

# Blind Man's Bluff

CONTRACTUAL RULES MEAN THAT IF A BUILDER HAS SOMETHING TO HIDE, AN OWNER COULD BE LEFT IN THE DARK

words: John Leonida, partner, Clyde & Co  
photography: iStockphoto

Picture this... you have commissioned a yacht; you are expecting the yacht to comply with certain regulations. You rely upon the builder, the flag stage and the classification society surveyors to work together to make sure the yacht is legal and safe. You get a piece of paper that appears to show you the journey. But is that road map clear and true or is it hiding something? Classification society rules, load line regulations, tonnage, MARPOL, the various iterations of the Large Yacht Code sometimes depend on opinion, interpretation, a certain point of view, but how far can you deviate from the original road map before it becomes a totally new and different journey? And if that journey has changed, how can you, as an owner, tell? Answer: you cannot.

No one is being deliberately secretive (I hope), but it is a fact that classification societies and flag states do what they do for money. They are commercial organisations. They enter contracts with builders to provide surveys and certificates. But in the middle of all this is a simple legal concept called privity of contract, which prejudices owners. Under normal circumstances, a contract between two people is made to the exclusion of others. In this case, a perfectly legal contract between the classification society or flag and builder, to provide services, excludes the owner.

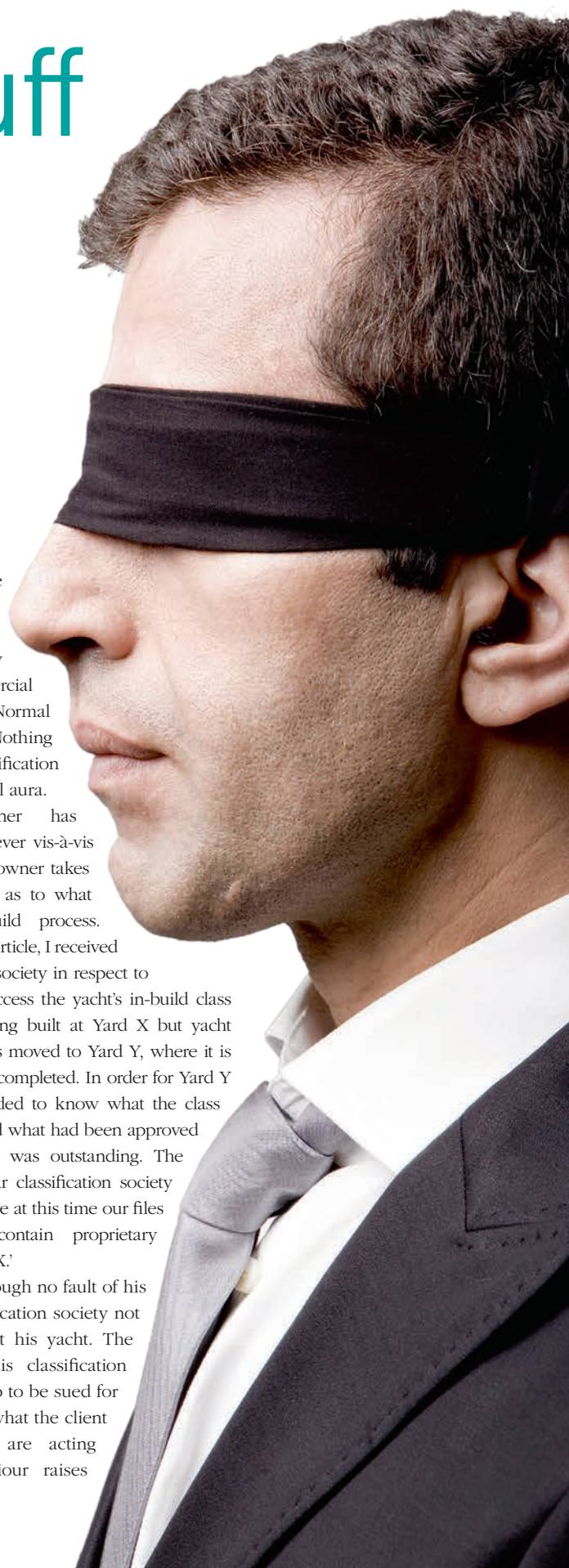
Owners may be surprised to discover that despite commissioning a yacht to be built to a certain set of rules and regulations, they have absolutely no right, at any time, to examine the correspondence between flag, class and builder in relation to their yacht. Any decisions and reasonings are secret. They also have no right to examine any survey reports produced by a classification society or flag state surveyor. When a builder agrees to construct a yacht to a particular set of class rules, it will sign a private commercial contract with the classification society. The classification society will be providing their services to the

builder and will examine and survey the yacht for the builder not for the owner.

A classification society needs to maintain commercial relationships with builders. Normal commercial pressure. Nothing illegal about that. But, classification societies have a quasi-official aura.

Pre-delivery, the owner has absolutely no rights whatsoever vis-à-vis class – and even when the owner takes delivery he cannot enquire as to what happened during the build process. Indeed, as I was writing this article, I received a letter from a classification society in respect to a request from a client to access the yacht's in-built class records. The yacht was being built at Yard X but yacht couldn't be finished and was moved to Yard Y, where it is intended for the yacht to be completed. In order for Yard Y to start the work, they needed to know what the class position of the yacht was and what had been approved or not approved and what was outstanding. The response from this particular classification society was: 'We are unable to release at this time our files to yourselves as they contain proprietary information owned by Yard X.'

