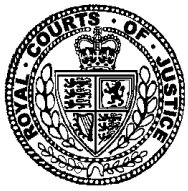

Neutral Citation Number: [2013] EWCA Civ 1567

Case No: A3/2013/0983

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, COMMERCIAL COURT
Mr Justice Teare
[2013] EWHC 593 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2013

Before :

SIR BRIAN LEVESON
President of the Queen's Bench Division

LORD JUSTICE TOMLINSON
and
LORD JUSTICE McFARLANE

- -

Between :

Firodi Shipping Limited	**Appellant**
- and -	
Griffon Shipping LLC	**Respondent**

Michael Coburn QC and **Charlotte Tan** (instructed by **Holman Fenwick Willan LLP**) for the **Appellant**
David Bailey QC and **Marcus Mander** (instructed by **Reed Smith LLP**) for the **Respondent**

Hearing date : 23 November 2013

- -

Approved Judgment

Lord Justice Tomlinson :

1. The Norwegian Saleform, more properly the Norwegian Shipbrokers' Association's Memorandum of Agreement for sale and purchase of ships, is the most commonly used form of contract for the sale and purchase of second hand tonnage. First issued in 1966, it has since been revised in 1983, 1986/7, 1993 and 2012. It makes provision for the parties to choose the governing law and seat of arbitration, English law and London and the law of New York and New York being the two express albeit not exclusive choices provided by the form. English law and London arbitration is commonly the parties' choice as it was in this case.

2. This appeal raises what the judge below, Teare J sitting in the Commercial Court, described as a controversial issue as to the construction of provisions in the 1993 Revision, which I shall refer to as "NSF 1993". It concerns Sellers' remedy in the event of non-payment of the deposit. An amendment to the form was made in the 1983 Revision which introduced an additional paragraph to what had hitherto been the single paragraph Clause 13 which bears the rubric "Buyers' default". The amendment was carried through into the 1993 and indeed the 2012 form. It concerns the situation where Buyers have failed to pay the deposit within the time limited by Clause 2 and the contract is thereafter terminated. It is said that this amendment had the effect of depriving Sellers of the ability to recover and retain the unpaid deposit, a remedy which this court clearly indicated would be available where NSF 1966 is used – see *Damon Compania Naviera SA v Hapag-Lloyd International SA ("The Blankenstein")* [1985] 1 WLR 435. Two London arbitrators, Mr Ian Kinnell QC and Mr John Tsatsas, accepted this argument but Teare J did not. I have no doubt that the judge was right.

3. The judgment the subject of this appeal, [2013] EWHC 593 (Comm), is reported at [2013] 1 Lloyd's Rep 50. The judge set out the facts and set the scene for the debate so succinctly and completely that there is no point in my doing other than reproduce the relevant paragraphs of his judgment, which I do below:-

> "2. The relevant facts may be shortly stated. On 28 April 2010 the Claimant Sellers (the "Sellers") agreed by way of an email recap to sell the mv GRIFFON to the Defendant Buyers (the "Buyers") at a price of US$22m. On 1 May 2010 the Memorandum of Agreement ("MOA") based upon NSF 1993 was signed. A deposit of 10%, some US$2,156,000, was payable within three banking days of signature, that is, by 5 May 2010. The deposit was not paid by 5 May 2010. On 6 May 2010 the Sellers accepted the Buyers' conduct as a repudiation of the MOA and/or cancelled the MOA pursuant to an express contractual right to do so and thereby brought the MOA to an end. The Buyers accepted that their failure to pay the deposit was a repudiatory breach (see paragraph 31 of the Award).
>
> 3. The damages recoverable by the Sellers on the conventional measure of the difference between contract and market price were said to be US$275,000, that is, very substantially less than the deposit.
>
> 4. The preliminary issue determined by the arbitration tribunal was expressed in these terms:

> "Is the effect of the Contract and/or the MOA such that, by reason of the failure by Buyers to pay the deposit in accordance with Clause 2 of the Contract and/or Clause 2 of the MOA, Sellers, having been entitled to, and having terminated the Contract and/or the MOA on 6 May 2010, may recover the amount of the deposit as a debt, or by way of damages."

