SHIPPING & INTERNATIONAL TRADE

Where Loss of Bargain Damages are Recoverable under Norwegian Saleform 2012

Introduction

In the recent decision of *Great Asia Maritime Limited v Orion Shipping and Trading LLC (The Lila Lisbon)* [2026] UKSC 23, the UK Supreme Court (**"UKSC"**), upholding the earlier Court of Appeal decision, unanimously held that a buyer who lawfully cancels a Memorandum of Agreement ("**MOA**") pursuant to Clause 14 of the Norwegian Saleform ("**NSF**") 2012 ("**Clause 14**"), is entitled to recover loss of bargain ("**LB**") damages without an accepted repudiatory breach of contract where a vessel is not delivered by the cancelling date due to a seller's proven negligence.

Brief Facts

Under an MOA on amended NSF 2012 terms, the Sellers agreed to sell the M/V LILA LISBON (the "**Vessel**") to the Buyers for US$15 million, with an original cancelling date of 20 August 2021. The Sellers failed to give Notice of Readiness ("**NOR**") by that date. The Seller and Buyers later agreed to a revised cancelling date of 15 October 2021. Notwithstanding the revision, the Vessel was still not ready for delivery by 15 October 2021, and the Buyers cancelled the MOA.

The dispute was referred to arbitration, and the arbitrators found that the Sellers' failures were due to their proven negligence in failing to take necessary steps to enable punctual delivery. The Tribunal awarded the Buyers compensation under Clause 14, which included US$1.85 million in LB damages comprising the difference between the Vessel's US$15 million MOA price and her US$16.85 million market price on or around the date of cancellation.

Clause 14, as incorporated in the MOA, entitled the Buyers to cancel the agreement should the Sellers fail to give Notice of Readiness or fail to be ready to validly complete a legal transfer by the Cancelling Date. Clause 14 further provided that, upon such failure, the Sellers "*shall make due compensation to the Buyers for their loss and for all expenses together with interest if their failure is due to proven negligence and whether or not the Buyers cancel this Agreement.*"

Procedural History

Following the award, the Sellers appealed on a question of law concerning the interpretation of Clause 14. The UK Commercial Court allowed the Sellers' appeal, holding that Clause 14, properly construed, does not entitle buyers to LB damages absent an accepted repudiatory breach. Any losses and expenses recoverable under Clause 14 must have resulted from the Sellers' specific breaches of their obligations under that clause and must have crystallised upon cancellation, rather than being merely prospective.

In allowing the appeal by the Buyers, the majority in the Court of Appeal reversed the Commercial Court's judgment, restoring the arbitrators' award. It held that the Buyers were entitled to LB damages, and not merely losses and expenses which accrued prior to cancellation. The Court of Appeal found *inter alia* that "*due compensation*" meant "*proper or appropriate compensation*", to which common law principles on damages apply, and that the plain meaning of "*loss*" extended to the Buyers' LB. The Court of Appeal disagreed with the need for losses to be crystallised upon cancellation, finding instead that the losses suffered depend on what happened. In any event, Clause 14 expressly provided for compensation for "*all expenses*", and such loss must have been intended to include the Buyers' LB if they elected to cancel.

Key Issues

The Sellers appealed to the UKSC. The first of the Sellers' two principal arguments was that LB damages were not recoverable where the loss was *legally caused* by the Buyers' exercise of their contractual right to terminate, rather than by any breach. The second was that Clause 14 could not confer an entitlement to such damages unless it did so in *clear terms*.

The issues before the UKSC were thus: (i) whether Clause 14 permits recovery of LB damages following lawful cancellation for the Sellers' proven negligence even though no repudiatory breach had been accepted; and (ii) whether principles relating to causation and the need for "clear words" displaced that interpretation.

Decision of the UK Supreme Court

The UKSC answered both questions in the Buyers' favour. It rejected the Sellers' appeal and upheld the Court of Appeal's interpretation of Clause 14, ruling that the Buyers were entitled to LB damages.

