Neutral Citation No. [2005] NIQB 72 | *Ref:* **SMIF5402**

Judgment: approved by the Court for handing down | *Delivered:* **28/10/05**

(subject to editorial corrections)

2004 No. 21808

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(COMMERCIAL LIST)

_____

BETWEEN:

DAVID MITCHELL

Plaintiff:

-and-

B J MARINE LIMITED

Defendant.

_____

Mr P D Smith QC

Introduction

[1] On 24 February 2004 the plaintiff signed a document by which he agreed to purchase from the defendant a Cranchi Endurance 41 motor cruiser for the sum of £162,500, including VAT. On that date Mr. Mitchell paid £32,500 of the purchase price and, in accordance with the agreement, paid the balance of £130,000 when the boat left the factory.

[2] The vessel was delivered to the plaintiff in June 2004. In July 2004 the plaintiff purported to reject the boat and rescind the contract. The defendant would not accept the return of the goods and the plaintiff brought these proceedings seeking return of the price and damages.

The Material Facts

[3] As the name implies, the Endurance 41 is about 41 ft. long. It was manufactured in Italy by Cantiere Nautico Cranchi SRL. Its hull is of fibreglass construction and it is powered by two Volvo Penta D6 diesel engines. The vessel has sleeping, cooking, washing and toilet facilities as well as accommodation below deck for sleeping and relaxation. As designed, the standard of comfort of the boat is high. Its size and structure, together with its powerful engines and navigational equipment, would - or should - have enabled it to sail in safety to Scotland or France or even further afield.

[4] The vessel was delivered to the plaintiff at the defendant's premises at Bangor, County Down on 16 June 2004. Prior to that it had undergone a sea trial in which the plaintiff participated and in the course of which a couple of instruments were found to be malfunctioning. Other problems with other instruments were experienced during the ensuing few days and, in addition, on the day after delivery the plaintiff noticed salt water in the bottom of the boat which he drew to the defendant company's attention on the next day. By Sunday 20 June the water had reached almost 100 mm in depth. The plaintiff discovered that the cause of the ingress was a hole in the transom through which a tube or cable passed and which was badly fitted, thereby, in certain circumstances, permitting sea water to enter the engine compartment of the vessel.

[5] The plaintiff effected a temporary seal to the hole and on Tuesday 22 June 2004 he faxed Mr. Bernard Gallagher, managing director of the defendant company, setting out his concern about the hole in some detail. He said that he would not accept the mere sealing of the hole because it might come under positive water pressure. He reminded Mr. Gallagher that his purpose in buying the boat "… was to provide maximum reliability for my family boating in the long term" and he expressed the opinion that Cranchi should be urgently informed of "the serious potential."

[6] The fax also referred to the washing of the engine bay and engines, an electrical problem on the port engine and a number of other unspecified problems which Mr. Mitchell did not believe to be critical and of which he promised a complete list "including action." The plaintiff went on to say that his wife, his children and himself were generally very pleased with the boat.

[7] On Wednesday 23 June 2004 Mr. Mitchell faxed Mr. Derek Craig of Robert Craig & Sons (Engineers) Limited the local Volvo Penta ("Volvo") agents detaining a number of instrument malfunctions which had already been the subject of discussions. On Friday 26 June 2004 the boat was returned to the defendant's premises at Bangor, lifted out of the water, and the hole in the transom photographed. The plaintiff was told that a member of the

defendant's staff, Mr. John Dunphy, was going to Italy and wanted to show the photograph to Cranchi. The boat was returned on Tuesday 29 June. The hole in the transom had been relocated in a position which, it appears, was satisfactory to Mr. Mitchell in the sense that the original water ingress problem had been dealt with effectively. However, as I shall explain in due course, this was not the end of the matter as far as Mr. Mitchell was concerned.

[8] On Saturday 3 July the boat was returned to the defendant for an alteration prescribed by Cranchi to the wiring of the alternator on one of the engines. According to the plaintiff, when he got it back again there was still a problem with the electrics. Nevertheless on Tuesday 13 July he was able to take the boat with his wife and children on board to Glenarm and back, which involved going out into the Irish Sea. The plaintiff accepted in cross-examination that at that stage he was generally satisfied with the boat, subject to remaining snags being dealt with. He was, as he put it, prepared to carry on forward. He had no predetermined time limit in mind for his resolution of the snags.