5. So the question was whether the Sellers could recover the deposit or could only claim damages in a lesser sum. There is no dispute that if the deposit had been paid the Sellers would have been entitled to retain the deposit, even though it would have exceeded the recoverable damages.

6. The relevant terms of the MOA are as follows:

> "1. Purchase price USD 22,000,000 …less 2% total commission.
>
> 2. Deposit
>
> As security for the correct fulfilment of this Agreement the Buyer shall pay a deposit of 10% (ten per cent) of the Purchase Price within 3 (three) banking days after this Agreement is signed by both parties and exchange by fax/email. This deposit shall be placed in the Sellers' nominated account with the Royal Bank of Scotland PLC, Piraeus and held by them in a joint interest bearing account for the Sellers and the Buyers, to be released in accordance with joint written instructions of the Sellers and the Buyers ……
>
> 3. Payment
>
> The said Purchase Price ……..shall be paid …….on delivery of the vessel……..
>
> 13. Buyers' default
>
> Should the deposit not be paid in accordance with Clause 2, the Sellers shall 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, the Sellers have the right to cancel the Agreement, in which case the deposit together with interest earned 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."

7. The Sellers' case was that the right to payment of the deposit had accrued before the MOA was terminated and accordingly the Sellers were entitled to claim the deposit either as a debt or as damages for breach of contract. The Buyers' case was that in the event of non-payment of the deposit the Sellers, on the true construction of the MOA and in particular Clause 13 thereof, were only entitled to claim "compensation for losses" and not the deposit.

8. The arbitration tribunal preferred the Buyers' case. It held, by an award dated 9 July 2012, that the Sellers were not entitled to recover the deposit but were restricted to their claim in damages. This was the remedy provided by the first limb of Clause 13.

9. The issue decided by the arbitration tribunal is controversial as the following history shows:

(i) In the NSF 1966 the equivalent of Clause 13 read as follows:

"Should the purchase money not be paid as per clause 16 the sellers have the right to cancel this contract in which case the amount deposited shall be forfeited to the sellers. If the deposit does not cover the sellers loss they shall be entitled to claim further compensation for any loss and for all expenses together with interest at the rate of 5 per cent. per annum."

(ii) It is to be noted that NSF 1966 did not contain the first limb of Clause 13 in NSF 1993 which dealt expressly with the non-payment of the deposit. The effect of NSF 1966 was considered in *Damon Compania Naviera v Hapag-Lloyd International, the Blankenstein* [1985] 1 WLR 435. In that case the deposit was due "on signing". But the MOA was never signed and so no deposit was paid. The sellers claimed the amount of the deposit. The Court of Appeal held that there was a binding contract (notwithstanding that the MOA had not been signed) and, by a majority, that the sellers were entitled to damages for the buyers' repudiation of the contract, the measure of damages being the amount of the deposit; see pp.449-452 per Fox LJ and p.457 per Stephenson LJ. Robert Goff LJ dissented on this point. He held that the sellers were entitled to damages for their loss of bargain, namely, the difference between the contract and market price of the ship, which was less than the amount of the deposit. However, he accepted that if the deposit had fallen due before the contract had been terminated the sellers could claim the deposit in debt; see p.456-7.

(iii) Clause 13 was amended in 1983 (before the decision of the Court of Appeal in the *Blankenstein*) to include the first limb regarding the non-payment of the deposit. The explanatory note produced by the Norwegian Shipbrokers' Association and published by BIMCO did not disclose any particular reason for the addition of the first limb; see the text of the note in *Sale of Ships* 2nd.ed. by Strong and Herring at appendix 2 p.325. The new form of Clause 13 was repeated in NSF 1987 and read as follows:

13 Buyers' default

Should the deposit not be paid as aforesaid, the Sellers shall have the right to cancel this contract and they shall be entitled to claim compensation for their losses and for all expenses incurred together with interest at the rate of 12% per annum.

