- JUDGMENT -

Before:

MR. JUSTICE TEARE

1. This is an appeal pursuant to section 69 of the Arbitration Act 1996 brought with the permission of Hamblen J. It raises a controversial issue as to the true construction of the Norwegian Saleform 1993 ("NSF 1993") and the payment of the buyer's deposit.

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.

11. The tribunal in the present case commenced with a consideration of the wording of clauses 2 and 13 of the MOA. The tribunal concluded that the effect of clause 13 was to provide a fundamentally different approach to a breach of clause 2 (failure to pay the deposit) from that applicable to a breach of clause 3 (failure to pay the price). Whereas a breach of clause 3 would result in the forfeiture of the deposit there was nothing in clause 13 which suggested that in the event of a breach of clause 2 the seller could recover the amount of the deposit; see paragraphs 35-37 of the Award. The tribunal then considered the *Blankenstein* and *Zalco Marine Services v Humboldt Shipping*. The *Blankenstein* was distinguishable because of the difference in wording between NSF 1966 and NSF 1993. The tribunal agreed with the approach of the Singapore Court of Appeal in *Zalco Marine Services v Humboldt Shipping* to the construction of clause 13*;* see paragraphs 41-42. The tribunal noted that the facts of the present case were distinguishable from those of the *Blankenstein* and of *Zalco Marine Services v Humboldt Shipping* because the right to payment of the deposit had fallen due before the contract had been terminated. The tribunal nevertheless held that the first limb of clause 13 excluded any right to claim payment of the deposit. The only right was to "compensation" which was the right expressly given by the first limb of clause 13; see paragraph 51 of the Award.

12. I agree with the arbitration tribunal that the correct resolution of the dispute between the parties depends upon the true construction of the MOA, and in particular clause 2 and 13, having regard to the established principles of the substantive law of contract.

13. Clause 2 makes provision for the payment of a deposit as "security for the correct fulfilment" of the MOA. It follows that, in the event that the deposit is paid and the buyer subsequently repudiates the contract, the deposit will be forfeited or, in the language of clause 13, "released to the Sellers." That would be so even if the sellers' recoverable damages assessed by reference to the difference between the contract and market price were less than the amount of the deposit. This is implicit in the nature and function of a deposit. As Fox LJ said in the *Blankenstein* at p.449:

> *"The purpose of the deposit was to protect Hapag-Lloyd against the event which actually happened, namely the failure by Damon to complete. In that event Hapag-Lloyd was intended to have secured to it, by forfeiture of the deposit, an amount of money which could well exceed the amount of the general damages recoverable against the purchaser for failure to take delivery and pay the purchase price."*

14. A deposit is different from a part-payment of the price. If the contract comes to an end by reason of the buyer's breach he must forfeit his deposit because it is paid as an earnest of his performance; see *Howe v Smith* (1884) 27 Ch.D 89. But he may be able to recover a part-payment of the price because the price is no longer payable; see *Dies v British and International Mining and Finance* [1939] 1 KB 724. The recoverability of the payment therefore depends upon the construction of the contract and in particular upon the purpose for which the payment is made. The question is whether the payment made by the buyer was unconditional or conditional upon performance of the contract; see *Discharge for Breach: The position of instalments, deposits and other payments due before completion* (1981) 97 LQR 389 by Jack Beatson (as he then was) at pp.390-391, 398-400 and 417-418, which article has been recently described by Eder J. (and I respectfully agree) as containing a most valuable analysis; see *Cadogan Petroleum Holdings v Global Process Systems* [2013] EWHC 214 (Comm) at paragraph 16. A clear statement of the principle that the recoverability of a payment made by the buyer depends upon whether the payment was intended to be made unconditionally or conditional upon performance of the contract is to be found, as Jack Beatson pointed out in his article, in the judgment of Dixon J. in *McDonald v Dennys Lascelles Ltd.* (1933) 48 CLR 457 at p.477 in the High Court of Australia, which judgment was approved by the House of Lords in *Johnson v Agnew* [1980] AC 367 at p.396. A part-payment of the price in a contract of sale is or can be an example of a payment made conditionally upon completion of the sale.

15. In the present case the deposit has not been paid but the right to payment of it accrued before the contract was terminated. The question therefore is not whether a deposit which has been paid can be recovered by the buyer but whether payment of the deposit can be enforced by the seller notwithstanding the termination of the contract. It is a principle of the substantive law of contract that accrued rights are not lost by reason of the subsequent termination of the contract consequent upon a repudiation of the contract; see *Johnson v Agnew* [1980] AC 367 and *Hyundai v Papadopoulos* [1980] 1 WLR 1129. The termination operates prospectively, not retrospectively. This would suggest that deposits which have fallen due for payment remain payable notwithstanding that the contract was terminated after the deposit fell due. This has indeed long been recognised to be the case; see *Hinton v Sparkes* (1868) LR 3 CP 161 at p.166, *Dewar v Mintoft* [1912] 2 KB 373 at p.387, *Millichamp v Jones* [1982] 1 WLR 1422 at pp. 1428 and 1430, the *Blankenstein* at first instance [1983] 2 Lloyd's Reports 522 at p. 532 per Leggatt J and the *Blankenstein* in the Court of Appeal at p.456-7 per Robert Goff LJ. It follows that had clause 2 of the MOA stood alone the Appellant Sellers would have been able to recover the deposit in debt.

