



Law of Shipbuilding Contracts Update 2025

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The fifth edition of *The Law of Shipbuilding Contracts* was published in 2020¹. Since then, we have continued to monitor the cases that directly relate to the law of shipbuilding contracts and those in the context of general commercial law, which impact on shipbuilding and related contracts².

In this latest edition of the *Haynes Boone Law of Shipbuilding Contracts Update*, we discuss some of the cases and developments in the past three years in the following areas:

- Contract Formation, including the formation of the shipbuilding contract, “subject to contract”, letters of intent and agreements to agree
- Allocation of the Design Risk
- Financing the Newbuilding, including the UK Shipbuilding Credit Guarantee Scheme and General Export Facility
- Force Majeure
- Notice Provisions
- Termination
- Payment of the Deposit: Conditions Precedent and the Prevention Principle
- Limitations of Liability
- The Nature of a Guarantee

¹See press release, [New Edition of 'The Law of Shipbuilding Contracts' Published](#) (28 May 2020).

²Our last update was [“Law of Shipbuilding Contracts Update 2022”](#) published in January 2023.

Contract Formation

The formation of the shipbuilding contract

The expenditure, timescale and risks involved in the construction and sale of a ship means that shipbuilding contracts and any associated agreements (such as variations to the contract) should clearly be recorded in writing and signed by the parties. Where this is not the case, it may fall to the courts to determine whether the requirements for an enforceable agreement under English law (i.e.: (i) offer and acceptance; (ii) intention to create legal relations; and (iii) consideration) exist. There have been several cases recently where the English courts have had to make such a determination. While these cases do not arise in the context of shipbuilding, they serve to illustrate the problems that can occur and illustrate the court's approach to determining such disputes.

Smit Salvage B.V. and Others v Luster Maritime S.A. and Others, m/v Ever Given (2024)³

This case concerned the March 2021 grounding of the Ever Given (Vessel) in the Suez Canal for six days. The appellants were co-owners of the Vessel (Owners) and sought assistance with re-floating the Vessel from the claimants, who were salvors (Salvors). The parties negotiated by email before the Salvors started work. The Salvors sent a detailed commercial proposal, draft salvage plan and draft amended WRECKHIRE 2020 contract form to the Owners. The Owners confirmed the remuneration terms. However, after the Vessel was refloated, a dispute arose over whether these exchanges created a legally binding contract as to remuneration. The Owners argued that at this point a legally binding contract had been concluded, at least in respect of remuneration. The Salvors disagreed and, having assisted with re-floating the Vessel, pursued a more lucrative claim for salvage before the Admiralty Court.

At first instance, the court found that the parties had reached an agreement on remuneration terms, but no binding contract had been concluded. On appeal, it was emphasised that the burden was on the Owners, as the party seeking to rely on the alleged contract, to demonstrate that the parties' exchanges evidenced unequivocally an intention to be bound. In the leading judgment, Lord Justice Males confirmed that the principles to be applied when determining whether a legally binding contract has been concluded when some matters are still to be agreed are well established⁴. He summarised those principles as follows: "... *the whole course of the parties' negotiations must be considered; that it is possible for parties to conclude a binding contract even though it is understood or agreed that a formal document will follow which may include terms which have not yet been agreed; that whether this is what the parties intend to do must be determined by an objective appraisal of their words and conduct; and that the burden lies on the party asserting that such a contract has been concluded to establish that it has.*" The Court of Appeal considered that the Owners had fallen considerably short of satisfying these requirements. Rather, the exchanges indicated an absence of intention to be legally bound until all outstanding matters were agreed. The Salvors were therefore successful in their claim for salvage.

Fenchurch Advisory Partners LLP v AA Ltd (2023)⁵

A similar situation arose in this case, where the High Court found that an agreement regarding fees, again recorded in an email exchange, did not constitute a binding contract for the provision of consultancy services.

³ [2024] EWCA Civ 260.
⁴ *RTS Flexible Systems Ltd v Molkerei Alois Mueller GmbH & Co KG* [2010] UKSC 14, *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, and *Global Asset Capital Inc v Aabar Block Sarl* [2017] EWCA Civ 37.
⁵ [2023] EWHC 108 (Comm).

"... it is possible for parties to conclude a binding contract even though it is understood or agreed that a formal document will follow which may include terms which have not yet been agreed ..."

The case arose from the provision of consultancy services by the claimant, Fenchurch, who was assisting the defendant, the AA, with the potential sale of its insurance division. Although a fee proposal had been agreed over email by the parties, an engagement letter (which was the subject of extensive negotiations between them) was not signed and key terms, such as the triggers for payment of a success fee, had not been agreed. Notwithstanding this, Fenchurch assisted the AA considerably in relation to the sale, although this ultimately did not go ahead, and Fenchurch went unpaid.

Fenchurch commenced proceedings asserting that the email correspondence regarding the fee proposal constituted a binding agreement, and as it had performed work, that it was entitled to payment. The AA disputed this, arguing that a binding contract would only exist when the engagement letter was signed. The court acknowledged that the parties had intended to enter into a binding contract, and an agreement had been reached on fees. However, the exchange of emails signified that there would not be a legal relationship between the parties until all matters were agreed and the engagement letter properly executed. Fenchurch was however successful in a claim for unjust enrichment in respect of the consultancy services provided, which the AA had benefited from. This was determined based on the court's view of what a reasonable person would expect to pay for such services.

DAZN Limited v Coupang Corp (2025)⁶

A binding contract was found in this case where FIFA, the sole owner of the broadcasting rights of the 2025 FIFA Club World Cup (CWC), licensed certain rights to DAZN Limited (DAZN), a UK streaming and entertainment platform, so authorising DAZN to sublicense them in different territories. Coupang Corp (Coupang), a South Korean e-commerce company, sought

⁶[2025] EWCA Civ 1083.



such a sublicense from DAZN for co-exclusive broadcasting rights to stream the CWC in South Korea. The negotiations were conducted through the exchange of various emails, WhatsApp messages and telephone calls between four key party representatives. Coupang maintained a binding contract had been reached in the process of these exchanges. Against the background of DAZN receiving a late, and substantially higher, third-party offer for the sub-licence, DAZN contended that the Coupang negotiations had only resulted in a non-binding agreement in principle.

Applying the legal principles taken from *Smit Salvage B.V.*⁷ to the parties' communications as a whole, Lord Justice Popplewell in the Court of Appeal agreed with the Commercial Court at first instance and found that DAZN and Coupang had reached an agreement by which they intended to be immediately and legally bound by the exchange of the two key emails. They constituted a valid offer and a clear acceptance.

Factors that supported this decision included that: (i) an agreement in principle on the essential terms of the deal as well as other more minor terms had been agreed in advance of the agreement on the price; (ii) it was common in the industry to reach an agreement on the terms of a deal orally or informally by WhatsApp, and then follow it up with a more formal step in an email; (iii) the language used in the key emails was consistent with offer and acceptance; (iv) subsequent communications from both parties confirmed that they both thought they had reached a binding concluded agreement; (v) indeed, DAZN suggested that Coupang should get on with marketing as soon as possible without waiting for the formalisation of a long form agreement; (vi) similarly, the absence of any "*subject to contract*" language further supported the notion that both parties intended to be legally bound, rather than it being conditional upon a formal signed contract; and finally (vii) the requirement of urgency in respect of the performance of the contract made it more likely that both parties intended to be immediately legally bound.

"Subject to contract"

An alternative way to address the issue of precisely when and how a binding contract is formed is to make such a contract conditional upon specific events, approvals or other formalities. In these situations, the draft contract is typically labelled "*subject to contract*" or a similar phrase. This was one of the relevant considerations in the following cases.

Southeaster Maritime v Trafigura Maritime Logistics Pte. Ltd, mv "Aquafreedom" (2024)⁸

The claimant, Southeaster Maritime, were the owners of a vessel, the Aquafreedom, (Owners), who were negotiating a four-year fixture with Trafigura (Charterers). Each party was represented by a broker (albeit from the same brokerage) and the negotiations took place by way of email, WhatsApp messages and telephone. Initial negotiations began on 25 January 2023, and a recap was circulated 5 days later. This recorded that conclusion of a binding charter was subject to: (a) "*As per previously agreed terms sub review both sides*"; and (b) "*Charterers management approval latest 2 working days after all terms agreed*". Negotiations continued with the Owners making an offer, which was initially rejected and met with counterproposals from the Charterers, before the Charterers sent the Owners an email on 6 February purporting to accept the Owners' offer as well as lifting its management approval subject. Viewing this as a 'stunt', the Owners

⁷[2024] EWCA Civ 260.

⁸[2024] EWHC 255 (Comm).

sent a withdrawal message via WhatsApp. They maintained that at no point did the negotiations result in a concluded charterparty, while the Charterers disagreed, alleging that a binding charterparty had been entered into, which the Owners had repudiated.

