Neutral Citation Number: [2024] EWCA Civ 719

Case No: CA-2024-000145

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
MRS JUSTICE DIAS
[2023] EWHC 3220 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/06/2024

Before :

LORD JUSTICE POPPLEWELL
LORD JUSTICE NUGEE
and
LADY JUSTICE FALK

- -

Between :

(1) KING CRUDE CARRIERS SA **(2) PRINCE CRUDE CARRIERS SA** **(3) ZENON CRUDE CARRIERS SA**	**Claimants/ Respondents**
- and -	
(1) RIDGEBURY NOVEMBER LLC **(2) RIDGEBURY SIERRA LLC** **(3) MAKRONISSOS SPECIAL MARITIME ENTERPRISE**	**Defendants/ Appellants**

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Julian Kenny KC and **Michal Hain** (instructed by **Wikborg Rein LLP**) for the **Appellants**
Nigel Eaton KC and **David Barnard** (instructed by **Reed Smith LLP**) for the **Respondents**

Hearing dates : 1 and 2 May 2024

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Approved Judgment

This judgment was handed down remotely at 11.00am on 27 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE POPPLEWELL :

Introduction

1. This appeal arises out of a dispute between buyers and sellers under three contracts for the sale of second hand tanker tonnage in materially identical terms. It raises an issue of law as to the existence or scope of what the appellant sellers call 'the *Abacha* principle', after the decision of Rix LJ at first instance in *Compagnie Noga d'Importation et d'Exportation SA v Abacha (No 3)* [2002] CLC 207 ('*Abacha*'), tracing its modern origins back to the speech of Lord Watson in *Mackay v Dick & Stevenson* (1881) 6 App Cas 251 ('*Mackay v Dick'*). I prefer to call it 'the *Mackay v Dick* principle'.

2. In the appellants' submission, the principle is that where the accrual of a party's obligation to pay a debt is subject to a condition, and the putative debtor wrongfully prevents that condition from being fulfilled, the condition is treated as dispensed with or fulfilled, with the result that the debt accrues. The principle is said to be the ratio of two cases binding on this court, namely that of the House of Lords in *Panamena Europea Navigacion (Cia Lda) v Frederick Leyland & Co Ltd* [1947] AC 428 ('*Panamena*'), and that of the Court of Appeal in *Wm Cory & Son Ltd v London Residuary Body & Western Riverside Waste Authority* (unreported 5 November 1990) ('*Cory v LRB'*).

3. The respondent buyers contend, as Dias J held, that there is no such principle, and that where a party prevents the fulfilment of a condition precedent to the accrual of a debt by its breach of contract, the remedy lies in damages for such breach, with the normal principles governing a contractual claim for damages applying, including those of causation, mitigation and remoteness; *Panamena* and *Cory v LRB* are examples of the application of a more limited principle which permits dispensation with conditions as to the machinery of payment of accrued debts.

How the issue arises

4. The dispute arises out of three contracts of sale concluded on 28, 29 and 30 April 2020 on an amended 2012 Norwegian Saleform ('the MOAs'). The MOAs differed as to parties, prices, dates and other details, but their material terms were identical, and there is no need to distinguish between them or the individual buyers and sellers. I shall refer to the appellants as 'the Sellers' and the respondents as 'the Buyers'.

5. The disputes were referred to arbitration in three separate references. The facts, as found in a common set of reasons published in all three references, were as follows.

6. The purchase price for the vessels was US$17.4 million, US$19.4 million and US$12.6 million respectively. By clause 5 of the MOAs delivery was to be by the Sellers tendering notice of readiness following the vessels' current employment, within dates identified in each MOA. Clause 2 of the MOAs obliged the Buyers to lodge a 10% deposit for the purchase price with Holman Fenwick & Willan Greece ('HFW') as escrow holders for the Sellers in the following terms:

> *"As security for the correct fulfilment of this Agreement, the Buyers shall lodge a deposit of 10% (ten per cent) of the Purchase Price (the "Deposit") in an account for the Parties with [HFW] who shall hold the Deposit in escrow for the Parties,*

and who shall only release same in accordance with and pursuant to the terms of an escrow agreement to be entered into between themselves (acting as escrow agent), the Sellers and the Buyers (the "Escrow Agreement") within 3 Banking Days after the date that:

(i) this Agreement has been signed by the Parties and exchanged in original or by e-mail or telefax; and

(ii) the Deposit Holder has confirmed in writing to the Parties that the account has been fully opened and ready [sic] to receive funds.

... The Parties shall provide to [HFW] all necessary documentation to open and maintain the account without delay."

7. By clause 3, the Buyers were to remit the 90% balance of the price to HFW the day before delivery, and HFW were to release it, plus the 10% deposit, on the Buyers' instructions after review of closing documents and within three days after the Sellers tendered Notice of Readiness. Clause 13 gave the Sellers a right to cancel the MOAs if:
   (1) the deposit was not lodged in accordance with clause 2, in which case the Sellers were also entitled *"to claim compensation for their losses and for all expenses"*; or
   (2) the 90% balance of the purchase price was not paid in accordance with clause 3, in which case the deposit *"shall be released to the Sellers"*.

8. Clause 21 provided for the parties to *"cooperate and make best endeavours to find a solution"* if the Buyers, acting reasonably and in good faith, could not conclude management agreements with the ships' existing managers by the time the Sellers tendered Notice of Readiness.

9. The MOAs were duly signed, but HFW was unable to confirm that the escrow accounts were open and ready to receive the deposits because the Buyers were in breach of their obligations under clause 2 to provide the necessary documents without delay to enable HFW to do so. In two cases this was a failure by the Buyers to provide HFW with the necessary Know Your Client documents. In the third case it was a failure by the Buyers to sign the Escrow Agreement. The deposits were not paid to HFW by the Buyers.

10. Having tendered notices of readiness for two of the three vessels, the Sellers gave notices purporting to terminate the MOAs on 22 May and 30 May 2020. They did so on two alternative bases: (a) pursuant to clause 13 relying on non-payment of the deposits; and (b) at common law treating the non-payment of the deposits as a repudiatory breach which was accepted. With regard to the third vessel, the Buyers purported to terminate on 5 June 2020 before a notice of readiness had been tendered. The Tribunal held that this was wrongful and that the Sellers were entitled to terminate as they did on 9 June 2020. The Sellers commenced arbitration seeking to recover the amount of the deposits totalling US$4.94 million (US$1.74 million, US$1.94 million and US$1.26 million respectively). The claim was advanced in debt, on the grounds that the conditions precedent to the obligation to lodge the deposits had been prevented from being fulfilled by reason of the Buyer’s breach of clause 2 in failing to supply HFW promptly with the KYC documents/signed Escrow Agreement so as to enable them to open the account, with the consequence that as a matter of law the Sellers are to be put in the same position as if the conditions had been fulfilled or did not need to be fulfilled. In the alternative

there was a claim for damages, in the same amount, for the breach of clause 2 in failing to supply the necessary documentation to HFW.

11. As to the claim in debt, it is established by the decision of this court in *Griffon Shipping LLC v Firodi Shipping Ltd* (‘*The Griffon’)* [2013] EWCA Civ 1567 [2014] 1 Lloyd’s Rep 471, that had the deposits become due in accordance with clause 2:

    (1) they would constitute debts owed by Buyers to Sellers notwithstanding that they were to be paid to a third party stakeholder; and

    (2) they would remain due and payable after termination pursuant to clause 13 because (a) at common law, lawful termination does not affect rights which have accrued prior to termination; (b) clause 13 does not circumscribe or remove such common law rights but provides for additional rights to ‘compensation for [Sellers’] losses’; and in any event (c) the additional right to compensation conferred by clause 13 includes a right to compensation for non-payment of the deposits, which would include the amount of the deposits.

12. The Buyers reserved the right to argue that *The Griffon* was wrongly decided in a higher court, but accepted that we were bound by it. Accordingly it was not disputed before us that if the *Mackay v Dick* principle operates to treat the conditions precedent to the accrual of the right to the deposits in clause 2 as fulfilled or dispensed with, the deposits would, following termination, be recoverable in debt (although the Buyers had advanced other arguments based on clause 21 which were rejected by the tribunals and not the subject matter of appeal).

13. As to the claim in damages, the Buyers sought to advance a defence that, if they had performed their clause 2 obligations to provide documentation and had lodged the deposits, the contracts would ultimately have fallen through under clause 21 or by frustration, and the deposits would then have been repaid to the Buyers; and that the Sellers had not suffered actual loss in the amounts of the deposits. This was characterised as ‘the *Golden Victory* point’ after the decision in *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12 [2007] 2 A.C. 353.

14. In the light of the various arguments, the arbitrators ordered the determination of three preliminary issues in each of the arbitrations, which were to be determined on the assumption that the facts averred in the Buyers’ pleadings were correct. These included an averment that by the time of breach the market had risen, and that accordingly the termination had given rise to a market gain and not a market loss to the Sellers. The second and third preliminary issues were:

    Issue 2: …..are the Buyers liable because they cannot rely on their own breach of contract preventing the fulfilment of a condition precedent to payment?

    Issue 3: If so, are the Sellers entitled to a final partial award for the amount of the deposit?

15. The majority answered the question in issue 2 ‘yes’ but recognised that it begged the question ‘liable for what?’ which they decided under issue 3. As to that they held that the Sellers were entitled to recover the amount of the deposits in debt because *"the*

decision in Abacha confirms the principle summarised above viz. where (i) a party breaches his contract and (ii) as a result of that breach, a pre-condition to the accrual of a debt that he would otherwise owe to his counterparty is left unsatisfied, then the relevant pre-condition is deemed to be either waived or satisfied. Whether that principle may at some time in the future be reviewed by the Supreme Court is a matter of speculation. However, regardless of any criticisms, that principle is now well-established and one which we readily accept." The dissenting arbitrators did not dissent on this principle, which is the issue under appeal, but on another issue as to whether the obligation to pay the deposit was suspended clause 21 of the MOAs.

16. The Buyers were granted leave to appeal under s. 69 Arbitration Act 1996 against the awards on a question of law framed by them in the following terms: *"Where an obligation for payment within a contract is contingent upon the fulfilment by one party of a condition, and that party fails, in breach of contract, to fulfil that condition, is the condition deemed to be fulfilled with the result that the payment sum can be claimed by the other party in debt? Or must the claim be in damages?"* Dias J allowed the Buyer's s. 69 appeal, holding that the claim did not lie in debt but rather had to be in damages. She granted leave to appeal to this court.

