September 30, 2024

Paying the ferryman – A tale of debts and damages

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Introduction

In domestic property transactions, the buyer pays a deposit ahead of the purchase of the property, understanding that this deposit will be forfeited if the purchase of the property does not proceed. This process aims to incentivise the eventual completion of the transaction. Deposits are also subject to forfeiture in large, commercial contracts in much the same way.

The position of deposits in commercial contracts has recently been clarified in the judgment of Popplewell LJ sitting in the Court of Appeal in *King Crude Carriers SA and Others* v *Ridgebury November LLC and Others* [2024] EWCA Civ 719. This case establishes that if a party breaches a contract in a way that leads to the non-fulfilment of a condition precedent, then that party cannot rely on this condition precedent not being satisfied in order to excuse its own non-performance.

Background

The case concerns an order for three ocean-going tankers. The contract price was around $50 million. The contract stipulated that the buyer would pay a 10% deposit within three days of signing the deal, but only if the seller's agent confirmed they were in a position to receive the monies. The contract required the buyer to provide necessary documentation to the seller's agent – for example, evidence required to satisfy the agent's anti-money laundering obligations.

The buyer did not pay the contractual deposit because the seller's agent did not confirm that they were in a position to receive the monies. The reason they did not do so was because the buyer did not provide the necessary documentation required under the contract. The seller elected to terminate the contract. The seller could have made a claim for damages for breach of contract, but instead elected to sue for the payment of the deposit as a debt.

The buyer argued that they were not required to pay the deposit, because the seller had breached the contract by (through their agent) not confirming that they were in a position to receive the monies. It followed, the buyer said, that the deposit was not due because the condition precedent was not met.

The seller disagreed. If the buyer's argument was correct, they would in effect be taking advantage of their own breach. The contract expressly required the buyer to provide the documents so that the seller's agent was in a position to confirm their readiness to receive the monies. In failing to do so, the buyer was the one who had prevented payment of the deposit.

Initial proceedings

The seller commenced an arbitration claiming the deposit from the buyer. The tribunal found for the seller. The tribunal reasoned that it was the buyer's breach of their contractual obligation to provide all necessary

documentation to the seller's agent which prevented the obligation to pay the deposit from arising. The arbitrators held that the obligation to pay the deposit was deemed to have arisen.

The buyer appealed the decision under Section 69 of the Arbitration Act 1996, on the basis that the tribunal had made an error of law. The question before the Commercial Court was:

> "*Where an obligation for payment within a contract is contingent upon the fulfilment by one party of a condition, and that party fails, in breach of contract, to fulfil that condition, is the condition deemed to be fulfilled with the result that the payment sum can be claimed by the other party in debt? Or must the claim be in damages?*"

On appeal, Dias J disagreed with the tribunal and concluded that, if the seller had a claim for the deposit, it was one for damages, not in debt. This time, the seller appealed. Before turning to the Court of Appeal judgment, it is important to understand why the question of whether the claim was for damages or debt was central to the case.

The distinction between claims for debt and claims for damages

An action in debt is one of the oldest forms of action. It is a claim to enforce a primary obligation, namely a promise to pay a sum of money. By contrast, a claim for damages is a claim to compensation which arises as a secondary obligation upon breach of a (primary) contractual obligation. Damages are, with limited exceptions, compensatory. Debts are not.

The distinction matters because in a claim for damages, a party must prove their loss. The buyers argued that the sellers would have suffered no loss, because the sale would have fallen through via other mechanisms in the contract, or would have been frustrated, thus entitling the buyer to recover the deposit in any event. In particular, the sellers pointed to the global COVID pandemic that was beginning at the time the parties entered into the contract.

Similarly, the sellers accepted that they would have to give credit for any market gain benefit made on termination. The market had in fact improved between the date of the contract and termination: the tankers could have been sold for more. These considerations would not be applicable to an action in debt. The money would simply be due, and issues of mitigation, causation and remoteness would not arise.

The decision of the Court of Appeal

Popplewell LJ, giving the leading judgment of the court, analysed the authorities, notably *Mackay* v *Dick* [1881] 3 WLUK 23, a decision of the House of Lords, although a Scottish case so not directly binding in an English law matter.

In *Mackay* v *Dick*, the sellers claimed the contract price (£1,115) for a steam excavation machine they had sold to the buyers. The buyers were contractors who had undertaken to build a railway line from Carfin to Garriongill. The contract of sale provided for a test of the excavation machine: it was to be capable of excavating 350 cubic metres of material during a period of 10 hours. The contract also stated that the test was to be conducted at the Carfin end of the railway line. When the machine was delivered, the buyers could not make the Carfin end available for the test. Instead, the machine was tested at Garriongill, where it failed to process the required quantity of material. The conditions at the Garriongill end were different and less favourable from what had been anticipated at Carfin. That was the reason why the machine failed the test. However, the buyers alleged that the

machine was defective and refused to pay the purchase price. That led the sellers to commence proceedings. The Court of Session found for the sellers.

