Michaelmas Term
[2025] UKSC 39
On appeal from: [2024] EWCA Civ 719

JUDGMENT

King Crude Carriers SA and others (Appellants) *v* Ridgebury November LLC and others (Respondents)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Hamblen
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
12 November 2025

Heard on 9 and 10 July 2025

Appellant
Nigel Eaton KC
David Barnard
(Instructed by Reed Smith LLP (London))

Respondent
Julian Kenny KC
Michal Hain
(Instructed by Wikborg Rein LLP (London))

LORD HAMBLEN AND LORD BURROWS (with whom Lord Reed, Lord Hodge and Lord Stephens agree):

1. Introduction

1. The focus of this appeal is on the decision of the House of Lords in the Scottish case of *Mackay v Dick* (1881) 6 App Cas 251. Sitting as a panel of three, there were two leading speeches in the House of Lords in that case. The speech of Lord Blackburn stands as uncontroversial authority for there being an implied duty to co-operate whereby contracting parties are obliged to co-operate to ensure the performance of their bargain. In contrast, the speech of Lord Watson is controversial. That speech indicates that there is a principle (or rule or doctrine) of law that, where a party wrongfully prevents the fulfilment of a condition precedent (ie a pre-condition) to that party's debt obligation (eg, as in that case, the duty to pay for goods being bought), that condition is treated as being fulfilled. The status of that "deemed fulfilment" principle, or alternative formulations of the same idea such as the condition being "dispensed with" or "deemed waiver" or "quasi-estoppel", has long been a matter of debate. We shall refer to that principle, or alternative formulations of it, as the "*Mackay v Dick* principle of law". This appeal raises the issue of whether there is such a principle in English law (without prejudice to the position in Scotland). Very closely related to that is the question whether, even if there is no such principle of law, contractual interpretation or an implied term achieves much the same outcome.

2. This issue arises in the context of contracts for the sale of three vessels on the Norwegian Saleform 2012, with amendments and additions. The sellers, who are the respondents, are (under each contract respectively) Ridgebury November LLC, Ridgebury Sierra LLC, and Makronissos Special Maritime Enterprise (the "Sellers"). The buyers, who are the appellants, are King Crude Carriers SA, Prince Crude Carriers SA, and Zenon Crude Carriers SA (the "Buyers"). Under the contracts, the Buyers were obliged to lodge a deposit of 10% of the purchase price with a deposit holder. The deposit was required to be paid within three banking days of the deposit holder confirming in writing that the deposit account had been opened. The parties were obliged to provide all necessary documentation for the opening of the account. In breach of contract, the Buyers never did so. The Sellers terminated the three contracts and claimed the deposits in debt, relying on *Mackay v Dick*. The Buyers contended that the Sellers' sole remedy was in damages and that no loss had been suffered. The Sellers' claim succeeded in arbitration, failed on appeal to the Commercial Court, but succeeded before the Court of Appeal. The Buyers now appeal to the Supreme Court arguing, primarily, that there is no *Mackay v Dick* principle of law in England and Wales and that contractual interpretation or an implied term cannot assist the Sellers in their debt claim in this case.

3. Both parties also seek to raise secondary cases. The Buyers contend that, even if the right to the deposits had accrued, on the true interpretation of the contracts the deposits

were not to be forfeited on termination by the Sellers. This requires them to contend that the Court of Appeal's decision to the contrary in *Griffon Shipping LLC v Firodi Shipping Ltd* ("*The Griffon*") [2013] EWCA Civ 1567; [2014] 1 Lloyd's Rep 471 was wrong.

4. The Sellers, in their secondary case, contend that the deposits accrued due as a debt when the contracts were made and that the stipulated conditions precedent went only to the time for payment of an already accrued debt. Put another way, it is said that the Buyers' breach was a failure in the machinery of payment and did not prevent the accrual of the debt. This arguably requires the Sellers to contend that the Court of Appeal's decision in *Damon Compania Naviera SA v Hapag-Lloyd International SA* ("*The Blankenstein*") [1985] 1 WLR 435 was wrong. It was there held, unanimously on this point, that the right to the deposit did not accrue until after the signing of a Saleform contract.

2. Factual background

5. Between 28 and 30 April 2020, the Sellers and the Buyers concluded three Memoranda of Agreement (the "MOAs") for the sale and purchase of three vessels, the Makronissos, the Ridgebury Astari, and the Ridgebury Alina L. Except for price, the three MOAs were on materially identical terms.

6. The lodging of the deposit was governed by clause 2 of the MOAs which provided (with amendments to the Saleform marked in strikethrough or italicised):

> "**2. Deposit**
>
> As security for the correct fulfilment of this Agreement the Buyers shall lodge a deposit of 10% (ten per cent) ~~or if left blank, 10% (ten per cent)~~ of the Purchase Price (the "Deposit") in an ~~interest-bearing~~ account for the Parties with the Deposit Holder within three (3) Banking Days after the date that:
>
> (i) this Agreement has been signed by the Parties and exchanged in original or by email or telefax; and
>
> (ii) the Deposit Holder has confirmed in writing to the Parties that the account has been *fully* opened *and ready to receive funds*.

> The Deposit shall be released in accordance with joint written instructions of the Parties. Interest, if any, shall be credited to the Buyers. Any fee charged for holding and releasing the Deposit shall be borne equally by the Parties. The Parties shall provide to the Deposit Holder all necessary documentation to open and maintain the account without delay."

The Deposit Holder was defined as being Holman, Fenwick, Willan Greece ("the Deposit Holder").

7. The consequences of failing to lodge the deposit were addressed in clause 13 which provided:

> "**13. Buyers' default**
>
> Should the Deposit not be lodged in accordance with Clause 2 (Deposit), the Sellers have the right to cancel this Agreement, and they shall be entitled to claim compensation for their losses and for all expenses incurred together with interest.
>
> Should the Purchase Price not be paid in accordance with Clause 3 (Payment), the Sellers have the right to cancel this Agreement, in which case the Deposit together with interest earned, if any, shall be released to the Sellers. If the Deposit does not cover their loss, the Sellers shall be entitled to claim further compensation for their losses and for all expenses incurred together with interest."

8. Clause 14 addressed "Sellers' default" and provided the Buyers with an option to cancel in the event of such default. If the Buyers elected to cancel, "the Deposit together with interest earned, if any, shall be released to them immediately". Clause 16 was an English law and London arbitration clause.

9. Following the signature of the three MOAs at the end of April 2020, in breach of clause 2 of each MOA, the Buyers failed to provide the Deposit Holder with the necessary documentation to enable the accounts to be opened without delay. For that reason, the Deposit Holder never confirmed that the accounts had been opened and were ready to receive funds, and the Buyers (by reason of their own conduct) could not, and did not, lodge the deposits.

10. In late May and early June 2020, the Sellers purported to cancel (ie to terminate) the MOAs under clause 13 of the Saleform on the grounds that the deposits had fallen due and that the Buyers, having failed to provide the necessary documentation, had not paid those deposits.

3. The decisions below

11. The Sellers commenced arbitrations under each of the three MOAs claiming, principally, payment of the deposits as debts. The tribunals ordered the determination of preliminary issues, including whether the Buyers were liable "because they cannot rely on their own breach of contract preventing the fulfilment of a condition precedent to payment [of the deposits]". A majority of each tribunal held that the Buyers were so liable, accepting the Sellers' case based upon *Mackay v Dick*. It was accordingly held that the Sellers were entitled to cancel the MOAs and claim payment of the deposits as debts. The tribunals ordered the Buyers to pay US$1.26 million (Makronissos), US$1.94 million (Astari) and US$1.74 million (Alina L).

12. On 21 October 2022 Foxton J gave leave to appeal in relation to the following question of law:

> "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?"

13. By a judgment dated 15 December 2023 ([2023] EWHC 3220 (Comm); [2024] 2 Lloyd's Rep 115) Dias J allowed the appeal and held that the Sellers' claim must be in damages. She conducted a careful and wide-ranging review of the authorities relevant to *Mackay v Dick* before concluding that the doctrine of deemed fulfilment (or deemed waiver) did not form part of English law. She also rejected the Sellers' alternative case (raised by respondents' notice) that the opening of the escrow account was not a true condition precedent but only part of the machinery of payment so that, on the Sellers' argument, the right to the deposit accrued upon signing, or three banking days after signature, of the MOA.

14. It is important to add that one of the facts assumed, for the purposes of the preliminary issues, was that the market price for each of the vessels was higher upon termination than the purchase price under each of the MOAs. On the face of it, therefore, the Sellers suffered no net loss by reason of the Buyers' breach of contract so that only nominal damages would be recoverable by the Sellers. Hence the importance of the

Sellers' submission that they were entitled to payment of the deposit as a claim in debt. It is trite law that, at least in general, a debt claim entitles the creditor to the payment of the sum promised irrespective of whether the creditor has suffered a loss of bargain or whether any loss could reasonably have been mitigated by the creditor.

15. Dias J granted leave to appeal. By a judgment dated 27 June 2024 ([2024] EWCA Civ 719; [2025] KB 311) the Court of Appeal (Popplewell, Nugee, Falk LJJ) allowed the Sellers' appeal.

