

BETWEEN

DW
APPLICANT

AND

VD
RESPONDENT

Date of Order:

11 May 2016

Referee:

Referee Savage

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that VD is to pay DW \$2866.55 by 1 June 2016.

Facts

[1] DW purchased a boat from VD in September 2010 for the sum of \$34,000, after seeing the advertisement on Trade Me and then phoning VD with questions about the boat. DW did not inspect the boat, have it inspected on his behalf or have a sea test before buying the boat. The boat was left with VD until storage was arranged. DW viewed it during this time. It was taken to A Town Marine for servicing in late November and then taken onto the harbour on about 10 December. The boat then had running issues.

[2] The boat was towed to B Town on about 17 December 2010 and booked in for repairs in late December. These were concluded in early March.

[3] DW claims \$15,000 from VD on the basis that VD misrepresented the condition of the boat and its fittings.

Issues

[4] The issues to be decided are:

- a) Did VD misrepresent that fittings in the boat were new or in working condition inducing DW into the purchase?
- b) Did VD misrepresent the condition of the boat inducing DW into the purchase?
- c) Did the parties enter into the agreement based on a mistake about the condition of the engine?
- d) What sum in damages, if any, is DW entitled to?

Did VD misrepresent that fittings in the boat were new or in working condition inducing DW to purchase the boat?

[5] Section 6 of the Contractual Remedies Act 1979 states that where a party to a contract has been induced to enter it by a false statement of fact (innocently or fraudulently

made) he is entitled to damages. A buyer in a private sale has a responsibility to carry out due diligence before entering into a contract – that principle is called *caveat emptor – buyer beware*. A seller is not obliged to point out faults or problems but statements made and answers to questions by the seller can be relied on and can amount to misrepresentation if false. In a private sale the Consumer Guarantees Act, Fair Trading Act and the section of the Sale of Goods Act, to do with merchantable quality, do not apply. Any statements made after the contract cannot be considered as representations.

[6] DW claims misrepresentations were made about the following items as described in the advertisement as follows:

- a) *AUTOMATIC ELECTRIC ANCHORING FROM THE HELM ALL CHAIN*
- b) *Front remote search light.*
- c) *Bilge pump.*
- d) *NEW LOWRANCE GPS CHARTPLOTTER AND COLOUR FISH FINDER;*
- e) *NEW PIONEER CD SYSTEM*
- f) *NEW FRESH WATER PUMP FOR SINK*
- g) *Rear shower on the boarding platform in teak*
- h) *Has had the MP1 6.2 litre engine UPGRADE FITTED APPROX 2002 and Bravo mercruiser stern leg, way more power and a lot better fuel economy*

[7] The best evidence before me that items were misrepresented or not is taken from ZZ's Job Sheet dated 31.03.2011 and YY's invoice of 3 December 2010, because the work occurred in close proximity to the purchase date. The Job Sheet clearly covers a multitude of items, but DW's claim of misrepresentation means he has to confine his claim to the items specifically referred to in the advertisement

[8] The findings on each are:

- a) I find VD did misrepresent the winch condition because it can be implied in the description *Automatic electric anchoring*...that this was functioning and the evidence is that the winch handle was broken and the winch needed a repair. I allow \$1226.55 because this work was identified in the Job Sheet and was quoted a few months after delivery to B Town.
- b) I find there was no misrepresentation made about the bow search light because the best evidence here is that the bow light was working - YY's invoice dated 3 December showing *CHECK ALL LIGHTS FIND OK*. The buyer beware principle applies to its condition in other respects.
- c) I find misrepresentation was made about the condition of the bilge pump on the basis that as it was identified in the advertisement it is reasonable to expect it to function. The Job Sheet refers to repairing a corroded connection to the bilge pump but there is no other evidence that it was not functioning and needed replacing. I allow a nominal sum of \$50 and not the sum of \$239.50 which is identified in the MARS invoice dated 2016.
- d) I find the GPS Chartplotter/Fish finder was misrepresented as to its age. The advertisement clearly says it was new. While it is fair to factor in time for shipping and despatch etc., an item manufactured in 2007/2008 is not new in 2010. Whilst it may have been new to VD, he cannot make a statement saying an item is new when it is not. Something 2-3 years old is not new. I allow \$1050 and not \$1499 claimed for a new one and \$419.75 to install it. This comprises 50% of the quote of \$1499 and \$300 for installing to factor in that the price provided is nearly 6 years after discovery. The remedy of damages is not to give new in addition to what was supplied, but to compensate DW for not having new.
- e) I find no misrepresentation as to the CD System. There is no evidence supporting DW's claim that at the time of purchase it was corroded and not working. I do not accept his view that an item made in 2009 cannot be described as new because the time period between manufacture and fitting on the boat is easily taken up in shipping and despatch to a retailer. I accept

VD fitted it early 2010 and given the sale was later in 2010, there is no misrepresentation.

- f) I find the condition of the fresh water pump was not misrepresented because the evidence presented showing corrosion is nearly six years old and there is no evidence that it was in this condition in 2010 at time of purchase.
- g) I find the condition of the rear shower was not misrepresented because there is no evidence as to its failure at purchase and because DW took the risk of purchasing without inspecting.

Did VD misrepresent the condition of the engine?

[9] Section 6 of the Contractual Remedies Act referred to earlier, again applies. DW's main argument is to do with the condition of the motor i.e. that it was severely corroded and this could not have occurred between the date of purchase and its discovery. He argues that the corrosion was pre-existing and therefore amounts to a misrepresentation by VD as to the condition of the engine. The majority of the costs claimed are for repairs to remedy this damage.

[10] The advertisement said

Has had the MP1 6.2 litre engine UPGRADE FITTED APPROX 2002 and Bravo mercruiser stern leg, way more power and a lot better fuel economy.

