SUPREME COURT OF NOVA SCOTIA
Citation: Van Duren v. Chandler Marine Inc., 2010 NSSC 139

Date: 20100413
Docket: Hfx.No. 250847
Registry: Halifax

Between:

Johannes A. Van Duren and
Cornelia J. Van Duren-Imhoe

Plaintiffs

v.

Chandler Marine Inc.

Defendant

DECISION

Judge: The Honourable Justice Kevin Coady

Heard: January 13, 14, 18, 19, 20, 21, 2010 , in Halifax, NS

Decision: April 13, 2010

Counsel: John Shanks, for the plaintiffs
Jessica White, for the plaintiffs
D. Kevin Burke, for the defendant

By the Court:

BACKGROUND:

[1] Dr. Van Duren (Van Duren) and his spouse reside on the Island of St. Eustatius in the Netherlands Antilles. He is a practicing dermatologist. In 2003 Van Duren decided to acquire a new vessel to facilitate his medical practice on several islands in the area. Additionally they required the vessel to assist them in their volunteer work monitoring marine nature parks and transporting pets to veterinary clinics.

[2] In 2003 the defendant Chandler Marine Inc. (Chandler) operated a boat building business at Dartmouth, Nova Scotia. They were known as designers and builders of the Gaski 36' Sportfisher motor launch.

[3] On or about April, 2003 Van Duren contacted Chandler after viewing their website online. Over the following months the parties exchanged e-mails regarding the size, design, structure and cost of constructing a Gaski vessel. In December, 2003 Van Duren travelled to Dartmouth to discuss the details of

construction and to check on the vessel's progress. On January 2, 2004 the parties signed a contract for construction of the vessel.

[4] There were many changes, substitutions and extras added to the vessel during construction. These changes resulted in additional costs and a four (4) month delay in completion. The vessel was completed and sea trials held in late November, 2004. Following completion Van Duren commenced the voyage from Nova Scotia to St. Eustatius.

[5] The vessel experienced problems from its departure from Nova Scotia until its final berth at St. Maartens in 2006.

[6] Dr. Van Duren testified that they lost confidence in the boat and the builder during construction. He stated that they accepted the vessel in late 2004 notwithstanding their concerns. Dr. Van Duren stated they took delivery of the vessel "as is" because they had no idea of the extent of any damage. They did not commission a pre-delivery full survey and, instead, accepted an inferior survey from someone they considered unqualified. They did not raise any concerns at sea

trials in the days before delivery. On November 17, 2004 they signed a "Final Quality Inspection Report" and shortly thereafter they sailed for the Caribbean.

[7] It is of note that when the Van Durens visited Nova Scotia in late 2003 to view the plant and to sign the contract, they enjoyed the hospitality of Chandler's principals. Further, they paid Chandler $143,637.43(US) between January 28, 2004 and November 30, 2004.

THE TRIP SOUTH:

[8] It will be helpful to review the first voyage as Dr. Van Duren testified that the problems with the vessel unfolded on that trip. The following represents Dr. Van Duren's evidence.

[9] While it was late in the season to be starting such a trip, they left Halifax on flat seas and under fine weather. On the first day a shaft seal overheated to the point that it was hot to the touch and required a repair. Dr. Van Duren checked a cold water line designed to cool the shaft seal and found it 3/4 closed. The vessel was towed into Lunenburg and by the next day the shaft seal had cooled.

[10] On the second day problems developed with the heating system and the cabin temperature was below O˚ Celsius and ice covered the windows. They put into Yarmouth. While in port repairs were made to the electrical system and the battery required charging.

[11] After leaving Yarmouth they sailed to Portland, Maine where they encountered further electrical problems, a toilet problem and a black water problem. Another stop in New London, Connecticut was required to effect further electrical repairs and to charge the battery. Dr. Van Duren testified that at this time they were very worried because they felt the electrical problems were "the tip of the iceberg." He stated they felt "unsafe and insecure" and described their trip to that point as a "nightmare."

[12] The vessel required further servicing while on a stop at Morehead City, North Carolina. It was determined that there were several bad electrical connections and that the inverter was inoperative due to low voltage. The next day they put in at Wilmington, North Carolina to address a failure in the air conditioning system. It was determined that there was no water flow into the unit

because plastic end plugs were still in place preventing such flow and subsequent cooling. This servicing was effected on December 21, 2004.

[13] On December 29, 2004 the Van Durens stopped at St. Augustine, Florida to effect four different electrical repairs. On January 13, 2005 they stopped at Palm Beach Shores, Florida to repair the refrigerator, repair the battery combiner problem and to repair the fuel gauge metre.

[14] On the voyage from Florida to the Turks and Caicos Islands the vessel's engine died just before a storm. It was later determined that a speck of fibreglass became stuck in a fuel line that was undersized for its purpose. The Coast Guard was alerted and they provided guidance on how the vessel could limp into the Turks and Caicos. It took the Van Durens three (3) days to reach their destination. It was during this trip that they noted fuel leaking in the engine room.

[15] The Van Durens could not get an answer to the fuel leak problem as the local yards did not have the capacity to resolve the leak. The only proposed solution involved the removal of the fibreglass fuel tanks and the installation of stainless steel tanks. The cost of this replacement was $10,000 but there were

unresolved warranty issues at play. Dr. Van Duren put the vessel into dry dock and in early February, 2005 flew home to St. Eustatius. The vessel remained in dry dock until December, 2005 so as to avoid the hurricane season.

[16] While the vessel was in dry dock Dr. Van Duren started to realize there may be issues about the integrity of the fibreglass. He also effected repairs to the fuel filter, the water alarm and the surface of the vessel. He replaced the fuel lines with a larger diameter.

[17] Dr. Van Duren retained two persons to assist him in sailing the vessel from the Turks and Caicos to St. Eustatius. He paid their expenses and provided them with pocket money in lieu of wages. On that leg of the journey they often replaced fuel filters but otherwise the trip was uneventful. They then docked in St. Eustatius for several days.