17. As to the claim to the deposits framed as an alternative claim in damages, the majority arbitrators held that they did not need to address it because (a) they had held that the claim in debt succeeded and (b) the Buyers' *Golden Victory* defence of no loss had not been pleaded. As to the latter, the Buyers contended that the majority were mistaken in concluding that it had not been pleaded, giving rise to a challenge for serious procedural irregularity pursuant to s. 68 of the 1996 Act. Dias J upheld that challenge and remitted the *Golden Victory* point to the tribunals for consideration.

18. It may matter, therefore, whether the Sellers can frame their claim in debt rather than damages for at least two reasons. First, the claim to have lawfully terminated the contracts under clause 13 depends upon the deposits having become payable as debts; and secondly, the claim for damages faces a no loss argument, and the damages would also, Mr Kenny KC conceded, have to give credit for any market gain benefit made by the Sellers on termination. This is not, therefore, a case where the application of the principle contended for by the Sellers necessarily mirrors the result which would follow for an alternative claim for damages for the relevant breach. Whether it does so depends upon issues which the tribunals have not yet resolved.

The Judgment

19. In a thorough and carefully reasoned judgment, the Judge first considered the question as a matter of principle by reference to the law concerning contractual conditions and recoverable loss for breach of contract. Leaving aside cases where specific performance is available, the primary remedy for breach of a contractual obligation is the payment of damages which is compensatory and subject to contractual rules as to causation, mitigation and remoteness. The Judge regarded the general principle upon which the Sellers relied as inconsistent with two aspects of these principles which she set out at [25(vi) and (vii)]:

> "vi) Where an obligation is expressed to be contingent on some other event, then it will not become effective unless and until that event occurs. An obvious example is the negotiation of an agreement "subject to contract". In this situation, signature of the contract is a condition precedent to the existence of a binding agreement and if it is never signed, the agreement never becomes effective. Conversely, an agreement may be subject to a condition subsequent or defeasant whereby it determines on the occurrence of the stipulated event: *Chitty (op.cit.)* §4-196."
>
> vii) If a claimant's ability to earn the debt is contingent on the defendant's performance and the defendant does not perform, the claimant cannot claim the debt but is restricted to a claim in damages: *Chitty (op. cit.)* §§30-006 to 30-009; *Goode & McKendrick on Commercial Law* (6th ed.) §3.116. Thus, absent agreement to the contrary, voyage charter freight is earned only upon arrival of the goods at the port of destination in merchantable condition ready to be delivered: *Scrutton on Charterparties* (24th ed.) §16-001. If the goods are lost during the voyage or are not delivered for some other reason, the freight is not earned and never becomes due. Likewise, the general rule in sale of goods cases is the seller cannot claim the price unless and until property in the goods has passed to the buyer, *even if* it is the wrongful act of the buyer which prevents property passing: *Benjamin on Sale of Goods* (11th ed.) §§16-001, 16-021, 16-023, 16-062. The seller's remedy in this situation is a claim for damages for non-acceptance."

20. The Judge then considered the authorities (except *Cory v LRB* which was not cited to her), which she concluded left the status of *Mackay v Dick*, and the precise propositions it stands for as a matter of English law, as less than clear. She then set out at [95] her conclusions as to the principles to be derived from the authorities. No summary can do justice to her full reasoning, but in essence she concluded that there was a maxim that a person could not derive a benefit from their own wrong, which can be applied to bar one party to a contract from relying on its own breach of contract to argue that the counterparty has failed to fulfil a condition precedent or that a condition subsequent has been triggered. It is a maxim which is not a freestanding rule of law, and can be given effect to by mechanisms which include waiver, but none involve deeming a condition to be fulfilled. It allows a condition to be dispensed with where the condition is one to payment of a debt which has already accrued, but not where the condition is as to the accrual of the debt, in which case the claimant's remedy is confined to damages.

21. There is, she held, no authority for a doctrine of deemed fulfilment of, or dispensation with, a condition precedent to accrual of a debt, which cuts across the principles set out in [25] of the Judgment; and no need or utility for such a principle. This, she said, accords with the majority of textbook commentary.

The rival arguments in outline

22. We had elaborate arguments on both sides which were skilfully and attractively crafted and presented, for which I am very grateful, and which I found of great assistance in bringing the issue into focus. By way of summary only, the essential elements of each were as follows.

23. On behalf of the Sellers Mr Kenny submitted that the principle applies where the condition is as to the accrual of a debt, not merely where it is a condition in the machinery of payment for an accrued debt. The mechanism by which it takes effect has been

expressed in different ways in the authorities as deemed fulfilment, waiver, quasi estoppel or construction, but it is not necessary to choose between these: it is a principle of law to which effect is to be given by any of these descriptions. It is reflected in the speech of Lord Watson in *Mackay v Dick* which although expressed to be based on Scottish law, in a Scottish appeal, is part of English law because: (a) Lord Watson based it on the more general principle that a party is not allowed to take advantage of their own wrong, which is a part of English law as much as Scottish Law; and (b) it has been applied as ratio as a matter of English law by the House of Lords in *Panamena* (without reference to it) and the Court of Appeal in *Cory v LRB* (expressly adopting it); and (c) it has been treated as a principle of English law by many authoritative dicta, including by Lord Wright in *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at p. 148; by Devlin J in *Mona Oil Equipment and Supply Company Ltd v Rhodesia Railways Ltd* (1950) 83 Lloyd's Rep 178 at p. 187, and in *Tiberghien Draperie Société à Responsabilité Limitée v Greenberg & Sons (Mantles) Ltd* [1953] 2 Lloyd's Rep 739 at pp. 733 and 734; by Parker LJ in *Agrimpex Hungarian Trading Company for Agricultural Products v Sociedad Financiera de Bienes Raices SA (The Aello)* [1958] 2 QB 385 at p. 407 and Lords Cohen and Jenkins in the House of Lords in that case ([1961] AC 135 at p. 186 and 209); and by Rix LJ in *Abacha* at [106]-[107]. It admits only of the exception that the claimant must have done all he is required to do to earn the debt, which explains the decision of McCardie J in *Colley v Overseas Exporters* [1921] KB 302 ('*Colley*') that an FOB buyer of goods who wrongfully fails to provide a vessel on which the seller can load the goods is liable in damages but not for the price which would fall due upon shipment of the goods on board the vessel. It is consistent with the principles governing compensation for breach of contract.

24. On behalf of the Buyers, Mr Eaton KC supported the Judge's reasoning. He submitted that the Sellers' case runs contrary to well established principles of contract law in that: (a) it interferes with freedom of contract; and (b) it cuts across the principles governing remedies for breach of contract such as causation, remoteness and mitigation. *Panamena* and *Cory v LRB* are authority only for the existence of a principle that the machinery of payment of an accrued debt may be dispensed with where it is frustrated by the debtor's breach of contract, which was applied to freight in *Vagres Cia Maritima SA v Nissho-Iwai American Corporation (The Karin Vatis)* [1988] 2 Lloyd's Rep 330 and *Colonial Bank v European Grain & Shipping Ltd ('The Dominique')* [1989] AC 1056. What Lord Watson said in *Mackay v Dick* was a statement of Scottish not English law, and in any event was being applied to a case concerned with a condition to the right to payment of an accrued debt, not a condition to the accrual of a debt. The principle contended for by the Sellers is inconsistent with the decisions in *Luxor v Cooper*; *Colley*; *Thompson v ASDA-MFI Group Plc* [1988] 1 Ch 24; and *Little v Courage Ltd* (1994) 70 P&CR 469. There is no support in the textbooks for the principle advanced by the Sellers.

Analysis

25. I shall first identify the relevant principles covering claims in debt and damages, then consider the relevant authorities, before addressing the issue from the point of view of principle more generally.

Claims in debt and damages: some basic principles

26. An action in debt is one of the oldest forms of action. It is a claim to enforce a primary obligation comprising the obligor's promise to pay a sum of money. By contrast, a claim

for damages is a claim to compensation which arises as a secondary obligation upon breach of a primary contractual obligation. Damages are, with limited exceptions, compensatory. Debts are not.

27. A debt is a sum of money which is presently payable or will become payable in the future by reason of a present obligation. The distinction between the two forms is often captured by the language of debts having accrued and debts having become payable. An accrued debt is a present obligation, but one whose payment may fall due in the future by reference to the passage of time or a future event. A typical example is rent accruing due daily but payable monthly in arrears. This is what is referred to by the latin tag "*debitum in praesenti (*sometimes *presenti), solvendum in futuro*". A debt in this form involves a legal right, which although it is as yet insufficient to support a claim for enforcement of the debt, carries with it legal incidents; for example it may be attached by way of execution. A debt which is payable is one which has not only accrued but can currently be enforced by a claim in debt because the conditions for payment have been fulfilled. For these uncontroversial principles see, for example, *Webb v Stenton* (1883) 11 QBD 518.

The authorities

28. I find it convenient to start with the decision of the House of Lords in the Scottish appeal in *Mackay v Dick*. In that case the sellers sued for the price of a steam excavation machine which they had agreed to sell and deliver to the buyer, who had contracted to construct a railway line which required the excavation of an extensive cutting with Carfin at one end and Garriongill at the other. The contract, concluded by an exchange of letters, provided that the machine was to be capable of excavating and putting into wagons 350 cubic metres of the material at the Carfin end of the cutting in a ten-hour day. The machine was to be erected and tested at the Carfin cutting by the following February. The price was £1,115. The buyer did not make Carfin available for the test and it was delivered to and erected at Garriongill, where it failed to extract the material at the stipulated rate. The Court of Session specified the facts upon which they were proceeding as established in the Sheriff Court, which the House of Lords had no power to review. These were that there had been no agreement to substitute Garriongill as the site for the contractual test; and the buyer was not entitled to say that because the machine had had an opportunity to show its capabilities at Garriongill, and had failed to meet the stipulated rate there, he was not obliged to give it another trial at Carfin; that it was a condition of the contract that the buyer should not be bound to accept and pay for the machine if it failed to meet the capacity stipulation at a trial at Carfin, but that such a trial required a face properly opened up by the buyer; and that the buyer failed to provide such a properly opened up face notwithstanding repeated demands and thus prevented the machine from being tested in accordance with the contract. On that basis the Court of Session held that the sellers were entitled to the price. The House of Lords affirmed the decision. Speeches were given by Lord Watson and Lord Blackburn, with Lord Selborne LC agreeing with both of them.

