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CURRENT DEVELOPMENTS: CASE COMMENT

The place of deemed fulfilment of condition

Jonathan L T Chu[†]

University of Cambridge, Cambridge, UK
Email: ltc30@cantab.ac.uk

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1. The issue

Where, on the face of a contract, the existence of a debt is conditional on the occurrence of a particular fact, and that fact has not occurred, because the person who promised payment has prevented it from occurring, does the debt arise nevertheless on the notion that the condition is then to be deemed fulfilled? In *King Crude Carriers SA v Ridgebury November LLC*,[1] a unanimous Court of Appeal, reversing the judge, endorsed the effect of that notion while appearing to resituate it as a matter of contractual construction, based upon the objective intention of the contracting parties. That would be a step in the right direction. The precise nature of that notion remains murky, however, and would profit from further clarification.

At issue was the buyers' obligation to pay deposits for the purchase of vessels on an amended 2012 Norwegian Saleform. They agreed to 'lodge' the deposits in an escrow account 'as security for the correct fulfilment' of the contracts. Accrual of their obligation to do so was assumed to be conditional on the escrow account being opened, which required cooperation from all sides. The buyers did not do their part; as a result, the account could not be opened. On terminating the contracts the sellers claimed the deposits as debts. Popplewell LJ, with whom Nugee and Falk LJJ agreed, allowed that claim. This decision is correct, although the court's reasoning merits reassessment.

2. A principle of construction?

Popplewell LJ articulated a 'principle' said to be discernible from the authorities:

> [A promisor] 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 [promisee], nor one which it is necessary for the [promisee] 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.[2]

It would follow that a promisor in such position becomes bound to pay the debt, even though the condition has not factually materialised; the promisee can bring a debt claim, and the court can order the promisor to pay the debt – not damages – in resolution of the claim.

[†]Doctoral Candidate, Downing College, Cambridge. I am grateful to Professor Lionel Smith, Professor Graham Virgo and the anonymous reviewer for their helpful comments. I am, of course, responsible for any remaining errors.

[1][2024] EWCA Civ 719; permission to appeal to the Supreme Court granted, 28 October 2024.

[2]Ibid, at [85].

While his Lordship referred to 'contractual intention' as the 'juridical basis for the principle', adding that it is 'a principle of construction, not of law',[3] the way that this 'principle' was formulated evokes the words of Lord Diplock that 'this, with respect, is not construction'.[4] What Popplewell LJ suggested does not encourage a judicious inquiry into the objective meaning of the contract that is grounded in the evidence. Rather, the phrase 'not permitted to rely' enjoins courts to apply a supposedly default position which is not ordinarily to be departed from. In question is whether this supposed position – effectively a rule of law – exists.

3. Debt as obligation

Some basic propositions relating to a contractual debt bear recapitulation. It is an obligation under a contract to pay a sum of money by a specified time. A debt is said to have 'accrued' when the obligation presently exists, though the money may fall to be paid not immediately but in the future. Accrual is a matter of the parties' agreement: if the obligation is wholly unqualified, it accrues on contract formation; if its accrual is conditional on a particular fact, it accrues on that fact occurring. When an accrued debt has become payable, the court can command specific enforcement of the obligation by ordering the debtor to pay her debt. Existence of the obligation therefore precedes the availability of a debt claim and the ensuing debt-payment order. A debt still in the process of accrual – commonly called a contingent or conditional debt – is strictly non-existent. It is 'a debt which has no existence now', said Lord Watson in a Scottish appeal, 'but will only emerge and become due upon the occurrence of some future event'.[5] It must follow that a debt claim cannot be brought, and a debt-payment order cannot be issued, on a conditional debt; parties bargain *not* for a debt claim[6] but for a debt along with all conditions incident to it.

Sometimes, a promisor facing a debt claim may be disabled from asserting an unfulfilled condition. She is – not always helpfully – said to have 'waived' the condition, either because she intimated an intention not to insist upon it, or affirmed the obligation in circumstances where she could have terminated the contract, or for some other reasons.[7] It has been suggested that the notion of deemed fulfilment may be understood as reflecting a waiver,[8] but this is mysterious. In none of the cases pertaining to that notion did waiver in one of the established senses exist. The idea is not that the promisor has waived a condition but that she is *deemed* to have done it. Introducing the language of waiver here is otiose and does not advance our understanding of the notion.

What then is the place of this notion of deemed fulfilment of condition in the law of contractual debts? Conditions for the accrual of obligations are not uniform; there exists a myriad of possible constitutive facts which may be grouped into separate analytical classes, each engaging distinct histories and considerations. Understanding these nuances would appear to be crucial to putting that notion in its right perspective.

