



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2019] NZDT 1335

APPLICANT NR

RESPONDENT HT

**SECOND
RESPONDENT** K and LX

**THIRD
RESPONDENT** CT Limited
For: TU

The Tribunal orders:

1. K and LX and CT Limited are to pay to NR the sum of \$2,997.71 on or before Friday, 29 November 2019.
2. The claim against HT is dismissed.

Reasons

1. In March 2017, Mr R purchased a 36ft [Redacted] motorsailer, "A", from Mr and Mrs X (the vendors) through an agent, TU of CT Limited.
2. Soon after purchase, Mr R discovered damage to timbers on the boat from electrolysis and was also advised that deteriorated steering gear made the boat unseaworthy. Mr R considered that the boat was misrepresented to him and was neither of acceptable quality nor fit for purpose. He has spent well over \$20,000.00 repairing the boat. Mr R filed a claim seeking compensation of \$15,000.00 as a contribution towards these costs.
3. Prior to purchasing the boat, Mr R had viewed a report on the boat written by a boat builder, HT (the Report). Mr R named the vendors, CT Limited (CT) and Mr T as respondents. The respondents defended the claim on the basis that the Report identified visible faults, and had been prepared for the vendors, not Mr R, that Mr R had signed a contract putting the risk of any faults on him, and that the boat was not subject to, or in breach of, any warranties.
4. The issues to be resolved are:
 - (a) Was Mr R induced to enter into the purchase on the basis of an actionable misrepresentation?

- (b) Was the boat of acceptable quality and fit for purpose?
- (c) If not, is Mr R entitled to compensation?

Was Mr R induced to enter into the purchase on the basis of an actionable misrepresentation?

5. Mr R contends that he was encouraged to buy the boat on the strength of misrepresentations. If this was so, he would be entitled to damages (s35 Contract and Commercial Law Act 2017 (CCLA)).

6. I find that he is unable to establish this aspect of the claim, for the following reasons:

(a) On 16 March 2017, the Xs obtained a report on the boat from a boat builder, Mr T, for their own purposes. The boat was slipped for the inspection. Mr T is not a surveyor. He stated in various places in the Report that he only undertook a visual inspection, and in a disclaimer at the end, stated that the Report was only for use by the Xs. The report noted various maintenance issues with the boat (among other things, worn gudgeons and damage by electrolysis to the shaft log area). However, the Report noted that the rudder appeared in good condition, and that the rudder gland and stock steering linkages appeared sound. Mr T states in his conclusion:

“In summary, I consider, apart from the several areas mentioned above, this vessel is in a relatively sound and seaworthy condition, and a suitable proposition for insurance.”

(b) It was later to transpire that the boat was not in “*relatively sound and seaworthy condition*”. Steering components had corroded and become compromised to the point where they could, and did, fail. However, it was not established that this could have been determined by the visual inspection that the vendors had obtained. I am satisfied that the Report was an honest opinion of how the boat appeared given the limited visual inspection that the vendors purchased. It was not established that the defects could have been identified in such an inspection. It was made clear in the Report that the opinions it expressed were limited in this way, and that the Report had only been prepared for the vendors.

(c) Additionally, Mr R signed a contract that stated in clause 5 (among other things) that he acknowledged the boat was second hand, that in deciding to buy it, he was not relying on any representation made by the vendors or CT, and that he had relied on his own inspections. The contract advised Mr R to obtain his own surveyors report and stated that CT accepted no liability for any errors or omissions of any surveyor or other expert.

(d) It is possible for the parties to make express provisions regarding representations (s34). This does not entitle a party to rely on such provisions and intentionally mislead. However, it was not established that there was any knowledge of the hidden defects. The full Report was released, including the limitations of it, and had this been an entirely private sale, the risk may have laid entirely with Mr R based on what had been negotiated in clause 5.

(e) Mr R stated that he asked Mr U for more information about the electrolysis mentioned in the Report, and that Mr U told him to make contact with Mr T. He recalls that Mr T substantially downplayed the problem both in terms of its seriousness, and future cost to repair. Mr T disputes this and advises that he gave general information about the risks and how to mitigate them, and a cost to undertake minor repairs in one area. Given the disputed recollections, it was not possible to make a finding that the conversation contained any misleading information. Mr R also pointed out that Mr U had directed him to Mr T for further information and had declined to give his own advice about a matter that would have been within his expertise. However, Mr T and Mr U both acted for the vendors, and had no duty under the contract to advise Mr R about the state of the boat. Furthermore, Mr U had only passed on the report. He had not himself made any statements about the boat that were misleading.

