

## New Build Yacht Accepted with Work Outstanding



**Riva Bella S.A. -v- Tamsen Yachts considers the implications of signing a Protocol of Delivery and Acceptance where**

**there are defects with the vessel and the seller's obligations to meet the standards of a classification society nominated by the buyer.**

Riva Bella S.A. ("the buyer") entered into an agreement to purchase a partly constructed superyacht (MV "NAMASTE") from Tamsen Yachts ("the seller"). The yacht was intended to be used commercially.

The purchase contract provided that the yacht was to be flagged in the Isle of Man, and would be classed by RINA as "RINA Charter Class (MCA)" as originally intended by the seller. The contract also included a warranty that the yacht's speed would be 30 knots +/- 10%.

As the date for delivery approached, many aspects were unfinished and delay was inevitable. A survey was carried out by the Isle of Man Registry, and a number of issues would require rectification before the yacht could be commercially registered.

Despite this a Protocol of Delivery and Acceptance (PDA) was signed by the buyer's representatives and the yacht registered as a pleasure yacht so it could be used by the beneficial owner for the remainder of the summer season. It would then return to the shipyard to be completed and commercially coded.

During sea trials it was apparent that the yacht could not reach the speed set out in the contract.

In September 2008, the yacht was deleted from the Isle of Man Registry. The buyer decided to flag the yacht in Luxembourg, and it was granted a provisional certificate by the Luxembourg Registry.

The seller failed to meet the new requirements of the Luxembourg Registry for commercial registration, and the yacht was moved to another shipyard by the buyer where works were completed and commercial registration was granted by the Luxembourg Registry in September 2009.

The buyer commenced proceedings against the seller for damages for breach of contract. This included allegations of defective workmanship, and a breach of the speed warranty. Damages were sought for loss of earnings due to the seller's failure to meet the requirements of the LY2 Code and commercial registration.

The seller argued that in signing the PDA, the buyer had waived the right to bring legal proceedings. Further, all the deficiencies as required by RINA and the Isle of Man Registry had been rectified. The seller also argued that the speed warranty was never intended to have contractual effect.

It was held that signing the PDA did not preclude a claim for damages. Nor did the agreement to take delivery of the yacht in its incomplete state amount to a contractual variation. The important consideration was that the yacht was being delivered late, incomplete and unregistered: the PDA formed no more than a temporary convenience.

In assessing the speed warranty claim, the court ruled that the clause was to be read as a contractual warranty, but that there was an implicit margin for error. Although it was

probable that the yacht could not reach 30 knots, the court had not been convinced by the buyer's evidence. The aim was 30 knots and the final figure would be stated in the final report of RINA but the minimum speed was 27 knots. Since the buyer was unable to prove that the yacht could not reach 27 knots the claim failed.

In assessing the issue of classification, the court agreed with the seller's argument that the question was whether the yacht complied with the LY2 code as applied by RINA (or the Isle of Man) and the fact that a different flag has taken a different view should be irrelevant. The seller had rectified the issues listed by the RINA and the Isle of Man surveys, and had therefore met the requirements of "RINA Charter Class (MCA)." The only reason that the yacht did not immediately achieve commercial coding was due to the buyer's decision to change flag registry which had different requirements.

### Summary

Signing the PDA before a yacht has met the agreed specification clearly does not absolve the seller of its contractual obligations. However, if it is not signed before the yacht is completed any deficiencies should be carefully noted, together with the obligations and requirements for rectification. In addition, a sale contract should be carefully drafted to meet the needs of each transaction. Generic agreements are likely to result in disputes arising either during or after construction as to the meaning of the terms of the contract.

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