4. Debt conditional on promisee's act

Existence of an obligation may be conditioned on an act of the promisee. In this category there *was* a principle of deemed fulfilment, invocable where the promisee's acting was prevented by the promisor. Deciphering the proper import of that principle demands an appreciation of its association with

[3]Ibid, at [82]–[84].
[4]*Cheall v APEX* [1983] 2 AC 180 (HL) at 188.
[5]*Fleming v Yeaman* (1884) 9 App Cas 966 (HL Scot) at 976.
[6]Contrast *King Crude*, above n 1, at [86].
[7]*Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2022) 277 CLR 445 (HC Aus).
[8]*Compagnie Noga d'Importation et d'Exportation SA v Abacha (No 3)* [2002] CLC 207 (QBD) at [100]–[106].

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pre-twentieth-century pleading rules.[9] Historically, a party who wished to claim damages for breach of contract had to prove compliance with all stipulations that were conditions precedent to, or concurrent with, the other party's promise to perform. In strict logic, a promisor was under no obligation to perform, and hence could not be sued for breach, when those conditions were unmet. For a promisee visited with the abuse of prevention, however, the principle allowed damages to be awarded nonetheless. *Hotham v East India Co*[10] is generally seen as the modern foundation of that principle, though in fact the case concerned a condition (claimants obtaining defendants' certificate) governing the accrual of the claimants' right of action, not the defendants' anterior obligation (not to incur short tonnage). Yet it weaves into the same thread of authorities attending to this category of conditions; they show that this principle operated in the *remedial* sphere only. It was concerned with enabling claims for damages – achieved by exempting proof of fulfilment of condition – *not* with bringing inchoate obligations to life.[11] It 'does not entitle [the promisee] to enforce the contract on the notional footing that [she] has actually performed';[12] to do so 'would have been to alter the contract'.[13] Hence there was no debt claim in cases like *Inchbald v Western Neilgherry Coffee &c Co Ltd*[14] and *Colley v Overseas Exporters*,[15] although damages claims were open. In *The Aello*,[16] having been prevented from doing what was required for the charterers' liability for demurrage to accrue, the shippers had no defence to the charterers' claim to recover payment made under protest, although their counterclaim for damages was carried.

As the law developed, it became accepted that not all preventions were actionable, but only those which were 'wrongful', and the 'wrong' came to be mediated through a finding that the promisor had breached an independent duty – implied into contracts in appropriate cases, if not express – not to impede the promisee's fulfilment of condition.[17] With that, the notion of deemed fulfilment lost its utility; while the law 'proceeds … by means of implied terms'[18] allegations of prevention may now be relegated to 'circumlocution'.[19] The *substantive* legal position is unchanged, however: breach of this new-found duty, though amenable to damages on its own, cannot precipitate accrual of obligation on the notional footing that the condition concerned has transpired.

5. Debt conditional on promisor's act

Some obligations, on the other hand, are conditioned on acts of promisors. Here the basic position is similar: the obligation accrues on fulfilment of condition, not before; non-fulfilment may itself constitute breach of an independent duty, in which case the promisee has a claim in damages not debt. But in this category an added consideration is engaged. If a person mouths a promise though existence of her obligation to honour it hangs entirely upon her own volition, she does not in effect promise anything; the promise is *illusory* because the condition, if unmitigated, presents an optionality that is diametrically opposed to the very nature of promising.[20] This consideration invites the law to treat such conditions –

[9]For instructive summaries see F Dawson 'Waiver of conditions precedent on a repudiation' (1980) 96 Law Quarterly Review 239; F Dawson 'Metaphors and anticipatory breach of contract' (1981) 40 Cambridge Law Journal 83; *Foran v Wight* (1989) 168 CLR 385 (HC Aus) at 402.

[10](1787) 99 ER 1295 (KB).

[11]*Laird v Pim* (1841) 151 ER 852 (Exch of Pleas) at 856–857.

[12]*Foran*, above n 9, at 397 (Mason CJ).

[13]*Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 (HC Aus) at 253 (Kitto J).

[14](1864) 144 ER 293 (CP).

[15][1921] 3 KB 302 (KBD).

[16][1961] AC 135 (HL).

[17]*Roberts v Bury Improvement Commissioners* (1870) LR 5 CP 310 (Exch Ch) at 325–326; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 (HL) at 148.

[18]*Thompson v ASDA-MFI Group plc* [1988] Ch 241 (ChD) at 266 (Scott J).

[19]*Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd* (1949) 83 Ll L Rep 178 (KBD) at 186 (Devlin J).

[20]SJ Stoljar 'The contractual concept of condition' (1953) 69 Law Quarterly Review 485 at 496–498.