[9] On Thursday 15 or Friday 16 July the plaintiff received a letter sent by recorded delivery from Volvo, the manufacturers of the boat's engines. This advised him that "some important modifications are necessary". There was then reference to the replacement of the out drive exhaust bellows and the fuel injection pipe and it was stated that the security of the gear shift cable fixing screws required inspection. Although not made explicit in the letter, it seems that this work was required on each engine. The letter went on to say that it was imperative that the work be completed immediately. Mr Mitchell was advised to contact his local dealer.

[10] The plaintiff interpreted the letter to mean that the boat was "unusable" (as he put it) as it stood. He telephoned and faxed the defendant company on Friday 16 July. He spoke to Mr Dunphy. It appears that Craigs, the Volvo agents in Belfast, were closed that week because of the Twelfth holidays.

[11] On Monday 19 July Mr. Mitchell contacted Craigs and spoke to Mr Derek Craig. He was aware of the problem and undertook to try and get the parts, which were not in Belfast. He told Mr. Mitchell that the Volvo factory in Sweden was closed for the whole of July. On Monday 19 or Tuesday 20 July Mr. Mitchell contacted the Volvo office in England and spoke to a Mr Carlsberg who undertook to try and procure the parts. Mr Mitchell followed this up by an e-mail dated 20 July which was returned electronically but which was resent by him by fax on Wednesday 21st. In it he stated that the boat "had been laid up at Carrickfergus Marina since receipt of your letter and obviously must remain so until I am advised by yourselves that it is fit for use at normal risk." He went on to refer to his inability to obtain any date

when all of the necessary components would be available and to seek compensation for loss of use. He threatened proceedings.

[12] Also on Wednesday 21 July Mr Mitchell spoke by telephone to another Volvo employee, Mr. Tony Wilson. He was told that the replacement bellows had been procured but not the injection pipes. Mr. Mitchell asked whether if the bellows were fixed but not the injection pipes Volvo would certify that the boat was fit for use at normal risk in normal conditions. On behalf of Volvo Mr. Wilson declined to do so and said that as the boat had been purchased from the defendant Volvo would deal with it through that company.

[13] On the same day, Wednesday 21 July 2004, Mr Mitchell telephoned Mr Gallagher and informed him of the position in relation to the engine parts. According to Mr Mitchell, Mr Gallagher said that the defendant company had not done anything wrong and that he, Mr Mitchell, responded by asking what he had got for his £162,500. He alleged that Mr. Gallagher replied that he had a boat he could not use and Mr Mitchell responded by asking for his money back. Mr Gallagher said "No chance" and Mr Mitchell stated that, in that case, they would have to go down the legal route.

[14] Mr Gallagher gave evidence at the hearing. His version of this conversation was somewhat, but in my opinion not significantly, different. He said that what Mr Mitchell wanted was that he should do something about getting the parts for the engines and asked if Mr Gallagher could authorise the use of the boat while the arrival of the parts was awaited. Mr Gallagher said that he would not over-ride the Volvo letter but that he would continue to do everything possible. It was a priority of his company to get Mr Mitchell afloat. He denied saying "No chance." to Mr Mitchell's request for his money back. He said that he told the Plaintiff that it did not work like that and that he would do all in his power to get the parts. He was not prepared to give Mr. Mitchell his money back because the defects were too minor. He accepted that Mr. Mitchell made some comment to the effect that he proposed to take the legal route.

[15] According to Mr Mitchell, on the same day he drafted a fax which he attempted to send to Mr Gallagher at a fax number he obtained from the defendant's office in Bangor. It appears that he sent it to the wrong fax number so that it did not, in fact, reach the defendant until Friday 30 July 2004 on which date Mr Mitchell realised, for the first time, that the defendant had not received it. The fax was copied to Volvo and appears to have been received as it is referred to in a letter from Volvo to the plaintiff of 28 July 2004 and to which I shall refer in due course.

