Hill Dickinson

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Marine Newsletter

Hill Dickinson

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STOP PRESS...STOP PRESS

Hill Dickinson is delighted to announce that on 17 September its North West Marine Team in Liverpool and Manchester was further strengthened by the arrival of Graham Jackson, who moved from London for family reasons. Graham has 30 years' experience in all aspects of shipping litigation, both as a leading City practitioner and in P&I Club management in Holland, and is looking forward to continuing with his practice in the North West. Graham's move follows the recent arrival of Stuart Kempson (formerly of Charles Taylor) at the Liverpool office.

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Letters to the editors

We would welcome any comments readers may have on the articles in this newsletter, or on any related topic, and would be happy to publish suitable commentary in a subsequent edition. Please contact the editors, whose details are on the back page.

Corporate Manslaughter Act July 2007

Royal Assent has been obtained for the Corporate Manslaughter and Corporate Homicide Act.

On 26 July 2007 the Ministry of Justice announced that Royal Assent had been granted to this very significant statute. Thus companies whose gross negligence leads to the death of individuals will now face prosecution for manslaughter, under what the Government is calling ".....tough new legislation".

Companies, organisations and Government bodies now face an unlimited fine if they are found to have caused death due to, for example, gross corporate health and safety failure.

The full text of this extensive Act can be seen via this link http://www.opsi.gov.uk/acts/acts2007/ukpga_20070019_en.pdf, but in brief the new legislation:

1. Will make it easier, by a more effective regime of corporate liability, to prosecute companies and other large organisations when gross failures in the management of health and safety lead to death;
2. Has removed a key obstacle to successful prosecution, such that both small and large companies can be held liable for manslaughter where gross failures in the management of health and safety cause death, not just health and safety violations;
3. Complements the current law under which individuals can be prosecuted for gross negligence, manslaughter and health and safety offences where there is direct evidence of their culpability. The Act builds on existing health and safety legislation, rather than imposing new regulations on business;
4. Removes Crown immunity from prosecution in this area. Thus Crown bodies will for the first time be liable to prosecution. The Act will apply to companies and other corporate bodies in both the public and private sectors, Government departments, police forces and also certain unincorporated bodies such as partnerships, where such are employers.

The Act comes into force on 6 April 2008. The Ministry of Justice will issue further guidance for bodies affected by it in the Autumn of 2007, and members of Hill Dickinson will be providing further detailed commentary in later editions of this newsletter and presenting a series of talks to associations, individual companies and many other bodies who or whose members will need to get to grips with these important new provisions.

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"Not when I'm on duty..."

A recent decision under the Railways and Transport Safety Act 2003 gives guidance on the key concept of "duty", but carries a warning of the dangers of alcohol.

While waiting alongside at a lay-by berth on the east coast of the UK, the Master of an oil rig supply ship was told by the charterers in the early evening that the vessel was not required for working until the following morning. Later, as usual on this vessel under such circumstances, the Chief Officer went on duty for the night, and deck and engine-room port watches were set.

The Master went ashore and returned later in the evening, having consumed 3 or 4 pints of beer. Some hours after his return an incident occurred that required the attendance of the police. However, though not involved in the incident, the Master was breathalysed. He was then arrested and charged with having alcohol in his breath over the prescribed limit - 35 micrograms per 100ml of breath - while being on duty as a professional Master of a ship, contrary to Section 78 1(a) of the Railways and Transport Safety Act 2003.

A further test at the police station confirmed the alcohol concentration at that time, but a subsequent forensic toxicology report indicated that the Master would have been below the limit at 08:00 hours the following day when he was due to come back on duty.

Furthermore, the amount of alcohol consumed did not put him in breach of his employer's own Drug and Alcohol Regulations. The Act is relatively new and stems from the Hayes* report, and this is thought to have been the first prosecution where a Master or seaman has been prosecuted under this Act alone, as compared to similar prosecutions which have been brought in conjunction with those under the Merchant Shipping Act 1995, e.g. in respect of running a vessel aground while drunk.

The case was tried before a District Judge, and turned on whether the Master was 'always on duty' for the purpose of the Act. The Act does not define 'duty' and there seems to be no relevant definition of it anywhere else. It is commonly thought that a Master is always on duty from the moment of signing on a vessel to the moment of signing off. But it was argued that the concept of duty here had to be limited in some way, because to decide otherwise would be to confuse performance and discharge of duty with the existence of a status or responsibility: it would also eliminate any distinction between the different facets of a Master's duties, which include those under common law, statutes and regulations, and also those which arise by custom and under contract.

For the Master it was argued that for the purpose of this Act:

" ...on duty means, in the course of his employment as a professional Master of a ship, performing or being liable to be called on to perform a safety critical function in the operation of the ship, which it is his duty to perform."

The Judge accepted this definition, further accepted that the Master had not performed any "safety critical" function at the time he was over the prescribed limit, and acquitted the Master accordingly.

The following facts were part of the Master's defence:

1. The vessel was laid up with no orders to sail until the following morning;
2. The Chief Officer was certified to act as Master on this particular vessel;
3. The level of alcohol consumed, whilst over the prescribed limit, was relatively low;
4. The Master complied and had here complied with all company regulations and procedures as regards alcohol;
5. The vessel complied with all the local harbour regulations and bye-laws;
6. The toxicology tests had shown that the Master would have been within the above limit when he came on duty the following morning.