[18] The vessel was then sailed to St. Maartens's because of their marine facilities and the availability of persons qualified to conduct a full survey. After two weeks the vessel was returned to St. Eustatius. It remained in the water for

several months but was used only once or twice. It was then placed in dry storage in St. Maartens to avoid storm damage. It has remained there since 2006.

THE LEGAL ACTION:

[19] On July 25, 2005 Van Duren commenced legal action in Nova Scotia against Chandler. They allege breach of contract as well as negligence in the design and construction of the vessel. In the Statement of Claim the Van Durens assert "the vessel remains in dry dock in an unseaworthy state, causing the plaintiffs continued emotional and economic hardship as the plaintiffs are prevented from undertaking recreational, business and humanitarian activities." They claimed the following from Chandler:

> (a) an Order of this Court directing that the Defendant pay the costs to complete the repairs on the Vessel, including any cost necessary to rectify the faulty workmanship of the Defendant;
>
> (b) payment of the expenses incurred by the Plaintiffs;
>
> (c) payment of the costs to move the Vessel to the new repairer's location, being the island of St. Maartens; and
>
> (d) payment of the costs of any surveys or appraisals to determine the damage to and the current state of the Vessel.
>
> In the alternative, the Plaintiffs claim against the Defendant:

> an Order of this Court directing that Defendant pay to the Plaintiffs all amounts paid by the Plaintiffs with respect to the Vessel, including amounts paid by the Plaintiffs directly to installers and suppliers, and that the Plaintiffs thereafter transfer ownership of the Vessel to the Defendant.

[20] Van Duren also seeks general damages as well as a wide variety of special damages including loss of employment income.

[21] Chandler filed its Defence on April 6, 2006 denying each and every allegation. The following paragraphs indicate their position:

> 2. By written agreement dated January 4, 2004, the Defendant contracted with the Plaintiffs to build and sell to them a thirty-six foot fibreglass boat ("boat"). The contract set forth terms of the agreement between the parties.
>
> 3. During the course of the construction of the boat, the Plaintiffs made numerous changes and additions. In addition, they personally selected many of the components of the boat and requested and instructed the Defendant to purchase various components from specific suppliers not normally used by the Defendant.
>
> 4. As a result of the numerous changes and additions made by the Plaintiffs, as well as the direction and requirement that components be purchased from specific suppliers, the Defendant incurred additional work, expense and delay in the completion of the boat.
>
> 5. The Defendant completed the construction of the boat in November 2004. In mid November 2004, the Plaintiffs took the boat for sea trials over a number of days and inspected and assessed the construction, operation and

> performance of the boat. The Plaintiffs completed their final inspection on or about November 17, 2004 and accepted the delivery of the boat.

[22] Chandler denied any breach of contract and asserted they were not negligent in the design and construction of the vessel. It was their position that "the boat was constructed in a good and workmanlike manner." Chandler attributed any defects to Van Duren.

THE CONTRACT:

[23] The parties signed a contract on January 2, 2004 for the supply of "one only fibreglass boat, Gaski Sport Fisher, approximate dimensions: 11' Deck, 11' Pilot House, 14' Forward Section". The following terms are the most germane to the issues in this trial:

- Fibreglass Hull: 36'x11'; Hull solid fibreglass; stringers and bulkheads, nidacore under fibreglass, decks nidacore under fibreglass.

- 4" PVC glassed in for electrical wires under deck.

- Fuel Tank: One 100 gallon fibreglass tank in center under hold (as in traditional Gaski). Two additional fibreglass tanks plumbed and installed in engine room, one

either side behind bulkhead, 150 gallons each. Standard Gaski marine fuel system with stainless fittings.

·Engine: Volvo Penta D7C TA 6 cylinder, 4 stroke, direct injected, turbocharged inboard marine diesel engine with aftercooler.

·Electrical: Complete 12V marine grade system included two batteries 8d marine lighting . . . 20 breaker panel with main switch. All marine wiring and installation included.

·Exhaust: Standard Gaski marine exhaust system included and installed.

·Price: $ 126,731.00 (US)

·Customer will be involved throughout the build and will inspect and visit whenever possible to assure he is satisfied.

·Should the customer be dissatisfied with progress, quality of work, cost or other justified complaint regarding any facet of the arrangement, customer shall have the right to pay funds owing to date and remove his boat to a place of his choice for completion.

·Completion Date: August 1, 2004

DELAY AND COST OVERRUNS:

[24] The evidence clearly establishes that the vessel was completed in mid-November, 2004, almost 4 months late. The evidence also establishes that the final cost was $143,637.43, approximately $16,906 above the quoted price.

[25] Dr. Van Duren testified that he and his spouse came to Nova Scotia in late October, 2004 and stayed for a month because the vessel was not ready. However, he also testified that he knew the vessel would not be ready upon their arrival but they felt their presence would accelerate completion. He testified that the Chandler principals did not speak to him about the completion date being missed. It is of considerable note that he did not testify about his response, if any, to the missed deadline.

[26] The issue of delay was not a major issue in this trial. While it was advanced as an inconvenience and an annoyance, Dr. Van Duren never equated it with additional costs. I find that the parties relationship was still intact in November, 2004 and that the Van Durens viewed the delay as inevitable, explainable and acceptable.

[27] I am also satisfied that the cost increase was not a deal breaker and was accepted by the parties. While the increase was mentioned in Dr. Van Duren's evidence, he did not state that he objected to the increased costs. The contract anticipated increased costs for changes and the evidence disclosed several changes during construction. Dr. Van Duren testified that he made the final payment of $21,137.43 (US) on November 30, 2004 notwithstanding his concerns about the vessel. This final payment was made after the November 15, 2004 sea trials and the signing of the Final Quality Inspection Report on November 17, 2004. I find that the Van Durens accepted the cost increases because they were aware that the changes were warranted and defensible. This view is supported by exhibit # 9, a document entitled "extras/deletions/changes."

OVERVIEW OF VAN DUREN CLAIMS:

[28] The Plaintiffs first position is that the vessel is not repairable and that it should be sold for salvage. In such a case the Plaintiff would be entitled to the difference between their costs and the salvage proceeds. They also feel that in such a situation they should be entitled to the costs of repairs as well as their travel expenses. The Van Duren's alternate position is that Chandler should pay to repair

the vessel in all respects and should reimburse all past repairs and expenses. Chandler disputes that the vessel is scrap and does not feel responsible for all repairs allegedly required.