[16] The fax of 21 July summarised the history of the boat since delivery. It referred, among other things, to the fact that Cranchi had not approved the relocation of the hole in the transom to which I have already referred and will

refer to again below. It recorded that there was no date for the supply of injection pipes and that Volvo had rejected a request for a letter certifying the boat as suitable for use without the modifications. It quoted Mr Gallagher as stating that the plaintiff had "a boat that cannot be used" and purported to confirm Mr Mitchell's rescission of the contract on the basis that the boat was not of satisfactory quality and not fit for use. It requested return of the purchase money and that arrangements be made for the collection of the boat.

[17] The plaintiff went to his solicitors and a letter of claim was sent to the defendant company dated 27 July 2004. There was some controversy at the trial as to when this letter was, or would have been, received by the defendant. Evidence was called on the plaintiff's behalf proving that it had been posted first class on 27 July. Since the hearing I have noticed among the documents furnished to me a copy of what appears to be the defendant company's desk diary in which the first of two entries for Friday 30 July 2004 reads: "Letter from D Mitchell's solicitors" and the second refers to the person making the entry speaking to Mr. Mitchell. From these entries I conclude that the letter of claim was received on 30 July prior to a telephone call being made by a member of the staff of the defendant company to the plaintiff on that day and to which I refer again below. Having said all this, I should add that, in my view, the date of receipt of the plaintiff's solicitors' letter has no particular significance in this case.

[18] Mr J H Grainger, a marine surveyor, was contacted on the plaintiff's behalf and he inspected the boat and reported on it on 28 July 2004. In addition to the engine defects identified by Volvo and the relocated hole, Mr Grainger found thirty-five defects of which he thought eleven had to be rectified before the vessel would be safe for normal use. Mr Grainger gave evidence at the Trial as an expert witness on the plaintiff's behalf.

[19] In the letter dated 28 July 2004, and to which I have already referred in paragraph 15 above, Volvo wrote to Mr Mitchell stating that "all parts will be despatched by 30 July to Robert Craig & Sons for fitting to your engines." The letter went on to confirm that on completion "the boat is usable at normal risk".

[20] The date on which Mr Mitchell received this letter from Volvo is not clear but on Friday 30 July he received two telephone calls, one from Craigs and one from the defendant company to which I have already referred in paragraph 17. Both calls were to inform him that the parts had been despatched. In the course of the latter it became apparent that his fax of 21 July had not been received. The plaintiff's response to a question as to whether he wanted the work done was that the matter was now "sub judice" meaning that it was in the hands of his solicitors. Also on that day Mr Mitchell resent the 21 July fax to the defendant.

[21] In a letter dated 2 August 2004 the defendant's solicitors replied to the letter of claim. They referred to "the current precautionary remedial works" required by Volvo and to "the series of minor repairs" carried out by their client and stated that: "We do not accept that the minor defects referred to above effect the 'fitness for purpose' of the … boat and the fact that your client is in any way entitled to rescind the contract." It went on to state that the offer to have the Volvo work carried out remained open.

[22] The plaintiff maintained his rejection of the vessel and on 10 August 2004 the Writ initiating these proceedings was issued.

The Terms of the Contract

[23] The agreement to purchase of 24 February 2004 was preceded by contacts between the parties. It is not necessary for me to set these out in detail but according to the plaintiff (and this was not seriously challenged by the defence) Mr. Gallagher expressly confirmed to him that the boat would be of high quality and suitable for use, from the points of view of safety and reliability, by the plaintiff, his wife and their two children. Furthermore, the plaintiff also said that he relied on the assertion as to high quality comprised in the boat manufacturer's literature.

[24] At the outset these statements were relied on by the plaintiff as grounding claims for misrepresentation and breach of express contractual condition. However, in his closing submissions Mr. David Dunlop, who appeared with Mr. Mark Orr, QC for the plaintiff, explicitly abandoned misrepresentation. As far as express condition is concerned it does not seem to me that what was alleged adds anything of significance to the plaintiff's claim of breach of an implied term that the boat be of satisfactory quality. Accordingly, in this judgment I make no further reference to these two claims.

[25] Section 14(1) of the Sale of Goods Act 1979 ("the Act") reads as follows:

> "Except as provided for by this section and section 15 below and subject to any other enactment, there is no implied term about the quality or fitness for any particular purpose of goods supplied under a contract of sale."