Therefore the owner, through no fault of his own, is faced with a classification society not releasing information about his yacht. The perverse thing is that this classification society would open itself up to be sued for breach of contract if it did what the client requested. So they not are acting illegally, but their behaviour raises



# owners' Handbook

suspicions about the information they are holding about the client's yacht.

In another case, the classification society said its contractual relationship with the builder prevented any disclosure of information to the owner and unless the builder consented to the release of information they would not do so. If the builder has something to hide, an owner will not be granted access to class records. There are a few builders who are quite happy to allow access, but as a rule, owners have to trust the builder and the chosen classification society to behave properly and transparently. This is not something unique to the yachting world. Commercial ship owners have been battling with this issue for many years. When put to proof, the classification societies and the flag states will always rely upon years of contractual practice.

flag state. Further, in the event that the owner terminates the build contract, the letter of authority confirms that the classification society and the flag state must confirm that they will, on request, subject to all outstanding fees being settled, disclose their complete files to the owner to enable the build to continue.

In the alternative, and where you don't have such a clause and you suspect something fishy, you can start proceedings against the builder and seek a court third-party disclosure order to serve upon the classification society or flag state.

In this era of transparency and full disclosure, owners deserve freedom of information from classification societies and from flag states at all points during a yacht's life. I have a file that clearly shows a surveyor letting things slide provided the yard corrects the 'defect' on the next

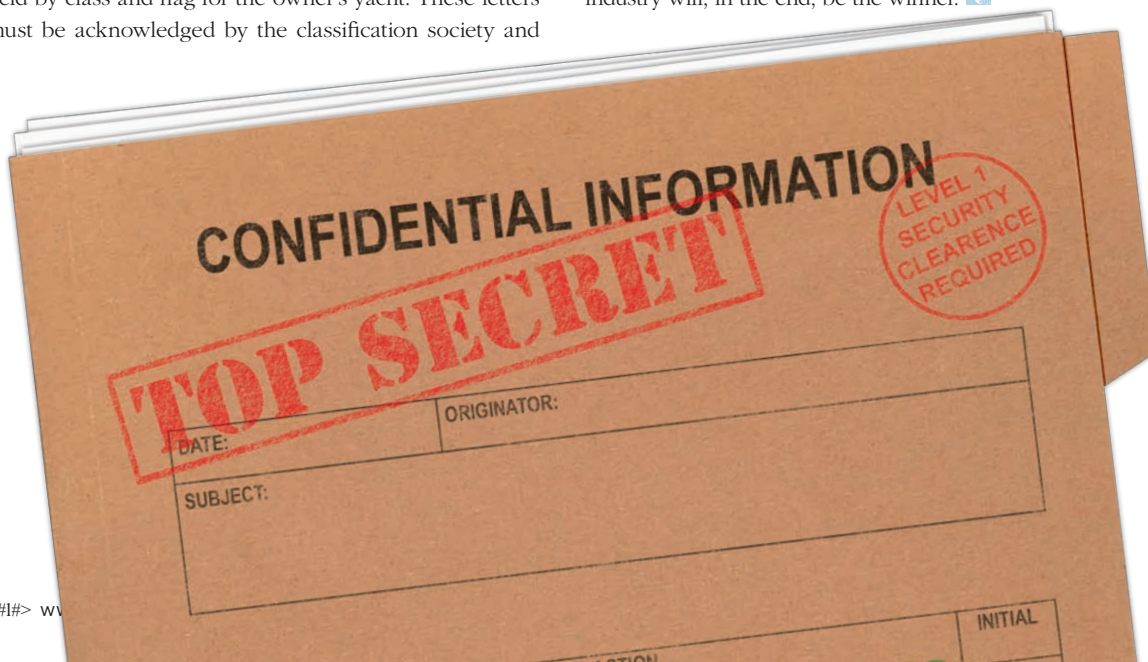
*In this era of transparency and full disclosure, owners deserve freedom of information from classification societies and from flag states*

We had occasion to deal with a particular flag state that was responsible for approving a yacht for commercial use that, in our opinion and in the client's opinion, made far too many concessions and gave far too many waivers to the point that the relevant regulations, in our client's opinion, had ceased to have any meaning. When we asked the flag state to disclose the file to the owner of the yacht, the flag state also refused to do.

There is a way to circumvent this. In recent months on new yacht building contracts that I have been negotiating, I have inserted contractual language that I would urge all owners to insist on. Firstly, get from the builder specific 'letters of authority' issued by the builder in favour of the owner and addressed to the relevant classification society and flag state allowing the owner free access to the files held by class and flag for the owner's yacht. These letters must be acknowledged by the classification society and

yacht. Would that surveyor have done the same thing if he knew that the owner would have full access to the surveyors' decisions?

I don't often agree with US Senator John McCain, but I agree with him when he says 'excessive administration secrecy feeds conspiracy theories and reduces the public's confidence in government'. Among owners and their advisers, the secrecy of flag states and classification societies that is founded on simple contract law reduces owners' confidence in the good work that classification societies and flag states do. No one should be able to deny access to the very people who pay for the industry to live. Remember: no owners, no industry. Owners must contractually obligate classification societies and flag states to be transparent. There will be resistance to this openness, but the superyacht industry will, in the end, be the winner. 📄



Privacy rules regarding contracts between builders and classification societies mean that pre-delivery, owners have no rights whatsoever regarding class. Even when an owner takes delivery of his yacht, he can't enquire as to what happened during the build process