[29] Van Duren's claims can be categorized as follows:

> ·Repairs, maintenance and services incurred on the voyage from Nova Scotia to the vessels present berth in St. Maartens.
>
> ·The expenses associated with hiring two sailors to sail the vessel between the Turks and Caicos Islands and St. Eustatius.
>
> ·Expenses of Dr. Van Duren leaving the voyage to attend his medical clinics and his return to the vessel.
>
> ·Storage and maintenance costs incurred since being placed in dry dock in 2006.
>
> ·Repairs to the fuel tanks or in the alternative replacement.
>
> ·Replacement of the electrical system.
>
> ·Replacement or repair of the hull.
>
> ·Loss of professional income.

SALVAGE OR REPAIR:

[30] There are many obvious defects and problems associated with the construction of this vessel. I will address them later in this decision. The Van Duren's preference would be to scrap the boat and have their money reimbursed. They would also like their expenses reimbursed by the Defendant. Chandler takes great exception to any suggestion the vessel is unseaworthy and that salvage is the only option. The theory behind salvage is that one should avoid repairs if the cost of such approaches or exceeds the value of the vessel.

[31] The Plaintiff retained William Bailey who was qualified to give expert evidence in the area of marine surveys. He has been a marine surveyor since 1995 and runs a business out of the British Virgin Islands. Mr. Bailey conducted a survey of the vessel on December 10 and 11, 2008 while it was out of the water at St. Maartens. He filed a report in this proceeding. It was his opinion that the vessel repaired would be worth approximately $150,000 US. He testified that it would cost $20,000 to repair the electrical system. It was his opinion that hull repairs would cost $30,000 to $40,000, a figure that he revised on his oral testimony to $40,000 to $50,000. He also testified that it would cost $25,000 to

repair all other noted defects. Mr. Bailey's view was that everything was repairable but it would not be financially feasible to repair.

[32] Mr. Bailey offered the following conclusions in his report:

> Residual value of the vessel
> Based on our knowledge of the local market, this will be a difficult vessel to sell. The vessel is cosmetically poor as a result of the unfair hull and sides. The finish to the gelcoat is also poor in places. The construction of the vessel is rather "industrial" rather than "yacht" quality. For example the unfinished Nidacore cut edges are expected in a fishing boat not a private yacht. The financial markets internationally are depressed. If the vessel was offered for sale "as is where is" we would expect to ask US$50,000.00 and sell for around US$30,000.00.
>
> SUMMARY
> The vessel is not fit to proceed to sea in its present condition. Heavy weather or large waves could cause structural failure of the hull as a result of the dis-bonded Nidacore and the diesel impregnated bulkhead. The vessel could catch fire as a result of the electrical installation.

[33] The Plaintiff also retained Stuart Knaggs who was qualified to give expert evidence in the area of marine surveys. He has been a marine surveyor since 1995 and runs a business out of St. Maartens. He conducted three surveys between 2005 and 2010. In his report dated January 17, 2006 Mr. Knaggs stated:

> "Solitude has serious structural defects to her hull that are the result of poor manufacturing technique. The exact extent of these defects has yet to be established . . . If the core used on the topsides is a structural part of the vessel, Solitude may be un-repairable."

[34] In his report dated January 26, 2007 Mr. Knaggs provided the following opinion:

> Evaluation
> Although she is a relatively new vessel, Solitude has serious structural failure of her hull as noted by separation of the core on the starboard side. We are of the opinion that the hull is unrepairable. For this reason, we must give a salvage value, made up of 50% of the value of machinery and equipment on board less the amount required to dispose of the remainder of the vessel in an ecologically sound manner. We therefore find her value to be **USD 25 000** or **twenty-five thousand United States Dollars.**

[35] In his report dated December 9, 2009 Mr. Knaggs offered the following conclusion:

> The structure of Solitude has been severely compromised by a combination of poor design and poor construction. Although it would be theoretically possible to put right some of the deficiencies noted above, we are of the opinion that the cost to do so would be excessive and close to the new cost of the vessel.
>
> Bearing the above in mind, we remain of the opinion that the vessel be considered a total loss. Some salvage value may be retained by the propulsion unit and other machinery on board. The additional findings from this subsequent inspection have not changed the original assessment of the vessel made in 2006.

Mr. Knaggs acknowledged that all items can be repaired but that the cost would come close to the original cost of the vessel.

[36] I have two problems with Mr. Knagg's evidence. One, he assumed a widespread problem with the Nidacore not being attached to the hull when that has not been determined through sufficient testing. Two, he did not cost out required repairs and provided the court with "ballpark" figures. I found the same deficiencies present in the expert evidence of Mr. Bailey. My ruling on the hull issue heavily impacts on whether the vessel should be scrapped or repaired.

[37] In *Alden Dedrick Fisheries Ltd. v. Legay Fibreglass*, 1994 CarswellNS 183 (N.S.S.C.) Goodfellow J. discussed the nature of damages flowing from a breach of contract involving the construction of a marine vessel:

> 36 The basic rule is that the measure of damages is the cost of repairs. It was reasonable to effect repairs which, as I have found, have been effective in placing Alden Dedrick Fisheries Limited in the position for which it contracted.
>
> 37 There is no law that presents an option to be exercised unilaterally of acquiring an alternate and disposing of the repaired item, holding the party liable for repair to a higher level than on the basic measure of damages. Obviously it would be different if the boat was beyond repair, or if the cost of repair exceeded or came close to the value of the boat. Such is not the case here. Repairs here were successfully completed in late 1991.

[38] This leads to my conclusion that any compensation should be based on repair rather than salvage. The claim in negligence does not change my conclusion.

CONTRACT AND/OR NEGLIGENCE:

[39] This action pleads breach of contract and negligence. The Van Durens allege that Chandler was negligent in the design and construction of the vessel as well as in the installation of various components. They further allege that Chandler breached its contractual duty to provide a vessel that was fit for its intended purpose, was seaworthy and was constructed in a good workman-like manner using materials of good quality.