(f) In summary, whilst the Report turned out to be incorrect, I do not consider that its contents created an actionable misrepresentation under s35 of the CCLA.

Was the boat of acceptable quality and fit for purpose?

7. However, as the Xs decided to sell their boat through an agent who is acting “in trade”, the sale of the boat became subject to the statutory warranties set out in the Consumer Guarantees Act 1993 (the CGA): *Walters & Ors v Taylor Marine Limited & Ors* (HC, AK CIV-2006-404-2772).
8. As a result, the boat was required to be of acceptable quality and fit for purpose as those terms are defined in ss6–8 of the CGA. Clause 5 of the contract placed the risk of errors in any report on Mr R, as discussed above. However, the clause also purported to contract out of CGA warranties. Whilst the parties are free as a matter of contract law in some circumstances to allocate certain risks (s34, s50 CCLA), they are not free to contract out of CGA warranties (s43(1)).
9. I find that the boat was not of acceptable quality. This is so for the following reasons:
 - (a) The boat would be of acceptable quality if it was as fit for purpose, safe and free from defects as a reasonable purchaser would consider acceptable having regard to the nature of the goods, the price paid, the nature of the supplier and the context in which the supplier supplies the goods, any representation made about the goods by the supplier, and all other relevant circumstances of the supply (s7 CGA).
 - (b) It was established that the boat had two notable defects. The first was that the shaft log and an area of timber around the rudder stock had been damaged by electrolysis (referred to as timber damage). The second was that the rudder shaft and associated steering components had deteriorated to the point where the boat was unsafe to take to sea.
 - (c) I find that the timber damage did not breach the warranty of acceptable quality. The boat is over 50 years old and has a kauri hull. It is expected that boats of this age and construction will have some deterioration of this type. The Report noted that there was some visible electrolysis damage where the propeller shaft exits the hull through the stern tube. The defect did create a maintenance obligation, but Mr R purchased the boat for \$7,000.00 less than the listing price, reflecting the need for some maintenance work to be done. A year after purchase, Mr R spent over \$20,000 on repairs, over half of which related to the timber damage. This aspect was undertaken by Mr C of G Creations. However, it was not established that the timber damage made the boat unseaworthy. Whilst the Report understated what was later found, given the warning in the Report, the nature of the boat and the fact that further deterioration would have occurred before the work was done, it could not be established that at the point of sale the timber damage rendered the boat of unacceptable quality. It was also not established that the vendors were aware of the extent of the problem. They had been advised in a 2015 report by a marine surveyor, Mr D, to undertake ongoing maintenance to address electrolysis damage. They had done so in some areas by using a treatment known as “Everdures” but had elected not to address the issues with the shaft log as this did not affect the structural integrity of the boat and was a long-term maintenance item. It was not established that the vendors were aware of the extent of the work to be done to completely remove the damage. Having had regard to the evidence of the parties, and oral evidence from Mr D and Mr C, I am satisfied that the likelihood of considerable timber deterioration of this nature was an identified risk that a reasonable purchaser would expect having regard to all the circumstances of the sale.
 - (d) However, I find that the deterioration in the steering gear did result in a breach of the warranty of acceptable quality. It was established from evidence presented (including inspection of the actual steering gear, and evidence from a marine engineer (S Engineering) and a general engineer from [Redacted] (KC of M Engineering) that it was probable that the thread on the rudder stock was worn, and that the rudder stock itself had corroded to a point where connections were loose, creating an imminent danger of a steering failure.
 - (e) I have had regard to a report prepared by Mr KS, an experienced marine engineer from [Redacted]. Mr S, who attended by phone, concluded that the rudder shaft was in good condition, with no signs of fretting or wear to suggest a loose fit, and that if there was any

deterioration, this could be fixed by minor work modifying and tightening existing components. It was his view that the claim had been brought to fund an elective upgrade to hydraulic steering.