Should the Purchase Money not be paid as aforesaid, the Sellers have the right to cancel this contract, in which case the amount deposited together with interest earned, if any, shall be forfeited to the Sellers. If the deposit

> does not cover the Sellers' losses, they shall be entitled to claim further compensation for their losses and for all expenses incurred together with interest at the rate of 12% per annum."
>
> (iv) NSF 1987 was considered by the Court of Appeal of Singapore in *Zalco Marine Services v Humboldt Shipping* [1998] 2 SLR 536. As in the *Blankenstein* the contract came to an end before the deposit fell due and the seller again claimed the deposit as damages but the Court of Appeal held that the sellers' only remedy was for "compensation" pursuant to the first limb of Clause 13 which was to be assessed on the conventional basis of the difference between the contract and market price. The decision in the *Blankenstein* was distinguished. On the wording of NSF 1987 the seller was only entitled to "compensation" pursuant to the first limb of the clause as opposed to the forfeiture of the deposit in the second limb of the clause; see paragraph 45 of the decision.
>
> (v) The two practitioners' texts on ship sales support the approach of the Singapore Court of Appeal; see *Sale of Ships* 2nd.ed. by Strong and Herring at paragraph 5.10 and *Ship Sale and Purchase* 6th.ed. by Goldrein, Hannaford and Turner at paragraph 5.50.3.
>
> (vi) In a London arbitration in 2011 the arbitration tribunal had to consider a claim for a deposit under NSF 1993 (which is essentially in the same terms as NSF 1987) in circumstances where the deposit had fallen due for payment, but had not been paid, before the MOA was terminated. The tribunal held that the sellers were entitled to the deposit either because it had fallen due for payment (as per the view of Robert Goff LJ in the *Blankenstein*) or as damages for breach of the obligation to pay the deposit (as per the decision of the majority of the Court of Appeal in the *Blankenstein*.) With regard to the effect of Clause 13 the tribunal considered that there was nothing in it which deprived the sellers of the accrued right to an unpaid deposit and that in any event the "compensation" in the first limb was wide enough to include the value of the deposit which had accrued due.
>
> 10. The facts of the present case are the same as those which confronted the London arbitration tribunal in 2011. Both cases involved the form of Clause 13 found in NSF 1993. However, the arbitration tribunal in the present case differed from the 2011 tribunal and decided the issue in favour of the Buyers. Thus there are now conflicting decisions from London maritime arbitrators as to the true construction of clauses 2 and 13 of NSF 1993."

4. I would just add this in relation to the decision of this court in *The Blankenstein*. The court was unanimous in its conclusion that as the deposit was due "on signing" the MOA and as the MOA had never been signed, albeit the Buyers were contractually bound to sign, so the obligation to pay the deposit never fell due. The court was equally unanimous in its conclusion that had the obligation to pay the deposit fallen due before the contract was terminated, the Sellers could, after termination, have simply recovered the deposit as a debt which had accrued due before termination and which remained payable notwithstanding the termination. Teare J at paragraph 9(ii)

reproduced above refers to the judgment of Robert Goff LJ on this point at page 456. Fox LJ at page 449 said precisely the same:-

> "In the present case, if the obligation [sc. to sign the MOA] had been performed, Hapag Lloyd could have sued Damon in debt for the amount of the deposit and it seems to me that that should be reflected in the damages recoverable for breach of the obligation."

5. This conclusion is unsurprising. It is as Mr David Bailey QC for the Sellers described it, "horn-book law". Chitty on Contracts 31st Edition explains the proposition thus:-

> "**Rights acquired before discharge.** Although both parties are discharged from further performance of the contract, rights are not divested or discharged which have already been unconditionally acquired.
>
> . . .
>
> . . . the innocent party can retain or recover sums paid or due before the time at which the repudiation is accepted by him and may maintain an action for damages in respect of any cause of action vested in him at that time. If the contract provides for payment of a deposit, which is forfeitable in the event of breach, the acceptance by the innocent party of the repudiation of the contract by the party in default does not preclude him from recovering and forfeiting the deposit if it is at that time due and unpaid."

Equally unsurprisingly, Mr Coburn QC for the Buyers did not dispute the correctness of these propositions, nor could he have done.