16. The leading judgment was given by Popplewell LJ. Nugee LJ gave a short concurring judgment, agreeing with the reasoning of Popplewell LJ. Falk LJ agreed with both judgments. Popplewell LJ reformulated what was laid down by Lord Watson in *Mackay v Dick* in the following terms (para 85):

> "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, and save insofar as a contrary intention is sufficiently clearly expressed, or is implicit because the nature of the condition or the circumstances of the case make it inappropriate".

17. He held that this was supported by "a consistent body of case law" (para 77). He further held that "the legal basis of the rule is that it represents the presumed contractual intention of the parties" and that "the agreement that the obligor will not engage in the conduct which prevents the debt accruing and/or becoming payable implicitly carries with it an agreement that the consequence should be that the debt accrues and is payable" (para 81). He held that this "accords with the approach to the maxim that a party should not be entitled to take advantage of their own wrong in the contractual field more generally" (para 84).

18. By Order dated 28 October 2024, the Supreme Court (Lord Briggs, Lord Hamblen, and Lord Burrows) granted the Buyers permission to appeal.

4. The Issues

19. Issue 1, which is the primary issue on the appeal, concerns *Mackay v Dick*. The parties' formulation of the issue is 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?

20. If the Buyers' appeal on Issue 1 fails, then Issue 2 is:

> Whether the Court of Appeal's decision in *The Griffon*, which held that under the Saleform the deposit was forfeited when the seller terminated the MOA for non-payment of the deposit, was wrong. This is concerned with the Buyers' secondary case (see para 3 above).

This raises a further and prior issue, Issue 2A, which is:

> Whether the Supreme Court does not have jurisdiction because Issue 2 is outside the scope of the question of law on which the Buyers obtained leave to appeal from the High Court.

21. If the Buyers' appeal on Issue 1 succeeds, then Issue 3 is:

> Whether under the Saleform the right to the deposit accrues when the MOA is concluded with the consequence that the pre-conditions in clause 2 are only pre-conditions to the payability of the deposit, not to its accrual. This is concerned with the Sellers' secondary case (see para 4 above).

This raises a further and prior issue, Issue 3A, which is:

> Whether Issue 3 is not open to the Sellers because the Commercial Court decided the point in the Buyers' favour and the Sellers did not obtain leave to appeal or seek to raise it before the Court of Appeal.

5. Issue 1 - 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?

(1) Is there a *Mackay v Dick* principle of law (in English law)?

(i) Mackay v Dick

22. In *Mackay v Dick* (1881) 6 App Cas 251 the defender buyer, who was involved in the construction of a railway, entered into a contract (by exchange of letters) with the pursuer seller for the manufacture and purchase of a steam-operated digging machine. The buyer wanted the machine for the purpose of excavating a long railway cutting and thereby saving the cost of manual labour. One of the terms of the contract was that the machine should be capable of digging out at least 350 cubic yards of clay in a day and that that capability should be tested at a trial at a specified railway cutting belonging to the buyer. It was agreed that, if the trial was successful, the buyer would keep the machine and pay the agreed price. If the trial failed, the seller would remove the machine. Although the machine was delivered as agreed, the buyer failed to provide a "properly opened-up" face at the railway cutting so that the trial of the machine could not go ahead. It was held by the House of Lords (as a panel of three) that the seller was entitled to the agreed price.

23. Lord Watson's reasoning was that payment of the price for the machine was conditional on the machine satisfying the buyer's specified requirements at the trial. But as the trial did not go ahead because of the buyer's default, that condition should be treated as if it had been fulfilled. He said at p 270:

> "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, I am of opinion that, as in a question with him, they must be taken to have fulfilled the condition. The passage cited by Lord Shand [in the Inner House] from *Bell's Principles* (para 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."

24. Lord Blackburn's reasoning was different. In his view, even though not expressly stated, a contract should generally be construed as including a duty on each party to do what is necessary on its part in order for the contract to be carried out. In modern parlance, there is an implied duty of co-operation. Under the terms of the contract in question, the buyer was bound to keep and pay for the machine that had been delivered unless it subsequently failed the trial; and that subsequent condition (failure of the trial) did not, and could not, occur because of the buyer's own default (in breach of its duty of co-operation) in not allowing the trial to go ahead. Lord Blackburn said, at pp 263–264:

> "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that 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. … the Defender, having had the machine delivered to him, was by his contract to keep it, unless on a fair test according to the contract it failed to do the stipulated quantity of work, in which case he would be entitled to call on the Pursuers to remove it. And by his own default he can now never be in a position to call upon the Pursuers to take back the machine, on the ground that the test had not been satisfied, he must, as far as regards that, keep, and consequently pay for it."

Lord Selborne LC, at p 272, agreed with both speeches.

25. It will be apparent that there are two significant differences between the two main speeches. First, Lord Watson regarded success at the trial as a condition precedent to payment, whereas Lord Blackburn reasoned that there was a condition subsequent that the buyer did not need to pay if the machine failed the trial. Secondly, and most importantly, Lord Watson's reasoning was that, by reason of the buyer's default, there was a deemed fulfilment of the condition precedent that the machine must be successful at the trial. In contrast, Lord Blackburn did not rely on any such deemed fulfilment. Rather the condition subsequent (failure of the trial) simply did not occur so that the buyer was bound to pay for the machine.

26. It follows that, because he did not rely on any deemed fulfilment of a condition, there is nothing controversial about Lord Blackburn's reasoning in *Mackay v Dick.*

Instead, his judgment is well known for its path-breaking recognition of an implied duty of co-operation. In contrast, it was Lord Watson's reliance on there being a deemed fulfilment of a condition, by reason of the buyer's default, that is being focused on when one refers to the *Mackay v Dick* principle of law.

(ii) The four main cases relied on by the Sellers

27. Julian Kenny KC, counsel for the Sellers, relies on four main cases (along with obiter dicta in several other cases) as establishing that there is a *Mackay v Dick* principle of law (in English law). Those four cases are: *Hotham v East India Company* (1787) 1 TR 639 ("*Hotham*"); *Panamena Europea Navigacion (Cia Ltda) v Frederick Leyland & Co Ltd* [1947] AC 428 ("*Panamena*"); *Cory v London Residuary Body* 1990 WL 753484 ("*Cory*"); and *Companie Noga d'Importation et d'Exportation SA v Abacha (No 3)* [2002] CLC 207 ("*Abacha*").

28. In *Hotham*, which was decided nearly 100 years before *Mackay v Dick*, Ashhurst J upheld a claim for deadfreight (ie for short loading) by shipowners against charterers. It was a condition of the charterparty that no claim for short tonnage could be made unless it was certified by the charterers' agents following loading in India. The charterers loaded 903 tons of cargo in India but the shipowners alleged that another 100 tons could, and should, have been loaded. Although requested to do so by the shipowners, the charterers' agents had failed to provide the certificate of short loading. The charterers argued that the certificate was a condition precedent to the shipowners' entitlement to deadfreight and that that condition had not been fulfilled so that deadfreight was not payable. Ashhurst J rejected that argument. His reasoning was that, because the shipowners had done all they could to obtain the certificate and that it had not been provided because of the default of the charterers, what the shipowners had done should be regarded as equal to performance ie the condition precedent of a certificate should be deemed to be satisfied. He said at p 645:

> "It is unnecessary to say whether the clause relative to the certificate be a condition precedent or not; for granting it to be a condition precedent, yet the [shipowners] having taken all proper steps to obtain the certificate, and it being rendered impossible to be performed by the neglect and default of the [charterer's] agents, which the jury have found to be the case, it is equal to performance. If it were necessary to cite any case for this, which is evident from common sense, it was so held in *Rolle's Abridgment*, 445, and many other books."

29. However, as there was clearly a breach of contract by the charterers in failing to supply the certificate, it may not have been of crucial importance whether the condition

precedent was treated as satisfied or not. The shipowners were entitled to damages for that breach by the charterers and it may have been that the measure of damages would have embraced the deadfreight that the owners would have been entitled to had the certificate been provided as it should have been.

30. *Panamena* concerned a contract to repair a ship during the Second World War. When repaired, the ship was to be chartered to the Ministry of War Transport. By the terms of the contract, the owners (who were the appellants) were to pay the repairers (who were the respondents) for the repairs on an ordinary commercial basis but their obligation to pay was dependent on the issuing of two certificates. The first was certification by the owners' surveyor to the effect that the work had been satisfactorily carried out; and the second was certification by the Costs Investigation Branch of the Ministry of War Transport (the "CIB") as to the amount due. Contrary to the terms of the contract, the owners' surveyor, Dr Telfer, failed to provide a certificate because he wanted information as to whether the repairs had been economically carried out. That was irrelevant to his role which was to certify the quality of the work. The other certificate was provided by the CIB specifying the amount due. The question at issue was whether the repairers were entitled to payment without the certificate of quality having been provided by Dr Telfer.

31. The House of Lords, sitting as a panel of four, held that the repairers were so entitled. Lord Thankerton, with whom Lords Uthwatt, Porter and Du Parcq agreed, reasoned that the conduct of the owners, through Dr Telfer, in illegitimately refusing to provide the certificate as to quality meant that the repairers were absolved from the requirement of obtaining such a certificate. They were entitled to the payment of the amount due without producing that certificate. Lord Thankerton cited the passage from Ashhurst J's judgment in *Hotham* set out at para 28 above. He also approved obiter dicta of Blackburn J in *Roberts v Bury Improvement Commissioners* (1870) LR 5 CP 310, at p 326, that "It is a principle very well established at common law that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself." Lord Thankerton continued at pp 435–436:

> "an illegitimate condition precedent to any consideration of the granting of a certificate was insisted on by Dr Telfer and by the appellants. It is almost unnecessary to cite authority to establish that such conduct on the appellants' part absolved the respondents from the necessity of obtaining such a certificate, and that the respondents are entitled to recover the amount claimed in the action."