The High Court found that the Charterer's case had no realistic prospect of success, awarding summary judgment in favour of the Owners. The court determined that the subjects in (a) and (b) above were condition precedents. Quoting from the judgment of *Goodwood Investments v Thyssenkrupp Industrial Solutions (2018)*⁹, the judge described the meaning of "subject to contract" as well-known, adding that "What it means is that (a) neither party intends to be bound either in law or in equity unless and until a formal contract is made; and (b) that each party reserves the right to withdraw until such time as a binding contract is made."

The judge also quoted from the leading judgment in the Court of Appeal decision in *Generator Developments Ltd v Lidl UK (2018)*¹⁰ where Lord Justice Lewison said that "in short a 'subject to contract' agreement is no agreement at all ...". This decision is also interesting because of the

Charterer's attempts to argue that the WhatsApp message sent by the Owners on 6 February should "in some way be disregarded, or is somehow of less significance" because it was sent by this medium. This was rejected by the court where the judge noted that there was nothing to suggest in this case that WhatsApp could not be used for the negotiations and a number of important points had been conveyed by WhatsApp.

It is also a salutary reminder that the informality of WhatsApp and other instant messaging services does not prevent them being sufficient to create binding obligations on the parties involved.

Jaevee Homes Ltd v Fincham (trading as Fincham Demolition) (2025)¹¹

This case also concerned the creation of a contract shared via WhatsApp messages, though this time in the context of a construction contract. The parties had exchanged messages on 17 May 2023, which set out the scope, price and payment terms for the works. Although the exchange was informal, it "evidenced and constituted a concluded contract" and there was no indication that these terms were "subject to contract" or further conditions. As a result, a contract, which was subsequently shared by email, was considered by the High Court to be an attempt to incorporate terms into an already existing contract. However, because the judge found that there was no acceptance of these further terms by Fincham, it was deemed irrelevant.

⁹[2018] EWHC 1056 (Comm).
¹⁰[2018] EWCA Civ 396.
¹¹[2025] EWHC 942 (TCC).

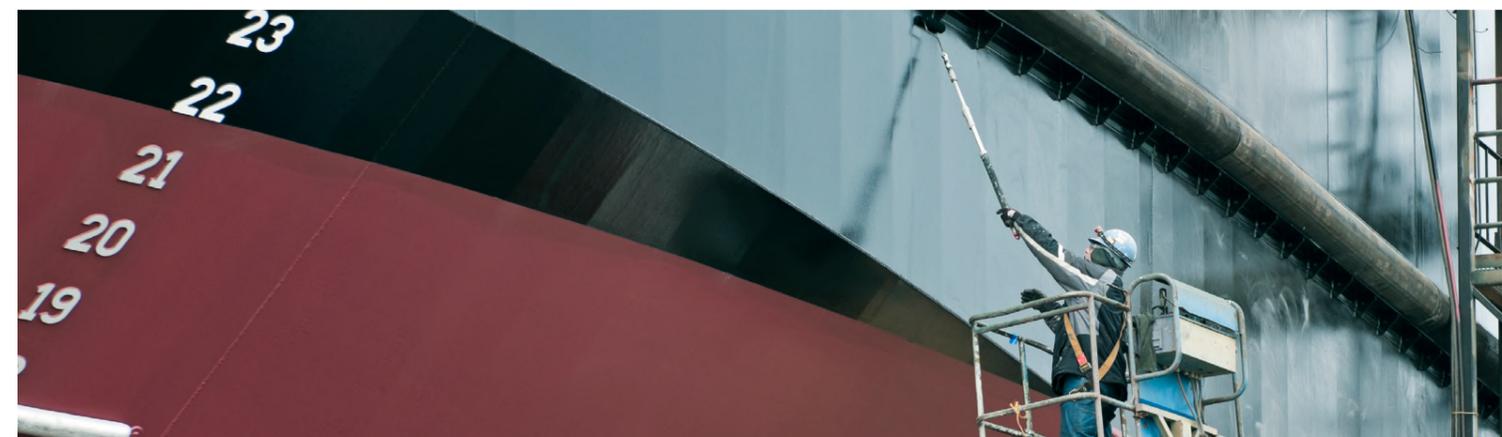
Letters of Intent / Agreements to Agree

One way that parties can seek to address the uncertainties that can arise prior to a full shipbuilding contract being signed is by entering into a letter of intent or heads of terms in which they record their mutual understanding for the basis of the shipbuilding contract. As these recent examples illustrate, however, such agreements are often no more than statements of intent and the English courts will generally not enforce a bare agreement to agree, unless there is an objective criteria or machinery for resolving any disagreement between the parties. If one party had relied on such a document as providing it with some certainty, it can be a shock to find it is not worth the paper it was printed on.

Pretoria Energy Company (Chittering) Limited v Blankney Estates Limited (2023)¹²

Pretoria wanted to build and operate an anaerobic digestion plant on a site owned by Blankney. The parties entered into "heads of terms" which, amongst other things, recorded that the parties had agreed that there would be a lease term of 25 years, which was to be outside the Landlord and Tenant Act 1954, and rent of £150,000 per year. It also provided that a formal agreement would be drawn up within one month of planning permission being granted and that there was an eight-month lock-out provision. Although planning permission was subsequently granted and a draft lease prepared, a lease had not been signed after 12 months so Blankney entered into alternative arrangements with a third party.

Pretoria commenced a claim for breach of contract and the parties disagreed on whether the terms concerning the grant of a lease in the Heads of Terms were sufficient to constitute a binding contract. The Court of Appeal found that the parties had not entered into a binding agreement for a lease. In doing so, it noted that in *RTS Flexible Systems Ltd v Molkerei Alois Mueller GmbH & Co KG (2010)*¹³, Lord Clark had said that the relevant question was whether the communications between the parties had "... [lead] objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations." The parties had expressly stated that a formal contract would be drawn up, and key provisions, which were not present in the Heads of Terms, would need to be addressed because this was a lease. The court did accept however that certain terms contained in the Heads of Term were binding, including the lock out provision - although this had since expired.



¹²[2023] EWCA Civ 482.
¹³See above.



Cohen and others v RiverRock European Capital Partners LLP and another (2025)¹⁴

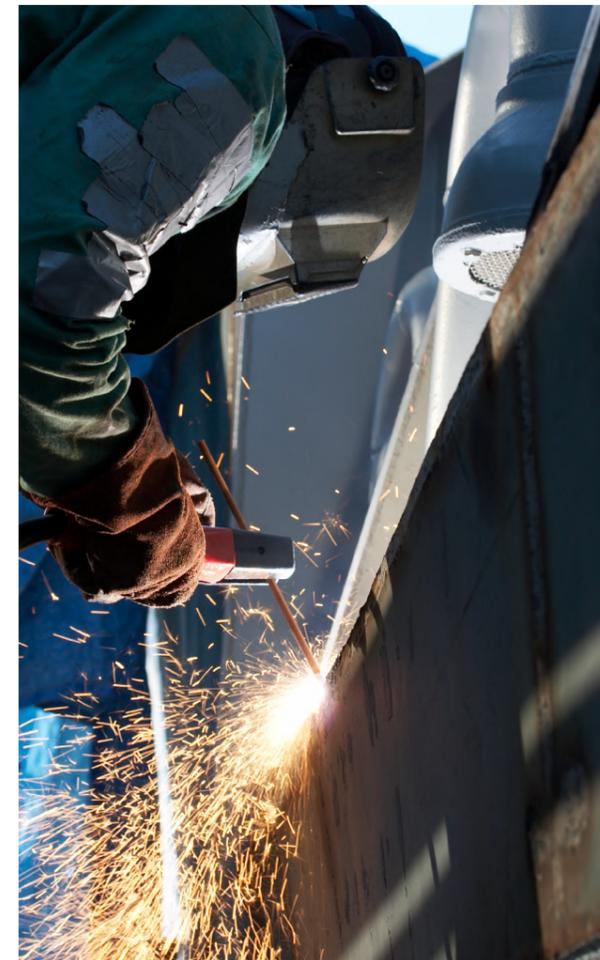
This case concerned a memorandum of understanding (MOU) entered between the claimants and the defendants to enable a cash injection into the defendants. The claimants later demanded repayment, pursuant to the terms of the MOU. Because the parties had not entered into further documentation contemplated by the MOU, the court had to decide whether the repayment terms within the MOU were enforceable.

The High Court considered the construction of the repayment regime. This was included in the MOU, which was headed “*subject to contract*” on every page. The MOU recorded that it was “*legally binding and is intended to create contractual obligations on the parties*” and “*the payment obligations ... are legally binding and not subject to ... Final Documentation*”. In the judge’s opinion, the payment obligations were “*sufficiently certain and complete to constitute or contain a legally binding repayment obligation*” and were “*self-sufficient*”. This he considered was “*a powerful indicator against it being subject to contract*.”¹⁵ The judge also acknowledged that it is possible for a legally binding contract to contemplate its own replacement by a fuller or more formal document in the future.

