

Second- Chance Saloon

Back when times were good, yachts were ordered, yachts were built and yachts were delivered. If an owner backed out of a build, another would almost always step in and snap it up. Waiting times for build slots stretched into the future, with more work than some yards could handle... And then came the end of 2008, and almost overnight the situation changed. One consequence was that yards were going bust and leaving owners with unfinished yachts. We have seen a number of orders drop out of the order book, never to be heard of again. What happens when work on adream yacht suddenly grinds to a halt?

By Ellie Brade

For the owner left with an unfinished boat and no yard to complete it, essentially three options remain: cut your losses and write the project off, finance the yard/sub-contractors to complete the build, or take the boat elsewhere for completion.

The decision to write off a build can vary in gravitas depending on how far along the build is. Generally, however, for a far along build, the amount invested is significant enough to warrant the drive to pursue other options for completion. Whilst an owner might be able to sell what has been built, it is unlikely this would recoup much of the true value of the investment to date. Most importantly, this option is one that would leave an owner with a bitter taste in the

mouth about the superyacht industry – something that should be avoided at all costs with the distinct need for new owners to sustain the market.

Financing or taking ownership of the build yard to enable completion is, says John Leonida, Partner at Clyde & Co, the most sensible option. This, while not ideal, allows the build to continue as uninterrupted as is possible. Aside from the challenges of moving a yacht and all the associated issues, another point to consider is that taking a yacht from one yard to another essentially makes it a hybrid – neither yard can lend its name solely to the project (and indeed the acquiring yard may not want to). The implications for later resale value are already there before the costs to complete the build are even considered.

The final option, and one that has been applied in a number of cases recently, is terminating the original build contract and moving the yacht to a solvent yard to allow completion. Most contracts have a clause that says if the yard is in default or insolvent the owner has the right to terminate the contract, to take the boat elsewhere and to charge the yard with any increased cost.

Whilst this seems straightforward on paper, executing it is considerably harder. “Termination of a build contract by an owner should always be viewed as a last resort, not lightly to be invoked,” says Tony Allen, Partner at Hill Dickinson. “Nonetheless, there sometimes comes a time when the owner has no option but to move on.”

Image: istock.com

FINANCING THE ORIGINAL BUILD YARD

The reasons an owner might look at ways of continuing building at the existing yard include avoiding becoming entangled in legal proceedings over the course of what could be several years. Ways of facilitating the yacht's completion almost all come down to putting more money in as the owner and an acceptance that the build time will be extended. The worry with this option is that an owner might put more money into a yard, but the money might go to pay off other creditors rather than for what it was intended. The obvious solution is to diplomatically negotiate with the yard for the owner to be allowed to pay suppliers directly. The success of this might ride on ensuring that the suppliers waive claims so they can't use the owner's money to offset against yard debts.

A clear benefit of remaining in the original build yard is that this allows the consistency of the boat remaining in same facility until completion, and means the owner could use the yard's labour, which they would likely also be paying for. This, however, only really works on projects well underway,

“Termination of a build contract by an owner should always be viewed as a last resort, not lightly to be invoked.”

perhaps where yard has been mostly financially healthy then hit problems at the end. Issues with the finance-the-yard approach include other creditors of the yard potentially coming in and making a claim on the yacht to offset overall yard debts.

An English law contract that proves

the owner's ownership of the yacht may not be enforceable under foreign law. Getting a foreign court of law to enforce a claim might take years. The ultimate question would therefore be whether the owner wishes to continue to put more money into a project that has gone sour. If the answer is a real no, then perhaps the terminate-and-take-away option is the right one.