32. Two points are noteworthy. The first is that, while *Mackay v Dick* was not mentioned in Lord Thankerton's speech, his language of the repairers being "absolved" from the necessity of obtaining a surveyor's certificate (the condition precedent) is similar, albeit not identical, to Lord Watson saying that the performance of the condition

precedent was deemed to be satisfied. Secondly, as with *Hotham*, the owners, through Dr Telfer, were clearly in breach of contract in failing to provide the surveyor's certificate. The damages to which the repairers were entitled, based on the position they would have been in if the surveyor's certificate had been provided as it should have been, might have been the same as the amount certified as due by the CIB.

33. In *Cory*, the Greater London Council ("GLC") had a contract with the claimant, Cory, for the bulk transfer of domestic waste from refuse transfer stations to landfill disposal sites. On the dissolution of the GLC on 1 April 1986, the contract was transferred to a new body, the Western Riverside Waste Authority ("WRWA"). The question arising was what was to be done about sums claimed by Cory from the GLC, before 1 April 1986, but which were unpaid as at that date. The key legislative provision was paragraph 9(1) of the Local Government Reorganisation (Property etc) Order 1986 (SI 148/1986) by which, "All rights and liabilities in respect of any payment which was due and payable by or to an abolished council before 1 April 1986 shall vest in the appropriate residuary body." That residuary body was the London Residuary Body ("LRB"). Therefore, if the sums claimed were due and payable before 1 April 1986, the LRB had to pay. If not, the WRWA was liable.

34. In the terms of the contract between Cory and the GLC, Cory was entitled to basic costs but also, under clause 19, for certain cost increases provided they were certified as valid by the GLC's engineer. It was common ground that there was an implied term that the certificate should be provided by the engineer within a reasonable time.

35. Cory submitted claims under clause 19 relating to the period 25 March to 29 December 1985 and it was common ground that a reasonable time for certifying or refusing to certify these claims had expired before 1 April 1986. If the engineer had issued the appropriate certificate, these increased sums would have become due and payable before 1 April 1986. But the engineer simply did nothing about those claims within a reasonable period.

36. The Court of Appeal (Lord Donaldson MR with whom Nourse and Russell LJJ agreed) held that the LRB was liable because the debt was due and payable before 1 April 1986. The LRB could not rely on its own failure—through its (ie the GLC's) engineer—to provide the necessary certificate. It was "in effect, estopped" from relying on the absence of the certificate. Lord Donaldson said at p 4:

> "But for the failure of the Engineer to certify, [the payment] would have been both due and payable before 1 April 1986. If the LRB, as the GLC's successor in respect of pre-April 1986 liabilities is, in effect, estopped from relying upon the absence of the certificate, it is as if no certificate had ever been required

> with the result that the payment was due and payable at a time for which the LRB is responsible. The authority for this quasi-estoppel is to be found in a long line of cases of which the best known is perhaps *McKay v Dick* [(1881) 6 App Cas 251]."

37. He then cited the crucial sentence from Lord Watson's speech in *Mackay v Dick*, at p 270, accepting that the condition was deemed to be fulfilled and also Lord Thankerton's approval in *Panamena* of Blackburn J's obiter dictum in *Roberts v Bury Improvement Commissioners* (set out at para 31 above). Lord Donaldson concluded:

> "Here the LRB, as 'executors' of the GLC, seek to take advantage of the GLC's failure to issue an Engineer's certificate by contending both that in the circumstances no payment was due before 1 April 1986 and that, even if any such payment was due before then, it was not payable before that date—debitum in praesenti, solvendum in futuro. If we were to accede to either proposition, we should be allowing the GLC and the LRB standing in its shoes to take advantage of its own wrong."

38. It is clear that Lord Donaldson was here relying on a fictional estoppel not only because he used the language of "quasi-estoppel" but also because no attempt was made to identify a representation (by the GLC) and reliance (by Cory) that are the minimum necessary requirements for a true estoppel. In any event, there appeared to be no dispute that one or other of the LRB or the WRWA was liable for the debt and that depended on—and the whole dispute was about—when the right to the debt accrued. It is also again noteworthy that the GLC's refusal to certify was a breach of contract entitling Cory to damages and it might have been that the damages would have been of the same amount as the debt.

39. The final of the four main cases relied on by Mr Kenny is *Abacha*. The Federal Government of Nigeria ("FGN") entered into a settlement, for the payment to it of DM300 million, with the "SJ Berwin Defendants" ("SJBDs"), who were individuals and companies associated with General Abacha, the former ruler of Nigeria. The bank accounts of the SJBDs were subject to freezing orders. One of the questions that Rix LJ, sitting as a single judge of the High Court, had to answer was the following. Under the settlement agreement, was the FGN entitled to immediate payment of the DM300 million plus interest or, rather, did that payment only become due, as the SJBDs argued, once their bank accounts had been unfrozen?

40. In answering that, Rix LJ reasoned that, even assuming that the release of the bank accounts was a condition precedent to the obligation to pay the DM300 million, the non-

fulfilment of that condition was caused by the breach by the SJBDs of their implied duty of co-operation (for which Rix LJ relied on Lord Blackburn in *Mackay v Dick*). Applying Lord Watson in *Mackay v Dick*, Rix LJ held that FGN was entitled to payment of the debt owed (and the relevant interest flowing from that).

41. After a wide-ranging survey of a number of authorities and obiter dicta, including some which expressed scepticism about the *Mackay v Dick* principle of law, Rix LJ concluded as follows at paras 106–107:

> "106. … there is the rather odd situation where *Mackay* v *Dick* is regarded as authority for a well founded and general principle of English law, but there is a certain divergence of opinion as to how that principle can best be expressed. It is at any rate clear that there must be a relevant breach of contract on the part of the defendant: by relevant, I mean causatively relevant. The breach must bear on the condition which otherwise needs to be fulfilled. A doctrine of waiver perhaps sounds more like the common law than a doctrine of deemed fulfilment taken from the civil law: but they are both fictions designed to achieve the right result to which common sense and fairness seem to point.
>
> 107. In the present case, it seems to me that *Mackay* v *Dick* is not only authority for the implication of the implied term of co-operation, but also authority for the potential waiver or deemed fulfilment of the condition precedent of release of the SJ Berwin defendants' accounts by means of discharge of the court's freezing orders … Because the condition precedent involves not only the actions of the parties, but also the order of the court, I have asked myself whether that is a factor which takes this case out of the general rule. I have concluded that it need not do so. The court's freezing orders will not have been released in fact, with all the consequences which go with that fact, until the court orders it so. But that is not to say that the SJ Berwin defendants can rely on their own breach of contract to prevent the fulfilment of a condition precedent to payment. At the same time the SJ Berwin defendants will be responsible for any damages which flow, in the ordinary way, from their breach."

42. We make two points about Rix LJ's judgment. First, it was clear that the SJBDs were in breach of contract (by their failure to co-operate) and therefore liable in damages. It may be that no different result followed from accepting that there was a claim in debt as well as damages (see Rix LJ at paras 94 and 108). Secondly, while accepting that

common sense and fairness appeared to support it, Rix LJ explicitly adverted to the difficulty of explaining the *Mackay v Dick* principle of law and saw waiver and deemed fulfilment as both being fictions.

(iii) Some of the obiter dicta relied on by the Sellers

43. In addition to those four main cases, in which the Sellers submit that the ratio decidendi supports the *Mackay v Dick* principle of law, Mr Kenny also relies on several obiter dicta. We here set out the most important of these (but see also, for example, Devlin J in *Tiberghien Draperie Sarl v Greenberg & Sons (Mantles) Ltd* [1953] 2 Lloyd's Rep 739, 743–744; and Lord Sumption dissenting in *Geys v Société Générale, London Branch* [2012] UKSC 63; [2013] 1 AC 523, at para 131).

44. Lord Wright in *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 summarised the effect of *Mackay v Dick* as follows, at p 148:

> "This House held that the buyers had prevented fulfilment of the condition because they held that, it being the buyer's duty under the contract to provide the necessary facilities, he had failed to do so. Hence his default prevented the seller from satisfying the condition. The seller could therefore say that he had done all that lay on him to fulfil the condition and was to be taken to have implemented it."

45. A few months later, in *Heyman v Darwins* [1942] AC 356 at 387, Lord Wright said that "It is familiar law that a party who has prevented fulfilment of a condition precedent cannot set up the fact of its non-fulfilment."

46. Devlin J in *Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd* (1950) 83 Lloyd's 178 at 187 said that *Mackay v Dick* established the implied term of co-operation and "a second proposition, based on the opinion of Lord Watson", which:

> "gives the plaintiff in appropriate cases an additional form of relief. If the breach of the implied term prevents the plaintiff from performing a condition binding upon him, he is to be taken as having fulfilled that condition; and if the condition is one on which his right to payment depends, he may therefore sue for payment instead of damages."