The decision seems intuitively correct and commonsense, but it could very easily have been different - for instance if the Master had been found to be over the limit, say, just an hour or so before sailing. Therefore, whatever a company's policy as regards alcohol on board their ships, the dangers of drink consumed ashore remain, and all involved will want to ensure as far as possible that their staff are fully aware of the relevant legislation and their own internal rules. While successful prosecution of a crew member - with all the potentially very serious consequences - might as here depend on an important legal definition, the risk of even an attempted prosecution arising can be minimised by awareness and informed behaviour, amid good practices and procedures.

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*Following the Marine Accident Investigation Branch inquiry into the Marchioness casualty in 1989, the then Government asked John Hayes to conduct a wider inquiry into river safety. The Hayes Report, published in 1992, included a recommendation that a breath test should be introduced, similar to that applying to motor vehicle drivers, for the Masters and crew of all vessels. These recommendations were endorsed by Lord Justice Clarke in his subsequent report on the Formal Investigation into the collision between the Marchioness and the Bowbelle.

Framlington Group Ltd & Axa Framlington Group Ltd -v- Ian Barnetson
(Court of Appeal, May 2007)

Can the "without prejudice rule" apply to negotiations which take place before even the threat of litigation? In this recent case the Court of Appeal considered whether the rule could apply to discussions which had happened months before litigation was mentioned.

In March 2005 B was orally offered the post of Chief Operating Officer at Framlington Group Limited. He accepted, on the understanding that the terms of his employment would later be confirmed in writing. But that proved problematic. When written terms were eventually presented B claimed that they were incomplete, in that they did not provide for the allocation of certain shares in the company, as well as a bonus to which he claimed to be entitled under the terms which had been presented verbally.

Over the ensuing months B tried to get written confirmation of the terms of his employment which matched his understanding of the verbal offer. Eventually, during a telephone conversation with the Framlington Chairman on 26 October he expressed great dissatisfaction, and on the following day he received a call from the Chief Executive Officer who told him that he would be dismissed at the end of the year, and sought to discuss terms for his departure.

During some resulting negotiations a compromise agreement was produced, and B set out his own settlement terms in reply. However the negotiations failed, and on 20 December B was finally given formal notice that his employment was to be terminated.

In April 2006 B sued for wrongful dismissal. Framlington later sought to exclude certain passages from his witness statement, claiming that they referred to matters which were "without prejudice". The passages in question concerned certain exchanges between B and Framlington between the end of October and December 2005.

It is settled law that written or oral communications made in negotiations genuinely aimed at (but not resulting in) settlement of a dispute are not admissible in evidence in litigation between the parties to the dispute. In the High Court the Judge rejected Framlington's application to exclude the relevant passages, saying that they were not covered by what is commonly called the without prejudice rule, because the exchanges took place before the start of litigation and moreover before there had been any suggestion of it.

But the Court of Appeal allowed Framlington's appeal, holding that the without prejudice rule is not limited to communications made where litigation has already been commenced or threatened.

The Court emphasised the public policy consideration behind the rule, which is to encourage parties to settle their disputes without resort to litigation. If without prejudice protection was confined to settlement communications once litigation had been threatened or only shortly before it had started, parties would think it was necessary to escalate their dispute with threats of litigation - or more likely to move quickly to it - before they could safely moot settlement, and that was the very opposite of the rule's rationale.

The application of the rule did not depend on any particular time or other nexus between the negotiations and the subsequent litigation. The correct approach was simply to consider whether, during the negotiations, the parties "contemplated or might reasonably have contemplated" litigation if they could not agree. On this analysis, in view of the large amount of money in issue and the manner and content of the negotiations, the Court concluded that both parties were clearly aware of the potential for litigation if they could not otherwise resolve the dispute. So, once Framlington had told B that they intended to dismiss him - towards the end of October 2005 - the discussions that followed were without prejudice and could not be used in evidence.

So it is clear that communications before litigation is commenced or even threatened might still be covered by without prejudice protection. The passage of time between the communications and the start of litigation will not, of itself, prevent the communications being caught by the rule. What matters is whether litigation was or might reasonably have been contemplated at the time the communications were made.

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Early Admissions and No More Payments into Court

The Civil Procedure (Amendment No. 3) Rules 2006 came into force on 6 April 2007. Among many changes* they have brought about some significant amendments as regards payments into Court and admissions of liability. This article considers the amendments to CPR Part 36 in relation to payments into Court, and to Part 14 concerning early admissions of liability.

Amendments to Part 36

A defendant used to be able to take steps to protect his position in relation to costs by making a Part 36 offer if proceedings had not been issued and a Part 36 payment into Court if they had. (A Part 36 offer had to be converted into a Part 36 payment into Court if proceedings were later issued.) A Part 36 payment was the payment into the Court's account of a sum of money which was supposed to be the defendant's assessment of his potential liability. If the claimant did not accept this money and was later awarded less at trial, he would usually have to pay his own and all of the defendant's costs since the last day when he could have accepted the money, normally 21 days after the payment into Court had been made.

