



Neutral Citation Number: [2023] EWHC 3220 (Comm)

Case No: CL-2022-000333

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**COMMERCIAL COURT (KBD)**

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

Date: 15/12/2023

Before :

**THE HONOURABLE MRS JUSTICE DIAS DBE**

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**IN THE MATTER OF AN ARBITRATION CLAIM BETWEEN:**

Between :

<b>KING CRUDE CARRIERS SA</b>	<b><u>Claimants</u></b>
<b>PRINCE CRUDE CARRIERS SA</b>	
<b>ZENON CRUDE CARRIERS SA</b>	
<b>- and -</b>	
<b>RIDGEBURY NOVEMBER LLC</b>	<b><u>Defendants</u></b>
<b>RIDGEBURY SIERRA LLC</b>	
<b>MAKRONISSOS SPECIAL MARITIME</b>	
<b>ENTERPRISE</b>	

CL-2022-000332

**AND**

**IN THE MATTER OF AN ARBITRATION CLAIM BETWEEN:**

<b>AGATHONISSOS SPECIAL MARITIME ENTERPRISE</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>BETA CRUDE CARRIERS SA</b>	<b><u>Defendant</u></b>

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**Mr Nigel Eaton KC and Mr Dave Barnard** (instructed by **Reed Smith LLP**) for the  
**Claimants**  
**Mr Julian Kenny KC and Mr Michal Hain** (instructed by **Stephenson Harwood LLP**) for  
the **Defendants**

Hearing dates: 8-9 November 2023  
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## **Approved Judgment**

This judgment was handed down remotely at 10am on Friday 15 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE DIAS DBE

## Mrs Justice Dias DBE:

1. I have before me two separate appeals under the Arbitration Act 1996 relating to four arbitrations under four separate but related contracts for the sale of four second-hand oil tankers, the “RIDGEBURY ALINA L”, the “RIDGEBURY ASTARI”, the “MAKRONISSOS” and the “AGATHONISSOS”. For convenience I shall refer to the first two vessels simply as the “ALINA” and the “ASTARI”. Each contract was concluded between one of the Claimant companies and one of the Defendant companies. It is unnecessary for the purposes of this judgment to distinguish between the different Claimants and Defendants and I therefore refer simply to “Buyers” and “Sellers”.
2. The contracts were all on materially identical terms and the disputes which arose in relation to each were likewise the same. Accordingly, the four arbitrations were heard together. By way of adding a touch of procedural spice, however, although each of the four panels was drawn from the same four individuals, the constitution of each panel differed from case to case. Thus it was that in the arbitrations relating to the “ALINA”, “ASTARI” and “MAKRONISSOS”, a majority award was made by the same two arbitrators, while the two arbitrators who had dissented in those arbitrations made a majority award to precisely the opposite effect in the “AGATHONISSOS” arbitration.
3. By leave of Mr Justice Foxton granted on 21 and 20 October 2022 respectively, Buyers now appeal on a question of law arising out of the awards in the first three arbitrations, while Sellers appeal on a different question of law arising out of the award in the fourth.

## THE CONTRACTS

4. The ship sale contracts were all concluded on the Norwegian Saleform 2012. which included the following terms:

### *“Definitions*

...

*“Deposit” shall have the meaning given in Clause 2 (Deposit)*

*“Deposit Holder” means Holman Fenwick Willian [sic] Greece 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”).*

### *2. Deposit*

*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 the Deposit Holder within three (3) Banking Days after the date that:*

- (i) this Agreement has been signed by the Parties and exchanged in original and by email or telefax; and*
- (ii) the Deposit Holder has confirmed in writing to the Parties that the account has been fully opened and ready to receive funds*

*The Deposit shall be released in accordance with joint written instructions of the Parties. Interest, if any, shall be credited to the Buyers. Any fee charged for holding and releasing the Deposit shall be borne equally by the Parties. The Parties shall provide to the Deposit Holder all necessary documentation to open and maintain the account without delay.*

### *3. Payment*

*The 90% of the Purchase Price and all other sums payable on delivery by the Buyers to the Sellers under Agreement shall be remitted to the Deposit Holder one Banking Day before delivery and to be held on the buyers' sole behalf pending release instructions from the buyers. The Buyers will only give such release instructions following review by the Buyers in the closing meeting of all documents to be delivered by the sellers under Clause 8, hereunder evidence that the Vessel is free of encumbrances.*

*On delivery of the Vessel, but not later than three (3) Banking Days after the date that notice of Readiness has been given in accordance with Clause 5 (Time and place of delivery and notices):*

*(i) the Deposit shall be released to the Sellers; and*

*(ii) the balance of the Purchase Price and all other sums payable on delivery by the Buyers to the Sellers under this Agreement shall be released in full free of bank charges to the Sellers' Account...*

...

### **13. Buyers' default**

*Should the Deposit not be lodged in accordance with Clause 2 (Deposit), the Sellers have the right to cancel this Agreement, and they shall be entitled to claim compensation for their losses and for all expenses incurred together with interest. ,*

*Should the Purchase Price not be paid in accordance with Clause 3 (Payment), the Sellers have the right to cancel this Agreement. in which case the Deposit together with interest earned, if any, shall be released to the Sellers. If the Deposit does not cover their loss, the Sellers shall be entitled to claim further compensation for their losses and for all expenses incurred together with interest.*

### **14. Seller's Default**

*Should the Sellers fail to give Notice of Readiness in accordance with Clause 5(b) or fail to be ready to validly complete a legal transfer by the Cancelling Date the Buyers shall have the option of cancelling this Agreement. If after Notice of Readiness has been given but before the Buyers have taken delivery, the Vessel ceases to be physically ready for delivery and is not made physically ready again by the Cancelling Date and new Notice of Readiness given, the Buyers shall retain their option to cancel. In the event that the Buyers elect to cancel this Agreement, the Deposit together with interest earned, if any, shall be released to them immediately.*

*Should the Sellers fail to give Notice of Readiness by the Cancelling Date or fail to be ready to validly complete a legal transfer as aforesaid they shall make due compensation to the Buyers for their loss and for all expenses together with interest if their failure is due to proven negligence and whether or not the Buyers cancel this Agreement.*

...

### **Clause 21. Transfer of Management**

*In the event that Buyers, acting reasonably in good faith, are unable to enter into Management agreements with the Vessel's Managers by the time of Sellers tendering NOR, then the Parties shall cooperate and make best endeavours to find a solution so that the Buyers are not in default and the Vessel can be delivered as promptly as possible."*

## **THE DISPUTES**

5. The MOAs were all duly signed but Buyers failed to pay any of the deposits required under clause 2. Sellers, having purported to tender notice of readiness in respect of three

of the vessels,<sup>1</sup> thereafter gave notice cancelling the contracts under clause 13 and commenced arbitration seeking to recover the amount of the deposits.

6. It was Buyers' case that the purpose of clause 21 was to address the effects of the COVID-19 pandemic and, in particular, the fact that Buyers were unable to appoint vessel managers of their own choosing due, amongst other things, to the difficulty of making crew changes. Clause 21 accordingly envisaged that Buyers would conclude management agreements with the vessels' existing managers and that if this had not been achieved by the time that NOR was tendered, both parties should co-operate to find a solution.
7. Buyers also submitted that despite their reasonable endeavours, they were unable to conclude management agreements prior to tender of NOR but that Sellers took no steps to co-operate in finding a solution and instead wrongfully terminated the contracts. Buyers' principal argument in the arbitrations was that they were thereby relieved of their obligations under the MOA, including the obligation to pay the 10% deposits.
8. In the light of these arguments, the arbitrators ordered the determination of the following three preliminary issues in each of the arbitrations:
  - i) Issue 1: Does Clause 21 in each MOA relieve the Buyers from any obligations under Clause 2 unless the Buyers have already entered into a management agreement, or a different mutually acceptable solution has been found within the meaning of Clause 21;
  - ii) Issue 2: If no, are the Buyers liable because they cannot rely on their own breach of contract preventing the fulfilment of a condition precedent to payment?
  - iii) Issue 3: If so, are Sellers entitled to a final partial award for the amount of the deposit?

For the purpose of determining these issues, the tribunal proceeded on the basis of certain assumed facts, including the matters set out in the first sentence of paragraph 6 and the first sentence of paragraph 7 above (save as to Sellers' termination being wrongful).

9. The majority arbitrators in the "ALINA", "ASTARI" and "MAKRONISSOS" arbitrations answered Issue 1 "no". Buyers do not seek to appeal that conclusion.
10. By contrast, the majority in the "AGATHONISSOS" arbitration answered Issue 1 "yes" and this is the subject of Sellers' appeal. Permission to appeal was granted by Foxton J on the grounds that there was *prima facie* an obvious error by the arbitrators which would substantially affect the rights of the parties.
11. As to Issues 2 and 3, the majority in the "ALINA", "ASTARI" and "MAKRONISSOS" arbitrations held that Buyers were in breach of contract in failing to provide the necessary KYC documentation to HFW as a result of which the escrow account could

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<sup>1</sup> The tribunal found that there was in fact no NOR in the case of the "ASTARI" as Buyers had purported to cancel first.

not be opened.<sup>2</sup> Again there is no appeal against that decision. However, they correctly recognised that this alone did not determine whether Buyers' consequent liability was in debt for the amount of the deposit, or in damages, a matter which they considered as part of Issue 3.

12. Sellers argued that they were entitled to claim the deposit as a debt on one or other of two bases.
13. Their primary case proceeded on the basis (accepted by Buyers) that payment of the deposit under clause 2 was subject to the following conditions precedent:
  - a) Signature and exchange of the MOA (this had been satisfied);
  - b) Provision by the parties to HFW of all necessary documentation (complied with by Sellers but not by Buyers);
  - c) Confirmation by HFW that the escrow account was fully open and ready to receive funds (not satisfied);
  - d) Lapse of 3 banking days thereafter.
14. They submitted that it was a general principle that where a defendant's breach of contract results in the non-fulfilment of a condition precedent to a debt, the condition is deemed to be either waived or satisfied on the basis that a wrongdoer should not be permitted to derive an advantage from his own breach. Accordingly, since the only reason the escrow account had not been opened was because of Buyers' breach of contract in failing to provide their KYC documentation, the relevant condition precedent must be deemed to have been waived or satisfied. In support of this "general principle", they relied principally on three cases: *Mackay v Dick* (1881), 6 App Case 251 (HL); *Comp Noga d'Importation et d'Exportation SA v Abacha (No.3)*, [2002] CLC 207 and *The Leonidas*, [2021] 2 Lloyd's Rep. 165. While failure to pay the deposits was a repudiatory breach in itself, Sellers were contractually entitled to terminate the contracts under clause 13 and forfeit the deposits.
15. Alternatively, Sellers argued that the deposits accrued due on signing the MOA and that the contractual provisions relating to the setting up of the escrow account were mere machinery which did not affect the accrual of the debt and could be dispensed with if necessary.
16. In response, Buyers denied any liability in debt on the basis that English law did not recognise any doctrine of "deemed fulfilment" of a condition precedent. They submitted that it was at the very least a problematic proposition which was not universally accepted. They argued further that Sellers were not entitled to recover the amount of the deposit even as damages, in essence because even if the deposit had been paid, it would have proved impossible to conclude any management agreement with the managers and Sellers's refusal to co-operate in breach of clause 21 would inevitably have resulted in cancellation or frustration of the MOAs through no fault of Buyers.

