SUPREME COURT OF QUEENSLAND

CITATION:	*Tarangau Game Fishing Charters Pty Ltd v Eagle Yachts Pty Ltd & Anor* [2017] QSC 306
PARTIES:	**TARANGAU GAME FISHING CHARTERS PTY LTD ACN 120 602 440** (plaintiff) **v** **EAGLE YACHTS PTY LTD ACN 108 311 404** (first defendant) and **BY WINDDOWN, INC** (second defendant)
FILE NO/S:	No 9201 of 2010
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	15 May 2017 to 26 May 2017
JUDGE:	Atkinson J
ORDERS:	**1. The court orders that the first defendant pay the plaintiff:** **$1,933,900 together with interest pursuant to s 47 of the *Supreme Court Act* 1995 from 22 July 2006 until the date of judgment.** **2. The court orders that the second defendant pay the plaintiff:** **$1,239,919 together with interest pursuant to s 47 of the *Supreme Court Act* 1995 from 7 March 2016 until the date of judgment.**
CATCHWORDS:	SALE OF GOODS – SALE OF GOODS LEGISLATION – ACTIONS FOR BREACH OF CONTRACT – REMEDIES OF BUYER – where the plaintiff purchased a yacht from the first defendant which was manufactured by the second defendant – where the yacht began to delaminate and then developed other structural defects well within its expected

lifetime – where the yacht was purchased for use in deep sea fishing – whether the yacht was fit for its intended purpose – whether the yacht was of merchantable quality

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – TERMINOLOGY – CONSUMER – where the plaintiff purchased a yacht from the first defendant which was manufactured by the second defendant – where the yacht began to delaminate and then developed other structural defects well within its expected lifetime – where the yacht was purchased for use in deep sea fishing – where the plaintiff intended to use the boat for personal use and for commercial charter – whether the plaintiff falls within the meaning of "consumer" under the *Trade Practices Act* 1974 (Cth) – whether the vessel was acquired for the purpose of resupply

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where the plaintiff purchased a yacht from the first defendant which was manufactured by the second defendant – where the yacht began to delaminate and then developed other structural defects well within its expected lifetime – where the plaintiff signed a warranty card provided by the second defendant upon purchasing the yacht – where the second defendant offered to repair the yacht in accordance with the warranty upon the discovery of the defects – where four experts gave evidence about the extent of the delamination and other defects – where the plaintiff's experts considered that the repair offer was inadequate to repair the defects – where the opinion of the plaintiff's three experts differed significantly from the expert of the second defendant - whether the second defendant breached the terms of the warranty

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – WHERE ECONOMIC OR FINANCIAL LOSS – where the plaintiff purchased a yacht from the first defendant which was manufactured by the second defendant – where the yacht began to delaminate and then developed other structural defects well within its expected lifetime – where four experts gave evidence about the extent of the delamination and other defects – where the plaintiff alleged the yacht was not built in accordance with the plans – where the plaintiff alleged the second defendant did not follow proper boat building processes in manufacturing the yacht – whether the second defendant manufacturer owed a duty of care to the plaintiff

Civil Liability Act 2002 (NSW) s 34, s 35
Civil Liability Act 2003 (Qld) s 30, s 31
Sale of Goods Act 1923 (NSW) s 19(1), s 19(2)
Trade Practices Act 1974 (Cth) s 4B, s 71, s 74B, s 74D, s 74G

ABN AMRO Bank NV (ARBN 84 079 478 612) and Others v Bathurst Regional Council and Others (2014) 99 ACSR 336, cited
Australian Competition and Consumer Commission v Valve Corp (No 3) (2016) 337 ALR 647; [2016] FCA 196, cited
Australian Knitting Mills Ltd v Grant (1933) 50 CLR 387, cited
Baldry v Marshall [1925] 1 KB 260, cited
Brambles v Commissioner of Taxation (1993) 179 CLR 15, cited
Bunnings Group Ltd v Laminex Group Ltd (2006) 153 FCR 479, cited
Carlton International PLC & Anor v Crawford Freight Services Ltd & Ors (1997) 78 FCR 302, cited
Clark v Macourt (2013) 253 CLR 1; [2013] HCA 56, cited
Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64, cited
Dow Jones & Co Inc v Gutnick (2002) 210 CLR 575, cited
East River Steamship Corporation v Transamerica Delaval, Inc, 476 U.S. 858,106 S.Ct. 2295 (1986), cited
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640, cited
Involnert Management Inc v Aprilgrange Ltd & Ors [2015] 2 CLC 307; [2015] EWHC 2225 (Comm), cited
Larking v Great Western (Nepean) Gravel Ltd (in liq) (1940) 64 CLR 221, cited
Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd as trustee for the G & M Geldard Family Trust (2013) 1 Qd R 319; [2012] QCA 315, cited
Regie Nationale des Usines Renault SA v Zhang (*Zhang*) (2002) 210 CLR 491, cited
Scandinavian Trading Tanker Co. A.B. v Flota Petrolera Ecuatoriana ("*The Scarptrade*") [1983] 2 AC 694, cited
Shaw v Shaw [1954] 2 QB 429, cited
Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272, cited
The "Ruapehu" (1925) 21 Ll L Rep 310, cited
Tiara Condominium Association v Marsh & McLennan, 110 So.3d 399 (Fla. 2013), cited
Tre Cavalli Pty Ltd v Berry Rural Cooperative Society Ltd [2013] NSWCA 235, cited
Vautin v BY Winddown Inc [2016] FCA 632, cited
Webb Distributors (Aust) Pty Ltd v Victoria (1993) 179 CLR 15, cited

COUNSEL:	D O'Sullivan QC with D Turner for the plaintiff S Anderson for the first defendant S Seefeld for the second defendant
SOLICITORS:	AJ & Co for the plaintiff JHK Legal for the first defendant Norton Rose Fulbright Australia for the second defendant

[1] In July 2006, the plaintiff, Tarangau Game Fishing Charters Pty Ltd ("Tarangau"), purchased a yacht, namely a Bertram 570 Flybridge Cruiser ("Bertram 570"), from the first defendant, Eagle Yachts Pty Ltd ("Eagle Yachts"). The Bertram 570 was designed and manufactured by the second defendant, now called BY Winddown, Inc ("Bertram"). The Bertram 570 was a fibreglass yacht and, well within its expected lifetime, the fibreglass started to delaminate and then other defects were discovered. This led to a dispute between the parties and eventually this litigation, where the issues at first broadened but by the end of the trial had become somewhat narrower. It is the issues as found in the pleadings filed by leave during and after the trial[1] (the final versions of which I shall refer to as the claim, the statement of claim, the first defendant's defence, the second defendant's defence, the reply to the first defendant's defence, and the reply to the second defendant's defence); and the consolidated statement of issues in dispute and not in dispute which govern the matters to be determined in this decision.

[2] It is first useful to narrate the facts and matters not in dispute. Some of the matters which were hotly contested during the evidence were no longer in issue by the end of the trial.

Facts not in dispute

[3] The Bertram 570 purchased by Tarangau was manufactured in about July 2004 by Bertram.[2] Bertram was a corporation incorporated in the United States of America and thus a foreign corporation within the meaning of the *Trade Practices Act* 1974 ("TPA").[3] Bertram designed and built a variety of yachts some of which were designed and built for use in the open water at sea, specifically sporting fishing yachts.[4] Bertram manufactured Bertram yachts in the United States of America which were sold worldwide through a network of dealers.[5] The Bertram 570, the subject of this litigation, is described as a 57.12 foot Bertram 570 Flybridge Cruiser having motor

---

1 The third amended claim; the fifth amended statement of claim; third further amended defence of the first defendant; further amended defence of the second defendant to the fifth amended statement of claim; reply to the third further amended defence of the first defendant; and reply of the plaintiff to the amended defence of the second defendant to the fifth amended statement of claim.

2 Statement of claim paragraph 5; first defendant's defence paragraph 4; second defendant's defence paragraph 1; list of facts and matters not in issue paragraph 4.

3 List of facts and matters not in issue paragraph 3.

4 Statement of claim paragraph 3; first defendant's defence paragraph 2, second defendant's defence paragraph 1, list of facts and matters not in issue paragraph 5.

5 Statement of claim paragraph 3; first defendant's defence paragraph 2; second defendant's defence paragraph 1; list of facts and matters not in issue paragraph 3.

numbers (P) CLX00571(S) CLX 00570 and bearing the manufacturer's Hull Identification Number US-BERX7019G405.[6]

[4] By a contract dated 9 March 2004 Bertram sold the Bertram 570 (pre-manufacture) to Azure Yachts Pty Ltd ("Azure Yachts").[7] Then in November 2004 the benefit of that contract of sale was assigned from Azure Yachts to Eagle Yachts. Eagle Yachts paid the balance of the purchase price under the contract and the Bertram 570 was delivered into its possession.[8] Prior to May 2005, Azure Yachts was Bertram's dealer for selling, servicing and promoting Bertram Yachts in Australia. On 9 May 2005, Bertram and Eagle Yachts entered into a dealer agreement under which Bertram appointed Eagle Yachts as its exclusive dealer in Australia to sell, service and promote Bertram Yachts in Australia.[9] Pursuant to that dealer agreement, Bertram from time to time sold yachts manufactured by Bertram to Eagle Yachts in order for Eagle Yachts to resell to members of the public in Australia. As Eagle Yachts was engaged in the business of selling yachts, it was a trading corporation within the meaning of the TPA.[10] Eagle Yachts acquired the Bertram 570 from Bertram for the purpose of re-selling it to the public in Australia and Bertram supplied the Bertram 570 to Eagle Yachts in trade and commerce.[11]

[5] On 17 September 2005, SW Booth and Associates produced a preliminary survey report in respect of the Bertram 570.[12]

[6] In late May 2006, Eagle Yachts displayed the Bertram 570 for sale at a boat show at Sanctuary Cove[13] which was attended by Daniel Choi Hing Wong, who became the director of Tarangau when it was incorporated.[14] It is common ground between Tarangau and Eagle Yachts that Mr Wong inspected the Bertram 570 and Bradley Rodgers, the Sales Manager – East Coast of Eagle Yachts,[15] told him that the yacht was a "Bertram 570 Flybridge Cruiser".[16] Mr Wong told Mr Rodgers that he was looking to buy a boat that could be used both as a recreational fishing boat and as a commercial fishing boat for charter. Mr Rodgers told Mr Wong that he could put him in touch with a surveyor and a naval architect.[17] Mr Rodgers was, as Mr Wong knew, not a naval surveyor or naval architect.[18]

---

6 Statement of claim paragraph 5; first defendant's defence paragraph 4; second defendant's defence paragraph 1; list of facts and matters not in issue paragraph 4.

7 Statement of claim paragraph 6; first defendant's defence paragraph 5; second defendant's defence paragraph 1; list of facts and matters not in issue paragraph 6.

8 Statement of claim paragraph 7; first defendant's defence paragraph 6; second defendant's defence paragraph 5; list of facts and matters not in issue paragraph 7.

9 Statement of claim paragraph 4; first defendant's defence paragraph 3; second defendant's defence paragraph 1; list of facts and matters not in issue paragraphs 8, 9.

10 Statement of claim paragraph 2; first defendant's defence paragraph 1; second defendant's defence paragraph 1; list of facts and matters not in issue paragraph 1.

11 Statement of claim paragraph 7; first defendant's defence paragraph 6; second defendant's defence paragraph 5.

12 List of facts and matters not in issue paragraph 11.

13 Statement of claim paragraph 8; first defendant's defence paragraph 7; second defendant's defence paragraph 1.

14 List of facts and matters not in issue paragraph 12.

15 Statement of claim paragraph 2; first defendant's defence paragraph 1; second defendant's defence paragraph 1; list of facts and matters not in issue paragraph 2.

16 Statement of claim paragraph 9; first defendant's defence paragraph 8.

17 List of facts and matters not in issue paragraph 13.

18 List of facts and matters not in issue paragraphs 14, 15.

[7] Tarangau alleged that in signing the contract on its behalf, Mr Wong relied on the description of the Bertram 570[19] whereas Eagle Yachts did not admit Mr Wong's state of mind and said that Mr Wong inspected the Bertram 570 prior to purchase.[20] In early June 2006, Mr Wong inspected the Bertram 570 for a second time, this time at Marina Mirage, on the Gold Coast.[21] Tarangau alleged that the defects in the Bertram 570 were not revealed on that inspection and were not such as would be revealed upon the inspection Mr Wong made.[22]

[8] On about 4 July 2006, Tarangau entered into an agreement in writing with Eagle Yachts for the purchase of the Bertram 570 for the sum of $2,200,000 ("the contract").[23] The contract had been prepared by Eagle Yachts and provided to Mr Wong on about 3 July 2006.[24] The yacht was described in the contract as a "Bertram 570 Flybridge Cruiser".[25] Clause 1.2 of the contract provided:

> "The offer of the Purchaser is accepted by the Dealer when:
>
> (a) this contract is signed by the Dealer Principal or an authorised Sales Representative; and
>
> (b) notice of the acceptance is given by the Purchaser. This Contract will then be binding on both parties."[26]

[9] On 6 July 2006, Tarangau was incorporated.[27] Mr Wong has been its director at all material times.[28] Eagle Yachts supplied the Bertram 570 to Tarangau in the course of its business as exclusive dealer in Bertram yachts.[29] Yachts of the kind of the Bertram 570 are commonly acquired or purchased by members of the public for the purpose of sailing in the open sea.[30]

[10] In Sydney on 22 July 2006, Mr Wong signed a second contract on behalf of Tarangau for the purchase of the Bertram 570 from Eagle Yachts. Mr Wong signed a warranty card and Bertram gave a written warranty to Tarangau in respect of the Bertram 570. That is referred to in these reasons as the express warranty. The express warranty was set out in a document headed "Bertram Yacht Inc. Limited Warranty (USA)". The express warranty constituted a contract. By the express warranty, Bertram warranted,

---

19 Statement of claim paragraph 15.
20 First defendant's defence paragraph 14.
21 List of facts and matters not in issue paragraph 16.
22 Statement of claim paragraph 27; first defendant's defence paragraph 26; second defendant's defence paragraph 11B; reply to the first defendant's defence paragraph 1.
23 Statement of claim paragraph 10; first defendant's defence paragraph 9; second defendant's defence paragraph 1; list of facts and matters not in issue paragraph 17; but see also statement of claim paragraphs 16, 17; first defendant's defence paragraphs 15, 16; second defendant's defence paragraph 1.
24 Statement of claim paragraphs 12, 13; first defendant's defence paragraph 11, 12; second defendant's defence paragraph 1.
25 Statement of claim paragraph 14; first defendant's defence paragraph 13; second defendant's defence paragraph 1; list of facts and matters not in issue paragraph 19.
26 Statement of claim paragraph 11; first defendant's defence paragraph 10; second defendant's defence paragraph 1; list of facts and matters not in issue paragraph 18.
27 Statement of claim paragraph 1; first defendant's defence paragraph 1; second defendant's defence paragraph 2; list of facts and matters not in issue paragraph 22.
28 List of facts and matters not in issue paragraph. 23.
29 List of facts and matters not in issue paragraph 20.
30 List of facts and matters not in issue paragraph 21.

so far as is presently relevant, that it would repair or replace defects in the hull of the Bertram 570 and its other fibreglass structural components for a period of five years.[31]

[11] On 27 July 2006 the signed warranty card and typed warranty terms were sent to Bertram by Eagle Yachts. The law governing the express warranty is the law of Florida in the United States of America.[32]

[12] The Bertram 570 was delivered to Tarangau at Jones Wharf in Sydney.[33] On 29 and 30 July 2006 Eagle Yachts sailed the Bertram 570 from Sydney to the Gold Coast without incident to deliver the vessel to Tarangau. The Bertram 570 was then sailed to Brisbane.[34]

[13] It is common ground between Eagle Yachts and Tarangau that the Bertram 570 was registered in Queensland as a recreational yacht. Tarangau sailed the Bertram 570 for more than 1,000 miles and the Bertram 570 recorded over 450 hours of engine use after being acquired by Tarangau.[35]

[14] In late 2006, KPS Maritime Pty Ltd ("KPS") was engaged by Tarangau to conduct a commercial survey.[36]

[15] In the period September to December 2007, the Bertram 570 sailed to Lizard Island on an extensive trip.[37]

[16] In July 2008, Navsafe Marine Pty Ltd ("Navsafe") replaced KPS for commercial survey work. On 15 October 2008 Mr Blundell of Navsafe inspected the Bertram 570 and requested the involvement of Andrew Harvey of Nekton International Pty Ltd ("Nekton"). Between 15 and 18 October 2008, Mr Harvey inspected the Bertram 570. On 20 October 2008, Mr Blundell of Navsafe provided a letter to Mr Wong asserting that he had found serious structural defects in the Bertram 570.[38]

[17] On 11 November 2008 Tarangau, by its solicitors, gave notice to Bertram, pursuant to the express warranty, of the defective condition of the hull of the Bertram 570 and invited Bertram to appoint a marine surveyor to undertake an inspection of the vessel. This notice was contained in a facsimile dated 11 November 2008 from McCullough Robertson to Bertram.[39]

[18] On 19 December 2008, Mr Harvey of Nekton delivered a report concluding that the vessel had serious structural defects and it was not economic to repair it.[40] By email dated 13 January 2009, Tarangau provided Bertram with a copy of its expert report identifying the structural failures in the Bertram 570's hull and its fibreglass structural components.[41]

---

31 List of facts and matters not in issue paragraph 24.
32 List of facts and matters not in issue paragraphs 25, 26.
33 List of facts and matters not in issue paragraph 24.
34 List of facts and matters not in issue paragraph 27.
35 List of facts and matters not in issue paragraph 28.
36 List of facts and matters not in issue paragraph 29.
37 List of facts and matters not in issue paragraph 30.
38 List of facts and matters not in issue paragraphs 31-34.
39 List of facts and matters not in issue paragraph 35.
40 List of facts and matters not in issue paragraph 36.
41 List of facts and matters not in issue paragraph 37.