Part 36 has now been amended, such that a defendant no longer needs to make a payment into Court – indeed he can no longer do so. Instead a defendant simply has to make a written offer to settle. This must specify a period of at least 21 days (the "relevant period") within which the offer will remain open, and the defendant will be liable for the claimant's costs if the offer is accepted. Payment pursuant to an accepted offer must be made within 14 days, or the claimant will be able to enter judgment and the defendant will lose any costs protection afforded by the Rules.

The Rules on withdrawal of and changes to Part 36 offers have also been changed. Provided obviously that the claimant has not yet served notice of acceptance, if the period for accepting without adverse costs consequences (usually 21 days) has expired, a defendant can now withdraw an offer - or make it less favourable - without the Court's permission, simply by serving written notice on the claimant. However, if a defendant wishes to withdraw an offer while it is still open for acceptance, he can only do so if the Court gives permission. If an offer is withdrawn at any stage it ceases to have any costs consequence.

A Part 36 offer is accepted by serving written notice of acceptance, and (unless of course the offer has been withdrawn) this may be done even after expiry of the relevant period, without the permission of the Court. If, then, the parties cannot reach agreement on costs the Court will make an order. This will normally be that the defendant should pay the claimant's costs up until the date when the relevant period expired, but after that the claimant is liable for the defendant's costs up to the date of acceptance.

The new procedure helps a defendant as it removes the need to pay money into Court in order to seek to protect the position on costs. It also allows tactical offers to be made and then withdrawn. However, the ability of a claimant to accept an offer at any time before it has been withdrawn - albeit subject to possible costs penalties - means that if for example any change in the state of the evidence or other assessment of the merits suggests that the offer is too generous, it should be formally withdrawn as soon as possible, because otherwise it could still be accepted by the claimant, even though the period for acceptance has expired.

Part 14 Admissions

A defendant has always been able to admit the whole or any part of the claimant's case after the start of proceedings, in order to prevent the claimant's solicitors incurring unnecessary costs in investigating liability generally or any particular part of the claim. However, new Rules now alter the position with regard to admissions made before the start of proceedings. In cases in which the personal injury, clinical disputes or disease protocols apply, a "pre-action admission" can now be made. This can be done either on receipt of a formal protocol letter of claim, or indeed even before that if the admission is specifically stated to be made under CPR Part 14. The advantage for a defendant of such an early admission (on for instance liability) is that it prevents the claimant's side from incurring any significant related costs - unless of course they want to run the great risk of paying them themselves - and if made early enough may significantly reduce the cost of a claimant's after the event insurance policy.

An admission made after the start of proceedings can only be amended or withdrawn with the permission of the Court. An admission made before the start of proceedings may be amended or withdrawn if the claimant agrees. If not, then on the commencement of proceedings the defendant may apply to amend or withdraw the admission.

If a defendant applies in this way, the Court will consider all the circumstances, including the reasons for making the application, whether there is any new evidence, the conduct of the parties, any prejudice either way, when it was made, the prospects of success if the admission is allowed to be amended or withdrawn, and the interests of the administration of justice.

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*This major amendment also contains changes to the Part 8 procedure (which is used in matters which are unlikely to involve major factual disputes), a new section on judicial review of certain decisions of the Immigration and Nationality Directorate, a widening of the telephone hearings pilot scheme, and a reissued Pre-Action Protocol for Construction and Engineering Disputes.

European Union:
Free Market or Social Protection?

The International Transport Workers' Federation and Finnish Seamen's Union -v- Viking Line ABP & OU Viking Line, ECJ Case, Advocate-General's opinion.

The founding principle of the European Union (variously the European Economic Community or the 'Common Market') has its origins in the European steel and coal community, an idea of common trading between the then West Germany and France, one of whose principal aims was that trade would prevent future conflicts between those countries.

The organisation has evolved out of all recognition since that time. However, in the Treaty of Rome the founding principles of what is now the EU still exist. Increasingly over time additional measures, particularly social protection, have become important. Nevertheless there still exists a hierarchy of precedent over the aims and objectives of the EU. The current case throws this into sharp relief.

Viking Line ABP is a Finnish shipping company based in Helsinki. The service in question ran between Helsinki and Tallinn in Estonia. From 2002 the service had been running at a loss because of the lower costs associated with competing Estonian carriers, largely due to lower wage costs resulting from lower standards of social protection. Viking Line sought, through the establishment of its subsidiary in Estonia, to relocate its operations to Estonia and take advantage of a lower cost base to stem the losses flowing from its service.

However, the International Transport Workers Federation (ITF) and the Finnish Seamen's Union (FSU), one of the 600 transport unions in 140 countries affiliated to the ITF, sought to take industrial action as a result of this, and informed all affiliated unions about the matter, requesting them not to negotiate with Viking Line. This, therefore, prevented Viking Line negotiating directly with Estonian trade unions in pursuit of its objectives, and effectively stopped its attempt to relocate its operation. As a result Viking Line settled the dispute, and agreed they would not attempt to re-flag before 2005. Anticipating that any attempt to continue to re-flag the vessel in question, the Rosella, would initiate collective action from the FSU and ITF, Viking Line sought the aid of the Commercial Court in London for injunctive relief requiring the ITF to withdraw its circular to its members and the FSU not to interfere with Viking Line's request to utilise its rights to freedom of movement in relation to the re-flagging of the ship, which was continuing to make large losses.