[40] It is well established that for Van Durens to succeed in negligence they would have to establish the following elements:

> 1. That the Defendant owed the Plaintiffs a duty of care?
>
> 2. If there was a duty of care owed by the Defendant, what is the standard of care?

3. Did the Defendant breach the standard of care and if so, what loss resulted?

[41] To be successful on the breach of contract issue, Van Duren would have to establish:

1. That the vessel is not fit for its intended purposes.

2. That the vessel was not constructed in a workman-like manner, and

3. That the vessel is not seaworthy.

[42] I agree with the Plaintiff that this case is akin to a building contract case and that the same principles apply. In the text Goldsmith on Canadian Building Contracts, 4th ed (Thompson 1988) a basic tenet of building contracts was set forth at section 5(2)(b):

> Work which does not meet the requirements or the specifications contained in the contract, or which, in the absence of such specifications, is not of a reasonable workmanlike quality, is not proper compliance with the contract and constitutes a breach. Furthermore, compliance by the contractor with the specifications will not be sufficient performance if the specifications were prepared by him and are deficient, even if they were approved by the owner. Whether work or material supplied, is defective or not is, in each case, a question of fact, depending on the construction of the particular specifications where there are any, and on expert evidence as to what is reasonable where there are none.

[43] In relation to negligence the Plaintiff cites Fridman, The Law of Torts in Canada, 2nd ed., (Toronto: Thompson Carswell 2002) at page 317:

> To establish such liability, it is necessary for the plaintiff to show: (I) that he was owed a duty of care by the defendant; (ii) that the defendant should have observed a particular standard of care in order to perform or fulfil that duty; (iii) that he broke his duty of care by failing to fulfil or observe the relevant standard of care; (iv) that such breach of duty caused damage or loss to the plaintiff; (v) that such damage was not too remote a consequence of the breach so as to render the defendant not liable for its occurrence.

[44] I have no difficulty finding that the Defendants breached the contract and were negligent in the construction of the vessel. It is not my intention to support this conclusion with extensive reasons because in the end it will not impact on damages.

PAST REPAIR COSTS:

[45] Van Duren submitted 26 receipts for repairs and servicing of the vessel during its southern voyage and for some time afterwards. These invoices total $14,129.07 and are found at Tab 2 of Exhibit #1 (Joint Exhibit Book). They represent repairs to the electrical system, service of the engine, repairs to the fuel system and various other items.

[46] The electrical system requires a complete replacement and Chandler does not challenge that conclusion. William Bailey offers the following opinion in his December 29, 2008 report:

> The entire electrical wiring will need to be removed and replaced. Some of the original wiring will be re-useable. Some of the electrical equipment will need to be correctly installed. We estimate around US$20,000.00

[47] Stuart Knaggs in his January 17, 2006 report commented on the electrical system as follows:

> The wiring on the vessel was extremely untidy. It was bundled together in a way that put unnecessary strain on connections at the electrical panels; causing a potentially dangerous situation with a risk of overloaded wires and related fire. The individual wires were not labelled making maintenance extremely difficult and unnecessarily costly.

[48] I am satisfied that the electrical system has been a serious problem since the vessel left Halifax. I conclude that all "electrical" expenditures are recoverable by Van Duren. (Exhibit #1, tab 2; pages 1 through 8, 10, 32) The total of these invoices is $2,840.87.

[49] The evidence satisfies me that there are problems with the fuel system. I approve all expenditures associated with that problem (Exhibit #1, tab 2; pages 18, 19, 22, 23, 25, 29). The total of these invoices is $1,758.91.

[50] The claim for servicing the engine is not allowed ($1,138.75, Exhibit #1, tab #2, page 16). This was scheduled maintenance and would be required regardless of the condition of the vessel.

[51] I have carefully reviewed the remaining invoices and the viva voce evidence advanced in support of those expenditures. I approve those invoices that can be clearly tied to vessel deficiencies. (Exhibit #1, tab 2, pages 34-36). I approve these expenditures in the amount of $3,958.34.

[52] I do not approve several invoices because the evidence does not satisfy me that these expenditures were anything beyond maintenance and improvements (Exhibit #1, tab 2; pages 20, 21, 24, 28, 31, 33, 47, 48 and 49).

[53] I find as a fact that Van Duren has proven past repair costs in the amount of $8,558.12 and I award that sum to the Plaintiff.

STORAGE COSTS:

[54] Van Duren seeks storage costs for the vessel. He seeks $2,003.47 (Exhibit #1, tab 3; page 76) for the time the vessel was in the Turks and Caicos. He seeks $13,080.35 for storage at St. Maartens after August, 2006 to the present (Exhibit #7). There was an error in this exhibit that reduced the claim by $1,361.55.

[55] I accept Dr. Van Duren's evidence that in 2005 he left the vessel at the Turks and Caicos because of the condition of the vessel. The wisdom of this choice is supported by the evidence of William Bailey and Stuart Knaggs. I also accept Dr. Van Duren's evidence that he left the vessel at the Turks and Caicos to wait out the storm season. I award Van Duren $2,003.47 to cover this expenditure.

[56] It is not disputed that the vessel has been at St. Maartens since August, 2006. I accept Dr. Van Duren's evidence that moorage at St. Eustatius was not an option because of the condition of the vessel and the uncertainties of the weather.

[57] The storage at St. Maartens costs $400(US) per month and has been incurred since August, 2006. I accept Dr. Van Duren's evidence that St. Maartens is the only yard capable of providing the services this vessel requires in its present condition. Messrs Bailey and Knaggs evidence supports this decision. While I expect that Van Duren would incur moorage/storage fees in any event, I have no evidence on point. I accept that the vessel has not been used since returning south save for a few local excursions. While the vessel is not a write off, there are many issues dictating that it not be sailed in its present condition. I award Van Duren $400.00 per months for a total of $16,000.00.

[58] The Plaintiff will recover $18,003.47 for storage costs up to December 31, 2009.