[19] On 5 March 2009, Bertram inspected the Bertram 570. It subsequently prepared survey and repair reports concluding that the defects were repairable and on 31 March 2009 Bertram sent a repair offer to Tarangau. On 8 April 2009, Bertram provided its survey and repair reports to Tarangau. On 4 June 2009, Tarangau rejected Bertram's offer to repair asserting that it did not address the existing defects in the vessel.[42]

[20] On 13 July 2009, Mr Harvey of Nekton produced a report as to proposed repairs to the vessel. That report was sent to Bertram on 15 July 2009.[43]

Defects to the vessel

[21] The defects to the Bertram 570 which are not in issue between Tarangau and Bertram but which are denied or not admitted by Eagle Yachts are as follows:[44]

(1) At least 6.18 per cent (as indicated by Mr Griffin in the second conclave report) of the total length of transverse tabbing of the transversal and longitudinal members is not securely bonded to the hull shell of the Bertram 570.

(2) Transversals M3, M4, M5 and M6 have developed partial and total delamination and separation of the secondary bonding angle laminate from the hull shell outboard of L2. The delamination is progressive. The transversal frame M5 has developed delamination and cracking. Bulkhead P2 has developed cracking, bond failure and separation of the 5083-grade aluminium angle and there is a failure of the structural liner sole to transversal connection.

(3) The port and starboard sides of the pulpit developed cracking and delamination at the connection to the deck.

(4) The internal structural support for the pulpit and the grounding tackle developed cracking and delamination at the connection to the hull shell and deck.

(5) The foredeck has developed structural failures in that there is excessive deflection from delamination of the foredeck composite structure between the forward foredeck hatch and the anchor locker hatch, and there had developed cracking at high stress areas around the forward foredeck hatch and the anchor locker hatch.

(6) The Bertram 570's cockpit sole had developed cracking. The cracking is indicative of excessive movement and instability of the cockpit structure. Further, the extended cockpit sole and floating cockpit sole failed to prevent water ingress into the lazarette and the machinery space or engine room.

The claim

[22] The claim sought the following relief:

1. As against the first defendant, Eagle Yachts, damages for breach of terms implied in the contract pursuant to which it sold the Bertram 570 to Tarangau, such terms being implied by ss 19(1) and 19(2) of the *Sale of Goods Act* 1923 (NSW)

---

42 List of facts and matters not in issue paragraphs 38-42.
43 List of facts and matters not in issue paragraphs 43-44.
44 List of facts and matters not in issue paragraphs 45-50.

("SGA") and s 71 of the *Trade Practices Act* 1974 (Cth) ("TPA") as in force at the time of entry into the contract.

In particular, Tarangau claimed against Eagle Yachts:

(a) $1,933,900.00 damages for breach of contract;

(b) interest pursuant to s 47 *Supreme Court Act* 1995 (Qld); and

(c) costs.

2. As against the second defendant, Bertram, Tarangau claimed damages for breach of the warranty given by Bertram, compensation pursuant to each of ss 74B and 74D of the TPA, compensation pursuant to s 74G of the TPA and damages for negligence.

In particular, Tarangau claimed against Bertram:

(a) $1,933,900.00, alternatively $1,239,919.00 or $852,950.00 (viz. the compensation claimed in paragraph 38(e) of the statement of claim), damages for negligence;

(b) $1,933,900.00 compensation, alternatively $1,239,919.00 or $852,950.00 pursuant to each of sections 74B and 74D of the TPA;

(c) $1,933,900.00 compensation, alternatively $1,239,919.00 or $852,950.00 pursuant to s 74G of the TPA;

(d) alternatively, $1,933,900.00 or $1, 239,919.00 or $852,950.00 damages for breach of contract;

(e) interest pursuant to section 47 *Supreme Court Act* 1995 (Qld); and

(f) costs.

Issues in dispute

[23] A number of issues remained in dispute between the parties and needed to be resolved. I have adjusted the numbering of the document provided by the parties at the end of the trial to delete reference to those issues which were no longer disputed. These do not precisely coincide with the matters left in dispute in the pleadings so I have also referred to the issues raised by the pleadings in the body of these reasons. During the course of these reasons I shall also deal with the issues in dispute as they arise for decision rather than seriatim. The issues in dispute were said by the parties to be:

1. Did Tarangau buy the Bertram 570 by description, namely "Bertram 570 Flybridge Cruiser"? (not in issue between Tarangau and Bertram)

2. Did Eagle Yachts deal in yachts of the description described in paragraph 1 above? (not in issue between Tarangau and Bertram)

3. Did Tarangau, expressly or by implication, prior to entering into the purchase contract on or about 6 July 2006, make known to Eagle Yachts that Tarangau was

proposing to use the Bertram 570 for sailing and fishing in the open sea off the coast of Australia?

4. Was Tarangau's proposed purpose (of using the Bertram 570 for sailing and fishing in the open sea off the coast of Australia) made known to Bertram, either expressly (by being communicated to Eagle Yachts) or by implication from the nature of the yacht and the uses for which such yachts are commonly acquired by members of the public?

   Bertram says this issue should be replaced with:

   What was Tarangau's purpose for acquiring the Bertram 570?

   Did Bertram have knowledge (whether expressly or impliedly) of Tarangau's purpose in acquiring the Bertram 570 at the time it was purchased or at any time before then?

5. In acquiring the Bertram 570, was Tarangau acquiring it for the purpose of re-supply, such as to preclude Tarangau's being a "consumer" within section 4B of the TPA?

   Bertram says this issue should be replaced with:

   In acquiring the Bertram 570, was Tarangau a 'consumer' within the meaning of section 4B of the TPA?

6. At the time of purchase, was the Bertram 570 not reasonably fit for the purpose of being used for fishing and sailing in the open sea off the coast of Australia, by reason of the matters pleaded in paragraph 26 of the statement of claim?

7. At the time of purchase, was the Bertram 570 not of merchantable quality, by reason of the matters pleaded in paragraph 26 of the statement of claim?

8. If they existed, were the defects in the Bertram 570 discoverable on a reasonable inspection of the Bertram 570 at the time of its purchase by Tarangau?

9. If they existed, did the defects in the Bertram 570 at the time of purchase have the consequences pleaded at paragraphs 28 and 29 of the statement of claim?

10. Did Bertram owe a duty of care to Tarangau to exercise reasonable skill and care in the manufacture of the Bertram 570?

    Bertram says this issue should be replaced with:

    Did Bertram as a matter of law owe a duty of care to Tarangau as pleaded in the statement of claim?

11. Is the existence of any duty of care owed by Bertram to Tarangau to be determined according to Australian law, or the law of the State of Florida?

    Bertram says this issue should be replaced with:

Is the existence of any duty of care to be determined by reference to the *lex loci delicti* of the alleged tortious conduct?

If so, is the *lex loci delicti* of the alleged tortious conduct the State of Florida in the United States of America?

If so, what is the applicable law of the State of Florida?

12. Did Bertram breach its duty of care, in the manner alleged in paragraph 33 of the statement of claim?

13. What was the market value of the Bertram 570 at the time of delivery to Tarangau?

Bertram says this issue should be replaced with:

(a) What is the proper measure of Tarangau's loss?

(b) Is the market value of the Bertram 570 relevant to the assessment of Tarangau's loss? If so, what is the relevant date of the market value of the Bertram 570? Is it:

(i) at the time of delivery to Tarangau, namely 2006?

(ii) as at 2008?

(iii) as at the present date?

(c) What was the market value of the Bertram 570 as at the relevant date?

(d) Is the Bertram 570 beyond economic repair?

(i) If so:

(A) What is the estimated cost to repair the Bertram 570?

(B) What is the salvage value of the Bertram 570?

(ii) If not, what is the estimated cost to repair the Bertram 570?

(e) Is Tarangau entitled to the relief claimed, namely the market value of the Bertram 570 as at the date of delivery to Tarangau together with costs, as pleaded in the statement of claim?

14. Did Tarangau fail to mitigate its loss by reason of the matters pleaded in paragraph 38 of the first defendant's defence?[45]

15. Did Bertram fail to comply with the warranty (which it is admitted was contractually binding and governed by the law of Florida)? (see issue 17 for Bertram's response to this issue).

16. Is Bertram liable, pursuant to section 74G of the TPA, to compensate Tarangau for the loss it suffered by reason of the failure of Bertram to comply with the warranty, as pleaded in the statement of claim?

[45] Paragraph 38 of the First Defendant's Defence was deleted in its final pleading.

17. Did Bertram discharge any obligations owed to Tarangau under the warranty by any offer made by Bertram to undertake repairs pursuant to the Bertram warranty?

[24] In addition Bertram said that these issues also remained in dispute:

18. Is the secondary bonding on the Bertram 570 inadequate? If so:
    (a) Where has inadequate secondary bonding been identified on the Bertram 570?
    (b) To what extent is each identified secondary bonding inadequate?
    (c) What is the cause of each identified secondary bonding inadequacy?
    (d) What is the consequence of each identified secondary bonding inadequacy?

19. What percentage of the total length of the transverse tabbing (of the transversal and longitudinal members) is not securely bonded to the hull shell of the Bertram 570?

20. Were there departures from the design of the Bertram 570? If so:
    (a) Were those departures as identified in "Attachment A" to the Expert's Conclave Report dated 27 July 2016?
    (b) What is the consequence of those departures?

21. Is bulkhead P1 watertight?

22. Do the transversal frames show any stress cracking? If so:
    (a) Which transversal frames show stress cracking?
    (b) To what extent do the transversal frames show stress cracking?
    (c) What is the cause of the transversal frames stress cracking?
    (d) What is the consequence of the transervsal frames cracking?

23. Was the pulpit damaged? If so:
    (a) What was the cause of the damage to the pulpit?
    (b) What is the consequence of the damage to the pulpit?

Analysis

[25] These issues traverse some common factual and legal areas and will be dealt with in the course of these reasons. It is useful to group them under a number of headings:

- Acquisition of the Bertram 570;
- Condition of the Bertram 570 on manufacture, at purchase, and thereafter;
- Liability of Eagle Yachts for the condition of the Bertram 570 at purchase;
- Liability of Eagle Yachts and Bertram under the TPA;

- Liability of Bertram under the express warranty;
- Duty of care owed to Tarangau by Bertram; and
- Damages recoverable by the plaintiff.

Acquisition of the Bertram 570

[26] The agreed facts regarding the purchase of the Bertram 570 by Tarangau are set out in [3] to [12] of these reasons.

[27] Three witnesses gave evidence as to the circumstances of the purchase of the Bertram 570: Mr Wong, Christopher Pritchard and Mr Rodgers. Each of them endeavoured to give his evidence as honestly as possible. Any variations in their evidence appeared entirely explicable by the passage of time and the different perspectives each of them brought to their role. Unless otherwise indicated, I was able to accept their evidence as honest and reliable.

[28] Mr Wong was born and grew up in Rabaul in Papua New Guinea and was educated in Brisbane. In Papua New Guinea he worked in a very successful family bakery and biscuit factory business. He also worked briefly in the tourism industry. In Papua New Guinea he owned a recreational 23 foot fishing boat. Mr Wong had not only owned his own relatively small recreational fishing boat but had been involved in game fishing both for recreation and in tournaments in boats belonging to friends. From that experience he knew that Bertram boats had a good reputation as game fishing boats.

[29] In 1986, Mr Wong and his family moved to South East Queensland where he built and operated another successful biscuit factory. He sold that business in June 2006. In 2005, while he was negotiating the sale of his biscuit factory, Mr Wong considered that he would like to buy a fishing boat that could be also used as a commercial charter boat. He discussed this possibility with Mr Pritchard. Mr Wong had met Mr Pritchard in 1998 when Mr Pritchard was managing a fishing tackle shop in Brisbane and Mr Wong was a frequent customer buying fishing gear. The Wong and Pritchard families had known each other in Rabaul in Papua New Guinea.

[30] Mr Wong attended a boat show at Sanctuary Cove in May 2006 with Mr Pritchard. When he went there Mr Wong had no firm idea of what he would like to buy, although he did have in mind to look at a Bertram boat or a Riviera boat. At the Bertram stand, there were two boats: a Bertram 510 which was 51 feet long and a Bertram 570 which was 57 feet in length. At the Bertram stand he spoke to two employees of Eagle Yachts, Mr Rodgers and David Sullivan.

[31] Mr Rodgers had commenced working in sales for Eagle Yachts in January 2005. He had acquired a Master 5 skipper's ticket in 1991 which allowed him to skipper a commercial vessel up to 24 metres (approximately 78.74 feet).

[32] At the Bertram stand at the Sanctuary Cove boat show, Mr Wong and Mr Pritchard looked first at the Bertram 510 and then at the Bertram 570. They walked all over the

publicly accessible areas of those two boats. Mr Wong told Mr Rodgers that he was looking for a boat to go off-shore game fishing with the possibility of doing some charter work as well. Mr Rodgers told Mr Wong that Eagle Yachts wished to re-establish the Bertram brand in Australia because it was well known as the maker of open sea big game fishing vessels. The particular Bertram 570 that Mr Wong saw on the stand, which was described as a demonstrator model, had already had modifications done to it to make it even more suitable for big game fishing, such as a game chair, outriggers and all the necessary electronics, bait-well and water making facilities. These extra modifications, as well as its larger size, distinguished it from the Bertram 510.

[33] Mr Rodgers told Mr Wong that it was easier to put the Bertram 570 into commercial survey in Queensland than in New South Wales. Mr Rodgers pointed out to Mr Pritchard various features of the Bertram 570 which would make it easier to get it into commercial survey. He also assured Mr Pritchard that the superstructure was strong enough for a tuna tower to be added. Mr Wong and Mr Pritchard were informed by Mr Rodgers that Eagle Yachts' employees had brought the Bertram 570 up from Sydney through very heavy seas and that it had handled very well and that they were able to travel at high speed in those conditions.

[34] Mr Wong saw a brochure about the Bertram 570 provided by Eagle Yachts before he purchased it. Amongst other things the brochure said "This Bertram 570 is battle ready. With a beautifully crafted Release game chair, this boat is also fitted with an oversized transom door with coaming gate to cope with your tournament class deep-water catch. A versatile bait & tackle centre with sink, salt and fresh water faucets, cutting board, top loading freezer and circulating bait-well to enhance your fishing." It also listed a number of options which were included as well those which were detailed as standard specifications. Those options related to the cockpit, the flybridge, the engine room, the hull, the décor and electronics. The sale price was listed at $2.2 million plus GST.

[35] On 31 May 2006, Mr Rodgers sent an email to Mr Wong about arranging a suitable time in the following week to view the Bertram 510 and Bertram 570 again. With regard to putting the boats into commercial survey he added "Just to let you know I have been speaking with our company head regarding the survey issue with the Bertram range and he stated that we could not guarantee a vessel going into survey but can assist a surveyor by supplying all documentation relevant to putting a Bertram into current Queensland survey." Mr Rodgers also suggested that he knew a number of people that register "their boat (not in survey) in their company name and are able to claim a lot of expenses through their business" and that this might be a viable option for Mr Wong.

[36] Mr Wong then inspected the two vessels at Marina Mirage with Mr Rodgers. Mr Rodgers told Mr Wong that Eagle Yachts had a survey report from a marine surveyor from New South Wales.

[37] On 9 June 2006 Mr Rodgers sent Mr Wong an email regarding the cost of installing extra options on the Bertram 510 so that it had some similar modifications to the Bertram 570. With regard to putting the vessel into survey, he said that exact figures were unknown at this stage but an allowance of around $200,000 would be close to the figure. Mr Rodgers agreed in his evidence that it was common for the owner of a large,

expensive fishing boat to wish to make the vessel available for charter. That requires the boat to be put into commercial survey.

[38] On 21 June 2006, Mr Rodgers sent Mr Wong a copy of a survey report said to be for the Bertram 570 to qualify for commercial survey in New South Wales. This survey report was done by SW Booth and Associates. In the facsimile transmission from Mr Rodgers also said "Please note that the regulations for Queensland are not as stringent and therefore a lot of the items indicated would be obsolete." The attached report from SW Booth and Associates was dated 17 September 2005. Contrary to the suggestion that it dealt with the requirements for commercial survey in New South Wales, the report said that its purpose was to compile a work list for the vessel to enter USL 2C/1E survey through the Queensland Transport system. The survey showed a large number of items that needed to be attended to for the vessel to be put into commercial survey. It did not however identify any defects in the vessel. Mr Rodgers told Mr Wong that Eagle Yachts would be able to assist by obtaining the plans and drawings from Bertram that would be required for a surveyor to undertake the survey process.

[39] Apparently pages 5 and 6 of the survey report were missing and Mr Rodgers told Mr Wong by email of 29 June 2006 that he had sent the missing pages to Mr Pritchard. Mr Rodgers also said that the Bertram 570 was leaving the Gold Coast for Sydney on the following Saturday and then onto a ship for Perth. He said he was letting Mr Wong know this in case he wished to make an offer on this boat prior to its leaving the Gold Coast and then Mr Rodgers would stop the transportation of the vessel. He also informed Mr Wong in that email that another Bertram 570 was arriving in Brisbane in early August 2006 with similar specifications but valued at more than $1 million more than the price of the Bertram 570 which Mr Wong had been shown.

[40] On Sunday 2 July 2006, Mr Wong phoned Mr Rodgers and then sent an email saying "Further to our telephone conversation, this morning, I confirm that I would like to make an offer of $2 million plus GST for the 570 demonstrator."

[41] On 3 July 2006, Mr Rodgers sent a facsimile to Mr Wong attaching a standard boating industry association contract to purchase the Bertram 570 which was by then at the Jones Bay Wharf in Sydney. He said Eagle Yachts required a deposit of $100,000 by 4 July 2006 with the remainder of the purchase price to be paid before the Bertram 570 headed back north to Queensland. Mr Wong signed the contract to purchase for $2,200,000 on 4 July 2006. It was said that it became binding when signed by the dealer. Annexure A to the contract set out various options which were included, such as those which made it particularly suitable for deep sea game fishing.

