

2019

SCC NO. 490071

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Blondin v. Axworthy*, 2020 NSSM 11

BETWEEN:

GUY BLONDIN

CLAIMANT

and

GARY AXWORTHY

DEFENDANT

REASONS FOR DECISION

BEFORE:

A. Robert Sampson, Q.C., Adjudicator

DATE OF HEARING:

Hearing held at Sydney, Nova Scotia on November 27, 2019

DECISION RENDERED:

January 10, 2020

APPEARANCES:

For the Claimant:

Self-Represented – Guy Blondin (with aid of interpreter)

Interpreter – Elizabeth Richard, Halifax, NS

For the Defendant:

Self- Represented – Gary Axworthy

Witnesses:

Gail Fraser – Common-law spouse of Defendant

Frank Campbell – For the Defendant

Gary Deveaux – For the Defendant

BY THE COURT:

1. This claim was commenced by a Notice of Claim filed with the Court on July 11, 2019 and originally scheduled to be heard on October 2, 2019. The Claimant, residing in Quebec, made several attempts to serve the Defendant through process servers without success. At the Claimant's request, an Order for Substituted Service was in the process of being granted however the court had been advised that the Defendant was successfully served. A new hearing date was set for November 27, 2019 commencing at 4:00 pm for purposes of allowing sufficient time for the parties to complete their evidence having regard to the fact that the Claimant was traveling from Quebec. A Defence was filed on October 3, 2019.

2. This is a claim arising out of a contract between the parties relating to the purchase and sale of a 1996, 2858 (28-foot) Cierra Bayliner motor boat (hereinafter referred to as “the Boat”) which the Claimant had purchased from the Defendant in Sydney on June 23, 2017. The Claimant claims from the Defendant the sum of twenty-five thousand dollars (\$25,000.00), being the monetary limit of this court, however provided evidence during the hearing supporting a greater amount relative to the alleged damages. The claim itself notes the grounds to be a number of “latent” defects discovered with the Boat after the sale and further, included with the claim and filed with the court, was a seven-page summary of the damage giving rise to this claim. The Defendant’s written defence states that he was not aware of any defects with the Boat at the time of sale and generally takes issue with the information submitted by the Claimant.

3. At the outset the court reviewed the general procedure to be employed in hearing the claim, the role of each party and how evidence was to be received including the opportunity of both parties to provide their “side of the story”, that each would be afforded a chance to question the other and any witnesses and further that at the end of the evidence, each would be afforded a chance to sum up their positions based on all the evidence presented. The parties were not represented by counsel. Ms. Fraser accompanied the Defendant and Ms. Richard, the interpreter, for purposes of assisting the Claimant together with the Claimant and Defendant were placed under oath and/or affirmed at the outset as is the practice of this court when dealing with self-represented parties. Each was advised that any comments made by them at any time throughout the proceeding would be considered information given “under oath”.

4. The court is appreciative to both parties for the organized and respectful manner in which they presented their position including the documents presented to the court. There were a total of five (5) exhibits tendered to the court, all from the Claimant. The court notes that several of the exhibits were in booklet format and included several individual documents relating to the overall subject matter of the exhibit. As such, at the court’s direction, each individual document within the exhibit was numbered as a sub-exhibit or sub-document which will be referred to throughout this decision.

5. Finally, from the court’s introductory summary of this matter, based on the pleadings of the parties and the evidence and exhibits received by the court, this matter can clearly be identified as a “claim” arising from a contract between the parties. Although this hearing was lengthy (5.5 hours) and extensive evidence was

given by both sides, the evidence confirmed that each party participated in the discussions and communications that led to the creation of a “sale contract” evidenced by Exhibit #4 whereby the Claimant agreed to purchase from the Defendant the Boat for an agreed upon price of twenty-three thousand five hundred dollars (\$23,500.00) and a 2012 boat trailer for three thousand five hundred dollars (\$3500.00). From the evidence there was no dispute surrounding what was purchased, the date/time and details of sale.

6. Essentially the basis of the Claimant’s claim was that he did not get what he bargained for as it related to both the condition of the engine as well as the hull of the Boat stating that he would not have been able to detect these defects later found upon his personal inspection of the Boat at the time of purchase. The Claimant states that these were “latent” defects, one being serious corrosion associated with the engine block located at the bottom of engine and the second relating to “rotten” wooden supports situate primarily at the stern of the Boat which were fiber glassed over and used to support the engine placement and an integral part of the hull structure. The Claimant further advanced the position through his evidence that the Defendant knew or ought to have known of these deteriorating conditions, largely based on what he had paid for the Boat at the time of his original purchase back in 2012. The evidence confirms the Claimant has since replaced the complete engine and tendered evidence of costs incurred as well as estimates confirming the work required to be carried out to repair the hull/stern which is scheduled to be completed this fall/winter (2019). Written estimates and the anticipated or actual costs were tendered. The Claimant seeks to be put back in the position he believes he should have been in at the time of purchase, that is a boat with a good engine and hull together and therefore claims his costs of repair together with reimbursement for the out-of-pocket expenses he has had to incur to advance this claim.

