



COMPREHENSIVELY YACHTS
HFW YACHTING INDUSTRY BRIEFING



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The yachting industry continues to boom on all fronts and the volume of new building contracts, design contracts and sale and purchase transactions handled by the HFW yacht team shows no sign of abatement. We have been involved in a significant proportion of the largest new building and sale and purchase projects to come to market in 2021 and, though there are concerns in some quarters as to the sustainability of the current market, for now at least it remains all hands on deck to service demand.

As a firm we take seriously our commitment to environmental, social and governance (ESG) matters. We are proud to announce that since the last edition of *Comprehensively Yachts* we have launched our **Sustainability Initiative** which is active across all of the firm's core sectors and which saw representatives of the firm attend COP 26 and the International Chamber of Shipping led event, 'Shaping the Future of Shipping' in Glasgow last month.

We are engaged in the provision of legal services in support of a number of cutting-edge projects concerning alternative propulsion and sustainability and continuing our theme of ESG related content, we are pleased to begin this edition with a piece considering the emerging interest in hydrogen fuelled yachts, one of several alternative fuel sources currently gaining traction in yachting.

In light of two recent health and safety prosecutions in the UK to affect yachting, on page 3 we analyse the importance of always putting health and safety first and the potential implications of failing to do so. Next, on page 4 we look at the EU's recent decision to end the punitive duty currently levied on US built yachts entering the EU.

On page 4 we revisit the recently appealed case of *Holyhead Marina Ltd v. Peter Farrer & others* [2020] EWHC 1750 (Admlty) which has real implications for the marine insurance industry and in particular those who insure yachts and marine leisure infrastructure. Finally, with cyber security once again at the forefront of people's minds following several recent high-profile attacks on commercial operations, we consider again the subject of cyber insurance in yachting before wrapping up with a short piece on cyber risk management and our exciting partnership with cyber security specialists, CyberOwl.



Hydrogen - a green revolution in yachting?

With this briefing published hot on the heels of COP26 and the ongoing discussions at the IMO concerning maritime emissions, it will be no surprise that we start by asking what the yachting industry is doing to help in the fight against harmful emissions. Whilst arguably well placed to assist in a green revolution, the yachting industry has for many years been subject to criticism from environmentalists and others. It is therefore encouraging to note that the yachting industry is beginning to play its part in the research and development of the use of alternative fuels and new propulsion systems and that there are a number of exciting projects at varying stages of development and construction.

Hydrogen based propulsion systems are front and centre in this initiative. For some, the use of hydrogen is indelibly linked to memories of the 1937 *Hindenburg* disaster in which the German airship famously caught fire and was destroyed whilst attempting to dock in New Jersey. However, this is an out-of-date view and the technology has advanced enormously. We now have cars, buses, trucks, trains and even

aeroplanes and ferries powered by hydrogen fuel cells. As such, hydrogen and hydrogen fuel cells are now being actively considered for yacht propulsion systems.

In April 2021, Lürssen announced details of their first yacht to be powered by hydrogen fuel-cell technology. This is not just at the prototype or developmental stage, with Lürssen intending to bring online a 120kW methanol-hydrogen power plant at the shipyard to prove the technology. According to reports¹, Lürssen has teamed up with experts at the Freudenberg Group to develop the plant. Technical details are obviously closely guarded but in essence the plant is designed to convert methanol into hydrogen, which is then used in fuel cells to generate electricity. From a practical point of view, methanol is much easier and safer to handle and store than liquid hydrogen, with Lürssen noting that the fuel cells require little maintenance, are more efficient than a diesel engine and that the only by-product is water vapour.

Lürssen are not alone in this. Alongside a range of well-known research and development projects in the ferry industry, it was announced in March of this year that a 28m

Sunseeker Predator 95, formerly belonging to Muammar Gaddafi, had been purchased and was being converted to a zero-emission, hydrogen-powered yacht named *Hydrogen Viking* by the Norwegian shipyard Green Yacht². The aim is to demonstrate that the technology is commercially and economically viable and that even existing yachts can be retrofitted with green fuel-efficient technology.

When considered alongside the rapid improvements in battery technology, we expect many more new building projects to incorporate such technologies in the coming years. Indeed it is to be hoped that owners may also give serious consideration to the retrofitting of such systems to their existing yachts as and when appropriate.

Health and Safety First!

Two recent prosecutions of UK yacht builders by the Health and Safety Executive (the **HSE**) (the UK's national regulator for workplace health and safety) highlight both the continued dangers of working in shipyards and the duty held by shipyards, owners, managers and others to put the health and safety of employees, crew and visitors first at all times.