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<sup>2</sup> In fact Buyers did provide the necessary documentation for the "ALINA" but did not sign the escrow agreement as required. This was also held to be part of the "necessary documentation" for the purpose of clause 2. It was not suggested that this slight variation in the facts made any difference to the issues to be addressed and there is no appeal against that conclusion.

One way or another, therefore, the deposits would have been returned to them and Sellers would have suffered no loss. (This was referred to before me as the “*Golden Victory* point”.)

17. The majority of the three tribunals accepted as well-established the principle that a party cannot rely upon its own wrong and accordingly held that Buyers could not rely on their own breach of contract as preventing the fulfilment of a condition precedent to payment. They further accepted that:

*“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.”*
18. They did not adjudicate on Buyers’ *Golden Victory* point that Sellers would not in any event have suffered any loss: first, because this was irrelevant if Sellers were entitled to recover the deposits as a debt and, secondly, because the point had not been pleaded and was therefore not open to Buyers.
19. Buyers now appeal the determination of the majority that the condition precedent in clause 2 requiring them to provide documentation was deemed to be fulfilled by reason of their breach of contract such that the obligation to pay the deposit thereupon accrued.
20. They also seek remission of the award under section 68(3) on grounds that the *Golden Victory* point had in fact been pleaded and that the majority’s failure to deal with it therefore amounted to a serious irregularity.
21. Permission to appeal was granted by Foxton J on 21 October 2022 on the basis that the point of law was one of general public importance on which there were conflicting statements in the authorities which might well merit exploration by a higher court in the future. Moreover, the principled basis of the “deemed fulfilment” doctrine was open to serious doubt, as was its full extent, such that the conclusion of the majority was itself also open to serious doubt.
22. In relation to the section 68 application, he rejected Sellers’ argument that Buyers had lost the right to appeal by failing to invoke section 57 of the Act since it was arguable that this did not provide a basis for revisiting the majority’s conclusion that the *Golden Victory* point had not been pleaded.

## **BUYERS’ APPEAL**

### **A. Recovery of deposits in debt**

#### *Preliminary observations*

23. Buyers’ case in a nutshell was that there is no binding English authority which establishes the “general principle” for which Sellers contend. *Mackay v Dick* was a

Scottish appeal; *The Leonidas* did not decide the point and *Abacha* is not a decision which is binding on me.

24. It was further submitted by Mr Nigel Eaton KC on their behalf that the doctrine of deemed waiver or fulfilment was in any event wrong in principle. He made the following preliminary observations:

- i) If Buyers had provided the required documents, the deposits would not have been payable directly to Sellers as debts which they were unconditionally entitled to retain, but would only have been payable to HFW on the terms of the escrow agreement. They could not have been released to Sellers unless and until Sellers became entitled to forfeit them. In accordance with clause 13, this could only have happened if Buyers failed to pay the purchase price. However, the purchase price never did fall due for payment.
- ii) The effect of the majority's decision was that the deposits nonetheless became payable directly to Sellers as debts which they were unconditionally entitled to retain purely as a result of Buyers' breach of contract in failing to provide documentation. However, a deemed satisfaction of the condition precedent could not sensibly produce a different result from an actual satisfaction.
- iii) The majority decision therefore involved a significant rewriting of the contract.

25. Like Buyers, I start by considering the question as a matter of principle.

- i) The primary remedy for breach of a primary obligation contained in a contract is the payment of damages. Leaving aside cases where specific performance is available, the primary obligation to render performance is replaced upon breach by a secondary obligation to pay damages: *Chitty on Contracts* (34<sup>th</sup> ed.) §29-001.
- ii) Damages are assessed on a compensatory principle designed to recompense the claimant for the loss he has actually suffered as a result of the breach, in other words, to put the claimant in the same position as if the contract had been performed, neither a better position nor a worse. To this end, various rules have been developed to govern questions of causation, remoteness, mitigation etc.
- iii) Assessment of a claimant's loss may depend on looking at what the claimant himself or a third party would have done had there been no breach. In the former situation, the claimant must satisfy the court on a balance of probabilities that he would have acted in a particular way. In the latter situation, the court assesses the likelihood that the third party would have acted one way or another – the so-called “loss of a chance” principle: *Chitty (op. cit.)* §27-078.
- iv) Furthermore, the court must assess the loss in the light of the facts and circumstances as they exist at the date of assessment. The leading case in this respect is *The Golden Victory*, [2007] UKHL 12; [2007] 2 AC 353 where a shipowner claimed damages for wrongful repudiation by the charterer of a long-term time charter containing a war clause. By the time the claim came to be assessed, war had actually broken out and the House of Lords assessed the



shipowner's damages on the basis that the charterparty would in fact have been cancelled and come to an end at that point.

- v) Where, however, the primary obligation consists of the payment of a sum of money, the court will effectively enforce performance of that obligation by giving judgment for the debt: *Chitty (op. cit.)* §2-021. The rules governing the recovery of damages do not apply and the claimant need only prove occurrence of the condition upon which the sum becomes payable: *Chitty (op. cit.)* §29-010; 30-002.
  - 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* (6<sup>th</sup> 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* (24<sup>th</sup> 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* (11<sup>th</sup> ed.) §§16-001, 16-021, 16-023, 16-062. The seller's remedy in this situation is a claim for damages for non-acceptance.
  - viii) In some circumstances, a claimant may, notwithstanding default by the defendant, be able himself to continue performance of such obligations as entitle him to sue for the price or other agreed sum: *Benjamin (op. cit.)* §16-061. It is not often that this will be the case but *White & Carter (Councils) Ltd v McGregor*, [1962] AC 413 is a well-known example.
  - ix) Termination of a contract following repudiation does not affect accrued rights. Accordingly, if a debt has accrued due prior to termination it may be claimed as such notwithstanding that the contract has since come to an end. Likewise, accrued rights to claim damages may still be asserted by either party: *Chitty on Contracts (op. cit.)* §27-082.
26. All of this is trite law, yet the "general principle" on which Sellers' case is founded involves a legal fiction which appears at first blush to be inconsistent with the principles set out in particular at paragraphs 25.vi) and 25.vii) above.

27. Jeremy Bentham expressed himself trenchantly on the subject of legal fictions nearly 200 years ago: see *The Works of Jeremy Bentham* (ed. Tait 1843) Vol. 7, Chap. VIII p.283:

*“What have you been doing by the fiction, - could you, or could you not, have done it without the fiction? If not, your fiction is a wicked like: if yes, a foolish one.*

*Such is the dilemma. Lawyer! Escape from it if you can.*

*But no: the distinction is but in appearance; folly none in either case, except in so far as all wickedness is folly: mischievous in every case the effect; in every case wicked, if it had any, the purpose.*

*Fiction of use to justice? Exactly as swindling is to trade.”*

28. The fiction relied on here deems an obligation to have been performed or waived when it has not in truth been performed or waived, and perhaps never could have been performed. The primary fact-finding function of the court is thereby removed and it is required to assume as true facts which are not or may not be true. The effects of a fiction thus go much further than those of a rebuttable presumption. In these circumstances, it might be thought that a fiction should not be adopted unless to do so is both necessary and in the interests of justice. For example, the legal fiction in cases of simultaneous death that the older life is presumed to have pre-deceased the younger provides a useful and practical answer to a problem which is otherwise incapable of resolution by traditional methods of proof.
29. In this case, however, a principle of deemed fulfilment/waiver is not obviously either necessary or in the interests of justice. On the contrary, it would allow the claimant to bypass all the careful controls that the courts have imposed over the years on the recovery of damages. While, on particular facts, the claimant’s loss might be the same as the amount of the debt, that will not necessarily be so. Holding that a breach of contract results in deemed fulfilment of a condition precedent absolves the claimant from having to prove his loss and precludes the defendant from raising legitimate arguments about the extent of that loss, thereby potentially placing the claimant in a better position than he would have been in had the contract actually been performed. There is no obvious commercial justification for this. The claimant has a perfectly adequate legal remedy for any breach by way of damages commensurate with his actual loss and there is force in the observation in *Chitty on Contracts (op. cit.)* §4-204 that such a fiction introduces an unnecessarily punitive element into the law of contract. If the parties intend that the claimant should be put in a better position in particular circumstances, they should say so expressly rather than relying on a naked fiction.

### *The case law*

30. Having made those observations, I turn to the authorities to see what the courts have held to be the effects of a breach of contract on the accrual of debts subject to conditions precedent. I was referred by the parties to the following with which I deal in chronological order.

*Hotham v East India Company*, (1787) 1 TR 639

31. This was a claim by a shipowner for deadfreight. The charterparty provided for the charterer to load as much cargo as the ship could carry and further provided that:

*“to the end the tonnage of the said ship, and the freight thereby payable, might be the better ascertained, it was thereby covenanted that no claim should be admitted, or allowance made by the defendants, for short tonnage or deficiency in loading the said ship in or for her homeward bound voyage unless the same should be certified by the defendant’s president, agent, or chiefs and councils, or supercargoes, from whence she should receive her last dispatch, which said certificate the said presidents, agents, or chiefs and councils, or supercargoes respectively, should give to the master for the time being, if reasonably demanded; and also unless such short tonnage be found and made to appear on her arrival in the river Thames upon a survey to be taken by four shipwrights, or others to be indifferently named and chosen by the defendants and the plaintiffs;...”*

32. The ship was short loaded and the defendant refused, despite request, to certify the deficiency. The shipowner sued for deadfreight and the defendant asserted that nothing was due as the required certificate had not been obtained. Mr Justice Ashurst agreed that if the certificate and the post-arrival survey were indeed conditions precedent to the shipowner’s right to recovery, then failure to obtain them would be a bar to the claim. This was purely a question of construction.

33. So far as the certificate was concerned, Ashurst J did not find it necessary to decide whether it was a condition precedent or not. Even if it was, the shipowner had taken all proper steps to obtain the certificate and since (as found by the jury) the neglect and default of the defendant’s agents had rendered it impossible to perform the condition this was *“equal to performance”* – a proposition which he clearly regarded as well-established and indeed a matter of common sense. He went on to state that the right of action was vested in the shipowner *“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.”* Having thus accrued, the cause of action could in principle have been defeated by the failure to carry out a post-arrival survey which was a condition defeasant or subsequent. However, the defendant could not rely on this point as it had not been pleaded.

34. Mr Justice Ashurst did not explain further what he meant by *“equal to performance”*. On their face, these words appear to support a doctrine of deemed fulfilment. However, what does seem tolerably clear is that the judge considered that the entitlement to freight accrued upon the mere fact of the ship being short loaded in breach of contract, in which case the requirement for a certificate could at best have been a condition precedent only to payment. Indeed, this is consistent with the wording of the contract itself which explained the certificate as being necessary in order to determine the quantum of the claim.

*Inchbald v The Western Neilgherry Coffee, Tea, and Cinchona Plantation Co Ltd* (1864), 144 ER 293

35. The defendant company employed a broker to dispose of shares in the company. He was paid £100 with the promise of a further £400 when all the shares were allotted.

However, the company was wound up before this could be achieved and the broker sued for breach of contract.