[11] I accept VD's evidence that the upgrade was carried out by a previous owner. DW did not provide any evidence to the contrary. I find there was no misrepresentation that the motor was upgraded in 2002.

[12] The particular issue here is whether that statement along with the photos of the boat running and the discussion pre-purchase amount to misrepresentation as to the condition of the boat at purchase.

[13] DW raised a concern about the hours travelled saying that VD told him it had done about 100 hours when in fact it had done 270 hrs. VD said he told DW there was no hour meter and his best estimate was it had done about 100 hours. The evidence shows that at the time of purchase it had done 270 hours.

[14] I find this was an opinion and not a statement of fact and therefore it could not be relied on as a statement of fact. It was up to DW to check this. In any event DW agreed that even 270 hours was at the lower end for an engine of this age.

[15] DW said as a result of the statement in the advertisement, the engine's low hours (whether 100 or 270) and the photos showing the boat in use, he reasonably concluded that he was buying a boat that was running and would do so for many years with no problems. He said the motor did not run and required significant work to get it into a running state. The stern leg also required significant repair work.

[16] I find that the statement in the advertisement, the photos provided pre-purchase and the answer given pre-purchase about the hours, do not amount to a misrepresentation inducing entry to the contract because they are not false statements of fact. I carefully considered the point that photos sent showed the boat being used in the summer before the purchase. All the photos show is that in the previous summer the boat was running. It does not take the place of DW's role in this that he did not carry out any inspection or sea-test before buying the boat.

Did the parties enter into the agreement based on a mistake about the corrosion in the engine?

[17] The Contractual Mistakes Act provides for relief to be granted if the parties to the contract are influenced in their respective decisions, to enter into the contract by the same mistake, resulting in a substantially unequal exchange of value. Sections 6(1)(a)(ii), s7(2), and s7(3).

[18] A great deal of hearing time was spent talking about engine corrosion: when it may have occurred and how long water needed to be present for this level of corrosion to occur. Is it more likely that the corrosion damage occurred between purchase date and its discovery some months later or that it pre dated the purchase date. If the corrosion was present at the time of sale and this was known to VD but not to DW it could be viewed as a unilateral mistake. If neither party knew, then a common mistake.

[19] We know the following facts to be accurate: the boat was purchased sight unseen on 18 November 2010, it was serviced by T Town Marine on 29 November and by XX on 3 December and it was in ZZ's workshop on 29 December. The times it was taken out in A

Town Harbour and what happened was given in a written statement from DW and his account is that it was about 10 December.

[20] I heard from DW and VD about the time it takes for corrosion to occur and also heard from witnesses they called. Mr A, for VD, said the photos showed the engine had been flooded at some time and he said corrosion of this extent would need water to be there for a month at least. He said it is not uncommon for rust of this kind to be present in an engine of this age and in an engine 8 years old (in 2010). When questioned again by DW as to how long corrosion of this kind would take, Mr A said *some months*.

[21] Mr K for A Town Marine could not give direct evidence about the service work his company carried out in late November 2010 for DW, but he answered questions about the work identified in the invoice and whether corrosion would have been visible if it had been present. Mr K said corrosion can occur in a matter of weeks and the usual cause of water in the bilge is from the bung being left out while boat is in the water or left in when the boat is on land. He said if corrosion had been present when the service work took place it would have been seen on the flywheel (when belt tension was checked) and on the engine mounts which would be visible at the time of the service. He said if there had been corrosion present it would have been noted on the invoice and the owner would have been told. He said it made no sense to believe that the owner would not be told as it could mean more work for the company.

[22] I find on balance it is more likely than not, the corrosion was not present when the contract was made because I am more persuaded by the evidence that if the corrosion was present it would have been notified to DW's son by A Town Marine. I note that the A Town Marine invoice included a list of 9 *comments to invoice* that did not include any mention of rust. I am satisfied that the corrosion, if present, would have been visible on the flywheel and engine mounts. Further, I accept Mr A's and Mr K's evidence that corrosion like this can occur in some weeks or just over a month.

[23] I find the parties did not enter the contract where there was a mistake about corrosion in the engine, because it is not proved that corrosion was present at the time of purchase.

Is DW entitled to damages?

[24] A breach of s 6 of the Contractual Remedies Act 1979 entitles a party to damages.

[25] The costs allowed total \$2326.55. In addition to these costs VD indicated it was fair for him to provide one new battery – that cost is \$270. I allow a further \$270 for a second battery because I prefer the evidence from DW that both were dead from the outset. The new total is \$2866.55

[26] DW claims \$2500 on the basis that VD told him the boat would need a service and instead of \$1000 being charged, he was charged \$3500. However, in DW's first written submission appended to the claim form, at item 6, DW said VD made the suggestion that the boat needed a service after the boat was purchased; and in item 8 of the same submission, DW said he was told by A Town Marine that the service would be less than \$1000. DW has not proved that VD misrepresented the cost of the service. The amount charged was a matter between DW and A Town Marine.

Conclusion

[27] Two very relevant factors in the outcome of DW's claim are that he purchased the boat without any inspection or sea test; and his claim, though within the Limitation period, is nearly 6 years after he discovered problems. It is possible that if the claim had been brought a few months after purchase when evidence was more easily available and relevant, DW may have been successful.

[28] DW requested that items and sums he did not initially include in the claim be taken into account. DW included all these costs in his latest submission discussed at the hearing. DW's claim can include costs in excess of \$15,000, the limit of \$15,000 applies to the amount the Tribunal can order. That was explained at the hearing by me. Consequently I have considered all the costs he claimed. DW cannot succeed in any part of his claim that does not amount to a breach of contract or misrepresentation. This decision is therefore confined to his claim of misrepresentation and the Contractual Mistakes Act that I also considered.