

JULY 2024

King Crude Carriers SA and ors v Ridgebury November LLC and ors [2024] EWCA Civ 719

The Court of Appeal has allowed an appeal by the sellers under three vessel sale contracts, holding that an obligor cannot rely on the non-fulfilment of a condition precedent to its debt obligation where the cause of the non-fulfilment is the obligor's own breach of contract.

The facts

- The dispute arose out of contracts for the sale of three second-hand tankers, between the defendants/appellants as sellers (the "**Sellers**") and the claimants/respondents as buyers (the "**Buyers**").
- The three sale contracts were concluded on an 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 the escrow account (the "**Account**") of 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 expressly required 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 "know your customer" documents in respect of the first two contracts, and the signed escrow agreement in respect of the third contract. The Buyers did not pay the Deposits, and the Sellers terminated the MOAs for non-payment of the Deposits.

Previous decisions

- The disputes were referred to arbitration in three separate references, heard together. 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.*"¹
- The Buyers were granted leave to appeal to the High Court. Mrs Justice Dias allowed the Buyers' appeal, holding that the Seller's claim lay in damages, not debt, and that the principle in *Mackay v Dick* (discussed below) is a statement of Scottish law which is not binding on the English courts. Damages are generally compensatory and subject to factors such as mitigation, causation and remoteness, whereas a sum payable in debt need not be.

The question before the Court of Appeal

- Where the accrual of a party's obligation to pay a debt is subject to a condition, and the obliging party wrongfully prevents that condition from being fulfilled (in this case by failing to provide the documents required to open the Escrow Account):
 1. is the condition treated as dispensed with or fulfilled with the result that the debt accrues (the Sellers' argument); or
 2. is it a breach of contract by the debtor, the remedy for which lies in damages in accordance with the usual rules (the Buyers' argument)?

¹ See [15].

Outcome

- The appeal was allowed. 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 Sellers should therefore have the benefit of that bargain, i.e. a debt claim.

Analysis

- Popplewell LJ, with whom Nugee and Falk LJ agreed, considered the application of the principle in the 1881 Scots law decision in the House of Lords of *Mackay v Dick*², which he formulated as being: "*that an obligor is not permitted to rely upon the non-fulfilment of a condition precedent to its debt obligation where it has caused such non-fulfilment by its own breach of contract*".³
- Popplewell LJ set out the test for when the *Mackay v Dick* rule will apply. There must be:
 - an agreement capable of giving rise to a debt rather than damages;
 - an agreement that the debt will accrue and/or be payable subject to fulfilment of a condition precedent; and
 - an agreement that the obligor will not do the thing which prevents the condition precedent being fulfilled so as to prevent the debt accruing and/or becoming payable.⁴
- But for the Buyers' breach in not providing the relevant documents, the escrow accounts would have been opened, in which case the Deposits would have become due and, in the event that they were not paid, recoverable.
- Contrary to arguments made on behalf of the Buyers, the *Mackay v Dick* principle did not cut across the usual rules applicable to damages such as causation, mitigation and remoteness, because the parties had not bargained for a claim in damages. The purpose of a deposit was to provide security to a seller against a buyer's non-performance; consideration of the rules of damages were therefore irrelevant.

Comment

- This judgment provides welcome clarification on how the courts will approach a situation where a condition precedent has not been complied with due to the fault of the obliging party. As with all contract disputes, when considering the application of the *Mackay v Dick* rule the contractual matrix and the parties' intentions are all-important. In this case, there was an express term that the Buyers would cooperate in satisfying a condition precedent, but this can also be implied. The parties are of course free to contract out of the *Mackay v Dick* principle if desired.
- It is not unusual for disputes concerning conditions precedent to arise in the context of vessel sales and purchases. It is perhaps more common to see a situation where the parties disagree as to whether a condition precedent has been satisfied or not. In such a situation, it will for the court to consider as a question of fact whether the condition precedent is satisfied, and to apply the test set out by Popplewell LJ in order to ascertain whether *Mackay v Dick* principle will be applicable. However, it remains to be seen whether the Buyers will seek permission to appeal to the Supreme Court.

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² (1881) 6 App Cas 251.

³ Subject to certain considerations - see [85].

⁴ See [81].