36. As appears from the judgment of Chief Justice Erle, it was conceded that the £400 never became payable as such because the shares were never all allotted. However, the defendant had prevented the broker from earning the £400 by its own wrongful act in winding up the company up and was therefore liable in damages for his loss of the chance to earn the money. Damages were assessed at £250.
37. Mr Justice Willes took the view that where one party undertook to pay his counterparty a sum of money upon a given event, he would be liable if he did any act which prevented or made it less probable that the other would receive it. He agreed that the plaintiff was entitled to receive £400 “*less an allowance for the risk*” and further agreed that £250 was a reasonable compensation in all the circumstances.
38. Mr Justice Byles likewise considered that the defendant was liable in damages, being in breach of an obligation not voluntarily to do any act which would prevent the plaintiff from earning his fee. Keating J concurred, albeit pointing out that the defendant’s act was not wrongful or voluntary but forced on it by the act of a third party. But for that, the plaintiff would have had a chance of earning the £400.
39. All four members of the court thus agreed that in the circumstances which had occurred, the plaintiff had not earned the £400. Nonetheless, he had been deprived of the opportunity of earning it and the defendant was liable in damages to compensate him for the chance that he might have done so. This is not a decision which subsequent courts have found easy to explain. Lord Wright in *Luxor v Cooper* (as to which, see further below) said he could not understand it unless it was treated as analogous to a case of wrongful dismissal. *Bowstead & Reynolds on Agency* (22<sup>nd</sup> ed., 2021) §7-041 fn 259 regard it as a case of doubtful authority and best explained on the basis of *quantum meruit*. An alternative explanation, although not clearly stated in all of the judgments, is that liability was based on breach of an implied term that the defendant would not voluntarily act so as to prevent the plaintiff from earning his fee. As such, it can perhaps be regarded as an early example of the argument later put to rest in *Luxor v Cooper* that a principal is under an implied obligation not to deprive his agent of the opportunity of earning commission.

*Mackay v Dick* (1881) 6 App Cas 251

40. *Mackay v Dick* is the *fons et origo* of the “general principle” relied upon by Sellers and thus merits close attention. It involved the sale of a mechanical digger which was guaranteed to be capable of digging out earth at a certain rate. The machine was to be brought to the buyer’s cutting at Carfin and tested on a properly opened up face. If it passed the test, the buyer was to keep it and pay the agreed price; otherwise the seller was to remove it.
41. It is important to note at the outset that this was a Scottish case which therefore has to be read in the context of the particular rules of pleading which applied under Scottish law.
42. The case started life before the Sheriff Substitute who found for the seller. An appeal to the Sheriff succeeded on the basis that the machine was in fact incapable of meeting

the contractual requirements. There was then a further appeal to the Court of Session. Under Scottish rules of pleading, the court was obliged to set out the facts which had been found established and state how far its judgment proceeded on those facts or on any point of law. The court had no power to go behind the facts as found but could only remit the case for further findings. Appeal from the Court of Session to the House of Lords only lay on a point of law.

43. The terms of the interlocutor pronounced by the Court of Session are therefore critical to a proper understanding of the House of Lords decision. So far as relevant they were as follows:
- i) It was a condition of the contract that the buyer should not be bound to accept and pay for the machine if it should fail to meet the guaranteed capability after being fairly tried on a properly opened-up face;
  - ii) It was impossible for the machine to have the stipulated fair trial unless the buyer provided a properly opened-up face at Carfin;
  - iii) The buyer failed to provide a properly opened-up face notwithstanding repeated requests and thus prevented the machine from being tested in the manner provided by the contract.
44. The machine had in fact been tried at another site (Garriongill) where it had abjectly failed to live up to its contractual billing. It is therefore perhaps understandable that the buyer saw no useful purpose in subjecting the machine to another test at Carfin which it was similarly doomed to fail. Much of the debate before the Court of Session accordingly centred on the buyer's argument that Garriongill had been substituted for Carfin as the contractual test site. This argument having been rejected, Lord Shand held that since the buyer had declined to provide the means to carry out the contractual test, it must be held that the test had been fulfilled on the basis of a proposition set out in section 50 of Bell's Principles that "*If a debtor bound under a certain condition have impeded or prevented the event it is held as accomplished. If the creditor have done all that he can to fulfil a condition which is incumbent on himself it is held sufficient implement.*" This proposition was said to be supported by Pothier drawing upon Roman law. With some reluctance, as he clearly felt that there were serious doubts as to the capabilities of the machine, Lord Shand (with whom Lord Mure and the Lord President agreed) therefore held that the buyer was obliged to pay the price. Lord Deas dissented.
45. Upon appeal to the House of Lords, the buyer argued that (i) nothing was due to the seller, (ii) he was not bound to accept the machine as it had failed on trial and (iii) the sale was conditional on a trial which the machine had failed so that he was not liable for the price. Again the argument centred on the substitution of Garriongill for Carfin as the test site and the alleged non-conformity of the machine.
46. The two leading judgments were given by Lords Blackburn and Watson. Lord Blackburn agreed with Lord Watson on a point of pleading which had been raised, namely that it was not open to the court to make findings on matters which had not been included in the issues before the jury. Accordingly, the buyer could not rely on the unfitness of the machine as there were no findings to this effect and he could not complain about this as he should have taken steps to amend his pleadings.

47. Having disposed of this point, Lord Blackburn held that the effect of the contract was that the contractual test was to be conclusive. If the machine failed, the seller was to remove it; if it passed, the buyer was to keep it and pay the price. He also set out in a very well-known passage the general rule that “*where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.*” This statement of principle has been relied on countless times and is undoubtedly well-established in English law. I refer to it as the “implied term of co-operation”.
48. By way of example, he went on to cite the 15<sup>th</sup> century case of the *Mildenhall Bell* which he referred to as the foundation of the principle. The *Mildenhall Bell* involved an action on an obligation<sup>3</sup>, whereby the defendant’s obligation to pay was to be void if a particular condition was satisfied. The condition was that the Mildenhall bell was to be brought by the men of Mildenhall to the defendant brazier’s house and there weighed and put into the fire and the defendant was to make a new tenor bell. The defendant declined to pay on the basis that the bell had not been weighed or put in the fire. As appears from the Year Book report of the case, his argument was that this was a condition precedent to his obligation to make a new tenor bell. However, the court rejected the defence as it was for the defendant himself to weigh the bell and put it in the fire, although it pointed out that he could also have put it straight in the fire without seeing it weighed in which case he would have waived the need to weigh it first.
49. On the basis of the interlocutor pronounced by the Court of Session, Lord Blackburn held that the buyer was bound to keep and pay for the machine unless it failed a fair test at Carfin. However, this required the co-operation of both parties and in the same way that the defendant in *Mildenhall* could not rely on his own failure to co-operate in order to argue that the bell had not been weighed and put in the fire, so too the buyer here could not rely on his lack of co-operation to argue that the test had not been satisfied. Accordingly, he could never be in a position of requiring the seller to take the machine back and must accordingly keep and pay for it.
50. Lord Watson, by contrast, reached the same conclusion but on a very different basis. On his view of the case, payment of the price was subject to a condition precedent that the machine passed a proper test. Relying on the same authority of *Bell’s Principles* and Pothier as Lord Shand in the Court of Session below, he held that since the seller had been prevented from carrying out the test by the fault of the buyer, he must be taken to have fulfilled the condition. He expressly acknowledged that this was a doctrine “*borrowed from the civil law, which has long been recognised in the law of Scotland*”.
51. Lords Blackburn and Watson thus approached the case from diametrically opposed starting points. In Lord Blackburn’s view, the effect of the factual findings was that the buyer was bound to pay the price subject to a condition *defeasant*, namely if the machine failed a proper test. However, the buyer had disabled himself from saying that the test had been failed by virtue of his breach of the implied term of co-operation, and

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<sup>3</sup> See *Baker: An Introduction to Legal History* (5<sup>th</sup> ed.) p.345. Actions on an obligation were a common form of action until the nineteenth century. They were founded on a form of conditional bond whereby the obligor bound himself to pay a sum of money unless he satisfied a stipulated condition consisting of whatever contractual performance was required of him.

was therefore bound to pay the price. For Lord Watson, the seller's claim was subject to a condition *precedent* that the machine had passed a proper test but this was deemed to have been fulfilled because of the seller's lack of co-operation. Lord Selbourne agreed with both judgments.

52. As has been recognised in subsequent cases (see below), there are therefore two *rationes* in *Mackay v Dick* which are mutually inconsistent. The doctrine of deemed fulfilment formed no part of Lord Blackburn's reasoning and was, moreover, based on a principle of Scots law derived ultimately from Roman law. So far as the rules of precedent are concerned, decisions on Scottish law are not binding on English courts and it is only the decision of Lord Blackburn which can be said to be authoritative.
53. It should be emphasised that the House of Lords was bound by the findings in the Court of Session interlocutor as to the meaning of the contract. This meant that the sole touchstone of whether the buyer was obliged to pay was whether the machine passed or failed the contractual test. Despite subsequent rationalisations of the case on the basis that property must have passed to the buyer, it is arguable that the findings of the Court of Session rendered it unnecessary to consider whether property had passed or not and that this was simply an irrelevant consideration.

*New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France*, [1919] AC 1

54. At issue here was a shipbuilding contract which provided for completion by 30 January 2015 subject to an extension if construction was delayed by an unpreventable cause beyond the control of the builder. Clause 12 of the contract provided that if the builder became bankrupt or insolvent or failed or was unable to deliver the vessel within eight months of the contractual completion date (extended to eighteen months if the impediment was due to France becoming engaged in a European war) the contract was to become void and all monies paid were to be returned to the buyer. The outbreak of the First World War prevented the builder from delivering the ship. Upon the expiry of 18 months from the completion date, the buyer called upon the builder to complete and deliver the vessel. The question for the court was whether the contract had become void.
55. The House of Lords agreed that the contract had indeed become void in accordance with its terms and that the builder was not precluded from relying on those terms as there was no question of any wrongful act or default on its part. Of interest for present purposes is how their Lordships would have dealt with the matter had completion been prevented by a matter within the builder's control.
56. Lord Finlay LC considered that it could not have relied on clause 12 to assert that the contract was void had it become bankrupt or insolvent since, as between builder and buyer, this was entirely the builder's responsibility even if unavoidable. Likewise, if the builder had simply failed or refused to deliver since it was a principle of law that no-one can take advantage of a situation which he himself has brought about and a breach of contract could not therefore confer any right upon the person in default. In such situations the contract was merely voidable at the option of the innocent party. Lords Atkinson, Shaw and Wrenbury delivered concurring speeches to similar effect.

*Colley v Overseas Exporters*, [1921] 3 KB 303

57. This concerned an FOB sale of unascertained goods under which it was the buyer's obligation to nominate a vessel. The ordinary rule in sale of goods cases is that the price is due when property passes and under an FOB contract property passes when the goods are loaded. The seller sent the goods to the load port but due to an extraordinary series of misfortunes the buyer was unable to nominate an effective ship. The seller sued for the price arguing on the basis of *Mackay v Dick* that the only reason the goods had not been put on board was due to the buyer's default and he was therefore disabled from denying that the price was due.
58. Mr Justice McCardie considered the speech of Lord Blackburn in *Mackay v Dick* in some detail. He rationalised the decision on the basis that property had apparently passed (although see paragraph 53 above). He pointed out that it was a decision on Scottish law and as such was based on the civil law rather than English common law. He also referred to various principles of Scottish law suggesting that property had passed as a matter of Scots law on delivery of the machine to the buyer. Thus payment of the price was subject only to what he described as a resolute condition. On that basis the decision could not assist the seller. Under English law, it was well-established that an action for the price could not be maintained unless and until property had passed and while Lord Blackburn's principle might be applied to situations where property had passed but there was a condition precedent to payment (in which context he cited *Hotham*), it could not make the price payable if it would otherwise not have accrued due. He pointed out with some force that if it were otherwise, every wrongful failure to take delivery would entitle the seller to sue for the price.
59. The seller's action for the price in *Colley* therefore failed, although the possibility of a subsequent amendment to claim damages was left open. It is of note that McCardie J did not refer to the speech of Lord Watson at all.