Meaning of "Loss" under Clause 14

The UKSC agreed with the arbitrators and the Court of Appeal that the plain meaning of "*loss*" in Clause 14 includes the LB damages suffered by the Buyers upon cancellation. The term "*loss*" was general and unqualified, and LB damages were the most obvious form of loss the Buyers would suffer upon cancellation. The conclusion was reinforced by considerations of contractual symmetry, where the parallel wording of Clause 13 of the NSF (governing Sellers' compensation) *did* confer on the Sellers the right to claim LB damages.

The UKSC noted that as a matter of English law, the Courts have consistently recognised that buyers who cancelled under Clause 14 could recover LB damages. Although Clause 14 had undergone various amendments through successive editions of the NSF, those amendments *did not* remove the right to claim LB damages. Instead, they arguably broadened Clause 14 by allowing recovery of both "*loss*" and "*all expenses*", whether the buyer elected to cancel or not. Accordingly, absent a clearly erroneous interpretation, this established meaning of Clause 14 would be the meaning conveyed to a reasonable person in the contracting parties' position.

Furthermore, denying LB damages to buyers in such a situation would lead to an uncommercial result in a rising market. With the vessel's value increasing, the Sellers should not be allowed to benefit from their negligence by keeping the vessel. Instead, the Buyers should be compensated for their loss of the benefit of the increased value.

Principles of Causation

As for the Seller's argument that LB damages should be denied because the *legal cause* of the LB was not the termination event itself, but the *exercise* of the right to terminate, the UKSC considered the Court of Appeal decision in *Financings Ltd v Baldock* [1963] 2 QB 104 ("***Financings***"), on which the Sellers relied. In *Financings*, the court held that where a hire agreement is terminated pursuant to an express contractual power and the owner retakes possession of the vehicle, the owner may recover only losses accrued up to termination. Absent repudiation, a mere failure to pay one or two instalments does not go to the root of the contract, so the owner's recovery is limited to the arrears and interest, and does not extend to post-termination damages.

While accepting that *Financings* remained good law, the Court held that it did not assist the Sellers. The Court emphasised that a repudiatory breach does not itself terminate the contract; it only takes effect when accepted by the innocent party. Accordingly, the Sellers' proposed distinction between termination for repudiatory breach and termination pursuant to an express contractual right could *not* be justified purely on causation grounds. In any event, *Financings* concerned a "bare" contractual termination right, whereas Clause 14 contains both a right of cancellation and an express compensation mechanism. Applying the alleged "causation principle" to Clause 14 would undermine the purpose of the compensation mechanism and, logically, would also preclude recovery of wasted expenses, which the Sellers themselves accepted were recoverable under the clause. There was therefore no basis for reading Clause 14 as excluding LB damages.

Clarity of Terms

The UKSC also rejected the Sellers' submission that the phrase "*due compensation to the Buyers for their loss*" was insufficiently clear to confer a right to recover LB damages. This argument arose because the Sellers contended that, absent a repudiatory breach, buyers would not be entitled at common law to recover LB damages upon cancellation. They thus argued that clear words were required before Clause 14 could be interpreted as creating such an entitlement.

The UKSC disagreed with the Sellers, holding that the "clear words" principle applies primarily where contractual language seeks to *exclude* rights and remedies that would otherwise exist at common law. In contrast, Clause 14 operated to *confer* an additional contractual remedy on buyers beyond their ordinary common law rights. Crucially, the Buyers here had in fact suffered a loss of bargain, and thus the awarding of damages was consistent with the compensatory principle. There was nothing inherently unlikely or unfair about parties intending Clause 14 to permit recovery of such losses, and the ordinary language of the provision was capable of doing so.

Concluding Remarks

The UK Supreme Court in *The Lila Lisbon* [2026] UKSC 23 settles, with finality, that a buyer who lawfully cancels an MOA on NSF 2012 terms under Clause 14 can recover LB damages, even absent an accepted repudiatory breach of contract. In doing so, the UKSC reinforced the significant weight that the court places on established market practice surrounding the NSF. Despite multiple revisions to different reiterations of the NSF, the measure of recoverable loss thereunder has never been displaced. It is worth nothing that unless clearly wrong, where a standard term in an industry-wide form has an established meaning, the courts will be slow to depart from it because that is what the contracting parties have come to expect. However, it remains to be seen whether the UKSC's affirmation of the importance of certainty, predictability, and consistency in interpreting standard form contracts will carry weight across other shipping standard forms such as BIMCO forms, and other standard form charterparties such as GENCON, NYPE, and BARECON.