16. Counsel for the Buyers submitted that this approach, based upon accrued rights, is not helpful because if an obligation to make a part-payment of the price of goods accrues due before the contract of sale is terminated the obligation to make the part-payment does not remain enforceable because the price is no longer payable. For the purposes of the argument this may be assumed to be true. But if it is true it is because the obligation to make the part-payment has not accrued unconditionally. There is, as Jack Beatson has argued, no incompatibility with the non-retrospectivity of discharge because the right to part-payment is a conditional right; see p.399 of his article. Thus in any case where the question is whether a payment which accrued due before termination remains

payable after termination it will be necessary to construe the contract with a view to determining whether the obligation to pay accrued due unconditionally or conditionally. This will depend upon the nature of the contract and the purpose of the part-payment. Thus in *Hyundai v Papadopoulos*, where the contract was a shipbuilding contract rather than a simple contract of sale, so that it was anticipated that the builder/seller would incur expense long before the sale could take place, the obligation to make a part-payment accrued due unconditionally; see Lord Fraser at p. 1148-1150 and Viscount Dilhorne at p.1134. By contrast where the contract is a simple contract of sale the part-payment may be regarded as accruing due conditionally upon the contract of sale being performed. But an express term which provides that the part-payment remains payable will be given effect, as in *Cadogan Petroleum Holdings*.

17. The question raised by this appeal is therefore whether clause 13 of the MOA has the effect of depriving the Sellers of their right to claim the deposit which had fallen due before the MOA was terminated so that, on the true construction of the MOA as a whole, the deposit did not fall due unconditionally. The arbitration tribunal considered that clause 13 had that effect. Clause 13 "excluded the implied term in favour of forfeiture (or its equivalent) that might otherwise have been derived from clause 2"; see paragraph 51 of the Award.

18. The right to a deposit is valuable. It is the seller's "security for the correct fulfilment of this Agreement". It has long been recognised that a deposit remains payable notwithstanding the termination of the contract (see above). The court would therefore expect that if the parties intended to exclude such right they would do so by the use of clear words; see *Gilbert-Ash (Northern) Ltd. v Modern Engineering (Bristol) Ltd.* [1974] AC 689 at p.717 per Lord Diplock. Counsel for the Buyers submitted that this principle did not apply because on the true construction of the MOA as a whole clause 2 does not provide an express or implied agreement to forfeit the deposit. However, in my judgment, the wording of clause 2 – "as security for the correct fulfilment of this Agreement the Buyers shall pay a deposit" – so clearly gives rise, absent other words, to an agreement to forfeit that the principle of *Gilbert-Ash* is applicable.

19. Clause 13 does not contain words which expressly deprive the sellers of the right to payment of the deposit in circumstances where it has accrued due.

20. Nor do I consider that clause 13 impliedly deprives the sellers of the right to payment of the deposit in circumstances where it has accrued due. Both limbs of clause 13 confer an express right to cancel the MOA. The natural meaning of this express right is, in my judgment, that it is an additional right to the common law contractual right to accept a repudiation of the MOA by the buyer as terminating the MOA. It would not be construed as limiting that common law right. In that context it would not be a natural construction of clause 13 that it excluded another common law contractual right, namely, the right to claim payment of a deposit which has fallen due for payment. There are no clear words excluding such right.

21. The arbitration tribunal considered that had " the draftsman of NSF 1993 or the parties in the present case" so chosen they could easily have expressed an *"intention – mirroring that of the second limb of clause 13 – that, upon cancellation for a breach of clause*

2, the Sellers might recover the amount of the deposit in any event, and any additional compensation for losses in excess of that amount. In our view there is, quite simply, nothing in the language of the MOA to suggest that was its intention."

22. I must differ from the tribunal, notwithstanding the care and skill with which its reasons are expressed.

23. In my judgment the language of the MOA does provide that the Sellers might recover the amount of the deposit in any event. That intention is to be found in clause 2 of the MOA, which expressly describes the payment as a deposit for the purpose of providing security for the correct fulfilment of the MOA. That indicates that when the deposit accrued due, as it did on 5 May before the MOA was terminated on 6 May, it accrued due unconditionally. The rights provided by clause 13 of the MOA are in addition to the right to claim the deposit as a debt. The reason why the second limb refers to the release of the deposit is because the limb assumes that the deposit has been paid. The reason why the first limb does not refer to the release of the deposit is because the limb assumes that the deposit has not been paid. I accept that the first limb does not say in terms that the deposit may be recovered but, for the reasons I have endeavoured to express, it does not need to and it would not be appropriate to infer from that omission an intention to exclude the right to recover the deposit otherwise provided by clause 2.