*Luxor v Cooper*, [1941] AC 108

60. This is of course a leading authority on an estate agent's right to earn commission. The argument before their Lordships was that where the agent was to be paid a commission if he brought about a sale, there was an implied term that the principal would not dispose of the property himself or otherwise act so as to prevent the agent from earning the commission.
61. All their Lordships accepted that in the absence of a concluded sale, nothing could be due to the agent on the express terms of the contract. Furthermore, the agent would need to point to some breach of contract in order to found a claim for damages. However, there was no express term which had been breached and the suggested term could not be implied as it was not necessary. *Mackay v Dick* and *Inchbald* were expressly referred to in this context by Viscount Simon LC and Lords Russell and Wright, but held not to justify the implication of any implied term of co-operation in the instant case. Their Lordships accepted that it might be possible in appropriate circumstances to imply a term that the principal would do nothing to prevent the agent from doing the work which he was contractually bound to do, but it would not have availed here as the agent was not dependent on the co-operation of the vendor in any respect. The action therefore failed.
62. Lord Russell stated the applicable principle in the following terms:



*“If according to the true construction of the contract the event has happened upon the happening of which the agent has acquired a vested right to the commission (by which I mean that it is debitum in praesenti even though only solvendum in futuro), then no act or omission by the principal or anyone else can deprive the agent of that right; but until that event has happened the agent cannot complain if the principal refuses to proceed with, or carry to completion, the transaction with the agent’s client.”*

63. It is also worth noting that Lord Wright expressly disapproved the principle articulated by Willes J in *Inchbald* (see paragraph 37 above) insofar as it suggested that acts falling short of a wrongful breach of contract might be relied upon. He regarded *Mackay v Dick* as an example of just such a wrongful breach where the buyer’s 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.”*
64. Whilst this statement taken in isolation and out of context could be said to provide some support for a doctrine of deemed fulfilment, the context of the case and the tenor of the speeches as a whole make clear that it can only apply where there is a wrongful breach of contract which prevents fulfilment of a condition precedent to payment, the underlying debt being otherwise due.

*Panamena European Navigacion (Comp Ltda) v Frederick Leyland & Co Ltd*, [1947]AC 428

65. This case concerned a repair contract regarding a vessel that had been chartered to the Ministry of War Transport. The shipowner was to pay for the repairs on the basis of cash against expenditure promptly after issue of a certificate by the owner’s surveyor that the work had been satisfactorily carried out and on receipt of a certificate of the amount due issued by the Ministry’s Costs Investigation Branch (“CIB”) certifying that the same had been checked and found correct. The CIB certificates were to be final and binding on all parties absent manifest error. The owner’s surveyor wrongly regarded it as his role to certify not only that the work had been satisfactorily carried out but also whether the amount and value of the materials and labour were reasonable and he refused to provide a certificate without further information which the repairers declined to produce. The House of Lords agreed with the lower courts that the surveyor had acted wrongfully in this respect and that his only function was to certify the quality of the work. There was no dispute that the requirement for CIB certificates had been fulfilled in accordance with the contract and the only question was whether the repairers could recover the amount certified as due by the CIB certificates without a certificate from the surveyor.
66. It was held by the House of Lords that the repairers had done everything necessary on their part to obtain the certificate. The owner’s wrongful failure to provide a certificate accordingly absolved the repairers from the need to obtain one with the result that they were entitled to recover the amount claimed. Reliance was placed on *Hotham* and the principle that no-one can take advantage of the non-fulfilment of a condition the performance of which he has himself hindered.
67. Again, however, it seems to have been the case that the amounts had accrued due by virtue of the CIB certificates and that the surveyor’s certificate was simply a condition precedent to payment.

*Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd* (1950), 83 Ll. L. Rep. 178

68. This case concerned a claim for damages for breach of a contract for the sale of oil tanks by the plaintiff to the defendant. The contract provided for payment to be made against signed confirmation by the defendant's shipping agents that the tanks were at the defendant's disposal. The agents refused to give any confirmation without instructions from the defendant but although the defendant subsequently issued instructions, it did not tell the plaintiff it had done so with the result that the plaintiff did not ask the agents again for the confirmation. The plaintiff's suppliers cancelled their contracts and the plaintiff in turn sued the defendant relying on an implied term that the defendant would procure the agents to take all reasonable steps to ascertain whether the tanks were at the disposal of the defendant and not to do anything to prevent or obstruct performance of the condition of payment.
69. Mr Justice Devlin suggested that, following *Luxor*, implied terms of this nature should now be confined to exceptional cases. He stated that they were generally regarded as having originated in the *dictum* of Willes J in *Inchbald* (albeit limited to prevention by wrongful acts in the light of Lord Wright's qualification in *Luxor*). He pointed out that where the wrongful act was a breach of contract in its own right, then it was unnecessary to resort to any implied term as the wrongful act could stand on its own. Accordingly the criterion by which any implication should be judged was whether performance of a condition by the other party could be prevented with impunity in the absence of such a term, in other words by applying the conventional test of necessity and business efficacy.
70. He also referred to *Mackay v Dick*, expressly recognising that it contained two separate and independent propositions: Lord Blackburn's implied term of co-operation and Lord Watson's doctrine of deemed fulfilment. He pointed out that Lord Blackburn's reasoning did not involve this second proposition at all. On the latter's view of the case it was not a question of the buyer preventing the seller from claiming payment; rather he prevented himself from escaping the liability to pay. *Colley* was cited as a further development of the point. In Devlin J's view, the formulation of any implied term thus depended on the necessity for co-operation.

*Tiberghien Draperie Sarl v Greenberg & Sons (Mantles) Ltd*, [1953] 2 Lloyd's Rep.739

71. This was another judgment of Mr Justice Devlin, this time concerning a contract for the sale of cloth with payment 30 days after delivery of invoice. He proceeded on the assumption that the plaintiff could not sue for the price of the goods unless they had been delivered and that it was for the plaintiff to arrange for them to be delivered in London. The goods were duly despatched and reached Folkestone but could proceed no further as the defendant wrongfully refused to pay customs duty as it was obliged to do under the contract. The plaintiff sued for the price asserting that it was an implied term of the contract that the defendant would pay the customs duty in such time as would enable it to deliver the goods in London.
72. Devlin J accepted that in this case there was a *Mackay v Dick* implied term of co-operation to the effect pleaded and that the defendant could not rely upon its breach of that term to argue that the goods had not been delivered in London. In circumstances where the only express condition precedent to payment was the submission of an invoice, he found it unnecessary to decide whether delivery was also a condition

precedent to payment. Even assuming that it was, however, the defendant could not assert that it had not been fulfilled because it had effectively waived delivery by rendering it impossible.

73. Two points can perhaps be noted about this decision - apart from the fact that the behaviour of the defendant had been so disgraceful that it is difficult to conceive that any court would have rejected the plaintiff's claim. First, there was no suggestion by Devlin J that the defendant's breach meant that the goods were deemed to have been delivered in London. Secondly, payment of the price was expressly conditioned only on presentation of an invoice so that any requirement of delivery could only have been regarded as a condition precedent to payment rather than accrual of the right to claim the price.

*Alghussein Establishment v Eton College*, [1988] 1 WLR 587

74. In this case a landlord agreed to grant a 99 year lease to the tenant provided that the latter should, as soon as reasonably practicable following all necessary licences, use its best endeavours to commence and proceed diligently with the development of a block of flats. Clause 4 of the agreement provided that if for any reason due to the wilful default of the tenant, the development was not completed by a certain date, the lease should forthwith be completed as provided by the agreement. On its face, therefore, clause 4 compelled the landlord to grant a lease in the event of the tenant's wilful default and it seems abundantly clear that the word "not" had been inadvertently omitted. However, the trial judge felt that he could not proceed on this basis in the absence of a claim for rectification.
75. The House of Lords regarded it as well-established that a contracting party would not normally be entitled to take advantage of its own breach as against the other party and so construed the agreement in such a way as to disentitle the tenant from relying on clause 4 where it was itself in breach. The cases referred to by Lord Jauncey who gave the leading speech were all cases where a defendant had not been permitted to rely on its own default to bring a contract to an end or to argue that it was invalid. In their Lordships' opinion, however, the principle could be extended to cases where one party "*seeks to obtain a benefit under a continuing contract on account of his breach.*" It is to be noted that the case was decided on the basis that this was a principle of construction rather than an absolute rule of law.

*Thompson v ASDA-MFI Group plc*, [1988] Ch 241

76. The plaintiff in this case was entitled to participate in the defendant's share option scheme for so long as he was employed by a group company. He exercised his right to do so and entered into various option agreements with the defendant. Subsequently, the defendant sold the subsidiary of which the plaintiff was an employee with the result that his share options lapsed. The plaintiff asserted that the defendant was in breach of an implied obligation not to sell the subsidiary, that in doing so it had repudiated the option agreements and that it could not rely on its own acts to defeat the options granted.
77. Mr Justice Scott held that no term could be implied which prevented the defendant from selling its subsidiaries since this was not necessary to give business efficacy to the options and in any event lacked commercial reality. He went on to consider the plaintiff's alternative case based on the principle that a party could not take advantage

of its own acts to avoid its obligations or defeat the rights of its counterparty. He considered this to be the same in essence as saying that a party could not rely on its own acts as defeating a condition precedent or fulfilling a condition subsequent.<sup>4</sup> Viewed in those terms, it was suggestive of the civil law doctrine of deemed fulfilment/non-fulfilment and the question was whether English law recognised any such principle.

78. The judge started by considering a statement in *Halsbury's Laws of England* to the effect that where a contract was subject to a condition precedent, it would generally be construed as imposing an obligation on the parties to do nothing to prevent the fulfilment of the condition. The authorities relied on in support of this text included *Inchbald* which Scott J analysed in the same way as had Lords Wright and Russell in *Luxor*, namely as a breach of contract for which the plaintiff was entitled to claim damages.
79. He then referred to *Mackay v Dick*, which he regarded as a case where the buyer's right to receive the price was subject to a condition precedent. As noted above, however, it was only Lord Watson and not Lord Blackburn who proceeded on this basis. Be that as it may, Scott J recognised that this was a Scottish decision based on principles of Scottish law. He also drew attention to the difference between the implied term approach of Lord Blackburn and the deemed fulfilment approach of Lord Watson.
80. So far as *New Zealand* was concerned, he regarded this as the high point in support of the plaintiff's case. On his reading, the case owed nothing to implied terms and, moreover, seemed to contemplate that the principle applied not only to wrongful acts but also to acts which were not themselves wrongful. In so far as the House of Lords was expressing approval of the proposition that a party could not claim to be discharged from a contract by the fulfilment of a condition subsequent if he had himself caused the condition to be fulfilled, he regarded it as expressing in substance the civil law principle of fictional non-fulfilment.
81. Although the comments in *New Zealand* were technically *obiter*, Scott J regarded them as considered answers to arguments in the case which should accordingly be regarded as authoritative. Nonetheless, he found it impossible to reconcile the approach of the House of Lords in *New Zealand* with its subsequent decision in *Luxor* or with the decision of Devlin J in *Mona*, both of which firmly espoused an implied term analysis and did not rely on *Mackay v Dick* in a manner consistent with Lord Watson's approach. He accepted that *New Zealand* had not been cited in either *Luxor* or *Mona* but held that it could not in any event survive the further House of Lords decision in *Cheall v APEX*, [1983] 2 AC 180 where the principle it articulated was expressly confined to acts which were in breach of a duty owed under the contract.
82. In short, Scott J concluded that the principle of deemed fulfilment of conditions precedent and deemed non-fulfilment of conditions subsequent as expressed by Lord Watson in *Mackay v Dick* were not principles of English law. English law proceeded by means of implied terms and if no suitable terms could be implied the contract would simply take effect according to its tenor.