7. On the other hand, the Defendant’s evidence was that he had purchased the Boat back in 2012 and since then used it regularly on weekends during the summer months on the Mira River. His position was that during his period of ownership, other than regular maintenance, he had no issues with the performance or operation of the Boat. In addition, his position was that he was not aware of any problems with the engine or the hull both at the time of purchase and during his ownership.

8. It is worthy of note that seldom in dealing with disputes of this nature is anything simply black or white. While many aspects of the evidence of both sides remains undisputed and/or confirmed by a document, clearly in the end the court is called upon to assess issues of credibility of each party not only as it relates to the

actual evidence that each has presented to the court but also an assessment of their ability (or willingness at times) to recall with accuracy what may have taken place, when, where and what, if anything, may have been said. Further, the nature of this claim gives rise for the need to consider well-accepted legal principles surrounding the purchase and sale of used chattels.

SUMMARY OF CLAIMANT'S EVIDENCE

9. The Claimant provided his evidence through the interpreter, Ms. Richards. He confirmed that he was experienced with boats as he had worked for approximately ten years (1990-2000) in his family enterprise which was situated in Levis, Quebec and known as Marine Pleinair Incorp-Quebec. He confirmed that this business dealt with repairing, buying and selling boats. In addition, the Claimant confirmed that between 2008 and 2013 he personally bought and sold a number of power boats. He stated, like the Defendant, he was buying these boats out of the US however stopped when the exchange rate became too high. He confirmed that from his experience and involvement in the marine industry he was accustomed to completing minor repairs such as oil/filter changes but did not perform mechanical work on engines. He testified that he never experienced any problems when buying boats and expected and dealt with any minor items that required attention after purchase.

10. As an aid to providing his evidence the Claimant tendered Exhibit #1, 2 & 3. Exhibit #1, entitled "history" included seven sections of documents. Exhibit 1-A was a copy of his November 27, 2018 letter to the Defendant. This recounted the events which occurred from the time of purchase in June 2017, the initial problems he incurred immediately upon launching the Boat in late July 2017 and what he later discovered about the status of the engine and later the hull of the Boat. His evidence described the initial problem which he later believed was a result of water in the fuel. His evidence confirmed that after experiencing similar operating problems and a breakdown immediately after launching the Boat for the second time in August 2017 while on holidays in Ontario he returned home and on August 8th had the Boat checked by an experienced Merc Cruiser boat mechanic. It was here that he learned that the main concern with the engine was not mechanical but rather severe deterioration and corrosion in the manifolds, engine block and various engine leaks. The Claimant testified that he had two independent mechanics inspect the engine and both were of the same opinion. They concluded and advised the Claimant after completing their inspection that the engine block was seriously corroded and needed to be replaced immediately and likely other parts also needed to be replaced.

11. Exhibit 2-A confirmed the estimate for engine replacement he had received in the amount of \$10,420.00 plus applicable installation costs. The Claimant testified that in connection with this second inspection which occurred in September 2017, the complete engine had been removed and this in turn led to the discovery of a second concern and, in part, the basis of this Claim. This second issue dealt with the condition of the fiberglass struts which supported the engine. It was reported that they appeared to be rotten and it looked as if someone previously had installed a larger steel plate to provide support for the struts and engine as well as the main frame which was designed to support the engine. The mechanic recommended that a further inspection take place by someone qualified in boat hull conditions. Copies of the receipts for having the Boat transported to the mechanic's shop, as well as the engine inspection costs were included in Exhibit 2. Finally Exhibit 2-E, F, & G included the invoices for the actual cost of replacement. Exhibit 1-B sets forth a summary of the total costs associated with the engine replacement at \$13,472.35.

12. The Claimant testified that he proceeded to engage a qualified marine surveyor. A copy of the survey report prepared by Michel Robichaud was tendered as Exhibit #3 dated October 3, 2017. I accept that the report confirmed the surveyor's qualifications. Through use of a moisture meter and visual inspection his report identified several locations, mainly at the stern of boat where the fiberglass and particularly the wood beneath was extremely wet (moisture) and would require repairs in order to safely support the engine. This included some areas of the stern transom which supports the stern drive leading off the rear of the engine. Pictures confirmed the areas in the stern presented itself as "clean". The Claimant confirmed that once he was made aware of the extent of the problem and anticipated costs he chose to deal with the engine replacement first, have it installed and deal with the required fiberglass work later. As a result he chose to paint the internal engine area before installing the replacement engine. His evidence was that the fiberglass work had to be completed in order for him to maintain insurance as well as eliminate possible adverse effects it would have if he was to resell the Boat in the future. He felt these problems would have to be disclosed to any purchaser.