29. The case is well known for Lord Blackburn's proposition about implied terms of cooperation: he said at p. 263 that as a general rule where parties to a contract agree that something should be done which cannot effectually be done unless both parties concur in doing it, the contract is to be construed as requiring each to do all that is necessary to be done on his part for the thing to be carried out. This was the term of which the buyer was in default in not enabling a test to take place at Carfin. His speech provides no direct

assistance in the present context, however, because his analysis that this failure entitled the sellers to the price, at p. 264, was one of a condition subsequent: the contract was that the buyer, having received the machine, was to keep it and pay for it unless on a fair test it failed to meet the stipulated rate; the fair test provided for by the contract had not taken place, so that he was bound to keep it and consequently pay for it.

30. Lord Watson's speech, by contrast, treated the passing of the contractual test at Carfin as a condition precedent to the sellers' right to the price. At p. 270 he said:

> "The Respondents were only entitled to receive payment of the price of the machine on the condition that it should be tried at a proper working face provided by the Appellant, and that on trial it should excavate a certain amount of clay or other soft substance within a given time. They have been thwarted in the attempt to fulfil that condition by the neglect or refusal of the Appellant to furnish the means of applying the stipulated test; and their failure being due to his fault, I am of opinion that, as in a question with him, they must be taken to have fulfilled the condition. The passage cited by Lord Shand from Bell's Principles (§ 50) to the effect that, "If the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished. If the creditor had done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement," expresses a doctrine, borrowed from the civil law, which has long been recognised in the law of Scotland, and I think it ought to be applied to the present case."

31. Lord Shand had explained that the passage in Bell's Principles was itself supported by the work of the French jurist Robert Pothier, itself founding upon principles of Roman law.

32. Mr Eaton submitted that property in the machine had passed (as a matter of Scottish law, as explained by McCardie J in *Colley*) and accordingly there was an accrued right to the price, so that the condition of successfully completing the contractual trial at Carfin was only a condition to payment of an accrued right to the price, not a condition of its accrual. This is not how I read Lord Watson's speech. In a contract of sale of goods the passing of property and the accrual of the right to the price are separate and distinct concepts. The passing of property does not necessarily and of itself confer a right to the price; all depends upon the contractual terms. There is no reference to the passing of property in Lord Watson's speech as relevant to the issue to be decided, nor to a right to the price having vested on delivery of the machine. On the contrary, Lord Watson's statement that the sellers "were only entitled to receive payment of the price of the machine on the condition that it should be tried at a proper working face provided by the buyer" was a statement as to the entitlement to the price as a matter of substance, not machinery of payment. That was what the parties had agreed, as is apparent from the terms of the exchanged letters quoted at pp. 252-253 of the report. The sellers' initial offer had been, if the buyer preferred, that the price should be payable "when the machine has been tested and proves capable of digging the work specified", and the buyer's response made clear that that was the option agreed: the price was only to be earned upon acceptance of the machine after a satisfactory test; and if the test were unsuccessful, the contract provided expressly that the machine would be removed by the sellers. That is inconsistent with a vested right to the price having accrued before the test took place. That is supported by the findings recorded by the Court of Session at p. 258, finding (2). It was not the passing of property which gave rise to the right to payment but the deemed fulfilment of the condition precedent to the right to the price.

33. In *Colley*, a decision which I will consider further below, McCardie J was concerned to distinguish *Mackay v Dick* on the grounds that the principle could have no application to cases where the price was dependent on the passing of property and property had not passed. That is a different point, to which I shall return. It is true that McCardie J treated the passing of property as explaining the decision in *Mackay v Dick*, and a similar approach has been taken by a number of commentators (e.g. Carter's Breach of Contract 2nd edn at 11-47). This, however, involved treating the condition as a condition subsequent, or 'resolutive condition' in Scottish terms, which is not how Lord Watson treated it.

34. Lord Watson's reasoning was expressly based on Scottish law as founded on Roman civil law. However the principle was not at that time exclusively one of Scottish or civil law. A more general principle had been recognised by the common law, at least by the time of Lord Coke, that a person should not be entitled to take advantage of a state of affairs which he himself wrongly brought about. Coke on Littleton states at 206b:

> "If a man make a feoffment in fee, upon condition that the feoffee shall re-infeoff him before such a day, and before the day the feoffor disseise the feoffee, and hold him out by force until the day be past, the state of the feoffee is absolute; for the feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof. And so it is if A. be bound to B. that I.S. shall marry Jane G. before such a day, and before the day B. marry with Jane, he shall never take advantage of the bond, for that he himself is the mean that the condition could not be performed. And this is regularly true in all cases.'

35. Lord Coke expressed the same principle in Latin form at C. Litt 148b: "*nullus commodum capere potest de injuria sua propria*" (no-one can take advantage of their own wrong).

36. The general principle there stated had been regularly applied as an aid to construction of contracts so as, for example, to construe leases expressed to be void upon something done by the lessee as voidable at the suit of the landlord: see *Roberts v Wyatt* (1810) 2 Taunt 268, *Rede v Farr* (1817) 6 M & S 121, *Doe d. Bryan v Bancks* (1821) 4 B&Ald 401, *New Zealand Shipping Company Ltd v Société des Atéliers et Chantiers de France* [1919] AC 1 pp. 8, 9 and 15.

37. Prior to *Mackay v Dick*, the principle had also been stated and applied to a contractual condition precedent in a charterparty. In *Hotham v The East India Company* (1787) 1 Term Rep 639 (99 ER 1295), Ashurst J upheld a claim for deadfreight by owners whose vessel had been chartered for a voyage to India and back where she was to load a full cargo. There was a condition that no claim for short tonnage could be made unless it was certified by the charterers' officers or agents following loading in India, as well as another condition of an independent survey upon arrival in the Thames upon return. The charterers loaded 903 tons of cargo in Bombay, but the owners averred that the vessel was capable of loading an additional 100 tons which they had demanded at the time of loading. The owners pleaded the shortloading. The charterers denied that the vessel was capable of loading the additional 100 tons, and additionally averred that the condition of a certification by their officers or agents had not been fulfilled. The defence did not rely on the absence of an independent survey upon return to the Thames. In reply the owners pleaded that they had requested the charterers' certification after loading at Bombay but it had been refused by the charterers, which by rejoinder the charterers denied. The jury found in favour of the owners on the factual issues. The issue on the motion before

Ashurst J was whether it was fatal to judgment in favour of the owners that they had not pleaded the fulfilment of the condition of certification by the charterers, which was said by the charterers to be a condition precedent to liability for the deadfreight. Ashurst J found it unnecessary to decide whether the certification by the charterers' officers or agents was a condition precedent because assuming that it was, the charterers could not rely on their own failure to conduct the survey. He said at p. 645:

> "It is unnecessary to say whether the clause relative to the certificate be a condition precedent or not; for granting it to be a condition precedent, yet the plaintiffs having taken all proper steps to obtain the certificate, and it being rendered impossible to be performed by the neglect and default of the company's agents, which the jury have found to be the case, it is equal to performance. If it were necessary to cite any case for this, which is evident from common sense, it was so held in Roll.'s Abridgment, 445, and many other books."

38. This was a case, therefore, in which the relevant (assumed) condition precedent was to a liability in damages rather than debt, but in which, nevertheless, the condition was deemed satisfied by reason of the owner causing it to remain unfulfilled. Mr Eaton argued that the deadfreight was earned upon shipment so that this was a case of an accrued liability with a condition as to payment, but that is not how it was treated by Ashurst J who assumed, in the passage quoted, that certification was a condition precedent to liability. Deadfreight is not a debt but a claim to unliquidated damages (see e.g. *Kish v Taylor* [1912] AC 604 at pp. 613-614) and there is no question therefore of accrual of a debt. Mr Eaton also argued at one stage that the decision was based on the condition being a condition subsequent. This is not so. The condition of certification by the charterers' officers or agents was expressly assumed to be a condition precedent in the passage quoted. There is reference to a condition subsequent in the passage which immediately follows but that was concerned with the separate condition of an independent Thames survey as a condition subsequent:

> "If so, there was a right of action once fairly vested in the plaintiffs, from the defendants not having fully-laden the ship before she left India, which they were by their covenant bound to do. For all that is necessary prima facie to found an action of covenant upon is, that the covenant should be broken. And this right of action, once vested, was only capable of being devested by a subsequent non-feazance, namely, by not taking the proper steps to procure a survey after the arrival of the ship in the river Thames. This therefore being a circumstance, the omission of which was to defeat the plaintiff's right of action, once vested, whether called by the name of a proviso by way of defeazance, or a condition subsequent, it must in its nature be a matter of defence, and ought to be shewn by the defendants; and as they have not insisted on it, though they have insisted on the want of a certificate, we must, after verdict, take it that the fact did not exist; and it will follow as a consequence that there is no ground for arresting the judgment, and that the rule must be discharged."

39. The principle was also expressed in *Roberts v The Bury Improvement Commissioners* (1870) LR 5 CP 310, where Blackburn and Mellor JJ (in a judgment read by Kelly CB) said at p. 326:

> "…for it is a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself; see Com. Dig. Condition (L);…"

40. Comyn's Digest, there referred to, provides at Condition (L)(6):

> "So the performance of a condition shall be excused by the obstruction of the obligee; as if a condition be to build a house; and he, or another by his order, hinders the coming upon the land. Or says that it shall not be built. So if a condition be that the lessee shall leave a house in good plight; and fire out of the chimney of the lessor next to it consumes it."

41. Accordingly, although *Mackay v Dick* was a Scottish Appeal and Lord Watson's reasoning was based on Scottish law with civil law origins, it was reflective of English common law at the time. That is indeed how it has been treated in subsequent English law decisions which are either binding or persuasive.