KSY Juice Blends UK Ltd v Citrosuco GmbH (2025)¹⁶

Another case recently considered by the Court of Appeal concerned whether a contract concluded in 2018 for the sale of orange pulp wash to be supplied over three years contained an “*agreement to agree*”. The contract provided for the delivery of 1,200MT of orange pulp wash (referred to as Wesos) per year, as well as the overall price to be paid over three years. However, it only stipulated the price for the first 400MT per year. The price for the remaining 800MT was to be “*at open price to be fixed latest December of the previous year*”.

There was no dispute that a binding contract existed between the parties. However, they disagreed on whether the contract for the sale of the additional 800MT of orange pulp wash was enforceable or a mere agreement to agree. The High Court¹⁷ found that the terms related to fixing the price for the additional orange pulp wash amounted to an agreement to agree. It declined to imply a term to address the price for the excess quantity, reasoning that the parties’ bargain was not destroyed, as there was still a contract for the sale of 400MT per year.



¹⁴[2025] EWHC 845 (Comm).

¹⁵See above.

¹⁶[2025] EWCA Civ 760.

¹⁷[2024] EWHC 2098 (Comm).

The Court of Appeal, however, allowed an appeal from the High Court's decision. It considered the starting point was the parties' intention to reach a binding agreement for the full quantity of pulp wash contemplated by the contract. Further, both parties were perfectly familiar with the trade, and the contract had provided a mechanism for deciding most of the elements of their long-term agreement. Applying the tests from the previous authorities, including *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD (No.1)* (2001)¹⁸ and *BJ Aviation Ltd v Pool Aviation Ltd* (2002)¹⁹, the Court of Appeal held this was a contract that it should strive to uphold. As the parties had agreed the overall price to be paid for all the pulp wash to be supplied over three years, as well as the minimum quantity to be supplied each year, the case for seeking to avoid the contract failing as to two-thirds of the quantity was compelling.

While there was no transparent market for orange pulp wash, there was a related market for frozen concentrated orange juice, which was comparable in terms of price. Therefore the court held that the contract was enforceable in its entirety and that, in respect of the portion of Wesos for which there was no agreed fixed price, "a term is to be implied to the effect that the price of Wesos ... was to be fixed, in the absence of agreement, as a reasonable or market price." The court considered, however, that the position would have been different if it had been difficult to ascertain a reasonable or market price for the pulp wash.

Allocation of the Design Risk

A newbuild contract may expressly address the allocation of responsibility for a vessel's design and this is commonly borne by the builder. Buyers generally reserve approval rights over design plans, but this will not ordinarily shift liability for design from the builder to the buyer (as is expressly recorded in BIMCO's NEWBUILDCON). Where the vessel is to be built in accordance with the buyer's design, a builder may refuse to provide a warranty in respect of the buyer's operational requirements but instead only agree to construct and assemble the vessel in accordance with the plans and drawings provided by the buyer.

Standard forms, such as the one published by the Shipbuilders' Association of Japan in 1974 and known as the SAJ form, are silent on design responsibility. Where this is the case, the builder will likely assume responsibility for the design of the vessel and ensure that it complies with the agreed specifications and applicable standards as part of its requirements to execute its obligations with good workmanship.²⁰ Unless tailored provisions are inserted, the default position is likely to apply and the builder remains responsible.

The court's approach to design responsibility in other sectors, which is largely reflective of the position in respect of shipbuilding contracts, is illustrated in these recent cases.

BNP Paribas Depository Services Ltd & Anor v Briggs & Forrester Engineering Services Ltd (2024)²¹

BNP Paribas Depository Services Ltd (BNP) engaged Briggs & Forrester Engineering Services Ltd (B&F) under a design-and-build contract to replace a stair pressurisation system in an office tower, in the knowledge that asbestos was present.

¹⁸[2001] EWCA Civ 406.

¹⁹[2002] EWCA Civ 163.

²⁰*Aktiebolaget Gotaverken v Westminster Corporation of Monrovia and Another* [1971] 2 Lloyd's Rep. 505.

²¹[2024] EWHC 2903 (TCC).

A dispute arose over whether B&F was obliged to undertake further asbestos refurbishment surveys beyond those identified pre-contract and to carry out all resulting removal works, including outside the originally scoped areas. B&F maintained its obligations were limited to asbestos identified in a subcontractor's quotation derived from the initial survey, with any additional works requiring formal instructions and variations. BNP contended that further surveys and removal were inherent in the contractor's design-and-build obligations. After further asbestos was found, B&F suspended and terminated. BNP treated this as repudiation.

The High Court held that B&F bore responsibility for delivering a fully compliant system, which encompassed undertaking further surveys and all necessary asbestos removal. Three contractual features were decisive: (i) a bespoke risk allocation clause requiring B&F to inspect and assume responsibility for known and unknown site risks, excluding reliance on employer information and any entitlement to additional time or money for unforeseen conditions, including asbestos; (ii) employer's requirements stating removal "included, but was not limited to" identified asbestos; and (iii) a general obligation to complete the works in compliance with statutory requirements.

As a result, the court concluded that the design responsibility extended beyond drawings and calculations to all investigations and compliance steps necessary to achieve a lawful, functioning end product. The case illustrates that contractors cannot not rely on employer-provided information unless the contract expressly permits it.

Workman Properties Ltd v Adi Building and Refurbishment Ltd (2024)²²

The position as to design responsibility was not as clear in this case where the employer's requirements contained contrasting bespoke clauses as to which party was responsible. Paragraph 1.4 stated that the contractor, Adi Building and Refurbishment Ltd (ABR) would be "fully responsible for the complete design, construction, completion, commissioning and defects rectification of the Works" and that "significant design has been developed to date ... taken to end of RIBA Stage 4 with some parts of contractor specialist design elements together with Services design to Stage 4(i)." By contrast, paragraph 1.5 required the contractor to "review the current design development to ensure that the employer's requirements were met."

ABR argued that the second part of paragraph 1.4 amounted to a warranty by the employer, Workman Properties Ltd (Workman), that the design had already been completed to RIBA Stage 4 / BSRIA Stage 4(i). However, the court rejected this argument. The judge held that all relevant contract terms, apart from the second part of paragraph 1.4, strongly favoured the employer's interpretation. The relevant wording in paragraph 1.4 was not sufficiently clear to override the other express clauses placing design responsibility on the contractor. The contractor therefore remained responsible for verifying and completing the design to the required stage and proceeding otherwise was at its own risk.

²²[2024] EWHC 2627 (TCC).



John Sisk & Son Ltd v Capital & Centric (Rose) Ltd (2025)²³

Another case before the High Court concerning design liability highlights the need to ensure consistency between documents when it comes to allocating design responsibility and that care should be taken when contracts are compiled electronically. The case concerned the construction of two new residential buildings together with repairs and refurbishment of other buildings. A dispute arose as to which party bore the risk of additional cost and delay arising from the state of existing structures.

Bespoke clauses in the contract appeared to place the risk on the contractor. As the employer gave no warranty regarding site condition or surveys, the contractor was deemed to have inspected the site and had accepted responsibility for the suitability of existing structures, even if information provided by the employer was inaccurate. However, those clauses were made subject to the employer being required to insure the existing buildings and obtain a warranty regarding their suitability, which was labelled “*Employer Risk*.”

Unlike the hard copy of the contract, the electronic version also included an unexecuted “*tender submission clarifications*” worksheet, which had allocated the risk to the contractor. The court found that this was not incorporated into the executed version of the contract and that pre-contract negotiations and “*tender submission clarifications*” were both inadmissible and irrelevant to interpretation. As such, on balance, the court held that the existing structures risk was allocated to the employer.



²³[2025] EWHC 594 (TCC).

Financing the Newbuilding

The United Kingdom once held a dominant share in the global commercial shipbuilding market, which explains in part the extensive use of English law in shipbuilding contracts. Now the UK accounts for under one per cent of the commercial shipbuilding globally. In recent years, the UK’s commercial shipbuilding industry has focused on production of smaller vessels.

To support the industry’s growth, the UK Government, in particular the UK Department for Business and Trade (UKDBT) working together with UK Export Finance (UKEF), has introduced several support schemes that are either aimed at or accessible to the commercial shipbuilding sector. These support schemes include the General Export Facility (GEF), the UK Shipbuilding Credit Guarantee Scheme (SCGS) and the Bond Support Scheme (BSC).

Both GEF and SCGS are partial guarantee schemes which can offer lenders an additional layer of protection against non-payment in the provision of finance for shipbuilding orders in the UK. Similarly, BSC offers a partial guarantee to an insurer underwriting a contract bond in an export contract won by a UK exporter. Contract bonds are contractual guarantees given by exporters to offer importers the additional protection that they will be financially compensated for consequential losses that may arise out of the fulfilment of the export contract.

UK Shipbuilding Credit Guarantee Scheme

Launched in July 2023, SCGS is a sector-specific guarantee scheme with wide coverage, including the issuance of guarantees for newbuilds, as well as retrofits, refits and repairs on existing vessels. The inclusion of refits and repairs of existing vessels suggests that the scheme would apply in cases where vessel owners are seeking to transition their vessels towards net zero.