13. The Claimant testified, as was confirmed in his November letter (Exh. #1), that he had tried on many occasions through late 2017, 2018 and 2019 to connect with the Respondent about these concerns but received no reply other than his initial call shortly after returning home with the Boat from Sydney in 2017 when

he first experienced engine problems immediately upon his launch in late July 2017.

14. Other documents in Exhibit #1 were also verified through the Claimant's evidence. Exhibit 1-C provided two on-line examples of near identical boats for sale in 2017 for similar values as that paid by the Claimant. Exhibit 1-E confirmed a series of text /email exchanges from the fall of 2016 through to November 2017 between the Claimant and "Gail" which was confirmed at the outset to be Gail Fraser, the Defendant's partner. The initial texts related to the lead-up to the purchase of the Boat and referenced videos, pictures, etc. The ones in late fall 2017 seemed to relate to the Claimant trying to send his letter setting out concerns to Gail but it remains unclear whether she received it. Exhibit 1-F sets forth a series of text messages starting in the spring of 2017, again mainly relating to buying the Boat. These texts confirm the deal that was struck, deposit to be paid, pick up date and so forth. In May 2017 the Claimant highlighted a specific text where he questions what Gail means by "new engine" and inquires whether it was new engine or new block. The seller's (Defendant) response was "from what I know it was a merc drop in complete". The evidence clarified this was intended to mean "mercruiser" boat engine. Also included was a text from the Claimant to Gail in early July 2017 which stated "...very happy with the Boat, I have almost finished the small modification (carpet, swim platform, etc.)". He confirmed that at this point in time the Boat had not been launched into the water. He goes on to ask for a copy of the contract which he had not yet received. The final series of text exchange relates to late July when the Claimant experienced problems with the Boat after first launching it. This exchange seems to confirm the problem was fuel related and is concluded with a final text from Claimant..."Thanks Gary everything OK. Water in Gas only". The Claimant testified that following this series of texts in late July 2017, based on the evidence it appears that the Claimant's next "attempt" to contact the Defendant was evidenced by the email sent in November 2017 regarding the problems and estimates that had arisen.

15. The Claimant testified that prior to traveling to Sydney to complete the purchase he had inquired with the Defendant and was advised that there was approximately 250 hours on the engine. The Claimant confirmed that he had been told by the previous owner that the engine had been replaced before the Defendant had purchased the Boat. The Claimant confirmed that this ties into his question set out in his text (see Exhibit 1-F) asking whether it was a new engine or block. The Claimant testified that he had asked the Defendant if he could have a survey made and the Defendant responded no problem. The Claimant went on to testify he had purchased a number of similar size boats before (slightly smaller - 23-26 feet) and

never had a problem. He said he relied on the seller's information that was provided together with his own inspection of the Boat. He further stated that had there been a survey done likely the problem would have been discovered. He estimated that it would have cost approximately \$1000.00 for the survey. He said he inspected the engine and it looked new and felt with 250 hours it was likely in good shape. He acknowledged that he noticed a small leak in the manifold at time of inspection but was not concerned. He confirmed that he knew it had not been the Defendant who had put the new engine in and further that he had owned the Boat since 2012.

16. The Claimant confirmed that he, his father-in-law and son travelled from Quebec and attended at the Defendant's residence to pick up the Boat on June 23, 2017. He testified that only he inspected the Boat. The Claimant confirmed the carpets, hull and interior/exterior of the Boat was in pristine condition and the trailer was like new and that he was very pleased. He testified that the Boat started with no problem and ran for period of time but was not put in water for test run. He testified that he did not believe he needed to water test the Boat. The Claimant testified he was on site with the Defendant at his residence for approximately two hours before he concluded payment and drove away with the Boat.

17. The Claimant concluded his evidence with tendering Exhibit #5 which included several individual documents each of which the court sub-numbered for reference. At the center of this information were Exhibits 5-5, 5-6 and 5-7. All of these documents related to and confirmed what the Defendant had paid for the Boat when he had purchased it back in 2012. Included was the Canadian Customs receipt confirming the values paid to have been \$8778.07 (CDN) for boat and \$5523.28 (CDN) for the trailer. Also included under Exhibits 5-2, 3 and 4 were copies of boat listing prices off the internet from 2010 and 2012 confirming the approximate value for similar make/model/size boats were listed in the range of \$33,000.00 US. The Claimant testified he had found these receipts on board the Boat after he had completed purchase. He testified that this information confirmed what he believed to have been an extremely below market purchase price back in 2012. He further stated that this information together with comments his mechanic made after removing the engine in September 2017 and discovering the motor mounts had been modified that "something did not appear right" had led him to conclude that "someone must have known there were problems with the Boat". The Claimant later repeated his evidence that because of the low price paid in 2012 together with fact that work had been done on the frame/motor mount, somebody knew something about the problems he inherited. He also again acknowledged that he knew the Defendant had not placed the engine in boat.