47. In *Agrimpex Hungarian Trading Co for Agricultural Products v Sociedad Financiera de Bienes Raices SA (The Aello)* [1958] 2 QB 385, Parker LJ, with whom Lord Goddard CJ and Lloyd-Jacob J agreed, summarised the ratio of *Mackay v Dick* as follows at p 407:

> "The defendant, having prevented the holding of that test, was held to be in the same position as if the condition had been fulfilled. In other words, the price became payable not because the property was deemed to have passed but because the condition was deemed to have been fulfilled."

(iv) Cases which appear to cast doubt on the Mackay v Dick principle of law

48. Nigel Eaton KC, counsel for the Buyers, submits that the *Mackay v Dick* principle of law is not part of English law. He seeks to distinguish *Hotham, Panamena* and *Cory* from the present case as cases where the condition, prevented by the debtor, is engaged where the creditor has already rendered performance and stands to lose the value of that performance. He further argues that *Abacha* was a simple case of breach sounding in damages equal to the debt. Moreover, he relies on two authorities in which it was explicitly indicated, by Scott J and Millett LJ respectively, that the *Mackay v Dick* principle of law forms no part of English law.

49. In the first of those two cases, *Thompson v ASDA-MFI Group plc* [1988] 1 Ch 241, C worked for X, part of D's group of companies. C bought options under a scheme run by D. Under the scheme rules (and underlying law), the options lapsed if C was no longer employed by a company within the group. D sold X. Although not a breach of contract by D, this prevented C from satisfying the condition precedent to the exercise of the options (ie that C was still employed by a company within D's group). Much of the argument was focused on implied terms. But Scott J made clear that, viewed as a principle of law separate from implied terms, *Mackay v Dick* was not a principle of English law. He said at p 266:

> "The principle expressed by Lord Watson in *Mackay v Dick,* 6 App Cas 251, 270, is not, in my view, a principle of English law. The fictional fulfilment of conditions precedent and the fictional non-fulfilment of conditions subsequent may be principles of the civil law, but they are not principles of English law. In this area of the law of contract English law proceeds, in my view, by means of implied terms. If a term can be implied that a party will not do an act that, if done, would prevent the fulfilment of a condition precedent, then the doing of that act will be a breach of contract; if a term can be implied that a party

> will not do an act that, if done, would cause a condition subsequent to be fulfilled, then the doing of that act will be a breach of contract. But if a suitable term cannot be implied into the contract then in my judgment, the contract will take effect according to its tenor. The condition precedent will fail and the condition subsequent will be fulfilled."

50. In the second case relied on by Mr Eaton, *Little v Courage Ltd* (1994) 70 P & CR 469, Courage was obliged to renew Mr Little's lease if, among other conditions, Mr Little agreed a new business plan. Courage took no steps to agree such a plan and then argued that the condition was not satisfied. The Court of Appeal, in a judgment given by Millett LJ, held that, although no term could be implied to this effect, as a matter of "construction" the condition only attached if Courage required Mr Little to agree a plan. For our purposes at this stage (we examine the case in more detail at paras 87–88 below) the case is significant for Millett LJ's clear statement, at p 474, that "The doctrine of fictional fulfilment of a condition precedent which is to be found in the civil law forms no part of English law."

(v) Colley v Overseas Exporters

51. Each side's counsel was able to draw some support for his submissions from passages in McCardie J's judgment in *Colley v Overseas Exporters* [1921] 3 KB 302 ("*Colley*"). In any event the decision repays careful attention because it illustrates very clearly the link between a debt claim and the passing of property (ie the transfer of title) in the context of the sale of goods. The facts were simple. The claimant sold a quantity of leather belting to the defendants "fob Liverpool" (ie free on board at Liverpool). In breach of contract, the defendant buyers failed to name an effective ship so that the claimant was prevented from loading the goods. The claimant sued for the price of the goods.

52. McCardie J held that, while the claimant was clearly entitled to damages for breach of contract, he was not entitled to the price. That was because property in the goods did not pass to the buyer until loaded onto the ship (ie the passing of property by loading was a condition precedent to the obligation to pay the price). The fact that it was because of the buyer's default that the loading had not occurred, and hence property had not passed, did not mean that one could treat that condition as having been fulfilled.

53. McCardie J distinguished *Mackay v Dick* as a case in which property in the machine must have passed to the buyer on delivery (and hence that the decision rested on Lord Blackburn's reasoning). Had that not been so and had the headnote to *Mackay v Dick* been correct (and although he did not mention this, it would appear that the headnote was referring to Lord Watson's reasoning), McCardie J considered that the principle "would be most far reaching, and the results extraordinary" (p 307).

54. Yet at the same time, McCardie J said, at p 308, that, while "*Mackay v Dick* turned on Scotch law", the same principle was "equally well settled in English law" and he referred with approval to, for example, Ashhurst J's judgment in *Hotham*.

55. It would appear therefore that McCardie J was accepting that the *Mackay v Dick* principle of law applies in respect of some conditions but does not apply to a condition in a sale of goods contract as to the payment of the price being dependent on the passing of property in the goods being bought (and, with reference to *Laird v Pim* (1841) 7 M & W 474, he thought that an analogous approach applied to contracts for the sale of land). Hence he said the following at pp 310–311:

> "A clear distinction exists between cases where the default of the buyer has occurred after the property has passed and cases where that default has been before the property has passed. To the former cases *Mackay* v *Dick* may be applied on appropriate facts. To the latter cases *Mackay* v *Dick* does not apply so as to enable the buyer to recover the price as distinguished from damages for breach of contract. To hold that *Mackay* v *Dick* applies where the property has not passed would lead to extraordinary results."

(vi) Academic commentary

56. The court was referred by both parties to the academic literature. Focussing on contract textbooks, Mr Eaton fairly summarised the general view, prior to the decision in the Court of Appeal in this case, as being one of scepticism as to the *Mackay v Dick* principle of law being good English law. For example, in *Treitel's Law of Contract*, 15th ed (2020), at para 2-112 (and to very similar effect, see *Chitty on Contracts*, 34th ed (2021) para 4-204, originally written by Sir Guenter Treitel), after mentioning *Mackay v Dick,* there is the following passage:

> "To hold the party in breach liable for the full performance promised by him, on the fiction that the condition had occurred, seems to introduce into this branch of the law a punitive element that is inappropriate to a contractual action. More recent authorities rightly hold that such a doctrine of 'fictional fulfilment' of a condition does not form part of English law."

The "more recent authorities" footnoted are *Thompson v ASDA-MFI Group plc* and *Little v Courage*.

57. Quite commonly (see, eg, *Goode and McKendrick on Commercial Law*, 6th ed (2020), para 34.05, note 17 and Roger Halson, *The Law of Contract*, 7th ed (2022), para 7.40, note 4) *Mackay v Dick* is simply side-lined in the textbooks as a case where property in the machine had passed to the buyer and the condition that failed was subsequent only (thereby putting to one side the reasoning of Lord Watson).

58. In contrast, Mr Kenny pointed out that the latest editions of texts, such as *Treitel's Law of* Contract*,* 16th ed (2025), at para 2.113 and *Chitty on Contracts*, 35th ed (2024), para 4.205, had been rewritten to reflect the decision of the Court of Appeal in this case and were not critical of it. Perhaps more significantly, he relied on three 2025 case notes which, he submitted, were supportive of the Court of Appeal's decision: Jordan English, "The principle in Mackay v Dick" (2025) 141 LQR 48; Jonathan Chu, "The place of deemed fulfilment of condition" (2025) Legal Studies 1; and Anthony Kennedy and Helen Morton, "Debt or Damages: Time to Dispense with the Doctrine of Deemed Fulfilment?" [2025] LMCLQ 24. But while we accept that those case notes do support the Court of Appeal's decision, they cannot be said to agree with all the reasoning of Popplewell LJ.

59. It is convenient at this stage to point out that we regard the support in, for example, Jordan English's case note, for Popplewell LJ's limitation of the *Mackay v Dick* principle of law to subsidiary and not principal obligations (see para 16 above) to be problematic. While that may be pragmatically necessary in order to avoid undermining cases such as *Colley*, it is hard to see any principled reason for drawing such a distinction. We also cannot agree with Jordan English that Popplewell LJ's reasoning is best rationalised as one of waiver of conditions (explored in greater depth in his book, *Discharge of Contractual Obligations* (2025), paras 5.1–5.36). We do not accept that English law recognises a form of waiver which the author describes as being waiver of a condition by prevention of fulfilment. That would constitute a novel and unwarranted extension of what is meant by waiver. Although the term "waiver" has different meanings (for example, it may refer to an estoppel or an election: see *Chitty on Contracts*, 35th ed (2024), paras 26-043–26-050, 28-060–28-062), it essentially requires the person waiving its rights to make clear that it is giving up (ie forgoing) those rights. There can be no waiver where the person is clearly not giving up those rights but is rather insisting on compliance with them. On the facts of this case, for example, to say that there was waiver of the conditions by the Buyers contradicts their clear insistence that the conditions should be fulfilled.