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<sup>4</sup> He considered that conditions precedent and subsequent were the obverse of one another and that the same principles applied to both.

*Little v Courage* (1993), 69 P & CR 447

83. This case concerned a tied public house agreement incorporating a five-year lease with a right of renewal by the tenant for a further five-year term subject to agreement of a new Business Plan Agreement. The tenant gave notice that he wished to enter into a new term but Courage refused to enter into negotiations for a new Business Plan Agreement. The question for determination was whether Courage was entitled to refuse a new five-year lease on the basis that the condition precedent relating to the Business Plan had not been fulfilled. It was common ground that the renewal option constituted a unilateral contract where neither party was under any obligation to do anything. Either the option was exercised in accordance with its terms or it was not.
84. At first instance, Mr Justice Ferris adopted the analysis of Scott J in *Thompson v Asda* and held that even if some sort of term could be implied of which Courage were in breach, there was no doctrine of fictional fulfilment in English law. He therefore found it difficult to see how the mere fact that non-satisfaction of the condition precedent stemmed from a breach of contract on the part of Courage could lead to the conclusion that the condition precedent was somehow nevertheless to be treated as satisfied. He regarded *Mackay v Dick* as being of no assistance to the tenant since it related to a bilateral rather than a unilateral contract.
85. On appeal, the judgment of the court was given by Millett LJ. He agreed that the civil law doctrine of fictional fulfilment formed no part of English law. Thus, the only question to be answered as a matter of English law was whether the condition precedent had been satisfied and, if not, whether it needed to be. As to this, the process of construction could include, where applicable, the implication of necessary terms and also take account of the doctrine that a party may not take advantage of his own wrong (although in the light of *Cheall*, the latter was confined to breaches of a legal obligation). Nonetheless, where a party had in breach of an express or implied contractual term prevented fulfilment of a condition precedent, in addition to incurring a liability in damages, he might also be precluded from claiming that the condition had not been fulfilled.
86. Terms could not usually be implied into a unilateral contract. Accordingly, there was no implied term in this case which required Courage either to do or not to do anything. There was therefore no room for application of the principle that Courage could not be permitted to take advantage of its own wrong. Nonetheless, the contract between the parties could be construed in such a way as to provide that the tenant was only to agree a further Business Agreement “if so required”. Since it had not been “so required” by Courage, the condition simply fell away.

*Comp. Noga d'Importation et d'Exportation SA v Abacha (No. 3)*, [2002] CLC 2007

87. *Abacha (No. 3)* was regarded by the majority as confirming the principle of deemed fulfilment/waiver relied upon by Sellers. In this case, the parties had concluded a settlement agreement which required the defendants to pay the sum of DM300 million upon release of their accounts which had been frozen in the action. One of the many consequential issues for the court was whether the unfreezing of the accounts was a condition precedent to the defendants' obligation to pay. The claimant argued that it could claim the DM300 million by any one of the following alternative routes: (i) as damages for breach of an implied term of co-operation in implementing the settlement

agreement; (ii) in debt on the basis that the defendants' wrongful failure to co-operate in releasing the frozen accounts amounted to the fulfilment/waiver of that condition; (iii) in debt as and when the court made an order discharging the freezing orders; (iv) in debt on the basis that payment had accrued due on signature of the settlement agreement and that the remaining provisions related merely to the machinery for payment.

88. Lord Justice Rix (as he by then was, albeit still deciding this case as a judge of the Commercial Court) left route (iv) open as he had himself raised the point and so not had the benefit of full argument on it. He accepted that the settlement agreement incorporated a *Mackay v Dick* implied term of requiring co-operation in implementing the agreement as this was obvious, reasonable and necessary in the circumstances. However, the question of whether the claimant's claim lay in debt or in damages was only significant in relation to the accrual of interest and nothing else and he therefore expressly eschewed the need for any thorough analysis of the distinction between the two. He nonetheless went on to analyse the case law as follows:

- i) *Mackay v Dick* was a case where the contract of sale was subject to a condition precedent, although the decision contained two different strands of reasoning by Lord Blackburn and Lord Watson respectively. (For the reasons already given, it is by no means clear that this was the basis on which Lord Blackburn proceeded.)
- ii) The *Mildenhall Bell* appeared to articulate a principle of waiver.
- iii) Mr Justice Scott's disapproval in *Thompson v Asda* of Lord Watson's reasoning in *Mackay v Dick* was in reality dealing with a different problem, namely whether a defendant could damage his legal rights by doing something that he was legally entitled to do. (It seems doubtful, however, that Scott J's reasoning can be so confined when read as a whole.)
- iv) Mr Justice McCardie in *Colley* held that *Mackay v Dick* was good law under English law as well as Scottish law. (Since McCardie J did not mention Lord Watson's speech at all, this can only have been true in relation to Lord Blackburn's reasoning.)
- v) Lord Wright in *Luxor* had approved Lord Watson's judgment in *Mackay v Dick*. (With the greatest respect to Rix J, this seems doubtful for the reasons given in paragraphs 63 and 64 above.)
- vi) Devlin J's comments in *Mona* about *Mackay v Dick* were technically *obiter* as he had held that the defendant was not in breach of contract. However, Devlin J had pointed out (i) that breach of the implied term of co-operation would normally lead to a remedy in damages while it was Lord Watson's approach that granted a remedy in debt; and (ii) that Lord Blackburn's analysis did not depend on the defendant having prevented the plaintiff from performing the condition precedent, but on the defendant preventing himself from escaping the liability to pay.
- vii) *Tiberghien* was close to the approach of Lord Watson but perhaps with an element of waiver.

- viii) *Little* was a decision on construction where Millett LJ had not referred to *Mackay v Dick* when rejecting the doctrine of fictional fulfilment.
89. On this basis, Rix LJ accepted that there was a divergence of opinion as to precisely what principle *Mackay* stood for, although he regarded it as clear that there must at least be a causatively relevant breach of contract. As between deemed fulfilment and deemed waiver, he considered that waiver was perhaps more consonant with a common law approach than a doctrine of deemed fulfilment taken from the civil law. Nonetheless they were both fictions designed to achieve the just result.
90. He concluded that *Mackay v Dick* was not only authority for the implication of the implied term of co-operation, but also for the doctrine of deemed fulfilment/waiver. On the facts of the case before him, he held that there was no necessary dichotomy between a claim in damages or in debt and that in appropriate circumstances, a claimant might be entitled to relief in both. Where, however, the subject of the dispute was a payment, his view was that the primary relief should be in debt unless a damages claim was necessary to compensate for any fall in the value of debt as a result of the delay in payment.
91. In essence, therefore, Lord Justice Rix decided the case on either or both of the principles in *Mackay v Dick* thereby leaving the point somewhat up in the air. He made no reference to the fact that *Mackay v Dick* was a decision on Scottish law only.

*The Leonidas*, [2020] EWHC 1986 (Comm); [2021] 2 Lloyd's Rep. 165

92. In this case the decision for the court was whether a charterparty had been concluded. Mr Justice Foxton held that it had not because the outstanding subject of suppliers' approval had not been lifted. However, he went on to consider *obiter* what the position would have been if he had accepted the claimant's case that there was a binding contract subject to a condition defeasant if the charterer failed to lift the suppliers' approval subject despite taking all reasonable steps to do so.
93. On this hypothesis, he would have accepted that the charterer was under an implied obligation to take reasonable steps to obtain the suppliers' approval and that it was in breach of that obligation. In his view this raised the following three questions:
- i) The burden and standard of proof as to whether the suppliers' approval could in fact have been obtained. In accordance with usual principles, this was for the charterer to prove on a balance of probabilities;
  - ii) Whether damages were to be assessed on the assumption that the suppliers' approval subject was satisfied on the basis of the supposed principle of deemed fulfilment set out in *Mackay v Dick*. In this connection, Foxton J noted that the precise status of the rule in *Mackay v Dick* might well merit exploration by a higher court and that while it could be explained on the basis of waiver in some cases, this was not so easy in others;
  - iii) Whether there were any and, if so, what circumstances in which the claimant's loss was to be assessed on the basis of a loss of a chance. Here he held that damages should be assessed on a loss of a chance basis because the lost benefit depended on the decision of a third party to approve the vessel.

*Conclusions on the authorities*

94. Where, then, does this leave us? On any view, the status of *Mackay v Dick* and the precise propositions it stands for as a matter of English law are less than clear and certainly merit exploration by a higher court as suggested by Mr Justice Foxton in *The Leonidas*.
95. For my own part, it seems to me that the principles to be derived from the authorities set out above are as follows:
- i) *Pace* Lord Justice Rix, the doctrine of deemed fulfilment does not form any part of English law. It is a doctrine derived from the civil law and in so far as it formed the basis of Lord Watson's decision in *Mackay v Dick*, that was a Scottish case which is not binding on the English courts. The doctrine was unequivocally rejected in *Luxor v Cooper*, *Thompson v ASDA* and *Little v Courage* and while Rix J in *Abacha (No. 3)* referred to *Mackay v Dick* as authority for the proposition, he did not apparently take account of its non-binding status as a Scottish case. Furthermore, he did not reach any definitive conclusion as between debt and damages in *Abacha (No.3)* because there was no need for him to do so where he could reach the same result either way. As such, while I differ from his analysis only with extreme diffidence, I take comfort from the fact that his decision was somewhat equivocal and is in any event technically not binding on me.
  - ii) A contract may, however, be construed as containing an implied term of co-operation wherever this is justified on grounds of obviousness, necessity and business efficacy in accordance with normal principles. This is a principle which derives from Lord Blackburn's judgment in *Mackay v Dick*. Although that is a Scottish case which is not binding on an English court, the principle has been consistently applied in countless English cases and is now firmly established as part of the English law canon, being accepted by the House of Lords in *Luxor v Cooper*. The remedy for breach of this implied term lies in damages.
  - iii) There also exists a further maxim to the effect that a person cannot derive a benefit from his own wrong. This maxim may fall for consideration in different contexts but seems most frequently to have been applied in two situations which may, on occasion, overlap:
    - a) To bar one party to a contract from relying on his own wrongdoing in order to assert a contractual right to terminate the contract as, for example, in *New Zealand*. In such a situation, the contract is merely rendered voidable at the election of the innocent party. The principle was subsequently extended in *Alghussein* to prevent a party from relying on his own wrongdoing in order to secure a contractual benefit.
    - b) To bar one party to a contract from relying on his own wrongdoing to argue that his counterparty has failed to fulfil a condition precedent or that a condition subsequent/defeasant has been triggered. While the argument is most commonly encountered in condition precedent cases, the same principles must apply *mutatis mutandis* in the case of conditions subsequent as pointed out by Scott J in *Thompson v Asda*.