Section 14(2) states that:

> "Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality."

By virtue of Section 14(6) a term implied by Section 14(2) is a condition. Breach of condition may give rise to a right to reject the goods and treat the contract as repudiated (see Section 11(3)) but where the buyer has accepted the goods then, unless there is an express or implied term to the contrary, breach of condition can only be treated as a breach of warranty (Section 11(4)). Breach of warranty does not entitle the buyer to reject the goods and treat the contract as repudiated but only to seek damages (see Section 11(3)).

[26] It was not disputed that the defendant had sold the boat in the course of a business but Mr. John Thompson, QC who appeared for the defendant company with Ms Monye Anyadike-Danes, contended that in the circumstances of the instant case the application of Section 14(2) of the Act had been modified so that the right to rescind had not, as a matter of law, arisen when the plaintiff purported to repudiate the contract.

[27] This contention was articulated in the amended Defence in the form of implied terms (and not, I emphasize, express terms) which, in so far as is material, are described as follows:

> "(i) The Defendant would provide the Plaintiff with manufacturers' guarantees from Cranchi, Volvo Penta and Raymarine [the suppliers of the electronics].
>
> (ii) The boat would be subject to a reasonable 'commissioning period' (of not less than [sic] 31st December 2004), during which period the Plaintiff would be obliged to allow any works required to be carried out.
>
> (iii) The Plaintiff would, in the first instance, have recourse to the warranties" [which I take to be synonymous with the "guarantees" previously referred to].

[28] The contention was developed by Mr Thompson in his closing submissions. He argued that the implication of the terms was necessary in order to maintain a market in which people without fortunes could purchase a craft like the Endurance 41. It was essential, he said, that the law does not veer off in the direction of one side or the other. The preferment of the interests of the individual purchaser, such as Mr Mitchell, would ultimately be to the detriment of other consumers. Implicit in Mr Thompson's submission was the need to moderate the otherwise unnecessarily harsh impact of Section 14(2) of the Act in order to protect retail trade in the United Kingdom or a significant part of it.

[29] In answer to Mr Thompson's submissions Mr Dunlop referred me to Rogers -v- Parish (Scarborough) Limited [1987] 2 All ER 323 (in which the English Court of Appeal expressed the view in relation to the manufacturer's warranty on a motor car that it was an addition to the buyer's rights and not a subtraction from them), to Section 55(1) of the Act and to Section 6(2) of the Unfair Contract Terms Act 1977 ("UCTA").

[30] I would be inclined to adopt and apply to this case the reasoning of Mustill LJ in Rogers' case which is encapsulated in the following: "If the defendants are right the buyer would be well advised to leave his guarantee behind in the showroom. This cannot be what manufacturers and dealers intend or what their customers reasonably understand" (at p. 237). As to Section 55(1) of the Act, while this provides that where a right, duty or liability would arise under a contract of sale by implication of law, it may (subject to UCTA) be negatived or varied by express agreement (and other factors which are not relevant) I note that it does not actually say that implied agreement may not also have the same effect. Section 6(2) of UCTA says that as against a person dealing as a consumer, liability for breach of the obligations arising from the seller's undertakings implied, inter alia, by Section 14 of the Act (of which satisfactory quality is one) cannot be excluded or restricted by reference to any contract term. However, the mere postponement of the buyer's right to reject, as contended for by Mr Thompson, may not properly be construed as an exclusion or restriction of liability within the meaning of the statute (see also Section 13(1) of UCTA).

[31] In my view, Mr Thompson's argument really falls down because it was predicated on the proposition that a term will be implied into a contract if it is necessary, in the business sense, to give efficacy to it (see Anson's Law of Contract, 28th Edition, pp. 145/146). But there was no evidence before me supporting the apocalyptic picture Mr Thompson painted and, therefore, no evidence to support the essential element of necessity. Indeed, I was struck on reading the 1987 report of the Law Commission and the Scottish Law Commission on the sale and supply of goods (Cmnd 137) by the absence of any significant degree of support for Mr Thompson's hypothesis and, in more recent times, it is noteworthy that his concerns do not appear to have been shared by the European Union which, by Directive 1999/44 has actually conferred additional rights on the consumer. Since 31 March 2003 these have been comprised in Part 5A of the Act, on the provisions of which neither party sought to rely in this case.