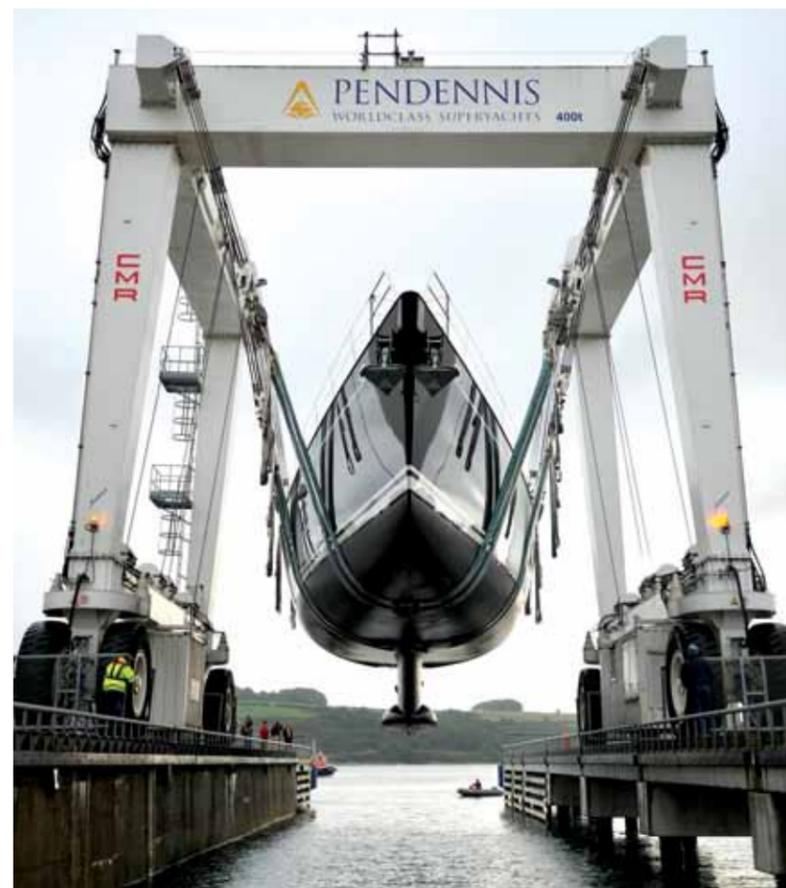
MOVING THE YACHT ELSEWHERE

Admittedly, the process of securing the completion of yacht at a different yard is not easy or uncomplicated. If it is as a result of the yard entering bankruptcy, then “The client is left high and dry – presuming he has no refund guarantees to cash in – in that he has often paid more money than is reflected in what has been built and what has been bought by the yard for the yacht,” says Leonida. “Often there are questions about build quality. If a yard is on its last legs and the funding for ongoing projects is going to cover pressing debts, the first thing to go is the manpower employed and the quality of manpower and by extension the quality of work.”

“The completion of the yacht is a delicate balance between a new build and a refit.”

Other issues arising might include problems with access to construction drawings or class records if class are owed money. Claims of sub-contractors looking to recoup in lieu for work and materials may also arise. And once a new yard is found and secured, the new yard is not likely to warrant the work of the ex-builder. Cost wise, the required amount of investment needed will almost certainly go up, unless you are in the unusual situation of moving from a North European yard to an emerging yard. It will also be almost impossible to get a yard to commit to a fixed price contract, since they cannot know what issues may arise.

All this aside, moving from one yard to another is feasible, and if the >>



The 32m sloop B105, which moved to the British yard Pendennis from the bankrupt Barcos Deportivos in Spain.

CASE STUDY | MASHUA BLUU

Built by the now-bankrupt Yachts Industries (who previously had acquired the also bankrupt BluBay Yachts) the 29m *Mashua Bluu* differs from *Crystal* (covered on page 108) in that she was 95 per cent complete upon her arrival in April 2010 for completion at JFA Yachts in France. Her delivery is now set for the end of the year. Following the demise of Yachts Industries the yacht was tied up in company liquidation processes for eight months.

As soon as she was released she was able to make her way under engine power from Caen to Concarneau, where she underwent an extensive inspection to ascertain the work outstanding, analysing and listing the existing drawings, items started and the MCA and BV request list in order to achieve compliancy. The initial job was the commissioning of all the piping system, and then finishing off the electrics – including producing all the electrical diagrams and drawings that did not come with the build. The major job was to tune the rig, having warranty issues with the mast builder.

