

**IN THE DISTRICT COURT
AT WHANGAREI**

**I TE KŌTI-Ā-ROHE
KI WHANGĀREI-TERENGA-PARĀOA**

**CIV-2019-027-000236
[2020] NZDC 24049**

BETWEEN

AND

GORDAN MALCOLM PERRY
Plaintiff

FAR NORTH HOLDINGS LTD
Defendant

Hearing: 17 and 18 November 2020

Appearances: G Holm-Hansen and S Cartright for Plaintiff
R Mark for Defendant

Judgment: 23 November 2020

DECISION OF JUDGE G M HARRISON

[1] The plaintiff, Mr Perry, seeks damages from the defendant (FNHL) for breach of contract in the performance of antifouling procedures carried out to his yacht “Watershed” in September/October 2013.

[2] Mr Perry is English by birth although now permanently residing in New Zealand. He bought the Watershed in 2005. It had been constructed in the United Kingdom by Camper & Nicholsons, a reputable boat builder.

[3] Mr Perry moored the Watershed at the Port Opuā Marina operated by FNHL. It had previously traded as Opuā Marina, and Ashby’s Boatyard. The difference in names is of no consequence.

[4] Mr Perry had the Watershed hauled out every year for maintenance which included the cleaning of the hull and touching up, with antifouling being applied.

The contract

[5] In 2013 he engaged Ashby's Boatyard to remove the old antifouling paint on the hull and to apply a semi-permanent antifouling product named Coppercoat. It was known to offer long-term resistance to marine fouling which would have removed the need for the yearly maintenance undertaken up to that point, and would have reduced long-term costs. The contract of 23 August 2013 described Watershed as a 12-metre yacht. The work to be undertaken was:

Full removal of existing antifouling by wet glass blasting down to gelcoat, preparation of hull, application of coppercoat as per manufactures (sic) recommendations. No warranties other than our standard workmanship.

[6] The contract went on to break down the individual cost components of the work. One component was as follows:

Antifoul removal by wet glass blasting 6.5 hours @ \$375. This could be a lot less as the hull is in good condition and not much antifouling built up. \$2438.

[7] The total estimate was \$9544 excluding GST. Mr Perry observed the work being undertaken over the period commencing 20 August-16 October 2013.

[8] After Watershed came out of the blasting bay Mr Perry discovered that garnet grit had been used to remove the previous antifouling, instead of glass blasting. He was concerned at this because garnet grid is harder than the GRP (glass reinforced polymer) substrate (hull), and had the potential to damage it.

[9] The contract had provided for removal of the existing antifouling "down to gelcoat", but the use of garnet grit had removed most or all of the gelcoat as well.

[10] Mr Perry raised his concern with personnel at the boatyard. In a letter to him of 18 September 2013 the then boatyard manager Mr Nick Voorhoeve addressed a number of matters. He explained that the use of garnet reduced the blast time by at least a third and then he said:

Yes in retrospect we should of (sic) informed you we have changed to garnet, this has never been an issue in the past but from now on it will be written in all our estimates that we reserve the right to use the best possible product to complete the work in the correct and timey (sic) fashion.

The breach of contract

[11] FNHL admitted that it had breached the contract of 23 August by using garnet grit and not wet glass blasting.

[12] Mr Perry's desire to use the coppercoat procedure was because its manufacturer's offered a 5-year guarantee, and it was known to last for 10-15 years.

[13] The failure of FNHL to apply the coppercoat procedure meant that the guarantee was not available to Mr Perry.

[14] The legal position appears to be that Mr Perry was entitled to have the antifouling work carried out according to the terms of the contract.

[15] In Chitty on Contracts Volume 1 32nd Edition 21-004 the following is stated:

The promisor, in the absence of waiver or subsequent variation by agreement, cannot substitute for the agreed performance anything different, even though the substituted performance might appear to be better than, or at least equivalent to, the agreed performance. ...

[16] The authority for that statement is set out in footnote 15 and includes the decision of *Arcos Ltd v EA Ronaasen & Son*.¹

[17] However, FNHL's defence was that Watershed had at all material times been suffering osmosis which is the leaking of moisture from the substrate through the waterproofing material to create blisters on the hull of the vessel. It relied on the evidence of Mr Mike Menzies, a marine surveyor specialising in GRP craft.

