

Fact or fiction: the doctrine of fictional fulfilment in Jersey contract law

Briefing Summary: Our latest briefing looks at the doctrine of fictional fulfilment and its status under English and Jersey law.

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The doctrine of fictional fulfilment works so that where parties enter into a contract subject to a condition precedent and that condition precedent fails, because one of the parties has caused it to fail, the condition is deemed to have been fulfilled. The UK Supreme Court in *King Crude Carriers SA v Ridgebury November LLC* [2025] UKSC 39 held that the doctrine is not part of English law. The position in Jersey law might well be different.

What happened?

In November 2025, the UK Supreme Court ruled that the principle of fictional fulfilment as expressed by Lord Watson in *Mackay v Dick* (1881), a Scots law case, did not form part of English law. The principle, borrowed from civil law, is that where a party to a contract wrongfully prevents the fulfilment of a condition precedent to that party's debt obligation, the condition is treated as being fulfilled so as to prevent the wrongful party from benefiting from his or her own default.

In *King Crude Carriers*, the buyers of three vessels appealed against a decision that the sellers had a claim in debt against them in respect of their failure to pay contractually agreed deposits. The parties had concluded three identical contracts, which obliged the buyers to lodge a deposit of 10% of the purchase price with a deposit holder within three banking days of the deposit holder confirming in writing that the deposit account had been opened.

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In the contract in question, both parties were obliged to provide all necessary documentation for the opening of the deposit account. In breach of contract, the buyers never did so. The sellers terminated the three contracts and claimed for payment of the deposits, relying upon *Mackay v Dick*. The buyers contended that the sellers' sole remedy was in damages and that the sellers couldn't get a judgment for the unpaid deposits. This was material here because if that was right then the amount of any damages would effectively be zero/nominal as a result of the market price for each of the vessels having increased in the intervening period. In other words, the buyers' position was that the sellers shouldn't be able to benefit not only for the increase in market price but also a separate 10% deposit from the earlier aborted transaction.

The Supreme Court reasoned that there were no English law authorities in support of the principle of fictional fulfilment. The English law of contract meant that the sellers were limited to a claim in damages. The court was also concerned that deeming a condition precedent to be fulfilled introduced "*a punitive element that is inappropriate to a contractual action*". Perhaps this could be taken to mean that fictional fulfilment could result in a penalty which would generally be unenforceable under English law (though Jersey law takes a different approach).

The principle of fictional fulfilment in Jersey contract law

Unfortunately, there does not appear to be any Jersey case law that deals explicitly with the doctrine of fictional fulfilment. However, that is not the end of the analysis.

English law is often helpful to the Royal Court in considering points of Jersey contract law, but the fundamental building blocks of Jersey contract law are to be found in Norman Customary law. Often Jersey law and English law come to the same answer by different routes, but that is not always so.

Pothier, a commentator upon whose works the French civil code was based, is often referred to as the surest guide to Jersey contract law. Pothier wrote extensively on the customary law of France as well as Roman law. The two systems are connected in that customary law would often look to Roman law as a basis for solving seemingly novel problems where no particular custom prevailed. Although Pothier's works are over 200 years old, he was in many ways well ahead of his time in tackling nuanced and complicated commercial transactions including guarantee, subrogation, indemnities and warranties and many others. Pothier's principles provide remarkable clarity and sophistication which can be used to solve the most modern contemporary challenges.

Pothier recognised that it is a rule common to all conditions of obligations, that such conditions are taken to be accomplished when the debtor who is obliged under such condition, has prevented its accomplishment. While Pothier does not appear to have used the phrase "fictional fulfilment", it seems that this is what he envisaged.

By comparison, it is perhaps helpful to look at other legal systems with Roman law roots. In South African law, for example, the doctrine of fictional fulfilment is well established and is articulated as a rule of Roman law (see *Gowan v Bownern* 1924 AD 550). The modern formulation of the doctrine has been expressed as follows: “Where a party to a contract, in breach of his duty, prevents the fulfilment of a condition upon the happening of which he would become bound in obligation and does so with the intention of frustrating it, the unfulfilled condition will be deemed to have been fulfilled against him” (*Scott and another v Poupard and another* 1971 (2) SA 373 (A)).

This comparative legal analysis suggests that Pothier’s position developed from a concept well known to Roman law, even though it appears not to have been accepted as part of English common law. As far as reported cases are concerned, the Royal Court has not had the opportunity to consider this point. However, it seems that this is one of those occasions where the law of Jersey may materially differ from that of England and Wales and that it is properly arguable that fictional fulfilment is part of Jersey law.

Practical conclusions for industry

This remains an unsettled area of Jersey law. However, businesses contracting under Jersey law could well have more options when it comes to remedies where a party has caused the non-fulfilment of a condition precedent.

As can be seen from the *King Crude Carriers* case, flexibility with remedies can have material commercial implications. If a party is limited to a claim in damages, rather than the agreed contractual performance, that party could be left materially worse off through no fault of its own. Equally, there seems to be something wrong with the suggestion that a party could improve its position by causing a condition precedent not to be fulfilled.

Whilst Supreme Court decisions on points of English law may well assist the Royal Court with analysing legal problems, they do not bind the Royal Court and the assistance from such decisions is limited to those areas where the law of England and Wales and that of Jersey are sufficiently similar. If the Royal Court does need to grapple with fictional fulfilment at some point then it remains free to carve its own path and determine the appropriate outcome as a matter of Jersey law.

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