18. On cross-examination the Claimant was specifically asked and confirmed that he knew he had the option to obtain a boat survey before buying. He stated because of its appearance he did not believe it was necessary. The Claimant also acknowledged that the Defendant never represented any guarantee to him and said he would not expect to have a warranty on problems that may cost \$1000, \$2000, \$3000 but in this case stated he was being required to spend more on repairs than the Boat was worth. The Claimant confirmed a second time that he did not expect a warranty. The Claimant confirmed that the engine had been replaced in 2017 and in 2018 they used the Boat on three occasions, each being six to eight days. He confirmed that the replacement engine was connected to the original motor mounts which had been temporarily strengthened until the Claimant was able to complete the second round of work to the hull repair which was being completed in the fall of 2019.

SUMMARY OF THE DEFENDANT'S EVIDENCE

Frank Campbell

19. Mr. Campbell gave evidence on behalf of the Defendant. He testified that he is a friend of the Defendant and because of his involvement in buying and selling boats over the past ten years, the Defendant had asked him to keep a look out for the specific type boat that was bought. He confirmed that he had, directly or indirectly, bought and sold 50-75 boats over the past ten years. He testified that he was regularly required to carry out repairs to boats he bought or sold. There was no evidence that he held any formal license or training involved with engines or boats.

20. He testified that back in 2012 he located a boat in the US of the type the Defendant had been looking for and passed off to him the name of the owner. He confirmed that the Defendant struck a deal and later asked if he would travel to the US to pick up the Boat. He confirmed that he picked up the boat in September 2012. He confirmed that he is not a certified Marine Surveyor but felt comfortable enough to look over the Boat, have the engine run and generally inspect it before finalizing the hand over. He testified everything looked fine and he was not aware of any problems with the Boat and specifically the engine. He confirmed his opinion that because inboard engines are generally fully covered all the time, regardless of age they often appear clean. He further stated that while he inspected the engine to similar extent as the Claimant had testified he had, he believed with regard to the problems associated with this claim that neither problem would have

been detected by way of casual “look and see” inspection. Upon his inspection before taking delivery back in 2012 he ran the engine and he was not aware of any repairs required beyond normal boat maintenance. Mr. Campbell testified that it was his understanding that the person the Boat was purchased from was dying and needed to sell the Boat. Mr. Campbell confirmed that when he picked up the Boat the former owner had left virtually everything on board.

21. Mr. Campbell testified that while the Defendant owned the Boat he was aware that it was used mainly on the Mira River and he had performed some regular maintenance from time to time but nothing he could recall of note. He further testified that before the Claimant purchased the Boat he recalls the Defendant asking if Mr. Campbell could perform a marine survey and he confirmed he could not but provided some names of persons qualified. As for the nature of the problem advanced by the Claimant, Mr. Campbell testified that from his experience, corrosion on a boat can occur very quickly and can be caused from a leaky manifold or other water sources. As for fiberglass failing, which appeared to be the problem presented regarding the hull damage, Mr. Campbell testified that with older boats it is not uncommon for fiberglass to shrink and crack over time from the heat of the engine and to be penetrated with moisture.

Gary Deveaux

22. Mr. Deveaux testified for the Defendant. He stated that he was a long-time, close friend of the Defendant and that since the Boat was purchased and launched in 2013 he was likely on the Boat as much as the Defendant. He testified that in 2016 he was on the Boat nearly every weekend during the summer months and to his knowledge there were no issues with its performance or the engine. Mr. Deveaux testified that he was a heavy equipment mechanic by trade and during the time the Defendant owned the Boat, other than minor repairs or maintenance that may have been required from time to time he was not aware of any problems with the Boat engine. He stated he was not aware how old the engine was. He confirmed that in 2017 he assisted the Defendant in retrieving the Boat from winter storage. He also confirmed that he and Defendant had launched the Boat shortly before the sale and ran it in the water for approximately 20 minutes to one-half hour with no problems. He stated that the reason they launched the Boat was to allow the Defendant to re-position the Boat on its trailer to ready it for the journey to Quebec. He confirmed that to his knowledge the Boat was stored inside a building in Glace Bay during the winter months.

23. On cross-examination he confirmed that he and the Defendant were “buddies”. He also confirmed that when the Boat was first purchased he recalls looking at the engine and everything appeared good. He was not aware that it was a new engine. He confirmed that any work he may have performed on the engine was of a routine service nature.

Gail Fraser

24. Ms. Fraser testified that during the period in which she and her partner/Defendant owned the Boat they would use it on weekends in the Mira River. She stated it was not moored but dropped in and taken out on trailer after use. She testified they looked after the Boat and stated that anything the Boat needed, it was tended to straight away. She confirmed that it was kept inside a building during winter months. She confirmed they (her and Defendant) never got a formal survey nor did they keep insurance on the Boat.

