's (the Purchaser's) approval prior to issuing revised plans. See paragraphs 114 through 116 of the Reasons".

20. Regretfully, these paragraphs are not particularly clear. The inference is that the seller did provide corrected measurements. However, the sentence *"There was no evidence that the Defendant obtained the sign off on the changes before making the changes to the measurements"* appears to be a finding that the seller did not provide a verification of the corrected measurements as required by the agreement and addendum. The judge made no finding as to how that verification ought to have occurred, but it appears that it is in fact a finding that there was a breach of that obligation. The sentence just cited is meaningless otherwise than as a finding that there was a breach of that obligation to verify.

Milestone schedule

21. In her judgment the trial judge said:

> **"From the evidence provided by both parties, a Milestone Schedule was produced however, it is apparent that due to the numerous changes which had to be made to the design plan a final Milestone Schedule could not have been provided. As the Milestone Schedule was subject to change consistent with the Final Approved Design Plan, it was obvious that as there was no Final Approved Design plan there could not be a final Milestone Schedule."**

22. In my judgement, the judge did not find that the seller/appellant failure to provide a Milestone Schedule was in breach of its obligations under the Agreement and Addendum.

The "WhiteBox" finish

23. The trial judge said:

> **103. While the Agreement for Sale spoke to the completion of the White Box, Clause 2 of the Addendum to the Agreement of Sale made it clear that the completion of the White Box should be based on the stipulations contained in the Addendum. Moreover, Clause 1 of the Addendum stated that where there any inconsistencies between the two documents the terms and provisions of the Addendum would prevail...**
>
> **104. Accordingly, the Plaintiffs as the Purchaser were required to provide any and all design plans necessary for the completion of the White Box. This included providing the design plans to the Defendant by 31 March 2017 and the final customized design plans and**

specifications for the interior and exterior of the Condo as approved by the Condominium Association and any necessary third party along with what was known as the Conceptual Plan.

105. By Clause 3 of the Addendum, the Conceptual Plan was the Plaintiffs' conceptual design plans for the Condo which depicted the proposed MEP installation location in the Condo and would have to have the features depicted in Clause 2(H) a-d were:-

"(a) to fit within the measured Unit's space,

(b) be operationally functional,

(c) code compliant, and

(d) not to adversely affect aesthetics, longevity or useful life of existing Common Area installations

Once these requirements were met by the Defendant/Seller, as an Association Board member, agreed to vote in favor of such elements of the Draft Design Plan. If the Draft Design Plan did not meet requirements (a) - (d), the Draft Design Plan would have to be revised before seeking Association approval and incorporation into the Final Approved Design Plan and permit application.

106. In addition to the above, the Plaintiffs as the Purchasers were also required to provide full details of any items required in order to complete the "White Box".

24. Earlier in paragraph 5 of the judgment the judge said:

> **"5. The Plaintiff did not provide final approved plans as they could not proceed with the onsite measurements required to be provided by the Defendant."**

25. This is a finding that the seller did not complete because the purchaser did not provide plans. This is not a finding that the seller was in breach of the agreement. If the seller was unable to complete because of the purchaser's failure it could not be said to be in breach of the agreement.

26. In the result, the only pleaded breach that the judge found that the purchaser had proved was the failure of the seller to verify the corrected measurements. The issue therefore is was the judge plainly wrong in that finding.

27. In my view, it cannot be said that the judge was plainly wrong in that finding. Clause 3A of the Addendum imposed an obligation on the part of the seller/appellant to verify the measurements. It was not the obligation of the seller to supply corrected measurements. It was obliged to verify as requested by the purchaser. There is no evidence that the seller did anything other than provide corrected measures to previously incorrect measurements that it

had previously provided. The purchaser architect's evidence was that it requested verification by the seller, the architect said he/she wanted to have verification of the site measurements before visiting the site. The following excerpt is material:

> **"Q. Right. And could you -- did you attempt to obtain correct information from the Seller?**
>
> **A. We attempted via PLDD. We requested survey information time and time again. Yes.**
>
> **Q. Okay. All right. And just to bring this back now to the -- in cross-examination, there was this question as to whether you visited the site and you indicated that you were prepared to visit the site and requested measurements before doing so. Why did you consider it to be important to have measurements, before visiting the site?**
>
> **A. Well, we had no idea how inaccurate the information was and how much we were missing. So in order to recalibrate our design and sort out any issues, it would make absolute and fundamental sense to do that in an office environment where we could make sure that the design worked with all the beams and so on and, then, get on to site to verify that with the contractor and iron out any further issues. But it's impossible trying to do that on site. You need to do that in a drawing form, rather than walking around looking at stuff. It just doesn't make sense. So with accurate survey information, we could easily have done that in an office environment; and, then, as I said, and, then, visit the site to iron out any further issues."**

28. It could not be that the seller can dictate to the purchaser how to verify the measurements that the seller provided. The seller must satisfy the purchaser as to the accuracy of the seller's measurements as reasonably requested by the purchaser.

29. The trial judge found that the seller was in breach of its obligations under the agreement and that the seller was not entitled to give notice to terminate. *"The party giving notice to complete must be ready and willing at the time of giving the notice to fulfil his own outstanding obligations under the contract".* See **Oakglade Investments Ltd v Dhand [2012] EWCA Civ 286** at para 39 referring to **Quadrangle Development and Construction Co Ltd v. Jenner [1974] 1 WLR 68** at 71 per Russell LJ.

30. The trial judge's finding that the seller failed to verify the onsite measurements was not plainly wrong. It cannot be set aside by this appellate court.

31. For these reasons I am of the view that the appeal should be dismissed and the judgment of the trial judge requiring the appellant to refund the deposit must be upheld.

32. The appellant shall pay the costs of this appeal to be taxed if not agreed.

The Honourable Sir Michael Barnett, P

33. I agree.

The Honourable Mr. Justice Isaacs, JA

34. I also, agree.

The Honourable Madam Justice Crane-Scott, JA