The case is well known for Lord Blackburn's proposition about implied terms of cooperation. His Lordship set out the general rule that, when a written contract provides obligations which are dependant on both parties, "… *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*."

For the purposes of *King Crude Carriers* v *Ridgebury*, however, Lord Watson's dicta in *Mackay* v *Dick* is more relevant. He treated the fulfilment of the contractual test at Carfin as a condition precedent to the sellers' right to the price. He said:

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

Lord Watson's reasoning was thus expressly based on Scots law, founded in turn on Roman civil law. However, as Popplewell LJ pointed out, the principle in question is not exclusive to those legal systems. The common law recognises the general principle that a person should not be entitled to take advantage of their own wrong. For those with a classical bent, the Latin maxim is "*nullus commodum capere potest de injuria sua propria*". This principle has long been used in English law as an aid to the construction of contracts. Accordingly, Lord Watson's reasoning was reflective of English common law at the time. After considering other authorities, Lord Popplewell concluded that this is how *Mackay* has been treated consistently.

An example of cases following *Mackay* is the Court of Appeal decision in *Panamena* v *Fredrick Leyland & Co Ltd* (1943) 76 Lloyd's Rep 113. In that case, shipowners contracted with a repair yard for work to the shipowners' vessel. The shipowners were under an obligation to make payment after the issue of a certificate by their surveyor "… *that the work has been satisfactorily carried out*" and on receipt of a certificate of the amount due issued by the costs investigation branch of the Ministry of War Transport, which had to certify the amount of wages and materials.

The shipowner's surveyor contended that the expression "… *that the work has been satisfactorily carried out*" meant that the certifying was not confined to an assessment of the quality of the work done, but it also required a review of the amount and value of the materials and labour expended. The surveyor refused to grant a certificate unless he was supplied with further information on the latter. The shipyard did not supply such information: they said this was not the surveyor's function.

The court agreed with the shipyard. They were entitled to recover the amount they claimed without producing the certificate from the shipowner's surveyor. Goddard LJ articulated the principle in the following terms:

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

Popplewell LJ concluded as follows on the authorities:

> "*… they provide a consistent body of case-law, both persuasive and, in the case of [Panamena], binding on this court, for the principle contained in the reasoning of Lord Watson in Mackay v Dick, applicable as a matter of English law, that an obligor is not permitted to rely upon the non-fulfilment of a condition precedent to its debt obligation where it has caused such non-fulfilment by its own breach of contract, at least where such condition is not the performance of a principal obligation by the obligee nor one which it is necessary for the obligee to plead and prove as an ingredient of its cause of action.*"

The rule was grounded in the maxim that a person should not be entitled to take advantage of their own wrong, although this was not a freestanding principle of universal application. One had to look elsewhere for the juridical basis for the rule. In Popplewell LJ's view, the basis of the rule in *Mackay* v *Dick* is that it represents the presumed contractual intention of the parties. That was a principled basis for the rule, because the judge held it only applied when three conditions were met:

1) there must be an agreement capable of giving rise to a claim in debt rather than damages;

2) there must be an agreement that the debt will accrue and/or be payable subject to fulfilment of a condition precedent; and

3) there must be an agreement that the obligor will not prevent the condition precedent from being fulfilled, so as (in turn) to prevent the debt accruing and/or becoming payable, whether that agreement takes the form of an express term, or the implied term of cooperation identified by Lord Blackburn in *Mackay* v *Dick*.

If the parties made the above three agreements, then it naturally follows that they also intended for the obligee to have the benefit of the debt in those circumstances.

Finally, Popplewell LJ dealt with some of the arguments the buyers had made against this formulation of the rule. The buyer contended that the principle interfered with the parties' freedom of contract because they had agreed the deposit would only be retained by the seller if the condition precedent had been met. The judge held, on the contrary, that the principle gives effect to the parties' contractual intention and does not frustrate it. If a contrary intention were expressed by the parties or could be implied from the circumstances of the case, the rule will not apply.

The buyers also argued that the rule contravened contractual principles applicable to claims for damages such as causation, remoteness or mitigation. The sellers would likely gain a windfall by the payment of the deposit, as those contractual principles which limit the amount recoverable in a claim in damages would not apply to a debt claim. Popplewell LJ found that this was irrelevant because on a proper construction of the contract, a debt claim arose. The rule does not take into account those elements of a damages claim because the parties had agreed the circumstances in which a payment was due, giving rise to a debt. Popplewell LJ therefore allowed the appeal and the buyers were ordered to pay the deposit to the sellers.

Comment

The decision of the Court of Appeal in *King Crude Carriers* is a welcome clarification that the rule in *Mackay* v *Dick* applies under English, as well as Scots law. By clarifying the juridical basis for the rule (giving effect to the presumed contractual intention of the parties), Popplewell LJ has made it easier for courts to follow and develop the rule in future cases. The rule itself reinforces the point that a party to a contract cannot take advantage of their own breach in order to attempt to resile from the contractual obligations they have agreed to.