42. In *Luxor v Cooper* the claim was by an estate agent whose agreement with a property owner would entitle him to commission if he brought about a sale of the property. The claim against the owner, originally framed in debt and damages, was for breach of an implied term that the owner would not dispose of the property so as to deprive the agent of his ability to earn the commission. The issue was whether such an implied term existed. Branson J held that it did not, and rejected the claim in debt and damages. The Court of Appeal held that it did, and upheld the claim in damages. The House of Lords held that it did not. By the time the case reached the House of Lords it was treated simply as a claim in damages. The relevance of the decision for present purposes lies in what Lord Wright said about *Mackay v Dick* at p. 148:

> "Thus in *Mackay v. Dick*, the maker of an excavating machine was required by the contract to send the machine for the purpose of being tested to the railway cutting which the buyer was engaged in constructing, and the buyer was only to be liable to pay for it if it there in working satisfied the test. This House held that the buyers had prevented fulfilment of the condition because they held that, it being the buyer's duty under the contract to provide the necessary facilities, he had failed to do so. Hence his default prevented the seller from satisfying the condition. The seller could therefore say that he had done all that lay on him to fulfil the condition and was to be taken to have implemented it. The test was only not satisfied because of the buyer's default."

43. This must be a reference to the reasoning of Lord Watson, rather than that of Lord Blackburn, because the latter's reasoning, based on a condition subsequent analysis, did not require the seller to be taken to have implemented the condition. It treats Lord Watson's reasoning as a decision of the House of Lords and as applicable as a matter of English law.

44. Mr Eaton sought to rely upon the decision as support for his case. His point, as I understood it, was ultimately that if the principle was of the width for which the Sellers contended, the claim could have been put in debt and dealt with on that basis. However because in the Court of Appeal the claim in damages succeeded, there was no purpose in the claim in debt being pursued in the alternative by the Respondent agent in the House of Lords: the issue was whether the implied term existed, and if it did, the appeal would

have been dismissed and the damages claim upheld. There was no relevant distinction to be made between a claim in debt and damages and therefore no significance in the agent's argument in the House of Lords being one to uphold the decision in the Court of Appeal, namely a successful claim for damages. There is nothing in the decision to support the Buyers' case in the current appeal.

45. In *Panamena*, there was a tripartite contract for the repair of a vessel, entered into by the owners, repairers and the Ministry of War Transport to whom the vessel was to be chartered upon completion of the repairs. Payment for the repairs was to be "on the ordinary commercial basis" of labour (wages plus 25% for overheads) and materials, both uplifted for 10% profit, plus sub-contract and cash disbursements uplifted by 5%. The owners had the right to have a superintending surveyor to inspect the vessel and supervise the repairs. The payment clause, clause 7, provided:

> "Payment shall be effected as required by the repairers on the basis of cash against expenditure during the progress of the work and the ascertained balance on the completion of the repairs and every such payment shall be effected promptly by the owners after the issue of a certificate by the owners' surveyor that the work has been satisfactorily carried out and on receipt of a certificate of the amount due issued by the Costs Investigation Branch of the Ministry of War Transport and certifying that same has been checked and found correct."

46. The repairers claimed from the owners a balance due on the repairs which had been certified by the Costs Investigation Branch of the Ministry ('the CIB'). No certificate was issued by the owners' surveyor, Dr Telfer, because he regarded his function as certifying not only the quality of the work but also its reasonable economy in terms of time, labour and materials, and he demanded the information to enable him to do this. The repairers did not supply the information challenging that this was any part of his function. The repairers' case as to his function was upheld in the House of Lords. On that basis the question arose as to whether the repairers were entitled to the sum claimed in the absence of a certificate from Dr Telfer. Lord Thankerton, with whom the other three members of the Judicial Committee agreed, held that they were. He said at pp. 435-6:

> "The view of the function of the appellants' surveyor under cl. 7 of the contract which I have already expressed, makes it clear beyond dispute that the respondents have done everything which was necessary for them to do in order to require Dr Telfer to proceed to consider the granting of a certificate under cl. 7, but that Dr Telfer declined to proceed with the matter unless he was provided with the information to which on his erroneous view of the contract, he held himself entitled; in this view the appellants concurred, and this position was maintained up to and after the issue of the writ. This means that an illegitimate condition precedent to any consideration of the granting of a certificate was insisted on by Dr Telfer and by the appellants. It is almost unnecessary to cite authority to establish that such conduct on the appellants' part absolved the respondents from the necessity of obtaining such a certificate, and that the respondents are entitled to recover the amount claimed in the action."

47. Lord Thankerton then cited from the judgment of Ashurst J in *Hotham v East India* and relied on the dictum from *Roberts v Bury Improvement Commissioners* which I have quoted at paragraph 39 above before concluding:

> "If the appellants had taken the contrary view of their surveyor's function under cl. 7, it would have been their duty to appoint another surveyor to discharge that function, and if they had refused to appoint another surveyor, the respondents would clearly have been absolved from the necessity of obtaining the surveyor's certificate; the respondents are equally so absolved when the appellants' wrongful view of their surveyor's function under cl. 7 prevents the appellants from obtaining the certificate. I agree with the view expressed on this point by Goddard L.J."

48. In the Court of Appeal in *Panamena* ((1943) 76 Lloyd's Rep 113) Goddard LJ had articulated the principle in the following terms at p. 127:

> "It is and must be conceded that if a party desires to rely on the non-performance of a condition precedent, he must do nothing to prevent the condition from being performed, and if there is anything that must be done by him to render possible the performance of the condition, a failure by him to do what is required disentitles him from insisting on performance of the condition."

49. The principle identified and applied by Lord Thankerton is exactly that articulated by Lord Watson in *Mackay v Dick*, although he did not refer to the latter (whether out of filial aversion or for some other reason is not known). Mr Eaton argued that *Panamena* was a case of a condition precedent to the machinery of payment of an accrued debt rather than a condition precedent to the accrual of a debt, suggesting that the debt accrued when the work was done, or in the alternative, as the Judge suggested, that the debt accrued when certified by the CIB. In my view neither the judgment of Lord Thankerton in *Panamena*, nor the contract in that case, can be read in this way. The language used by Lord Thankerton is generally of a condition precedent to an entitlement, without any hint of a distinction between accrual and payment, as is the language of Goddard LJ which is endorsed. Moreover I have difficulty in seeing how clause 7 could operate sensibly and commercially if either form of certification were a condition precedent only to the payability of an accrued debt. There could be no accrual prior to CIB certification because that was intended to define the debt: if the CIB had certified that some part of the claimed time or expenditure had not occurred in the amount claimed, to that extent the amount claimed would not have been earned, even if the repairers disputed the CIB certification. It is unrealistic to treat the contract in that case as creating any sum certain which has been earned in the absence of CIB certification. So too with the condition of certification of quality by the owners' surveyor. What if the work had not been certified by the surveyor as in some respect not having been "satisfactorily carried out" which the owners disputed? What debt would have accrued? Mr Eaton's answer was whatever amount would accrue after applying the doctrine of abatement for defects in quality. But the certification by the surveyor is the contractual mechanism for determining quality, and therefore for determining the extent of any abatement. It is an essential element in determining the amount of the debt, not merely machinery for its payment. This accords with the position in building contracts where payment is expressed to be due upon an architect's certificate, in which the certification is a condition precedent to the cause of action arising: see *Dunlop & Ranken Ltd v Hendall Steel Structures Ltd* [1957] 1 WLR 1102 at p. 1107.

50. The alternative analysis of the debt accruing upon certification by the CIB is in my view equally untenable: the two conditions, one as to quantification and the other as to the quality of work, are both expressed in similar format (indeed with the quality certification identified first in the contract), and there is no warrant in the contractual wording or in

principle for treating one as a condition precedent to the accrual of the debt and the other only as a condition of the machinery of payment.

51. Mr Eaton also submitted that the decision was not founded upon the shipowners having been in breach of contract, but the language of the judgments suggests that it was. Lord Thankerton spoke of the owners insisting on an "illegitimate" condition to Dr Telfer's consideration of certification (by demanding materials on the cost and quantity of work) and taking a "wrongful" view of his function. Goddard LJ, whose views Lord Thankerton endorsed, referred to the absence of a certificate being due to the refusal by the owners' surveyor to perform the duty assigned to him by the contract; and Goddard LJ had agreed with and adopted the views of Scott LJ as to the construction of the contract, with Scott LJ saying in terms that Dr Telfer's conduct put the owners in repudiatory breach of contract (at p. 126).

52. In *Mona v Rhodesia Railways*, Devlin J identified the two propositions for which *Mackay v Dick* was authority at pp. 186-7. The first was the implied term of cooperation identified by Lord Blackburn, breach of which gives rise to a claim for damages. The second was that of Lord Watson:

> "The second proposition, based on the opinion of Lord Watson, advances a stage further and gives the plaintiff in appropriate cases an additional form of relief. If the breach of the implied term prevents the plaintiff from performing a condition binding upon him, he is to be taken as having fulfilled that condition: and if the condition is one on which his right to payment depends, he may therefore sue for payment instead of damages. That these propositions are distinct is shown by the fact that Lord Blackburn's reasoning does not involve the second at all. His construction of the contract does not require it. He says at p. 264 "…". On this view, there was no question of the defender preventing the pursuers from claiming payment; he prevented himself from escaping from the liability to pay. ….. Lord Watson, in *Mackay v. Dick*, sup.at p. 270, proceeded on a different construction of the contract and so invoked the principle I have stated. He rested it upon well-established doctrine (see also the authorities cited by McCardie, J., in *Colley v. Overseas Exporters*, sup., at p. 308) and not upon any implication in the contract."

53. The authorities cited by McCardie J in *Colley* to which Devlin J there referred included *Hotham v East India Co.*

54. Although the decision itself in *Mona* is not directly in point, the treatment of *Mackay v Dick* is illuminating, It articulates the proposition for which Lord Watson's speech is authority as one of English law, supported by and consistent with "well-established" (English law) doctrine. Moreover it expresses the principle in terms which draw no distinction between conditions to the accrual of a debt and conditions to the machinery of payment of an accrued debt, and without any suggestion that it is confined to the latter ("if the condition is one on which his right to payment depends").