[42] On 22 July 2006, at the Jones Bay Wharf in Sydney, Mr Wong, who had flown down to Sydney to take delivery of the Bertram 570, signed another contract to purchase the Bertram 570. In that contract the purchaser was said to be Daniel Wong or nominee and the nominee was said to be Tarangau Game Fishing Charters Pty Ltd as trustee for the Tarangau Trust. Mr Wong's evidence was that this was done on the advice of his accountants. The purchase price was again said to be $2,200,000 with a deposit of $100,000 having been paid on 4 July 2006 leaving a total amount owing of $2,100,000. It was signed as accepted by Eagle Yachts on 26 July 2006. In all other respects the

conditions of sale and options attached were the same as the contract which had been signed on 4 July 2006.

[43] Also on 22 July 2006, Mr Wong signed what is referred to on it as a Bertram warranty card. He signed it for Tarangau. That warranty card provided as follows:

> "I have received a copy of and have read the Bertram Yacht Warranty and understood that the said Warranty becomes effective upon receipt by Bertram Yacht, Inc. of this Warranty Card, completed and signed. I understand that there is no other Warranty by Bertram Yacht, Inc. applicable to the above described boat purchased by me."

[44] There does not appear to have been any "above described boat". The warranty card also provides "This warranty does not apply to commercial/charter boats." Mr Wong's evidence was that he was not given the Bertram yacht warranty at the time but was given the warranty card to sign by Mr Rodgers and he did so. Mr Rodgers did not give evidence of having a clear memory of providing the warranty to Mr Wong. Although nothing turns on it, it appears that Mr Wong was not provided with the warranty until 29 October 2008 when it was faxed to him.

[45] A tax invoice was produced by Eagle Yachts dated 21 July 2006 for the sale of the Bertram 570 to Mr Wong showing that $2,200,000 had been paid in full. It provided that the settlement date was 4 July 2006.

[46] On 22 July 2006, the Bertram 570 was sailed from Sydney heading to Queensland. On board was Mr Wong and his partner, Mr Pritchard, Mr Rodgers and a Mr Whitehead who was a skipper. As at that date neither Mr Wong nor Mr Pritchard had the necessary licence to operate a commercial charter boat. To do so, a coxswain's licence is required. Mr Wong enrolled himself, Mr Pritchard and Andrew Yeh in a coxswain's course at the Australian Maritime College after he purchased the Bertram 570. Mr Pritchard had given notice at the business where he worked so that he could take up employment with Tarangau.

[47] On 27 July 2006, Mr Rodgers of Eagle Yachts sent to Bertram by facsimile transmission an unsigned copy of the Bertram warranty, a signed copy of a Caterpillar engine warranty signed by Mr Wong, and an unsigned copy of a Kohler warranty. As previously mentioned, there was no evidence that Mr Wong had seen the Bertram warranty at or around this time.

[48] After July 2006, the Bertram 570 was berthed at Marina Mirage and Mr Rodgers provided tuition to both Mr Wong and Mr Pritchard about sailing the Bertram 570.

[49] The Bertram 570 was registered by the Tarangau Trust as a recreational vessel in Queensland. Without registration, it would have been illegal to use it. It appeared from Mr Wong's answers in cross-examination that he was required to certify that the vessel was seaworthy when it was first registered. Thereafter he renewed the registration annually simply by paying the relevant registration fee.

[50] After he purchased the boat on behalf of Tarangau, Mr Wong employed Mr Pritchard to assist him in the business of chartering the Bertram 570. At no time did he consider bare boat chartering the vessel. As Mr Pritchard explained in his evidence, it was always to be chartered with a skipper, crew and equipment.

[51] After Tarangau purchased the Bertram 570, Mr Wong engaged KPS Marine Surveyors ("KPS") to assist him to try to get the Bertram 570 into commercial survey. KPS had been recommended to him by Mr Rodgers.

[52] In September 2006, KPS sent its fee proposal estimate for $22,080 to carry out an assessment in order to be able to issue a certificate of compliance. Mr Wong accepted the fee proposal on 4 December 2006. In December 2006, KPS asked Bertram for the plans of the vessel so it could get the vessel into commercial survey.

[53] Sometime in early 2007, Mr Lockyer from KPS told Mr Wong that he was not confident that he would be able to get the Bertram 570 into commercial survey. In an email from KPS on 5 March 2007, KPS said that they had received only some drawings from Bertram which showed that some of the forward bottom laminate, rudder and propeller shafting were not compliant with the relevant Australian standard or the Uniform Shipping Law ("USL"). They spoke of the difficulty in obtaining any detailed drawings from Bertram. On 6 March 2007, Mr Lockyer from KPS told Mr Pritchard on behalf of Tarangau that the structure and engineering met their compliance requirements in only a few areas. Mr Lockyer did not suggest the vessel was unfit; merely that it did not meet their particular construction standards.

[54] On 3 May 2007, KPS sent a copy of the "hull shell scantlings assessment" to Mr Wong. That assessment dated 17 April 2007 was prepared by KPS by Mr D Matchett, a naval architect. The summary at the end of the report provided:

> "The following areas will need to be rectified in order to comply with USL regulations for commercial use:
>
> 1. Inner Skin thickness will be issued as a non-compliance, being only 74% as thick as the Outer Skin.
>
> 2. The Topside section between Frames P1 to M1 forward (bow area), below the sheer line and above the chine Port and Starboard must be decreased in panel size so that the maximum unsupported height between stringers is no more than 1157mm as per Fig 1.
>
> 3. Watertight Bulkheads P2 and P3 must be decreased in panel size to less than 1400mm of unsupported length by the use of vertical stringers running the full height of the panel as per Fig. 2.
>
> 4. The Collision Bulkhead must be altered to fulfil the criteria specified in the calculations above and Fig. 3. This may require alterations to the cabin and bunk arrangement in the forward cabin."

[55] On 4 May 2007, Mr Matchett provided an inconclusive report on the rudder and shafting. That was because of insufficient information received from Bertram. A

further report by KPS dated 14 June 2007 dealt with the necessary amendments to the bilge, fire and fuel systems.

[56] On 4 September 2007, Mr Lockyer informed Mr Wong that testing of the shell laminate had been carried out. A report by Structural Testing Services ("STS") said that the bottom shell laminate was suitable for commercial service. It does appear from that report, however, that the three samples of laminate supplied to STS for mechanical testing were of uneven thickness.

[57] Mr Wong took the Bertram 570 to Lizard Island in October 2007 for a game fishing trip and later to a fishing competition in Mooloolaba. Mr Wong and Mr Pritchard were questioned extensively, particularly in cross-examination by Eagle Yachts, about the treatment of the boat both during his trip to Lizard Island and during subsequent flooding of the Brisbane River in an endeavour to suggest, as was then pleaded, that somehow the treatment of the boat under his ownership was responsible for the defects found in the Bertram 570. However this allegation was dropped by the end of the trial and the evidence is therefore irrelevant to any matter that needs to be decided, except to say that I was satisfied from the evidence that Mr Wong and any one employed with or by him were completely blameless in causing or contributing to any defects which manifested themselves in the Bertram 570.

[58] On 5 February 2008, KPS wrote to Mr Pritchard of Tarangau setting out a list of the outstanding issues which needed to be addressed.

[59] On 30 May 2008, Mr Lockyer from KPS inspected the Bertram 570 and gave a report to Tarangau about what needed to be done to put the vessel into commercial survey.

[60] On 18 July 2008, Mr Pritchard from Tarangau sent an email to Mr Rodgers telling him that Tarangau had engaged the services of a new surveyor, Toby Blundell of Navsafe. He asked Mr Rodgers of Eagle Yachts to release any information requested by Mr Blundell or employees of Navsafe.

[61] On 23 July 2008, KPS informed one of its contractors by an email copied to Mr Wong that Tarangau was no longer pursuing commercial registration and so the work proposed to be done should be cancelled. In fact, Mr Wong had decided to continue to seek commercial survey but to replace KPS with Navsafe.

[62] On 14 August 2008, Navsafe wrote to Bertram by email seeking copies of the drawings and documentation relating to the Bertram 570 so that they could determine whether the vessel as built met and complied with the USL Code or another recognised standard for construction, safety, stability and design rather than them having to undertake reverse engineering and destructive testing.

[63] On 22 September 2008, Mr Wong contacted Mr Rodgers by email frustrated by the lack of progress in having the Bertram 570 brought into commercial survey and the lack of information provided by Bertram. He wrote:

> "As discussed on the telephone, it would be very much appreciated if you can urgently communicate with Bertram to release the information and specifications requested by Toby Blundell of Navsafe, who have taken over from KPS. I do not know what Bertram gave to KPS when I paid for Nick Lockyer of KPS to visit Bertram last year. KPS did release some information, but it seems that what they have released are either incorrect, inaccurate or not pertinent. I have now owned the boat for over two years and I am totally frustrated with trying to get the vessel into survey.
>
> As well as the loss of opportunity, there is also the high cost of carrying staff who have had a futile attempt in getting the vessel into survey.
>
> All I am asking is for some cooperation from Bertram to supply the necessary information to facilitate this process."

Discovery of defects in the Bertram 570

[64] On 20 October 2008, Toby Blundell, the director of Navsafe, provided a preliminary report to Tarangau saying that he had attended the Bertram 570 on 15 October 2008 to begin the preliminary compliance inspections with the intent of issuing a certificate of compliance for survey for commercial ship registration application purposes on the satisfactory outcome of the inspections. He said the agreed process was for Navsafe to inspect the reasonably accessible areas of the ship and provide a list of items or issues that in Navsafe's opinion would require additional work or upgrade to ensure compliance with the USL code and the National Standard for Commercial Vessels prior to any compliances being issued.

[65] However, Mr Blundell reported that the inspection was temporarily suspended to allow further discussions and consultation following the discovery of what he considered to be structural defects within the internal hull framework. Mr Blundell said that in his opinion delamination of the fibre reinforced material, secondary bonding connections between the hull laminate and several of the structural transverse frames was evident. He said that the defects were discovered by visual inspection on entering the forward, lower accommodation cabin and underfloor tank space. He expressed his concern to the ship's representatives regarding this discovery and arranged to engage Navsafe's preferred accredited ship designer Mr Andrew Harvey of Nekton to re-attend the ship with Mr Blundell on 17 October 2008 for his professional opinion. As a result Mr Blundell recommended that the ship not be operated in the short term until further investigation had taken place because determination of how or when the defects appeared in the structure or if there was any likelihood that the defects would propagate was unclear.

[66] Mr Harvey described the problem to Mr Pritchard as being "catastrophic delamination". Mr Harvey told Tarangau's employees that the extent of the delamination suggested that it was a manufacturing problem. Mr Harvey produced a preliminary inspection and condition report on 21 October 2008.

[67] As previously noted, Mr Wong did not receive the Bertram warranty until 28 October 2008.

[68] On Mr Wong's instructions, Tarangau's solicitors, McCullough Robertson, sent a letter on 11 November 2008 to the General Manager of Bertram and to Mr Rodgers at Eagle Yachts. The letter to Eagle Yachts said *inter alia*:

> "During a recent inspection of the internal hull of the vessel, severe delamination of the hull was identified by both a marine surveyor and a naval architect. In their opinions the delamination is as a result of defective workmanship or materials, the responsibility of Bertram as manufacturer. The defects are so severe that the vessel cannot be used for any purpose, either private or commercial and is in effect a complete write off.
>
> The purpose of this letter is to not only provide notice of defective condition of the hull pursuant to the hull warranty but also that our client requires to be fully compensated in respect of the purchase price, costs 'thrown away' and lost revenue as a result of the defective condition of the vessel.
>
> A full report in respect of the defective condition of the hull is currently being prepared on behalf of our client and a copy will be forwarded to you when complete. In the meantime, our client invites you to appoint your own marine surveyor to undertake an inspection of the vessel. Our client requires that inspection to take place within the next ten days."

[69] A copy of the letter to Bertram was enclosed with the letter to Eagle Yachts. The letter to Bertram enclosed a copy of the letter to Eagle Yachts and the offer which had been extended to Eagle Yachts in respect of the appointment and inspection of the vessel by its own marine surveyor was extended to Bertram. Furthermore it said that the notice of the defects operated in the same manner as outlined in the letter to Eagle Yachts.

[70] Mr Harvey undertook a further inspection of the Bertram 570 on 15 November 2008 and, as a result, produced a comprehensive inspection and condition report with annexures which was released on 19 December 2008 ("Harvey Report 1"). Mr Harvey is a naval architect with a degree in engineering specialising in naval architecture with honours from the Australian Maritime College. He is accredited with Marine Safety Queensland as a ship designer, including the design of fibre reinforced plastic materials. He has been entrusted with involvement in the design and construction of vessels for Australian customs, the Australian Federal Police and a number of other agencies.

[71] Essentially Harvey Report 1 found that the Bertram 570 had structural failures, had non-structural failures, had failures which indicated potential structural failures, had locations where defects might exist or be hidden and that could not be investigated without interfering with the vessel's structure surfaces or fittings, had not been constructed to the design, plans and specifications provided by the manufacturer and that the vessel should not be operated or used for its intended purpose, that is it should not be used for private pleasure or commercial purposes in its present condition as the known structural defects made the vessel unseaworthy. The report also concluded "The cost of repairs and inspections, requiring the removal of the structural liner sole, fuel tanks and associated equipment, with the integration of the deck construction, structural liner sole and hull construction would indicate that the repair of the vessel to a recognised standard to be uneconomical." The report further concluded that the vessel had a limited resale value in its current condition and that market knowledge of the vessel's defects would render it saleable only for salvage.

[72] After he read Harvey Report 1, Mr Wong only used the Bertram 570 when it was necessary to move it on two occasions when there was a flood in the Brisbane River.

[73] On 13 January 2009, Tarangau's legal representatives provided a copy of Harvey Report 1 by email to Mr Allen, who acted on behalf of Bertram, and to Mr Rodgers. The email again invited them to inspect the Bertram 570.

[74] On 31 March 2009, Bertram's Florida lawyers replied to that email informing Tarangau's legal representatives that they had obtained the survey report conducted by Bertram's representatives on Tarangau's Bertram 570. It said that in general Bertram did identify items that needed to be repaired some of which were covered by the warranty and others that would be excluded from warranty coverage but that Bertram was still willing to repair as a "customer courtesy". It said that no items were identified that would render the vessel "uninsurable" or "unseaworthy" and that each of the repairs could be carried out in a non-invasive manner. It then purported to put conditions on the disclosure of its report.

[75] Bertram's inspection report shows that the inspection was carried out on 5 March 2009 by Don Flippen who was described as the director of a customer support group for Bertram and Chuck Mooney who was described as the process engineer for Bertram. Neither gave evidence. I was informed that Mr Flippen had a major heart attack immediately before the trial, although no medical evidence was ever provided as to his unavailability to give evidence, and Mr Mooney's whereabouts were unknown. Neither was able to be cross-examined. This inevitably affects the weight which can be given to the report and the efficacy of their inspection. The summary of the report was as follows:

> "During this inspection and in consideration of its scope, we undertook and identify the following issues:
>
> Structural issues called to our attention via the owner's survey (Nekton, International, Consultant Naval Architects and Maritime Engineering Queensland, Australia) and dated; December 19, 2008. Also issue involving structure that we discovered and noted during our inspection dated March 5, 2008 which is also included in this report. The issue are: some loose tabbing in the forward bilge area, a loose tab in the engine room air box, starboard side, delamination of skin coat in the foredeck and fly-bridge and an area in the Lazarette area around a PVC Drain tube.
>
> We have also undertaken to identify some of the non-structural issue highlighted in the Nekton survey but not currently covered under the Bertram warranty i.e. Pulpit cracks, other gel-crazing throughout the vessel (foredeck, side-decks, cockpit and fly-bridge area), missing drain for the rope locker, clouded lenses for all the bow hatches, stained/discolored gel-coat on the bridge brawl area, misadjusted helm pod articulating console and gel-cracks in the cockpit area and stress cracks in the fairing compound of the engine room stringers. All areas not currently covered under the Bertram Yacht Limited Warranty for structure but will be repaired as a courtesy to the owner.

> It is our opinion that the vessel is repairable and not as the December 29, 2008 survey by Nekton International indicates 'un-repairable'. The issues inspected and or discovered by the Bertram team were minor in nature and easily repaired. We did not see any issue which would warrant disassembling the boat in order to examine any and all hidden structure." (errors in original)

[76] After some negotiation about the conditions imposed upon the release of the Bertram 570 survey report it was eventually sent to Tarangau's legal representatives on 8 April 2009 together with a document said to be Bertram's repair procedures, dated 18 March 2009.

[77] On 27 April 2009, Mr Rodgers enquired of Mr Flippen about the outcome of Mr Wong's complaint. Mr Flippen replied that Bertram's plan was to repair the Bertram 570 but they had not received the go-ahead from Mr Wong.

[78] On 4 June 2009, in response to a further email from Bertram's legal representatives, Tarangau's legal representatives sent Bertram's legal representatives an email on 4 June 2009 saying:

> "Unfortunately, Bertram's response to the defects identified by Andrew Harvey is not considered sufficient. Furthermore, the suggested repairs by Bertram do not give my client any confidence on the boat's manufacturing defects being fully rectified.
>
> Andrew Harvey is currently preparing a response to the report prepared by Bertram and as soon as that is to hand I will send you a copy.
>
> As a means of unlocking the impasse, can I suggest the appointment of an independent expert. In that regard, Russell Behan of Marine Matters is held by the marine industry in Queensland in high regard. Alternatively, you might want to suggest an alternative person."

[79] The Nekton report in response to the Bertram report was released on 13 July 2009 ("Harvey Report 2").

[80] Mr Wong said he was able to maintain insurance on the Bertram 570 until the end of 2014 but has not been able to insure it since then.

[81] On 10 March 2010, Mr Rodgers sent an email to Mr Wong asking if Bertram had worked out "a scenario to assist" with the issues that Mr Wong had had with the Bertram 570. Mr Wong's reply on 12 March 2010 told Mr Rodgers that he had not been using his boat as he was not even allowed to move it from its berth. He said it was a "constructive total loss". He said that Bertram had refused to assist him so he had been left with no alternative but to pursue legal recourse through the courts. Mr Wong said to Mr Rodgers that, as vendor of the boat and agent for Bertram, Mr Wong would encourage him to find a solution. The boat was a total loss and Mr Wong said he was seeking reimbursement of all monies expended by him in the purchase and the money thrown away as a result of the fact that the vessel could never be used.