[32] The excerpt from the Defence which I have set out above also enabled Mr Thompson to advance what was really an alternative argument to the effect that the boat required to be commissioned, that this would inevitably take some time and that it was implicit in the agreement between the parties that the plaintiff could not reject the goods until the commissioning period,

lasting until 31 December 2004, had expired. In support of this alternative Mr Thompson referred me to Atiyah, The Sale of Goods, 10th Edition, p. 191 where it is contended that where complex goods are supplied and the seller has a duty to commission them, the seller has a reasonable period in which to effect the commissioning before the buyer can reject.

[33] In Atiyah, the sole authority given for the contention to which I have referred is Burnley Engineering Products Limited -v- Cambridge Vacuum Engineering Limited (1994) 50 Con LR 10. That case concerned a beam welding machine costing over £1,000,000. The machine was delivered in August 1991. The seller's conditions of purchase provided that before the buyer could exercise the right to reject the goods the seller should be afforded a reasonable opportunity to rectify any breach. The judge held that, having regard to the nature of the machine, the duration of that opportunity extended to 25 September 1992.

[34] There are obvious marked distinctions between the Burnley Engineering case and the instant case. It is apparent from the report that the machine was infinitely more complicated than an Endurance 41. There was an express condition suspending the right to reject. However, even without such a condition, and in contrast to the instant case, it is conceivable that the effect of the doctrine of implication by necessity would have produced the same result as it is clear that getting the beam welding machine up and running would have involved considerable expenditure on the part of the seller over a protracted period which it would have been inconceivable that the seller would have agreed to if the buyer could have rejected the machine on a whim at any time.

[35] Mr. Dunlop pointed out that the Burnley Engineering case did not involve a consumer sale and relied once again on Section 55(1) of the Act and Section 6(2) of UCTA. However, irrespective of the applicability of those provisions, I am satisfied that the proposition upon which Mr Thompson relied does not apply in this case: the goods are not of the requisite high degree of complexity; there is no express term; and there is no basis on which I would be entitled to imply one.

Were the Goods of Satisfactory Quality?

[36] I have already quoted Section 14(2) of the Act in which the phrase "satisfactory quality" first appears. Section 14(2A) says that "For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all other relevant circumstances" and Section 14(2B) reads:

> "For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods –
>
> (a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
>
> (b) appearance and finish,
>
> (c) freedom from minor defects,
>
> (d) safety, and
>
> (e) durability."

[37] I have already referred to the fact that Mr Grainger, the plaintiff's expert witness, identified thirty-five defects in the boat, apart from the engine defects listed by Volvo and the relocated hole. The defendants had also secured the services of an expert, Mr F G Cronin, a marine engineer, who inspected the boat, reported and who also had a meeting with Mr Grainger at which agreement was reached not only to the effect that the vast majority of the defects found by Mr. Grainger did indeed exist and required repair but also as to the repair of three additional defects noticed by Mr. Cronin and several others which, it appears, came to Mr Grainger's attention after his inspection. The defects on which agreement was reached were mostly in the finishing of the boat and most of them, according to Mr. Cronin, were of a minor nature and consistent with a snags list in any building project. Furthermore, the experts agreed that the craft was repairable.

[38] In my opinion, a reasonable person considering the defects to which I have referred and having regard, in particular, to the price of the boat (£162,500) and the factors referred to in Section 14(2B)(b) (appearance and finish) and Section 14(2B)(c) (freedom from minor defects) would not have regarded the boat as delivered as of satisfactory quality. It is true that Mr Mitchell accepted in cross-examination that the defects he was aware of on 13 July 2004 would not have caused him to reject the boat but this does not mean that, applying the statutory test, the vessel was of satisfactory quality on that date (see Clegg -v- Olle Andersson t/a Nordic Marine [2003] EWCA Civ 320 at para. 71 per Hale LJ). Furthermore, that the defects were repairable, or readily repairable, or inexpensively repairable does not mean that the goods were of satisfactory quality (see Clegg op. cit. at para. 47 per Sir Andrew Morritt V-C). And it will be borne in mind that if it is held that defects in goods do not render them not of satisfactory quality the effect is not that what would otherwise be a right to reject becomes a right to seek damages: In such circumstances the buyer has no remedy at all under Section 14(2) of the Act

(see Millars of Falkirk Limited -v- Turpie 1976 SLT (Notes) 66). In this context, I believe the test to be whether the defects were significant in that more than minimal remedial work was required (see Clegg op. cit. at para 49 per Morritt V-C). In my view, the repair of the defects would amount to remedial work which was more than minimal.