The Commercial Court granted injunctions and in 2005 the ITF and FSU appealed to the Court of Appeal, which then referred the matter to the European Court of Justice (ECJ).

The Advocate-General (AG) has just given his preliminary opinion on this matter: although not binding on the full Court, the AG's opinion is usually seen as reflecting the will of that body.

Although a series of complex questions on matters of law were directed to the ECJ, in essence the issue came down to a central point: which is more important, Article 43 of the Treaty of Rome dealing with the importance of freedom of movement (or in the present case, freedom of establishment), or the subsequent social protection provisions of the EU? As the Court posed the question, is the short term interest of workers in a particular establishment more important in terms of their social protection and relief than the longer term success of a business which can be guaranteed or enhanced by relocation and freedom of movement?

The Court has been asked to adjudicate between these apparently conflicting aims and decide either in favour of free trade, movement and investment, or social protection for a dedicated workforce.

The AG's opinion should give hope to those who value the ability of organisations, together with individuals and capital, to enjoy the freedom of movement guaranteed by the EU, and also those who still seek to make the Union a competitive organisation.

The view taken was that collective action by a trade union or association to promote, via industrial action, the objectives of the community's social policy, is not, for that reason alone, exempt from the application of Article 43, and therefore cannot override it. The relevant article has direct effect on any legal proceedings between an organisation and a trade union, and therefore application of social policy cannot take precedence over freedom of movement, association and establishment.

However, the regulations do not prevent trade unions taking collective action in order to attempt to restrict the rights of businesses to relocate to another member state in order to protect the workers of their organisation. It is a matter of national competence for a national court to determine whether such action is lawful in the light of applicable domestic rules. Therefore it is likely that, if the full Court follows the AG, the national court in question (London) would apply its own rules, and therefore concepts such as secondary action, or solidarity action, which may be legal in Scandinavian countries, will not be applicable in this case.

The AG's view was that the Articles of the EC treaty preclude any co-ordinated policy of collective action by trade unions which seek to restrict the right to freedom of establishment and which in effect partition a labour market to impede hiring workers from certain member states in order to protect the jobs of workers in other member states. In essence, therefore, freedom of movement trumps social policy. Because of the Court's insistence on national law, this is not a "one-size-fits-all" panacea for the entire European Union. However, as far as it goes it is a powerful argument in respect of maintaining the rights of businesses to relocate and to compete in economic terms, particularly if forethought is given to headquartering such organisations in countries where the national laws preclude secondary action.

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Yachting in Italy

Sarah Marshall-Ellison takes a look at some key points for owners and charterers operating in Italian waters.

The yacht industry in Italy has enjoyed substantial growth in recent years. The country is now the second largest manufacturer of yachts worldwide behind the USA and a market leader in the construction of 'superyachts'. This expansion has been in part fuelled by the development of 'yacht friendly' Italian legislation over the past five years, which has created tax concessions for both Italian and foreign yacht owners alike.

Matriculation and flagging

Italian flagged pleasure yachts must be registered with either the Registro Imbarcazioni da Diporto (between 10 and 24m in length) or the Registro Navi da Diporto (over 24m in length) which are the country's pleasure yacht registries. Yachts over 24m and up to 1000gt which are in commercial use for sport or pleasure only are allowed, under certain conditions, to be registered with the commercial registry - Registro Internazionale. These vessels should not carry cargo or more than 12 passengers. Yachts over 1000gt cannot be included on the commercial register and should be registered as pleasure vessels with the Registro Navi da Diporto, but they may still charter providing certain conditions are met.

Ownership

Non-Italian residents or companies can register a pleasure yacht with one of the registries as long as they have a place of business in Italy. In addition, providing they comply with certain survey regulations, any EU resident company can register a yacht over 24m with the Registro Internazionale and will receive the same tax concessions as Italian owning companies.

Documentation onboard

Vessels registered with either pleasure yacht registry should carry onboard an original navigation licence issued by their relevant registry together with a safety certificate confirming the vessel's seaworthiness. The safety certificate is issued by the Maritime Authorities on the basis of CE Certification for yachts up to 24m and on the strength of a Certificate of Compliance with the Italian Safety Code for Pleasure Yachts for those vessels over 24m. The latter may be issued by any of the approved Classification Societies which include RINA, American Bureau of Shipping, Bureau Veritas and Germanischer Lloyd.

Commercially registered yachts over 24m must also carry a navigation licence and a Certificate of Compliance with the Italian Safety Code for Commercial Yachts, and have a charter Class Certificate from one of the above Classification Societies.

Insurance

Both pleasure and commercially registered yachts must keep their insurance policy onboard covering the civil liability of the owner and crew for any personal or property damage caused to third parties, and this should be in an approved form.

Chartering

An Italian-flagged pleasure yacht of any size may be operated for charter by either an Italian or foreign charter company providing the vessel complies with standard safety regulations and is authorised to charter by the Maritime Authorities through a specific declaration on the Navigation Licence. If a foreign charter entity intends to operate a yacht, the owner should be registered with the Italian Chamber of Commerce.