[82] To this Mr Rodgers replied on 16 March 2010 saying that he had spoken with Bertram who advised him that they did make an offer to make repairs to assist in selling the vessel. He said that their offer was made in September 2009 and they had not received any response.

[83] On 30 March 2010 Mr Wong sent an email back to Mr Rodgers telling him that the offer from Bertram was completely inadequate and ignored all the expert advice that the boat was a total loss. He said anything short of full compensation and reimbursement of the thrown away costs for the boat would not be considered. That last response was sent on legal advice from Mr Wong's solicitors.

[84] Mr Harvey undertook a further inspection on 29 October 2012. He then produced a third report on 22 November 2012 ("Harvey Report 3") which referred to new structural failures in the vessel consisting of partial and total delamination and separation of the secondary bonding angle laminate at the P1 bulkhead.

[85] Mr Lyons made his first report on 22 November 2012 ("Lyons Report 1"). Mr Lyons is a senior engineer with about 30 years' experience. He graduated with a Bachelor of Engineering with Honours from the University of New South Wales in 1987. Since that time he has developed special expertise and interest in composite materials, particularly fibre reinforced plastics. He is a Fellow of the Royal Institution of Naval Architects and Marine Engineers and a Member of Engineers Australia. He lectures in yacht design at the School of Mechanical and Manufacturing Engineering at the University of New South Wales. He also has significant practical experience as a yachtsman having been awarded an Australian sports medal for sailing as a result of his work in yachting.

[86] Mr Lyons produced two other reports: a report of 4 March 2016 ("Lyons Report 2") and a report of 1 May 2016 ("Lyons Report 3"). He also prepared and explained a display board showing samples of all the secondary bonding which was cut out of the Bertram 570 during destructive testing carried out in 2016 ("Lyons display board").

[87] The third expert called by the plaintiff was Mr Wright. He is a principal designer and the managing director of Norman R Wright & Sons (Queensland) Pty Ltd and Norman R Wright & Sons (Design) Pty Ltd. He is a very experienced shipwright. He began his career as an apprentice and has been building boats for approximately 46 years. He provided two reports to the court. The first report was dated 26 August 2014 ("Wright Report 1") and the second produced on 7 March 2016 ("Wright Report 2").

[88] All of the experts called by Tarangau gave their evidence in a careful and measured way demonstrating the depth of their knowledge and experience. All of them were considered by me to be entirely reliable in their observations and opinions.

[89] Unfortunately this can be contrasted to the knowledge and experience of the only expert called by Bertram, Lloyd Griffin III. Mr Griffin has a degree in economics and business administration and became the operations manager for a shipyard in North Carolina. However, between 1996 and 2008, he owned a business which designed and built custom made stainless steel and copper range hoods. In 2008 he undertook a six week course of study with the Chapman School of Seamanship in Florida obtaining a marine

survey certificate. He has some experience in building boats and during oral evidence said that he had undertaken an apprenticeship as a boat builder. He produced three reports. The first dated 9 May 2013 ("Griffin Report 1"), the second dated 21 April 2016 ("Griffin Report 2") and the third dated 20 May 2017 ("Griffin Report 3"). Mr Griffin lacked the qualifications, knowledge and experience enjoyed by each of the plaintiff's experts. His lack of judgment was exhibited when he expressed the opinion that the Bertram 570 was seaworthy as it could float. I was not able to rely on his observations and opinions unless they coincided with an observation made or an opinion expressed by one of Tarangau's experts. No evidence was called by Bertram which provided a factual basis for the assumptions he made.

Condition of the Bertram 570

[90] Boat building is a highly specialised business. The process involves skilled design, building to that design, quality control and the remedying of any defects. As Mr Wright, an experienced shipwright, said in his evidence:

> "As a builder and as a designer, I know how important it is that whoever builds your design follows your plan exactly because they have been calculated from a set of rules, whether it be Det Norske Veritas rules, Lloyd's rules, APS rules, ABYC rules. They are there for a reason. People just don't sit back and dream up those rules to design a structure that's got to go fast through heavy seas."

[91] A vessel which is expected to be taken far off-shore for deep sea big game fishing must be sufficiently strong to withstand any predictable seas or winds so that the lives of its crew and passengers are not put at risk.

[92] The plans and specifications for the design of the Bertram 570 which are Exhibits 2 and 3 in these proceedings are detailed and comprehensive. The boat, as built, did not conform to those plans and specifications in numerous ways. No justification for the disconformities was ever provided in evidence by Bertram.

[93] The plans show that the Bertram 570's hull is made from 12 layers of fibre reinforced plastic or glass fibre reinforced resin plastic, commonly known as fibreglass, laid up into a mould. There is a hull lamination schedule set out on the plans showing the precise glass weight, percentage of fibre, layer weight and thickness of each layer, as well as precisely where the layer is to go.

[94] After the hull is laminated, transversal and longitudinal members are laid across the hull to strengthen the hull and the transversals provide part of the base for the liner sole. These are referred to as structural members. There are 14 transversals (from forward (front) to aft (back)), P1, M1, M2, M3, M4, M5, M6, P2, M7 (P3), M8, M9, M10 (P4), M11 and P5. There are four longitudinals, L1 and L2 on each side of the boat, starboard and port. Each of the members is attached to the hull using layers of fibreglass. A structural liner sole sits above those members to create a base for the cabin. It too is meant to be attached to the hull and to the transversals with layers of fibreglass to provide strength and stability.

[95] An analysis of the plans and specifications, as well as the expert evidence led, fully supports a finding that these are the following disconformities from the plans, as submitted by Tarangau:

(1) the bonding on the hull side of the structural liner sole is inadequate.[46] The plans require that the structural liner sole be fully bonded to the hull side.[47] This requires that the structural liner sole be bonded above and below (one must laminate the underside and the topside of the connection between the structural liner sole and the hull shell). It is uncontroversial that the structural liner sole was bonded in some places above, but in no places below, although Mr Griffin attempted without success to assert that the lamination above was complete. The fact that the necessary work has not been done greatly diminishes the strength of the vessel;[48]

(2) the deep floor frames (sometimes also referred to as the ring frame) have been cut out below the minimum specified height at M2, M3, M4, M5 and M6, thereby reducing the structural strength of the vessel.[49] These cut outs cause a weakening of the hull structure and high point loading where the deep floor frames terminate on the hull shell;[50]

(3) none of the observable transversal frames at M2, M3, M4, M5 and M6 have the required edge capping, with the consequence that the strength of the transversals is greatly diminished;[51]

(4) the plan at Exhibit 3 permitted the attachment of the cabin sole to the deep floor frames by the use of aluminium angles together with the use of a bonding material called Plexus. This alternative method of construction specified secondary bonding on both sides of the cabin sole using two aluminium angles, one on either side. As constructed, however, there are no angles at all on the hull side.[52] Further, Plexus was not used. Instead, silicon sealant was used. Silicon sealant is not a bonding product.[53] Accordingly, the deep floor frame is not attached to the cabin sole as it should be;[54]

(5) bulkhead P1 is not watertight because a non-watertight hatch has been inserted.[55] This is a major concern for flooding and safety;[56]

(6) the limber holes in the transversal deep floor frames are not capped. There is no capping at M2, M3, M4, M5 and M6, and at the aft peak lazarette.

---

46 Conclave Report, non-conformance with Bertram design, item 8 (Plaintiffs' Experts column); Attachment A, item 8.
47 Conclave Report; Attachment A, item 8; Exhibit 2, note 7; Exhibit 3, note 1.
48 Conclave Report; Attachment A, item 8.
49 Conclave Report, non-conformance with Bertram design, item 5 (Plaintiffs' Experts column).
50 Conclave Report, Attachment A, item 5.
51 Conclave Report, non-conformance with Bertram design, items 2 and 6 (Plaintiffs' Experts column); Attachment A, items 2 and 6.
52 Conclave Report, non-conformance with Bertram design, items 3 and 4 (Plaintiffs' Experts column).
53 Conclave Report, Attachment A, item 4.
54 Conclave Report, Attachment A, item 3.
55 Conclave Report, non-conformance with Bertram design, item 1 (Plaintiffs' Experts column).
56 Conclave Report, Attachment A, item 1.

This greatly diminishes the strength of the transversal deep floor frame;[57] and

(7) the transversals are not fully bonded to the hull, resulting in greatly diminished strength.[58]

[96] The only evidence called by Bertram contrary to the evidence which I have accepted, was deeply unsatisfactory. Mr Griffin expressed the opinion in the Conclave Report that all departures from the design should have been approved by Bertram engineers at the time of manufacture and assumed that such approvals would have been obtained although not documented on any amendment of the plans. There was no evidence to support the suggestion that any departures from the design had been approved. Such evidence, if it existed, would have been readily available to Bertram and the failure to produce any such evidence suggests that there was none which supported a contention that the disconformities from the plans were approved by engineers. The effect of the disconformities was that there was gross departure from the plans and from good boat building practice.

[97] I accept the opinion expressed by Mr Wright in Wright Report 2 that the disconformities are serious and are sufficient to render the vessel unsafe and unseaworthy. The serious latent defects existed from the time of manufacture and therefore existed at the time of sale to Tarangau. That meant that, as alleged in the statement of claim, at the point of manufacture the transversal and longitudinal members were not securely bonded to the hull shell and the structural liner sole was not securely bonded to the transversals and the hull shell. There were fundamental defects in the vessel's hull and other fibreglass structural components.

[98] In addition to the disconformities there were manufacturing defects which were latent at the time of sale but which manifested themselves whilst in Tarangau's ownership. In particular, there was a failure of secondary bonding of the fibreglass layers to create a strong hull and strong attachment of the structural members to the hull shell.

[99] As set out earlier, the plans had within them a hull lamination schedule setting out which layer of fibreglass was to be attached next. When each layer is attached it must bond to the previous layer so that both a mechanical and a chemical (or secondary) bond creates strong fibreglass for the hull material. The window of time within which the fibreglass can be layered without sanding is typically between 24 and 72 hours. Seventy-two hours was explained by Mr Wright to be the "extreme limit". The practice at his boat building yard is to sand the material if the period of time exceeds 36 hours. In Mr Wright's opinion, which I accept, a vessel the size of the Bertram 570 could not be fully laid up within a window of 72 hours, so sanding would be required to create a sufficient secondary bond. It is an essential step in order to achieve adequate secondary bonding.

[100] Mr Wright explained secondary bonding in this way in his evidence:

---

[57] Conclave Report, non-conformance with Bertram design, item 7 (Plaintiffs' Experts column); Attachment A, item 7.

[58] Conclave Report, non-conformance with Bertram design, item 9 (Plaintiffs' Experts column); Attachment A, item 9; Exhibit 3, note 1.

> "A secondary bond is defined as the practice of bonding fresh material to a cured or partially cured laminate and in the case of the vessel, the fresh material is considered the structural member in question and the partially cured laminate is the hull shell inner surface; further, a secondary bond is a resin or glue based bond made between separate laminates, other than by mechanical fastenings, and where peel plies are not used, the joining surfaces shall be sanded back, and be dust free, clean and dry and where applicable Styrene wiping may be used to reactivate the laminates for bonding; whilst acetone should not be used for this purpose as it may degrade the resulting bond strength. Secondary bonds shall be commenced with a wet resin coat and layers of fibre reinforcement of the requisite type be laid down wet on wet and the laminate be built up accordingly and as specified without voids or resin starved or rich zones, the emphasis being on a high fibre content with minimum resin content consistent with a fully filled matrix; preferably, but not exclusively, the abutting layers of the cured or partially cured surface and the secondary bond of the joint shall be chopped, strand mat."

[101] Mr Wright explained the inability to lay up the vessel within 72 hours in his evidence-in-chief as follows:

> "[This is] a mould and within that mould, there's approximately 12 laminates of glass to go into that mould, which takes a team a fair while to do. Once that laminating is complete, the next job to do is to put the longitudinals in; that would be what you know as L1 and L2, both on the port and starboard sides. You would normally have a crew of about four people per side putting in those longitudinals. That would take about three days in itself. So technically, you could get away without sanding the secondary bond for the longitudinals; however, by the time you get around to putting the transverse deep floor frames in, you would definitely be outside the window and you would have to stop and what we call grind the hull out, which is literally sand the whole interior of the laminated surfaces at that time to create a bond for all future work."

[102] He estimated that putting in the deep floor frames would take two teams at least a week. There was no evidence called by Bertram to refute any of that evidence. In its submissions it said that none of the experts called by the plaintiff were involved in the construction of the vessel so could not speak to this issue. This is a plainly inadequate response because I am satisfied that inferences as to the manufacturing process can be drawn from the demonstrated results of that process. Both mechanical bonding and chemical bonding of the fibreglass layers are necessary to create a strong material with adequate bond peel strength. Bond strength is created by the adhesion between the bonded surfaces so that the fibreglass does not start to delaminate, that is, where the layers separate and can potentially be peeled off.

[103] Mr Lyons' evidence readily persuaded me that the cause of the delamination in the Bertram 570 in this case was a lack of necessary secondary bonding arising from poor surface preparation. I accept the evidence of Mr Lyons helpfully set out in the submissions of Tarangau. In Lyons Report 1, Mr Lyons recorded the following observations and opinions, which I accept, that:

1. It is not acceptable to find any secondary bond failures in a vessel such as the Bertram 570. They are all instances which should be classified as structural defects requiring repair.

2. The steps that Bertram ought to have taken, but manifestly did not, in undertaking secondary bonding form part of the corpus of fundamental glass reinforced plastic boat building knowledge, and steps to ensure adequate secondary bonding should form part of the builder's quality control programme.

3. The steps recommended by applicable literature in the absence of peel ply (that is precleaning and surface abrasion) have not been followed. The extensive secondary bond failures identified by Mr Lyons are clear evidence that the applicable work process was not followed during the Bertram 570's construction.

4. Mr Lyons extracted one piece of secondary bond flange laminate from the forward starboard face of the P1 bulkhead by easily snapping it off. It came away very easily as there was no bond at all holding it in place. The appearance of this piece prior to its removal was identical to all other identified sites of failed secondary bonds between the hull shell inner surface and the structural members throughout the Bertram 570. Its "glassy" appearance confirmed the lack of bonding, as does the fact that the chopped strand mat side of the bonding ply was not applied along the bond line.

5. The underlying cause of the structural defects was faulty manufacturing procedure in particular, the absence of correct surface preparation processes to ensure good secondary bonding of the hull shell inner surface to structural components, and poor laminating practice.

6. The faulty manufacture originates from the date of the original construction.

[104] After Mr Lyons produced Lyons Report 1, he undertook further extensive testing of the fibreglass hull of the Bertram 570.

[105] Mr Lyons took samples from the most highly loaded parts of the vessel, namely the hull bottom shell below the port and starboard chines in the forward half. The samples are shown on a display board which is Exhibit 64. On 29 February 2016 he extracted 10 samples. Also attached to the display board is a copy of the plan of the Bertram 570 showing precisely where the samples were taken from. It also shows where five samples were peeled off on 29 October 2012 referred to in his report of 22 November 2012. In addition the display board contains four samples taken by Mr Nolan Head of Norman R Wright & Sons on 2 March 2016. All of those samples are referred to in the Lyons Report 2.

[106] Samples were taken from the most highly loaded parts of the vessel because inadequate secondary bonding in this region would have the most critical structural ramifications. This region is below the structural liner sole and is exposed to the slamming loads exerted by the sea on to the bottom of the vessel as it travels at speed into oncoming waves.

[107] Mr Lyons took 10 samples, five on the port half and five from the starboard half, each with a diameter of five centimetres and cut through to the secondary bonding tapes to a depth of 4mm. Each sample was cut with a hole saw and prised out with a flat screwdriver blade. Samples were also taken above the structural liner sole, forward in the anchor locker and in the aft peak.

[108] In undertaking the exercise, Mr Lyons was interested in the degree of difficulty with which the prising out could be done and the appearance of the underside of the sample, which is the bond line of the inner surface of the hull. A well bonded sample should not be able to be prised out intact and would sustain significant damage. All of the 10 samples were extracted from areas that displayed no external signs of failed and peeled secondary bonds yet all of the samples, except one, displayed shiny bond line surfaces and poor adhesion, indicating lack of the required abrasion of the substrate hull surface before bonding. In Mr Lyons' opinion, which I accept, all sample specimens with the exception of two exhibited an unacceptable amount of shiny surface. This can readily be seen by observations of the samples which were produced to the court. One of the samples had a dull fractured surface which could not be considered as indicative of a poor bond. Another of the samples taken from the aft peak prised off easily but the surface was obscured by green foam from the laminate so was not described as shiny but was still of poor bonding quality.

[109] Most samples exhibited a moulded surface with a striated appearance and texture aligned parallel to the arrow on the sample's label which denoted the direction towards the bow of the vessel. This is significant because the imprint of the particular fibre layer which can be seen on the bond line of the samples is clear evidence, in Mr Lyons' opinion, of poor adhesion. Good adhesion would not have allowed this moulded imprint to be seen as the two laminates would have completely combined together both mechanically and chemically.

[110] Mr Lyons also carried out reliable tests as to the secondary bond peel strength. Peel strength is adhesive bond strength expressed as pounds per inch of width obtained by stress applied in a peeling mode. The applicable peel strength was found to be 23 per cent of the required ultimate peel strength. Mr Lyons expressed the opinion that the measured peel strength was consistent with the relative ease with which nine of the 10 samples were extracted in the region below the liner sole as well as with their shiny bond line surfaces.

[111] I agree with Mr Lyons' opinion that the destructive testing described in his report confirmed that the structural secondary bonding of the longitudinals and the transverse frames and the bulkheads to the inner surface of the Bertram 570's hull shell both below and above the liner sole was manifestly and quantifiably inadequate. The structural secondary bonding of the hull shell, longitudinals, transverse frames and bulkheads below the liner sole were deficient in 14 of the 15 samples taken.

[112] I also agree with Mr Lyons' opinion that the arrangement and quantity of the samples taken were sufficiently extensive to provide a statistically valid and representative indication of the state of the secondary bonding within the entire area of the vessel. It was manifestly inadequate. Mr Lyons' test results were consistent with more than 90 per cent of the area below the liner sole suffering from inadequate secondary bonding.