TRAVEL COSTS:

[59] Van Duren seeks $5,698.51 in travel costs incurred as a result of the vessels defects. These costs include car rentals, airline fares, hotels, meals and the like.

They all relate to expenditures in 2005 and January, 2006. These costs relate to two activities. One was to facilitate Dr. Van Duren leaving the vessel on route and travelling back and forth to conduct pre-scheduled medical clinics. The second related to bringing two sailors from St. Maartens to the Turks and Caicos Islands to recover the vessel and to limp it back to St. Maartens. I have reviewed each invoice, and the supporting viva voce evidence and I approve this claim in the amount of $5,698.51. I am satisfied that Dr. Van Duren would not have incurred these expenses if the vessel had been able to sail from Halifax to St. Eustatius/St. Maartens.

NON-STRUCTURAL DEFECTS:

[60] The Van Duren vessel was plagued with a multitude of defects that require repairs or replacement. Stuart Knaggs described his findings as follows:

> During our survey, we found a number of deficiencies in the vessel that originated at the manufacturer due to poor design, construction or both. These deficiencies ranged from irritating to unsafe and structurally inadequate. The deficiencies are laid out below along with their suggested solutions.

A great deal of the focus in this trial was on the vessel's structural deficiencies. I will address those later in this decision. However, I find that these secondary defects demonstrate Chandler's carelessness and lack of attention to detail. The following are some of the defects of which I speak:

·The exhaust outlet was located where it was 60% submerged with the vessel at rest.

·A crack in the aft end of the cabin.

·Various bolts either missing or improperly installed.

·Corrosion of stainless steel welding joining the keel to the rudder.

·Lack of non-skid finish on the foredeck.

·The mast and boom installation.

·No water alarm installed.

·Leaky cabin windows and lack of caulking throughout.

·Sewage disposal equipment did not work.

·Incorrect mounting of the circulation pump for the air conditioning unit, as well as other installation problems.

·Inadequate surfacing.

·Leaky deck hatches.

[61] Mr. Knaggs reported that “although each one might be minor in itself, together they will require considerable work at significant cost to put right.” He did not offer any evidence as to the costs associated with these secondary defects. William Bailey suggests a “ballpark figure of US$25,000.00" to effect these repairs. This was the only evidence on non structural repair costs.

[62] I accept the $25,000 figure as it represents all repairs not hull or electrical and it includes repairs to the fuel tanks. It should be noted that these deficiencies are well established but are too numerous to list. I award the Van Durens $25,000 for these non-structural defects.

THE FUEL TANKS:

[63] There was much evidence called that addressed problems with the vessel’s fuel tanks and the leakage of diesel fuel. The genesis of these problems stem from the installation of a different engine. The contract called for the following:

> Engine: Volvo Penta D7C TA 6-cylinder, 4 stroke, direct injected, turbocharged inboard marine diesel engine with aftercooler, commercial rated 265 hp @ 2300 rpm. ZF 280 V drive transmission 2.063:1 ratio, algae-X fuel cleaning system,

> duplex ractor fuel filter switchable with guage, 12 months unlimited warranty.
> Electric drill pump kit for oil changes.

[64] Dr. Van Duren testified "in the end they put in a Caterpillar Engine" because the Volvo was not available in the North American market because of an emission issue. I accept that Chandler suggested that Caterpillar was a good choice and a good engine. When the new engine arrived at Chandlers it was obviously too big for the rear compartment where it was to be originally installed. This required moving the engine forward and installing the fuel tanks at the rear of the vessel. This resulted in several changes in the original design.

[65] Dr. Van Duren reports that these changes resulted in raising the floor of the pilot house by one foot and increased the noise in the pilot house substantially. It is his view that these mid-construction changes contributed to the subsequent fuel problems. It is helpful to review the evidence on point.

[66] Dr. Van Duren testified that he first noted some fuel leaking in the engine room on the trip south. He stated that it came from the sidewall of the vessel. He further testified that when he got to the Turks and Caicos the fuel leak continued. When he consulted with a repair yard there he was told that the only solution was

to replace the fibreglass tanks with stainless steel at a cost of US$10,000.00. Dr. Van Duren did not pursue this avenue because of the cost and the possibility of a warranty covering the repair. On the subsequent voyage from the Turks and Caicos to St. Eustatius many fuel filter changes were required. Dr. Van Duren testified that when he retained Stuart Knaggs the fuel leak problem was his biggest concern.

[67] I find as a fact that the fuel leak problem originated with the fuel tanks that leaked as a result of their relocation to accommodate the larger engine. I am unable to find that this problem resulted from Mr. Van Duren overfilling one of the tanks. While I accept that he downplayed this event, the evidence does not support a finding that one overfill would create this ongoing problem.

[68] Mr. William Bailey testified that he found areas of delamination in the area of the fuel tanks and it was his opinion that this was likely caused by a fuel leak in the interior of the vessel. He testified that the bottoms of the tanks were formed by the bottom of the hull, the sides of the tanks by the side of the hull, the ends by a bulkhead and the top by the floor of the cabin. The inside walls are fibreglass

panels. Mr. Bailey found a lack of sealant in the tanks construction. He provided the following opinion:

> We conclude that both the inward wall and the fore and aft bulkhead walls of the fuel tank are permeable to diesel and that the diesel has permeated the forward bulkhead, which forms the front end of the diesel tanks.

[69] Mr. Bailey testified that the solution to the fuel tank issue was to remove the fibreglass tanks and to replace them with free standing steel tanks.

[70] Stuart Knaggs testified that a diesel fuel leak could cause delamination but it could take years to have that effect. He testified that where he drilled test holes in the hull it was saturated with "water and fuel oil." He found full contamination in the starboard aft quarter.

[71] Olie Gunnarson, Chandler's employee, testified that the oil tanks were placed in the engine room because the engine was moved forward and the only place for the tanks was the rear. He felt that if there was a fuel problem, the solution was to replace the existing tanks. He testified that such a procedure would take a 10 hour day at an hourly rate of $50/$55.

[72] I am satisfied that the fuel problem is both a breach of contract and is attributable to negligent design and construction. The only evidence I have as to a repair cost is the $25,000 “ballpark” figure advanced by Mr. Bailey. This figure includes all secondary repairs and excludes hull and electrical repairs.

