Ship Sale and Purchase: A Buyer's Right to Damages for Loss of Bargain Under SALEFORM 2012

October 31, 2025 Andreas Silcher, Fiona Cain, Tram Nguyen

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The Court of Appeal has overturned the Commercial Court's decision in *Orion Shipping v Great Asia Maritime* [2025][1] , clarifying that where a seller fails to use due or reasonable diligence to deliver a vessel by the cancelling date, the buyer may exercise its contractual right to terminate under Clause 14 of the Norwegian Sale Form 2012 (**SALEFORM 2012**) and recover damages, including loss of bargain damages. The decision is significant because it clarifies the interpretation of a key provision in SALEFORM 2012, the industry standard form in many shipping jurisdictions for ship sale and purchase transactions.

Background Facts

Great Asia Maritime (**Buyers**) and Orion Shipping (**Sellers**) entered into a memorandum of agreement (MOA) dated 4 June 2021 on an amended SALEFORM 2012 for the sale of the M/V Lila Lisbon (**Vessel**). The Cancelling Date was initially set for 20 August 2021, but this could not be met, in essence due to the Sellers' failure to arrange flights for their departing crew, which resulted in the loss of the berthing slot. The Buyers agreed to the Sellers' request for an extension to 15 October 2021 but expressly reserved their right to claim damages under Clause 14 of the MOA for failure to meet the Cancelling Date due to the Sellers' "proven negligence."

Clause 14B of the MOA provided that:

"*Should the Sellers fail to give Notice of Readiness by the Cancelling Date or fail to be ready to validly complete a legal transfer as aforesaid they 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.*"

The Vessel was not delivered by 15 October 2021. On 18 October 2021, the Buyers arrested the Vessel, signalling their intention to terminate the MOA and to secure their claim for damages for, amongst other things, the difference between the contract price and the Vessel's current market value.

The Tribunal's Award and Appeal to the Commercial Court[2]

The Tribunal found that the Buyers were entitled to, and did, cancel the MOA on 18 October 2021. The Sellers' failure to deliver the Vessel was due to their failure to take reasonable steps to arrange for the delivery to take place, which amounted to "proven negligence", even though it did not constitute a repudiatory breach. The Tribunal awarded the Buyers damages, including loss of bargain damages calculated as the difference between the contract price and the market price for the Vessel on the Cancellation Date.

On appeal, Mrs. Justice Dias in the Commercial Court overturned the Tribunal's award, holding that the Buyers could only recover losses and expenses that had crystallised at the point of cancellation and not any "prospective losses and expenses caused by the cancellation,", such as damages for loss of bargain.

The Court of Appeal's Judgment

The Buyers obtained permission to appeal on two grounds: (1) whether the Sellers were contractually obliged to tender a Notice of Readiness by the Cancelling Date, and (2) whether, absent an accepted repudiatory breach, the Buyers could recover loss of bargain damages when exercising a contractual right to terminate under Clause 14B.

The Court of Appeal unanimously overturned the Commercial Court's decision. It held that the Sellers were not ready to deliver the Vessel by the Cancelling Date due to their proven negligence, which entitled the Buyers to exercise their contractual right to cancel under Clause 14 and recover damages for loss of bargain under Clause 14B. The court also determined, by applying the principles in The Democritos[3] , that Clause 5 imposed an implied obligation on the Sellers to use due diligence to deliver the Vessel by the Cancelling Date, which they had failed to do.

Although Ground $_1$ was not determinative for the appeal, the Court of Appeal confirmed that the Sellers were not under an absolute obligation to deliver by the Cancelling Date, but were required to use reasonable or due diligence. Failure to do so constituted "proven negligence" under Clause 14 and a breach of contract, entitling the Buyers to compensatory damages regardless of whether the right to cancel the contract was exercised.

On Ground $_2$, the Court of Appeal reversed the Commercial Court's decision and held that the Buyers were entitled to loss of bargain damages upon termination, even in the absence of an accepted repudiatory breach. The court reached this conclusion for the following reasons:

1. **Loss of Bargain Damages**: The court held that there was an express right in Clause 14 enabling the Buyers to recover their "loss" and that this extended to loss of bargain. That loss is quantified as the difference between the market value of the vessel when the contract is cancelled and the contract price. Therefore, it will only arise in a rising market. The court considered that if a buyer was not entitled to recover such losses, the rights contained in this clause would "be of little utility to Buyers" and could incentivise a seller in a rising market to delay delivery in the hope that the buyer decides to cancel and leaves them with the more valuable vessel. The court also suggested that such a claim may not be available when selling a single asset if the clause had not contained an express right.
2. **Prospective Losses**: The court rejected the view, which had been accepted by the Commercial Court, that only losses that had crystallised at cancellation were recoverable under Clause 14 (i.e. the expenditure that would be wasted when the Buyers cancelled the MOA, such as inspection costs and legal fees associated with the sale). Instead, the Court of Appeal reasoned that the Buyers' losses would depend on the actual consequences of cancellation. Lord Justice Nugee stated "But if [Buyers] have suffered a loss of bargain, it is not obvious to me why they cannot claim that that is a loss that they have suffered. It is still caused (certainly at any rate in a "but for" sense) by Sellers' culpable failure to be ready in time: if Sellers had been ready, Buyers would not have been able to cancel."
3. **Parity with Seller's Rights**: The court noted that the corresponding right given to a seller in the event of non-performance by a buyer under Clause 13 (for example, failure to pay the deposit), included a right to cancel and claim compensation for their losses, which would

include damages for loss of bargain . Since SALEFORM 2012 is a standard form contract, the court considered that these clauses should operate "even-handedly" as between buyers and sellers.

4. **Cancellation v. Non-Delivery**: The court considered that it was not straightforward to determine whether the Buyers' cancellation in these circumstances was equivalent to non-delivery but ultimately concluded that it was.

The Court of Appeal's decision makes it clear that buyers can claim loss of bargain damages where a seller fails to give Notice of Readiness by the Cancelling Date due to a lack of due diligence and the buyers exercise their contractual right to cancel under Clause 14 of the SALEFORM 2012. The judgment brings clarity to the interpretation of a provision of this widely used standard-form contract. It is worth noting that the precise wording of Clause 14 is not replicated in BIMCO's more recent and first ship sale and purchase standard form, SHIPSALE 22. In this new standard contract, the clause refers to "direct losses and expenses" which are "due to negligence" and while similar, these clauses are not identical and may not result in the same outcome.

[1] Orion Shipping and Trading Ltd LLC v Great Asia Maritime Ltd [2025] EWCA Civ 1210.

[2] Orion Shipping and Trading Ltd v Great Asia Maritime Limited [2024] EWHC 2075 (Comm). For our analysis of this decision, see Ship Sale and Purchase: A Buyer's Right to Damages.

[3] [1976] 2 Lloyd's Rep 149

[4] The Court reached that conclusion by reference to the Court of Appeal's decision in The Griffon [2013] EWCA Civ 1567.

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