The scheme provides a partial guarantee against non-payment of the instalments of the principal amount and interest due under the guaranteed loan for up to 80 per cent of the full contract price for a maximum repayment period of up to 12 years. The premium payable for the guarantee is determined on a case-by-case basis and details of when the guarantee will be triggered have not been released.

Following the change in government last year, we understand that the SCGS will be reviewed, at which stage hopefully full details of the eligibility criteria will be clarified. At present these include the following requirements: (i) the shipyard must be carrying on business in the UK; (ii) the bank making the loan must be acceptable; and (iii) the underlying financials and contractual structure must be acceptable.

We have already written on the limits of this scheme, and the fact that it is unlikely to provide much of a boost to British tonnage.²⁴

A scheme guaranteeing the repayment of lenders, rather than providing refund guarantee support, will not provide comfort to owners, who are typically required to provide substantial initial instalments to shipbuilders and who will (as “non-lenders”) fall outside the scope of the SCGS.

²⁴See press release, [New UK Shipbuilding Credit Guarantee Scheme - July 2023](#) (15 August 2023).

This is particularly significant given that the UK regulatory apparatus does not allow for the registration of a vessel under construction, which might otherwise provide some (albeit limited) comfort to an owner in the event of insolvency and bankruptcy of the shipyard.

It is therefore unsurprising that, following a reply to a Freedom of Information Act request, we can now confirm that UKEF had not yet received any applications or issued any guarantees under the SCGS by August 2025.

General Export Facility

Launched in December 2020, GEF is designed to aid small and medium-sized enterprises (SMEs) in exporting their goods and services overseas. An SME is classified as any organisation that has fewer than 250 employees and a turnover of less than £44 million or a balance sheet total of less than £38 million.

The scheme is intended to help UK exporters access bank facilities, typically worth up to £25 million, without the need for an export contract. The guarantees can cover up to 80 per cent of the credit risk for a maximum repayment term of up to 5 years. GEF is available with a wide range of facilities including cash facilities such as trade loans and contingent obligation facilities such as bonding and letter of credit lines.

To access the scheme, exporters have to satisfy the relevant bank's and UKEF's criteria. As the principal requirement, an exporter must be able to declare that: (i) in any one of the last three financial years, at least 20 per cent of their annual turnover has been made up of UK export sales; or (ii) in each of the last three financial years, at least 5 per cent of their annual turnover has been made up of UK export sales. Additionally, the exporter must declare that: (i) they have premises and employees in the UK; (ii) they pay UK or Isle of Man/Channel Islands National Insurance Contributions or Corporation Tax; (iii) their deliverables would qualify for a UK Chambers of Commerce Certificate of Origin; and/or (iv) they do not solely engage in the supply of goods that have been manufactured outside of the UK or services where the person contracted to perform the services ordinarily carries on business outside the UK.

The facility is obtained from a bank participating in the scheme. There are currently ten participating lenders listed on the government's website. Lenders relying on the guarantee have to pay a fee to UKEF which is calculated based on the interest margin paid by the exporter to the lender in question.

GEF is available and has recently been used in relation to shipbuilding contracts involving:

- Alicat Workboats and Marine Specialised Technology Group, who obtained a £2 million financing package from Virgin Money for a contract to build offshore wind workboats.²⁵
- Marine Specialised Technology Group, who obtained a £5 million facility from NatWest for contracts to manufacture inflatable and high-speed workboats.²⁶

²⁵See press release, [Norfolk boat building wins major offshore wind contract with government backing](#) (7 October 2024).

²⁶See press release, [UKEF support helps UK boat manufacturer charter new waters](#) (13 June 2023).



Force Majeure

Shipbuilding contracts will, invariably, contain Force Majeure (FM) clauses which provide for the consequences following such events (typically an entitlement for the Builder to postpone the contractual delivery date). Often, such as in Article 34 of the NEWBUILDCON Form, these clauses provide that the party claiming relief under the FM clause must have made all reasonable endeavours/efforts to overcome the relevant event.

Welcome clarification from the Supreme Court last year has confirmed that FM clauses which provide that an event must not be capable of being overcome by reasonable endeavours do not require a party to accept non-contractual performance (even where it would cause no detriment) unless there is clear wording requiring it.

RTI Ltd v MUR Shipping BV (2024)²⁷

RTI and MUR entered into a Contract of Affreightment (COA) which required RTI to make freight payments to MUR in USD. RTI's parent company was sanctioned, which MUR claimed relieved it from the requirement to make payment. RTI claimed that the payment issue was capable of being overcome by reasonable endeavours, by RTI paying MUR in Euros, which would be converted to USD by MUR, with RTI covering any conversion losses. It argued that this meant MUR could not invoke the FM clause so as to avoid paying freight.

The lower court decisions

RTI commenced arbitration proceedings – claiming that MUR was in breach of contract by suspending performance because the FM clause was not engaged. The Tribunal agreed, holding that the exercise of reasonable endeavours required MUR to accept a “*completely realistic alternative*” - payment in Euros.

The award then ping-ponged up through the different levels of the court. The High Court upheld MUR's initial appeal - finding that reasonable endeavours did not require MUR to “*sacrifice their contractual right to payment in US dollars, and with it their right to rely upon the force majeure clause.*”²⁸

RTI were then, in turn, successful in appealing to the Court of Appeal. The majority held that the reasonable endeavours required MUR to accept alternative performance, where it caused no “*adverse consequences*” or “*detriment*”.²⁹ This decision then fell to be considered by the Supreme Court.

What did the Supreme Court say?

The Supreme Court preferred the decision of the High Court, unanimously finding that a reasonable endeavours requirement does not require a party to accept non-contractual performance because:

1. Reasonable endeavours wording in FM clauses consider whether the event causing a failure of *contractual* performance could not have been avoided. They are geared towards whether *contractual* rather than *alternative* performance was possible.
2. Freedom of contract entails the right to refuse non-contractual performance.
3. The interpretation by the Court of Appeal (and Tribunal) would result in MUR forgoing its right to pay in accordance with the contract - clear words would be required to forego such rights.
4. Considerations of whether alternative performance would cause detriment would engender significant, undesirable, commercial uncertainty.
5. Parties could, if they wanted (by very clear words), provide that alternative performance should be considered by the other party.

The court reached this decision as a general “*matter of principle*”, such that the reasoning will apply to reasonable endeavour provisos (whether express or implied) in FM clauses generally.



²⁷See above.
²⁸MUR Shipping BV v RTI Ltd [2022] EWHC 467 (Comm).
²⁹MUR Shipping BV v RTI Ltd [2022] EWCA Civ 1406.

Notice Requirements

The NEWBUILDCON provides in Clause 39(a)(ii) that, before a buyer can terminate a shipbuilding contract due to the builder's failure to "perform any of the work relating to the construction of the Vessel", it must serve a notice allowing the builder a set number of days to remedy its breach. It is only if the builder "fails to remedy its breach" that the buyer can serve the termination notice. There is no similar provision in the SAJ form.

The Court of Appeal recently considered two such termination clauses. The first entitled a party to terminate for material or persistent breaches where a breach that was "capable of remedy" had not been remedied within a specified period following notice of the breach. The second illustrates that the failure to comply with the notice requirements in such a clause – depending on the drafting of the relevant agreement – can bar claims completely. However, as the third case (which is a Commercial Court judgment) illustrates, this is only likely to be the case where there is a time bar.

Kulkarni v Gwent Holdings Limited & Another (2025)³⁰

A dispute arose between a company and its two shareholders – Mr. Kulkarni and Gwent Holdings Limited (**Gwent**) – in relation to the shareholders' agreement (**SHA**). Clause 7 of the SHA provided for compulsory transfer of shares in certain circumstances including: "(d) the Shareholder committing a material or persistent breach of this agreement which, if capable of remedy, has not been so remedied within 10 Business Days of notice to remedy the breach being served by the Board (acting with Shareholder Consent)." Mr. Kulkarni brought proceedings against Gwent and the company in respect of four breaches relating to the allotting of A and B shares, a purported termination and failure to recognise the appointment of a director of the company. Mr. Kulkarni sought declarations that each of these breaches engaged the compulsory transfer of shares under Clause 7 of the SHA, notwithstanding that the board had not served a notice requiring Gwent to remedy its breaches.

In dismissing the appeal, the Court of Appeal found that where a "material or persistent" breach is capable of remedy, Clause 7.1(d) requires service of a notice to remedy and failure to cure within 10 business days before the transfer mechanism was engaged. In reaching their conclusion, the court determined that the common law consequences of a repudiatory breach are not relevant in determining whether a breach is "capable of remedy" under a contractual regime and therefore, subject to the terms of the contract, it is possible to cure a repudiatory breach.

