Wrapping up Mackay v Dick – No 'deemed fulfilment' principle under the tree

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PRACTICES International Arbitration, Litigation

In *King Crude Carriers SA and others (Appellants)* v *Ridgebury November LLC and others* (Respondents) [2025] UKSC 39 three companies associated with King Crude ("Buyers") contracted to buy three vessels from various "Sellers". The Contracts were materially identical. Each required the Buyer to pay a deposit of 10% of the purchase price. The deposits were to be paid into an escrow account opened with a law firm. The Buyers had to provide any documentation required for the account to be opened. Failing to pay the deposit by the due date would entitle the Sellers to terminate.

The escrow provider sought documentation from the Buyers. They refused to provide it, so the accounts were not opened and the deposits were not paid. The Sellers terminated the contracts.

At termination, however, the market price for each of the vessels was higher than the purchase price provided for in the contract. The Sellers, therefore, could mitigate their loss (indeed, make more profit) by selling the vessels to others at market price, so could recover no damages for breach of contract. Nonetheless, the Sellers claimed the (unpaid) deposits from the Buyers as debts due under the contracts which had arisen prior to termination.

It is trite law that a debt claim entitles the creditor to be paid the sum promised irrespective of whether any loss could reasonably have been mitigated by the creditor. Could the Buyers claim the deposits from the three King Crude companies in this way?

Three separate arbitral tribunals each (by a majority) ordered the Buyers to pay the Sellers the deposits. The majority of the tribunal relied in each case on the so-called *Mackay* v *Dick* principle. Following appeals under Section 69 of the Arbitration Act 1996, Dias J in the High Court held the principle not to be part of English law and set aside the awards. The Court of Appeal disagreed, held that the *Mackay* v *Dick* principle was part of English law, and restored the awards. And so the case came to the Supreme Court.

What is the *Mackay* v *Dick* principle?

In *Mackay* v *Dick* (1881) 6 App. Cas. 251 a railway builder contracted with a Seller to purchase a steam excavator. The contract required that the excavator be capable of digging a specified amount of clay a day, to be tested at a particular cutting face belonging to the Buyer, and within a certain period of time. If the test was successful the Buyer would pay the price. If not, the Seller would remove the digger and the Buyer wouldn't need to pay. The Buyer refused to provide a cutting face on which to test the digger. The Buyer then claimed that it did not have to purchase the digger because the test (which could not be done without access to the cutting face) had not been passed within the requisite time.

Lord Blackburn held there was an implied duty to co-operate: contracting parties are obliged to work together to ensure the performance of their bargain. That implied duty is recognised to be part

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of English law, and is uncontroversial. The purchaser was bound to keep, and pay for, the machine unless it ***failed*** the test. Since the machine had not failed the test, and could now never do so, the Buyer was bound to keep it.

Lord Watson adopted different reasoning, saying the condition should be treated as though it had actually been fulfilled:

> "*The* [sellers] *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* [buyer]*, 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* [buyer] *to furnish the means of applying the stipulated test; and their failure being due to his fault … they must be taken to have fulfilled the condition. The passage cited by Lord Shand … 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*."

Whether this principle (a party who has prevented a condition from being fulfilled will be treated as though it had been) forms part of English law has been given different answers over the years.

The Supreme Court's decision

The Supreme Court held unanimously that the principle does not form part of English law. The lead judgment is by Lord Hamblen and Lord Burrows. There were 6, interrelated, reasons why the principle was on the naughty list.

First, as can be seen from the above extract, Lord Watson's judgment in *Mackay* v *Dick* was founded on civil law and stated to be part of Scottish law. The other judges had not expressly supported the doctrine and the judgment could be explained on different bases (such as the implied duty of cooperation and that the test was a condition *subsequent*, with the Buyers required to pay unless the test was failed). Lord Burrows' rejection of the principle on this ground should have come as no surprise. Andrew Burrows (as he then was) had not included the principle in his *Restatement of the English Law of Contract* (2020), referring to the "*excellent judicial discussion … in Thompson v Asda MFI Group plc [1988] Ch 241 (rejecting as Scottish law, not English law, that part of the reasoning in Mackay v Dick … supporting the idea that a condition may be treated as fictionally fulfilled)*".

Second, subsequent authorities could not rescue the doctrine. They did not speak with one voice. While some decisions supported the existence of the principle, many could also be explained by the implied duty of cooperation and an orthodox award of damages.