GARY AXWORTHY

25. Mr. Axworthy, the Defendant and owner of the Boat testified together with providing his summation. He confirmed he was a retired Ironworker. He stated that he was sorry for the trouble the Claimant had experienced but confirmed that he looked after the Boat during the time he owned it. He stated that he trusted Frank Campbell to have inspected the Boat and was satisfied with its performance, no issues. He stated he did not offer any guarantees and that the Claimant had a chance to have a survey but chose not to have one completed. He stated that he was not aware of any of the issues the Claimant presented before the court. He stated that when the Claimant arrived to conclude the deal and pick up the Boat he offered to have the Boat launched for a water test but the Claimant was in a hurry and did not want this. While carrying out the inspection on land the motor was run for approximately one hour during which time the Boat transmission was engaged in forward and reverse and worked fine. The Defendant confirmed that he personally had never been down in the engine compartment. He testified that he had no prior knowledge of any of the problems being advanced by the Claimant.

26. On cross-examination by Claimant, the Defendant confirmed that after they purchased the Boat in 2012, starting in 2013 they took the Boat in and out each year. The Defendant confirmed that in 2014 they were able to leave the Boat on a mooring during part of the summer months, but each year after they only ever launched and hauled the Boat after each use. He further confirmed that it was stored “indoor” during the winter months during his ownership.

ANALYSIS OF EVIDENCE AND REASONS FOR DECISION

27. I have taken considerable time to set forth a summary of the evidence presented. This case extended over a lengthy court sitting and the evidence was extensive. I wish to note that the foregoing is intended as a summary only and does not necessarily include everything that was said under oath or presented as an exhibit. I confirm that I had taken detailed notes and have read all exhibits, including the initial claim and defence filed by each party. From this evidence the court's task is to determine what the relevant issues are and make a determination, based on the evidence presented and the law. To that end I have determined the issues required to be addressed by the Court as follows:

- (i) Was there a sale contract between the Claimant and Defendant? If so what were the terms?
- (ii) Did the Defendant misrepresent to the Claimant the condition of the Boat?
- (iii) What affect, if any, does the provisions of the *Sale of Goods Act, R.S.N.S., c. 408, s. 1* or *Consumer Protection Act, R.S.N.S., c. 92, s. 1* have on this contract situation?
- (iv) Does the principle of *caveat emptor* or "buyer beware" apply in this case?
- (v) If a contract is found to have been breached, what are the remedies the Claimant is entitled to receive?

28. This case, like so many others, is somewhat like a jig-saw puzzle. In addition to reviewing and assessing the evidence given, including the various documents, clearly the court is required to assess issues of credibility of the respective witnesses, notably the parties to this action. In providing my decision I will attempt to explain the reasons for any conclusions. The Court can confirm at the outset that there is no evidence before me to question the credibility of any of the witnesses or the information exhibited to me. What this case boils down to is the classic situation where someone has purchased a used chattel from another and after the sale was complete found problems that were not detected at the time of purchase.

29. Much of the evidence presented remains undisputed between the parties. Both acknowledge the exchanges that occurred between them leading up to entering into a final sales contract on June 23, 2017 relating to the sale of the Boat and trailer. The evidence is also clear that immediately after purchasing the Boat the Claimant experienced problems with the engine which led to several inspections that occurred into the fall of 2017. The Claimant presented two independent inspection reports verifying the engine problems that were discovered and through this also serious problems with parts of the hull mainly located at the stern of the Boat. This was also verified by a Marine Surveyor report. I find nothing unusual about the documents exhibited to verify the problems detected and the corresponding repair costs and therefore accept these as presented.

30. Similarly, evidence and documents were tendered providing verification of the Defendant's original purchase price of the Boat and trailer that had been purchased separately and again I find nothing unusual about this evidence and accept the same. While the court acknowledges from the Claimant's evidence that he believes this 2012 information surrounding the purchase of the Boat by the Defendant, and particularly the purchase price paid at the time tells a different story, I find there is not sufficient evidence to support this theory. Accepting the Claimant's exhibits which verify that similar boats were being listed for sale on the market in and around 2012 for substantially more than what the Defendant had paid is simply not sufficient to imply that the Defendant knew or ought to have known there were potential problems with either the engine or hull of the Boat at the time he purchased it or at the time he later sold it. Added to this is the fact that the Claimant, by his own admission, knew that the Defendant had not replaced the engine in the Boat during the time in which he owned it but had disclosed to the Claimant that it had been his understanding from the previous owners that the Boat had been previously re-powered which he believed to have been a drop in Mercruiser engine. There is no evidence that the Claimant made any further inquiries as to any details surrounding the engine replacement and from the Defendant's testimony the court is of the position that the Defendant did not have any more information than what he conveyed.