[113] Apart from the core samples which were taken by Mr Lyons the only other evidence as to the extent of the delamination was testing carried out by Mr Griffin, which he referred to as percussion testing. His evidence was that this was an industry accepted method for detecting voids and delamination in fibreglass vessels. It involved using a hammer to test whether or not there was a sound of a void underneath the surface which was hit with the hammer. The limitations of this method were explored in cross-examination and by evidence given by Mr Lyons and are readily understood. Percussion sounding will or may identify a void but it will not identify where one sheet of fibreglass is sandwiched against another but not properly bonded. In that case there is no chemical bonding and yet there is no void. It is nevertheless a poorly bonded area which has not been properly manufactured and is likely to delaminate at any time under any stress. Another inadequacy of this method of testing was shown when Mr Griffin gave evidence of doing percussion sounding immediately beside the areas where Mr Lyons had taken samples. Those samples clearly showed lack of proper bonding and yet the percussion sounding in the fibreglass material immediately adjacent to them did not demonstrate the lack of proper bonding to Mr Griffin.

[114] I also accept the evidence of the experts called by Tarangau that there were numerous and extensive secondary bonding failures between the hull inner surface and the structural members. These failures prevented the structural members from achieving their primary function which was to reinforce, stiffen and strengthen the Bertram 570 against normal loads exerted on it by the sea whilst it was in normal operation. The samples taken clearly showed that one could extrapolate that 90 per cent of the secondary bonding forward of P2, which is amidships, was inadequate and it is more likely than not that the secondary bonding in the rest of the vessel, which cannot be tested without completely dismantling the vessel, would be similarly defective.

[115] All of these matters, that is the many disconformities with the plans and the inadequate bonding of the fibreglass, meant that the vessel was full of latent defects when it left the manufacturer. Only the manufacturer was in a position to know of the defects. Those latent defects included structural defects which made it unsafe and unfit for its intended purpose of being taken to the open sea for big game fishing.

[116] As a result of the various defects in the construction of the Bertram 570 which have been referred to, the defects which were latent have started to become patent so diminishing the strength and stability of the hull as to render it unseaworthy and consequently unsafe.

Specific findings on issues raised by the pleadings

[117] Tarangau claimed in paragraph 26 of the statement of claim that at the time of sale the Bertram 570 had the following defects or problems which meant that it was not fit for its purpose or of merchantable quality. The response of the second defendant is referred to in parenthesis after each allegation.[59] My findings based on the expert evidence which I accept follows each allegation.

---

[59] Defence of the second defendant para 11A.

[118] *The transversal and longitudinal members were not securely bonded to the hull shell*.[60] (Bertram admitted that a portion, being approximately less than 1 per cent of the total length of the transversal and longitudinal members, was not securely bonded to the hull shell.)

[119] In Harvey Report 1,[61] Mr Harvey observed that transversals M3, M4, M5 and M6 exhibited partial and total delamination and separation of the secondary boundary angle laminate from the hull shell outboard of L2. The delamination appeared to be progressive.

[120] Mr Lyons' inspection on 29 October 2012 revealed numerous failure of the secondary bonds between the Bertram 570's hull shell inner surface, bulkheads and transverse and longitudinal stiffening members.[62] His inspection confirmed the presence of numerous and extensive secondary bond failures between the hull shell inner surface and the structural members. As he observed, these failed bonds prevented the structural members from providing their primary function to reinforce, stiffen and strengthen the vessel against normal loads exerted on it by the sea whilst in normal operation.[63]

[121] In Wright Report 1, Mr Wright said that the failure to bond the structural partitions of the fitout above the structural liner sole to the hull shell inner surface as specified in the vessel's drawings eliminated the major stiffening of the hull top sides between P1 and P2. Standard boat building practice, he said, would also require these partitions to be adequately bonded to the decks over and under these partitions as well, although this did not appear to be specified in the vessel's drawings. In his opinion this failure was particularly risky as it occurred in a region of the hull susceptible to high impact loads at sea and, properly bonded, these partitions also help support the deck edge to the hull join and the main deck above.

[122] It follows from the above that the transversal and longitudinal members were not securely bonded to the hull shell.

[123] *The structural liner sole was not securely bonded to the transversals and to the hull shell*.[64] (Denied by Bertram.)

[124] Mr Harvey concluded in Harvey Report 1 that in total, the liner sole was not structurally bonded to both the transversals and the hull shell in accordance with the structural notations of the manufacturer's supplied construction drawings and specifications.[65]

[125] Mr Wright gave evidence of a detailed inspection of the problems in this area. He set out what good boat building practice would require and then concluded that as a result of the poor or non-existent secondary bonding of the cabin sole (structural liner sole) to the hull at the side in combination with the haphazard secondary bonding of the cabin sole to the various transverse structural members, the degree the cabin sole could be

---

60 Statement of claim para 26(a).
61 Para 1.1.3.1.
62 Lyons Report 1 p 5.
63 Lyons Report 1 p 7.
64 Statement of claim para 26(b).
65 Harvey Report 1 para 5.3.1.

considered a significant structural element in the vessel is highly contentious if not totally in doubt.[66] In oral evidence Mr Wright said number 7 of the notes to the plan of the design of the boat which is Exhibit 2 provides that "the liner sole must be structurally bonded to both the transversals and the hull shell." Mr Wright's evidence was that that was not the case. He said that it was partially bonded above but not structurally bonded and not bonded at all underneath the liner sole.

[126] In his oral evidence Mr Wright summarised the position as follows

> "When I looked at the boat on a number of occasions, I came to the conclusion that the plans that were supplied were not followed, and there was a … lot of nonconformities that I found with critical members, such as the secondary bonding, the deep floor frames not being connected to the structural liner sole. And I'll repeat the liner sole is a structural liner sole, as shown in the drawings. The liner sole's lack of connection to the hull side, the lack of capping to any of the cut outs in the deep floor frames, the lack of bonding for the transversal frames above the structural liner sole, all of these lack of detail and ability to finish off the structures properly highly compromise the structure of the vessel."

As Mr Wright observed the lack of any one of these things is critical but the lack of several has a cumulative effect.

[127] It is correct to conclude that the structural liner sole was not securely bonded to the transversals and to the hull shell.

[128] *The construction of other structural components of the yacht was inadequate*.[67] (Denied by Bertram.)

[129] In Lyons Report 2, Mr Lyons reported that he said in Lyons Report 1 that he would expect his findings and resulting opinion about the secondary bonding and the vessel to be enhanced by taking some further samples of the kind he took on 29 February 2016. He said that this had proven to be true. The limited destructive testing that he carried out had served to confirm his opinion that the structural secondary bonding of the longitudinals, transverse frames and bulkheads to the inner surface of the vessel hull shell both below and above the liner sole was manifestly and quantifiably inadequate.[68]

[130] Mr Wright gave his opinion as to stress related cracking in the cockpit, of which he found numerous instances. These were most frequently at various changes of section in the moulding of the side deck and were particularly evident at the various corners associated with the moulded-in steps abaft the cockpit side curtains. His considered opinion was that these areas were most likely either inadequately engineered or the layup of the laminate did not conform to the designer's specification. Whatever the reason, his opinion was that the degree of cracking was an indication of stress levels exceeding the local capacity of the structural laminate at these positions.[69]

---

66 Wright Report 1 p 28.
67 Statement of claim para 26(c).
68 Lyons Report 2 p 26.
69 Wright Report 1 p 12.

[131] It follows that the construction of other structural components of the yacht was inadequate.

[132] *The yacht has experienced normal flexing but the response to that flexing has been abnormal because of the inadequacy of the structure to contain and absorb the expected flexing of the hull*.[70] (Bertram admitted that the yacht experienced normal flexing but denied that the yacht's response to normal flexing was abnormal).

[133] In Harvey Report 3, Mr Harvey concluded that:

> "The failure of Bertram to construct in accordance with the details, specifications and notations listed within the construction drawings and therefore failure to conform to the design intent, results in a vessel that would not perform as expected or required in the environment to which the vessel had been designed to operate.
>
> The failure to construct the vessel in accordance with the construction drawings, particularly the failure to structurally bond the structural liner sole to both the transversals and the hull shell, would influence the hull and structure's ability to flex and absorb the energy of impact and motion expected in open water operations.
>
> It is likely that this failure directly contributes to the defects and structural failures exhibited in the vessel and particularly the pulpit, foredeck, hull and hull structure.
>
> If the vessel was subject to sea conditions typical of open waters with the known structural defects and failures, the probability to cause further failure in the vessel's structure, hull shell and super-structure is high.
>
> The vessel should not be used for private pleasure or commercial purposes in its present condition. The known structural defects and failures make the vessel unseaworthy."[71]

[134] Mr Wright in Wright Report 2 agreed with Mr Griffin that all boats flex to a degree however, as Mr Wright said, they will flex far more if the internal structure (secondary structure) is not bonded correctly to the primary structure. This in turn could finally result in a catastrophic failure.[72]

[135] Mr Wright set out in his general assessment in Wright Report 1 the many ways in which the Bertram 570 was not constructed in accordance with the plans.[73] His conclusion in his second report[74] was that the vessel had too many major defects to be considered seaworthy for its intended purpose in any way or form except in smooth or possibly partially smooth water. It was designed as a fast sea-going game fishing boat but was not able to be operated as such. As previously noted, Mr Wright was of the opinion that the flaws detected in the Bertram 570 could finally result in a catastrophic failure.[75]

---

70 Statement of claim para 26(d).
71 Harvey Report 3 p 8.
72 Wright Report 2 p 10.
73 Wright Report 1 pp 26-30.
74 Wright Report 2 p 6.
75 Wright Report 2 p 10.

[136] It is apparent that the Bertram 570 has experienced normal flexing but the response to that flexing has been abnormal because of the inadequacy of the structure to contain and absorb the expected flexing of the hull.

[137] *The yacht departed from the design of the 570 Flybridge Cruiser in ways which rendered the yacht not fit for the purpose of operating in the open sea and not of merchantable quality*.[76] (Denied by Bertram).

[138] Mr Harvey expressed the opinion,[77] which I accept, that the as-built vessel did not conform to the details, specification and notations of the manufacturer's supplied construction drawings and specifications. There are multiple non-compliances. He observed that with the known non-compliance of the vessel as built with the structural design drawings supplied by the manufacturer, it is reasonable to expect that the vessel will not perform or comply with the structural design loads the vessel was designed and expected to be subject to in operation. With this in mind he said that it was his opinion that, as a global structure, the longevity and survivability of the vessel would have a high risk of catastrophic failure.

[139] In Mr Harvey's opinion, the known structural defects and failures had the potential to cause further failure in the vessel's structure, hull shell and super-structure and therefore it should not be operated in its present condition. It would be contrary to the maritime safety legislation to take it out to sea. It should not be used for its intended purpose in its present condition with the known structural defects and failures. It could not be used as an offshore sporting game fishing vessel. It could not be used in the open water around the unprotected coastline of Australia without restriction. The known structural defects and failures have the potential to allow water ingress into the vessel and down flooding of the engine room and machinery space to occur. It would be subject to sea conditions which, with the known structural defects and failures, have the potential to cause further failure in the vessel structure, hull shell and super-structure, in its present condition. The disclosure of the known structural defects and failures would affect the vessel's ability to obtain insurance cover which legislation in Queensland requires a vessel to have.

[140] As previously noted, Mr Harvey's conclusion was that the vessel should not be used for private pleasure or commercial purposes in its present condition. The known structural defects made the vessel unseaworthy. It was structurally failing under relatively low design loads and operation.[78]

[141] I conclude based on the evidence that the Bertram 570 departed from the design of the 570 Flybridge Cruiser in ways which rendered the yacht not fit for the purpose of operating in the open sea and not of merchantable quality.

[142] *Full particulars of the respects in which it was alleged that the Bertram 570 was not fit for purpose or was not of merchantable quality are set out in the expert reports of Mr Harvey, Mr Lyons and Mr Wright:*[79]

---

[76] Statement of claim para 26(c).
[77] Harvey Report 1 pp 14-16.
[78] Harvey Report 1 pp 14-16.
[79] Statement of claim para 26 – Particulars.

The particulars relied on in paragraph 26(c) of the statement of claim include the pulpit and foredeck and area of the anchor locker and cockpit sole which were inadequate due to poor design and/or construction detailing, specifically inadequate connection laminates between pulpit and hull/deck, small corner radii at connections leading to high stress concentrations in all itemised areas, hard spots where there is an abrupt change in the stiffness of two connected structural elements, poor gelcoat application that is intolerant of surface stresses, poor yard detail, particularly poor laminating practice, excessive gap bridging by sealant between assembled mouldings leading to cracking of sealants and loss of watertight integrity as well as generally, a contribution from those fctors at paragraph 26(a) and (b) of the statement of claim.[80] (Denied by Bertram).

[143] This particular is taken essentially from Lyons Report 1 at page 13. It confirmed what Mr Harvey had found on his inspection and reported at Harvey Report 1 paragraph 1.1.1 that the Bertram 570's pulpit and areas in the anchor locker have structural failures because of delamination and because the bulkhead P1 was not watertight in accordance with the structural notations on the plans. It was fitted with an unrated plastic access hatch.[81] It was also consistent with Mr Harvey's findings on his inspection of the vessel that there were other non-structural failures such as the lazarette exhibiting areas of separation or poor laminating around knees and fixtures.[82] It must be accepted to be correct.

[144] The particulars relied on in paragraph 26(e) of the statement of claim include:

The lack of complete bonding of the internal transverse and longitudinal members to the hull shell. Complete bonding is shown on the design drawing but there are failures of the bonds between the M3, M4, M5 and M6 transversals and the hull shell outboard of the longitudinal L2 and other areas identified in the expert reports.[83] (Bertram alleged that the bond failure was repairable at a cost of approximately USD 36,350.00, and remains repairable.)

[145] These defects were set out and supported by Harvey Report 1[84] and Wright Report 1.[85] As Mr Harvey said in Harvey Report 1, the delamination appeared to be progressive.

[146] In his oral evidence, Mr Lyons said the root cause of that lack of bond strength was inadequate secondary bonding due to the inadequacy of the steps that were taken to prepare the surface of the hull or the subsequent adhesion of the supporting members inside. Even Mr Griffin agreed in cross-examination that the transversals were not properly bonded to the hull because they were cut short which was not in conformity with the plans.[86]

---

80 Statement of claim para 26 – Particular (i).
81 Harvey Report 1 para 5.3.5.
82 Harvey Report 1 para 2.1.12.
83 Statement of claim para 26 – Particular (iii)(A).
84 Para 1.1.3.1.
85 At p 9.
86 Transcript 7 – 83.

[147] *Inadequately bonded and fastened 5083-grade aluminium angle used to secure structural liner sole to floor at bulkhead P2*.[87] (Bertram alleged that it was appropriate to attach the liner to the aluminium angle by using fasteners to secure the liner sole to the transverse frame).

[148] Mr Harvey found, as set out in Harvey Report 1,[88] that bulkhead P2 exhibited cracking, bond failure and separation of the AL5083 angle. There was failure of the structural liner sole to the transversal connection. Mr Harvey also found[89] that the forward fuel tank void at bulkhead P2 had exhibited cracking, bond failure and separation of AL5083 angle on the forward side and failure of the structural liner sole to transversal connection. Although it could not be seen on non-destructive investigation, he concluded that it was reasonable to expect that an equivalent structural failure could exist on the aft side of P2 or the forward side of P3. Inspection of that area would require removal of the fuel tank. In his opinion the integration of the deck construction, structural liner sole and hull construction made removal and reinstallation of the fuel tank uneconomical.

[149] Mr Lyons agreed with Mr Harvey's observations, saying in Lyons Report 1:[90]

> "I also concur with Andrew Harvey's observations regarding the departure from the construction drawings of the means of attachment of the structural liner sole to the transversals and it is my opinion that the attachment of the liner sole to the transversals by means of the 5083 – grade aluminium angles and sealant with oddly spaced fasteners, rather than methacrylate ('Plexus') adhesive with regularly spaced fasteners as specified on the relevant construction drawing was not adequate and represented a structural defect."

[150] Mr Wright agreed.[91] Referring to photographs he took he said that the transverse frames and bulkhead secured to the structural liner sole might appear to be secure but were not built as per the design which would have the supporting calculations to show why the aluminium angle (AL5083) should be on both sides of the deep floor frames and be bonded with plexus not a poor substitute as was the case.

[151] In his oral evidence Mr Wright said one could observe from photographs that there was no bonding at all at the lower side of the hull to the transversal. It should have four double-bias laminates holding that transversal to the hull shell.

[152] I agree with the opinions of the plaintiff's experts.

[153] *Watertight bulkhead P1 is not watertight*.[92] (Denied by Bertram)

[154] This particular was supported by evidence from Mr Harvey who said[93] that the bulkhead P1 was not watertight in accordance with the structural notations. The bulkhead was

---

87 Statement of claim para 26 – Particular (iii)(B).
88 At para 1.1.3.3.
89 Harvey Report 1 at para 4.2.2.
90 At pp 13-14.
91 Wright Report 2 p 11.
92 Statement of claim para 26 – Particular (iii)(C).
93 Harvey Report 1 para 5.3.5.

fitted with an unrated plastic access hatch. That was seen on his inspection on 15 November 2008. When he reinspected the Bertram 570 on 29 October 2012 to prepare Harvey Report 3 he said that a new significant structural problem had exhibited itself at bulkhead P1. Bulkhead P1, the forward collision bulkhead, now exhibited partial and total delamination and separation of the secondary bonding angle laminate from the bulkhead on the starboard side. Mr Wright was also of the opinion that bulkhead P1 was designed to be watertight but was not.[94]

[155] *Structural liner sole not fully bonded to the transversals and hull shell*.[95] (Bertram alleged that all fasteners securing the liner sole to the transverse frames were secured and tight).

[156] This particular is supported by the evidence of Mr Harvey[96] and by Mr Wright.[97]

[157] *Transversals in way of the forward WC and shower sump region structural liner sole have been removed*.[98] (Denied by Bertram)

[158] The evidence, which I accept, for this particular is found in Mr Harvey's first report[99] where he says that the forward transversal frames were not in accordance with the structural details specified. Sections of the transversal frames had been removed for the installation of head and shower sump areas of the structural liner sole.