As to what is meant by "capable of remedy", the court considered that the question to be answered is whether the mischief caused by the breach can be redressed and put right for the future as a matter of common sense and practicality because "remedy" means to cure going forward. It does not require undoing all past effects. However, the court accepted that for breaches, such as where confidential information has been disclosed, this is not possible due to the enduring prejudice resulting from the breach.

³⁰[2025] EWCA Civ 1206.

Finally, the court also accepted that, as a matter of construction, the cure period informs remediability and a breach that cannot be cured within that timeframe will generally not be "capable of remedy" under the clause. However, the cure period runs from service of the notice to remedy and where no such notice is served, as was the case here, the time limit for remediation did not start.

Drax Smart Generation Holdco Limited v Scottish Power Retail Holdings Limited (2024)³¹

Scottish Power sold shares in a company known as VPI Power Limited (VPI Power) to Drax. One of the assets of VPI Power was a site in Kent, which was a potential location for a new gas power station. However, connecting to the national electricity grid was most easily achieved through an adjacent site owned by a third party. The share purchase agreement therefore contained warranties, which stated that VPI Power had the benefit of an option to acquire an easement over this site. However, upon completion of the sale, it came to light that VPI Power did not have the benefit of such an option.

Subsequently, Drax brought a claim against Scottish Power for breach of that warranty. It originally framed its quantum by reference to loss which would be suffered by VPI Power and used this logic when serving notice of its claim and in its subsequent Particulars of Claim. Drax later amended its pleadings to change the basis of its claimed quantum to the reduced value of the shares it held in VPI Power.

In applying for summary judgment, Scottish Power asserted that Drax's claim, as amended, had no real prospect of success. It argued that Drax had not sufficiently stated the "nature of the claim and the amount claimed" in its notice of claim under the contract because it had not gone onto claim quantum on the same basis.

The relevant clause provided that "... the Seller shall not be liable for a claim unless the Buyer has notified the Seller of the claim, **stating in reasonable detail the nature of the claim and the amount claimed** (detailing the Buyer's calculation of the Loss thereby alleged to have been suffered)".

The Court of Appeal, overturning the High Court's decision, considered that Drax was not forestalled by this clause. The court endorsed comments by Lord Justice Popplewell that the commercial purpose of notice of claim clauses was to "enable the recipient to make such inquiries as it is able ... with a view to gathering or preserving evidence; to assess so far as possible the merits ... and to take into account the nature and scope of the claim in its future business dealings ..." ³² and considered that the requirements of such provisions should be viewed in light of this purpose, at least where general words like those in the immediate clause were used.

In this case, Drax had provided sufficient information to Scottish Power for the purpose of the clause to be fulfilled. Lord Justice Males considered that the "nature of the claim" was straightforward and "under the terms of the Agreement, the Company ought to have had the benefit of the Damhead Creek II Option Agreement, but did not". A genuine estimate of loss was included in the notice, but there was nothing in the clause that required Drax to specify the

³¹[2024] EWCA Civ 477.

³²*Dodika Limited v United Luck Group Holdings Ltd* [2021] EWCA Civ 638.

“the parties would have had to spell this result out much more clearly than they have in this contract ...”

manner by which it now quantified its loss in proceedings. The court concluded that “*To impose such a requirement serves no commercial purpose and merely introduces a trap to defeat what may be a valid claim.*”

Aviation Saudi Arabian Airlines Corporation v Sprite Aviation No. 6 DAC (2024)³³

Separately, *Saudi Arabian Airlines v Sprite Aviation*³⁴ concerned a clause under which the Lessee was to contribute to maintenance costs. Clause 7.2 provided that the “*Lessor will pay the following amounts to Lessee by way of contribution to the cost of maintenance of the Aircraft, upon receipt by Lessor, within six months after commencement of such maintenance and before the Expiry Date, of an invoice and supporting documentation reasonably satisfactory to Lessor evidencing performance of the following work by the Maintenance Performer...*”.

The Lessor claimed that the Lessee had not provided it with “*supporting documentation reasonably satisfactory...*” within six months of the work or by the Expiry Date (which was in August 2019). As such, the Lessor refused to reimburse the amounts claimed by the Lessee. This issue was referred for consideration as a preliminary issue.

While Mr. Hancock KC, sitting in the Commercial Court, was unable to provide a final view because of a lack of evidence on industry practice, his preliminary view was that the Lessee was not precluded from claiming the sums from the Lessor by virtue of providing the relevant documents late.

He considered that it would be a “*disproportionate*” result for the Lessee to be deprived of its right to reimbursement in these circumstances, suggesting that “*the parties would have had to spell this result out much more clearly than they have in this contract to lead to a result which I would regard as commercially unlikely*”. This was particularly the case given that the contributions would come from a pot that the Lessor had contributed to through the payment of supplemental rent, which was supposed to be for the purposes of meeting maintenance costs that would come about through the term of the lease.

He considered that it would be a “*disproportionate*” result for the Lessee to be deprived of its right to reimbursement in these circumstances, suggesting that “*the parties would have had to spell this result out much more clearly than they have in this contract to lead to a result which I would regard as commercially unlikely*”. This was particularly the case given that the contributions would come from a pot that the Lessor had contributed to through the payment of supplemental rent, which was supposed to be for the purposes of meeting maintenance costs that would come about through the term of the lease.

While this was a preliminary determination, the decision appears to reflect the concern raised in *Drax* about these clauses being used as a “*trap to defeat what may be a valid claim*”. Here, however, there was no contractual time bar to prevent the claim. Where a judge is of the view that it would be inequitable for a claimant to be deprived of their claim, we may see the court seeking to stretch wording to avoid this outcome or awarding damages to achieve the same outcome, depending on the circumstances.



³³[2024] EWHC 371 (Comm).
³⁴See above.

Termination

Where a party to the shipbuilding contract considers that a right to terminate has arisen, they will need to ensure that such a right has, in fact, arisen, and that they comply with the relevant contractual provisions in exercising that right. This may include serving the termination notice in accordance with the contract. A failure to do so can, as the case of *Thomas Barnes & Sons PLC (in administration) v Blackburn with Darwen Borough Council* illustrates, result in the termination being invalid.

Thomas Barnes & Sons PLC (in administration) v Blackburn with Darwen Borough Council (2022)³⁵

The dispute related to a contract for the construction of a bus station. Blackburn with Darwen Borough Council (Council) contracted Thomas Barnes & Sons (Claimant) to perform the works. Due to significant cost increases and delay to the project, the Council sought to terminate the contract on the grounds of contractor default.

Effective Method of Service?

In providing a termination notice to the Claimant, the Council was required to adhere to Clause 1.7.4 of the contract, which stated that “Any notice expressly required by this Contract to be given in accordance with this clause 1.7.4 shall be delivered by hand or sent by Recorded Signed for or Special Delivery post.” The Council initially sent their termination notice by way of email, which was deemed invalid. However, the Council subsequently served an additional termination notice, this time by post, constituting an acceptable method of service.

Does an Ineffective Termination Notice Amount to a Repudiatory Breach Under English Common Law?

The Claimant asserted that the Council’s ineffective attempt at terminating the contract amounted to a repudiatory breach. His Honour Judge Stephen Davies considered guidance from *Eminence Property Developments Ltd v Heaney (2010)*³⁶ as to whether conduct is repudiatory which provided that:

- It is whether, looking at all the circumstances objectively, the contract breaker has “clearly shown an intention to abandon and altogether refuse to perform the contract”.
- Whether there has been a repudiatory breach is highly fact sensitive.
- All the circumstances which bear on an objective assessment of the intention of the contract breaker, including motive, are to be considered.