55. Devlin J came to apply the principle in *Tiberghien v Greenberg*. In that case French sellers of cloth for delivery to London sued for the price. The goods were despatched to Folkestone but the buyers wrongly refused to pay the customs duty due, thereby preventing delivery to London. The sellers invoked the principle that the buyers could not take advantage of their own breach to rely on the sellers' failure to deliver in London under, as Devlin J put it, "a well-known principle of law (of which the case of *Mackay v*

Dick and another is perhaps the best known example)" (see p. 743). Devlin J referred to the fact that it was open to the buyers either to pay the duty at Folkestone, or to give instructions for the goods to be forwarded in bond to London and pay the duty there, but they had done neither. He said at p. 744:

> "They did none of these things, and their failure to do these things which by necessary implication under the contract they were required to do was the reason why the sellers were prevented from tendering the goods. Accordingly, in my judgment, for the reasons which I have given and on the principle of *Mackay v. Dick and Another*, sup., the defendants cannot rely upon the defence that the goods were not actually delivered in London.
>
> That leads me then to the matters which are raised in the amended defence, and I am not at all sure that it is a good defence in law. As Mr. Whitworth put the matter in his closing speech for the plaintiffs, his case is this: he is suing for payment. Payment under the contract which I have found was made was due 30 days after invoice. The delivery of the invoice is not disputed, and 30 days have elapsed. Therefore, prima facie, his case for payment can proceed. If the only answer that can be made to that is for the defendants to set up some condition precedent to payment which the plaintiffs have failed to fulfil, the only condition precedent which they can set up is that the goods had not been delivered. Whether that is a condition precedent or not, I need not determine, but assuming that it is, for the reasons I have already given it is not open to them now to set up that condition, the non-fulfilment of that condition. Therefore this point fails. In short, by waiving delivery, because that is what it amounts to, they waived their right to inspect and reject the goods."

56. This is Devlin J again treating Lord Watson's reasoning in *Mackay v Dick* as a well established principle of English law and applying it on the hypothesis that delivery was a condition precedent to the right to payment of the price. Mr Eaton contended that it was a decision which is explicable on the evidence by a straightforward application of the doctrine of waiver. I agree that it might have been decided on that basis but it was not: Devlin J was purporting to apply the principle in *Mackay v Dick*, albeit that he concluded that it amounted in effect to a form of waiver. Mr Eaton also emphasised that Devlin J noted that the only express term as to payment was 30 days from invoice, and contended therefore that if delivery had been a condition precedent to payment, it would have been a condition precedent to the right to payment of an accrued debt, rather than to accrual of a right to claim the price. However there is no trace in the judgment of such a distinction in the application of the *Mackay v Dick* principle, and the 30 days from invoice point is not mentioned in the first passage in which *Mackay v Dick* is treated as being applicable.

57. *Cory v LRB* is a decision of Lord Donaldson MR, Nourse and Russell LJJ in this court in 1990. It is unreported and was not cited to Dias J. The researches of counsel have been unable to find a report or transcript of the first instance judgment of Hobhouse J. The Greater London Council ('the GLC') had a contract with Cory for the bulk transfer of domestic waste from transfer stations to landfill disposal sites. The GLC was abolished with effect from 1 April 1986 and had a statutory successor, the London Residuary Body ('LRB'), in whom liabilities were vested in respect of payments "due and payable" by the GLC prior to its abolition on 1 April 1986. The Cory contract was transferred to another body, the Western Riverside Waste Authority ('WRWA'), but only in respect of

liabilities which had not devolved to LRB. The issue was whether liability for sums claimed by Cory from the GLC prior to its demise, but unpaid at the time of abolition, were a liability of WRWA or of LRB. The contract provided that Cory was to submit to the GLC, at the end of every accounting period of 28 days, an invoice for the amount claimed, setting out the tonnage of waste on which it was based. The GLC's Engineer was then to notify within 7 days whether the payment was authorised, and if not, in whole or in part, why not. Clause 19 provided for adjustments in the event of changes in wages and working methods of barge traffic on the River Thames. They were to be certified by the Engineer as a condition of payment. There was an arbitration clause for resolution of disputes if the Engineer refused to certify. It was payments claimed under clause 19 which formed the subject matter of the claim. By 1 April 1986 the claims had been submitted and a reasonable period had expired for certification but the Engineer had done nothing about them, perhaps because it was in the GLC's dying days. Hobhouse J held that the Engineer's certificate was not a condition precedent to liability, since Cory could establish its claim by arbitration or judgment irrespective of such certificate; and that the right to the sums had therefore vested prior to 1 April 1986 and LRB was liable. On appeal LRB argued that Cory's claim lay in damages for the GLC's failure, through its Engineer, to certify within a reasonable time, and that such liability would not arise until the court gave judgment which was after 1 April 1986. Lord Donaldson MR, with whom Nourse and Russell LJJ agreed, rejected the argument on the basis that Cory's primary claim was in debt, and that the principle in *Mackay v Dick* and *Panamena* meant that the GLC, in whose shoes LRB stood, could not rely on the failure by the Engineer to certify so as to be able to contend either that the right to payment had not vested, or that if it had, it had not become payable. He said:

> "The only defence to this claim, apart from a challenge to its amount, is that the Engineer never certified it before 1st April 1986. This, as is now admitted, was an omission for which the G.L.C. was vicariously responsible. That being so, the L.R.B. is unable to rely upon this as a defence. It goes not only to the issue of whether the payment was due, but also to the issue of when it became payable. But for the failure of the Engineer to certify, it would have been both due and payable before 1st April 1986. If the L.R.B. as the G.L.C.'s successor in respect of pre-April 1986 liabilities is, in effect, estopped from relying upon the absence of the certificate, it is as if no certificate had ever been required with the result that the payment was due and payable at a time for which the L.R.B. is responsible. The authority for this quasi-estoppel is to be found in a long line of cases of which the best known is perhaps McKay v. Dick [1881] A.C. 251."

58. Having referred briefly to the facts of *Mackay v Dick* and to the relevant passage in Lord Watson's speech, and to Lord Thankerton's speech in *Panamena*, he continued:

> "Here the L.R.B., as "executors" of the G.L.C., seek to take advantage of the G.L.C.'s failure to issue an Engineer's certificate by contending both that in the circumstances no payment was due before 1st April 1986 and that, even if any such payment was due before then, it was not payable before that date – *debitum in praesenti, solvendum in futuro*. If we were to accede to either proposition, we should be allowing the G.L.C. and the L.R.B. standing in its shoes to take advantage of its own wrong."

59. Here again we have a clear adoption and application of the reasoning of Lord Watson in *Mackay v Dick*, applied as a matter of English law not merely to an accrued debt payable

in the future (*debitum in praesenti solvendum in futuro*) but to the accrual of a debt. Mr Eaton submitted that it lacked authority because it was an ex tempore judgment, but it is none the less binding or persuasive for that.

60. In *Abacha*, Rix LJ had to consider a number of consequential issues arising from a judgment given by him at first instance, including one as to the date on which interest should start running. The parties had concluded a settlement agreement which required the defendants to pay DM300 million conditional upon release of their accounts from a freezing order which had been in force during the proceedings. Rix LJ accepted that there was an implied duty of cooperation by the defendants in securing the discharge of the freezing order, and if the claim lay in debt, interest could date back to the time at which the settlement agreement would have taken effect if the defendants had fulfilled the condition so as to enable the release of the accounts. Rix LJ considered the authorities and concluded that the principle was as stated by Lord Watson in *Mackay v Dick* and as contended for by the Sellers in the current dispute: see in particular his conclusions at [106]-[107] and [120(1)].

61. In *Geys v Société Générale* [2013] AC 523 at [131], Lord Sumption JSC referred to

> "the doctrine of deemed performance endorsed by the House of Lords in *Mackay v Dick* (1881) 6 App Cas 251, according to which a party who is prevented by the non-cooperation of the counterparty from satisfying a condition precedent to his right to receive remuneration may be deemed to have earned it notwithstanding the condition".

62. Although merely a passing dictum, this frames the principle unequivocally as one applying to conditions to the accrual of the debt ("deemed to have earned it"), not conditions to the payment of accrued debts.

63. The cases which I have so far considered provide a consistent line of authority, of which *Panamena* and *Cory v LRB* are binding on this court, that the principle expressed by Lord Watson in *Mackay v Dick* is a principle of English law and applies to conditions precedent to the accrual of debts, not merely conditions precedent to the payment of accrued debts, with the result that non-fulfilment of the condition forms no defence to the claim in debt. I turn to the other authorities upon which Mr Eaton placed particular reliance.

64. The first is *Colley*. In that case the FOB seller of unascertained goods sent conforming goods to the port of shipment but was unable to deliver them on board because the buyer failed to name an effective ship. The seller sued for the price, invoking the *Mackay v Dick* principle. McCardie J held that the claim lay only in damages. He distinguished *Mackay v Dick* on the grounds that in that case property had passed, so that fulfilment of the condition was all that remained to entitle the sellers to payment; whereas in the case before him property had not passed, which was an essential concomitant to the right to payment of the price under s. 49(1) of the Sale of Goods Act 1893. Mr Kenny accepted that *Colley* was rightly decided and described it as an exception to the *Mackay v Dick* principle. He did so on the basis that the exception covered cases where the claimant had not done everything it could to fulfil its contractual obligations. That, however, would not put the facts of *Colley* in his exceptional category: the FOB seller had done all he was able to so as to deliver the cargo on board and he was only prevented from doing so as a result of the buyer's default in failing to nominate an effective vessel on which to load them.

65. I readily accept that *Colley* was correctly decided and that the circumstances of that case fall outside the scope of the principle contained in the reasoning of Lord Watson in *Mackay v Dick*. Although it is not necessary for the purposes of deciding this appeal to identify definitively why that is so, I can see at least two possible reasons, which are not mutually exclusive. First, as I explain below, the underpinning juridical basis of the *Mackay v Dick* principle is one of contractual intention, and is sensitive to the particular circumstances of the case. The principle can be contracted out of, and may be inapplicable to certain types of contractual 'conditions'. As McCardie J said in *Colley* at p. 307, if the principle applied to the facts of that case it would have most far reaching and extraordinary effects. It may be, therefore, that the inapplicability of the *Mackay v Dick* principle is best explained by the parties not having the presumed intention that a claim in debt should be available in the particular factual circumstances of the case when property does not pass. This is an explanation suggested by the editors of Benjamin on Sale of Goods 12th edn at 16-023.