Foreign-flagged yachts in Italian waters

EU flagged yachts can be used for private pleasure or charter use inside Italian territorial waters without restriction. Non-EU flagged yachts can navigate inside Italian territorial waters subject to EU customs regulation no. 993/2001.

This regulation provides for the temporary admission of both pleasure and commercial yachts with full relief from import duties and taxes on goods intended for re-export.

Non-EU flagged pleasure yachts may remain temporarily in Italian waters for a maximum period of 18 months after which they must be imported (and 20% VAT plus import duties must be paid) or re-exported outside EU waters. Non EU-flagged commercial yachts may remain temporarily in Italian waters for the time necessary to complete any charter provided that such charter commences or finishes outside EU waters.

VAT exemption

A pleasure yacht whether under or over 24m which is authorised for charter is allowed a full VAT exemption on the following:

- Yacht's purchase price
- Fuel
- Engine machinery, components and spare parts
- Provisions and yacht stores
- Docking, maintenance, repair and refurbishing services

Commercial yachts registered with the Registro Internazionale are also granted a full VAT exemption on the above plus leasing, rental and demolition services.

Tax concessions

In addition to the above VAT exemptions, the following tax concessions are granted to commercial yachts registered with the Registro Internazionale:

- Only 20% of the vessel's earnings are taxed
- A tax credit, equal to the amount of the withholding tax to be paid by the owner on crew salaries
- Full exemption on crew social security contributions

Italian leasing

Leasing is becoming increasingly popular, whereby the yacht is leased and financed for a period of time. Once the lease expires, the lessee has the option to purchase the yacht. Italian law requires that VAT at 20% must be applied on leasing fees of pleasure yachts while the vessel remains in EU waters. Naturally, this is difficult to monitor and the Italian authorities have predetermined a flat rate based on the propulsion and length of the vessel. The bigger the boat, the bigger the VAT reduction so, for example, a pleasure yacht of more than 24m will enjoy a rate of 6% (30% of the standard Italian VAT rate of 20%).

Type of pleasure yacht	% of lease fee subject to VAT @ 20%	Effective VAT rate
Sailing yacht up to 10m and motor yacht up to 12m	60%	12%
Sailing yacht from 10.01 to 20m and motor yacht from 12.01 to 16m	50%	10%
Sailing yacht from 20.01 to 24m and motor yacht from 16.01 to 24m	40%	8%
Sailing yacht or motor yacht above 24.01m	30%	6%

The reduced VAT rate does not apply to the redemption price. However, in the case of commercial yachts, both leasing fees and the redemption price are fully VAT exempt.

Any EU or non-EU resident or corporate entity may take advantage of the scheme for the purchase of either a pleasure or commercial yacht of any flag.

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We are indebted to Federico Santini of Studio Legale Internazionale d'Ippolito, Rome, for his contribution to this article (f.santini@slidlex.com).

Yacht Ownership - Ltd Co. or LLP?

Which corporate vehicle should be used to purchase a yacht? This article examines the pros and cons of a limited company and a limited liability partnership (LLP).

A limited company has long been the preferred option. Personal ownership is not often recommended (unless the cost is disproportionate) due to the risk of exposure of the owner's personal assets in the event of any claim against the yacht. Corporate ownership is therefore recommended in cases where the beneficial owner's personal assets are significant.

A special-purpose vehicle company (SPV), whether on or offshore, provides limited liability as the company is recognised as a separate legal entity, distinct from its owner(s). Any claim arising in respect of the yacht would therefore be against the company and, if the company were an SPV, such claim would be limited to the value of the single asset; i.e. the yacht. For the English Courts at least, this principle of distinct existence is sacrosanct and will only be overruled in exceptional circumstances such as gross negligence on the part of directors or fraud. In certain jurisdictions the use of a company may also carry the benefit of anonymity, as it may not be necessary to maintain, or at least disclose, a register of shareholders or directors.

There is however a downside to the use of UK limited companies: the taxation of benefits-in-kind. A director or shadow director will be liable for income tax based on the value of the yacht. While the tax authorities will reduce the "taxable benefit" to reflect periods that the yacht is being chartered or actively marketed for charter, their presumption is that the yacht is available for the director's use for the entire year and the liability will be calculated accordingly.

An alternative is the use of a limited liability partnership (LLP). This is increasingly being adopted as a vehicle for yacht ownership as it does not give rise to liability to tax on benefits-in-kind. A LLP is a relatively new form of legal entity which is available to "two or more persons associated for carrying on a lawful business with a view to profit", where "person" can be either an individual or any entity with legal personality such as a company. While therefore not suitable for situations where the ownership is intended to be solely as a nominee for the beneficial owner, the intention to generate any charter revenue will be sufficient to satisfy the "view to profit" requirement.

A LLP avoids the benefits-in-kind problem because it is taxed like a partnership, with each member being taxed as an individual. Accordingly, tax is paid on each member's share of the income and there is no employers' national insurance (NI) due on the relevant share of the profits.

However, NI contributions will have to be paid if the LLP employs crew, whereas this would not generally be required if an offshore limited company owned the yacht (although this may soon change as proposals are being considered which would make the yacht's chosen flag an overriding issue for NI purposes). The LLP also has the ability to register for VAT.