- (f) I accept that there is room for opinion in these matters, but in the end it falls to the Tribunal to make findings, if only to the balance of probabilities, on what is most likely. I consider it established that the rudder stock was compromised, as viewed by me, and as explained by the engineers who gave evidence for Mr R. This arose from the degraded thread and a degree of corrosion in the shaft itself. The steering in the boat did fail after purchase, luckily without serious incident. Mr S pointed out that Mr R had sailed safely from [Redacted] to [Redacted] after he took possession of the boat, but this was in fine conditions and only under motor power, not sail, putting limited pressure on the steering. Mr S also noted that Mr R became aware after purchase, due to the boat being slipped for maintenance, that the rudder strap was wobbly on the shaft, and the boat was then relaunched without tightening any nuts or addressing any steering issues. However, it appeared most likely that the worn thread on the rudder stock, along with considerable play in the steering mechanism caused by wear, resulted in the tiller arm retaining nut popping off. This was not picked up as a risk either by Mr T, in his inspection, or by Mr R after purchase, but it remained a defect that compromised safety and needed to be fixed.
- (g) The Report gave no indication of the extent of the problem, stating that the rudder was in good condition, albeit with slightly worn gudgeons, and that the rudder gland and stock steering linkages were sound. CT elected to hand over the Report despite it not being a survey, and despite it not being suitable for use by a purchaser, having been limited only to the needs of a vendor. In a consumer setting, such a document cannot be provided, and then contracted away from. The provision of the Report was part of the circumstances of the sale and was used by Mr R to gain insurance. In those circumstances, a reasonable purchaser would not consider such a fundamental defect, which directly concerned the safety (and insurability) of the boat, to be acceptable. Whilst the boat was second hand, and known to have some faults, this was a serious matter that needed to be addressed to be able to use the boat safely.
- (h) I accept Mr U's submission that he was only selling on behalf, and Mr R signed a contract stating that he could not rely on the Report and must therefore do his own investigations. I am required to have regard to the context of the sale, the terms of the contract and the role taken by the supplier. Whilst this may have been the end of the matter had the sale been a private one, the vendors' decision to use CT to sell the boat, and the provision of the Report through that process, imbues a sense of legitimacy and confidence in the product being sold. CT becomes a "supplier" in trade, giving rise to consumer rights that cannot be signed away in clause 5. The boat was old and in need of work, and as discussed, much of that was Mr R's risk. However, I do not accept that the boat could be unsafe in this setting and still be of acceptable quality to a reasonable consumer. It is arguable that the clause 5 "disclaimer" in the CT contract at least prevents Mr R from asserting that he relied upon Mr U or the Report in assuming that boat was fit for purpose (s8). However, I need not determine this point, as I am satisfied that the CGA overrides the disclaimer for the purposes of s7, and unbeknownst to all parties, the steering was about to fail.
- (i) An agent might well challenge the fairness of the warranties imposed in return for a little reward. Mr U has priced a commission without expectation of liability, based on his clause 5 disclaimers. This point was addressed by the Court of Appeal in *Walters & Ors v Taylor Marine Limited & Ors (above)*. The Court noted the potential burden on agents that sell on behalf but considered that the CGA clearly extends its warranties to agents who act on behalf of others that are not in trade, and noted that such agents are in a better position to obtain insurance, or seek an indemnity from their client, than the consumer.
- (j) I have also had regard to Mr U's submission that the Court of Appeal in *Nesbit v Porter* [2000] 2 NZLR 465 made the point that old second-hand goods of uncertain history (in that case an imported ute) would be expected to have defects of the kind encountered, and therefore the existence of them does not necessarily breach the standard of acceptable quality. In each case, the determination of what is acceptable is informed by reasonable expectations. The

stakes are higher for a boat buyer, both in terms of outlay, and the consequences of failure. I accept Mr U's submission in relation to the timber damage, but I find that the steering defect was a safety issue that a reasonable consumer would not expect to arise having regard to the price paid, and all the circumstances of the sale. An inexperienced boat buyer is entitled to rely on the statutory warranties created by the involvement of a professional in the sale, and thus pass the risk of an unacceptable hidden defect back to the vendors.

Is Mr R entitled to compensation?