The expert evidence

[18] Within his report of 5 November 2019 Mr Menzies said:

The analysis of the craft has unfortunately revealed a hull with numerous osmosis blisters large and small and also one holding significant moisture with its corresponding "wicking" and "milky" appearance. These issues will have been there for a very long time in my experience and being a 1980's craft in many ways I am not surprised. The fact that my sample grinds went into –

¹ *Arcos Ltd v EA Ronaasen & Son* [1993] AC 470.

2.5mm and we still didn't find a good base tells me that this craft has had a deep-seated laminate problem for a very long time and the size of the osmosis tells me the laminate issues established with this inspection developed way before 2013 when the epoxy coatings were applied. They certainly have not come after the epoxy coatings were applied. Also, if the epoxy was failing in any way it would show extensive blistering of the laminate and this is certainly not the case.

[19] Mr Menzies reached this conclusion based on his own inspection of the vessel. No literature was reviewed, and he conceded that he had come to his own view, without paying regard to any contemporaneous records or other expert reports. He also conceded that he had not seen the contract.

[20] Mr Perry had obtained a report of 7 September 2011 from Gulf Stream Consultants Ltd for insurance purposes. The report was prepared by Mr Ian Butchart. He said:

By sight and by sound, no evidence of damage, voids or delamination was noted at this inspection. There are perhaps half a dozen small patches where layers of paint have detached from the hull surface. No evidence of osmosis was noted at this inspection. The paint detachment appears to be a result of minor lapses in the prep. at primer stage.

SUMMARY

The vessel presents as well built and well maintained. Nothing was noted at this inspection to suggest any lack of hull structure or integrity. There appears to be no threat to its immediate existence, and given proper ongoing maintenance, the vessel should provide many years of service.

[21] Mr Perry sought a further report from Mr Butchart after discovery of the use of garnet. His report of September 2017 stated:

The underwater hull has been stripped of paint and for perhaps the top 300mm from the waterline down, the epoxy coating that is normally applied to these hulls has largely been removed. On the skeg and on the port side aft, there are a few small areas of the polyester structure which require grinding out and epoxy filling. The hull otherwise presents as generally fair and sound overall.
...

[22] Having received Mr Voorhoeve's letter of 18 September 2013 which I have already referred to, Mr Perry replied, inter alia:

In my 40 years' experience in the construction industry in UK the rule is never use a grit which is harder than the substrate. Glass was quoted and might be okay as it dissipates on impact. Garnet does not.

[23] The work was completed and FNHL invoiced Mr Perry for a total of \$12,546.94 exclusive of GST. Mr Perry queried aspects of the invoices and arranged for his accountant, Kim Edge to review them. In a letter of 16 November 2013 various queries were raised in a letter countersigned by Mr Perry. In particular, that letter stated:

The original work estimate details blasting with “wet glass blasting” and in fact was done with garnet. This raises serious concerns as this blasting medium is not recommended for use on glass fibre, Mr Perry was not advised of the change of medium and he would not have agreed to the works had he been aware of the change.

[24] In May 2017 the Watershed was pulled out to scrub off the hull and to change anodes. She was damaged by the yard’s travel lift. That issue was resolved but at the time Mr Perry noticed some blisters in the hull. He was immediately concerned that this might have been caused by the works in 2013. Correspondence followed in which he sought that any repairs necessary would be at the cost of FNHL. No agreement was reached and the vessel was put back into the water.

[25] In June 2018 Watershed again suffered minor damage and was hauled out to carry out repairs. At this time the hull had extensive blisters in the coppercoat. Mr Perry arranged for SGS Industrial to report on a coating sample from the underwater hull. The key findings of this report were that the coating profile consisted of two layers, the top coat and primer/undercoat. The top coat thickness was approximately 220 microns, and the primer thickness was approximately 150 microns. The top coat was properly bonded with the primer coat, and the primer coat was properly bonded with the hull substrate. No blistering could be identified. There were other findings related specifically to the sample provided which it is unnecessary to record.