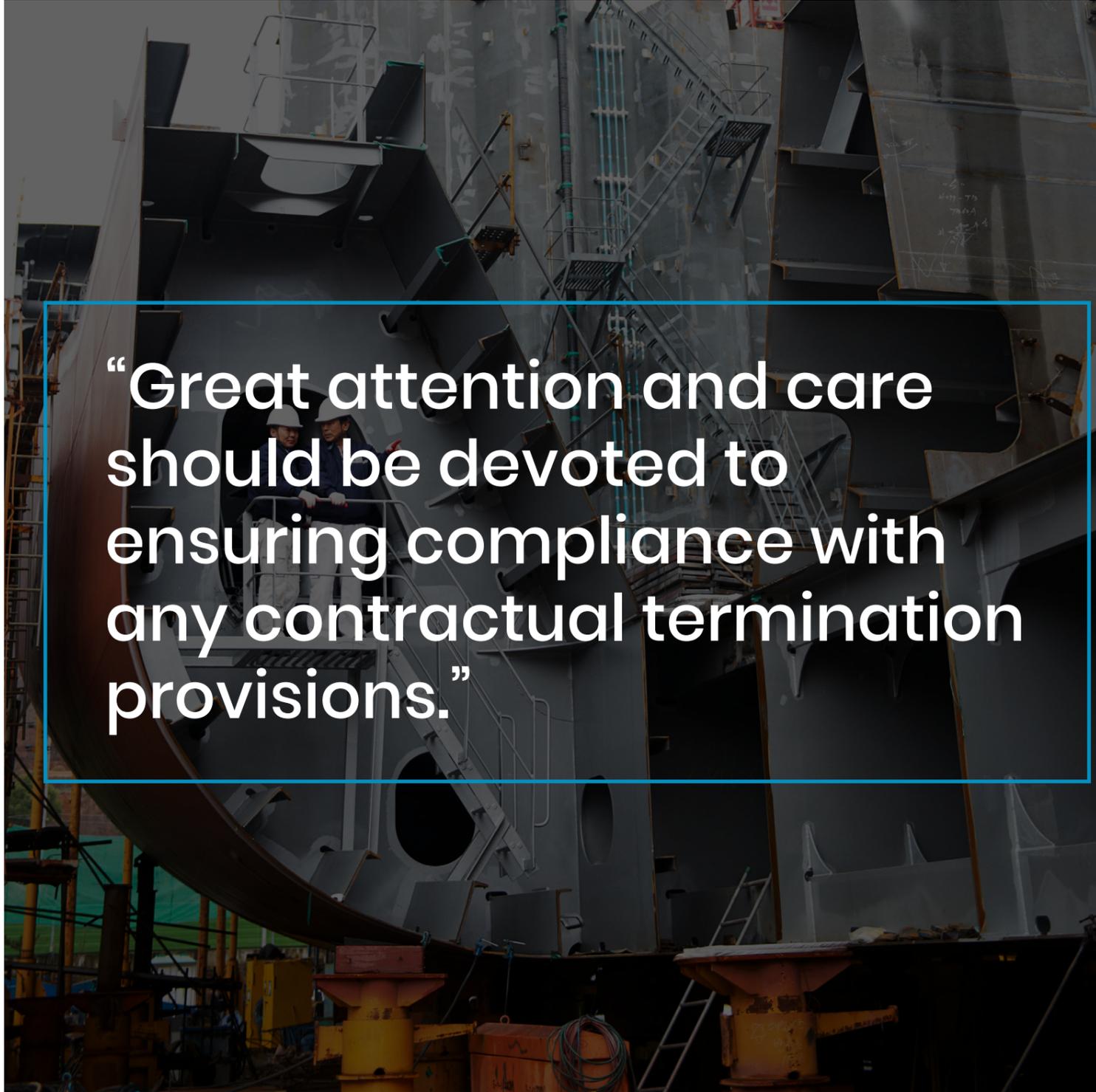
The court held that the Claimant had ceased to meaningfully perform activities prior to service of the termination notice. In addition, HHJ Stephen Davies stated that the Claimant must have known, objectively, that the Council was entitled to terminate under the contract, and that the Council was intending to terminate. Therefore, in these circumstances, the Council was not in repudiatory breach.

³⁵[2022] EWHC 2598 (TCC).

³⁶[2010] EWCA Civ 116.

³⁷Keating on Construction Contracts, 12th edition, at 11-003.

The case serves as an important authority for two reasons. Firstly, the risks and consequences for failing to comply with procedural contractual termination provisions can be extensive. Although the Council avoided liability for repudiatory breach following its invalid termination notice, it is well known that “a wrongful termination by the employer or its agent normally amounts to repudiation on the part of the employer”.³⁷ Therefore, great attention and care should be devoted to ensuring compliance with any contractual termination provisions.



“Great attention and care should be devoted to ensuring compliance with any contractual termination provisions.”

Furthermore, the court held that the Council's right to terminate at common law had arisen. The extent of poor performance, and/or delay necessary to give rise to a repudiatory breach is substantial, to say the least. Anything short of a performance "plagued by delays" and consisting of "serious and significant breaches of contract" is unlikely to amount to repudiation so as to discharge the innocent party from continuing any obligation to perform the contract.

It is also important for a party to understand the precise basis on which they are seeking to terminate the contract and whether that right to terminate has in fact arisen. A party that seeks to terminate a contract when this is not the case risks being in repudiatory breach itself and likely liable for damages to the other party. However, parties also need to be aware that if they wait too long, they may be found to have waived their right to terminate. These are both issues that were discussed in the following shipbuilding case.

Havila Kystruten AS v Abarca Companhia De Seguros, SA (2022)³⁸

The case concerned the termination of two shipbuilding contracts (Shipbuilding Contracts), entered into between Havila (Buyer) and Hijos (Builder). Under the Shipbuilding Contracts, the Builder was to design and construct two coastal passenger vessels for the Buyer at a price of €108M per vessel. The Shipbuilding Contracts provided for pre-delivery instalments to be made to the Builder, although the Buyer had the benefit of refund guarantees.

The dispute arose due to the Buyer's originally intended lender no longer being in a position to provide finance in line with the agreed structure of the project. In sourcing an alternative lender, the Buyer concluded a number of addenda to the Shipbuilding Contracts. Of particular relevance was Addendum 7, which required the Buyer to provide a "written, committed statement" of its financing for the vessels by an agreed deadline, failing which, the Builder would be entitled to terminate the Shipbuilding Contracts.

The Builder asserted that the Buyer did not comply with the provision contained in Addendum 7. While the Buyer provided a term sheet from its new lender, the Builder maintained that the obligation required providing executed loan documents evidencing the new financing arrangements.

As a result, the Builder purported to terminate the Shipbuilding Contracts. The Buyer argued that the Builder was not entitled to terminate and purported to terminate itself – seeking to recover pre-paid instalments.

Interpreting a Right to Terminate

The court found in favour of the Buyer. The Builder was not entitled to terminate the Shipbuilding Contracts such that its wrongful termination was, itself, repudiatory and entitled the Buyer to terminate. Pursuant to the principles of contractual interpretation summarised in *Arnold v Britton* (2015)³⁹ the court relied on the fact the Buyer did not know that the Builder's bank needed sight of executed loan agreements. As the fact was not known by both parties,

³⁸[2022] EWHC 3196 (Comm).
³⁹[2015] UKSC 36.

it was not relevant to the interpretation of the addendum. Furthermore, Mr. Justice Henshaw emphasised that "if the parties meant by the word "financing" that there had to be executed loan documents with funds ready to draw down, it would have been easy to say so."

Waiver of the Right to Terminate

Although the court held that the Shipbuilder was never entitled to terminate the Shipbuilding Contracts pursuant to Addendum 7, Henshaw J nevertheless considered whether the Builder's conduct and delay in exercising the termination right would have amounted to a waiver of the right.

As per *Stocznia Gdanska v Latvian Shipping* (2002)⁴⁰, where a party does nothing for too long, there may come a time when the law will treat him as having affirmed the contract. Rather unhelpfully, the length of period available to the innocent party in order to make up their mind will depend on the facts of the case. However, *Force India Formula Team v Etihad Airways PJSC* (2010)⁴¹ provided that factors which will be considered are any urgency involved and prejudice suffered by prolonged delay of a decision.

The court, relying on the aforementioned principles, held that the Builder's delay would have amounted to a waiver of the termination right, had it arisen. Termination would have been required "promptly", due to simultaneous ongoing negotiations aimed at fundamentally altering the commercial terms of the Shipbuilding Contracts.

The urgency and potential prejudice associated with delayed action pointed towards a shortened "reasonable time" in the present case.

The decision of Henshaw J serves as a timely reminder that parties must choose their words extremely carefully. As a default, language in a contract will be given its ordinary meaning and "be left to speak for itself without the need for any gloss or reinterpretation".

In addition, the courts do not adopt a one-size-fits-all approach in relation to waiving termination rights. The position of the parties will certainly influence what constitutes a reasonable period of time in the circumstances, and therefore great care should be taken by parties faced with considering whether to exercise such rights.



⁴⁰[2002] 2 Lloyd's Rep 436.
⁴¹[2010] EWCA Civ 1051.

Conditions Precedent to Effective Date Clauses

*King Crude Carriers SA and others v Ridgebury November LLC and others (2025)*⁴²

In the fifth edition of the book, we discussed the House of Lords decision in the Scottish case of *Mackay v Dick* (1881)⁴³ in the context of conditions precedent to Effective Date provisions. Many shipbuilding contracts contain a provision specifying that the contract will only become binding and effective on the parties upon the occurrence of a number of conditions precedent, which may include actions that must be taken by one of the parties.

Mackay v Dick has in the past often been interpreted as indicating that there is a principle of law that, where a party wrongfully prevents the fulfilment of a condition precedent, that condition is treated as being fulfilled, the “deemed fulfilment” principle.

On 12 November 2025, the Supreme Court clarified the position in its judgment in *King Crude Carriers*. This case considered three Norwegian SALEFORM 2012 Memoranda of Agreement (MOAs) to purchase three vessels. The MOAs required the Buyers to lodge deposits of 10 per cent of the purchase price with a third-party deposit holder shortly after the deposit accounts were opened, and to provide all the necessary documentation to enable the account to be opened. In breach of contract, the Buyers did not provide the documentation, so the deposit accounts could not be opened. The Sellers terminated the MOAs and argued that the *Mackay v Dick* principle of law applied and the Sellers could claim the deposit amounts as debts. The Buyers argued that the Sellers' sole remedy was in damages and that the Sellers had suffered no loss because the market price for each of the vessels was higher on the date of termination than the purchase price.