66. An alternative explanation is that the principle only applies to conditions precedent to the fulfilment of principal obligations, not to 'conditions' in the sense of the mutually dependant principal obligations themselves, such as the delivery of the goods and payment of the price. Or perhaps, to the extent different, that it does not apply to 'conditions' which are essential ingredients of the cause of action. Although payment of the price is conditional on delivery under what is now s. 49(1) Sale for Goods Act 1979, delivery is not the sort of 'condition' to which the principle is addressed because it is a principal obligation and a freestanding and essential ingredient of the cause of action. By contrast a condition precedent to entitlement to the price, in the sense used in the *Mackay v Dick* principle, and its fulfilment, are not ingredients of a cause of action, but rather matters which go to a defence. This is reflected in the former rules of pleading under the Rules of the Supreme Court, in which a condition precedent was treated as distinct from an element of the cause of action, the latter requiring to be pleaded by the plaintiff but the former not. In a claim for the price of goods the seller was bound to plead sale *and delivery* if the price was said to fall due under s. 49(1) Sale of Goods Act 1979. By contrast, the plaintiff was not obliged to plead a condition precedent and its fulfilment: Order 18 rule 7(4) of the Rules of the Supreme Court provided that fulfilment of any condition precedent was deemed to be implied in a statement of claim, so that it did not need to be pleaded; as explained in Bullen & Leake 12th edn at section 24, that was a matter for the defendant to raise by way of defence, notwithstanding that if raised, fulfilment of the condition was something on which the plaintiff bore the burden of proof.

67. There is a hint of this rationale in Carter's Breach of Contract 2nd edn in which the author states at 11-46: "A promisor's repudiation does not convert a dependent obligation into an independent obligation. Thus if a condition precedent is prior or concurrent performance by the promisee, breach or repudiation by the promisor does not entitle the promisee to treat the condition precedent as fulfilled." So too the editors of Chitty on Contracts at 4-205, who suggest a distinction in this context between principal and subsidiary obligations.

68. This is also consistent with the way *Mackay v Dick* was treated in *The Aello*. In that case, there was a dispute as to whether the vessel had become an arrived ship so as to start time running for demurrage; the charterers paid demurrage under protest and sought to recover it on the grounds that the vessel was not an arrived ship. The owners contended that the vessel was an arrived ship; and in the alternative that if the vessel was not an arrived ship,

that was a result of the charterers' breach, and that since being an arrived ship was conditional on the charterers' obligation to procure her arrival, the principle in *Mackay v Dick* operated to deem her to have been an arrived ship. The Court of Appeal determined that the vessel was not an arrived ship, and could not be deemed to be so by application of the principle in *Mackay v Dick*: the charterers' breach sounded in damages by way of counterclaim, not as a defence to the claim for the return of the demurrage. Parker LJ, with whom Lord Goddard CJ and Lloyd-Jacob J agreed, treated the principle as inapplicable to the charterers' "primary obligation to arrive geographically" at the place where she would be an arrived ship. Parker LJ's approach was endorsed in the House of Lords ([1961] AC 135) by those who addressed the issue, namely Lord Cohen at p. 186, Lord Jenkins at p. 209 and Lord Morris at p. 223. By contrast, *Mackay v Dick* was treated as a case where the relevant primary condition had been fulfilled, namely delivery giving rise to the passing of property, subject to the condition that the price was only payable upon satisfactory fulfilment of the test at Carfin. The condition of satisfactory performance of the test at Carfin was one which also qualified the right to the price, but that condition was not one of the primary obligations. Parker LJ said at pp. 406-7:

> "The reason, as I understand it, why the plaintiff in *Mackay v. Dick* recovered the price and not damages was that the machine had been delivered and the property had passed, subject only to the defendant's right to reject if the machine on a special test failed to come up to a particular standard of performance. The defendant, having prevented the holding of that test, was held to be in the same position as if the condition had been fulfilled. In other words, the price became payable not because the property was deemed to have passed but because the condition was deemed to have been fulfilled. If in such a case as this the ship had arrived, but it was provided that lay days were not to begin until something had been done which depended on the charterers' co-operation, then if the charterers refused or neglected to co-operate, that something might well be deemed to have been done. But here, if I am right, the primary obligation to arrive geographically was never fulfilled; and, that being so, I think the charterers' breach is a matter for counterclaim."

69. Before leaving *The Aello*, I should address Mr Eaton's submission that it supports the view that *Mackay v Dick* was a case in which the right to the price had accrued because property had passed and was therefore a case of an accrued debt. I would not so regard it. Parker LJ treated the entitlement to the price in *Mackay v Dick*, as a matter of the accrual of the debt, as subject to the Carfin test condition, which was then treated as fulfilled. The conditional passing of property was a necessary but not sufficient condition to the entitlement to the price. The fact that performance of the primary obligation of delivery, resulting in the passing of property subject to the Carfin test condition, was a 'condition' to the accrual of the right to the price did not make the Carfin test condition any less a condition to its accrual.

70. What is clear from *The Aello*, on any view, is that *Mackay v Dick* was treated as authority for a principle of English law; and that the principle was treated as giving rise to deemed fulfilment of a condition precedent in certain circumstances, which was the reasoning of Lord Watson.

71. Returning to the reason why the *Mackay v Dick* principle is inapplicable to the facts of *Colley*, I recognise that the second of the possible explanations I have identified is not entirely easy to reconcile with the passages in Devlin J's judgment in *Tiberghien v Greenberg* which I have quoted above, which appear to regard the principle in *Mackay v*

Dick as applicable to delivery as a condition of payment of the price, although the decision is readily explicable on other grounds on its facts. But however that may be (and there may be other reasons why the *Mackay v Dick* principle was inapplicable in *Colley*, in addition to the two I have suggested, on which it is unnecessary to speculate), the facts of *Colley* are far removed from the present, and the decision gives no helpful guidance on the outcome of the current appeal.

72. Mr Eaton also relied on *Thompson v ASDA-MFI Group Plc* [1988] 1 Ch 241, in which Scott J said at p. 266:

> "The principle expressed by Lord Watson in *Mackay v. Dick*, 6 App. Cas. 251, 270, is not, in my view, a principle of English law. The fictional fulfilment of conditions precedent and the fictional non-fulfilment of conditions subsequent may be principles of the civil law, but they are not principles of English law. In this area of the law of contract English law proceeds, in my view, by means of implied terms. If a term can be implied that a party will not do an act that, if done, would prevent the fulfilment of a condition precedent, then the doing of that act will be a breach of contract; if a term can be implied that a party will not do an act that, if done, would cause a condition subsequent to be fulfilled, then the doing of that act will be a breach of contract. But if a suitable term cannot be implied into the contract then in my judgment, the contract will take effect according to its tenor. The condition precedent will fail and the condition subsequent will be fulfilled."

73. I agree with Rix LJ in *Abacha* at [99] that *Thompson* was dealing with a different problem, namely whether a defendant can damage its legal rights by doing something which it is legally entitled to do. In *Thompson* the plaintiff employee of a department store, a subsidiary of the defendant, claimed an entitlement to exercise an option under the terms of a share option scheme established by the defendant for the benefit of its employees and those of its subsidiaries. The terms of the scheme provided that the option could only be exercised if the employee remained employed by the defendant or one of its subsidiaries. The defendant sold the subsidiary to a third party so that the plaintiff ceased to be an employee within the meaning of the scheme. The plaintiff claimed that in doing so the defendants had repudiated the scheme agreements.

74. The plaintiff's argument involved two alternative submissions. The first was that there was an implied term that the defendant would do nothing to cause the options to lapse or to cease to be exercisable, or two other variations of such an implied term. Scott J held that none of the terms suggested could be implied. The second and alternative submission was that the plaintiff could pray in aid a general principle of law that a party to a contract could not take advantage of its own acts to avoid its obligations or defeat the rights of the other party, which Scott J reformulated as being a proposition that if a contract is subject to a condition precedent a party cannot rely on its own acts as defeating the condition precedent. This was an ambitious argument because it was sought to be applied to conduct which the party was contractually free to undertake, and the decision of the House of Lords a few years earlier in *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] AC 180 had put beyond doubt that the principles relied on could only be invoked if the conduct amounted to a breach of contract: see per Lord Diplock at p. 189F-G. However *Cheall* was not cited in argument in *Thompson*, which proceeded on the basis that a wider view was supported by the decision of the House of Lords in the *New Zealand Shipping Co* case. *Cheall* came to the parties' attention after the hearing and was the subject of written submissions.

Ultimately Scott J decided, unsurprisingly, that it was a complete answer to the point. I doubt he would have embarked upon such a lengthy analysis of the principles had the argument not been largely conducted without reference to it. He did not consider either *Panamena* or *Cory v LRB* which were not cited to him. I respectfully disagree with his obiter remarks that the principle expressed in Lord Watson's speech in *Mackay v Dick* is not one of English law.

75. Mr Eaton also relied on the decision of this Court in *Little v Courage* in which the judgment was given by Millett LJ. Courage had let a public house in Norwich to Mr Little for 5 years with a term that Mr Little was granted an option to renew on certain conditions, one of which, in clause 26(1)(c), was that the parties should agree a new business plan. Mr Little purported to exercise the option but Courage refused to formulate or enter into discussions about a new business plan. Mr Little brought an action to enforce the option and grant of a new 5 year lease, and was met with the defence that the condition had not been fulfilled. He failed at first instance but succeeded on appeal. The decision was that in the light of what had happened at the time of the original lease, what was contemplated was that the landlord would formulate and propose a new business plan; and that the condition in the lease that a new business plan should be agreed was to be construed as meaning that such a plan was to be agreed *if required by the landlord*. As a matter of construction, therefore, the condition did not apply on the facts because the landlord had not required a business plan. Mr Little had also argued in general terms that Courage had acted cynically in refusing to agree a business plan and was therefore seeking to take advantage of its own wrong. This argument could not survive the fact that what is required is a breach of obligation, and Courage was under no obligation to agree a new business plan (Mr Little's arguments that a term should be implied to that effect having been rejected). The decision is therefore of no direct relevance to the issue in the appeal, but the passage in the judgment relied on was that at p. 474:

> "*General principles*
>
> 1. The doctrine of fictional fulfilment of a condition precedent which is found in the civil law forms no part of English law. The only questions which fall to be answered in English law are whether on the true construction of Clause 26(1) of the Lease and in the events which have happened (i) the condition precedent in paragraph (c) has been satisfied and (ii) if not whether in the circumstances it needed to be satisfied.
>
> 2. The process of construction includes, where applicable, the necessary implication of unexpressed terms and the doctrine that a man may not take advantage of his own wrong.
>
> 3. The latter doctrine is confined to the case where a party seeks to take advantage of his own breach of a legal obligation owed by him to the party opposite. Where, in breach of a contractual obligation, express or implied, a party has prevented the fulfilment of a condition precedent, he may not only be liable in damages for the breach but may also be precluded from claiming that the condition has not been fulfilled. But nothing less than breach of a legal obligation will do: see *Cheall v. Association of Professional Executive Clerical and Computer Staff*.
>
> …"

76. It is the first sentence of paragraph 1 upon which Mr Eaton particularly relies. However that is not a statement that the reasoning of Lord Watson in *Mackay v Dick* does not constitute a principle of English law. On the contrary, the second sentence of paragraph 3 recognises such a principle, and expresses the consequence as being that the party is precluded from claiming that the condition has not been fulfilled. All the first sentence of paragraph 1 is taking issue with is the concept of deemed or fictional fulfilment as the effect of the principle, rather the effect being akin to estoppel ("precluded") as recognised in paragraph 3. As I explain below, this difference in description of the effect of the principle is apparent in a number of the authorities but is irrelevant to the existence or scope of the principle itself. The passage relied on does nothing to support the Buyers' case in this appeal.