- iv) The maxim will only be triggered by wrongdoing which amounts to breach of a legal obligation owed to the other party, whether express or implied. Anything less will not suffice: see *Cheall*, *Thompson v Asda*, *Mona*, *Luxor v Cooper*; *Abacha (No. 3)*.
- v) The maxim does not, however, amount to a freestanding rule of law. In so far as the decision in *New Zealand* suggests that it does, it is inconsistent with the subsequent approach of the House of Lords in *Cheall*. Nonetheless, it is a maxim which can be given effect as the circumstances permit by any one or more of the following mechanisms - see, generally, *Chitty on Contracts (34<sup>th</sup> ed.)* §15-113; *Halson on The Law of Contract, (7<sup>th</sup> ed.)* §3.47; *Lewison: The Interpretation of Contracts (7<sup>th</sup> ed.)* §7-112ff:
  - a) Construction of the contractual terms, for example to prevent a party in breach from relying on a particular provision (as in *Alghussein*) or to limit the application of a particular condition precedent (as in *Little*). This is certainly one possible explanation of the *Mildenhall Bell* (defendant's breach precluded him from relying on the requirement for the bell to be weighed and put in the fire). *Mackay v Dick* itself and *Hotham* can also be explained on this basis, as can *Panamena* and *Tiberghien*.
  - b) Implication, where justified on orthodox principles, of an implied term which may, depending on the circumstances, be a term requiring co-operation, or a term preventing one party from relying on a particular provision when itself in breach. *Inchbald* was analysed along these lines in *Luxor v Cooper* and *Thompson v Asda* and, in my judgment, that is the best explanation of the case.
  - c) Waiver. It may alternatively be possible to say that a party who fails to fulfil a condition precedent which he is obliged to perform, or prevents his counterparty from performing waives compliance with the condition. This was the basis on which Rix LJ analysed the *Mildenhall Bell* and it is also possibly the best explanation of *Tiberghien*.

These different techniques are not mutually exclusive and are capable of overlapping. Which is most appropriate in a given situation will depend on the circumstances.

- vi) The consequences which flow from the operation of the maxim will depend on the mechanism adopted to give it effect. Where breach of an express or implied term is relied upon, the remedy will lie in damages in accordance with orthodox principles. However, none of the mechanisms outlined above involves deeming a condition to have been fictionally fulfilled when it has not. At most, the condition may be treated as being dispensed with altogether or as simply not applying. Thus:
  - a) Where a debt has already accrued, the wrongdoer cannot rely on his own breach to argue that a condition precedent to *payment* has not been triggered or that a condition defeasant has operated. Either the condition will be construed as not applying or it may be held to have been waived.

In either case, the claimant can sue for the debt which has already accrued due. Mr Justice Ashurst's statement in *Hotham* that breach by the defendant was "*equal to performance*" makes sense if viewed in this context as limited to recovery and quantification of damages. See further the comments of Mr Justice McCardie in *Colley* at 309-310. The *Mildenhall Bell*, *Mackay v Dick*, and *Panamena* can also be analysed in this way. *Tiberghien* is more difficult to accommodate within this analysis. Since it was held that the defendant was in breach of a *Mackay v Dick* implied term of co-operation, damages would have been the obvious remedy. However, damages had not been claimed and the court was clearly anxious to find for the claimant. It is to be noted that Mr Justice Devlin did not hold that the goods were deemed to have been delivered in London and the decision is perhaps best explained by saying that the goods were delivered in Folkestone and that the defendant waived the requirement to take them any further, thereby allowing the claimant to sue for the price.

b) By contrast, where the debt has not already accrued due, the claimant will be restricted to a claim in damages on the basis that the relevant condition would or might (depending on the circumstances) have been fulfilled. For this purpose, however, the defendant will be precluded from relying on his own breach of contract as a reason why it would not have been fulfilled. Thus:

i) Where the only condition precedent related to something which the claimant had to do, the claimant will be entitled on ordinary principles to prove on a balance of probabilities that the condition would have been fulfilled but for the breach. In those circumstances, the amount of damages is likely to be equivalent to the amount of the debt.

ii) Where other contingencies are also in play which depend on the actions of third parties, damages will be assessed on a loss of a chance basis as in *Inchbald*.

iii) In neither case is there any question of the wrongdoer being allowed to rely on his own breach to derive a benefit. On the contrary, the breach exposes him to a liability to pay damages in the normal way.

96. If this analysis is correct, there is neither need nor utility in a doctrine of deemed fulfilment which cuts across the established principles set out in paragraph 25 above. Indeed, to countenance such a doctrine would do violence to those principles for no apparent purpose. It is no doubt for this reason that textbook commentary is almost entirely uniform in rejecting any doctrine of fictional fulfilment which has the effect of making a defendant who wrongfully prevents fulfilment of a condition precedent liable on the contingent obligation. The prevailing view is rather that the claimant should only be entitled to claim damages to the extent of its loss, thereby allowing the court to take account of any possibility that the relevant condition might not have been satisfied anyway or that loss may not have been suffered for some reason. For example:

- i) *Chitty on Contracts (op. cit.)* §4-204 and *Treitel's Law of Contract (15<sup>th</sup> ed.)* §2-112 regard the doctrine of fictional fulfilment as introducing a punitive element which is inappropriate to a contractual action.
- ii) *Andrews on Contractual Duties (4<sup>th</sup> ed.)* §19-009 asserts the general rule that a debt subject to a condition precedent cannot be recovered if the condition remains unsatisfied. There is an exception if the only reason for the failure of the condition is the defendant's breach of contract, express or implied. In that event, the defendant will be barred from invoking the failure as a defence, although this exception only applies where the right to payment has actually accrued. If the defendant's breach of contract prevents the debt accruing at all, the claimant's only remedy is in damages.
- iii) *Carter's Breach of Contract (2<sup>nd</sup> ed.)* §11-46-11-47 is to like effect: a promisor's repudiation does not convert a dependent obligation into an independent obligation and breach or repudiation by the promisor does not entitle the promisee to treat a condition precedent as fulfilled. The condition may be regarded as eliminated for the purposes of a claim for damages but there is no general right to receive the performance promised. *Mackay v Dick* is not authority for any such proposition and can be explained on the basis that property had already passed to the buyer such that the contingency in issue took the form of a condition subsequent which the buyer disentitled himself from relying on due to his own conduct. See also *Benjamin's Sale of Goods (11<sup>th</sup> ed.)* for a similar rationalisation of *Mackay v Dick*. (For the reasons given in paragraph 53 above, however, it is arguable that the passing of property was simply an irrelevant consideration in that case.)
- iv) See also *Goode & McKendrick on Commercial Law (6<sup>th</sup> ed.)* §3-116; *Halsbury's Laws of England (2019)* Vol. 2 Sect.71 and fn 45, and *Burrows: A Restatement of the English Law of Contract (2<sup>nd</sup> ed.)* Commentary Part 2 §9(2).

### ***Consequences for the majority award***

97. The majority concluded at paragraph 33 of their reasons that Buyers could not rely on their own breach of contract preventing the fulfilment of a condition precedent to payment. At paragraph 36(i), they further held that by virtue of the principle of deemed fulfilment/waiver, which they regarded as confirmed in *Abacha (No. 3)*, the precondition to the payment of the deposits must be deemed to have been waived or satisfied. Since Sellers had validly cancelled the MOAs, they were entitled to forfeit the deposits under clause 13 and could accordingly claim them in debt.
98. Given my conclusions above, which are based on citation of considerably more authority than was available to the tribunal, it necessarily follows that in my judgment the majority erred in law in concluding that the doctrine of deemed fulfilment formed part of English law such that Buyers' admitted breach entitled Sellers to recover the deposits as debts notwithstanding that an express condition precedent to the accrual of those debts had not been fulfilled. The appeal must therefore succeed to this extent.
99. I reject the argument of Mr Julian Kenny KC on behalf of Sellers that this conclusion effectively permits Buyers to rely on their own breach of contract to derive a benefit or to rid themselves of the contract. Far from deriving any benefit, Buyers' breach exposed

them to a liability in damages. Nor would they be rid of the contract, since that depended on whether or not Sellers elected to cancel.

100. However, the error does not in itself require the award to be set aside if it can be upheld on some other basis. For this purpose, it is necessary to consider
- i) Seller's alternative case that the deposit in any event accrued due upon signing of the MOA (this being the subject of their Respondents' Notice); and
  - ii) The alternative reason given by the majority for their award, namely that Sellers would have been able to recover the amount of the deposits by way of damages in any event (this being the subject of Buyers' section 68 appeal).

### ***Respondent's Notice***

101. As already noted, whereas Sellers' primary case starts from the premise that the right to sue for the deposit as a debt was subject to the four conditions precedent set out at paragraph 13 above, including the requirement for confirmation by HFW, the premise of their alternative argument is altogether different, namely that the requirement for HFW to confirm the opening of the escrow account was not a true condition precedent but only part of the machinery of payment and that the right to claim the deposit as a debt in fact accrued on the signature of the MOA.
102. In support of this argument, they relied on *The Dominique*, [1989] AC 1056 and *The Karin Vatis*, [1998] 2 Lloyd's Rep. 330. In truth, however, neither case casts any light on the issue for determination. In *The Dominique*, a voyage charter provided that full freight was deemed to be earned on signing bills of lading and that freight was to be prepaid within five days of signing and surrender of the final bills. The bills were duly signed but had not been surrendered before the charterparty came to an end during the voyage following the vessel's arrest. The House of Lords held that the owners' right to freight had accrued prior to termination by virtue of the express provision that it be deemed earned on signing bills of lading. The mere postponement of payment was not a condition precedent to the acquisition of the right to sue for freight and the requirement for the release of the bills related simply to the machinery of payment. The owners' accrued right to sue for freight accordingly survived the termination of the charter.
103. *The Karin Vatis* is to like effect. In that case, the bill of lading provided that freight was earned on loading. 95% was payable within 3 days of loading and the balance within 20 days of discharge. The ship sank on the voyage and it was held by the Court of Appeal that these provisions were merely dealing with the manner of payment, not the obligation to pay which accrued on loading. Accordingly, completion of discharge was not a condition precedent to the right to recover payment. If the contractual formula for payment became unworkable, then some way round it must be found, which on the facts was the implication of a reasonable time.
104. In both cases, however, there was no doubt that the freight had already accrued due and that it was only the condition precedent to payment which had not been fulfilled at the relevant time. Accordingly neither case assists in determining the all-important question of when, as a matter of construction of the particular contract, the relevant debt accrues due.