[39] But even if I am wrong about the defects to which I have referred this still leaves the Volvo engine defects and the relocated hole. As I have already said, the engine defects were three in number and they related to the outdrive exhaust bellows, a fuel injection pipe and gearshift fixing screws on each engine. The defendant sought to demonstrate that none of these problems either individually or collectively rendered the boat not of satisfactory quality and Mr. Michael Rooney, BEM, Volvo's Market Support Manager for Northern Ireland, the Republic of Ireland and Gibraltar, was called in support of this proposition.

[40] The thrust of his argument on this point was that what Volvo proposed to engine owners were really improvements with no significant safety implications and Mr. Rooney referred me to the category of significance (there were three) into which each "modification" was placed by that company. The exhaust bellows defect came within the highest priority of the three - "product recall" - because of a minor risk to safety; the fuel injection pipe defect and gearshift fixing screws were both in the middle category - "campaign" - because they really related to reliability. Mr. Rooney sought to argue that notwithstanding categorisation of the bellows defect as "product recall" it merely gave rise to a remote risk - there would only be a problem if a hose split under certain extreme circumstances involving very violent manoeuvring. As to the fuel injection pipe defect it did not follow that the escape of fuel in the event of a pipe fracture would cause a fire and, although Volvo had experienced loosening of the gearshift fixing screws in another type of engine, the problem had never been observed in the type of engine in question notwithstanding that some customers have not had their engines modified.

[41] It is an interesting question how much the hypothetical "reasonable person" (see Section 14(2A) of the Act) is to be deemed to know about a defect when he or she is judging satisfactory quality. However, I do not have to dilate on this question in this particular case. I accept the evidence of Mr Grainger that the defects were significant in safety terms and I quote from the report of Mr. Cronin, the defendant's own expert, which supports Mr Grainger's concerns:

> "The requirement for replacements by the manufacturers are essential to the safety of the Craft. Should the outdrive exhaust bellows fail, then the

> engine compartment could become flooded with disastrous consequences.
>
> The replacement of the clamps on the injector pipes and the injector pipe replacement themselves are essential as failure occurring on these with a high pressure common rail system could cause fuel leakage in the engine compartment and result in fire.
>
> The requirement to replace the clamps on the gear cables is essential as loosening of these could render the Craft unmanoeuvrable."

[42] Mr Cronin's remarks, at least as far as the exhaust bellows are concerned, seem to me to be borne out in contemporaneous Volvo documents. In a letter to "Dear Dealer" of 15 July 2004 the exhaust bellows modification is described as "safety related" and it is stated that "It is therefore vital that this matter is given immediate attention …." In a letter to Mr Gallagher dated 16 July 2004 Mr. Rooney refers to "important safety related changes." Last but not least there is the Volvo letter of 30 July 2004 to Mr Mitchell, and to which I have already referred, which, after confirming that the parts would be despatched that day, continues with the sentence "Upon completion of the work the boat is usable at normal risk." In my opinion if, as Mr Rooney suggested, the risks to which the modifications were directed were insignificant, there is no reason why Volvo did not confirm that the vessel was fit for use at usual risk pending their completion as Mr Mitchell had requested.

[43] In my judgment the three defects and the exhaust bellows problem in particular each gave rise to a significant safety risk in the sense that in each case the risk was more than minimal (see Clegg op. cit. at para. 38 per Morritt V-C). Accordingly, I consider that each of the engine defects rendered the boat not of satisfactory quality.

[44] I now come to the relocated hole. Mr Mitchell was concerned as to whether the method by which the original hole had been plugged would permit water to enter the layer of wood between those of fibreglass and cause deterioration. He wanted it endorsed by Cranchi. Mr Grainger believed that a statement of repair would be required to be approved by Cranchi. Mr. Cronin thought that approval by any recognised marine engineer should be adequate. In fact, neither of these things happened and in 2005 Cranchi indicated that it was not prepared to stand over the repair.