24. Counsel for the Buyers sought to support the arbitrators' construction of clause 13 by reference to the principle of construction known as *expressio unios est exclusio alterius* (the expression of one thing is the exclusion of another). However, the principle of construction relied upon is no more than a presumption and little weight should be given to it "where it is possible to account for the *expressio unius* on grounds other than an intention to effect the *exclusio alteris"*; see *The Interpretation of Contracts* 5th.ed. by Lewsion LJ at pp.354-355 and *Dean v Wiesengrund* [1955] 2 QB 120. In the context of clause 13 of NSF 1993, as I have said in the previous paragraph, the reason why the deposit is mentioned in the first limb but not in the second limb can be explained on grounds which do not imply an intention to exclude recovery of the deposit where it has fallen due.

25. Counsel for the Buyers also sought to uphold the arbitration tribunal's construction by reference to cases which were said to be analogous to the present case (*Palmer v Temple* (1839) 9 AD & E 508 and *Mayson v Clouet* [1924] AC 980), to the views of the editors of the practitioners' textbooks (to which I have referred above) and to the views of the Singapore Court of Appeal in *Zalco Marine Services v Humboldt Shipping* (to which I have also referred above). I do not consider that the two cases mentioned are analogous (for they concern different terms from clauses 2 and 13 of the NSF 1993) and, for the reasons I have endeavoured to express, the clear meaning of the MOA (that which a reasonable person would have understood the parties to have meant) is that where the deposit required by clause 2 is not paid on the due date it remains payable and clause 13 provides the seller with an additional remedy rather than with a remedy in place of that which would naturally flow from clause 2.

26. If, contrary to my view, the construction of clause 13 of the MOA is ambiguous such that there are two possible constructions of it, one which excludes the right

of the seller to payment of the deposit pursuant to clause 2 and one which does not but gives additional rights then the latter is the construction more consistent with business common sense. A deposit serves the commercial purpose of providing the seller with security for the performance of the MOA. It would not be consistent with business common sense to enable a buyer to put himself in a better position than he would be in having paid the deposit by adopting the simple expedient of refusing to pay the deposit; see *Hinton v Sparkes* (1868) 3 LR 3 CP 161 at p.166 per Willes J, *Dewar v Mintoft* [1912] 1 KB 373 at p.387-8 per Horridge J., and the *Blankenstein* at p.451 per Fox LJ. For this reason the Sellers' construction of the MOA, which is more consistent with business common sense, is to be preferred; see *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at paragraph 21 per Lord Clarke.

27. I have noted the submission of counsel for the Buyers that the construction of the MOA favoured by the arbitration tribunal is consistent with commercial sense but am unable to accept it. The first part of the submission is that since deposits are an anomaly because they enable the innocent party to retain a sum in excess of its actual loss the court should not expand the scope and operation of a deposit. It is true that deposits enable a party to retain a sum in excess of its actual loss but that is in the nature of a deposit. The requirement to pay a deposit encourages the buyer to perform. "It is a guarantee that the purchaser means business"; see *Soper v Arnold* (1889) 14 AC 429 at p.435 per Lord Macnaughten. The encouragement flows from the fact that the deposit may indeed exceed the seller's damages. The prevalent use of deposits in the sale of property, whether the property be real estate or ships, indicates that they have a real and accepted purpose. I do not regard that purpose as uncommercial or anomalous. The second part of the submission is that there is good commercial reason for the buyer paying loss of bargain damages where he fails to pay the deposit because the seller can immediately "walk away and put the vessel back on the market" and will "have probably lost relatively few opportunities" so that loss of bargain damages would be appropriate. However, as with the first part of the submission, this ignores the commercial purpose of deposits. Moreover, it has long been recognised that a deposit which has been paid will be forfeited if the buyer fails to perform even though the deposit exceeds the loss of bargain damages. In those circumstances there is, in my judgment, no commercial or business sense in permitting a buyer to improve his position by the simple expedient of not paying the deposit. This has been recognised since at least 1868; see *Hinton v Sparkes*.

28. Finally, it was submitted that even if the correct construction of clause 13 were that it excludes the right to payment of the deposit and provides in its place the remedy provided by the first limb of clause 13, namely, the right to claim compensation then, just as the common law remedy of damages entitles the seller to recover the amount of the deposit as damages for breach (for the reasons explained by the majority in the *Blankenstein*), so the express contractual remedy to claim compensation would entitle the seller to recover the amount of the deposit as damages for breach. Notwithstanding that the majority decision in the *Blankenstein* is not binding as to the construction of "compensation" and notwithstanding the dissent of Robert Goff LJ I consider that I ought to follow the reasoning of the majority in the *Blankenstein* since it is difficult to see why one construction should apply to "damages" and another to "compensation".

29. For these reasons I have concluded that the arbitration tribunal erred in law by answering the preliminary issue No. The appeal should be allowed and the answer to the preliminary issue should be Yes.

30. There was some discussion arising from the circumstance that clause 2 did not provide for the deposit to be paid to the Sellers but to be paid into a joint account for the Sellers and the Buyers. However, by the end of the hearing of the appeal it was not suggested that that provision was an obstacle. 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.