[26] Mr Perry also arranged for Wainui Marine to inspect the hull coating below waterline. The inspector was Mr Paul Stock. The report’s conclusion noted:

- (i) potential contamination from grit blasting;
- (ii) osmotic action in dark areas indicating that the laminate may not have been thoroughly dry prior to coating;

- (iii) coating contamination;
- (iv) incorrect application equipment leading to contamination, that is, the rollers used appear to be yellow foam rollers but coppercoat instructions specifically state short pile simulated mohair or high quality neoprene foam sleeve should be used;
- (v) application quality control procedures, which Mr Perry reported were not evident when the vessel was prepared and coated.

[27] In the course of the hearing Mr Mark objected to the production of this report in evidence on the grounds that it was hearsay. I delivered a Bench ruling admitting the report in evidence pursuant to s 17 of the Evidence Act on the basis that it appeared to be entirely reliable, prepared by an expert and was confined to Mr Stock's inspection and did not purport to rely on the opinions of others.

[28] These reports, and in particular, the report of Mr Butchart of September 2017 that the hull was "generally fair and sound overall" were at odds with the opinion of Mr Menzies that osmosis had been present in the hull of Watershed for "a very long time".

[29] Mr Perry called the evidence of Mr Bernard Kerr a marine surveyor. He undertook a joint inspection with Mr Menzies.

[30] His opinion was that the blistering to the hull had been caused by insufficient and improper preparation in the course of the work in 2013 which had caused accelerated hull blistering over a five-year period. He said that such blistering would not have occurred if correct preparation and coating guidelines had been adhered to.

[31] He also advised that owing to the damage the boat could not be put back in the water without first being repaired because of the risk of water ingress and further laminate degradation.

[32] In answer to a question from me, whether the performance requirements of the contract had been followed the blistering of the hull would have occurred Mr Kerr said:

A. I don't believe so, providing they had followed the full recommendations which would have also included a moisture testing.

Q. Understood. There's a significant part of your reasoning here the fact that the gel coating was removed and not replaced.

A. That's right Sir.

[33] For these reasons I accept the evidence of Mr Kerr that the blistering to the hull was caused by the failure of FNHL to perform the contract by its terms and that if it had done so the blistering would not have occurred.

[34] It was suggested by Mr Mark that Mr Perry had agreed to accept the procedures adopted by FNHL, by payment of its invoice.

[35] But that is not the case. The accountant's letter querying the invoices raised specifically the failure to adhere to the terms of the contract, as did Mr Perry's letters in 2018 when the blistering to the hull had been observed, and his demand that the blistering should be resolved at no cost to him. There is no evidence that any variation or waiver of Mr Perry's rights with respect to the admitted breach of contract ever came into being.

Counterclaim

[36] FNHL has claimed the cost of Watershed occupying a hard stand position at its boatyard. This is despite the fact that Mr Perry still maintains a berth in the marina and pays the appropriate charges. There is an obvious element of "doubling up".

[37] In any event Mr Mark conceded that if liability was determined against FNHL the counterclaim could not be maintained. It is dismissed accordingly.

Conclusion

[38] At 24-054 of Chitty (op cit) the following the stated:

Upon discharge, the primary obligations of the party in default to perform any of the promises by him and remaining unperformed come to an end, as does his right to perform them. But for his primary obligations there is substituted by operation of law a secondary obligation to pay to the other party a sum of money to compensate him for the loss he has sustained as a result of the failure to perform the unperformed primary obligations.

The footnote refers to *Moschi v Lep Air Services Ltd.*²

[39] Mr Perry's claim for damages was brought in the alternative. He sought either the diminution in value of Watershed as a result of the repair work required, or the cost of undertaking such work. In his closing submissions Mr Holm Hansen elected to recover the estimated cost of repairs. In July 2019 these were estimated at \$39,942.51, but that may well have changed.

[40] Leave is accordingly granted to Mr Perry to submit an updated estimate of the cost of repairs with FNHL having the right to comment in that regard.

[41] The issue of costs is also reserved. In the event that agreement cannot be reached memoranda may be filed.

[42] The formal entry of judgment is therefore deferred until the estimated cost of repairs has been established.

G M Harrison
District Court Judge

² *Moschi v Lep Air Services Ltd* [1973] AC331, and other authorities.