The entity is made up of "members" rather than directors and shareholders and has no share capital. There are no Memorandum and Articles of Association. Although not strictly necessary, most LLPs are regulated by an agreement between the members which supplements the rules imposed by statute.

The LLP is designed to combine the concept of limited liability with the flexibility and tax transparency of a partnership. Hence, the LLP is structured as a body corporate by having a legal personality which exists separately from its members but, like a partnership, the relationship between the members is governed by an agreement. In contrast to a limited company, there is no distinction between the managers (the directors) and the owners (the shareholders).

A LLP is a body corporate and may hold property, employ people, sue or be sued, and the assets, profits and liabilities belong to the LLP rather than the members. As the name states, the LLP affords its members limited liability. The LLP is liable for its own debts so, like shareholders of a company, the members are not personally liable for any debts incurred by the LLP other than to the extent of their contribution to the assets. This is advantageous if the LLP encounters difficulties as each member only risks the capital invested in the LLP and does not have to contribute from personal assets, even in the event of a catastrophic claim. The advantage of not being personally liable for the mistakes of other members (as with a partnership) is tempered by the fact that, in the case of negligence, members may be personally liable if they have assumed a personal duty of care and have acted in breach of that duty. This additional liability will not, however, be shared by the other members of the LLP. Although insurance will provide considerable protection, liability limits may be insufficient in the event of an extraordinary or catastrophic claim. Exceptionally, there may also be situations where cover lapses or is ineffective.

There are, however, disadvantages. Unlike an ordinary partnership, the members' home addresses must be filed in most instances with the Registrar of Companies and these details can be viewed on a readily accessible register. In addition, there are various statutory obligations which must be complied with, such as the filing of audited annual accounts, although these duties are much the same as those which apply to a limited company.

Crucially, however, if a LLP does not satisfy the requirement of an intention to generate a profit, it will be taxed as a company. The immunity from benefits-in-kind will no longer apply and the tax authorities will be able to recover taxes deemed due from previous years.

To summarise, while both the LLP and the limited company provide the advantage of limited liability, the disadvantage of taxation on benefits-in-kind when using a limited company means that, increasingly, the LLP is becoming an attractive option for yacht owners. With several flags accepting this structure for ownership, we may increasingly see more owners opting for the LLP.

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Financial Security for Super Yacht Construction Contracts

As the size and value of yacht construction projects have soared in recent years, so too has the significance of the security offered by builders for the instalments of the purchase price payable prior to delivery. This imperative has become even more acute in circumstances where many projects now take three to five years from first agreement to delivery, and is further compounded by the security requirements of the various lenders engaged in the provision of pre-delivery construction finance.

Historically, commercial shipbuilders have generally been prepared to offer refund guarantees by way of security for most if not all of the instalments payable under a construction contract. Such guarantees have tended to be less readily available in the yacht construction industry, no doubt partly as a result of the costs involved (which typically equate to one or two per cent of the amount secured per annum), but perhaps also because of the need for the yard to have and maintain sufficient collateral to procure the issuance of the guarantee from its own financial backers. This latter point is often of particular significance for start-up operations and other newcomers to the construction market. As a consequence, many yacht builders now offer to transfer title to the vessel as it is being constructed as an alternative to providing refund guarantees.

So, what are the relative advantages and disadvantages of these different approaches and what are the key issues that a prudent buyer or its financiers should be aware of when assessing the value of any security which is being offered?

Refund guarantees

As a starting point, and as with any such security, one should first check the credit rating of the bank issuing the guarantee, particularly if the contract is of a very high value.

Next, one should examine the provisions of the guarantee governing the circumstances in which a demand can be made. Ideally, it should be possible for the borrower to make a demand under the guarantee simply by stating that it has become entitled to a refund by reason of the operation of some relevant provision of the contract. In the alternative, the guarantee may actually stipulate each of the particular circumstances in which the buyer may demand a refund. In that event, care needs to be taken to ensure that the relevant provisions of the refund guarantee exactly mirror the corresponding provisions of the build contract, and that the mechanism for presenting the guarantor with a demand is not too unwieldy or complex. Moreover, and as unlikely as a yard insolvency may be in the current market environment, the guarantee should ideally be "on-demand" at the first sign that the yard is in financial difficulty, rather than being contingent on, for example, the appointment of an official receiver or the final outcome of administration proceedings, which might involve years of delay and issues of local law alien to the buyer and its financiers.

Care is also required when checking the validity period of any guarantee. In particular, one should ensure that the guarantee does not expire until at least a few days after any right to reject the vessel (including any permissible delay or force majeure period under the build contract) has expired. A guarantee which expires on the same date as that which is stipulated in the contract for delivery may mean that the buyer has only that one single day within which to decide what to do and, if appropriate, to make the demand under the guarantee before it expires.

Pre-delivery transfers of title and mortgages

As explained above, refund guarantees can be both difficult to procure and costly to maintain. By contrast, a transfer of title should cost next to nothing, save in those jurisdictions where it is necessary to take additional steps to perfect the transfer, such as arranging for the prior translation, notarisation or registration of the build contract.

Once the buyer has secured title, it should also be at liberty to register a mortgage over the hull in favour of its financiers in much the same way as it would execute and register a mortgage over the yacht once delivered.