60. Both counsel also drew to our attention a very recent case note by Robert Stevens, "Deemed Fulfilment Again" [2025] LMCLQ 244. That note cuts both ways. On the one hand, Stevens rejects the reasoning of Popplewell LJ. He also persuasively argues (in line with what we have said in the previous paragraph) that there was plainly no true waiver on the facts of this case. "One thing the buyers were clear upon throughout was that they insisted upon the condition of the opening of the escrow account, something which they could frustrate. They never expressly or impliedly waived it." (At p 245.) Stevens further

rejects the "contractual intention" explanation (which we discuss at paras 70–99 below) because it "seems to stretch that concept too far." On the other hand, Stevens suggests that the Court of Appeal's decision can be saved because the payment of the deposit into the escrow account was a mere payment mechanism. We examine that suggestion at paras 123–124 below.

(vii) The main reasons why, in our view, Mackay v Dick is not a principle of law in English law

61. Having surveyed the most relevant case law and academic commentary, it is our view that *Mackay v Dick* is not a principle of law in English law. This is for the following six main reasons.

62. First, Lord Watson in *Mackay v Dick* did not cite or rely upon any English law authorities in support of the principle stated by him. Rather he relied upon what he understood to be "a doctrine borrowed from the civil law" (see para 23 above). Lord Blackburn's reasoning was different and Lord Selborne LC's speech is ambiguous since he agreed with both speeches.

63. Secondly, the English law authorities do not speak with one voice. While the four main cases relied on by Mr Kenny (*Hotham*, *Panamena, Cory* and *Abacha*) support such a principle of law, Scott J in *Thompson v ASDA-MFI Group plc* and Millett LJ in *Little v Courage* have voiced persuasive views to the contrary. Moreover, it is possible that, in those four main cases relied on by Mr Kenny, the same result could have been reached through the application of the law on damages for breach of contract rather than the law on debt.

64. Thirdly, such a principle of law is contradicted by *Colley*. As McCardie J recognised, it would fundamentally undermine the law on contracts for the sale of goods (and it would appear also for the sale of land) if *Mackay v Dick* were to be applied in respect of a failure to fulfil a condition precedent to the passing of property. At the very least, therefore, and in order to avoid what McCardie J referred to as "extraordinary" and "far reaching" consequences, one would have to cut back the ambit of the *Mackay v Dick* principle of law. Indeed, as Mr Eaton submitted, one can think of many other types of contract (eg the payment of freight in a voyage charter) where the application of the *Mackay v Dick* principle of law would undermine the established law as to when a debt accrues. But it is unclear how one could achieve such a cut back in a principled manner and without resorting, for example, to the particular intentions of the parties. In a similar vein, it should be noted that the formulations of the principle in cases such as *Hotham* and *Panamena* are very wide ranging and give no indication that any such principle of law must have some limits.

65. Popplewell LJ in the Court of Appeal recognised that there must be limits and formulated the principle in terms which recognised four broad exceptions (see para 16 above). But the application and rationale of those exceptions are uncertain. As Mr Eaton submitted, a supposed general rule which has to be stated in terms which significantly but uncertainly qualify and curtail it does not make for a robust principle of law.

66. Fourthly, the various formulations or explanations of the *Mackay v Dick* principle of law are all fictional. Rix LJ explicitly recognised this in *Abacha*. The language of there being a deemed performance, or a deemed waiver, or a quasi-estoppel immediately makes that clear. In reality, there has been no performance, and the ingredients of a true waiver or of a true estoppel (eg a representation plus reliance) have not been satisfied. Fictions tend to obscure transparent reasoning and, wherever possible, should be removed. Jeremy Bentham famously despised fictions. In his words (see J Bowring (ed), *The Works of Jeremy Bentham*, (1962), vol 5, p 92): "in English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system, the principle of rottenness." Lord Nicholls, in his dissenting speech in the economic tort case of *OBG v Allen; Douglas v Hello! Ltd (No 3)* [2007] UKHL 21; [2008] AC 1, paras 228–229, said: "fictions, of their nature, conceal what is going on. They are a pretence … I would like to think that, as a mature legal system, English law had outgrown the need for legal fictions." And in *Forsyth-Grant v Allen* [2008] EWCA Civ 505; [2008] 2 EGLR 16, at para 45, looking at "waiver of tort" in the context of damages for the tort of nuisance, Toulson LJ remarked that the "modern tendency has been to eschew resort to legal fictions". At the very least, a fiction has to be properly explained. But there is no convincing explanation for *Mackay v Dick* as a principle of law.

67. Fifthly, we regard Scott J as being correct when he observed in *Thompson v ASDA-MFI Group plc* that the English law of contract in this area 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 is consistent with the importance which English law attaches to freedom of contract, and to the application and enforcement of the terms of the bargain which the parties have made. This promotes certainty and predictability, which are important considerations, especially in the commercial law context.

68. Sixthly, the consequence of rejecting *Mackay v Dick* as a principle of law does not lead to injustice. Subject to terms to the contrary, where a condition precedent has not been fulfilled because of the debtor's breach of contract, that breach is appropriately and adequately dealt with in English law through the claimant's remedy in damages. Those damages aim to compensate the claimant by putting it into as good a position as if the contract had been performed, subject to limitations such as mitigation and remoteness. There is no good reason to strain to uphold a claim for debt where, as illustrated by this case, this involves disregarding the terms of the contract and where, in contrast to damages, allowing the debt claim may exceed the claimant's net loss.

69. In the light of our rejection of *Mackay v Dick* as a principle of law, we move on to consider whether the Sellers can here succeed by relying on *Mackay v Dick* not as a principle of law but as an aid to contractual interpretation or as based on an implied term. Both interpretation and the implication of terms (by fact) may be said to rest on the objective intention of the parties, but it was made clear in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742 ("*Marks and Spencer*") that they are different (and, it would appear, sequential) techniques. In simple terms, interpretation is concerned with what is there in the express terms of the contract whereas the implication of terms inserts into the contract what is not already there.

(2) Contractual interpretation?

70. Popplewell LJ's reasoning in the Court of Appeal was 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.

71. In support of this approach Mr Kenny relied on Lewison, *The Interpretation of Contracts*, 8th ed (2023), at para 7.108 in which it is stated:

> "**A contract will be interpreted so far as possible in such a manner as not to permit one party to it to take advantage of his own wrong**.
>
> This principle is not a rule of law; rather it is an aspect of the principle of interpretation that leans against interpretations that produce unreasonable or absurd consequences that could not have been intended. The contractual intention is still to be decided by reference to the ordinary principles applicable to the interpretation of contracts." (Original emphasis.)

72. Mr Kenny also relied on a number of cases cited by Lewison and, in particular, Rede v Farr (1817) 6 M & S 121, New Zealand Shipping v Société des Ateliers et Chantiers de France [1919] AC 1 ("New Zealand Shipping"), Cheall v Association of Professional Executive Clerical and Computer Staff [1983] 2 AC 180 ("Cheall v Apex") and Alghussein Establishment v Eton College [1988] 1 WLR 587. Lest there be any confusion, it should be noted at the outset that, in the first two cases, where the language used includes that the contract is "void", it is clear from the context that what is meant by "void" is that the contract is brought to an end (in modern terminology is terminated) and not that the contract never existed.

73. In *Rede v Farr* it was a term of a lease that if the rent was not paid for 40 days, the lease "shall cease, determine and be utterly void". The lessee failed to pay the rent for more than 40 days and sought to rely on this provision to claim that the lease was thereby determined. It was held that he was not entitled to do so. Lord Ellenborough CJ stated, at p 124:

> "In this case, as to this proviso, it would be contrary to an universal principle of law, that a party shall never take advantage of his own wrong, if we were to hold that a lease, which in terms is a lease for twelve years, should be a lease determinable at the will and pleasure of the lessee; and that a lessee by not paying his rent should be at liberty to say that the lease is void."

74. In *New Zealand Shipping* it was a term of a shipbuilding contract that, in the event of France becoming engaged in a European war, if the French shipbuilder were unable to deliver the vessel within 18 months of the completion date then "this contract shall become void". It was held by the House of Lords that the contract became "void" and was thereby brought to an end in circumstances where this had not been caused by any wrongful act or default on the part of the shipbuilder. Lord Ellenborough's judgment in *Rede v Farr* was cited with approval and Lord Atkinson stated, at p 9:

> "if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong …"

75. In *Cheall v Apex* Lord Diplock referred to *New Zealand Shipping* and summarised the applicable principle as follows, at pp 188–189:

> "In the course of the speeches, which are not entirely consistent with one another, reference was made by all their Lordships to the well known rule of construction that, except in the unlikely case that the contract contains clear express provisions to the contrary, it is to be presumed that it was not the intention of the parties that either party should be entitled to rely upon his own breaches of his primary obligations as bringing the contract to an end, i e as terminating any further primary obligations on his

> part then remaining unperformed. This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon an event brought about by his own breach of contract as having terminated a contract by frustration, is often expressed in broad language as: 'A man cannot be permitted to take advantage of his own wrong.'"

