

**Insights**

## **CONDITIONS PRECEDENT AND DEEMED FULFILMENT**

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### **SUMMARY**

Conditions precedent play an important role in contracts and it is often said that a party cannot benefit from its own breach. But in *King Crude Carriers SA and others v Ridgebury November LLC and others* [2025] UKSC 39, the Supreme Court rejected a principle from a House of Lords decision dating back to 1881, concerning whether a party can wrongfully, and in breach of contract, prevent the fulfilment of a condition precedent to that party's payment obligation such that the innocent party cannot make a simple debt claim. In this BCLP Insight, we examine the case and consider the key takeaways.

### **The dispute and arbitrations**

The case concerns three contracts for the sale of three vessels based on the Norwegian Sale form 2012 standard form. Under that form, the buyers were required to pay a deposit of 10 percent of the purchase price to a deposit holder within three banking days of (i) the agreements being signed and exchanged, and (ii) the deposit holder confirming the account was fully opened and ready to receive funds. Both parties were required to provide all necessary documentation to the deposit holder to open and maintain the account without delay.

Following execution of the agreements, the buyers failed to provide the deposit holder with the necessary documentation to enable the accounts to be opened without delay and did not pay the deposits. The sellers then commenced arbitrations under each of the three agreements, claiming payment of the deposits as accrued debts, which amounted in total to c. US\$5 million.

The sellers' case was based upon the principle of deemed fulfilment as established by Lord Watson in *Mackay v Dick* (1881) 6 App Cas 251, a case that concerned an agreement for the manufacture and purchase of a steam operated digging machine to be used in constructing a railway. The sellers argued that where the paying party prevented the condition precedent from being fulfilled, that party cannot rely on the non-fulfilment to avoid its obligation to make payment.

The buyers' position was that their liability to pay the deposits never accrued because the deposit holder had never confirmed the accounts were open and ready to accept funds. The buyers argued that the sellers' only remedy lay in damages, which the sellers had to prove. This distinction was a key issue because the market price for the vessels on termination was higher than the purchase price under the agreements, which meant the sellers did not suffer a loss.

The sellers were successful in the arbitrations and the tribunal accepted the sellers' case based upon the *Mackay v Dick* principle. The buyers, however, were granted leave to appeal under sections 68 and 69 of the Arbitration Act 1996 on the basis of a serious procedural irregularity in the decision of the tribunal and on a question of law.

## **The lower courts**

Hearing the appeal in the Commercial Court, Dias J agreed with the buyers and held that *Mackay v Dick* was a Scottish law case and that the principle does not form part of English law.

The Court of Appeal, however, reversed this decision and reinstated the tribunal's award. The leading judgment was given by Popplewell LJ, who recognised that the principle had its limitations and observed that the juridical basis of Lord Watson's reasoning in *Mackay v Dick* was presumed contractual intention and the maxim that a party should not be entitled to take advantage of its own wrong.

Permission to appeal to the Supreme Court was then granted on the basis that whether there is a principle of deemed fulfilment in English law was a significant legal question of general public importance.

## **The Supreme Court decision**

The key issue on appeal to the Supreme Court therefore concerned the *Mackay v Dick* principle and was formulated as follows:

"Where a party (i) has an obligation to make a payment when a pre-condition is fulfilled, (ii) has an obligation to fulfil the pre-condition but (iii) in breach of contract, fails to do so, is the pre-condition deemed to be fulfilled—or otherwise treated as inapplicable or dispensed with—so that the other party can claim the payment as a debt? Or must the other party's claim be for damages only?"

In a unanimous verdict, the Supreme Court allowed the buyers' appeal and rejected the sellers' case. This was for several reasons, including the fact that the *Mackay v Dick* decision did not rely on any English law authorities but on "a doctrine borrowed from the civil law" and the English law authorities are inconsistent on whether the *Mackay v Dick* principle exists.

In addition, it was held that the *Mackay v Dick* principle would fundamentally undermine the law of contract for the sale of goods and for the sale of land and that the English law of contract proceeds on the basis of the terms of the contract (express and implied) and their proper

interpretation, rather than by way of fictional fulfilment of a condition precedent. This was not seen as causing any injustice, as the innocent party could still make a claim for general damages.

The Supreme Court then went on to consider whether the issues were relevant in the context of contractual interpretation, as the sellers argued the buyers were relying on their own breach to treat the contract as being at an end, which goes against the presumption in English law that parties do not intend a party to profit from its own breach. This argument was rejected on the basis that the buyers had not benefited from their breach, as they were still liable for general damages. Other arguments based on implied terms and when the deposit accrued were also rejected.

## **Key takeaways from the decision**

This decision is based on its own specific facts and concerns a condition precedent to a payment obligation. Nonetheless, it is important to note that the Supreme Court has chosen to reject what was seen as a long-standing established principle, which the Court of Appeal considered should still apply. It is now clear that where a party wrongfully prevents the fulfilment of a condition precedent to their debt obligation, that condition will not necessarily be treated as fulfilled.

The innocent party will not be able to claim the sum as a debt, but will instead need to put forward a claim in damages for breach of contract, which will be subject to the usual rules concerning causation, mitigation and remoteness. That is not as simple as making a debt claim.

It is also interesting to note that the Supreme Court made it clear that there is no wider presumption that a party cannot benefit from its own wrongdoing. As the Supreme Court observed, damages for breach of contract are to compensate the claimant and not to punish the defendant and, subject to rare exceptions, damages or an account of profits are not awarded to strip profits made by the defendant's breach. This means that contract law permits what was referred to as "efficient breach" and parties may therefore profit from their own wrongdoing. Any consequences of breach will ultimately be determined by what the parties have agreed i.e. by looking at the contractual terms.

Finally, it is worth noting that although this decision rejected the reasoning of Lord Watson on the principle of deemed fulfilment, the Supreme Court confirmed that Lord Blackburn's speech in *Mackay v Dick* remains good authority for the principle that there is an implied duty on parties to co-operate to ensure the performance of their bargain.

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*This Insight was Co-authored by Trainee Solicitor Adam Wade-Baylis*

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