31. Further on this point, all of the Defendant's witnesses testified that during the period in which the Defendant owned and operated the Boat he did not experience any major problems with the engine. Further added to this was the evidence that leading up to the time of sale the Defendant openly inquired whether the Claimant wished to have a formal survey or, as a minimum, wished to take the Boat for a sea trial and he passed on both.

32. As noted above, there was extensive evidence confirming the nature of the defect(s) found, and the extent and cost of the repairs required to be made to the engine and hull. I am also satisfied having regard to the evidence that the defects were discovered within a reasonable time after the purchase occurred and therefore on balance likely existed at the time of sale. None of this evidence is in dispute. However, it only becomes relevant if it is found that the Defendant has breached any term, implied or otherwise, of the original sale contract with the Claimant.

33. I am also satisfied that the Claimant was an experienced boat buyer by his own admission having bought and sold a number of boats of similar type and size over the years. He also worked in the marine business through his family business for a number of years which would also lend him some basic experience around boats, buying, selling, types of repairs required and so forth. Further there is undisputed evidence that the Claimant considered getting a survey for purposes of having an independent inspection by a qualified marine surveyor but choose not to. His evidence was that he had never had one before and always chose to rely on what a seller told him together with his own inspection and over the years he had never had any problems such as the ones he faced following this purchase. The Claimant testified that he appeared to understand that he was buying a used boat, in this case one which was 21 years old and with that he fully expected there may be some odds and ends that would have to be fixed or upgraded. However, he testified that in this instance he never expected to be faced with the extent of repair costs which he felt exceeded the value of the Boat.

34. I find there is no dispute between the parties that at no time did the Defendant guarantee or offer any warranty associated with the sale. The Claimant's evidence was that he knew there was no warranty and did not expect one. However, upon further investigation the Claimant is now of the belief that the Claimant knew something and in fairness to him, if that was the case, then the condition of the engine and hull should have been disclosed. He believes the condition of the Boat at time of sale was misrepresented to him. The Claimant is aware that he bears the burden, on the balance of probabilities, to prove that his theory is correct.

Was there a sale contract between the Claimant and Defendant? If so what were the terms?

35. I am satisfied there was a "lawful contract" for sale between the parties as set forth in Exhibit #4 entitled "Sale Contract" which sets out the essential terms. There were two chattels being sold, one being a 1996 Bayliner Cabin Cruiser 2858

for a purchase price of \$23,500.00 and a second chattel being a Mark Road King 2012 boat trailer for \$3,500.00. The contract was signed by the named Claimant and the named Defendant herein. The contract document was concluded on June 23, 2017 and from the evidence before me I am satisfied that delivery of the goods occurred on that date.

36. The contract document referred to above does not reference any other terms, expressed conditions or warranties as to the quality or fitness of the chattels. I have reviewed the evidence including all of the exhibits in an effort to determine whether there were collateral conditions from the exchange of communications between the parties that related to the contract and find there to be none. Exhibit 1-F acknowledges an exchange whereby the Claimant inquired what was meant by the reference “new engine...new block”. The response from the Defendant was...”from what I know it was a Merc drop in complete”. From the evidence before me, it appears there were no further discussions or texts on this subject. The Claimant acknowledged in his evidence that he was aware the Claimant did not carry out any work to the engine during his period of ownership and what he was repeating to the Claimant was the information he had received from the previous purchaser/owner back in 2012. This included his estimate as to the hours on the engine however all parties knew there was no working hour meter on the Boat. There is no evidence of representations made as to how long ago any engine work may have taken place. There was no evidence of any discussion regarding the hull condition other than the photos that appear to have been provided when the Boat was listed for sale.

Did the Defendant misrepresent to the Claimant the condition of the Boat?

37. The Claimant himself was abundantly clear that after inspection he was satisfied that the Boat and trailer were in pristine condition. After delivery when the Claimant initially launched the Boat in late July 2017 he experienced a problem with the motor and later upon further inspection of the engine he learned more about the condition of the Boat. The Claimant stated that at the time of purchase he was relying in part on his previous experience in buying boats when he inspected the engine.

38. The Claimant in his evidence further acknowledged that he knew the Defendant had not carried out any major work on the engine and that the information he had been provided surrounding the previous replacement of the engine was based on what the Defendant had been informed by the previous owner. Based on the evidence, even if the court was to find that this exchange

referred to above which occurred in May 2017 about the engine having been replaced in the past was a representation intended to be relied upon in connection with the sale, there is absolutely no evidence before me confirming that this did not occur at some time in the past. I have reviewed in detail the survey report which included the engine at a time when it had been removed from the Boat and it does not provide any specific reference to any serial numbers from the engine block or other parts of the engine which presumably would have been listed and provided details as to its age. I have reviewed Exhibit #2 which provided various estimates and expenses for the engine replacement and reference is provided to make and model but no information is provided as to the year of the block or engine. The Court finds there is no evidence before it to suggest that there were any misrepresentations made by the Defendant.