76. Both *Rede v Farr* and *New Zealand Shipping* concerned reliance on a contractual provision bringing the contract to an end by rendering it void. *Alghussein Establishment v Eton College* concerned reliance on a provision conferring a contractual benefit. An agreement between a landowner and a developer provided that a 99-year lease would be granted to the developer "if for any reason due to the wilful default of the tenant [ie the developer] the development shall remain uncompleted" on a certain date. It seems clear that the word "not" had been inadvertently omitted, but the trial judge felt that he could not proceed on that basis in the absence of a claim for rectification. The developer claimed to be entitled to the lease under this provision in circumstances where the failure to complete the development was due to its wilful default. The House of Lords held that it was not so entitled. In so concluding, Lord Jauncey referred to and relied upon *Rede v Farr*, *New Zealand Shipping* and *Cheall v Apex.* He held that the principle stated in those cases equally applied to a provision under which a party claimed the right to enjoy a contractual benefit because of his wrong. He said, at p 594:

> "Although the authorities to which I have already referred involve cases of avoidance, the clear theme running through them all was that no man can take advantage of his own wrong. There was nothing in any of them to suggest that the foregoing proposition was limited to cases where the parties in breach were seeking to avoid the contract and I can see no reason for so limiting it. A party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations."

77. In *Chitty on Contracts*, 35th ed (2024), at para 16-115, these cases (and others) are cited in support of the following proposition:

> "It has been said that, as a matter of construction, unless the contract clearly provides to the contrary it will be presumed that it was not the intention of the parties that either should be entitled to rely on their own breach of duty to avoid the contract or bring it to an end or to obtain a benefit under it."

78. In the light of the modern developments in the approach to contractual interpretation (see, eg, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173) it would appear that the above cases supporting the presumption that the parties did not intend a party to profit from its own breach, are best rationalised as ones where that presumption reflects the objective intention of the parties in the relevant context. But in any event, we agree with *Chitty* that, as a matter of authority, the cases on the presumption are all concerned with a claimed entitlement to treat the contract as being at an end or to obtain a benefit under it. They do not support any wider presumption that a party may not take advantage of its own wrong. There are many contractual circumstances in which a party may do so. This is most obviously illustrated by the principle that 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. Contract law permits efficient breach and the defendant may therefore profit from its wrong.

79. In the present case the Buyers are not relying on their own breach of contract to treat the contract as being at an end or to claim a benefit under it. They are not using it in order to found or to invoke any right under the contract. As Dias J said at first instance at para 99: "Far from deriving any benefit, Buyers' breach exposed them to a liability in damages. Nor would they be rid of the contract, since that depended on whether or not Sellers elected to cancel." Put another way, the Buyers' reliance on the terms of clause 2 is purely defensive. They acknowledge that they are liable to pay damages but contend that to claim in debt the Sellers must show, and they cannot, that the pre-conditions set out in clause 2 have been satisfied. That is not comparable to any of the cases on interpretation principally relied upon by the Sellers (see paras 72–76 above) which are clearly distinguishable. In these circumstances the maxim that a party cannot take advantage of its own wrong is of no assistance in interpreting the contracts in this case. It is not a principle of interpretation of universal application, as the Court of Appeal acknowledged (para 79). More generally, applying the modern objective and contextual approach to contractual interpretation, we do not consider that the correct interpretation of the express pre-conditions in this case is that they do not need to be satisfied where the Buyers have defaulted.

80. Mr Kenny advanced a further and related argument that, unless the MOA is interpreted as not requiring the pre-conditions to be satisfied, unreasonable and absurd consequences follow. He submitted that the Buyers' reading of clause 2 requires one to accept that the MOA: (i) requires the Buyers to pay the deposit upon the Deposit Holder's confirmation; and (ii) requires the Buyers to provide documents to enable the Deposit Holder to give such confirmation; but (iii) allows the Buyers to avoid (i) by breaching (ii). That, he submits, is not a realistic interpretation. It permits the Buyers to adopt a "cunning plan" to avoid its agreed obligations. He relies on the concurring judgment of Nugee LJ in the Court of Appeal in this case and, in particular, his statement at para 101:

> "It cannot have been the parties' intention that the buyer could avoid his obligation to pay the deposit by the simple expedient of deliberately failing to comply with what is on any view a subsidiary obligation to sign the necessary forms to open the account."

81. The difficulty with this argument is that it means that the parties cannot have intended what they have stated and agreed. Leaving aside the Sellers' case on Issue 3, clause 2 makes the Buyers' obligation to lodge the deposit within three Banking Days conditional on: (i) the parties signing and exchanging the MOA; (ii) the parties providing the Deposit Holder with all necessary documentation to open the account; and (iii) the Deposit Holder confirming that the account is fully open and ready to receive funds. This is what clause 2 states. The Sellers' case is that there are, however, unstated circumstances in which those pre-conditions do not apply. If so, that would seem to require some term to be implied. It does not follow from the wording of clause 2.

82. As Mr Eaton submitted, there is nothing extravagant about the proposition that a conditional obligation applies according to its terms. The parties should be understood to mean what they say. The Sellers' case on interpretation means that a payment obligation subject to a promissory condition requires payment to be made regardless of whether the condition is performed. But if the parties intended it to be paid regardless, they would not have made it conditional. The Sellers' case effectively strikes out the condition and rewrites the terms of the contract. It should also be stressed that it is always open to the parties to include a term in the contract making clear that a condition precedent to a debt obligation does not apply where the failure of the condition precedent is caused by the debtor's breach.

83. A similar point arose in *The Blankenstein* in which it was held that signing the MOA was a pre-condition to the deposit being payable. As Robert Goff LJ observed (at p 456):

> "I realise that the effect is that the seller does not get the protection of the deposit until signature; and that the buyer, by repudiating the contract before signature of the memorandum of agreement, can escape from the consequence of forfeiture of the deposit. That may not be very satisfactory from the seller's point of view; but it is, in my judgment, what he has agreed. The security of the deposit is not due until after signature of the memorandum of agreement; and so, if the buyer repudiates the contract before signature, the seller is without the benefit of the deposit."

84. Subject to the Sellers' case on Issue 3, the same applies to the pre-conditions in the present case. Until they are satisfied the Sellers do not have the security of the deposit. That is what they have agreed.

85. In many contracts for the sale of land a deposit is paid at the time that the contract is made, often on exchange of contracts. In such cases the seller has the security of the deposit from the outset and from that moment the right to the deposit accrues. Subject to the Sellers' case on Issue 3, the parties have agreed to defer that moment until certain pre-conditions have been satisfied, as in *The Blankenstein*.

(3) An implied term?

86. During the course of oral argument, it was suggested by Mr Kenny that the fact that the deposit arrangements were for the benefit of the Buyers might support an implied term (implied by fact, whether by reason of business efficacy or obviousness, the leading case being *Marks and Spencer*) to the effect that they could not be insisted upon in circumstances where the Buyers had made them impossible to carry out. An analogy could be drawn with *Little v Courage Ltd* (which has already been briefly looked at, in para 50 above, in respect of Millett LJ's explicit rejection for English law of the *Mackay v Dick* principle of law).

87. Mr Little was the tenant of a public house and Courage was his landlord. His lease was for five years with an option to renew for a further five years. It was a condition precedent to the exercise of the option that Mr Little had agreed with Courage a "Business Plan" and a "Business Agreement". Having decided that it did not wish the lease to be renewed, Courage did not put forward either document. The Court of Appeal held that the parties did not contemplate negotiation and agreement of these documents but rather acceptance by Mr Little of what Courage put before him. It further held that the documents were essentially for Courage's benefit. In these circumstances it was held that, if Courage decided to dispense with the documents, that could not prevent the option being exercisable. Millett LJ stated as follows, at p 479:

> "What, then, if Courage had changed its policy and decided to dispense with Business Agreements and Business Plans? Would this mean that Mr Little would no longer have the right to renew the Lease? If the officious bystander had asked the parties this question in 1986, they would have told him not to be silly. The Business Agreement contained the tie, and both documents were essentially for Courage's benefit. There could be no possibility of Courage ever dispensing with either. But legal problems are often most easily solved by considering what would happen in improbable events. The hypothetical

> bystander must be persistent as well as officious. If he had persisted in his question, I have no doubt what answer the parties would have made. Of course Mr Little could still exercise the option to renew. Courage had to give Mr Little something to sign. If Courage did not want him to agree anything, there was nothing for him to agree.
>
> In my judgment effect can be given to the parties' obvious intentions by construing condition (c) as if it read:
>
> (c) the Lessee shall *if so required* have agreed with the Company a further Business Plan and a further Business Agreement." (Original emphasis.)

88. Given the difficulty here of implying a term (because the contract was unilateral), Millett LJ described it as a matter of construction, but he relied on the officious bystander and did read terms into the lease. In the case of a bilateral contract that would be regarded as being a matter of implication.

89. Mr Kenny argued that a similar approach could, and should, be adopted in this case given that the deposit arrangements were there for the Buyers' benefit. Real difficulties arose, however, when Mr Kenny sought to formulate an appropriate implied term.

90. The first two suggested implied terms involved inserting the following italicised words into clause 2:

<u>First suggested implied term:</u>

> "… the Buyers shall lodge a deposit … in an account for the Parties with the Deposit Holder within three (3) Banking Days after the date that:
>
> (i) [the MOA is signed]; and
>
> (ii) *(unless wrongfully prevented by the Buyers*) the Deposit Holder has confirmed in writing to the Parties that the account has been fully opened and ready to receive funds."

Second suggested implied term:

> "… the Buyers shall lodge a deposit … in an account for the Parties with the Deposit Holder within three (3) Banking Days after the date that:
>
> (i) [the MOA is signed]; and
>
> (ii) the Deposit Holder has confirmed in writing to the Parties that the account has been fully opened and ready to receive funds *(or would have done if not wrongfully prevented by the Buyers)*."