10. Having established a breach of the warranty of acceptable quality, Mr R is entitled to claim repair costs, and consequential losses that are reasonably foreseeable as liable to result (s18). The vendors and CT did not accept responsibility for the claim and did not undertake any repairs to the boat themselves.

11. Mr R incurred the following costs relating to the timber repairs and replacement of steering componentry:

Timber repair (EC)	\$11,589.10
Steering components (S Engineering)	\$7,078.91
Hardstand costs	<u>\$1,928.00</u>
Total	\$20,596.01

11. These costs do not include further investments made in a new hydraulic steering system, steering wheel hub and work on a cutlass bearing. These items were unrelated to the claim.

12. During the proceedings, it became clear that timber remediation costs would be difficult to prove, particularly in the shaft log. An item was also removed from the S Engineering's account that was considered to be unrelated to the claim. Mr R therefore amended his claim to seek costs only related to the replacement of the steering components, and timber remediation in that area only. The claim therefore became:

Timber repair (EC)	\$3,296.82
Labour @\$30 p.h. (Mr R)	\$450.00
Steering components (S Engineering)	\$6,500.72
Hardstand costs (apportioned to 28%)	<u>\$548.32</u>
Total	\$10,795.86

13. I find that the S Engineering's invoice and hardstand costs are directly related to the steering failure and proved by the provision of invoices. Mr R's own labour costs were a new addition to the claim and are not able to be proved. I imagine that Mr R has spent numerous hours on the rectification work and upgrades, but there is an inability to objectively quantify this work for the area claimed, and it is therefore not possible to award it.

14. However, two further questions arise. The first is whether the timber remediation is recoverable because of the replacement of the steering gear in that area, and the second is how to assess

betterment. The boat now has brand new steering componentry but was bought as an old boat with some timber degradation, and with the original rudder stock and associated gear.

15. On its own, the timber remediation work is not recoverable in light of the findings made about that work in general. However, I accept that the timber remediation work in the area of the rudder shaft became an associated cost to the replacement of the steering componentry, as it would be unreasonable to replace this without ensuring the timber into which this work is seated is sound. The timber remediation in that area is therefore a consequential loss arising from the failure of the steering componentry.
16. However, both this work, and the new steering componentry, resulted in a significant betterment. Given that the boat was over 50 years old, I consider this betterment to be well over 50%, but not at 100%, as there could have expected to be some use left in it at the point of purchase. In the absence of precise assumptions to measure the exact degree of betterment, I consider the figure of 75% should apply (thus entitling recovery of costs at 25%). This takes into account the fact that Mr R could have reasonably expected some further period of use in the steering (perhaps 15-20% of life left), but also makes an allowance for the financial cost of the unintended early investment in upgrading this gear (for which a further 5% of notional life is attributed). The hardstand cost contains no betterment, as it was a direct consequential cost that contained no upgrade to the boat itself.

Timber repair (EC)	\$3,296.82	@25%	\$824.21
Labour @\$30 p/h (Mr R)	\$450.00		\$0.00
Steering components (S Engineering)	\$6,500.72	@25%	\$1,625.18
Hardstand costs (apportioned to 28%)	<u>\$548.32</u>	@100%	<u>\$548.32</u>
Total	\$10,795.86		\$2,997.71

Conclusion

17. In the final analysis, I am satisfied that Mr R has proved that the boat was not of acceptable quality, having regard to the nature of what he purchased, the price paid, and all the circumstances of the sale. However, he was unable to establish the extent of the award sought, as part of his concerns related to timber remediation that was acceptable for that boat in those circumstances, and the steering system has now been substantially upgraded.
18. Notwithstanding these limitations, Mr R has established a right to be compensated in part by vendors and CT to reflect the statutory warranties that were provided with the boat because of the manner of its sale.

Referee: J Robertshawe

Date: 6 November 2019



Information for Parties

Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available or a mistake was made.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 28 days of the decision having been made. If you are outside of time, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

Ground for Appeal

There is only one ground for appealing a decision of the Tribunal. This is that the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings.

A Notice of Appeal may be obtained from the Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 28 days of the decision having been made. There is a \$200 filing fee for an appeal. You can only appeal outside of 28 days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, and serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.