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known to civilians as 'potestative' conditions[21] – with suspicion. To strive against absurdity, courts *construe* those conditions restrictively, if this best reflects the objective intention of the parties as gauged from all the circumstances of the case. *Little v Courage Ltd*[22] is a recent illustration of that approach, but the idea stretches back to *Dallman v King*,[23] respecting a potestative condition (lessor's approval) governing the accrual of what effectively was a debt obligation (lessor's duty to remit expenses from rent). 'It never could have been intended', said Tindal CJCP, 'that [the lessor] should be allowed capriciously to withhold his approval'; if he did so, 'the thing granted would pass discharged of the condition'.[24] Those words betoken the *qualified* nature of the condition, revealed by means of a judicious construction of the contract. The condition pertained to the extent that its fulfilment was not 'capriciously' withheld by the promisor. When that happened, the condition ceased to be applicable, *not* deemed fulfilled. The debt then accrued on the basis that all applicable conditions had been satisfied. This way of construing potestative conditions is well-established.[25]

This approach was implicit in *Panamena Europea Navegacion Cia Ltda v Frederick Leyland & Co Ltd*[26] and *WM Cory & Son Ltd v London Residuary Body*.[27] The repairers in *Panamena* were 'absolved'[28] from the necessity of obtaining the shipowner surveyor's certificate, when that was unjustifiably withheld. In *Cory*, the council engineer's certificate 'was not a condition precedent'[29] to the council's debt to the contractor, when there was no warrant for the extraordinary delay in its issuance. These outcomes were secured through construing the relevant conditions to ascertain their true extent of application.

Mackay v Dick[30] lends itself to the same, if slightly adapted, analysis. The dispositive condition (machine's satisfactory performance on trial) was partly potestative, in that its fulfilment required cooperation from both parties to the sale. The sellers had done their part; what was left to be done was provision by the buyer of a proper site for the trial, whereupon the machine must perform to certain standards. The buyer did not make such provision despite repeated demands. The parties could not have intended that the buyer could avoid his obligation to pay for the machine by withholding cooperation in such unreasonable manner. The 'proper construction on the contract', stressed Lord Blackburn,[31] must yield to a conclusion that the buyer must pay the price. The sellers 'must be taken to have fulfilled the condition', said Lord Watson,[32] because the unaccomplished, potestative element of the condition had, in the circumstances, become inapplicable; what remained of the condition must then go as well: without the trial – the sole agreed mechanism for establishing the sufficiency of the machine – the sellers need not trouble themselves with alternative proof of conformity.[33]

Not all potestative conditions are susceptible to restrictive reading;[34] in this, civil law Scotland may well concur.[35] Thus in *Luxor (Eastbourne) Ltd v Cooper*,[36] the condition (principal agreeing to transact with

[21]This is a narrower sense of 'potestative'; there is a broader sense which refers to a condition based on an act of any one of the contracting parties.

[22](1995) 70 P&CR 469 (CA).

[23](1837) 132 ER 729 (CP). On one view, the relevant condition in *Hotham*, above n 10, was in fact potestative; for that reason, *Hotham* was cited in argument in *Dallman*.

[24]Ibid, at 730.

[25]K Lewison *The Interpretation of Contracts* (Sweet & Maxwell, 8th edn, 2023) paras 14.19–14.29; *Park v Brothers* (2005) 80 ALJR 317 (HC Aus) at [38]–[39], [47].

[26][1947] AC 428 (HL).

[27](Unreported, CA, 5 November 1990).

[28]*Panamena*, above n 26, at 436 (Lord Thankerton).

[29]*Cory*, above n 27, transcript at 5 (Lord Donaldson MR).

[30](1881) 6 App Cas 251 (HL Scot).

[31]Ibid, at 264.

[32]Ibid, at 270.

[33]Ibid, at 270–271.

[34]*Stadhard v Lee* (1863) 122 ER 138 (KB).

[35]AF Rodger 'Potestative conditions' 1991 SLT (News) 253.

[36][1941] AC 108 (HL).

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agent's nominee) operated at full strength considering the nature of the commission contract in question; that it was hopeless for the agent to claim in debt was conceded by counsel and accepted by all the Lords in that appeal.[37] The proper treatment of each potestative condition therefore depends on 'the nature of the condition and the circumstances of the case'.[38] There is no default position, and we must abjure 'the attempt to enunciate decisions on the construction of agreements as if they embodied rules of law'.[39]

6. Qualified potestative condition, not deemed fulfilment

So the notion of deemed fulfilment of condition does not belong in the law of contractual debts. Where a debt is conditional on the promisee's act, that notion was helpful in supplying a remedy for wrongful prevention, but it cannot rouse the debt from nihility. Where it is conditioned on the promisor's act, that notion – besides exhibiting prevarication[40] – mischaracterises the legal process by which the debt may be found to have accrued. That process rests not on fiction but on contractual intention.