*The nature of a deposit*

105. I therefore start by considering the nature of a deposit as it appears from the authorities. In *Howe v Smith* (1884) 27 Ch. D. 89, the purchaser paid a deposit by way of part payment of the purchase price under a contract for the sale of land. The contract was to be completed on a particular day and if the purchaser failed to complete, the vendor could resell and recover any deficiency in price. The purchaser failed to complete and the vendor resold the land at the same price. The purchaser sued to recover his deposit.
106. The Court of Appeal held that the fate of the deposit if a buyer failed to complete was a question of construction of the contract and that there was no rule that the buyer was necessarily entitled to its return. Generally a deposit was to be regarded as a guarantee that the contract would be performed with the result that if the purchaser repudiated the contract, he could not recover. However, this was not an invariable rule, since there might be circumstances (which the court did not identify) where the seller would not be entitled to retain the deposit even though the court would not grant specific performance of the contract. The basis for the general rule was said to be the principle that a party cannot take advantage of its own wrong and the decision can therefore be seen as an example of the courts giving effect to this principle by way of construction.
107. It is to be noted that the deposit in *Howe v Smith* had been paid. The case therefore tells us nothing about what the analysis would have been if the deposit had not been paid and the vendor was suing to recover it.
108. *The Blankenstein*, [1985] 1 Lloyd's Rep 93 was a case concerning the sale of three ships on an earlier version of the NSF form. This also required payment of a 10% deposit on signing and clause 13 also provided that the seller could cancel the contract and forfeit the deposit if the purchase price was not paid. However, the earlier version of clause 13 did not contain any express provision for what was to happen if the *deposit* was not paid.
109. The Court of Appeal held that there was in fact a binding contract between the parties prior to signature of the MOA. This contract required the parties to sign the MOA and further required the buyer to pay the deposit upon signature of the MOA. The buyer failed to sign the MOA.
110. All their Lordships held that in these circumstances the seller had the right to claim damages for failure to sign the MOA. However, there was a difference between them as to the appropriate measure. Lords Justices Fox and Stephenson held that if the buyer had performed its obligation to sign, the seller could then have sued for the deposit in debt. The seller could accordingly claim damages for the loss of the right to recover the deposit. They considered it irrelevant that the seller might recover more than his loss of bargain because the purpose of the deposit was precisely to protect it against the buyer's failure to complete.
111. Lord Justice Robert Goff, dissenting, agreed that the seller could have recovered the deposit as a debt if the buyer had repudiated the contract after the deposit had accrued due but before payment. However, where, as here, the contract was repudiated *before* the deposit accrued due (because the MOA had not been signed), the seller could only recover damages for its loss of bargain, not for the amount of the deposit itself.

112. All members of the Court of Appeal thus agreed that the deposit was not recoverable as a debt.
113. *The Griffon*, [2014] 1 Lloyd's Rep. 471 concerned a ship sale on the NSF 1993 form which now contained a clause 13 in the same terms as the in the present case. Here, the deposit was payable within 3 banking days of signature of the MOA into a joint account in the names of both buyer and seller, to be released in accordance with the joint written instructions of both parties. The deposit was not paid and the seller cancelled the contract on grounds of repudiatory breach by the buyer. It was common ground that if the deposit had been paid, the seller would have been entitled to retain it under clause 13.
114. The judgment of the Court of Appeal was given by Lord Justice Tomlinson. He accepted that the court in *The Blankenstein* had unanimously held that the seller was only entitled to recover damages because the obligation to pay the deposit had not yet accrued. He considered the different terms of clause 13 before him and rejected the argument that the new provision restricted the seller's remedy for non-payment of the deposit to one in damages only. In his view, clause 13 conferred an express contractual right to cancel which was not dependent on proof of repudiation and which was additional to any rights which the seller might otherwise have at common law. Clause 13 thus said nothing about the characterisation of the rights which attached under clause 2.
115. As to this, payment of the deposit was an earnest of performance. Under clause 2, the seller was invested 3 banking days after signature of the MOA with an accrued right to receive and sue for the deposit as an agreed sum forfeitable in the event of the buyer's failure to fulfil the agreement. That right survived the subsequent termination of the MOA. Alternatively, the seller had an accrued right to sue for damages for breach of the obligation to pay the deposit, the measure of which was the same as the amount of the deposit.
116. Finally the court considered the effect on these conclusions, if any, of the fact that the deposit was to be paid into escrow rather than directly to the seller. It was conceded by the buyer that if the contract did indeed provide on its true construction for payment of a deposit which would be both recoverable and forfeitable in the event of termination, then the contractual machinery for payment could not be an obstacle to recovery by the seller. The court regarded this concession to be plainly correct since the fact that a deposit was to be paid to a third party stakeholder could not affect the rights and obligations of the parties to the contract.
117. I accept that *The Griffon* is binding on me although I would myself have been a little more doubtful as to whether clause 13 is entirely irrelevant to the characterisation of the rights arising under clause 2 – particularly when read together with clause 14. It does not seem to me by any means self-evident that the seller should have the right to sue for the deposit *as a debt* in circumstances where it is to be paid into escrow and may subsequently fall to be “released” (not, it should be noted, “repaid”) to the buyer. Be that as it may, that is an argument which is clearly foreclosed for the time being.
118. The difficulty for Sellers, however, is that in *The Griffon*, the only pre-condition to payment of the deposit, namely signature of the MOA, had been satisfied. It is therefore unsurprising that the Court of Appeal, having held that clause 2 conferred the right to

sue for the deposit as a debt, also held that the debt had indeed accrued due. Indeed, the reasoning of Tomlinson LJ at paragraph [13] was founded on the proposition that the seller had acquired an right to the deposit which was not in any other sense conditional. Given that he was expressly applying the analysis adopted in *The Blankenstein*, it is difficult to think that he could have reached this conclusion if there had been a further condition precedent to payment of the deposit which had not been fulfilled. On the authority of *The Blankenstein* itself, he would have been bound to hold that the only remedy was in damages.

119. In the present case, even assuming that, as a matter of construction, Buyers were not permitted to rely on their own failure to supply documents, this would still not meet the further condition stipulated in clause 2, namely that HFW should confirm in writing that the account was fully open. No such condition was present in either *The Blankenstein* or *The Griffon* and in my judgment this is a real ground of distinction. I accept in accordance with *The Griffon* that clause 2 in principle confers on Sellers the right to receive and sue for the deposit as a debt forfeitable in the event of Buyers' failure to fulfil the MOA. However, the question whether or not the accrual of the debt is subject to a condition precedent is a question of construction: see *Hotham*.
120. In this case, the confirmation of HFW was no empty cipher; even if Buyers had provided the required documents, they might have been rejected or queried by HFW. Further, HFW may have been unable to open the account for some other reason or (less likely) simply refused to give the confirmation. Even if these are somewhat remote possibilities, they are precisely the sort of contingencies which can be comfortably accommodated within an assessment of damages but which cannot be ignored on any principled basis in the context of a condition precedent.
121. For this reason, Sellers cannot in my judgment argue that the entirety of the escrow arrangement (including the confirmation of HFW) was mere machinery and that the debt in fact accrued due 3 banking days after signature. The decision in *The Griffon* that payment into escrow in that case was irrelevant was premised on the fact that the only pre-condition to payment was signature of the MOA which had been fulfilled. The relevant stakeholder account had already been nominated and there was no further pre-condition of independent third party confirmation such as exists in this case. In this case, I am satisfied that the requirement for HFW's confirmation that the escrow account was open and ready to receive funds was a pre-condition to the accrual of Buyer's obligation to pay the deposit and Sellers' correlative right to sue for it.
122. I therefore reject the argument that Sellers became entitled to claim the deposits as a debt on signature of the MOAs. The majority award cannot therefore be upheld on the basis set out in the Respondent's Notice.

**B. Claim for damages: appeal under section 68**

123. This leaves the majority's alternative basis of decision, namely that Sellers were in any event entitled to claim the amount of the deposits as damages for breach of contract.
124. At paragraph 35 of their reasons, the majority recorded Buyers' submission that it was not inevitable that the deposits would have been released to Sellers because the MOAs would inevitably have come to an end in any event as a result of Sellers' own breach of

their obligation to co-operate under clause 21 – the *Golden Victory* point. However, the majority declined to deal with this point on the basis that it had not been pleaded.

125. Before me, Buyers demonstrated to my satisfaction that the point had in fact been properly pleaded in their Defences. It is not clear how the majority came to conclude the contrary and they must simply have overlooked the relevant paragraphs. Since the point was clearly raised and argued, the majority's failure to deal with it was thus a serious irregularity within section 68(2)(d) of the Act, which in my judgment has caused substantial injustice to Buyers since the impact of the point may well have been to reduce Sellers' claim for damages substantially, if not extinguish it altogether. In circumstances where, as I have held, Sellers are not entitled to recover in debt, this is plainly a critical point and the awards should *prima facie* be remitted to the tribunal to enable it to determine the point. I do not accept Sellers' argument (advanced rather faintly before me) that *The Blankenstein* and *The Griffon* establish that the measure of damages in a case such as the present is always the value of the deposit. Whether it is or not will necessarily depend on the particular circumstances and, unlike here, there was no argument in either of those cases that damages should be awarded in anything other than the amount of the deposit.
126. Sellers nonetheless argued that Buyers are debarred from seeking relief under section 68 because they failed first to exhaust their available recourse under section 57(3) of the Act. Section 57(3)(a) permits the tribunal to "*correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity.*" I am quite satisfied that this provision has no application to this case. There was certainly no clerical mistake or ambiguity. Moreover, as set out in *Russell on Arbitration* (24<sup>th</sup> ed.) § 6-168, quoting from *The "Trade Fortitude"*, [1986] 2 Lloyd's Rep. 209, in order to attract the operation of section 57(3)(a), an error must generally be an error affecting the expression of the tribunal's thought, not an error in the thought process itself. That was plainly not the case here; on the contrary, the majority said exactly what they intended to say but were simply mistaken. However, section 57 is not the appropriate vehicle for asking the tribunal to change its mind.
127. Neither can section 57(3)(b) apply. This section permits the tribunal to make an additional award in respect of any claim presented to the tribunal but not dealt with in the award. However, the majority did deal with every claim that was presented to it. Buyers themselves were not presenting any claim. Rather they were raising a particular issue as a defence to a claim. An issue raised by way of defence is not in my judgment a "claim" for these purposes.
128. Buyers are accordingly not precluded from seeking relief under section 68.

### **Conclusion on Buyers' appeal**

129. In the light of the foregoing, I hold that:
- i) Buyers' appeals succeed;
  - ii) The awards should be set aside in part and/or remitted to the arbitrators for reconsideration of Sellers' claim for damages in the light of Buyers *Golden Victory* point and this judgment.