6. Mr Coburn's point was a different one. He contended that the right to receive the deposit had not been unconditionally acquired by the Sellers, because the NSF 1993, unlike the NSF 1966, demonstrated by its terms that the deposit was neither payable nor, a fortiori, forfeitable if unpaid before termination of the contract.

7. Mr Coburn's sustained and erudite argument was advanced with great skill and charm and I hope that my paraphrase of it does it full justice. Essentially however it amounted to this. Whilst Clause 2 might give rise to an expectation that a deposit, once paid, is at risk of forfeiture in the event of failure by the Buyers correctly to fulfil the agreement, Clause 2 does not actually provide in express terms for forfeiture and, importantly, it says nothing about what will happen in the event that the Buyers, in breach of obligation, fail to pay the deposit. Clause 13, he suggested, deals expressly with the circumstances in which the deposit will be forfeitable and Clause 13, in its first limb, "tells you what happens if the deposit is not paid". The contrast in treatment between the case where the deposit has been paid, limb 2, and the case where the deposit has not been paid, limb 1, demonstrates a clearly expressed intention that in the event that termination takes place before the deposit has been paid, Sellers' remedy is compensation for their losses, assessed as did the Singapore

Court of Appeal in *Zalco* on the conventional basis of the difference between the contract and market price, here therefore US$275,000.

8. This was in substance the argument advanced before and rejected by the judge. The judge had, suggested Mr Coburn, fallen into error by first looking at Clause 2 in isolation and finding in it a right which Clause 13 did not expressly exclude. The judge should rather have looked at the contract as a whole, and Clauses 2 and 13 read together are inimical to the conclusion that the parties agreed to the deposit being forfeitable before payment. The structure of the contract demonstrates that the draftsman had addressed his mind to what is to happen if the deposit is not paid. The contract gave to the Buyers three days to "put their money where their mouth is". If they failed so to do, the Sellers could terminate and claim damages but were not intended to be able to take the benefit of a windfall. There was nothing particularly surprising or uncommercial about this since security in the form of money unpaid is no security at all.

9. The last point is a fair point so far as it goes but it adds nothing to the contractual analysis and in any event overlooks that the Buyers' obligations may be separately, and possibly personally, guaranteed.

10. The basic fallacy in this argument is that limb 1 of Clause 13 does not prescribe what is to happen if the deposit is unpaid. It does no more than to afford to Sellers an express contractual right or rights exercisable in the event that the deposit is not paid. These contractual rights are to be distinguished from those which arise under the general principles governing discharge by breach. The right to cancel given by limb 1 of Clause 13 is not dependent upon proof that failure to pay the deposit on time is repudiatory in nature. Indeed, until the decision of this court in *Samarenko v Dawn Hill House Limited* [2013] Ch 36, it would not have been clear that a failure to pay the deposit on time is, without more, repudiatory of the Buyers' obligations. Limb 1 of Clause 13 therefore confers upon Sellers a valuable contractual remedy over and above the remedy which they already enjoy at common law, the availability of which latter remedy is however attended by uncertainty. That uncertainty was greater before the decision of this court in *Samarenko*, and thus at the time when limb 1 was introduced. Whatever the position now, a contractual remedy of termination which has no need to characterise the defaulting Buyers' conduct as repudiatory is a valuable addition to Sellers' armoury. The circumstances out of which Buyers' repudiation must be spelled are not always clear cut. A contractual right of termination exercisable upon the happening or non-happening of an event usually brooks of less argument. The express entitlement to compensation together with interest for losses and expenses is also at the least a valuable clarification of a right to which the Sellers were in any event entitled at law, which is henceforth made available as an express term of the contract.