77. To conclude therefore, on the authorities, they provide a consistent body of case-law, both persuasive and, in the case of *Panamena* and *Cory v LRB*, binding on this court, for the principle contained in the reasoning of Lord Watson in *Mackay v Dick*, applicable as a matter of English law, that an obligor is not permitted to rely upon the non-fulfilment of a condition precedent to its debt obligation where it has caused such non-fulfilment by its own breach of contract, at least where such condition is not the performance of a principal obligation by the obligee nor one which it is necessary for the obligee to plead and prove as an ingredient of its cause of action. This formulation is subject to one further qualification which arises out of the juridical basis for the principle, which I address below.

Principle

78. Unlike the Judge, and contrary to Mr Eaton's submissions, I consider that the *Mackay v Dick* principle, as so formulated, involves no inconsistency with established tenets of contract law, but on the contrary, gives effect to them.

79. It is first helpful to seek to identify a juridical basis for the principle. It arises from the concept that a person should not be permitted to take advantage of their own wrong, but that is a statement of policy, or as the Judge described it, a 'maxim', rather than a juridical basis for the rule. It is not a freestanding principle of universal application even in contract law. It may be very profitable for a party to break its contract without inflicting an equivalent loss on a defendant, but generally speaking in such cases the law does permit it to take advantage of its own wrong and to keep the profit: damages are generally compensatory and, save in limited circumstances, do not involve disgorgement of profits.

80. The authorities use a series of different epithets to describe how the principle takes effect. In some cases the language is that of deemed fulfilment of the condition: Lord Watson in *Mackay v Dick* (the condition is "held as accomplished"); Ashurst J in *Hotham* ("equal to performance"); Parker LJ in *The Aello* ("condition deemed to have been fulfilled"); Lord Sumption in *Geys* ("deemed performance"). In others it is that the condition is dispensed with: Lord Thankerton in *Panamena* ("absolved from the necessity of obtaining the surveyor's certificate"); Goddard LJ in *Panamena* ("disentitles him from insisting on performance of the condition"). In others it is the language of estoppel or quasi estoppel or waiver: Lord Donaldson MR in *Cory v LRB* ("quasi estoppel"); Devlin J in *Tiberghien* ("not permitted to assert" non fulfilment of the condition and "in effect waiver"); Millett LJ in *Little v Courage* ("precluded from claiming that the condition has not been fulfilled"). These, however, are merely descriptors of the effect of the principle, not by way of identification of a legal doctrine whose ingredients must be fulfilled and

are then applied. None of the authorities, with their various descriptions of the effect of the principle, seeks expressly to identify its legal basis.

81. In my view, the legal basis of the rule is that it represents the presumed contractual intention of the parties. That is a principled basis for it, because in order for it to apply there must be (1) an agreement capable of giving rise to a debt rather than damages; (2) an agreement that the debt will accrue and/or be payable subject to fulfilment of a condition precedent; and (crucially) (3) an agreement that the obligor will not do the thing which prevents the condition precedent being fulfilled so as to prevent the debt accruing and/or becoming payable, whether that agreement takes the form of the implied term of cooperation identified by Lord Blackburn in *Mackay v Dick*, or an express term, as in this case. Unless (3) exists, the principle has no application, as *Cheall* confirms. The natural presumption arising out of that combination of ingredients is that the parties intend that in those circumstances the obligee will have the benefit of the debt for which it has bargained. The presumption is not, as Mr Eaton would have it, merely that the breach of element (3) should give rise to a claim in damages, because that ignores the bargain that in certain circumstances the obligee should have the benefit of a right in debt, which is recognised by elements (1) and (2). Put another way, the agreement that the obligor will not engage in the conduct which prevents the debt accruing and/or becoming payable implicitly carries with it an agreement that the consequence should be that the debt accrues and is payable.

82. That contractual intention is the juridical basis for the principle was recognised in *Newmont Property Ltd v Laverton Nickel NL* (1982) 44 ALR 588, a decision of the Privy Council on an Australian appeal about an agreement between provisional liquidators of mining companies which was conditional on approval by the court. It was held that the principle in *Mackay v Dick* had no application in such circumstances, because the condition was not one for the benefit of the parties only, but by way of statutory supervision whose main purpose was the protection of the contributors and creditors against the background of insolvency; and not one which the provisional liquidators could fulfil or the fulfilment of which they could procure. The Opinion of the Board, comprising Lords Diplock, Keith and Roskill, Sir John Megaw and Sir Harry Gibbs was given by Sir Harry Gibbs who said at p. 606:

> "In argument counsel for the appellant cited cases such as *Mackay v Dick* (1881) 6 App Cas 251 in support of the submission that where one party makes it impossible for a condition of the contract to be fulfilled, the condition is to be taken as satisfied. That is true in some cases, but not in all; whether performance of a condition precedent is excused where a party has prevented its performance must depend upon the nature of the condition and circumstances of the case. In some cases the nature and purposes of the condition will themselves be sufficient to indicate that the parties must have intended that the obligations which are expressed to be dependent on the fulfilment of the condition will come into existence only if the condition is fulfilled, and that it will not be enough that performance of the condition has been prevented by the wrongful act of one of the parties."

83. For these reasons I am unable to accept Mr Eaton's argument that the principle interferes with freedom of contract. It is a principle which gives effect to contractual intention, not one which frustrates it. If a contrary intention is sufficiently clearly expressed or can be implied from the circumstances of the case, the principle will not apply.

84. This accords with the approach to the maxim that a party should not be entitled to take advantage of their own wrong in the contractual field more generally. As I have explained, it has regularly been applied as a matter of construction since at least the early 18th century, but it has always been treated as a principle of construction, not of law, and as subject to a sufficiently clearly expressed contrary intention: see, for example, *Cheall* at pp.188H-189A, *Alghussein Establishment v Eton College* [1988] 1 WLR 587 at p. 595G; and *BDW Trading ltd v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548 at [31].

85. I would therefore formulate the principle as being that an obligor is not permitted to rely upon the non-fulfilment of a condition precedent to its debt obligation where it has caused such non-fulfilment by its own breach of contract, at least where such condition is not the performance of a principal obligation by the obligee, nor one which it is necessary for the obligee to plead and prove as an ingredient of its cause of action, and save insofar as a contrary intention is sufficiently clearly expressed, or is implicit because the nature of the condition or the circumstances of the case make it inappropriate.

86. Such a principle does not cut across contractual principles applicable to claims for damages such as causation, remoteness or mitigation. It does not apply principles which are applicable to claims for damages because a claim for damages is not what the parties have bargained for; they have bargained for a right in debt and impliedly agreed that in the circumstances in which the principle applies, the obligee should have the benefit of that bargain, namely a claim in debt.

87. Mr Eaton submitted that the Sellers' case betrays a confusion of thought between obligations and remedies: primary obligations, such as those in clause 2 to provide documentation, give rise to secondary remedies upon breach, namely remedies in damages; treating the remedy as lying in debt is impermissibly to treat the primary obligation as the remedy. The flaw in this analysis is its focus on the fact that what has prevented the fulfilment of the condition precedent is a breach of contract. Whilst that is indeed a necessary aspect of the *Mackay v Dick* principle being applicable, based as it is on the principle that a person should not be permitted to take advantage of their own wrong, Mr Eaton's point does not focus on the relevant aspect of the principle, which is the advantage which the wrongdoer is seeking to take. Where the advantage is the avoidance of the wrongdoer's liability in debt, it is to such liability that the remedy must be applied, and so it is entirely in accordance with principle that the remedy should be in debt.

88. Some commentators have suggested that the claim should be in damages because that enables the court to take into account the possibility that the condition might not have been fulfilled even if there had been no such breach, which the principle does not; and so the consequence of the principle is to introduce into this branch of the law a punitive element which is inappropriate to a contractual action: see e.g. Chitty on Contracts 35th edn at 4-205. I disagree. The argument supposes that the principle dispenses with the concept of causation, but it does not: the concept of a causative link is contained in the principle itself, namely that the obligor's conduct must have prevented the condition precedent being fulfilled. So in *Mackay v Dick*, for example, it would have been sufficient to prevent the principle applying had the buyer sought to plead and prove that the machine would in any event have failed the test at Carfin so that his failure to arrange it had no causative effect on the condition being unfulfilled. That was why the judgments focussed so closely on the procedural position which prevented the buyer from raising

any such argument. Applying principles of causation can give rise to difficult questions, no doubt in this as in other contexts, but it is not necessary to explore them here: on any view the Buyer's conduct was what caused the accounts not to be opened by HFW, and the tribunals so found. Mr Eaton submitted that it was not clear whether, if the accounts had been opened, the deposits would not have been paid, but that does not seem to me to be a relevant question. It is enough for the Sellers to prove that but for the breach the accounts would have been opened, in which case the deposits would have become due and been recoverable as a debt in the events which happened, i.e. non-payment of the deposits.