## **SELLERS' APPEAL**

130. Sellers appeal against the conclusion of the majority in the “AGATHONISSOS” arbitration that clause 21 in each MOA relieved Buyers from any obligations under clause 2 unless they had already entered into a management agreement, or a different mutually acceptable solution had been found within the meaning of clause 21.
131. For the purposes of this appeal I leave out of account entirely the fact that a different conclusion was reached by the majority in the other arbitrations. It is inherent in the arbitral process that different tribunals may take different views of the same facts and even reach different conclusions based on the same facts. Provided they commit no error of law in the process, their decisions are unappealable and the mere fact that a different tribunal reached a contrary conclusion is not a cause for complaint or an indication of error. All that matters for present purposes, therefore, is what the majority in this arbitration decided and whether their reasoning discloses any error of law.
132. The Tribunal considered Issue 1 against the background of certain assumed facts, including the following:
  - i) The purpose of clause 21 was to deal with the effects of the COVID-19 pandemic and Buyers’ resulting inability to appoint vessel managers of their own choosing, due, amongst other things, to the difficulty of changing crew members.
  - ii) Given travel and other restrictions imposed by various governments internationally in response to the pandemic, the parties and the managers knew and understood that crew changes would be impractical, if not impossible, and thus the delivery of the vessels, and the parties’ rights and obligations under the MOAs would require and be contingent upon the conclusion of a management agreement between the managers in place at the time of contracting and Buyers.
  - iii) The NOR tendered by Sellers on 11 May 2022 was invalid.
  - iv) Despite the exercise of best endeavours and good faith on Buyers’ part, it was not possible to conclude any management agreements before Sellers purported to terminate the MOA on 22 May 2022.
  - v) Sellers took no steps to co-operate with Buyers to find a mutually acceptable solution.
133. The first point with which the majority dealt concerned the point in time at which the obligation of co-operation under clause 21 was triggered. Before the tribunal and in their appeal skeleton argument Sellers argued that they came under no obligation to co-operate until NOR had been tendered. They did not press the point orally before me and the argument was rejected by the majority, in my opinion rightly so.
134. In my judgment, the obligation of co-operation under clause 21 is capable of being triggered at any time whether before or after tender of NOR. All that is required is that Buyers shall have tried in good faith to enter into a management agreement but been unable to do so. Whether or not the clause imposed a positive obligation on Buyers to take steps to conclude a management agreement prior to tender of NOR, it clearly

contemplated that they would or might. And given the majority's unchallengeable conclusion in paragraph 29 that the most important and urgent task for both parties following signature of the MOA was to solve the crew and management issues, the suggestion that Sellers could unilaterally postpone their obligation to co-operate by the simple expedient of declining to serve an NOR<sup>5</sup> made no sense at all, commercial or otherwise. On this point I am in complete agreement with the majority.

135. Furthermore, I reject Sellers' argument that the parties must have contemplated that their joint obligation of co-operation would only take effect days or weeks after the time at which the deposit would otherwise be payable under clause 2. Clause 21 is not conditioned by reference to any timescale which might be applicable to the payment of the deposit and it is therefore perfectly possible that the obligation of co-operation might be triggered before or after the deposit fell due for payment – for instance if the existing managers had been approached immediately after signing and refused outright and for all time to enter into a new agreement with Buyers.
136. The majority then went on to consider Issue 1 on this basis. Their conclusions are succinctly set out in paragraphs 26-32 of their reasons as follows:

*“26. ... The delivery of the Vessel required a crew on board and the only practical method that this could be achieved, given the COVID restrictions which were in force at the time, would be the retention of the existing crew. This could only be achieved if a management agreement with the existing managers could be concluded. Since that proved impossible (despite, it is further assumed, the Buyers acting in good faith in attempting to achieve this) the practical result is that the Vessel could not be delivered to the Buyers. In these circumstances the Buyers could not reasonably be expected to remain under an obligation to pay the deposit and continue performing the MOA, even if they could not take delivery of the Vessel.*

*27. Both before the MOA was signed, and immediately thereafter, both representatives of the Sellers and of the Buyers sought to persuade the Vessel's existing managers to enter into management agreements with the Buyers. The Sellers' broker, Mr Askaroff of Clarksons, who presumably had a hand in drafting clause 21, was also proactive in trying to sort out the management situations. He plainly did not interpret clause 21 as meaning that the giving, or not giving, of an NOR by sellers was in any way a precondition to the operation of clause 21.*

*28. The Sellers' conduct in not apparently mentioning the KYC/deposits for several weeks after the MOA's were signed also shows that they recognised that clauses 2 were subject to clauses 21. One can only go by the limited correspondence which the Sellers chose to exhibit to their pleadings in this respect.*

*29. By far the most important and urgent task for both parties the moment the MOAs were signed was to solve crew/management issues. This plainly needed the immediate and continuous active involvement of the Sellers. No moratorium, pending the giving of NOR by the Sellers makes any commercial or indeed any sense at all. The idea that Sellers had the power to extend or shorten the alleged moratorium (a concept which*

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<sup>5</sup> Or by serving an invalid NOR. Buyers' pleaded case was that the only NOR served was invalid and Sellers accordingly argued before the arbitrators that they had not come under any obligation to co-operate at all prior to termination of the MOA. This argument was also rightly rejected by the arbitrators and their decision on this point is not appealed.

*appeared for the first time in Mr Julian Kenny QC's skeleton argument) by giving or not giving NOR equally makes no commercial, nor any, sense.*

*30. We consider that the impossibility of reaching a management agreement with the existing managers also made delivery of the Vessel to the Buyers impossible. No "solution" was found, whether this was because the Sellers failed to cooperate in seeking one or not. Clause 21 does not mention what is to happen if the Parties cannot find a "solution". But it is obvious to us that in these circumstances performance of the MOA was no longer possible. If the Buyers could not enter a management agreement then they could not take delivery of the Vessel. Delivery of the Vessel would not simply be delayed, it would become impossible. In this sense, therefore, the rights and obligations of the parties under the MOA were contingent on the conclusion of a management agreement.*

*31. Put another way, since delivery of the Vessel became impossible, the deposit would never become capable of being released to Sellers in accordance with the terms of cl. 3, even if it had been paid by Buyers to the Deposit Holder.*

*32. We also find that by 22.05.21, being the time the Sellers purported to terminate the MOA for the Buyers' repudiatory breach of cl. 2, or when they purported to cancel the MOA pursuant to cl. 13, performance of the MOA had already become impossible and the Parties were relieved of their obligations due to the operation of Cl. 21.*

### ***Sellers' submissions***

137. Sellers criticise this reasoning on the grounds that it is confused and unclear. For example, it is not obvious whether the "impossibility" which the majority found had arisen by 22 May was a permanent impossibility or merely a present impossibility which might only prove to be temporary. On one reading of paragraphs 26 and 30, they seem to be accepting that Buyers' obligations under clause 2 had already bitten but that they were relieved of them by virtue of supervening impossibility. However, as Mr Kenny submitted, this does not justify the answer given by them to Issue 1 which asked whether the obligations under clause 2 accrued *at all* pending a management agreement or alternative solution.
138. Moreover, Mr Kenny pointed out that there was no express wording in either clause 2 or clause 21 which made Buyers' clause 2 obligations conditional in this respect. Accordingly, although they did not articulate it in this way, the majority reasoning necessarily involved the implication of a term relieving both parties of their obligations should it turn out to be impossible to conclude a management agreement before tender of NOR or find an alternative solution thereafter so that delivery of the vessel was impossible. However, he submitted that such an implication was neither necessary nor obvious. In such circumstances the contract would be frustrated, neither party would be under any further obligations and the deposit would be repaid to Buyers. Likewise, if Sellers wrongfully refused to co-operate, they would be in repudiatory breach entitling Buyers to cancel the MOA and be repaid the deposit under clause 14.

### ***Buyers' submissions***

139. In response, Mr Eaton submitted that it was not permissible to go behind the factual assumption made by the majority as set out in paragraph 132.ii) above. Accordingly,

part of the factual matrix against which the construction of the MOA was to be judged was the parties' appreciation that full performance of the contract would be impossible unless a management agreement could be concluded or alternative solution found. The effect of this was that performance of the MOA was contingently impossible from the outset in the absence of a management agreement/alternative solution and it would be futile to require the deposit to be lodged since, unless an agreement could be concluded or alternative solution found, there would never be any circumstances in which it would become payable to Sellers. As the majority recognised, conclusion of a management agreement was the most pressing task for the parties.

140. The suggestion that implication of a term was not necessary or obvious, was nonsensical given the majority's factual premise that all parties knew and appreciated that full performance of the MOA was impossible without a management agreement or alternative solution. In those circumstances, the parties could not realistically have intended Buyers to be under an obligation to pay the deposit if there was no prospect of it being released to Sellers. Reading clauses 2 and 21 together, it was therefore implicit that the obligation did not arise unless and until a management agreement or alternative solution was in place. This was not a case of supervening impossibility but a present, contingent impossibility. The practical effect of the majority's implied term was therefore that Buyers' obligations under clause 2 did not accrue at all in the absence of a management agreement or alternative solution and the answer they gave to Issue 1 was correct.
141. As to the point raised by Foxton J when giving permission to appeal (namely that the tribunal did not grapple with the time at which the clause 21 obligation arose or explain how a provision addressing the situation at the time of service of NOR could relieve Buyers of an anterior obligation under clause 2), this was sufficiently answered by the construction of clause 21 outlined in paragraphs 134 and 135 above and the fact that (as Buyers submitted) there was a contingent impossibility from the outset. On that basis there was nothing in the terms of clause 21 which was inconsistent with the implied term suggested by the majority.

### *Conclusion*

142. It was not in dispute that I should give the award a benevolent and generous reading, in a reasonable and commercial way and not seeking to find fault. Nonetheless, I have no doubt that Sellers' submissions are ultimately to be preferred.
143. I agree that the majority must be taken to have proceeded on the basis of an implied term. I also agree with Sellers that there is some uncertainty as to whether the impossibility they found was a supervening impossibility or a contingent impossibility pertaining at and from signature of the MOA.
144. Even assuming in Buyers' favour that it was the latter, however, I am unable to agree that the term which the majority implied was either necessary or obvious for any or all of the following reasons:
  - i) It is inconsistent with the reference in clause 21 to the tender of NOR which necessarily implies that the parties contemplated continued performance of the MOA at least to some extent, notwithstanding the absence of any management agreement or alternative solution.

- ii) In so far as the contingent impossibility might only be temporary, it could not be said that payment of the deposit would be futile or pointless. As long as there was at least a possibility that a management agreement could be concluded or alternative solution found, then it would make commercial sense for the deposit to be paid and all other pre-delivery obligations complied with so that delivery could take place as soon as possible thereafter. There is considerable force in Mr Kenny's submission that mere uncertainty does not make it necessary to imply the term in question.
  - iii) Furthermore, the suggested implied term fails to grapple with the possibility that Buyers might fail to exercise reasonable efforts in good faith to conclude a management agreement. While it might be said that Buyers would in those circumstances be precluded from relying on their own breach in order to take advantage of the implied term, this seems an unnecessarily cumbersome way of approaching things. The more straightforward approach would be not to imply a term in the first place.
  - iv) Ultimately, the difference between the parties resolved into the question of whether a term can be implied because it is reasonable to do so because performance would otherwise be futile, or only where it is necessary to do so. To that question there can only be one answer. Potential futility of performance is not a legitimate ground for implication; the only relevant touchstone is that of necessity and obviousness. Accordingly, the question is not so much "what is the point of performance?" as "why should the parties not be held to their bargain?"
  - v) In this case, I cannot discern any prejudice to Buyers in requiring them to pay the deposit. As discussed above, a deposit is a guarantee of performance and to that extent has a value over and above its mere monetary value. If it eventually became impossible to deliver the vessel without fault on Buyers' part, then one way or the other the MOA would be cancelled and the deposit would be returned to them.<sup>6</sup>
145. For all these reasons, I conclude that the majority erred in law in holding that clause 21 of the MOA released Buyers from any obligations under clause 2 unless they had already entered into a management agreement, or a different mutually acceptable solution had been found within the meaning of clause 21. The question should have been answered in the negative.
146. The appeal accordingly succeeds and the award must be remitted to the tribunal for reconsideration in the light of this judgment.
147. I will hear counsel on the appropriate form of any orders.

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<sup>6</sup> I have some doubt as to whether failure to conclude a management agreement could itself be relied upon as a frustrating event, having been expressly foreseen and provided for in clause 21. However, it may well be that such a failure would lead to a frustrating delay.