The Sellers' debt claim succeeded in arbitration, failed in the Commercial Court but succeeded before the Court of Appeal. The Supreme Court unanimously allowed the Buyers' appeal and essentially restored the relevant parts of the Commercial Court judgment. So the Sellers' claims were limited to claims in damages for any loss.

The Supreme Court concluded that the *Mackay v Dick* “principle of law” is not a part of English law.

As for the Sellers' alternative case that the deposit should be deemed due as a matter of contractual interpretation, the Supreme Court held that there is no general presumption of interpretation that a party cannot take advantage of its own wrong.

The Supreme Court did, however, refer to a number of authorities which held that, as a matter of construction, unless the contract clearly provides to the contrary, it will be presumed that it was not the intention of the parties that either party should be entitled to rely on its own breach of contract to avoid the contract, bring it to an end, or to obtain a benefit under it. The Supreme Court distinguished these authorities because these cases were all concerned with a claimed entitlement to treat the contract as being at an end or to obtain a benefit under the contract, and therefore they did not apply in the context of a condition precedent which, if satisfied, would give rise to an obligation of the party in breach.

As for the Sellers' second alternative argument that the Court should imply a term that the condition precedent would not apply if it was wrongfully prevented by the party in breach, the Supreme Court held that no such term should be implied.

So in light of *King Crude Carriers*, it is now clear that the so-called *Mackay v Dick* principle of law will not apply. The consequences of a wrongful failure to achieve a condition precedent will therefore be decided simply as a matter of construction of the contract. It is also likely that, in the context of a condition precedent to an Effective Date clause, when interpreting the contract, there will be no presumption that a party cannot take advantage of its own wrong. This is because the failure to achieve the condition precedent to an Effective Date clause will not bring the contract to an end, because the contract never became effective in the first place.

However, the position may be different if the parties have agreed a condition subsequent (i.e. although the contract has come into force, it will be deemed void if a condition has not been satisfied within a certain time period). In that case, it would seem that, when interpreting the contract, there would be a presumption that it was not the intention of the parties that either party should be entitled to rely on its own breach of contract to bring the contract to an end. If that presumption were applied, clear words would be required to rebut it.



⁴²[2025] UKSC 39.
⁴³[1881] 6 App Cas 251.

Limitations of Liability

While not included in the SAJ form, clauses which limit a party's liability for breach of contract (or a particular type of breach) to a specified sum (or percentage of the contract price) are sometimes included in shipbuilding contracts. They enable parties to avoid being exposed to potentially unlimited liability – helping to reduce the commercial risks inherent in the contract.

A common dispute arising from these clauses is whether they operate on an aggregate basis, meaning that the sum claimed (for the purpose of the cap) is cumulative and includes previous claims, or on a per claim basis, so that the sum claimed “resets” for each claim made and the total liability across all claims can therefore exceed the specified cap.

Drax Energy Solutions Limited v Wipro Limited (2023)⁴⁴

The consequences of either of these interpretations were on stark display in this case. Drax argued that its potential liability was (at most) one third of the sum claimed by Wipro because a limitation clause operated on an aggregate basis. Wipro, predictably, disagreed.

The limitation of liability clause read:

“33.2 Subject to clauses 33.1, 33.3, 33.5 and 33.6, the Supplier's total liability to the Customer, whether in contract, tort (including negligence), for breach of statutory duty or otherwise, arising out of or in connection with this Agreement (including all Statements of Work) shall be limited to an amount equivalent to 150% of the Charges paid or payable in the preceding twelve months from the date the claim first arose. If the claim arises in the first Contract Year then the amount shall be calculated as 150% of an estimate of the Charges paid and payable for a full twelve months.”

The Technology and Construction Court agreed that this clause operated to provide for an aggregate limit of Drax's liability.

Applying the normal principles of contractual interpretation, the first few lines of the clause (including the references to “total liability”) suggested that the cap was on an aggregate basis, and this could not be rejected as superfluous boilerplate language. Conversely, there was no reference to “each claim” in the clause, which one would expect if the clause operated on a per claim basis.

The fact that the clause limited liability by reference to when “the claim first arose” did not affect matters. On a true construction of the clause, the court found that “the claim” meant the first claim.

Provided that parties make it clear that a limitation clause is clearly expressed to operate on an aggregate basis, *Drax* shows that the court will be inclined to give effect to the parties' bargain.

This approach was subsequently followed by Mr. Justice Constable in *Tata Consultancy Services Ltd v Disclosure and Barring Service (2024)*.⁴⁵

⁴⁴[2023] EWHC 1342 (TCC).
⁴⁵[2024] EWHC 1185 (TCC).

EE Limited v Virgin Mobile Telecoms Limited (2025)⁴⁶

A further area of dispute relates to the interpretation of any clause which sets out the losses that are excluded from the builder's liability. The SAJ form and NEWBUILDCON both exclude “loss of profits”. The English courts recently looked at the interpretation of the phrase “loss of anticipated profits”.

Virgin Mobile (VM) had a contract with EE including an exclusivity agreement, which required VM to use EE for (virtually all) services provided to their users. EE argued that VM had breached that exclusivity agreement by moving their users to different providers and claimed damages for the sums that they would have received from VM as fees. VM, however, argued that a limitation clause, which said “neither Party shall have liability to the other in respect of: (a) anticipated profits”, meant that EE could not recover the sums claimed – even if they were correct that VM was in breach – because they were “anticipated profits” under the contract.

The majority of the Court of the Appeal accepted VM's argument. While EE's claim was formulated as a claim for lost charges, it could only have a claim for damages as a result of VM's breach of contract. Expectation damages for a breach of contract (which is what EE's claim was said to be for) were synonymous with loss of profits and so were excluded by the contract.

The court rejected the argument that this left the contract devoid of content because EE was left with no effective remedy, both because the contract contained a minimum revenue obligation and because of the availability of injunctive relief.

The applicability of this approach to commercial contracts more generally may, however, be open to doubt for three reasons:

1. There was a dissenting judgment by Lord Justice Phillips, who would have held that the contractual wording did not exclude EE's claim for anticipated profits because it meant that VM could breach the contract with very little consequence.
2. One of the reasons why the majority of the court upheld VM's argument was because there was a minimum revenue which VM needed to pay, regardless of how many people were on the network. This led to the court concluding that the “suggested incentive to VM to insulate itself from any duty to pay compensation by terminating for convenience was therefore illusory”. Such provisions are not, however, universal and – where they are not present – it is more likely that a court would accept that the incentive to breach would therefore be found.
3. The majority of the court thought that injunctive relief/an order for specific performance could also provide EE with appropriate relief. In more complex contracts, however, where greater cooperation between the parties is required, such orders are less likely to be available and so would not provide an effective remedy to the innocent party.

⁴⁶[2025] EWCA Civ 70.

The Nature of a Guarantee

One of the main questions which gives rise to disputes concerning guarantees is the nature of the guarantee – whether it is a “*see to it*” guarantee or an on-demand guarantee.

The importance of the distinction arises out of the difference in what a claiming party must demonstrate.

Under a “*see to it*” guarantee, the guarantor’s liability is secondary; they guarantee the performance by the principal counterparty and are only required to step in if the claiming party can demonstrate that the principal counterparty is in default. By contrast, an on-demand guarantee creates a separate primary obligation on the guarantor independent of the underlying contract which is payable whenever a demand complies with the requirements of the guarantee instrument, regardless of the underlying liability of the principal counterparty.

This has further consequences for contracting parties, as a “*see to it*” guarantee needs to comply with the requirements of section 4 of the Statute of Frauds 1677⁴⁷ in order to be binding. An on-demand guarantee on the other hand, creating a separate primary obligation and not guaranteeing the underlying obligations, does not need to comply with those requirements.

Popplewell LJ’s judgment for the Court of Appeal in *Shanghai Shipyard Co v Reignwood* (2021)⁴⁸ is now considered to be the “*go to*” recent authority on the construction of guarantees.⁴⁹ A number of recent judgments provide useful examples of the elucidation and application of those principles in the context of other drafting.

Chugga Chugg Pty Ltd v Prinvest Holding SAL (2025)⁵⁰

Chugga Chugg (Owner) entered into a shipbuilding contract with Nobiskrug (Builder), with a parent company guarantee in the amount of the first instalment⁵¹ being provided by Nobiskrug’s parent company – Prinvest.

The relevant sections of the guarantee provided that:

“1:... we hereby guarantee to you the due and punctual performance of all of the Builder’s obligations under the Contract up to ... €9,955,000....”