One of the first issues with any such transfer of title is to ensure that title is transferred free of any encumbrances. It is also important to remember that the builder (and possibly its subcontractors) will almost invariably be entitled to a statutory, and possibly to a contractual, lien over the hull for any sums owed by the buyer and that this could serve to prevent the buyer - or its bank - removing the vessel following the occurrence of an event which has given rise to a right to terminate the contract. The priority or otherwise of such liens, as well as the impact of any other issues which might affect the buyer's title (including any requirement to register the contract as mentioned above) may well turn on issues of law governed by the jurisdiction in which the builder is based, irrespective of whether the build contract is governed by English law. As a consequence, the buyer will almost certainly need to take local advice to ensure that its position is adequately secured.

Next, and in purely commercial terms, the transfer of title is arguably of limited value until the hull under construction has become watertight and hence capable of being removed or towed out of the yard for completion elsewhere. As a result of this, one often sees a hybrid model where the builder provides refund guarantees for the first two or three instalments of the purchase price, which might together equate to around 20% or 30% of the total payable, with the transfer of title taking place as a condition precedent to the payment of the third or fourth instalment - which, not by coincidence, should also represent the point at which the hull becomes watertight.

As a further commercial consideration, a buyer should always try to ensure that the payment provisions of the contract are structured so as to ensure that the value being added to the hull keeps pace with the instalments paid over to the yard. It is important to realise however that the value of an incomplete hull - particularly in the early stages of construction - will almost certainly always be lower than the amount actually invested, in part because any third party buyer would wish to factor in the cost of removing it for completion elsewhere and, it might be argued, because it may be difficult to find another yard willing to take the project on at a competitive price.

Next, the buyer should also seek to ensure that the transfer of title operates continuously so that as materials and goods are delivered to the yard for the construction, they too become the buyer's property and so capable of being transferred to the buyer in a default situation.

The situation can also be a little more complicated in those instances involving a mortgage in favour of the buyer's bank. Like any other mortgage subject to foreign law, the bank will need to take local advice to ensure that the mortgage will be enforceable and afford it adequate security against the claims of any other competing creditors - not least the builder and its subcontractors by reason of their lien(s) as mentioned above. In this instance the builder will also be keen to ensure that the contract makes adequate provision for what is to happen in the event of a buyer's default and, in particular, the mechanism by which the bank's mortgage is to be released in such circumstances so as to strike an appropriate balance between the competing interests of the yard and the buyer or its bank in any ultimate sale of the vessel or incomplete hull. By contrast, a refund guarantee would simply fall away in such a situation and therefore need not be expressly dealt with.

In conclusion, there can be little doubt that, if available, a properly-structured refund guarantee from a reputable financial institution will always be preferable to a transfer of title from the buyer's perspective. As with any other contract however, the maxim caveat emptor applies and both buyers and their banks need to ensure that they properly understand the type of security which is being offered to them and that they will be able to rely on it in the event of default.

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SECA Rules – What Ship Owners and Managers Need to Know

Introduction to the SECA rules

Sulphur Emission Control Areas (SECAs) are geographically defined areas where ships must limit their sulphur oxide emissions. SECAs were established by Annex VI to the marine pollution treaty (MARPOL 73/78) which came into force in May 2005. Under MARPOL the general global limit on sulphur content is 4.5 % but provision is made for the establishment of SECAs which are areas where the sulphur content of fuel oil used onboard ships must not exceed 1.5% by mass.

The Baltic Sea SECA was introduced in May 2006 and the North Sea and the English Channel are due to become SECAs on 21 November 2007. Somewhat confusingly, the EU Marine Fuel Sulphur Directive ("the Directive") co-exists with MARPOL and under this Directive the 1.5 % sulphur limit is applicable in the North Sea and English Channel areas from 11 August 2007. Therefore, strictly speaking, ship owners and operators of vessels sailing in this area should already adhere to the 1.5 % sulphur limit. It should also be noted that under the Directive, the sulphur limit is also applicable to passenger vessels operating on a regular service to or from any EU port.

Under the Directive and MARPOL, ship managers have two options to ensure compliance:

1. Burn low sulphur fuel in SECAs
2. Use abatement technology to remove sulphur oxides from emissions in SECAs

Low sulphur fuel

Concerns have been raised over the availability, quality and price of low sulphur fuel.

Availability of low sulphur fuel is not likely to be a problem. There are reports that suppliers have been stocking up on low sulphur fuel in preparation for the new rules. Further, despite fears that there would be a shortage of low sulphur fuel bunkers when the SECA was introduced in the Baltic, this did not materialise but logistical problems did arise in the days leading up to the enforcement date as there were insufficient barges to deliver the fuel.

The quality of the fuel supplied is said to be a concern. Low sulphur fuel is more prone to elevated levels of catalyst fines, sediments and ignition and combustion problems when compared to fuels with high sulphur content. Much of this may be explained by the fact that blending to low sulphur levels is a relatively new process. As fuel providers gain more experience of the specific blending and procedural requirements applicable to this fuel, improvements in quality are likely to be made.

In terms of price, low sulphur fuels are significantly more expensive than fuel with a normal sulphur content. Therefore, it is expected that ship operators will attempt to reduce costs by switching between low sulphur fuel and fuels of normal sulphur content when entering and leaving a SECA. This will be a complicated procedure, and full details of the changeover procedures are required to be entered in the engine room log book and oil record book. Relevant details will include the volume of low sulphur fuel in each fuel tank, the date and time of completing the changeover and the vessel's position at the time.