89. Nor would I accept Mr Eaton's argument that the application of the principle would work injustice to the Buyers on the facts of the current case. He suggested that it would do so because it would provide a windfall on a rising market, and would allow Sellers to recover an amount which exceeds any amount which the Sellers could recover in damages. Both aspects (if true) are beside the point. The deposits were required as an earnest of performance of the contract to protect the Sellers from the Buyers' failure to perform. As Fox LJ explained in *Damon SA v Hapag-Lloyd SA (The Blankenstein)* [1985] 1 WLR at p. 449G-H, the purpose of such a deposit is to protect the buyer against non-performance and to secure the seller, by forfeiture of the deposit, by an amount of money which could well exceed the amount of damages recoverable for failure to take delivery and pay the purchase price. That is the bargain, and the application of the *Mackay v Dick* principle gives effect to it. In this case the deposit fell to be paid as an earnest of performance and with the intention that a failure to pay it would entitle the Sellers to sue for it. In order to enable it to be paid an account had to be opened and the Buyers agreed to do what they needed to do in order to get it opened. They deliberately failed to do this. The parties cannot have intended that they should be able to rely on that breach of contract to avoid the obligation to pay the deposits, or the consequences of their failure to do so as giving rise to a claim in debt in accordance with the nature of the contract, the purpose of the deposits, and the law as explained in *The Griffon*.

90. The result in this case is not that the Sellers obtain a "windfall" US$4.94 million on the assumption that their loss caused by the Buyers' breach of contract in a damages claim would be nothing. The effect of the Buyers' breach of contract was to avoid a liability to pay US$4.94 million in circumstances where it was contractually agreed to be payable as a forfeitable deposit, irrespective of any damages claim or loss quantified by reference to market movement. To require such payment is not a windfall but rather holding the Buyers to their bargain by requiring the Buyers to provide the contractual benefit they agreed to provide, of which they have sought to deprive the Sellers by their wrongful breach of contract. In other words the bargain was for non-compensatory debt in the form of a liquidated forfeitable sum, and a remedy in non-compensatory debt, rather than compensatory damages, reflects the loss of bargain.

91. I agree with the more expansive treatment of this aspect of the argument by Nugee LJ in his judgment.

92. I would also accept Mr Kenny's submission that there is no logical or principled basis for drawing a distinction, in this context, between conditions as to the accrual of a debt, on the one hand, and on the other, conditions as to payability of an accrued debt, the latter of which Mr Eaton accepts attract the application of a principle which dispenses with fulfilment of the condition.

93. Mr Eaton treated the latter as following from the decisions of the House of Lords in *The Dominique* and of this court in *The Karen Vatis*. In *The Dominique* freight was earned on signing bills of lading and payable within 5 days of surrender of bills of lading. After loading, but before the expiry of 5 days from surrender of the bills, the vessel was arrested by creditors, and the charterers treated the arrest as a repudiation so as to terminate the charterparty. The plaintiff bank, as assignee of the owners' earnings, sued the charterers for the freight and succeeded. The freight was held to have been earned upon loading and the debt then accrued; the postponement of payment provided for was not a condition of the acquisition of the right to freight which was treated as having been "unconditionally" acquired prior to the termination: see per Lord Brandon at p. 1098-1099. That was so as a matter of construction of the clause: see p. 1098, treating the conclusion as in accordance with the decision of the Court of Appeal in *The Karen Vatis* on a comparable clause. In *The Karen Vatis*, the charterparty provided that freight should be deemed earned on shipment and 95% paid within three days of loading, with the balance of 5% payable within 20 days from completion of discharge. The vessel was lost on the voyage and owners claimed the 5% balance of freight. The claim succeeded. The reasoning of Lloyd LJ, with whom Slade and Croom-Johnson LJJ agreed, was that the full freight was earned upon shipment, and the apparent condition to payment of the balance of 5%, namely discharge, was not a condition at all as a matter of construction of the clause because such a condition would be inconsistent with the main thrust and purpose of the clause providing that the freight was earned in full on shipment: see p. 332 (and per Slade LJ at p. 336). Lloyd LJ expressly rejected the owner's argument that "the completion of discharge is a condition precedent to the owners' right to recover 5 per cent": see p. 333. He said that the reference to 20 days from discharge could be dispensed with as unworkable (see p. 333), and payment within a reasonable time substituted as "a gap in the machinery for final settlement of the parties' mutual claims" in the words of Slade LJ at p. 336. He did not purport to be applying the *Mackay v Dick* principle, which could not have applied because the non-completion of the voyage was not the result of owners' breach of charter.

94. Neither *The Dominique*, nor *The Karen Vatis*, therefore, were cases in which there was a condition precedent to the payment of an accrued debt, but rather ones in which it was held that there was no such condition precedent, applying normal principles of construction. The debts accrued unconditionally and therefore were payable.

95. Where there is such a condition precedent, whether it be to the accrual of a debt, or to its payability, it is necessary for the *Mackay v Dick* principle to apply in either case if a party is to be prevented from taking advantage of its own wrong, as Lord Donaldson observed in *Cory v LRB*. Both are conditions but for the fulfilment of which the cause of action does not arise, and therefore but for the fulfilment of which the debt cannot be claimed or recovered.

96. Accordingly the principle in *Mackay v Dick*, as I have formulated it, is as well grounded in principle as it is in authority.

Conclusion

97. For these reasons I would allow the appeal.

LORD JUSTICE NUGEE :

98. I agree, and I am very grateful to Popplewell LJ for his masterly analysis of the authorities.

99. I add a few words on the justice of the outcome in the present case, as Mr Eaton, echoing some remarks by Dias J at the outset of her judgment (see at [25]-[29]), submitted that the ordinary remedy for breach of contract was damages, that damages were awarded on the compensatory principle, and that to accept the Appellants' argument would be to subvert these fundamental principles of the law of contract. I disagree.

100. A buyer agrees to buy a ship, and signs a contract. This requires him to pay a 10% deposit. In order to do that an account has to be opened. The buyer agrees to provide the documentation necessary to open the account without delay. This would I think be implicit anyway, but in the Norwegian Saleform is an express obligation. The buyer fails to do so. It is not now disputed that that was a breach of contract – indeed it seems to me a plain and egregious breach. That means the deposit cannot be paid. Is the buyer in those circumstances liable for the unpaid deposit? Or can he say that because in breach of contract he failed to co-operate in opening the account the deposit never became due and hence he only has to pay such damages as the seller can prove?

101. On these uncomplicated facts I would have thought the answer was straightforward. It cannot have been the parties' intention that the buyer could avoid his obligation to pay the deposit by the simple expedient of deliberately failing to comply with what is on any view a subsidiary obligation to sign the necessary forms to open the account.

102. The purpose and effect of requiring a buyer to pay a deposit is well known. As it is put in the cases, the deposit is an "earnest of performance" (*The Griffon* at [13] per Tomlinson LJ), or more fully "an earnest of the purchaser's ability and intention to complete the purchase in due course" (*Myton Ltd v Schwab-Morris* [1974] 1 WLR 331 at p. 336B per Goulding J). Or as clause 2 of the MOAs here puts it the deposit is paid as "security for the correct fulfilment of the agreement" (see paragraph 6 above). If the buyer completes it operates as part payment of the price. But if the buyer defaults and the contract is never completed, the seller forfeits the deposit and keeps it. A deposit therefore operates as a powerful disincentive to a buyer from signing a contract unless he both genuinely intends, and is confident of being able, to complete; and an equally powerful disincentive to a buyer who has signed a contract from defaulting on the purchase. For the seller it operates to reassure him that the buyer is serious about completing; and also as a fixed sum which he can keep in the case of the buyer's default in completing without having to prove what damage he has suffered, and very often without having to take proceedings at all. For a purchase to go off after a contract has been signed can often have a number of practical disadvantages which may be real enough even if they cannot be readily quantified and compensated for in damages. The right to forfeit the deposit is the seller's protection against being, for want of a better term, messed around by a buyer, and represents a careful allocation of the risks and consequences of the buyer defaulting on the purchase.

103. There is nothing obscure or technical about this. Nor of course is it peculiar to the sale of ships. It has long been standard practice on the sale of land, and I would have thought it was readily understood by almost every vendor and purchaser of ordinary domestic

property, where the system usually operates smoothly without any difficulty or the need for litigation.

104. In the case of contracts for the sale of land, the practice is that the deposit is payable on exchange of contracts, so that a vendor will not usually exchange contracts with a purchaser without the deposit being paid. The Norwegian Saleform by contrast does not require payment of the deposit on signature but within 3 days afterwards. We were not given any explanation why this is so. It may be a reflection of the fact that a ship can be sold more quickly and more simply than the rather protracted and elaborate way in which most conveyancing is conducted. But it is difficult to believe that the parties thereby intended to make a radical alteration in their respective rights.

105. If the buyer defaults in payment after the deposit has become due, he remains liable to pay it: see *The Griffon* at [4] per Tomlinson LJ explaining that it was the unanimous conclusion of the Court in *The Blankenstein* that "had the obligation to pay the deposit fallen due before the contract was terminated, the sellers could, after termination, have simply recovered the deposit as a debt which had accrued due before termination." Under the current form of the contract, the seller also has an express contractual right to cancel and claim compensation in clause 13. But it has been held by this Court in *The Griffon* that this does not affect his right to claim the unpaid deposit from the buyer. Mr Eaton accepted we were bound by this decision, but reserved the right to challenge it in the Supreme Court. We therefore did not hear any argument on it. As at present advised, however, my own view is that it is correct. The parties intended that the buyer should pay the deposit and I do not myself see any reason to think that they intended that the seller should lose the right to payment by terminating the contract.

106. Against this background, what is the position if the buyer not only does not pay, but does not even do what he is obliged to do to enable the account to be opened? To my mind it is difficult to suppose that the parties intended that this should make all the difference. The obligation to co-operate in opening the account is a minor administrative necessity, but cannot have been intended to give the buyer an opportunity to avoid paying the deposit – what the parties surely intended is that he should open the account as a preliminary to paying it, not that it should give him the option whether to pay or not and leave the seller to sue for such damages as he could prove. It seems to me most unlikely that they intended to alter the balance of risks in this way.

107. So one would expect to find that the law provides that the buyer's failure to do what he has agreed to do to enable the account to be opened does not affect his liability to pay the deposit. As explained by Popplewell LJ this is precisely what the *Mackay v Dick* principle achieves in a case like the present by precluding the buyer from relying on the non-fulfilment of the condition precedent that he has brought about by his own breach. For the reasons I have sought to explain this does not to my mind cut across ordinary contractual principles. Rather it gives effect to the parties' bargain.

108. It is not necessary for me to repeat the analysis which leads to this conclusion. I agree that the appeal should be allowed for the reasons that Popplewell LJ has so well expressed.

LADY JUSTICE FALK :

109. I agree with both judgments**.**