2. If an alleged breach or termination is uncontested by the Builder, we shall procure performance or pay as required, on first demand being made by the Owner. If the alleged breach or termination is contested by the Builder, we shall procure performance or pay as required against presentation of both (a) a final unappealable award in favour of the Owner ... and (b) a written demand by the Owner stating that the Builder is obliged to pay the amount(s) or perform the obligations referring to the relevant clause of the Contract and which the Builder did not pay or perform.

....

4(a) We agree that the Owner may proceed against us as primary obligor, without first pursuing the Builder, in the event the Builder defaults under the Contract (subject to the terms in Clause 2 above being complied with)

(b) We agree that our liability will not be affected by (i) the insolvency or liquidation of the Builder; (ii) any extension of time or forbearance that may be granted by the Owner under the Contract or any other related documents; (iii) any failure or election not to pursue any remedies the Owner may have against the Builder; ... or (vii) any matter or occurrence which but for this provision would operate to release or diminish our liability under this Guarantee.”

Dias J considered that this drafting created a “*see to it*” guarantee, so that Prinvest would only be liable as far as the Builder’s liability could be proved. This was for several reasons, including that:

- Clause 1 expressly provided that Prinvest was guaranteeing “*the due and punctual performance of all of the Builder’s obligations under the Contract*”.
- There were no words imposing primary liability on Prinvest. The only reference to “*primary obligor*” was to Clause 4(a), which simply made clear that (procedurally) the Owner didn’t need to pursue the Builder before pursuing the Guarantor.
- When a breach was disputed, the Guarantor would only be required to pay once the Owner obtained a “*final unappealable award*”. Dias J considered that the requirement that the award be final and unappealable suggested that the guarantee was “*not responding simply to the existence of the award, as a document, but rather to the award as reflecting an established liability*”.

The Owner’s argument that the guarantee was a demand guarantee, based on the reference to a “*written demand*” being required in Clause 2, was rejected. While a demand was required, this was “*not inimical to this being a surety guarantee of the “see to it” variety*” and it was “*difficult to see how in practical terms*” the guarantor could be expected to know they were obliged to pay without a written demand.

CE Energy DMCC v Bashar (2025)⁵²

Mr. Bashar gave a guarantee in his personal capacity for the benefit of CE Energy (CEE) to support a company he owned in purchasing cargoes of hydrocarbons (UOG). The relevant sections of the guarantee provided that:

“2.1 In consideration of CEE entering into the Payment Agreement, [Mr. Bashar] irrevocably and unconditionally:

2.1.1 guarantees to CEE the punctual performance by UOG of all of UOG’s payment obligations to CEE under the Payment Agreement, the Sale Contracts, New Spot Cargo 1 and New Spot Cargo 2;

⁴⁷Requiring that the guarantee be made in writing and signed.

⁴⁸[2021] EWCA Civ 1147. See [Law of Shipbuilding Contracts Update 2022](#) (5 January 2023) for our analysis of this decision.

⁴⁹While the decision was the subject of an appeal to, and heard by, the Supreme Court, the case was withdrawn by the consent of all parties prior to judgment.

⁵⁰[2025] EWHC 585 (Comm).

⁵¹The later instalments were, unusually, paid into escrow and only to be released at a later stage in construction.

⁵²[2025] EWHC 297 (Comm).

2.1.2 undertakes with CEE that whenever UOG does not pay any amount when due under the Payment Agreement, [Mr. Bashar] shall immediately on demand pay that amount as if the Guarantor were principal obligor, without any need whatsoever for CEE to have to obtain an award or judgment against UOG first ...”.

CEE argued that this drafting meant that the guarantee was a demand guarantee, so that Mr. Bashar was required to pay – as long as a good faith demand was made by CEE. Paul Stanley KC, sitting as a judge in the Commercial Court, rejected this for the following reasons:

- While Clause 2.1 referred to Mr. Bashar “irrevocably and unconditionally” providing the guarantee, which Popplewell LJ had considered in *Reignwood* to be suggestive of an on-demand guarantee, he did not consider this to be the case here. Instead, the judge thought that the wording was “of emphasis rather than definition”.
- What was being guaranteed “irrevocably and unconditionally” were “all of UOG’s payment obligations” (and Clause 3 of the guarantee, which was not excerpted in the judgment, was said to extend the guarantee to “sums payable by UOG to CEE”).
- While there was a reference to a “demand” in clause 2.1.2, this was (again) considered to form part of the mechanics for payment and the right to demand would only arise when there was an underlying liability.
- The fact that the guarantee was issued by Mr. Bashar personally did not change matters. While it has previously been said in some textbooks, particularly in *Paget’s Law of Banking*, that there was a “presumption” that guarantees issued by entities other than financial institutions were not demand guarantees, this “presumption” was expressly disapproved of in *Reignwood* and such disapproval was echoed by the judge here. The identity of the issuer did not give rise to a “presumption” but could fairly be considered to remain “a relevant point of context”.

Ocean Clap Shipping Limited v (1) Global Offshore Services BV; (2) Global Offshore Services Limited (Ben Nevis and Kailash) (2025)⁵³

In this case, involving guarantees provided by the parent company of charterers in respect of long-term bareboat charterparties, the guarantees were found to include two guarantees with different triggers, namely an on-demand guarantee and a “see to it” guarantee. The relevant sections of the guarantee provided that:

“2.1.1 The Guarantor irrevocably and unconditionally:

(a) guarantees to the Owner the due and punctual observance and performance of all the obligations of the Charterer under Bareboat Charterparty and the Security Documents and the due and punctual payment of all the Guaranteed Liabilities; and

(b) undertakes with the Owner that whenever the Charterer does not pay any amount of the Guaranteed Obligations when due, the Guarantor shall immediately on demand pay that amount as if it were the principal obligor ...”.

Mr. Justice Butcher, sitting in the Commercial Court, found that sub-clause (a) contained a “see to

it” obligation. He considered that this was a separate obligation from that contained in sub-clause (b), which contained an on-demand obligation. He also found that the use of “and” between these clauses was an indicator of separate obligations, which also made sense “grammatically and syntactically”.

When Can You Resist Paying Under a Guarantee by Claiming It Would Be Unlawful?

As guarantees provided in the context of shipbuilding contracts often involve parties based in multiple jurisdictions, there is the risk that a guarantor paying out could place them in breach of local proscriptions. With the increased use of sanctions in geopolitics and resurgence in capital controls in economies like India and China, the courts have handed down several judgments considering the issue.

This includes the following two cases:

- In *IDBI Bank Ltd v Axcel Sunshine Ltd (2025)*⁵⁴ the Commercial Court considered arguments made by a bank that paying \$143.7 million under a guarantee would contravene Indian law, which restricts Indian entities from guaranteeing the liabilities of India’s residents to non-residents.⁵⁶
- In *Litasco SA v Banque El Amana SA (2025)*⁵⁷ the bank sought to argue that they were similarly not obliged to make payment because it would be contrary to orders of the Mauritanian court. These arguments were both rejected.

Both guarantors sought to rely on the Court of Appeal’s decision in *Ralli Bros*⁵⁸, where the court accepted an exception to the general principle that the legality of a contract is determined by English law. This would be the case where the contract necessarily required performance in a place where that performance would be illegal. In *Ralli Bros* that meant that a charterer was excused from paying freight in excess of what Spanish law required.

However, in *IDBI v Axcel Sunshine* the court considered that this doctrine did not apply. That was because the Indian prohibition provided for a licensing regime, whereby such transactions could be permitted with the state’s endorsement. Drawing on the court’s decision in *Banco San Juan v Petroleos de Venezuela*⁵⁹, the court held that the doctrine was not available to the bank because it could not prove that it had made reasonable efforts to apply for and had been refused a licence.

The bank’s attempt to rely on the Mauritanian court’s orders in *Litasco v BEA* was also unsuccessful, including for the same reason as in *IDBI*. The bank had been obliged to make payment since January 2022 and the court orders which it alleged prevented payment were only made two years later. As a result, the bank could have done something to avoid any illegality (including simply paying when it was required). Even if this was wrong, the court considered that illegality must be determined at the place of performance – which in the case of the payment to *Litasco* would be at the receiving bank in Switzerland. Therefore, Mauritanian illegality was irrelevant. Finally (and even if the previous two points were wrong), the rule in *Ralli Bros* was said to not encompass court orders. This was because the *Ralli Bros* rule was a part of the law concerning governing law, rather than the recognition of foreign judgments.

⁵³[2025] EWHC 1591 (Comm).

⁵⁴[2025] EWHC 442 (Comm).

⁵⁵The court also found that even though the document was labelled “letter of comfort”, this was “not determinative of its content” and that by construing the document as a whole it was found to be a promise of indemnity.

⁵⁶This facilitates external trade and payments and promotes the orderly development and maintenance of foreign exchange markets in India by precluding attempts to circumvent capital controls through the use of guarantees.

⁵⁷[2025] EWHC 312 (Comm).

⁵⁸*Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287 (CA).

⁵⁹[2020] EWHC 2937 (Comm).

About Haynes Boone

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