[159] *Hull bottom strakes are concave in the bilge rather than filled with flush hull shell laminate continuing over them*.[100] (Denied by Bertram)

[160] The evidence, which I accept, for this particular is again found in Harvey Report 1[101] where he observed that the strakes construction was not in accordance with the structural details specified.

[161] *Hatch fitted in watertight bulkhead P1 is not a suitably rated watertight bulkhead*.[102] (Bertram alleged that although the hatch fitted at bulkhead P1 is not watertight as a consequence of the type of access hatch installed, the access hatch can be replaced at minimal expense).

[162] The evidence for this particular was found in the first of Mr Harvey's reports[103] where he observed that the bulkhead P1 is not watertight in accordance with the structural notations. The bulkhead is fitted with an unrated plastic access hatch. Mr Griffin agreed on cross-examination that defects to P1 were due to improper surface preparation. It is, in my view, necessary, and reasonably easy, to replace the access hatch but that would not solve all the problems with the bulkhead P1.

---

94 Wright Report 2 p 11.
95 Statement of claim para 26 – Particular (iii)(D).
96 Harvey Report 1 para 5.3.1.
97 Wright Report 1 p 30.
98 Statement of claim para 26 – Particular (iii)(E).
99 Harvey Report 1 para 5.3.3.
100 Statement of claim para 26 – Particular (iii)(E).
101 At para 5.3.4.
102 Statement of claim para 26 – Particular (iii)(G).
103 Harvey Report 1 para 5.3.5.

[163] *Unsealed cutaways and penetrations in foam cored and timber panels not in accordance with standard GRP boatbuilding practice*.[104] (Bertram alleged that although there are unsealed cutaways and penetrations in foam cored and timber panels, this did not adversely impact the structural integrity of the Bertram 570.)

[164] The evidence for this was again found in Mr Harvey's first report[105] where he observed that, as one of the non-structural failures, the vessel's electrical cables exhibited areas of poor separation, organisation and securing. In areas, electrical cables run unprotected and unsupported through unsealed penetrations in frames and bulkheads. This is poor boat building practice, but I agree that it does not affect its structural integrity.

[165] *The Bertram 570 departed from the design of the 570 Flybridge Cruiser in the respects identified in the document styled "Experts' Conclave Report 27 July 2016" at Annexure A, pages 16 to 19, items 1 to 9 inclusive."*[106] (Bertram alleged that there is no evidence that there were any departures from the design of the 570 Flybridge Cruiser in the respects identified in the report as alleged and otherwise said any such departures from design, which were denied, did not render the Bertram 570 not fit for the purpose of operating in the open sea as set out in the expert reports of Mr Griffin (9 May 2013 and 21 April 2016) and the comments of Mr Griffin in the document styled "Experts' Conclave Report 27 July 2016.")

[166] Attachment A to the Conclave Report of the experts[107] set out the number of different ways in which the Bertram 570 as built did not conform to the plans. This was prepared by Mr Wright based on the evidence before the court and appeared to be entirely correct. There were nine major non-conformities. They were:

(1) P1, P2 and P5 bulkheads are not watertight which was a major concern for flooding and safety.

(2) The transversal deep floor frames are not capped as required. This included the deck frame support of the deep floor frames. This appeared to be the case on the visible deep floor frames: M2, M3, M4, M5 and M6. As Mr Wright observed, all deep floor frames must be capped otherwise the strength of these frames is greatly diminished.

(3) The deep floor frame is not attached to the cabin sole correctly. Two methods of attachment are shown but neither has been followed correctly. The alternative floor sole connection (use of aluminium angles) has been used but only one angle has been used on one side, not one angle on either side as per the design. This would, as Mr Wright said, weaken the structure as only half the correct connection has been undertaken. This appears to be the case on the visible deep floor frames M2, M3, M4, M5 and M6.

(4) The aluminium angle used on the deep floor frame to the sole connection is not bonded as per the plan. Clearly plexus or equivalent is to be used. A silicon sealant has been used instead. The aluminium angle is supposed to be hard against the sole but this is not the case as up to a 12mm gap is the average. This

---

[104] Statement of claim para 26 – Particular (iii)(H).
[105] Harvey Report 1 para 2.1.14.
[106] Statement of claim para 26 – Particular (iii)(I).
[107] Exhibit 58.

appears to be the case on the visible deep floor frames M2, M3, M4, M5 and M6. It should be noted that silicon sealant is not a bonding product.

(5) The cut outs of the deep floor frames particularly at the chine cause a weakening of the hull structure and high point loading where the deep floor frames terminate on the hull shell. This appears to be the case on the visible deep floor frames M2, M3, M4, M5 and M6.

(6) Cut outs in the transversal deep floor frames are not capped. This includes the deck frame support of the deep floor frame. This appears to be the case on all the visible deep floor frames. All deep floor frame cut outs must be capped otherwise the strength of these frames is greatly diminished.

(7) Limber holes in the transversal deep floor frames are not capped. This appears to be the case on the visible deep floor frames M2, M3, M4, M5 and M6 and the aft peak/lazarette. All deep floor frame cut outs must be capped otherwise the strength of these frames is greatly diminished.

(8) The hull side to the structural liner sole connection is not fully bonded as per the plan. It is clearly stated on the plan that all structural liner sole must be fully bonded to the hull side otherwise the strength of this area is greatly diminished.

(9) The hull side to the transversal connection is not fully bonded as clearly stated on the plan. As clearly stated on the plan all transversals must be fully bonded to the hull otherwise the strength of this area is greatly diminished.

[167] Tarangau did not make any further allegations in paragraph 26 of its statement of claim however Bertram's defence contained the following two paragraphs:[108]

(J) Bertram alleged that the design of the prototype of the Bertram 570 was approved and certified by Italian Classification Society, Registro Italiano Naval Services S.p.A. (RINA) in compliance with the essential safety requirements of Directive 94/25/CE of the European Parliament (Directive) on 2 September 2004;

(K) Bertram alleged that the construction of the yacht was examined in accordance with Annex X of the Directive and found to be in compliance with the applicable essential safety requirements as required by RINA.

[168] Evidence as to this was given by Bertram's witness, Antonio Campagnuolo. Mr Campagnuolo is a naval architect and marine engineer who was employed by the Ferretti Group which owned Bertram from 1998 to 2015. His evidence was that the design of the Bertram 570, whose place of manufacture was not disputed to be Florida, USA, was certified by RINA as being in compliance with the essential safety requirements of the Directive 94/25/CE. He said that a RINA certificate had issued for the specific Bertram 570, which was subsequently purchased by Tarangau, that it was in compliance with that directive.

[169] However, he was unable to provide any evidence that this particular vessel was inspected. No evidence at all was called as to the manufacturing process or quality control for the manufacture of this particular vessel. On the evidence before the court I

[108] Second defendant's defence para 11A.

could not be satisfied that the construction of the Bertram 570, the subject of this litigation, was examined in accordance with Annex X of Directive 94/25/CE and found to be in compliance with the applicable essential safety standards as required by RINA. Indeed, given the defects in construction and disconformities from the plans and drawings, it is difficult to see how it could have been.

[170] In its defence to paragraph 26 of the statement of claim, Eagle Yachts set out its reasons for not admitting Tarangau's allegations.[109] The reply by Tarangau to Eagle Yacht's allegations is set out, where relevant, in parenthesis after each allegation.[110] Where necessary, the relevant findings about each allegation follow seriatim.

[171] Eagle Yachts alleged in paragraph 25(a) of its defence that a preliminary survey obtained by Eagle Yachts from SW Booth & Associates ("Preliminary Survey") to assist with trying to obtain survey did not reveal that the Bertram 570 was not reasonably fit for purpose or of merchantable quality. (Tarangau said in response that the Preliminary Survey did not involve an examination of whether or not the Bertram 570 was unseaworthy as the purpose of the Preliminary Survey was "to compile a work list for the vessel to enter USL2C/1E survey through the Qld Transport system").

[172] There is no evidence to suggest that the survey by SW Booth & Associates looked at any disconformity with the plans or at any of the latent defects caused by poor manufacturing process that later became manifest or patent.

[173] In paragraph 25(b) of its defence, Eagle Yachts alleged that on 29 July and 30 July 2006, Eagle Yachts sailed the Bertram 570 from Sydney to the Gold Coast without incident to deliver the Bertram 570 to Tarangau. (This was admitted by Tarangau).

[174] In paragraph 25(c) of its defence, Eagle Yachts said that in or about late 2006, Tarangau engaged KPS Maritime, a firm of naval architects, to assist with obtaining commercial survey for the yacht. (This admission was adopted by Tarangau).

[175] In paragraph 25(d) of its defence, Eagle Yachts said that KPS Maritime did not find that the Bertram 570 was not reasonably fit for purpose or of merchantable quality. (Tarangau correctly said in response, that KPS Maritime was not instructed to investigate whether or not the Bertram 570 was seaworthy or of merchantable quality).

[176] In paragraph 25(e) of its defence, Eagle Yachts said that the Bertram 570 had been sailed by Tarangau for thousands of nautical miles in open seas in winds of up to at least 30 knots. (Tarangau admitted that it sailed the Bertram 570 but denied it had been sailed in winds of up to at least 30 knots since Tarangau acquired the Bertram 570).

[177] This allegation, as with the allegation in paragraph 25(f) of its defence, that the Bertram 570 had recorded over 450 hours of engine use since being acquired by Tarangau, which was admitted by Tarangau, was relevant only to a line of defence which was not pursued at the trial.

[178] In paragraph 25(g) of its defence, Eagle Yachts alleged that Tarangau registered the Bertram 570 in Queensland as a recreational ship and in so doing certified that "the ship complie[d] with safety requirements set out in the Transport Operations (Marine Safety)

---

[109] First defendant's defence para 25.
[110] Reply to the first defendant's defence para 5.

Regulation 2004." (Tarangau admitted that the Bertram 570 was registered in Queensland as a recreational yacht but otherwise said the allegations were untrue.)

[179] There was no evidence led as to any certification by Tarangau as to compliance with the safety requirements set out in the *Transport Operations (Marine Safety) Regulation* 2004.

[180] Eagle Yachts alleged, in paragraph 25(h) of its defence, that to the extent that each of the issues pleaded at paragraph 26(a) to 26(e) of the statement of claim existed at the date of the contract, which was not admitted, the matters pleaded were manufacturing issues that could not have been identified by Eagle Yachts prior to the sale of the Bertram 570 to Tarangau. (Tarangau denied these allegations on the basis that no such allegation was made in the statement of claim).

[181] In fact in paragraph 27 of the statement of claim, Tarangau alleged that each of the defects pleaded in paragraph 26 of its statement of claim were latent defects which were not discoverable at the time of purchase by Tarangau.

[182] Tarangau denied the allegations said to have been pleaded in sub-paragraph 25(i) of the first defendant's defence, but there was no such sub-paragraph.

[183] While Eagle Yachts did not admit that the defects existed at the time of purchase, it said that, if they did, they would not have been discoverable on a reasonable inspection of the Bertram 570 by either Tarangau or Eagle Yachts.[111]

[184] Bertram admitted that, to the extent that it was established that the insecure bonding of the transversal and longitudinal members to the hull was caused by poor manufacturing practices, it was a latent defect and otherwise denied the allegations.[112]

[185] Tarangau alleged a number of consequences of the defects which it alleged existed in the Bertram 570.[113] Eagle Yachts did not admit the consequences but said that to the extent they occurred, they were a result of manufacturing issues which it could not have identified.[114] Bertram denied that the structural failures were the consequence of the matters pleaded by Tarangau.[115]

[186] It is reasonably clear from the evidence which I have accepted that each of the defects was a manufacturing defect which was latent at the time of the sale of the Bertram 570 from Eagle Yachts to Tarangau which was not discoverable by Eagle Yachts or Tarangau on visual inspection.

[187] I accept that the consequences of the defects were as alleged by Tarangau in paragraph 28 of its statement of claim.

[188] *The hull structure of the Bertram 570 did not perform its design function*.[116]

---

[111] First defendant's defence para 26.
[112] Second defendant's defence para 11B.
[113] Statement of claim para 28.
[114] First defendant's defence para 27.
[115] Second defendant's defence para 11C.
[116] Statement of claim para 28(a).

[189] The evidence for this found in Harvey Report 1 at paragraph 5.4.2 where Mr Harvey said:

> "With the known non-compliance of the vessel 'as built' with the structural design drawing supplied by the manufacturer, it is reasonable to suspect that the vessel will not perform or comply with the structural design loads the vessel was designed and expected to be subject to in operation."

[190] *The failure of the hull structure to perform its design function resulted in other parts of the Bertram 570 being subjected to movement and flexure beyond that which they were designed to bear.*[117]

[191] The evidence for this is found, as previously set out, in Harvey Report 3.[118] Mr Wright's oral evidence was that because the frames did not go the full length or width of the boat there were very long unsupported panels which lacked sufficient strength. Instead of each supported panel being roughly 1.2 metres apart it could be 3.6 metres before the next support. This would lead to too much flexing which would eventually lead to fatigue and a severely weakened structure over time particularly if it had been in rough water, as of course, a vessel of this nature would be expected to be able to easily withstand. Because the frames do not go all the way to the edge the effect of the void is that support for the structural liner sole and the hull panel is missing. Because of this, it will be compromised due to the bottom slamming off waves.

[192] *Stress beyond what they were designed to bear was placed on the structural inner sole, the pulpit, the area of the anchor locker, the foredeck and the cockpit sole, resulting in cracking, delamination and excessive flexure of those components.*[119]

[193] The evidence of this consequence can be seen in Mr Harvey's first report[120] where he observed that cracking at high stress areas around the forward foredeck hatch and the anchor locker hatch is consistent with excessive deflection. The extended cockpit sole exhibits cracking at radius corners and drainage points, and failures in the cockpit structure are indicative of excessive movement and instability in that structure.

[194] Mr Wright observed on his inspection on 14 and 28 February 2014 that numerous instances of stress related cracking were evident, most frequently at various changes of section in the moulding of the side deck, particularly evident at the various corners associated with the moulded-in steps abaft the cockpit side curtains. This is indicative of stress levels exceeding the local capacity of the structural laminate at these positions.[121]

[195] *The hull became permanently deformed.*[122]

[196] The evidence for this is found in Mr Harvey's third report[123] where Mr Harvey observed that there was a permanent deformation of either the hull shell or bulkhead P1 because the separation of the secondary bonding angle laminate from the bulkhead P1 is

---

[117] Statement of claim para 28(b).
[118] Paragraph 7 page 8.
[119] Statement of claim para 28(c).
[120] Harvey Report 1 para 1.1.2.2, para 1.1.5.1, para 1.2.5.4.
[121] Wright Report 1 p 12.
[122] Statement of claim para 28(d).
[123] Harvey Report 3 para 4.2.3.

significant in magnitude and the hull and structure have not returned to an initial relative position. Mr Harvey explained in oral evidence, when cross-examined by counsel on behalf of Eagle Yachts, that fibreglass boats inherently absorb energy and deflect and deform when loads are applied to them but usually they return to their original state. However, in this case when force had been physically applied, rather than return to its original state, the fibreglass had deformed permanently leaving an air gap. In re-examination he gave evidence that because of deformation there was now a gap between the hull and its transverse and longitudinal members. He conceded that the deformation could be in the hull or in the transverse and other members.

[197] *The Bertram 570 suffered progressive structural failures in multiple areas*.[124]

[198] The evidence for this was again found in Mr Harvey's first report[125] where he said that the failures were indicative of excessive movement and instability of the cockpit structure.

[199] *The Bertram 570 became non-watertight.*[126]

[200] The evidence for this is found in Lyons Report 1.[127] Mr Lyons refers in his first report to "loss of watertight integrity or leaks".[128]

[201] *The Bertram 570 became unseaworthy*.[129]

[202] Mr Harvey expressed the clear opinion[130] that the known structural defects made the vessel unseaworthy. The additional structural failures he found when he further inspected the vessel on 29 October 2012 reinforced his opinion that the vessel was not seaworthy.[131] In his oral evidence, Mr Harvey said that further defects were expected to develop and unless all repairs were carried out, the vessel could not be certified as seaworthy. The repairs recommended by Mr Griffin could not make the vessel seaworthy as they were only spot repairs limited to defects that had already manifested in easily accessible areas. As Mr Harvey observed, the type of defects that occurred were likely to be progressive and manifested in parts of the vessel which were not easily accessible. The delamination was likely to affect the whole of the structure including all of the hull. This is because there is no difference in the laminating process in all parts of the vessel while it is being manufactured.

[203] In his last report Mr Wright also expressed the opinion[132] that "the vessel has too many major defects to be considered seaworthy for its intended purpose in any way or form except in smooth or possibly partially smooth water." He reiterated that in response to Mr Griffin's opinion that the boat was seaworthy because it was able to be moved on its own bottom in smooth water, that this did not mean that the boat could be used for its intended purpose of being a fast seagoing game fishing boat. If it was in seagoing condition it could and would operate in unrestricted offshore conditions. Any master

---

[124] Statement of claim para 28(e).
[125] Harvey Report 1 para 1.2.5.4.
[126] Statement of claim para 28(f).
[127] See pages 5 and 13.
[128] Lyons Report 1 p 13.
[129] Statement of claim para 28(g).
[130] Harvey Report 1 p 16.
[131] Harvey Report 3 p 8.
[132] Wright Report 2 pp 6, 13.

being aware of the condition of the secondary hull laminates would not be prepared to operate the boat in anything other than smooth or partially smooth waters as the vessel's strength did not comply with its original design loading for its intended purpose.

[204] In his evidence, Mr Griffin conceded that he could not say whether the vessel was seaworthy.

[205] Tarangau alleged that in consequence of the matters pleaded, during use by Tarangau over a period of two years following its purchase, the Bertram 570 developed structural failures.[133] The specific response of Bertram is, where relevant, set out in parenthesis following each allegation.[134]

[206] *Transversals M3, M4, M5 and M6 have developed partial and total delamination and separation of the secondary bonding angle laminate from the hull shell outboard of L2. The delamination is progressive. The transversal frame M5 has developed delamination and cracking. Bulkhead P2 has developed cracking, bond failure and separation of 5083-grade aluminium angle and there is a failure of the structural liner sole to transversal connection*.[135] (Bertram admitted these structural failures).