39. The essence of the Claimant's position seems to be that the problems found associated with the engine/hull should be considered latent defects and were willfully hidden from the Claimant. He based this on the fact that after taking possession of the Boat, the Claimant found various papers associated with the Defendant's purchase of the Boat back in 2012. This included the receipt between the Defendant and the buyer stating the sale price at \$8900.00 and a custom declaration sheet which confirmed the Boat was purchased for \$8778.00 and the trailer was purchased for \$5,523.00 and those were the two amounts on which tax was paid. He searched and found evidence of the sale price of similar boats in and around 2012 and found them to be significantly higher. Therefore, he concluded that there must have been something wrong with the Boat at the time it was purchased and that is why the Defendant was able to purchase it for such a low price. However, at the same time the Claimant acknowledged in his evidence that both of these conditions would have likely been detected had there been a survey completed prior to purchase.

40. Further, as previously noted in my decision, I find that this evidence alone provides little or no proof as to the condition of the engine and more directly what the Defendant knew as to the condition of the engine. Supporting this position is the evidence that the Defendant himself used the Boat for the following three boating seasons without any major incident with the engine or hull. It is also worthy to note that the Claimant's own evidence confirmed that he himself over the years had purchased several boats in the US when monetary exchange values were more favorable as the marketplace was bigger in the US and often boats could be secured at a substantially lower price than in Canada. Further on this point is the evidence of Mr. Campbell who travelled to the US to pick up the Boat and met the seller in person. He indicated that it was his understanding that the

seller was ill and he felt this played a factor in the seller's willingness to accept a purchase price less than market value at the time.

41. Finally on this issue, I believe it is relevant that there is no evidence to suggest that the Defendant either attempted to side track or be vague in answering any questions the Claimant had in connection with the condition and history of the Boat. Added to this was the Defendant's evidence that he offered to assist the Claimant in securing a Marine surveyor to carry out an inspection but it was the Claimant who chose not to obtain one. In addition, at the time in which the Claimant attended at the Defendant's residence for the inspection of the Boat the Defendant offered to put the Boat in the water for a sea trial and the Claimant confirmed there was no need. It is the court's view that this type of conduct by a seller does not suggest that he was trying to hide anything from a buyer. The court is satisfied there were no misrepresentations.

What affect, if any, does the provisions of the *Sale of Goods Act (NS)* or *Consumer Protection Act (NS)* have on this contract situation?

42. The court is satisfied that this contract took place in Nova Scotia and applicable statutory laws apply to Nova Scotia statutes. I find overall this sale would fall under the terms of the *Sale of Goods Act*. I find Article 17 dealing with "quality or fitness for a particular purpose" is only relevant insofar as confirming there is "no" implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under contract of sale unless one of the exceptions apply. I find that none apply in this case. This section is repeated below:

Quality or fitness for particular purpose

17 Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness, for any particular purpose, of goods supplied under a contract of sale, except as follows:

(a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgement and the goods are of a description that it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose, provided that, in the case of a contract for the sale of a specified article under its patent or other trade-name, there is no implied condition as to its fitness for any particular purpose;

(b) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality, provided that, if the buyer has examined the

goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

(c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

(d) an express warranty or condition does not negative a warranty or condition implied by this Act, unless inconsistent therewith. R.S., c. 408, s. 17

43. The evidence confirms the Defendant was not “in the business” nor is there evidence to suggest that the seller (Defendant) had any specific or special skills to have had any knowledge of the problems associated with the condition of the engine or hull. In fact, from the evidence I find the Claimant had a greater knowledge and experience in buying and selling boats. The only other relevant provision of the *Sale of Goods Act* is section 36(10) which requires that a buyer be provided sufficient time to complete an inspection. In this regard I am satisfied that it was open for the Claimant to complete any type of inspection he wished, including having a Marine Survey as well as an in-water test and he choose not to. I find from his evidence that he considered his options and chose to rely on his own skill, knowledge and past experience and had sufficient time to complete his inspection.

44. In the *Consumer Protection Act* (NS), it is clearly stated that its provisions are intended to apply to “...sellers who are in the business of selling goods and services to buyers”. The Defendant was not in the business of selling used boats, motors or trailers. Therefore, the Claimant cannot rely on the statutory provisions under the *Consumer Protection Act* or the implied conditions of quality and fitness under Section 19 of the *Sale of Goods Act*. In this particular case I find that the contract of sale was between two individuals, neither of whom are considered to be in the business of buying or selling boats. Therefore, none of the provisions of this *Act* including implied warranties are applicable in this case.

Does the principle of *caveat emptor* or “buyer beware” apply in this case?