11. The express contractual rights afforded by limb 1 of Clause 13 may however never be exercised, not least because Sellers may rely on their common law right to accept Buyers' repudiatory breach as terminating the contract. The rights given by limb 1 are, as I have pointed out, additional to those enjoyed by the Sellers at law. Moreover the Sellers are not compelled to terminate the contract in the face of a failure by Buyers to pay the deposit on time. The existence of the prospective contractual rights afforded by limb 1 of Clause 13, exercisable in the event of a failure to pay the deposit on time, can have no bearing on the proper characterisation of Sellers' and

Buyers' rights and obligations in the period between signature of the contract and the expiry of the time within which Buyers have promised to pay the deposit. It follows therefore that limb 1 of Clause 13 is simply of no relevance to the proper characterisation of the rights and obligations to be spelled out of Clause 2. The Buyers seek to attribute to limb 1 of Clause 13 a purpose which is simply absent. Limb 1 does not spell out the consequences which will inexorably follow a failure to pay the deposit on time.

12. The proper approach to the contractual analysis is therefore that adopted by Fox LJ in *The Blankenstein* at page 448D:-

> "First, what rights did [Sellers] have under the contract, in relation to the deposit, immediately prior to the acceptance by [Sellers] of the repudiation? Secondly, what was the effect upon those rights of the acceptance of the repudiation? "

13. The deposit is, as Clause 2 of the MOA provides, "security for the correct fulfilment" of the agreement. It is an earnest of performance. The right to receive it is unconditional, which was the analysis adopted by this court in *The Blankenstein*. The right to receive the deposit is plainly not conditional upon the contract being performed by the Sellers, nor can it sensibly be regarded as in any other sense conditional. In *The Blankenstein* Fox LJ put it this way, at 450G-451A:-

> "I do not think that Clause 13 [which was of course there the single limb 2] does anything more than make it clear that prompt payment of the specified amounts of the purchase price upon delivery of each vessel is essential and failure will involve forfeiture of the deposit. But Clause 13 does not, it seems to me, detract from Clause 2, which states that the deposit is "security for the correct fulfilment of this contract". That is in wide terms which are in no way restricted to the circumstances stated in Clause 13 and are wholly in accord with the general purposes for which a deposit is given. It is, I think, a matter of necessary implication from the language of Clause 2 that if the Buyers were in default and refused to complete the contract the deposit might be forfeited. The agreement to forfeit may be implied as well as express: see *Hinton v Sparkes* (1868) LR 3 CP 161, 165 in the passage there cited from *Casson v Roberts* (1862) 32 L.J. (Ch.) 105. And it normally will be implied unless the contract as a whole shows an intention to exclude forfeiture: see Halsbury's Laws of England, 4th Edition, vol. 42 (1983) page 169, paragraph 244."

For the reasons I have already given, the newly added limb 1 of Clause 13, whether looked at in isolation or read together with limb 2, can likewise have no effect upon the proper construction and effect of Clause 2.

14. Thus on 5 May the Sellers were invested with an accrued right to receive and thus to sue for the deposit as an agreed sum forfeitable in the event of failure by the Buyers correctly to fulfil the agreement. It is trite law that in construing a contract "one starts with the presumption that neither party intends to abandon any remedies for its breach

arising by operation of law, and clear express words must be used in order to rebut this presumption". See *Modern Engineering v Gilbert-Ash* [1974] AC 689 at page 717H per Lord Diplock. Limb 1 of Clause 13 does not provide clear express words intended to deprive Sellers of their accrued right to sue for the deposit. Indeed, as I hope I have demonstrated, limb 1 does not purport even to bear upon the question what is the nature of the Sellers' rights at common law consequent upon a failure to pay the deposit on time.

15. On 6 May Sellers both accepted the Buyers' repudiatory breach in failing to pay the deposit on time as terminating the agreement and exercised their right to cancel the agreement afforded by limb 1 of Clause 13 thereof. The rights unconditionally acquired by the Sellers prior to termination survive the termination. Accordingly, I agree with the judge that the Sellers retain the right to sue for the deposit as an agreed sum which they may simply recover in debt. Alternatively, the Sellers have an accrued right to sue for damages for breach of the obligation to pay the deposit, the measure of which is the amount of the deposit.

16. I also agree with the judge that in any event the word "compensation" in limb 1 of Clause 13 is apt to embrace recovery by Sellers of compensation for failure by the Buyers to pay the deposit, the measure of which, by analogy with the position at common law, will be at least the amount of the deposit itself.