[207] *The transversal frames have separated from the hull shell to a significant degree and the hull and structure have not returned to an initial relative location.* (Bertram denied this structural failure).[136]

[208] This allegation is supported by the evidence given by Mr Harvey[137] where he observed that the failures of the vessel's hull and structure are plastic in nature. The separation of the transversal frames from the hull shell is significant in magnitude and the frames and the hull structure have not returned to an initial relative location. This indicates a permanent deformation of either the hull shell or the hull structure, or as he said in his oral evidence, it may be both.

[209] *The longitudinal L1 had developed a crack on the port side midway between M5 and M6; the transversal M9 has cracking across its section on the inboard Side of Starboard L1, the transversals P4/M10 have cracking across its section on the inboard side of starboard L1, the main engine raw water pickups have cracking around the doubling plate on both port and starboard sides, the intercostal sole between inboard longitudinals L1 have cracking around the perimeter of the panel, the transversal M11 has cracking across its section on inboard side of Port L2 and there is delamination of secondary laminate connection to the hull shell on the starboard side inside air intake.*[138] (Bertram denied these structural failures).

[210] All of these findings are set out in paragraph 3 of Harvey Report 1. They are also supported by various photographs.

---

[133] Statement of claim para 29.
[134] Second defendant's defence para 11D.
[135] Statement of claim para 29(a).
[136] Statement of claim para 29(b).
[137] Harvey Report 1 para 1.2.3.2.
[138] Statement of claim para 29(c).

[211] *Bertram 570's structural liner sole has cracking and has structural failures. There is separation of the structural liner sole and the transversals*.[139] (Bertram denied these structural failures).

[212] The cracking in the structural liner sole which is a structural failure was observed by Mr Harvey and reported by him in his first report.[140] There is ample evidence, to which I have already referred, as the separation of the structural liner sole and the transversals.

[213] *The port and starboard sides of the pulpit have developed cracking and delamination at the connection to the deck*.[141] (Bertram admitted these structural failures).

[214] *The internal structural support for the pulpit and the grounding tackle have developed cracking and delamination at the connection to the hull shell and deck*.[142] (Bertram admitted these structural failures).

[215] *The foredeck had developed structural failures in that there is excessive deflection from delamination of the foredeck composite structure between the forward foredeck hatch and the anchor locker hatch, and there has developed cracking at high stress areas around the forward foredeck hatch and the anchor locker hatch*.[143] (Bertram admitted these structural failures).

[216] *The Bertram 570's cockpit sole has developed cracking. The cracking is indicative of excessive movement and instability of the cockpit structure. And the extended cockpit sole and floating cockpit sole fail to prevent water ingress into the lazarettte, machinery space or engine room*.[144] (Bertram admitted these structural failures).

[217] *Bulkhead P1 has developed significant structural failures consisting of partial and total delamination and separation of the secondary bonding angle laminate from bulkhead P1, such delamination being progressive and visually manifesting between 15 November 2008 and 29 October 2012*.[145] (Bertram admitted that the bulkhead P1 had developed structural failures consisting of partial and total delamination and separation of the secondary bonding angle laminate from bulkhead P1 and otherwise did not admit that those structural failures were significant or that such delamination was progressive and visually manifested between 15 November 2008 and 29 October 2012.)

[218] Mr Harvey noted a new structural failure between his inspection on 15 November 2008 and his inspection on 29 October 2012. This new structural failure was at bulkhead P1 where delamination was observed which appeared to be progressive.[146] Mr Lyons also reported that secondary bond failures normally develop in a progressive manner.[147]

---

[139] Statement of claim para 29(d).
[140] Harvey Report 1 para 1.1.4.1 – 1.1.4.2. See also Lyons Report 2 p 26.
[141] Statement of claim para 29(e).
[142] Statement of claim para 29(f).
[143] Statement of claim para 29(g).
[144] Statement of claim para 29(h).
[145] Statement of claim para 29(i).
[146] Harvey Report 3 para 4.
[147] Lyons Report 1 para 5.3.

[219] Eagle Yachts did not admit that the defects, structural failures or their consequences existed, but to the extent that they did, it alleged, correctly, that such issues were the result of manufacturing issues that could not have been identified by Eagle Yachts.[148]

[220] Eagle Yachts also alleged, in the alternative, to the extent that bulkhead P1 had developed significant structural failures consisting of partial and total delamination and separation of the secondary bonding angle laminate from bulkhead P1, such delamination having visually manifested between 15 November 2008 and 29 October 2012, that that structural failure to bulkhead P1 was caused or contributed to by the Bertram 570 impacting with fixed mooring posts causing damage to the bow of the Bertram 570 including the hull and substructure during the 2011 Brisbane floods on 12 January 2011. The particulars were said to be:

> "The Marine Incident Report dated 12 January 2011
>
> The Evidence of Daniel Wong that Tarangau paid more than $18,000 to repair the damage caused by the 2011 floods."[149]

[221] Although it remained in its pleading, this allegation was withdrawn in Eagle Yachts' final submissions and so need not be further considered.

[222] Tarangau alleged that since about October 2008 the Bertram 570 has been unable to be used and beyond economic repair.[150] Eagle Yachts did not admit those allegations.[151] Bertram alleged in its defence[152] that since in or about October 2008, the Bertram 570 was economically repairable and Tarangau was informed by Bertram, by an email dated 31 March 2009 from Robert Allen Law to McCullough Robertson, that Bertram would undertake the repairs on behalf of Tarangau under the Bertram warranty. It further alleged that the Bertram 570 was able to be repaired for a sum not exceeding USD 115,000.

[223] To this allegation, Tarangau admitted in its reply [153] that the offer to repair was made but that Tarangau acted reasonably in not accepting the offer, in that:

> (i) the offer did not extend to many of the defects in the Bertram 570 referred to in the statement of claim, and in particular would not rectify the structural deficiencies referred to in paragraph 26(a) and (b) of the statement of claim;
>
> (ii) the offer did not propose that structural deficiencies and other defects in inaccessible parts of the Bertram 570 would be identified and repaired;
>
> (iii) the manner of repair and the time allowed for repairs in the offer was insufficient to achieve a proper repair of the defects of the Bertram 570;

---

148 First defendant's defence para 28 (a)-(d) and (f).
149 First defendant's defence para 28(g).
150 Statement of claim para 36.
151 First defendant's defence para 35.
152 Second defendant's defence para 13C(v), (vi).
153 Reply to second defendant's defence para 6.

(iv) Tarangau acted on the advice of experts (Nekton International report dated 13 July 2009 and preceding oral advice to similar effect provided prior to 4 June 2009) in regarding the offer of repair as inadequate and unacceptable.

[224] Tarangau also said that on or about 15 July 2009, Tarangau communicated to Bertram the unsatisfactoriness of its proposal for repair, by sending to Bertram a further report of Nekton International dated 13 July 2009 and says that Bertram did not thereafter offer to properly repair all the defects in the Bertram 570 referred to in the amended statement of claim, or to do so in a way which would repair the Bertram 570 to an acceptable standard.

[225] The evidence of Mr Harvey, Mr Lyons and Mr Wright satisfied me that the repairs that Bertram said it was prepared to carry out were at best a superficial response to the structural defects identified in the Bertram 570. Nothing less that the thorough work recommended by those experts, which was adequately identified by Mr Harvey in Harvey Report 1, could deal appropriately with the latent defects which have been identified by them which they were able to reliably extrapolate would also have affected the parts of the vessel which they were unable to inspect without dismantling the whole vessel. The only way of rendering this vessel seaworthy would be to undertake the repairs recommended by the expert evidence called by Tarangau. The integrated design and fibreglass construction of the vessel would have made adequate repairs expensive and difficult but, if it was to be repaired, there was no other way of remedying the defects in its hull and other fibreglass structural components.

Liability of Eagle Yachts for the condition of the Bertram 570 at purchase

Relevant pleadings

[226] Although not explicitly admitted,[154] it appears to be common ground from the submissions that the proper law of the contract is the law of New South Wales.

[227] Tarangau alleged in paragraph 19 of the statement of claim that it bought the yacht by description, namely "Bertram 570 Flybridge Cruiser", that at all material times Eagle Yachts dealt in yachts of that description and supplied that Bertram 570 to Tarangau in the course of its business as Bertram's exclusive Australian dealer. Eagle Yachts denied[155] that it was a sale by description for the purposes of s 19(2) of the SGA because the contract was for the sale of a particular boat chosen by Tarangau, having been inspected by Mr Wong at the Marine Village at Sanctuary Cove on an afternoon between 18 and 21 May 2006, prior to his signing the contract on behalf of Tarangau. It said that it did not deal in yachts of the description pleaded as the Bertram 570, the

[154] Statement of claim paragraph 18; first defendant's defence paragraphs 14, 15, 17; second defendant's defence paragraph 8.
[155] First defendant's defence paragraphs 14, 18.

subject of these proceedings, was the first Bertram of any kind sold by Eagle Yachts, even though it supplied the Bertram 570 to Tarangau in the course of its business as Bertram's exclusive Australian dealer. In paragraph 2 of its reply, Tarangau said that at the time of the contract Eagle Yachts held an appointment as Bertram's dealer for Australia of Bertram yachts.

[228] Eagle Yachts admitted that the Bertram 570 was of a kind ordinarily acquired for personal use.[156] However, Eagle Yachts denied Tarangau's allegation that it acquired the Bertram 570 as a "consumer" within the meaning of the TPA,[157] as Tarangau acquired the Bertram 570, or held itself out as acquiring the Bertram 570, for the purpose of re-supply as a commercial fishing boat for charter and therefore did not acquire the Bertram 570 as a consumer within the meaning of the TPA.[158]

[229] Bertram also denied the allegation, saying that Tarangau's purpose in acquiring the Bertram 570 was to use it for commercial chartering by way of leasing or hiring the yacht to third parties. This was made known to Eagle Yachts and therefore Tarangau acquired and held itself out as acquiring the Bertram 570 for the purpose of re-supply and thereby supply within the meaning of the TPA.[159]

[230] In its reply to the second defendant's defence, Tarangau said that the proposed commercial chartering of the Bertram 570 was dependent on its first achieving commercial survey; it did not achieve commercial survey and the proposed chartering of the Bertram 570 never occurred; Tarangau's proposed chartering of the Bertram 570 did not involve leasing or hiring of it to third parties, but was intended to be conducted on the basis that the boat would at all times remain in the possession and under the control of Tarangau.[160]

[231] Tarangau alleged in paragraph 21 of the statement of claim that it expressly or impliedly made it known to Eagle Yachts that Tarangau proposed to use the Bertram 570 for sailing and fishing in the open sea off the coast of Australia and that Tarangau proposed to spend money to make the Bertram 570 meet the requirements for, and to put it into, commercial survey whereby it could be chartered for commercial game fishing. These matters were, Tarangau alleged, conveyed in face to face discussions that took place between Mr Wong and Mr Rodgers at the boat show at Sanctuary Cove in or about late May 2006 and further discussions between Mr Wong and Mr Rodgers between 31 May and 4 July 2006.

[232] These allegations were admitted by Bertram.[161] The allegations were admitted by Eagle Yachts except to say that at a boat show in late May 2006 at Sanctuary Cove Mr Wong told Mr Rodgers that Mr Wong was looking to buy a boat that could be used as a recreational fishing boat and as a commercial fishing boat for charter. Mr Rodgers told Mr Wong that the Bertram 570 was the first of its type in Australia, being the latest generation Bertram boat and had not obtained commercial survey in Australia and nor had any other vessels of the same type. Mr Rodgers further told Mr Wong that Eagle

---

[156] Statement of claim paragraph 20(a); first defendant's defence paragraph 19(a); this was not admitted in paragraph 9(a) of the second defendant's defence.
[157] Statement of claim paragraph 20(b).
[158] First defendant's defence paragraphs 19(b), 20.
[159] Second defendant's defence paragraph 9 (b), (c).
[160] Reply to the second defendant's defence paragraph 2.
[161] Defence of the second defendant para 1.

Yachts would work with Mr Wong to try to obtain commercial survey for the Bertram 570, if Mr Wong were to buy it. Mr Rogers told Mr Wong that the Bertram 570 would need to be approved by a naval architect before it could obtain commercial survey and that he could put Mr Wong in touch with a surveyor and naval architect. Eagle Yachts alleged that Mr Wong inspected the Bertram 570 and said to Mr Rodgers that Mr Wong liked it and was still interested in buying the Bertram 570 despite the fact that it had not obtained commercial survey.[162]

[233] In its reply, Tarangau admitted that Mr Wong told Mr Rodgers that Mr Wong was looking to buy a boat that could be used as a recreational fishing boat and as a commercial fishing boat for charter; and that Mr Rodgers told Mr Wong that Eagle Yachts would work with Mr Wong to try to obtain commercial survey for the Bertram 570 if Mr Wong were to buy it; and that Mr Rodgers would put Mr Wong in touch with a surveyor and a naval architect. Tarangau otherwise joined issue with the allegations made by Eagle Yachts in paragraph 20 of its defence.[163]

[234] In paragraph 23(a) of its statement of claim, Tarangau alleged that its purpose in acquiring the Bertram 570 was expressly made known to Bertram by being communicated as set out above by Mr Wong to Mr Rodgers. That allegation was denied by the Bertram on the basis that the knowledge of Eagle Yachts was not its knowledge.[164] However Bertram did admit that Tarangau's purpose in acquiring the Bertram 570 was impliedly made known to it in that the Bertram 570 was designed and manufactured by Bertram to be used for sailing in the open sea and that yachts of the kind of the Bertram 570 Flybridge Cruiser are commonly acquired by members of the public for that purpose.

[235] Tarangau alleged, in paragraph 22 of its statement of claim, that the contract contained the following implied terms:

(a) The Bertram 570 was reasonably fit for the purpose of being used for fishing and sailing in the open sea off the coast of Australia; and

(b) The Bertram 570 was of merchantable quality.

[236] Tarangau alleged that because of the defects pleaded in its statement of claim, Eagle Yachts was in breach of its contract with Tarangau.[165] Eagle Yachts denied that those terms were implied into the contract but said, if they were, it was not in breach of those terms.[166]

[237] Tarangau said that the terms were implied by s 19 of the SGA and by s 71 of the TPA. Eagle Yachts denied those allegations and, repeating what it had said earlier, also alleged in paragraph 21 of its defence that Mr Rodgers was not a naval surveyor or a naval architect and that Mr Wong and Tarangau knew that Mr Rodgers was not a naval surveyor or naval architect. Eagle Yachts alleged that Mr Wong and Tarangau knew that Mr Rodgers and Eagle Yachts did not have the necessary skill or judgment to promise that the Bertram 570 was either reasonably fit for the purpose of being used for

---

[162] Defence of the first defendant para 20.
[163] See reply to the first defendant's defence para 3.
[164] Defence of the second defendant para 10.
[165] Statement of claim para 30.
[166] First defendant's defence paras 24-29.

fishing and sailing in the open sea off the coast of Australia or that it was of merchantable quality and that neither Mr Wong nor Tarangau relied upon Mr Rodgers or Eagle Yachts' skill or judgment in relation to those matters.

[238] Eagle Yachts further alleged that the pleaded implied terms were not each reasonable or equitable, necessary to give business efficacy to the contract, so obvious as to go without saying, and capable of expression. Further Eagle Yachts said that Tarangau has failed to plead what description, if any, it relied upon when buying the Bertram 570 and that in any event, the alleged implied term does not cover any defects that ought to have been revealed when Mr Wong inspected the Bertram 570. In its reply Tarangau admitted that Mr Wong and Tarangau knew, as was the case, that Mr Rodgers was not a naval surveyor or naval architect but otherwise denied the allegations.[167]

Consideration

[239] Section 19 of the SGA as at the date of purchase provided:

"**19 Implied condition as to quality or fitness**

Subject to the provisions of this Act, and of 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:

(1) 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 judgment, and the goods are of description which it is in the course of the seller's business to supply (whether the seller by 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.

(2) Where goods are bought by description from a seller who deals in goods of that description (whether the seller 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.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."

[240] In paragraph 26 of the statement of claim Tarangau claimed that at time of sale the Bertram 570 was not reasonably fit for the purpose of sailing and fishing in the open sea and was not of merchantable quality, for the reasons therein set out.

The Bertram 570 was not reasonably fit for its purpose

---

[167] Reply to the first defendant's defence paragraph 4.

[241] The evidence referred to in detail in this judgment leaves little doubt that the Bertram 570 purchased by Tarangau was not reasonably fit for the purpose of sailing and fishing in the open sea.

[242] The vessel was riddled with latent defects and not suitable for sailing or fishing in the open sea off the coast of Australia.

[243] Mr Lyons gave compelling evidence as to what would be likely to happen if the Bertram 570 were taken out in the open sea and met conditions that it would be expected to cope with without any loss of the ship's integrity. He did this by reference to the internationally accepted Beaufort scale.[168] He did not believe the vessel was capable of withstanding Beaufort scale 8 or above. The consequences of any such failure would be catastrophic. His evidence was to the following effect:

> "And given your knowledge of [this Bertram 570], what's your professional opinion on what would happen to the vessel?---I'd be concerned that the separations in some of the structure that I've seen would propagate further.
>
> And what would happen then?---The internal structure, whether it's the bulk heads or the transverse and longitudinal members, would continue to part company from the hull shell, and this leads to a breakdown in the unitary structure which is intended in the design.
>
> And what happens when you've got a breakdown of the unitary structure that's intended in the design?---The deflections of the vessel, that is the way it bends and twists, progressively increase until such time as there's either a loss of water tight integrity or the propeller shafts may not be able to turn any longer if they're out of alignment.
>
> And what happens after that?---You'll either have to stop and get rescued, or you'll sink."

[244] However, for s 19(1) of the SGA to apply the purchase, Tarangau must show not only was the Bertram 570 not fit for its purpose but also:

(1) that Tarangau made known to Eagle Yachts the purpose for which it required the goods,

(2) so as to show that it relied upon the skill or judgment of Eagle Yachts,

(3) that the vessel was of a description that it was in the course of Eagle Yachts' business to supply, and

(4) that the proviso of sale by patent or trade name is not applicable.