ELECTRICAL SYSTEM:

[73] I have already reviewed repairs effected on the electrical system during the voyage south. The evidence clearly establishes that notwithstanding these repairs the system must be replaced. Mr. Bailey felt that the existing installation was a fire risk. When he inspected it in 2008 he would not touch the wiring as it was a “shock hazard”. It was his opinion that all wiring must be taken out and replaced and that nothing was salvageable. He offers the following problems in support of his opinion:

- 110 AC volt colour wire has been used for some 12 volt circuits.
- 12 volt colour wiring has been used for some 110 volt circuits.
- Some cables are not labelled with their manufacturer or carrying capacity.
- Where the cables pass through bulkheads, there are no grommets or chafe protection provided.

> ·12 volt wiring is inadequately supported in places for example the cables to the anchor windlass are supported approx 6' intervals not the 12" recommended.
>
> ·The 110 volt wiring is not supported from the socket where it enters the to the 110 volt panel. The cables are hanging off the connector.
>
> ·110 volt wiring and 12 volt wiring are bundled together in places.
>
> ·There are not “buss bars” but wires are crimped together.
>
> ·We conclude that the wiring is a shock hazard and a fire risk.
>
> ·There may well be other exceptions to ABYC which can not be determined at this time due to the confusion caused by the incorrect wiring. For example the ground wire should be bonded. There is no way to prove this at present due to the changes in wire colour. Incorrect bonding can result in electrolysis of external metal fittings.

[74] I accept Stuart Knaggs evidence that the electrical wiring indicated a lack of planning and that color codes and conventions were not followed. I accept that normal electrical practices were ignored and that the wiring was not supported and there was a danger of short circuiting. Mr. Knaggs felt that the best fix was to fully rewire the vessel.

[75] In closing submissions Chandler’s counsel acknowledged that the wiring must be replaced and that the cost is found at Exhibit #1 (tab 6, page 6). He was referring to the following paragraph:

> The entire electrical wiring will need to be removed and replaced. Some of the original wiring will be re-useable. Some of the electrical equipment will need to be correctly installed. We estimate around US$20,000.00.

[76] I award Van Duren $20,000.00 to replace the electrical system.

LOST INCOME:

[77] Dr. Van Duren argues that his medical practice on the Island of Saba suffered a $37,500 loss as a result of the problems with the vessel. He filed extensive documentation in support of this item (Exhibit #3). It is Dr. Van Duren's position that he could not service the Saba clinic for a variety of reasons. I offer the following responses to those reasons:

- The vessel was not available to transport liquid nitrogen to Saba. Yet since 2000 he transported this substance by a cargo boat and he travelled by air. All expenses were paid by Saba.

- Referrals stopped after his March, 2005 clinic. Dr. Van Duren offered no explanation as to why family physicians ceased referrals. The evidence suggests that the cost of his services was a factor.

- Saba started using a general practitioner in St. Maartens as a dermatologist.

·Dr. Van Duren worked for Saba without a contract. At one point he told them that he would not return without a contract and that contributed negatively to the relationship.

·It was necessary for Dr. Van Duren to sue the Saba government for his outstanding fees.

·It was not unusual for clinics to be cancelled for a number of reasons.

[78] I am unable to determine from the oral and the documentary evidence that Dr. Van Duren experienced the financial losses he alleges. There is a lack of historical comparison and all figures are gross rather than net. The financial document (Exhibit#3) was prepared by Dr. Van Duren who is not an accountant and who has an interest in the outcome. There are no confirming documents provided. I am also unable to conclude the causes of any losses (if any) were caused by the ongoing problems with the vessel. Dr. Van Duren's practice at Saba existed before he purchased this vessel and I suspect it ended for the reasons set forth in the preceding paragraph.

[79] Even if Dr. Van Duren could overcome the above obstacles to recovery, he would still have to establish that his wage losses were not too remote from the alleged breach. He must also establish that his income losses were reasonably foreseeable by Chandler when they undertook the construction of the vessel.

Compensatory damages would flow if the Defendant could foresee that Dr. Van Duren would suffer wage loss as a result of their actions. I find that wage losses were not foreseeable given all of the circumstances in this case.

[80] I dismiss this aspect of the Plaintiff's claim.

THE HULL/DELAMINATION:

[81] The issue of the hull was very much front and centre in this trial. While there were many problems with this vessel, Dr. Van Duren's greatest concern at trial was that the integrity of the hull had been compromised and that the vessel was unseaworthy. There are two aspects to his concern. One relates to the structural soundness of the hull. The other relates to the problem of delamination or the separation of the layers of fibreglass by the actions of fuel and/or water. While these two issues are separate in cause and effect, they overlap in many ways. I will deal with these items as one.

[82] I will review the evidence of each witness on point. Dr. Van Duren identified an e-mail dated April 28, 2003 from Chandler to himself wherein the

former stated “hull to be solid fibreglass construction; bulkheads and stringers to be Nidacore encapsulated with fibreglass.” The January 2, 2004 contract stated “hull fibreglass, stringers and bulkhead Nidacore under fibreglass, decks Nidacore under fibreglass . . .”

[83] Dr. Van Duren testified that at inspection on November 17, 2004 he neither noticed nor reported any concern about the hull. He stated that a Mr. Thompson, an engineer and naval architect, was present at the sea trials and raised no concerns about the hull. There were no hull problems identified on the voyage south.

[84] Dr. Van Duren stated that when the vessel arrived at the Turks and Caicos drydocks he “also realized issues about the integrity of the fibreglass.” He gave no indication as to why he felt that way. Dr. Van Duren also stated that he retained Stuart Knaggs because of concerns about “construction problems” but does not expand beyond those words.

[85] He testified that in time he raised issues about the stability of the vessel i.e. listing to the right. However there is no evidence that this was caused by the condition of the hull. Also he felt that the secondary problems were the tip of the

iceberg and that there were problems not yet detected. However he provided no foundation for feeling that way.