17. I appreciate that in reaching this conclusion I am, like the judge, differing from the views expressed by the authors of the two practitioners' texts on ship sales and by the Singapore Court of Appeal. However in my respectful view neither the Singapore Court of Appeal nor the learned authors sufficiently grappled with the point that clear language would be required to divest the Sellers of a right accrued before termination. I am comforted to find that my view, and that of the judge, is shared by the arbitrators who rendered the 2011 award to which the judge refers at paragraph 9(vi) reproduced above. Those arbitrators, Mr Dominic Kendrick QC and Mr Clive Aston, expressed their conclusion shortly as follows:-

> "28. We have also considered whether the language of Clause 13 of NSF 93 operates so as to deprive the Sellers of an accrued right to the unpaid deposit. We find that it does not do so. There is nothing in the terms or phrases used to suggest any loss or surrender of accrued rights, let alone such an important right as conferred by Clause 2 of the MOA. The language used is not that of limitation or restriction, while the reference to "compensation" is wide enough to include the value of the deposit where, as here, that right has accrued prior to repudiation and therefore represents a part of the Sellers' loss to be compensated. We consider that much clearer explicit language would have been necessary to deprive an innocent seller of its accrued right to claim and keep the deposit."

18. It follows that like the judge I consider that the answer to the Preliminary Issue should be Yes.

19. Before the judge it was not ultimately suggested that the circumstance that the deposit is by Clause 2 to be paid into a joint account for the Sellers and Buyers presents any obstacle to its recovery by the Sellers. The judge concluded, at paragraph 30:-

> "The effect of answering the preliminary issue in the affirmative is that if the deposit were paid into such an account the Buyers would be obliged to agree to its release to the Sellers. It may be that, in those circumstances, the Buyers will agree that the deposit be paid directly to the Sellers."

20. Although inclined to make a little more of the argument than had his learned junior below, Mr Coburn did not contend that the fact that the deposit is payable into a joint account could be a decisive feature. It was not however, he suggested, an irrelevant consideration. Ultimately, as I understood his argument, he accepted that if the contract did indeed on its true construction provide for payment of a deposit which would be both recoverable and forfeitable in the event of termination before payment, the contractual machinery for payment of the deposit could not be an obstacle to recovery by the Sellers. That approach is plainly correct. The fact that a deposit is to be paid to a third party stakeholder does not affect the rights and obligations of the parties to the contract. As Eve J said in *Hall v Burnell* [1911] 2 Ch. 551 at 554:-

> "I cannot conceive that the mere fact that the money is placed for the time being in the hands of a third party as stakeholder would be treated as altering the nature of the deposit, or the implied terms on which the money is paid by the purchaser. Whether it is paid to the vendor direct, or to a third party stakeholder, the implication, in the absence of any other element of difference, must in each case be the same."

In my view, given that both the Sellers and the Buyers are parties to these proceedings and that the Sellers are entitled to the deposit as against the Buyers, the fact that the contract provided that payment of the deposit was to be made into an account in joint names is no impediment to the Sellers' entitlement to judgment, or an Award, for the debt. The Sellers can give a good discharge for the sum payable. In the 2011 arbitration to which I have already referred, the deposit was similarly payable into a joint account. The preliminary issue for decision by the arbitrators was:-

> "Whether, pursuant to the terms of the MOA and Clause 13 specifically, the Sellers are entitled to the unpaid deposit of US$ 3,400,000."

The arbitrators simply made an award in favour of the Sellers in the amount of the unpaid deposit.

21. I have no doubt that the arbitrators in the present case have the power to make an award in similar terms. There is equally no doubt of their ability to award damages and/or compensation. In order to give effect to the Sellers' entitlement it is no longer necessary to invoke the contractual machinery for payment of the deposit. It is sufficient to record that the existence of the machinery designed to protect the interests of both parties whilst the ultimate fate of the deposit remained in doubt is of

no relevance to the proper characterisation of the parties' rights and obligations now that the contract has been terminated.

22. For all these reasons, which are in substance those which commended themselves to the judge, I would dismiss the appeal.

Lord Justice McFarlane :

23. I agree.

Sir Brian Leveson :

24. I also agree.