91. The obvious difficulty with both these implied terms is that they render clause 2 unworkable. Although they mean that the Buyers cannot contend that the time for lodging the deposit has not arisen, there is no account into which the deposit can be lodged. Such an account does not and cannot exist. Without the Buyers' documents and, for example, compliance with Know Your Client requirements, the Deposit Holder cannot open the requisite account and so the deposit cannot be lodged as required by clause 2. There can be no justification for implying a term which makes a key part of the performance of the Buyers' obligations under clause 2 impossible. Such a term cannot be necessary or obvious. Further, by making part of the performance of the Buyers' obligations impossible, it contradicts and is inconsistent with the express terms agreed. Such unworkability means that there can equally be no justification for so interpreting clause 2 if, as Mr Kenny submits but we reject, introducing these additional words is a matter of interpretation rather than implication.

92. In an attempt to meet this difficulty Mr Kenny put forward a third possible implied term.

Third suggested implied term:

> "… the Buyers shall lodge a deposit … in an account for the Parties with the Deposit Holder within three (3) Banking Days after the date that:
>
> (i) [the MOA is signed]; and

> (ii) the Deposit Holder has confirmed in writing to the Parties that the account has been fully opened and ready to receive funds *(or in the event the Buyers wrongfully prevent the above account from being opened, the Buyers shall promptly lodge the Deposit with the Sellers)*."

93. The obvious difficulty with this implied term (and again the same difficulty applies if one treats Mr Kenny's submission as going to interpretation rather than implication) is that it is rewriting the contract. There is a major difference between a deposit arrangement which involves the deposit being held in escrow by a trusted intermediary and paying the deposit over to the sellers. Such a deposit arrangement provides significant protection for the buyers and it is an important part of the Saleform 2012. The sellers only obtain the deposit funds as a part payment of the contract price on delivery of the vessel or if the deposit is forfeited. Under clause 14 the buyers have the right to have the deposit released to them in the event of the sellers' default. 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.

94. The importance of deposit holder arrangements is explained in Strong & Herring, *Sale of Ships*, 3rd ed (2016), para 5.05:

> "banks have become increasingly reluctant to accept deposits into joint accounts. The advance of financial regulation and anti-money laundering legislation worldwide means that it is now significantly more difficult and time-consuming for a bank to set up and operate a joint account for the purpose of holding a deposit under an MOA.
>
> As a result, in most instances now the sellers and buyers find themselves having to agree on an alternative to the more traditional deposit arrangements once taken for granted in ship sale and purchase transactions.
>
> As the banks' interest in acting as deposit holder has waned, so other entities prepared to assist with holding deposits have come to the fore. However, many of these bodies such as shipbrokers and lawyers will still be subject to regulatory oversight and will almost certainly require compliance by the parties with, for example, local anti-money laundering restrictions before they are able to act."

95. Notwithstanding these difficulties, Strong & Herring state that it remains "extremely rare" for buyers to agree to pay the deposit to sellers, and observe that in such a case a refund guarantee is likely to be required:

> "In situations where sellers and buyers are unable to identify a suitable deposit holder there would seem to be only two other alternatives. Either the sellers and buyers will need to agree that there will be no deposit and that the full purchase price will be paid on delivery, or that the buyers will pay the deposit directly to the sellers-perhaps in return for a refund guarantee by the sellers or their parent or another company of substance.
>
> The second of these alternatives is extremely rare and requires a much greater degree of trust and confidence by the buyers in the sellers and its affiliates."

96. These considerations highlight how implausible it is for payment of a deposit directly from the buyer to the seller to be a matter of implication. To alter the parties' bargain in such a fundamental way is neither necessary nor obvious.

97. Any such term also contradicts and is inconsistent with the express terms agreed which contemplate a third party deposit holder. Indeed, many of the terms of clause 2 are inapplicable to a deposit lodged with the sellers, such as the fundamental requirement that it be an account "for the Parties" under which the deposit shall be released "in accordance with the joint written instructions of the Parties".

98. We also regard the implication of any term dealing with a failure by the buyers to lodge the deposit as problematic because of clause 13 (set out at para 7 above) under which the parties have already dealt expressly with what is to happen in that situation ie the sellers are entitled to cancel the agreement and to claim compensation.

99. For all these reasons, we do not consider that there is a justification for any of the implied terms argued for by Mr Kenny. In any event, this is the type of issue which should have been raised before the arbitrators. They are generally best placed to decide what business efficacy requires or how the officious bystander test should be applied in relation to the implication of a term into a standard form ship-sale contract.

(4) Conclusion on Issue 1

100. The appeal on Issue 1 therefore succeeds. There is no *Mackay v Dick* principle of law in English law. Moreover, in this case, the proper interpretation of the contract does not entail, and there is no implied term, that the conditions precedent to the Buyers' debt obligation are to be ignored because of the Buyers' breach of contract in respect of those conditions precedent. The Sellers have their remedy in damages for the Buyers' breach but they do not have a valid debt claim.

101. It follows that, on this issue, we agree with the decision and the essential reasoning of Dias J and disagree with the Court of Appeal. Popplewell LJ recognised the difficulties with accepting a *Mackay v Dick* principle of law and that no doubt explains why, first, he recognised significant exceptions to its operation and, secondly, he recast the principle as one resting on the parties' presumed intentions (see para 16 above). But, with respect, and as has already been touched on in para 65 above, the two exceptions he formulated apart from contrary intention and the circumstances of the case ("the 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") are not only very difficult, and probably impossible, to rationalise but would be highly complex to apply in practice. And, as we have made clear, a focus on the parties' intentions, whether through interpretation or an implied term, would not assist the Sellers in this case.

6. Issue 2 - Whether the Court of Appeal's decision in *The Griffon*, which held that under the Saleform the deposit was forfeited when the seller terminated the MOA for non-payment of the deposit, was wrong.

Issue 2A - Whether the Supreme Court does not have jurisdiction because Issue 2 is outside the scope of the question of law on which the Buyers obtained leave to appeal from the High Court.

102. In the light of our conclusion on Issue 1 (and what we go on to conclude on Issue 3) it is not necessary to address the Buyers' secondary case formulated as Issue 2 (and nor do we need to address the procedural Issue 2A).

7. Issue 3 - Whether under the Saleform the deposit accrues due when the MOA is concluded with the consequence that the pre-conditions in clause 2 are only pre-conditions to the payability of the deposit, not to its accrual.

Issue 3A - Whether Issue 3 is not open to the Sellers because the Commercial Court decided the point in the Buyers' favour and the Sellers did not obtain leave to appeal or seek to raise it before the Court of Appeal.

103. We shall address first the procedural objection (Issue 3A) to Issue 3 being raised.

104. If this issue had been sought to be raised for the first time on appeal to this court, we have little doubt that it would have been allowed to be put forward. The Sellers are relying on it as an alternative or additional reason for upholding the judgment of the Court of Appeal. This is permissible under the Supreme Court Rules 2009 (which apply to this appeal: see Supreme Court Rules 2024, rule 62(1)(a)), specifically rule 25(1)):

> "A respondent who wishes to argue that the order appealed from should be upheld on grounds different from those relied on by the court below, must state that clearly in the respondent's written case (but need not cross-appeal)."

105. The issue raises a pure question of law and there is no possible prejudice to the Buyers if it is allowed to be advanced. The issue relates directly to the question of law in respect of which leave to appeal was given for the appeal to the Commercial Court and for the appeal to the Court of Appeal. The underlying issue raised by that question of law is whether the claim can be made in debt or whether it must be in damages. Can the payment sum "be claimed by the other party in debt? Or must the claim be in damages?"

106. If this court could, and would, have given permission for the issue to be put forward had it been raised for the first time on appeal to this court, the Sellers cannot be in a worse position because it was in fact raised before—before the arbitrators (who did not decide it) and before Dias J (who rejected it). In these circumstances, we have no doubt that the Sellers should be permitted to argue the issue.

107. Turning to the merits of the issue (ie Issue 3), it is helpful to make clear at the outset that we regard "the accrual of the right to the debt" and "the accrual of the debt" and "the debt having accrued due" as all being synonymous. They are all to be distinguished from the debt being payable. The important substantive point is that the time when a debt is payable may be later than when the right to the debt accrues.

108. The Sellers argue, as they did before Dias J, that the Buyers' breach was a mere failure in the machinery of payment and did not prevent the accrual of the debt. It would then follow (according to the Sellers' submissions) that, as the right to the debt has accrued, the Sellers are entitled to succeed in a debt action even though the contract has been terminated for the Buyers' breach. The Sellers rely on cases in which a distinction is drawn between when the right to a debt accrues and when it becomes payable. That distinction is sometimes expressed (see, eg, Lord Donaldson in *Cory*, para 37 above) using the Latin maxim debitum in praesenti, solvendum in futuro ("a debt due at present, payable in the future"). A well-known example of a case in which the distinction was drawn is *Bank of Boston Connecticut v European Grain & Shipping Ltd ("The Dominique*") [1989] AC 1056. In that case a voyage charterparty provided that "full freight" was "deemed to be earned on signing bills of lading". Freight was to be paid "within five days of signing and surrender" of the bills of lading. The charter was terminated on the acceptance by the charterers of the owners' repudiation. This occurred after the bills of lading had been signed but before they were surrendered. The House of Lords held that the owners had an accrued right to full freight at the time of termination. That right had been unconditionally acquired on signing of the bills of lading and this was not affected by the fact that the obligation to pay the freight had been postponed and had not arisen at the time of termination. Another case to similar effect is *Vagres Compania Maritima SA v Nissho-Iwai American Corporation* ("*The Karin Vatis*") [1988] 2 Lloyd's Rep 330 in which freight was expressly stated to "be deemed earned as cargo loaded", although payable later.