45. I find that the legal principle of *caveat emptor* or “buyer aware” applies in the sale of used goods including, in this instance, a used motor boat. I find this principle is enhanced even further having regard to the type of chattel being purchased as well as its age. In the case before me the chattel was a 21 year old boat. While the evidence confirms it “showed well” the fact remained that it was a 21 year old hull and no certainty as to how old the engine was regardless of the estimated hours. In the reported case of *Darryl Quibell v. Dakota Kuntz*, 2014 SKPC 134, that court dealt with a similar case involving the sale of a used boat and the discovery of problems and discrepancies after the deal was concluded.

Although the issues of concern were different the court was satisfied that the notion of *caveat emptor* applied to the situation. In that decision, the following passages are found that assist in providing some guidance to the determination of this case. The court acknowledged, as I do, that more often this issue arises in connection with the sale of used cars. The court stated:

The Application of these principles to the sale of used cars is summarized in the comments of Gow J. in *Rushak v. Henneken*, [1986], B.C.J. No. 3072 (QL) (S.C.) where he states: At a common law in the absence of a fiduciary or analogous relationship, there is not as between negotiating parties any duty of disclosure. Almost always the seller of a used car knows of its defects, or at least some of them, but he is not under any duty to disclose them to a potential buyer, unless there has been on his part active concealment, that is, he has done something to the car with intent to prevent the defect being discovered. *Leeson v. Darlow*, [1926] 4 D.L.R. 415 at p. 432; *Allen v. McCutcheon*, 1979 CanLII 280 (BSSC), (1979) 10 B.C.L.R. 149; *Sorensen v. Kaye Holdings Ltd.* 1979 CanLII 621 (BCCA), (1979) 14 B.C.L.R. 204 per Lambert, J.A. at p. 235. The common law rule is *caveat emptor*. The underlying philosophy of the law of contract is that “a party is expected to look out for himself, and make his own bargains. If he has done so foolishly, this is his own fault and he is left to his own devices.”

46. The court went on to say “the distinction between patent and latent defects is described in *Halsbury’s Laws of England* (3d ed.) Vol 34, page 211, para. 353 as follows:

“Defects of quality may be either patent or latent. Patent defects are such as are discoverable by inspection and ordinary vigilance on the part of a purchaser; latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase. As regards patent defects, the vendor is not bound to call attention to them; the rule is *caveat emptor*; a purchaser should make inspection and inquiry as to that which he is proposing to buy.”

However, fraudulent misrepresentation on the part of the seller will have an impact on the principal of *caveat emptor*. Fraud may be found when the vendor has actively concealed a latent defect. However, if the latent defect is unknown to the vendor, there will be no redress for the purchaser and the principle of *caveat emptor* or “buyer beware” will apply (*McGrath v. MacLean* (1979), 95 D.L.R. (3d) 144 (Ont. C.A.) at p. 150.)

47. A fraudulent misrepresentation is a statement known to be false or made not caring whether it is true or false (Waddams, *The Law of Contracts*, 5th ed. Para. 416; *Derry v. Peek* (1880), 14 App. Cas. 337 (H.L.(E.)). Such a statement must be material to the decision of the purchaser to enter the agreement and the

misstatement must serve as an inducement to the making of that decision (McCarmus, *The Law of Contracts*, 2005, p. 326).

48. As I have noted earlier I do not find that there was any evidence of the Defendant having misrepresented the situation to the Claimant. He told him what he believed to be true and more directly of the fact that he himself was simply repeating what the prior owner told him. Even with that, while there is plenty of evidence to suggest that there were problems with the engine block and hull of the Boat, there is no evidence to suggest that the Defendant knew of this or attempted to conceal anything from the buyer. In fact the evidence points to the fact that there was no hesitation on the part of the Defendant to answer any questions asked and to encourage the buyer to secure a Marine Survey should he wish.

49. From my review of the case law the overall effect of the principle of “buyer beware” was best described by Adjudicator Slone in his decision of *MacLean v. Leblanc*, 2014 NSSM 77, a case which involved defects arising after the sale of a home wherein he stated.... (35) “The legal principle of caveat emptor, or “buyer beware,” is still alive and reasonably well - if not universally loved - in Nova Scotia. This phrase is shorthand for the cold truth that a buyer of any type of property has very limited protection available in the event that something goes wrong. While this may seem harsh, from a policy perspective it could be seen as equally or even harsher that someone might sell property in good faith and yet have a potentially ruinous claim come back to haunt him or her, years later, because of a problem that no one knew about. For better or worse, the law has provided only very limited recourse in such situations.

50. However unfortunate was the situation the Claimant found himself in subsequent to concluding his purchase, I find that he chose to accept the risk of relying on his own expertise and judgment in completing his inspection knowing that such potential latent defects could have been found by a professional inspection and while this practice had served him well in the past, it did not in this instance. He chose the level and detail of inspection to be employed which led to his decision to purchase the Boat and with that he also knowingly assumed any risks as to the condition of any part of the Boat. The court hereby dismisses this claim.

DATED at Sydney, Nova Scotia this 10th day of January, 2020.

ROBERT SAMPSON, Q.C.
Adjudicator