Some of the main reasons for JFA's selection as the completion yard were their experience in both new build and refit, and proximity to the original yard. From a technical point of view, there were no major issues, Gaël Jouguet, of JFA Yachts, explained. "The main difficulties came from the liquidation and bankruptcy of the previous builder which first led to the delay in the arrival of the boat, and then caused numerous money negotiations with suppliers and sub-contractors. Our yard was successful in reaching an agreement with most of them but the relationship with some of the suppliers has been and still is very hard as because of delays and money issues, they have totally lost confidence in the completion of this boat and therefore are not working towards this aim."

As the boat was nearly complete on its arrival the yard had to approach the project with the aim of fixing it and finalising it. There are many aspects that they say would have been done differently had the yacht been built at JFA from the outset. However, in this kind of case unless you dismantle and rebuild everything it is nearly impossible to build using the process you would use when building your own boat. "*Mashua Bluu* is much more like a maintenance refit than a JFA build," Jouguet said.



Image: JFA

>> above problems do have to be faced, the end result will nonetheless mean a completed yacht. Speaking to Toby Allies from Pendennis, he stressed that what is important when you are dealing with a half completed yacht, is to be aware that there are options. A bankrupt build yard does not mean the end of your yacht becoming a reality. "It is a salvageable situation," he says. Yachts that Pendennis have taken on include the catamaran *Hemisphere* and the 32m sloop B105, which moved to the British yard from the bankrupt Barcos Deportivos in Spain.

Mark Vermeulen, Director of Operations at Moonen Yachts, said of the Dixon 120, *Crystal*, which is currently completing at Moonen, that "The completion of the yacht is a delicate balance between a new build and a refit". Entering into an interrupted work process is by no means ideal and in keeping with this, those yards that do take on half-finished yachts tend to be yards with established experience in refit work – yards such as Pendennis, Moonen, Southampton Yacht Services and others – those that are familiar with the ins and outs of such a project.

Once the decision has been made to move a project between yards, the next step is to get the yacht from one yard to the other to allow completion to commence. This can vary in complexity depending on the progress of the yacht. Some yachts, such as *Mashua Bluu*, which left Yachts Industries for completion at JFA Shipyards are complete enough to be able to move to the yard under their own power. Others, such as *Crystal* and B105, rely on shipment. Peters and May have worked to transport a number of half-completed yachts, including *Hemisphere*. >>

Legal Considerations to Safeguard against a Half-Built Scenario*



Image: istock.com

TITLE

Most build projects involve the title of the yacht passing to the owner from the beginning. A question to ask is: will the passing of title clause be affected if the build yard is insolvent? Does the local law state that if a contract is entered into within a time near to insolvency, title transfer can then be defeated by a creditor challenging the yard's right to begin a contract knowing of their impending insolvency?

BANK GUARANTEES

Bank guarantees, often provided by the yard to the owner, are a positive in this kind of situation. As well as title, an owner might also have a part guarantee, with a bank guarantee for the first 10 per cent and title passing thereafter. It is important to look carefully at the wording of the build contract to see whether the termination of the contract triggers the bank guarantee or whether the termination of the contract terminates the bank's liability to pay. Guarantees can often create a 'catch-22' situation, but it is important to make sure guarantees are not thrown away by terminating a contract.

ACCESS

Once a contract terminates, how will the owner stand on getting into the yard to get the vessel? Is there a right in the contract that says when a contract is terminated the yard has to grant access? If not, is this a discussion that should be had with the yard beforehand to come up with a termination agreement that allows access? Would this agreement be jeopardised if the yard were to be owned by someone else, such as a creditor, who might disallow access?

* This does not constitute legal advice

INTELLECTUAL PROPERTY (IP)

If the original build contract is terminated, will the owner have access to the designs? It is important to check whether there is a contract clause that says if you terminate the yard must continue to give you the licence to use the IP to finish the boat. The contract might say termination loses you this access right. If the designer has been hired directly by the owner, rather than through the yard, this makes the situation easier.

WARRANTY

What, if any part, of the build is covered by warranty upon contract termination? A new yard taking on a build will generally provide warranty for their work alone. On cancelling a contract, an owner will have to accept that their warranty position is rather exposed. The positive side is that on an average build a very big proportion of the warranties will be backed up by sub-contractor warranties, provided those companies are solvent. They, at least, give a proportion of warranty cover and it is important to be given an assignment of those warranties. That should be provided in the contract but it may not be.