¹ <https://robbreport.com/motors/marine/lurssen-first-hydrogen-fuel-cell-superyacht-2025-1234608791/>

² <https://www.boatinternational.com/yachts/news/gaddafi-superyacht-hydrogen-viking-project>

“The removal of the EU tariff was announced during the recent G20 summit in Rome and will be welcomed by American yacht builders who have suffered a significant decline in EU sales since its introduction. The lifting of the EU tariff is currently scheduled to take effect from 1 January 2022.”

Both prosecutions related to lifting tasks which were found not to have been properly planned, risk assessed, appropriately supervised or carried out in a safe manner. They resulted in fines of £200,000 and £230,000 for the shipyards concerned.

Where an incident results in a fatality, those companies registered or operating in the UK can, in the most serious of cases, face prosecution under the Corporate Manslaughter and Homicide Act 2007, punishable by unlimited fines. In addition, the individual directors (or senior managers) of the company can be prosecuted for gross negligence manslaughter which carries a maximum sentence of life imprisonment.

The UK's Maritime and Coastguard Agency (the **MCA**) has similar powers to the HSE in relation to incidents occurring on UK-registered vessels, no matter where they are in the world and foreign registered vessels within UK waters.

As well as the criminal proceedings outlined above, shipyards, owners, managers and others who fail to uphold safety standards may face civil claims for damages for personal injuries from injured employees, crew or visitors or their respective estates and dependants in the event of a fatal accident occurring.

Given the potential sanctions, it is essential that shipyards, owners, managers and anyone else engaging personnel in potentially dangerous environments have in place robust safety management arrangements, including risk assessments and operating instructions. These must be regularly reviewed and updated as circumstances change, consistently followed and well documented. It is essential that they are brought to the attention of and understood by those they are designed to protect. By complying with existing health and safety legislation and documenting their compliance, companies will reduce the chance of injuries or fatalities occurring. Should such incidents occur, they should then also be in a position to avoid criminal prosecutions and civil claims by demonstrating that they had discharged all duties owed to the injured or deceased person.

End of EU duty on US-built yachts

It has been announced that a deal has been struck between the EU and the US for the removal of the 25% tariff placed on the entry into the EU of certain US-built yachts.

The tariff, which was introduced by the EU in 2018 as part of wider retaliatory measures following the Trump administration's imposition

of a US toll on steel and aluminium imported from the EU, had previously been expected to double to 50%.

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Update: Holyhead Marina Ltd v Farrer & ors [2021] EWCA Civ 1585

In the **December 2020** edition of **Comprehensively Yachts** we reported on the first instance decision of the UK's Admiralty Court in Holyhead Marina Ltd v. Peter Farrer & others [2020] EWHC 1750 (Admlty).

By way of a recap, the case arose following the destruction of Holyhead Marina and the loss of or damage to 89 vessels moored there during Storm Emma in 2018. The owner of the marina (the **Claimant**) had sought to limit its exposure to the circa £5,000,000 in claims by issuing a limitation claim under s.191 of the UK's Merchant Shipping Act 1995 (the **Act**) against the owners and insurers of the lost or damaged vessels (the **Defendants**). The Claimant sought a declaration of its right to limit its

liability at 500,000 Special Drawing Rights in a manner similar to the right of a ship owner under the 1976 Limitation Convention.

The Defendants resisted the claim and argued that (1) the Claimant was not the owner of a “dock” as required by the Act; (2) the Claimant had lost its right to limit liability because the loss and damage resulted from the Claimant’s personal and reckless act or omission; and (3) the limit of the Claimant’s liability should be assessed by reference to the tonnage of the largest UK ship to use the wider harbour in which the marina was based.

At first instance, the Admiralty Court held that a marina, notwithstanding its lack of connection with commercial shipping, is a landing place and so is within the extended statutory definition of dock. Therefore, the Claimant could limit its liability for damage to property, including vessels. Since we last wrote, the Defendants have appealed this decision to the Court of Appeal on the basis that:

- while the individual elements of the marina might constitute landing places, jetties or stages, the marina as whole could not be described as a single landing place, jetty or stage so as to entitle the Claimants to limit liability;
- the logical consequence was that there ought to have been a separate limitation fund available in respect of each floating pontoon;
- the right to limit was primarily intended to encourage commercial shipping and should therefore not be extended to structures used primarily by leisure craft unless those structures fell clearly within the natural and ordinary meaning of the terms used by the section; and
- if marinas can limit liability, insurance premiums for yacht owners could rise and so there was a wider public policy issue to also consider.

The Court of Appeal upheld the first instance judgment and confirmed the decision of the Admiralty Court that a marina was not a “dock” on

the ordinary meaning of that term, but held that it could properly be described as a “landing place”.

With regard to the suggestion that each pontoon should have its own limitation fund, the Court of Appeal considered that this was completely impractical.

