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DEPOSIT OR DAMAGES? UK SUPREME COURT RULES ON CONDITIONS PRECEDENT IN KING CRUDE CARRIERS SA AND OTHERS V RIDGEBURY NOVEMBER LLC AND OTHERS [2025] UKSC 39

In a potentially far-reaching decision, the Supreme Court has reinstated the decision of Mrs Justice Dias, holding that the 'deemed fulfilment' principle in the Scottish case of *Mackay v Dick* does not exist under English law. This has important consequences in a number of commercial arenas.

KEY BACKGROUND

The dispute arose out of contracts for the sale of three second-hand tankers, between the claimants/appellants as buyers (the "**Buyers**") and the defendants/respondents as sellers (the "**Sellers**"). The three sale contracts were concluded on the (amended) 2012 Norwegian Saleform (the "**MOAs**").

Under the MOAs, the Buyers were obliged to lodge as security a deposit of 10% of the purchase price in an escrow account (the "**Account**") at law firm HFW, the escrow agent (the "**Deposits**"). The Deposits would only be released three banking days after the date that: (i) the relevant MOA was signed; and (ii) HFW had confirmed in writing that the Account was open and ready to receive funds. The parties were obliged to provide to HFW all

necessary documentation to open and maintain the Account "without delay". The Sellers had the right to cancel each MOA if: (i) the Deposit was not lodged; or (ii) if the balance of the purchase price was not paid in accordance with the MOA, in which case the Deposit would be released to the Sellers.

The MOAs were signed, but HFW was unable to confirm that the Account was ready to receive funds because the Buyers had failed to provide the required KYC documents for the first two contracts, and the signed escrow agreement for the third contract. The Buyers therefore could not and did not pay the Deposits, and the Sellers terminated the MOAs.

THE MACKAY PRINCIPLE

At the heart of this case is what the Supreme Court referred to as the *Mackay v Dick* principle (the "**Mackay Principle**"), arising out of a speech by Lord Watson in the Scottish Court of Session case of that name,¹ which can be summarised as follows: where a party wrongfully prevents the fulfilment of a condition precedent to its debt obligations, that condition is treated as being fulfilled. Each of the High Court, Court of Appeal and Supreme Court considered whether the

¹ *Mackay v Dick* (1881) 6 App Cas 251



Mackay Principle existed under English law, a question that had not been finally answered for over a century.

Put simply, if the Mackay Principle applied, the Buyers' failure to provide the KYC documents necessary for the lodging of the Deposits with the Escrow Agent would mean the Sellers could recover the value of the Deposits in debt instead of (in this case) a lower sum in damages for a simple breach of the MOAs. This is because, under the Mackay Principle, the condition precedent would have been deemed to have been fulfilled by the Buyers despite their not providing the KYC documents.

The Courts also considered the question of whether contractual interpretation or the implication of a term could result in the same outcome as the application of the Mackay Principle.

PREVIOUS DECISIONS

The disputes were referred to arbitration. The resulting Awards held that the Sellers were entitled to recover the amounts of the Deposits in debt, on the basis that: "*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.*"

The Buyers were granted leave to appeal to the High Court. Mrs Justice Dias allowed the Buyers' appeal, holding that the Sellers' claim lay in damages, not debt, and that the Mackay Principle is a statement of Scottish law which is not binding on the English courts.

The Court of Appeal unanimously overturned the High Court's decision. It held that the Mackay Principle (as reformulated by Popplewell LJ) was supported by a 'consistent body of case law' which confirmed that it existed as a principle of English, as well as Scottish, law. By agreeing that the sale should be secured by a deposit, the parties had not bargained for a claim in damages but instead a right in debt. The Mackay Principle gave effect to that bargain.

SUPREME COURT

In another reversal, the Supreme Court allowed the Buyers' appeal, and held that the Mackay Principle does not form part of English law. The English authorities cited by the Sellers were inconsistent, and no English authorities were relied upon by Lord Watson in the original case. If the Mackay Principle applied in other contexts, e.g. in respect of a failure to fulfil a condition precedent to the passing of property, the impact could be 'extraordinary' and 'far-reaching'. It would therefore be necessary to impose limits on the operation of the Mackay Principle and, while the reformulation by Lord Popplewell recognised certain exceptions, their application and rationale was uncertain. Excluding the operation of the Mackay Principle in this case did not lead to injustice; the Sellers' remedy lay in damages.

The Sellers also argued that they could rely on the Mackay Principle as an aid to construction or as based on an implied term, rather than as a principle of law. The Court held that the principle that a party cannot take advantage of its own wrong was not applicable in this case; in contrast to the authorities cited, the Buyers did not rely on their own breach to treat the contract as being at an end or to claim a benefit under it. Further, the Court held that there were difficulties with the implied terms proposed by the Sellers, which would render clause 2 of the MOAs (the "Deposit Clause") 'unworkable' and fundamentally alter the parties' bargain.

As an alternative argument, the Sellers submitted that the deposits accrued as being due at the point the MOAs were agreed, and that the pre-conditions in the Deposit Clause were only pre-conditions to the payability of the deposit, not its accrual. Therefore, the Buyers' breach was only a failure in the '*machinery of payment*', and did not prevent the accrual of the debt. The Court rejected this: the deposits accrued upon satisfaction of the pre-conditions in the Deposit Clause, and therefore the Sellers could have no claim in debt for the deposit until the pre-conditions had been met.



COMMENT

On one view, the Buyers could be said to have profited from their breach in this case. They failed to ensure that the Deposits they had expressly agreed to pay under the MOAs were, in fact, paid. In doing so, they reduced their liability to a lower sum than would have been awarded if they had pulled out of the sales after lodging the Deposits. And while there may be some situations (the Supreme Court referred to four previous cases) where damages might be awarded in the same amount of the Deposits, it is not clear this will always be the case, or indeed whether their judgment overrules those cases.

Be that as it may, the Mackay Principle emanated in Scottish law and, it appears, will stay there. Implied terms and construction will remain the English law basis for resolving disputes where the contract breaker “profits” from their own failure to fulfil a condition precedent to their own performance. The Supreme Court made it clear that if the commercial community did not favour the impact of their decision on MOAs, they were free to agree a different outcome.

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