[45] The defendant's case is that all that the plaintiff was entitled to was the benefit of the manufacturer's warranty. There is no dispute but that the hole in the transom was originally in the wrong place. It has not been repaired in

accordance with the hull manufacturer's warranty, otherwise Cranchi would have been prepared to stand over it. In my opinion, the hole, as originally located, of itself rendered the boat not of satisfactory quality. The relocation to which the plaintiff agreed has not, in my view, made the vessel of satisfactory quality as Cranchi are not prepared to stand over it and this is irrespective of whether the risk of water ingress through the plugged hole is great or small. Mr Thompson relied on the fact that the plugged hole had been backed by the defendant's public liability insurers but in my opinion this did not make the boat of satisfactory quality in this respect.

[46] Accordingly, for the reasons given, I hold that the boat was not of satisfactory quality.

Was the Plaintiff Entitled to Reject the Boat?

[47] As I have already said, when a buyer accepts the goods he or she loses the right to reject the goods and treat the contract as repudiated (see Section 11(4) of the Act). Acceptance is dealt with in Section 35 of the Act and I set out the portions of it that are relevant to this case:

> "(1) The buyer is deemed to have accepted the goods subject to subsection (2) below –
>
> > (a) when he intimates to the seller that he has accepted them, or
> >
> > (b) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller.
>
> (2) Where goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them under subsection (1) above until he has had a reasonable opportunity of examining them for the purpose –
>
> > (a) of ascertaining whether they are in conformity with the contract …
>
> (3) Where the buyer deals as a consumer, the buyer cannot lose his right to rely on subsection (2) above by agreement, waiver or otherwise.
>
> (4) The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he

> retains the goods without intimating to the seller that he has rejected them.
>
> (5) The questions that are material in determining for the purpose of subsection (4) above whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods for the purpose mentioned in subsection (2) above."

What is a reasonable time is a question of fact - see Section 59 of the Act.

[48] Mr Thompson did not suggest that the plaintiff had intimated to the defendant that he had accepted the goods (Section 35(1)(a)). However, it was contended on the defendant's behalf that in taking his family to Glenarm on 13 July 2004 the plaintiff had done an act inconsistent with the ownership of the seller. However, when one reflects on the meaning of the statutory words and looks at the authorities it becomes clear that what the plaintiff did is not what Parliament had in its collective mind when it enacted Section 35(1)(b). In Hardy -v- Hillerns and Fowler [1923] 2 KB 490 it was held that the transfer of possession to subpurchasers was an act inconsistent with the ownership of the sellers. In Benaim -v- Debono [1924] AC 514 the buyer's act of delivering the goods to purchasers from him was held to be inconsistent with the ownership of the seller. In Ruben -v- Faire Bros. [1949] 1 KB 254 the buyers lost the right to reject because they had asked the sellers to deliver the goods to a purchaser from the buyers. Finally, in Kwei Tek Chao -v- British Traders and Shippers [1954] 2 QB 459 Devlin J suggested that for an act to be inconsistent with the ownership of the seller it must interfere with the seller's reversionary interest, an example being despatch to a third party.

[49] In the Law Commission and Scottish Law Commission report on the sale and supply of goods which I have already mentioned it was suggested (at para. 2.47) that the underlying principle may be that goods cannot be rejected if they cannot be returned to the seller. Even if the scope of Section 35(1)(b) is not as narrow as this I am satisfied that the trip to Glenarm was not an act inconsistent with the ownership of the defendant in this case.

[50] Mr Thompson also contended that the plaintiff had accepted the boat because he had retained it beyond a reasonable time.

[51] In paragraph 15 of the Statement of Claim the plaintiff relied on what is described as the plaintiff's letter of 21 July 2004 but which is, in fact, the plaintiff's fax of that date to Mr Gallagher, and to which I have already referred in paragraph 15 above, as communicating his rejection of the boat. As I point out in that paragraph that fax did not actually reach the defendant

until 30 July. However, it appeared from the evidence, and I so find, that in the course of his telephone conversation with Mr Gallagher on 21 July Mr Mitchell made it clear that he was treating the contract as repudiated and that all that that fax was intended to do was to record what had passed between the interlocutors earlier that day (the relevant paragraph begins: "I confirm my recession (sic) … "). Accordingly, the question becomes: Had a reasonable time elapsed by 21 July 2004?

