

The Griffon: the deposit or compensation? What can a seller claim when the buyer fails to pay the deposit?

Griffon Shipping LLC v. Firodi Shipping Ltd (Griffon) [2013] EWHC 593 (Comm)

The recent decision of Mr Justice Teare in this case heralds a departure from the previously held view that, under clause 13 of the standard form Norwegian Sale Form 1993, where a buyer fails to pay the deposit under a memorandum of agreement, an innocent seller's claim is limited to compensation for its losses. In this case, the Court concluded that a seller is in fact entitled to claim the deposit in such circumstances.

The background facts

Griffon Shipping LL C, as Sellers, entered into a memorandum of agreement ("MOA") with Firodi Shipping Ltd, as Buyers, for the purchase of the *Griffon*. The MOA was on a standard Norwegian Sale Form 1993 ("NSF 93"). Pursuant to clause 2 of the MOA, a deposit of 10%, (US\$2,156,000) was due to be paid within three banking days of signature of the MOA. The MOA was signed but the deposit was not paid within the three banking days. On the following day, the Sellers accepted the Buyers' conduct as a repudiation of the MOA and/or cancelled the MOA.

Clause 13 of the NSF 1993 provides as follows:

"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."

The damages recoverable by the Sellers, being the difference between the contract and market price of the vessel, were said to be US\$275,000, substantially less than the deposit of over US\$2 million which had not been paid.

Arbitration proceedings were commenced and the Tribunal was asked to consider, as a preliminary issue, whether the Sellers could recover the deposit or whether they could only claim damages in the lesser sum. The Sellers argued that the right to payment of a 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 argued that, in the event of non-payment of the deposit, on the true construction of the MOA it was clear from clause 13 that the Sellers were only entitled to claim "*compensation for their losses*" and not the deposit.

The Tribunal preferred the Buyers' position and confirmed that the Sellers were not entitled to recover the deposit and were restricted to their claim in damages. The decision was appealed by the Sellers to the Commercial Court.

The Commercial Court decision

Mr Justice Teare considered the previous case law. In *The Blankenstein* (1985), the MOA was on the NSF 1966 form. The MOA was never signed, so the deposit was not paid. The Sellers claimed the amount of the deposit but the Court of Appeal held that there was a binding contract and, by a majority, that the Sellers were entitled to damages for the Buyers' repudiation of it, the

measure of the damages being the amount of the deposit. Robert Goff LJ dissented and considered that the Sellers were only entitled to damages for their loss of bargain, namely the difference between the contract and market price of the ship.

Clause 13 in the NSF 1987 (in a form different to the NSF 1966) was considered by the Court of Appeal of Singapore in *Zalko Marine Services v. Humboldt Shipping* (1988). Again, the contract came to an end before the deposit fell due and the Sellers claimed the deposit as damages. The Court of Appeal held that the Sellers' only remedy was for "compensation" under the first limb of clause 13. The decision in *The Blankenstein* was distinguished. The practitioners' texts on ship sale and purchase support the approach in *Zalko Marine Services*, confirming that a seller's claim should be limited to compensation for its loss.

In an arbitration decision in 2011, the Tribunal considered a claim for a deposit under the NSF 1993 in circumstances where the deposit had fallen due for payment but had not been paid - circumstances akin to the case in question. In that case, the Tribunal held that the Sellers were entitled to the deposit, either because it had fallen due for payment, or as damages for the obligation to pay the deposit.

The differing conclusions of the Tribunals in the current case and the 2011 case meant that there were contradictory decisions by maritime arbitrators as to the true construction of clause 2 and clause 13 of the NSF 1993 that should be considered by the Commercial Court. The court placed much reliance on the fact that clause 2 of the MOA made provision for the payment of a deposit as "security for the correct fulfilment" of the MOA. The court considered a deposit to be different from a part payment of the price. If a deposit is paid, it is to be forfeited if the contract comes to an end, because it is paid as "an earnest of performance". On the other hand, a part payment of the price may be recoverable after termination, because the price is no longer payable. It was the court's view that the recoverability of the payment depended upon the purpose for which the payment was made and whether payment was made conditionally or unconditionally upon performance of the contract.

In this case, the deposit had not been paid, but the right to payment of it accrued before the contract was terminated. Accrued rights are not lost by reason of the subsequent termination of the contract. It was the court's view that a deposit which has fallen due for payment remains payable, notwithstanding that the contract is terminated after the deposit falls due. The court concluded that the language of the MOA and, in particular, clause 2 provided that the Sellers might recover the deposit in these circumstances. Clause 2 expressly described the payment as a deposit for the purpose of providing security for the correct fulfilment of the MOA. This indicated that, when the deposit accrued due before the MOA was terminated, it accrued due unconditionally. The rights provided by clause 13 for compensation were therefore additional to the right to claim the deposit.

Comment

In practical terms, this decision enables a seller to claim a deposit which is in excess of the actual loss it suffers as a result of a buyer's non-payment of the deposit. This is perhaps a surprising result and not one which the market had expected. It is understood that leave to appeal has been granted and that, in due course, the decision will be reviewed by the Court of Appeal.

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