[86] William Bailey testified and provided a report dated December 29, 2008. On inspection he found the topside of the vessel (between water line and deck) to be “not fair.” In other words it does not form a smooth curve. One explanation offered was that the length of the vessel was extended and a piece put in the middle. Another explanation was that delamination could cause the lack of fairness. I could not find any evidence supporting those conclusions. He also testified that he found areas of high moisture in the topsides.

[87] Mr. Bailey said he noticed cracks where 75% of the deck joins the hull and he suggested this represented poor building practices. He stated that this could allow water to enter and then migrate into the fibreglass and this, if not repaired, could ultimately lead to delamination and that could lead to a structural failure. He was unable to determine if there was any delamination when he inspected the vessel. He also testified that if the source of the water was stopped that the area would dry up and deterioration would cease.

[88] Mr. Bailey testified that Nidacore is an acceptable material for the construction of a vessel. He stated that this material reduces condensation by acting as a thermal barrier. It also provides support for the hull and the fibreglass topsides. It was his opinion that if Nidacore is used as a strengthening agent that stringers are not necessary. He stated that usually the bulkheads are attached to the actual hull to provide horizontal stability. He testified that attaching the bulkheads to the Nidacore could lead to structural failure. This approach, he felt was not proper boat building.

[89] Mr. Bailey was asked about the structural integrity of this vessel. He identified an issue of diesel contamination. He also identified a failure to bond the bulkheads to the sides of the hull. Mr. Bailey felt that the first issue was likely to cause delamination of the fibreglass hull and the second could result in a lack of stability. He could not say with certainty that there was any delamination at the time of his inspection.

[90] Mr. Bailey filed a report dated December 9, 2008 (Exhibit #1, tab 6). He offers the following observations at page 2:

> The hull topsides were sounded with an acetate hammer to try to detect delamination either of the solid fiberglass or delamination of the fiberglass from the Nidacore. Sounding of the topsides with an acetate hammer is a normal way of testing for delamination on fiberglass structures. There was no delamination of the fiberglass found. The thickness of the fiberglass made determining whether the Nidacore was properly bonded inconclusive. However, it may well be that the area of high moisture are indicative of disbonded Nidacore/Fiberglass.

[91] He stated as follows at page 3:

> The thickness of the solid fiberglass is considered to be adequate to provide structural support for the hull. The topsides however are panels approx 33" wide. It would be normal and customary practice for panels of this width to have structural supports to reduce flexing. These supports could be either vertical or horizontal stringers, commonly made of cored fiberglass. There are no stringers to the hull topsides. The Nidacore appears to be providing the function of the stringers and if the Nidacore is properly bonded to the fiberglass will result in an adequately stiff panel. The Nidacore is therefore providing a structural element to the hull topsides. Where it is properly bonded to the topsides, it is providing good support to the topsides and sound bonding to the structural bulkheads and floors.

[92] Stuart Knaggs testified for the Plaintiff and filed four reports. In his report of January 17, 2006 he offered the following opinion about the hull at page 3:

> ·Inspection showed that the polypropylene honeycomb core of the hull topsides was not attached to the outer skin of the hull. This situation was evident in three places in the engine room on the starboard side where core samples showed a gap of up to 3mm between the core material and the outer skin. Moreover, the scrim of the outer side of the core showed no sign of being saturated in resin or of ever being in contact with the outer hull skin. Sounding the outside of the hull indicated that this condition exists over 80% of the starboard side and 40% of the port side.

[93] Polypropylene honeycomb is Nidacore.

[94] Mr. Knaggs continues at page 5:

> ·The bulkhead at the starboard aft end of the engine compartment was seen to be attached only to the inner skin of the hull. This is structurally unsound as it has been shown above that there is no physical contact between the inner and supposedly structural outer skin of the hull. We assume that the other bulkheads on the vessel are attached in the same way but this will have to be confirmed by internal inspection.
>
> ·The forward sides of the two front bulkheads are not attached to the hull.

[95] Mr. Knaggs provided the following conclusion at page 19 of his January 17, 2006 report:

> Solitude has serious structural defects to her hull that are the result of poor manufacturing technique. The exact extent of these defects has yet to be established . . .

[96] Mr. Knaggs recommended that "further core samples should be taken on the hull to establish the extent of separation between the core and the hull skin."

[97] In his report dated December 3, 2009 Mr. Knaggs indicates that his retainer was "to further investigate the structure of the vessel's hull." This resulted in

seven core samples taken from various vessel locations. Three samples resulted in findings that the core is not attached to the hull. One sample resulted in a finding that the inner skin and core are partially separated from the outer skin and core. He also noted that this sample disclosed that a bulkhead is attached to the inner skin and that there is no physical connection to the outer skin of the hull. The remaining core samples did not disclose delamination or contamination.

[98] Chandler called Olie Gunnarsson as its only witness. He was employed by the Defendant throughout the design and construction of the Van Duren vessel. He has all the educational requisites needed to construct fibreglass boats and has been building Gaski boats since 1983. He testified that between 1985 - 1999 he built 50 such boats in Iceland. It was his evidence that since 1999 he built between 10 and 20 Gaski boats at Chandler. Mr. Gunnarsson testified that the Van Duren vessel was the only one where there has been a complaint about hull structure. It was his evidence that he has used Nidacore effectively throughout. He did not examine this vessel after it left Nova Scotia.

[99] Mr. Gunnarsson stated that they used two halves of a mold to construct this vessel. These halves were fitted together lengthways and not horizontally. He said

that the hull is 15mm thick which he described as sufficient. He testified that they used Nidacore as a means of insulating the hull and as a means of strengthening the vessel. He stated that the 19mm of Nidacore avoided the need for stringers. It was his evidence that the use of Nidacore made the boat thicker and stronger.

[100] Mr. Gunnarsson addressed the issue of gaps between the Nidacore and the actual fibreglass hull. He testified that the gaps at the core sample areas (S. Knaggs) are not indicative of a gap throughout the hull. He testified that there can be gap areas where the surface of the fibreglass is not even and there is overlap between the layers. He did not see this as a problem and not terribly surprising. He felt that if more core samples were taken that his theory would be borne out. Mr. Gunnarsson's view was not disturbed on cross-examination even though it is somewhat at variance with Stuart Knagg's opinion.