[52] What is or was a reasonable time is a question of fact (see Section 59 of the Act) which falls to be judged according to the circumstances of the particular case. Although the question of whether the buyer had a reasonable opportunity of examining the goods is relevant to the determination of the reasonable period of time it is clear that it is not determinative of it (see Section 35(5) of the Act and Clegg op. cit. at paras. 63 and 75).

[53] In this connection, I go part of the way with Mr Thompson's commissioning argument, although not as far as the conclusion he invited me to reach. Although the boat cannot be equated with the beam welding machine in the Burnley Engineering case (see paras. 33-35 above) it is, nevertheless, more complex than the vast majority of items which meet the description "consumer goods". I think that in the normal course of things anyone purchasing a boat of this sort would anticipate that there might be defects which, although in strict law they would give rise to a right to reject, the buyer would usually prefer to have rectified, if rectification were possible. Mr. Mitchell reflected this when, in the course of cross-examination, he accepted that he thought that after delivery the boat would be subject to snagging and as at 13 July 2004 the items identified by the experts, other than the Volvo modification and the relocated hole, would not have caused him to reject the boat. However, in my opinion, it must have been anticipated by both parties at the date that the contract was made that all defects would or might not be apparent on the day of delivery and that some or many might only emerge over a period during which the boat might be put to use.

[54] It is true that by 28 July 2004 Mr Grainger was able to identify most of the defects suggesting that it is at least possible that such an inspection could have revealed them perhaps weeks before. However, in my view Section 35(2) of the Act does not imply examination by an expert. In my judgment on the date of rejection (21 July 2004) Mr Mitchell was still within the reasonable time permitted by Section 35(4) and my conclusion would be the same if the date of rejection were to be taken as 30 July, the date on which the defendant actually received the plaintiff's fax of 21 July 2004.

[55] This conclusion would fit with the plea in the Defence that a reasonable commissioning period would have extended to at least 31 December 2004 (see paragraph 1(4)(ii)). It is true that this period is pleaded in the context of the plaintiff being obliged to allow remedial works to be carried out but I

consider that the choice of such a long period points clearly to recognition that the period of time to which the buyer was entitled in this case would not have been a period of only days or weeks.

[56] There is another reason for my conclusion that a reasonable time had not elapsed by 21 July or even 30 July and this relates to the relocation of the hole. As I have already said the hole in its original location meant that the boat was not of satisfactory quality. The plaintiff asked for and agreed to its repair. In doing so he is not to be deemed to have accepted the goods (see Section 35(6)(a) of the Act). The repair was not satisfactory to the plaintiff because it had not been approved by Cranchi, a concern articulated by Mr Mitchell in his fax to the defendant of 21 July 2004.

[57] In my view it is consistent with the approach of Hale LJ in Clegg (op. cit. at para. 75) that the plaintiff would have had a period of time in which to seek and obtain from the defendant such information in relation to the repair as would have permitted him to make a properly informed choice between acceptance, rejection or cure, and if cure in what way, during which he would not have lost his right to reject. I am satisfied that in relation to this defect, taken in isolation, the period for rejection had not expired even by 30 July 2004.

[58] I would add that in paragraph 16 of the Defence the defendant made reference to Section 35(6)(a) and pleaded that the plaintiff "… having asked for and or (sic) agreed to the repair of the matters complained of including the modifications to the Volvo Penta engines … was, in all the circumstances, bound to permit a reasonable time for those works to have been carried out … " I record that although it is clear from my description of the material facts that the plaintiff did indeed ask for and agree to some repairs, he did not ask for or agree to the Volvo modifications. What he did in relation to these was to inquire as to when the parts would become available to enable them to be completed and, not having received a satisfactory answer, he rejected the boat.

Conclusion

[59] It follows that Mr. Mitchell was entitled to treat the contract as repudiated and reject the goods. He is entitled to the return of the price. I will hear counsel as to the quantum of damages which issue I stood over pending my decision on liability.