The Court of Appeal agreed that there was no justification for excluding structures used primarily by leisure craft from Section 191 of the Act and concluded that the terms used in the Act are not used in a technical sense and there is overlap between them. The Court of Appeal held that the Admiralty Court had “*reached a common sense conclusion which was clearly correct*” and so the appeal was dismissed.

Cyber Insurance for Yachts

We have for many years spoken of the risk posed by a cyber-attack on yachts, both operationally and in terms of the potential to lose the considerable personal and sensitive data often held on board a yacht. Given the increasing number of cyber-attacks impacting commercial operations and individuals alike, there is now a growing awareness in the yachting industry of the need to take the threat seriously and procure appropriate cyber insurance.

Traditionally, many insurers have excluded cyber risks from their policies by incorporating exclusion clauses, common examples of which include the CL380 or the LMA5403. Today there are a number of ways to obtain cyber cover and a range of different types of cover available. However, there is significant variation between the policies available and it is therefore important to understand precisely what is covered.

The more comprehensive policies generally cover crisis response, physical damage (including inoperable vessel technology), third party losses and business interruption as a result of a cyber-attack. However, prospective policyholders should always review the policy’s wording. For instance, many policies only provide cover for losses arising out of “malicious” cyber-attacks or cyber-attacks whose purpose is “inflicting harm”. Given that many cyber-attacks

adopt a scatter-gun approach or are not designed to inflict harm (but, for example, to harvest data), these policies may not provide the coverage policyholders expect. Further, policies often contain wide-ranging exclusions, including war risks. This exclusion can be important as several cyber-attacks have been attributed to state actors.

Alternatively, some insurers offer cyber-crime policies which cover more limited risks. For instance, some policies only provide cover for losses incurred in response to a cyber-attack, but not resulting from it. These policies cover the cost of extortion payments and crisis consultants (e.g. negotiators or translators).

Finally, some insurers offer cyber exclusion buy-backs, which provide cover for incidents which would otherwise be irrecoverable due to a cyber-attack exclusion clause. However, as these policies only remove exclusion clauses, the exact cover provided under these policies can be uncertain. The Lloyd’s market is no longer permitted to underwrite these types of policies due to fears around “silent cyber” (i.e. unquantified risk).

Given the variety of cyber insurance policies available on the market, yacht owners and yachting businesses alike should consult their insurance brokers or seek coverage advice from their lawyers before taking out a new cyber policy.

Cyber Risk Management

Rather than having their cyber risk management policy driven by a desire to ensure peace of mind, reliability and limit liability, many in the yachting (and in the wider maritime industries) have focussed on a compliance-driven approach, catalysed by IMO 2021. However, cyber risk management in yachting is for all yachts primarily a risk management issue and, for charter yachts at least, a commercial issue also. Compliance is just one consideration. A growing number of yachts have conducted a cyber maturity assessment (**CMA**), which is positive. However, a large proportion of these CMAs have significant limitations:

- they are limited to safety, technical and operational controls, and ignore commercial considerations;
- the check list approach assumes all have an equal budget and need to invest in the same way, regardless of risk profile;
- they do not set out a means for an incremental approach that builds over time, which we consider essential to any successful cyber risk management plan.
- incorporating a review of charterparty and supply contracts to understand the key commercial exposures in the event of a cyber incident;
- providing a view of the limitations of any existing insurance coverage;
- assessing whether a cyber risk management plan is sufficient to mitigate a client's key cyber risks and is also practical and incremental;

We have partnered with leading maritime cyber security experts, CyberOwl, to allow us to deliver a one stop shop of technical expertise and industry knowledge to our clients on cyber related matters. Our goal is to help our clients rapidly assess the cyber-risk-related security, commercial, operational, technical, compliance and insurance exposures facing their yachting and broader maritime operations. This goes further than a standard maritime CMA, but still leverages well recognised frameworks. Our approach maximises value to our clients by:

- identifying areas of risk in a client's ability to demonstrate due diligence in ensuring the seaworthiness of its yacht in relation to cyber security;
- presenting the findings, supported by a set of recommended actions, directly in line with the best practice guidelines set out in the Guidelines on Cyber Security Onboard Ships published by BIMCO to form part of a client's evidence base for easy presentation to any auditor or insurer.

If you would like to discuss any of the matters raised in this edition of *Comprehensively Yachts*, please contact your usual partner at HFW or any of the team below.

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The HFW yacht team has been an integral part of the yacht industry for over 30 years and has a physical presence in many of the major yachting jurisdictions. The enduring relationships developed with the owners, builders, designers, financiers, insurers, brokers and managers of yachts, our in-depth knowledge of the yacht industry and our international reach ensure we are pre-eminent in the field. For more information on HFW's yacht team and the services we offer, please see www.hfwyachts.com

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