In this area that nebulous maxim that 'no person may take advantage of their own wrong' has become the conduit for confused thinking. For one thing, the maxim does not say what should follow as the consequence of its application; that must vary depending on contexts.[41] The wrong turn taken in some judicial analyses[42] lies in analogising across different categories of conditions when no analogy, and hence no equal treatment, is called for. Besides, ascribing the way that the law treats potestative conditions to this maxim can be perilous. That approach does not hinge on a 'wrong', in the sense of a breach of duty committed by the promisor. Rather, it is predicated on the law's concern for seemingly illusory promises which the parties could not have intended. It is true that courts in *Mackay*, *Panamena* and *Cory* proceeded on the breach of a duty to satisfy a condition; and, existence of such duty may well feed into the way that the condition is qualified as a matter of construction.[43] But breach of duty is not an essential basis for that approach, as *Dallman* and *Little* illustrate. The basis is broader, encompassing all situations where a promisor cannot, consistently with the parties' objective intention, insist upon the full ostensible extent of a potestative condition, performance of which she, the promisor, has withheld.

7. Was the issue engaged?

The approach advanced here can support the court's decision in the instant case. Despite the escrow arrangement, the buyers' obligation to pay the deposits, when accrued, would be owed to the sellers direct.[44] Assuming accrual of that obligation was conditional on the escrow account being opened, which required cooperation from all sides including the buyers, that condition could be read restrictively, so that the account need not be opened if the buyers unjustifiably withheld cooperation. The debts therefore accrued on the buyers so behaving. The account not being in place, the buyers' obligation was simply to seek out the sellers and pay their debts in the ordinary way, failing which the sellers could sue in debt. All these proceed upon an uncritical acceptance of the sellers' position that the buyers' obligation was subject to the assumed condition. The soundness of that view may be questioned, however. Much of Popplewell and Nugee LJJ's *apologia* for the 'justice' of their decision[45] is tied up with the implicit nature of a deposit.

[37] Ibid, at 115, 124, 129, 136, 152; contrast *King Crude*, above n 1, at [44].

[38] *Newmont Pty Ltd v Laverton Nickel NL* [1983] 1 NSWLR 181 (PC NSW) at 187 (Sir Harry Gibbs).

[39] *Luxor*, above n 36, at 130 (Lord Wright).

[40] *King Crude*, above n 1, at [23], [80].

[41] Contrast ibid, at [87].

[42] *Tiberghien Draperie Sarl v Greenberg & Sons (Mantles) Ltd* [1953] 2 Lloyd's Rep 739 (QBD) at 742–744; *Abacha*, above n 8, at [94]–[108], [120(1)]. These lengthy discussions are obiter; both cases were rightly decided for reasons not engaging the notion of deemed fulfilment: *Tiberghien*, at 742 col 1; *Abacha*, at [120(2)]; contrast *King Crude*, above n 1, at [55]–[56], [60].

[43] *King Crude*, above n 1, at [81].

[44] *The Griffon* [2014] 1 Lloyd's Rep 471 (CA) at [20].

[45] *King Crude*, above n 1, at [89]–[91], [99]–[107].

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That is often said to be a guarantee for a buyer's commitment to a sale, but a deposit has another role. It is also 'the *quid pro quo* for [a seller] depriving [herself] of the ability to deal commercially with the property, and so of making any potentially greater profits, while awaiting completion'.[46] By entering into a valid contract of sale, thereby committing to the bargain, a seller has, in a sense, 'earned' the deposit, so long as that commitment lasts. Normally, then, one would expect contracting parties to intend a buyer to be *bound* to pay a deposit immediately on contract formation, even though the *time* for payment may be deferred.[47] A fair reading of the deposit provision in question[48] would suggest that that was what the present parties had intended. The words 'lodge … in an [escrow] account' merely express a desired mode of payment, touching neither the accrual of the debts nor their payment time. At most they control the latter; as things stood, however, that must have been substituted by a reasonable time.[49] On either view, the debts were not subject to the assumed condition, and the buyers were obliged to pay them from the start.

[46] *Polyset Ltd v Panhandat Ltd* (2002) 5 HKCFAR 234 at [69] (Ribeiro PJ).
[47] *Griffon*, above n 44, at [13].
[48] *King Crude*, above n 1, at [6].
[49] *The Karin Vatis* [1988] 2 Lloyd's Rep 330 (CA).

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