Third, the doctrine would seriously undermine case law in the context of contracts for the sale of goods, where actions for the price cannot generally be brought unless property has *actually* passed. Other settled areas, such as contracts for the sale of land, or when freight is due under a voyage charterparty, would also be undermined. While a formulation of the principle could be concocted excluding these areas, it would be unclear how this could be done in a principled way without simply resorting to the implied intentions of the parties (on which see further below).

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Fourth, the bases for the principle are fictional – the condition is "*deemed*" to have been fulfilled – even though all parties know that it is not. At first instance Dias J had quoted the 18th century philosopher Jeremy Bentham "*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 lie: if yes, a foolish one.*" In the Supreme Court, Lord Hamblen and Lord Burrows also quoted Bentham "… *in English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system, the principle of rottenness*".

Fifth, insofar as English law was to recognise the obligation of a party to fulfil an obligation where the requirements had not been met due to their own fault, that could be adequately catered for by express or implied terms of a contract. If a party valued the *Mackay* v *Dick* principle, it could expressly contract to provide for it.

Sixth, the rejection of the doctrine would not give rise to injustice. A claim for damages arising out of the well-established and respected implied duty of cooperation would lie where a party breached it. That was not attractive to the Sellers here, because the rising market meant the Sellers had suffered no loss through the Buyers' lack of cooperation. The Courts would not struggle, and resort to legal fictions, to secure a windfall for the Sellers.

Could the Sellers be rescued by an implied term?

The Sellers, as a back-up, sought to argue that a term should be implied to the effect that the deposit be paid to the escrow provider even if the provider had not confirmed that the account was open, if such confirmation was prevented by the Buyers. Of course, the obvious issue with that - and why the Court rejected that implied term - was because in that scenario there would be no account that the deposit could be paid into, so this would have been an agreement to do the impossible. The terms were as workable as a large Santa Claus fitting down a narrow blocked chimney. The Sellers' implied argument that the Buyers could just foist the sum onto the escrow provider was not plausible.

Finally, the Sellers sought to argue that, if the escrow provider had not opened an account, the Buyers should be required to pay the deposit directly to the Sellers. The Court rejected this as "*rewriting the contract*" – with there being a major difference between paying the deposit to a trusted third party and your contractual counterparty. "*It is doubtful that many buyers would be willing to enter into an MOA on terms requiring the deposit to be lodged with the sellers; it involves a major rebalancing of risk*".

Had the deposit accrued, but just not yet become payable?

Some contracts provide that a debt accrues before the date upon which it is actually payable. For example, in *The Dominique*[1] a Charterparty provided that freight was "*deemed to be earned on signing bills of lading*" but to be paid "*within five days of signing and surrender*" of the bills. The Charterparty was terminated after signing of the bills, but before surrender. The Court held that the right to the freight already having accrued, the carriers could recover the sums. Had the deposit accrued but not yet become payable? Sadly for the Sellers, this wasn't a case of Christmas come early.

The challenge for Sellers here was that the Contracts drew no distinction between the Buyers' obligation to make payment of the deposit and the accrual of the right to the Sellers. That might give rise to a period where the Buyers could withdraw, without sacrificing their deposit, but – as Goff

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LJ observed in *The Blankenstein*[2] - "*That may not be very satisfactory from the seller's point of view; but it is, in my judgment, what he has agreed.*" *Blankenstein* itself concerned the construction of the Norwegian Saleform, in materially the same form as the wording in the Contracts. The Court was anxious (in any event) to avoid disturbing "*an established construction*" in such a contract.

Conclusion

The three King Crude companies proved to bear no gifts, and the Sellers received, no doubt, a hefty legal bill in their stockings. For commercial parties, the takeaway is clear, if you want a chance at the windfall that deposits can provide, you must take care to draft with precision so that the right to the deposit accrues when you need it to (particularly if that is before payment is actually made). The Court will not engage in storytelling to save you from infelicitous drafting. A further point to note is that, even where the contractual mechanism gives the seller a *prima facie* right to be paid, and to keep the deposit, the deposit does require to be a 'reasonable' amount (*Workers Trust & Merchant Bank Ltd* v *Dojap Investments Ltd* [1993] AC 573). That may provide an upper limit to the windfall that can be obtained, however cunning one's drafting.

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[1] [1989] AC 1056

[2] [1985] 1 WLR 435

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