Further, commercial consequences also weighed heavily in the UKSC's reasoning. If LB damages are disallowed, this would result in risk allocated in a manner ripe for opportunism. As pointed out above, sellers would have every incentive to delay or refuse delivery in a rising market, whereas buyers would be forced to delay cancellation in the hope of establishing a repudiatory breach. This would lead to an uncommercial outcome that would undermine the certainty of parties' agreement, and would raise questions as to how sellers or buyers would respectively react to opportunism.

If you have any queries on the above, please feel free to contact our team members set out on this page. For regional Shipping & International Trade matters, please see Rajah & Tann Asia's Regional Shipping Practice for more information.

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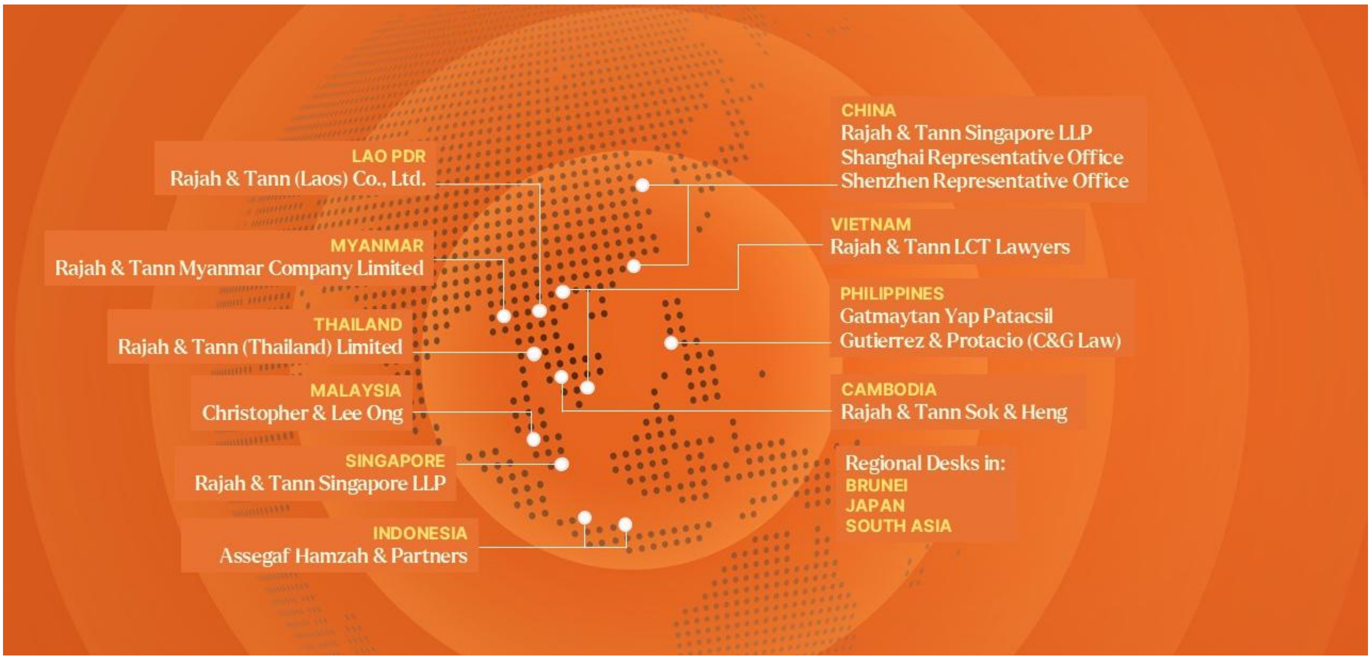

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