Abatement technology

As an alternative to burning low sulphur fuel, an exhaust gas cleaning system of equivalent effect is also permitted. The IMO published guidelines on exhaust gas cleaning in July 2005. The EC has stated that it will build on these and publish its own on the subject, but these are still awaited. In the meantime the EU has advised that ship operators wishing to use exhaust gas cleaning technologies should take advantage of the 18 month trial periods for this purpose set out in the Directive. To apply for a trial period, ship operators should notify their flag state (if EU flagged), the EU port states they plan to visit and the Commission, six months before they plan to start using the technology.

Enforcement

Estimates have put compliance with the Baltic SECA at just 20%. However, ship operators are warned against non-compliance with the rules. Speaking in March of this year, the British Shipping Minister signalled that a tough approach will be adopted to the enforcement of the SECA rules in the North Sea and the English Channel.

As far as penalties are concerned, if the fuel onboard a vessel does not comply with the MARPOL limits, port or flag state authorities may require a deviation, de-bunkering and replacement of fuel, causing delays and additional costs. A breach of the MARPOL regulations may also lead to fines against the vessel.

The future

Looking to the future, regulations on sulphur oxides and other emissions are likely to become more stringent. For example, from 1 January 2010 the sulphur limit for all fuel burned in EU ports falls to 1%. Ship operations will have to be continually modified to ensure the new requirements are met. Forward planning and awareness of the planned changes will therefore be essential.

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Freight Forwarders – Exemption from FSA Regulation

On 20 July, a Statutory Instrument bearing the catchy title of The Financial Services and Markets Act 2000 (Exemption) (Amendment No.2) Order 2007 came into force.

Somewhat gratifyingly, the new legislation has taken on board the precise anomaly which we highlighted in an e-alert back in January.

Originally, the Statutory Instrument was drafted (and released last December for the purposes of consultation) in terms whereby only liability policies held by the freight forwarder would fall within the exemption. This was at odds with the Treasury's stated intention.

The new draft Statutory Instrument now grants exemption to freight forwarders and also to storage firms, in each case where the dealing is with a customer who is not an individual.

Since 20 July, there is exemption from the general prohibition in respect of regulated activities (including assisting in the administration and performance of a contract of insurance) where a freight forwarder or a storage firm holds a policy of insurance in its own name in respect of "loss of or damage to goods" which the freight forwarder or the storage firm is transporting or arranging to transport or, respectively, storing or arranging to store.

The exemption operates where the freight forwarder or storage firm makes available to the customer rights under the policy enabling the customer to claim directly against the insurer.

As set out above, the exemption applies where the customer of the freight forwarder or storage firm is not an individual.

"Individual" is not defined in the Statutory Instrument. It is not defined in the underlying Order which the Statutory Instrument amends. It is not defined in the Financial Services and Markets Act 2000 itself. Finally, in the 33 pages of the FSA Handbook Glossary dedicated to the letter "i", there is, again, no definition!

The term "customer" is defined in the new Statutory Instrument as "a person who is not an individual who uses the service of a freight forwarder or storage firm."

The Interpretation Act 1978 states: ""Person" includes a body of persons corporate or unincorporate."

The FSA Glossary adopts and enlarges on this definition of "person", indicating that: "(in accordance with the Interpretation Act 1978) any person, including a body of persons corporate or unincorporate (that is, a natural person, a legal person and, for example, a partnership)."

This is interesting, although only to a point! It is also not very constructive. It still leaves a question mark over the situation in which the freight forwarder is dealing with a business man, in the course of the latter's business but where the business man is, himself, an individual. It would seem odd if the exemption does not apply in those circumstances and the freight forwarder would still need to be regulated to offer the benefit of his open cover. However, in what is perhaps a poorly drafted piece of legislation, there must remain doubt on the point.

Bearing in mind that the Glossary to the FSA Handbook is not directly relevant to the actual Parliamentary legislation, further possible indirect guidance may be sought in the definitions given in the Glossary for "individual member": "a member, or former member, who is a natural person"; and for "retail customer": "... an individual who is acting for purposes which are outside his trade, business or profession".

Whilst these two definitions are included for completeness, they do not, perhaps, lead to any great strides forward in terms of removing the uncertainty arising out of the wording of the new Statutory Instrument.

The definition of "individual member" set out above certainly points to a possible interpretation as equating "individual" to a natural person. This might, in turn, lead to a potential conclusion that the business man who is a sole trader is an "individual" and thus the freight forwarder dealing with him would still need to be regulated.

The second of the foregoing definitions would seem to envisage that an individual could be acting for purposes either outside, or within, his "trade, business or profession". In the latter instance, the individual will not be a retail customer as defined. However, "retail customer" is not the term used in the Statutory Instrument which brought in the new exemption.

The writer considers that there must therefore remain an uncertainty as to how the term "individual" as used in the new Statutory Instrument will be interpreted. Some comfort may be taken from indications that there is a possibility that the Treasury is contemplating removing altogether the qualification whereby dealings with customers who are individuals fall outside the new exemption.

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