[101] The onus is on Van Duren to prove, on a balance of probabilities, that Chandler's design and construction left the vessel with a defective, delaminated hull, either as a breach of contract or as a result of negligence. To award damages for the hull I must be satisfied that the Plaintiff's evidence tips the scale in their favour. If the evidence on an issue is evenly balanced, the asserting party has

failed to meet its onus. In deciding whether an issue has been proved on a balance of probabilities, I must consider all evidence on point no matter who produced it.

[102] I am unable to find as a fact that the vessel's hull suffers from the conditions alleged by Van Duren.

[103] I accept that some water and diesel fuel leaked into the hull structure and created isolated issues. I accept that the leakage of these substances were caused by Chandlers lack of attention to tightness and their construction of the fuel tanks. However, there is no clear evidence that delamination is widespread and that the hull could fail. It may be that extensive destructive testing might enhance Van Duren's position, but I do not have that kind of evidence before me.

[104] I am further not satisfied that the lack of formal bulkheads and stringers have contributed to any structural weakness of the hull. I am satisfied that the use of Nidacore was anticipated in the contract and that it provided all the structural requirements needed for this vessel.

[105] I find that there are also “annoying” issues associated with the finishing of the hull but I find they are cosmetic rather than structural in nature.

GENERAL DAMAGES:

[106] Van Duren seeks general damages for the “aggravation, frustration and anguish resulting from the unseaworthiness of their dream boat, as well as by the Defendant’s negligent design and construction of the vessel.” In assessing this head of damages I have listened carefully to Dr. Van Duren’s evidence to assess the personal impact on he and his family.

[107] Dr. Van Duren testified that the ongoing, unrelenting failings caused he and his wife much mental distress. He stated that this was to be a dream boat for them yet they never had “a good secure feeling.” He stated they now have no confidence in this vessel and that they can not afford another boat. He testified that they are seeking damages for the dreams they had for retirement.

[108] In *Fidler v Sun Life Assurance of Canada* 2006 CarswellBC 1596 the court discussed damages for mental distress in breach of contract cases:

> 44 We conclude that damages for mental distress for breach of contract may, in appropriate cases, be awarded as an application of the principle in *Hadley v. Baxendale*: The court should ask "what did the contract promise?" and provide compensation for those promises. The aim of compensatory damages is to restore the wronged party to the position he or she would have been in had the contract not been broken. As the Privy Council stated in *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301, at p. 307: "the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed." The measure of these damages is, of course, subject to remoteness principles. There is no reason why this should not include damages for mental distress, where such damages were in the reasonable contemplation of the parties at the time the contract was made. This conclusion follows from the basic principle of compensatory contractual damages: that the parties are to be restored to the position they contracted for, whether tangible or intangible. The law's task is simply to provide the benefits contracted for, whatever their nature, if they were in the reasonable contemplation of the parties.
>
> 47 This does not obviate the requirement that a plaintiff prove his or her loss. The court must be satisfied: (1) that an object of the contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties; and (2) that the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation. These questions require sensitivity to the particular facts of each case.

[109] In *Stoddard v. Atwill Enterprises Ltd.*, 1991 CarswellNS 315 Saunders J. (as he then was) stated at paragraph 13:

> [113] I am satisfied that Mr. and Mrs. Stoddard have suffered mental distress by virtue of the defendant's negligence and breach of contract. This anxiety was first occasioned by continuous leakage from the time they moved in and was aggravated when their experts disclosed how dangerous their house was.

> [114] These damages are compensable. I need not repeat my analysis in the case of *Gourlay v. Osmond* (1991), 104 N.S.R. (2d) 155, 283 A.P.R. 155 (T.D.) Damages in this case for mental distress lie both in negligence and breach of contract. While the Stoddards' stress could not be compared to the acute depression suffered by Mrs. Eileen Gourlay (which necessitated medication and professional therapy) it was real and continuous nonetheless. I award the plaintiffs $3,000 nonpecuniary damages for mental suffering.

[110] In *Force Construction Ltd. v. Campbell* 2008 CarswellNS 249 this court canvassed the evolution of the law in this area:

> 124 I believe it is fair comment that these type of general damages are the exception in building contract cases. It is only in the most egregious cases that such awards are ordered. In *Gourlay v. Osmond* (1991), 104 N.S.R. (2d) 155 (N.S.T.D.) Saunders, J. (as he then was) stated at page 163:
>
> > [28] The law has changed and continues to evolve. At common law damages for breach of contract were traditionally limited to those related to compensation. The absolute rule was set out in *Addis v. Gramophone Co. Ltd.*, [1909] A.C. 488 (H.L.), and *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673, 58 D.L.R. (2d) I, to the effect that damages for mental distress were not available in breach of contract cases because contractual damages must be tangible, estimable and compensatory.
> >
> > [29] New ground was broken in *Jarvis v. Swans Tours Ltd.*, [1973] Q.B. 233, [1973] 1 All E.R. 71, when Lord Denning awarded compensatory damages for "the disappointment, the distress, the upset and frustration" occasioned by a ruined holiday. He dismissed the argument that because such damages were difficult to quantify they ought be declined. He recalled the principle that difficulty of assessment is no deterrent to a legitimate claim. Lord Denning found that such damages were proper in breach of contract cases provided they conformed to the standard test for remoteness and foresee-ability. As long as it could be said that the parties should reasonably have foreseen mental distress as a

> consequence of their breach at the time the contract was entered into, damages for such mental suffering will be awarded.

[111] The Van Durens suffered a great deal of anxiety and distress as a direct result of Chandler's breach of their contract and as a result of their negligence. While the vessel is not a "write off" they experienced nothing but failure and disappointment from the day they sailed away from Nova Scotia. The problems in total may not make the boat unsalvageable but it has kept them out of the water since 2006. I award general damages of $15,000.

[112] In conclusion the Van Durens shall recover $92,260.10 in Canadian dollars. If necessary I will hear the parties on costs which will include any adjustments for currency.

J.