109. In many cases, a contract will not draw a distinction between when a right to a sum of money accrues (or, as it is sometimes put, is earned) and when it is payable. The MOA does not do so. The only provision as to timing in clause 2 is the requirement that the Buyers "shall lodge a deposit" within three banking days after the MOA has been signed and the Deposit Holder has confirmed that the account has been opened and is ready to receive funds.

110. The main reason advanced by the Sellers for contending that the right to the deposit accrues when the MOA is concluded is the provision in clause 2 that the deposit is "security for the correct fulfilment of this Agreement". Michal Hain, who made the oral submissions for the Sellers on Issue 3, argued that this means security for the fulfilment of all the Buyers' obligations under the MOA, including, for example, the obligation to provide the necessary banking documentation. It can only stand as such security if it is to accrue before any such obligations arise, which means from the moment that the contract is made.

111. We do not consider that this is a necessary inference to be drawn from the MOA wording. A deposit will still be "security for the correct fulfilment of this Agreement" even if it only becomes so once it is due to be lodged. In this type of contract, if a distinction is to be drawn between when the right to a sum accrues and when it is payable,

one would expect that to be made clear in the contract, as it was in *The Dominique* and *The Karin Vatis*.

112. Mr Hain submitted that it is necessary to construe the MOA as meaning that the right to the deposit accrues as soon as it is concluded in order to meet the commercial purpose of deposits. He says that that purpose is to protect the Sellers from being "messed around", as Nugee LJ put it in the Court of Appeal (para 102). No doubt a deposit does generally serve this purpose but from when it does so will depend on the terms of the contract. There is no a priori rule that it must do so from the time that the contract is made. Nugee LJ relied on the analogy of contracts for the sale of land but, as Robert Goff LJ observed in *The Blankenstein* at p 453:

> "We were referred to a number of authorities relating to deposits payable under contracts concerning land. In the last analysis, everything must depend upon the construction of the terms agreed …"

113. Mr Hain further submitted that the deposit is the quid pro quo for the Sellers taking the vessel off the market, which occurs as soon as the contract is made. Again, however, that depends on the contract terms. If that was the intention, the contract could so state, but the MOA does not so provide. Further, quid pro quo is the language of consideration and, while the deposit is part of the consideration, its essential function is to provide security for performance. It will only become a part payment of the price when, and if, delivery of the vessel is made.

114. Next, Mr Hain submitted that, unless the right to the deposit accrues when the MOA is concluded, there will be a lacuna in the contractual allocation of risk. The Sellers will be locked in but the Buyers will have a window of time in which they may choose not to proceed without being at risk of forfeiting a deposit. This is correct, as Robert Goff LJ acknowledged in *The Blankenstein* (see para 83 above). In most cases, however, that window will be short and in all cases buyers will be liable in damages if they choose not to go ahead with the contract. There are also unlikely to be many cases in which buyers change their mind in the short interval between concluding the MOA and lodging the deposit.

115. In our view, the MOAs are not contracts, such as those in *The Dominique* and *The Karin Vatis*, where a distinction is drawn between when the right to a sum accrues and when it is payable. As in many contracts, they are concurrent.

116. This conclusion is strongly supported by *The Blankenstein.* In that case clause 2 of the earlier Norwegian Saleform in issue provided that (at p 453):

> "As a security for the correct fulfilment of this contract, the buyers shall pay a deposit of 10 per cent … of the purchase money on signing this contract."

117. This is in materially the same terms as clause 2 of the MOA, save that there was only one stated pre-condition to payment (or lodging) of the deposit, namely the signing of the MOA. All three judges in the Court of Appeal considered that the seller's only claim was in damages.

118. At p 448 Fox LJ set out the buyer's argument that "there is a short answer to any claim for the amount of deposit. Clause 2 … provides for payment of the deposit 'on signing' the contract. The contract was never signed and accordingly … the deposit never became payable". He then set out the seller's answer to that case but rejected it. He therefore accepted that there could be no debt claim for the deposit, but only one for damages. He nevertheless went on to find that the buyer was liable in damages for the amount of the deposit for breach of the obligation to sign the MOA within a reasonable time of the contract being made. Stephenson LJ agreed with Fox LJ's judgment.

119. Robert Goff LJ recited that the arbitrator had held that the sellers "were not entitled to the deposit, because the payment of the deposit was conditional upon [the buyers] signing the memorandum of agreement and they had not done so" (p 455). He agreed with the arbitrator's conclusion. His analysis, with which we agree, was as follows, at pp 455–456:

> "there are two distinct obligations resting upon the buyer. The first is the obligation to sign the memorandum of agreement; if no time is specified for the performance of this obligation, it must be performed in a reasonable time, but that must usually mean very shortly after receipt of the memorandum of agreement from the seller or his broker, in due form. The second obligation is the obligation to pay the deposit. This obligation is however to be performed not within a reasonable time, but upon signature of the memorandum. The fact that the practical effect is that the deposit must be paid within a reasonable time, or even that the deposit may be paid simultaneously with the handing over of the memorandum of agreement signed by the buyer, does not in my judgment alter the fact that the two obligations are separate and distinct, and that the obligation to pay the deposit does not accrue until the memorandum of agreement is signed. …

> So far as the deposit is concerned, the position of Hapag-Lloyd in the event of the repudiation of the contract by Damon was as follows. If the repudiation occurred after Damon had paid the deposit, Hapag-Lloyd would be safe: they would have the deposit and could keep it. If the repudiation occurred after the obligation to pay the deposit had accrued due, but before Damon had paid it, Hapag-Lloyd could sue Damon for the deposit as a debt; whether they could get it or not would depend on whether they could enforce that right, and in particular would depend on the solvency of Damon. But if the repudiation occurred before Damon's obligation to pay the deposit had fallen due, then Hapag-Lloyd could only recover damages for the repudiation …"

His conclusion was that the sellers had a claim for damages for the loss of their bargain but not for the amount of the deposit as a debt claim. He went on to decide, dissenting from the majority only on this point, that the damages claim did not encompass the amount of the deposit. We are not concerned with that point because, on this appeal, the quantum of the damages for breach of contract, and whether they embrace the non-payment of the deposit, is not before us.

120. It is correct to observe that the argument based on there being a difference between when the right to the deposit accrued and when it is payable was not advanced in *The Blankenstein*, but the decision was that there could be no claim in debt for the deposit until the MOA had been signed. Under these MOAs that would mean that there could be no such claim until all the clause 2 pre-conditions had been met.

121. We agree with the decision in *The Blankenstein.* Even if it were open to doubt, we would be very reluctant to reverse a decision on a standard form made 40 years ago. As is stated in *Lewison*, *The Interpretation of Contracts*, at para 4.65:

> "**In a case where the contract is based upon a standard form of commercial agreement, the court recognises the desirability of certainty, and is reluctant to disturb an established construction.**" (Original emphasis.)

122. As Lord Denning observed in *The Annefield* [1971] P 168 at p 183, if the business community is not satisfied with a decision, the form can be altered.

123. For completeness we should mention that Mr Hain relied on two of the recent case notes already mentioned (see paras 58 and 60 above) which provide some support for the Sellers' case on Issue 3, namely those of Jonathan Chu and Robert Stevens. Both suggest

that the right to the deposit had accrued on contract formation and that the payment into the escrow account was mere payment machinery. For example, having rejected the Court of Appeal's reasoning on *Mackay v Dick*, Robert Stevens writes ([2025] LMCLQ 244, at 245):

> "The better solution, it is suggested, is that it is necessary to distinguish between conditions attaching to the entitlement to the contracted sum and conditions attaching to the mechanism of payment.
>
> The sellers' entitlement to the 10 per cent deposit did not depend upon the opening of the escrow account at all."

124. We have carefully considered those case notes but, in our view, they do not focus sufficiently on the wording of the MOA and its established interpretation, as set out in *The Blankenstein.* We also do not consider that the deposit holder arrangements can be regarded merely as machinery of payment, as explained in paras 93–95 above. It is also our view that, if the escrow account failed through the fault of neither party (eg, as Stevens postulates, because of the insolvency of the specified solicitors' firm) the deposit would not be payable direct to the Sellers but, rather, there would be an implied obligation to set up an alternative escrow account. For all these reasons we conclude on Issue 3, in agreement with the reasoning of Dias J, that under the Saleform the right to the deposit does not accrue when the MOA is concluded (nor when it is signed nor three banking days after signature). We therefore reject the Sellers' secondary case.

8. Conclusion

125. In conclusion, the *Mackay v Dick* principle of law is not part of English law. Nor, in this case, can the same outcome be achieved by contractual interpretation or an implied term. Furthermore, the terms of clause 2 are conditions precedent to the accrual of the debt. They are not merely concerned with the machinery of payment for an accrued debt.

126. We would allow the appeal and restore paras 1 to 6 of the order of Dias J.