LOCAL LAW

In moving a boat, or financing the yard to complete it, local law and tax issues (different from English law, say) may arise. For example, if an owner takes over the boat and has it completed it at the yard, employing the yard staff, local tax authorities might argue that you are established in the country, and need to be registered, pay taxes, etc. You might be told if you take on half the staff, you have to employ them all. When taking over a boat project Transfer of Undertakings regulations can acquire an owner a lot of the employment liabilities by default.

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CONSTRUCTION REPORT | SECOND-CHANCE SALOON

CASE STUDY | MOONEN 120 CRYSTAL

The 37m *Crystal* was designed by Bill Dixon, with interior design by her owner. I first viewed her in June 2010 where she was sat in two pieces – effectively an incomplete oversized jigsaw puzzle. My instant impression was that I felt no envy for those tasked with picking up the reins of the project and ensuring her completion. She arrived at the Moonen Groot Ammers facility 30 per cent complete, along with 9,000 build drawings that had to be matched up to establish what went where. All GRP pieces of the yacht were present, along with around 20 per cent of the electrical equipment.

It was, according to Mark Vermeulen, Director of Operations at Moonen, “a difficult project to take on, as we were picking up what someone else had started elsewhere using different working methods”. Added to the challenge of the project was the fact that this is the first GRP (glass reinforced plastic) yacht Moonen have worked on, usually only building custom and semi-custom steel-hulled superyachts. They have drawn on the expertise of Green Marine for the GRP work for the project.

That said, Moonen is confident in their ability to finish the project to their usual high standards and plan to launch her ready for use by her owner in July 2011. This will be an achievement not least in the face of her chequered build history. *Crystal* began life under the commission of her first owner as a Royal Denship 105. After the Aarhus Shipyard entered insolvency in 2008, Royal Denship took over the yard, and the hull, with a new owner onboard, was subsequently lengthened by 15 feet. After Royal Denship too entered insolvency in 2009, Moonen successfully bid for the project as one of the tendering yards. Moonen’s was not the cheapest bid, but the owner decided the price was worth the work of an established and reputable yard. Would Moonen have bid for such a complex project pre-recession when the order books were fuller? “It’s nice to do something different,” said Vermeulen, neatly sidestepping my question.



Images: Dick Holthuis Photography



The process of conducting the move of the project consisted of three phases. First came the start-up phase where Moonen investigated what of the yacht was there, and gave the owner an idea of costs involved. The second phase – establishing what was what and getting the build up and running again – followed the contractual agreement with the owner to resume building. The third phase, the normal building process, is now underway. Due to the quality of work executed at her old yard and the build processes used some work had to be redone to bring it up to Moonen standard, and all of it checked over. What will she be called when she finishes? “She will be a Dixon 120 finished by Moonen,” said Vermeulen firmly.

>> “Half-built yachts are harder to move because structurally they may not be as sound,” says Simon Judson, of Peters and May. “They are also naturally harder to insure as it is hard to establish a value for them. There is huge involvement from naval architects in the process. For example, you might need their advice on whether a selected lashing point [to secure a yacht to the deck of the transporting vessel] is structurally suitable. A lot of these yachts are not designed to be moved until prior to completion. That said, sometimes being half completed can make things

easier; a boat without a mast is much easier to move.”

Although there has been an increase in this type of scenario over the last few years, they remain a micro market of the total yacht market. The more important lesson to take from such build situations where an owner does face these decisions is the importance of safeguarding against such an outcome from the start of build.

“I would encourage both yard and owner to have the fullest possible transparency and dialogue in

their dealings, so that no one gets entrenched or taken by surprise should the worst happen,” concludes Allen. “Often, when we are initially meeting with someone looking to buy a boat, they say to us, ‘What can you do for me? I’m trying to buy a boat not a contract.’ In response we say, ‘One of the best things we can probably do for you is make sure you do end up buying a boat and you don’t end up buying a yard.’”

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