

Paying the ferryman – A tale of debts and damages

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PRACTICES International Arbitration

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.

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