[245] The first two of these requirements in the statute were examined in the High Court decision of *Australian Knitting Mills Ltd v Grant*[169] where Starke J held[170] that the buyer must make known, expressly or by implication, the particular purpose for which the goods are required, in order to show that the buyer trusts the seller's skill and

---

[168] See Exhibit 81.
[169] (1933) 50 CLR 387.
[170] At 410 – 411.

judgment to supply something reasonably fit for the purpose. The buyer's reliance is a question of fact, to be determined by examining what was said and done with regard to the proposed transaction prior to entry into it. Dixon J (as his Honour then was) held[171] that the condition as to reliance is satisfied if reliance is a reasonable inference. The section does not require that such reliance be exclusive of any other reliance, such as advice of the buyer's own experts or the use of the buyer's own knowledge.

[246] In this case it is apparent from the evidence that Mr Wong, on behalf of Tarangau, at the very least told Mr Rodgers, on behalf of Eagle Yachts, that he wanted a vessel which was suitable for sailing and fishing in the open sea off the coast of Australia. He relied upon the skill and judgment of Eagle Yachts, as a reputable seller of such vessels, that it would sell him a vessel that was suitable for that purpose. He looked both at Riveria Yachts and then at the Bertram Yachts at the Eagle Yachts stand. Mr Wong's behaviour does not in any way suggest that he was intending to buy the Bertram 570 no matter what.

[247] The evidence of Mr Wong, Mr Pritchard and Mr Rodgers showed that Mr Wong went to the Sanctuary Cove boat show and told Mr Rodgers that he was looking for a boat to go offshore game fishing with the possibility of doing some charter work as well. Mr Rodgers told him that the Bertram boats were suitable for the purpose of offshore game fishing and that the particular Bertram 570 which was available had already had modifications done to it to make it even more suitable for big game fishing, such as the installation of a game chair, outriggers and all the necessary electronics, bait well and water making facilities. Mr Rodgers assured Mr Pritchard that the superstructure was strong enough for a tuna tower to be added. He told both Mr Wong and Mr Pritchard that the Bertram 570 had been sailed up to Sanctuary Cove from Sydney through very heavy seas and that it had handled very well in those seas. Eagle Yachts also provided the brochure on which Mr Wong was entitled to rely as to the vessel's suitability for deep sea game fishing. Mr Wong knew of Bertram's reputation for deep sea fishing boats and had been a passenger on them before. This made him receptive to Mr Rodger's advice but did not mean that he did not rely on the advice and reputation of Eagle Yachts to sell him a suitable vessel.

[248] The third element that Tarangau was required to satisfy was that the vessel was of a description that it was in the course of Eagle Yachts business to supply. Eagle Yachts was the exclusive dealer in Bertram boats in Australia. Its suggestion that it did not deal in yachts of that description as it was the first Bertram 570 that it had sold is irrelevant to the question. Whether or not this was the first or the fifteenth of the yachts of that description that it sold, it was a vessel of a description that it was in the course of Eagle Yacht's business, as exclusive dealer for Bertram in Australia, to supply.

[249] There is a proviso to s 19(1) that there is no implied condition as to the fitness for any particular purpose in the case of a contract for the sale of a specified article under its patent or other trade name. Eagle Yachts did not submit that this proviso applied but nevertheless, as Tarangau submitted, it should be dealt for the sake of completeness.

---

[171] At 414 – 415.

[250] It is clear from the authorities that this proviso only applies where the purchaser did not rely upon the seller when he or she bought the goods. This principle, which is derived from the leading case of *Baldry v Marshall*,[172] was recently applied by the New South Wales Court of Appeal in *Tre Cavalli Pty Ltd v Berry Rural Cooperative Society Ltd*.[173] In *Tre Cavalli* Gleeson JA, who delivered the leading judgment, referred[174] to the narrow application given by the English Court of Appeal to the proviso in *Baldry v Marshall*. He said that the English Court of Appeal emphasised that "the mere fact that an article is sold under its trade name, in the sense that the trade name forms part of the description of the thing sold, does not necessarily make the sale a sale under a trade name. Whether it is a sale under a trade name depends upon the circumstances. For example, if the buyer mentions the article by its trade name and also asks whether it will suit its particular purpose, the proviso has no application."

[251] In *Baldry v Marshall* Bankes LJ explained this proviso[175] as follows:

> "In my opinion the test of an article having been sold under its trade name within the meaning of the proviso is: Did the buyer specify under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly that it will answer his purpose, and that he is not relying on the skill or judgment of the seller, however great that skill or judgment may be?"

[252] In *Tre Cavalli*, the purchaser bought a cattle vaccine by taking it from the fridge at the respondent's store and presenting it with an injector gun to the salesperson for purchase without any discussion. In such a case the proviso applied.

[253] However, in this case, there was, as has been set out in these reasons, considerable discussion between the purchaser and the seller so as to show that Mr Wong on behalf of Tarangau did not purchase the Bertram 570 without any reliance upon the skill or judgment of the seller that the vessel was suitable for open sea sailing and fishing. In these circumstances the proviso has no application.

[254] It follows from the above discussion that Tarangau has proved on the balance of probabilities that Eagle Yachts was in breach of the term requiring fitness for purpose implied in the contract by s 19(1) of the SGA. Eagle Yachts is liable to Tarangau for that breach of contract.

The Bertram 570 was not of merchantable quality

[255] For Tarangau to succeed against Eagle Yachts under s 19(2) of the SGA, it must show:

(1) that the vessel was bought by description;

(2) that Eagle Yachts dealt in goods of that description;

---

[172] [1925] 1 KB 260.
[173] [2013] NSWCA 235.
[174] At [98].
[175] At p 267.

(3) that the vessel was not of merchantable quality; and

(4) that the defects were not such that an examination by Tarangau should have revealed them.

[256] Although Mr Wong inspected the particular vessel, the evidence set out shows that he purchased it by its description, particularly the detailed description shown in its accompanying brochure.

[257] A sale of goods may be by description even when identified goods are sold. As Dixon J held in *Grant*:[176]

> "When the ground upon which the goods are selected or identified is their correspondence to a description and when, therefore, it may be said that the buyer primarily relies upon their classification or possession of attributes, then, notwithstanding that they are bought as specific goods ascertained and identified, the goods are bought by description."

[258] In this case, although the vessel was bought as a specific ascertained chattel, it was sold as having a particular classification and attributes so that it was a sale by description. The description of the vessel was integral to the transaction that took place. There was no doubt that Eagle Yachts, as the exclusive dealer of Bertram Yachts in Australia, dealt in goods of that description.

[259] What is required for goods to be of merchantable quality was set out by Dixon J in *Grant*:[177]

> "The condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition, would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition without special terms."

[260] In this case the vessel was sold with an extraordinary number of hidden defects which have been referred to in these reasons. It is an inescapable inference that Tarangau would not have purchased the vessel if it had known that it had so many hidden defects that it could not safely be taken out to the open sea for deep sea fishing. It goes without saying that Tarangau would not have bought it had it known of the hidden defects without abatement of the price. The vessel is not of merchantable quality and was not at the time it was purchased.

[261] The fourth area to be examined is whether the defects were such that an examination by Tarangau should have revealed them. It is common ground that the latent defects in the vessel could not have been found by Tarangau's pre-purchase inspection. The defects were latent not patent. No plans were made available to reveal the disconformities of the construction with the plans.

---

[176] (1933) 50 CLR 387 at 417.
[177] (1933) 60 CLR 387 at 418.

[262] The Bertram 570 was not of merchantable quality and Eagle Yachts is liable for breach of the term implied in the contract of sale by s 19(2) of the SGA.

Liability of Eagle Yachts and of Bertram under the TPA

[263] For Tarangau to succeed it must show that it falls within the definition of "consumer", pursuant to s 4B of the TPA.

[264] Eagle Yachts denied that Tarangau was a consumer for the purposes of the TPA. However it said that if Tarangau was a consumer and the Bertram 570 was not fit for the purpose of being used for sailing and fishing in the open sea off the coast of Australia and if the Bertram 570 was not of merchantable quality then the allegations that it was in breach of s 71 of the TPA were admitted.[178]

[265] Section 71 provides:

> "**71 Implied undertakings as to quality or fitness**
>
> (1) Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business, there is an implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality, except that there is no such condition by virtue only of this section:
>
> (a) as regards defects specifically drawn to the consumer's attention before the contract is made; or
>
> (b) if the consumer examines the goods before the contract is made, as regards defects which that examination ought to reveal.
>
> (2) Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation or to the person by whom any antecedent negotiations are conducted any particular purpose for which the goods are being acquired, there is an implied condition that the goods supplied under the contract for the supply of the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the skill or judgment of the corporation or of that person.
>
> (3) Subsections (1) and (2) apply to a contract for the supply of goods made by a person who in the course of a business is acting as agent for a corporation as they apply to a contract for the supply of goods made by a corporation in the course of a business, except where that corporation is not supplying in the course of a business and either the consumer knows that fact or

[178] First defendant's defence paras 23 and 24.

reasonable steps are taken to bring it to the notice of the consumer before the contract is made."

[266] Tarangau claims against Bertram under ss 71, 74B and 74D of the TPA. Tarangau alleged that Bertram became liable pursuant to s 74B of the TPA to compensate Tarangau for any loss suffered by reason of the Bertram 570 not being reasonably fit for the purpose of being used for sailing and fishing in the open sea off the coast of Australia.[179] Further it asserted that pursuant to s 74D of the TPA, Bertram became liable to compensate Tarangau for any loss suffered by reason of the Bertram 570 not being of merchantable quality.[180]

[267] Bertram denied the allegations.[181]

[268] Section 74B provides:

"**74B Actions in respect of unsuitable goods**

(1) Where:

(a) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply;

(b) a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer;

(c) the goods are acquired by the consumer for a particular purpose that was, expressly or by implication, made known to the corporation, either directly, or through the person from whom the consumer acquired the goods or a person by whom any antecedent negotiations in connexion with the acquisition of the goods were conducted;

(d) the goods are not reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied; and

(e) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not reasonably fit for that purpose;

the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.

(2) Subsection (1) does not apply:

---

[179] Statement of claim para 24.
[180] Statement of claim para 25.
[181] Second defendant's defence para 11.

(a) if the goods are not reasonably fit for the purpose referred to in that subsection by reason of:

(i) an act or default of any person (not being the corporation or a servant or agent of the corporation); or

(ii) a cause independent of human control;

occurring after the goods have left the control of the corporation; or

(b) where the circumstances show that the consumer did not rely, or that it was unreasonable for the consumer to rely on the skill or judgment of the corporation."

[269] Section 74D of the TPA provides:

"**74D Actions in respect of goods of unmerchantable quality**

(1) Where:

(a) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply;

(b) a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer;

(c) the goods are not of merchantable quality; and

(d) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not of merchantable quality;

the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.

(2) Subsection (1) does not apply:

(a) if the goods are not of merchantable quality by reason of:

(i) an act or default of any person (not being the corporation or a servant or agent of the corporation); or

(ii) a cause independent of human control;

occurring after the goods have left the control of the corporation;

(b) as regards defects specifically drawn to the consumer's attention before the making of the contract for the supply of the goods to the consumer; or

(c) if the consumer examines the goods before that contract is made, as regards defects that the examination ought to reveal.

(3) Goods of any kind are of merchantable quality within the meaning of this section if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to:

(a) any description applied to the goods by the corporation;

(b) the price received by the corporation for the goods (if relevant); and

(c) all the other relevant circumstances."

[270] Tarangau submitted that, as Bertram appeared to acknowledge in its written submissions, these claims depend upon the court's findings as to the extent of the defects and as to whether Tarangau is a consumer. It submitted that the court should resolve these questions in favour of Tarangau.

[271] Bertram's submissions were that if the court is satisfied that Tarangau is a consumer for the purposes of the TPA, the question then becomes whether the defects are sufficient to render the vessel unfit for purpose and not of merchantable quality.

[272] Bertram acknowledged that the vessel has structural defects. Principally, Bertram submitted, this concerns the visible delamination in the P1 bulkhead, and the M3 to M6 transverse members. However this acknowledgement does not deal with all of the structural defects and design disconformities which, as I have already found, render the vessel unseaworthy, not fit for its purpose and not of merchantable quality.

[273] However the defendants' liability under the TPA depends on whether Tarangau falls within the definition of consumer.

[274] At the time of the purchase of the Bertram 570, "consumer" was defined in s 4B(1) of the TPA as:

"(1) For the purposes of this Act, unless the contrary intention appears:

(a) A person shall be taken to have acquired particular goods as a consumer if, and only if:

(i) The price of the goods did not exceed the prescribed amount; or

(ii) Where that price exceeded the prescribed amount – the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle;

> and the person did not acquire the goods, or hold himself or herself out as acquiring the goods for the purpose of re-supply…".

[275] Further, s 4B(3) provides that where it is alleged in a proceeding under the TPA that a person is a consumer, there is a presumption that a person is a consumer unless the contrary is established.

[276] Section 4C(e)(i) provides that a reference to the re-supply of goods acquired from a person includes a reference to:

> "a supply of the goods to another person in an altered form or condition".

[277] "Supply" of goods is defined in s 4 of the TPA to include:

> "supply (including re-supply) by way of sale, exchange, lease, hire or hire – purchase."

[278] The prescribed amount for the purposes of s 4B(1)(a)(i) is $40,000. Clearly, the price of the vessel in this case exceeded the prescribed amount. It is therefore necessary to determine:

> (1) whether the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; and
>
> (2) whether the goods were acquired for the purpose of re-supply.

[279] Both defendants made submissions as to whether or not Tarangau should be considered to be a consumer and it is convenient to deal with those arguments together.

Was the vessel of a kind ordinarily acquired for personal use?

[280] Tarangau submitted that the vessel was a good of the kind ordinarily acquired for personal use, being a good that was marketed as a pleasure craft, and noting that Bertram was not in the business of selling commercial vessels.

[281] Eagle Yachts did not make submissions on the first proposition. Bertram submitted that the essential character of the vessel considered on a common sense view took it beyond the description, "goods of a kind ordinarily acquired for personal, domestic or household use". Bertram focused on the price of the vessel, considered in the context of the legislative intent of the TPA as well as the ability of purchasers of multi-million dollar goods to protect themselves.

[282] Bertram referred to the decision in *Bunnings Group Ltd v Laminex Group Ltd*.[182] In that case, Young J considered the relevant case law in this area and extracted several propositions. Importantly, Young J noted that "the word 'ordinarily' means 'commonly' or 'regularly' not 'principally', 'exclusively' or 'predominantly'".[183] In the present context, it is relevant to consider the purposes for which a yacht of this kind is ordinarily, commonly or regularly acquired, not the purposes for which it was principally, exclusively or predominantly acquired.

---

[182] (2006) 153 FCR 479.
[183] At 496.

[283] Further, Young J noted that the definition of consumer should be construed in the context of the particular statutory purposes which underpin the TPA. The phrase "goods of a kind ordinarily acquired for personal, domestic or household use" should therefore be construed broadly, "so as to give the fullest relief which the fair meaning of its language will allow."[184]

[284] The decisions in *Vautin v BY Winddown Inc*[185] and *Involnert Management Inc v Aprilgrange Ltd & Ors*,[186] support a finding that the yacht in question was a good of the kind ordinarily acquired for personal use. This was the finding (albeit in an interlocutory decision) of Rares J in *Vautin*, in relation to a larger Bertram yacht. In *Involnert*, Legatt J observed that "where yachts differ from other vessels is that they are typically owned and used solely or mainly for their owner's recreation and pleasure rather than as assets employed in a business … Owning a large yacht is usually an expensive luxury rather than an enterprise carried on for profit."[187]

[285] I am satisfied that a luxury off-shore fishing yacht such as the Bertram 570 could be considered to be of a kind ordinarily acquired for personal use.

Was re-supply a substantial purpose of the purchase?

[286] The second key question is whether Tarangau acquired the Bertram 570 for the purpose of resupply. Section 4F(1)(b) of the TPA provides that a person is deemed to have engaged in conduct for a particular purpose if the person engaged in conduct for purposes including that purpose and that purpose was a *substantial* purpose.

[287] Re-supply is not defined in the TPA. However, the TPA defines "supply" as including supply by way of "sale, exchange, lease, hire or hire-purchase". Tarangau submitted that the key issue is whether it acquired the vessel or held itself out as acquiring the vessel for the purpose (being a substantial purpose) of re-supply by way of "hire".

[288] Tarangau submitted that the court would find on the evidence that the plaintiff (by Mr Wong) had dual purposes in acquiring the vessel, being:

(a) a purpose of using the vessel for pleasure; and

(b) a second, conditional, purpose of employing the vessel in the carrying on of a proposed game fishing charter business in the event that the vessel could be put into commercial survey.

[289] It submitted that the fact that Mr Wong had no unconditional purpose of acquiring the boat for re-supply is significant. Rather, he had a conditional purpose of acquiring the boat for re-supply in the event that it could be put into commercial survey. Such a conditional purpose ought not be held to engage the exception. As remedial legislation, the Act should be applied so as to give the fullest relief which the fair meaning of its language will allow.[188] It would be contrary to this principle to hold that a plaintiff with

---

[184] At 496.
[185] [2016] FCA 632.
[186] [2015] 2 CLC 307; [2015] EWHC 2225 (Comm).
[187] [2015] 2 CLC 307; [2015] EWHC 2225 (Comm) at [110].
[188] *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 41.

a conditional purpose which the evidence demonstrates was never capable of fulfilment, should be disallowed relief otherwise available to it.

[290] As Bertram submitted, that the verb "hire" is not defined in the TPA. The Macquarie Dictionary, relevantly, defines "hire" as: "To engage the temporary use of for payment." [189] The New Shorter Oxford English Dictionary relevantly defines "hire" as: "Procure (from a person) the temporary use of (a thing) for stipulated payment."[190]

[291] In *Brambles Australia Ltd v Commissioner of Taxes (NT)*,[191] the Court of Appeal of the Supreme Court of the Northern Territory considered whether the provision of cranes with an operator (known as a wet hire) to customers was a "hiring arrangement" under certain taxation legislation. The appellant in that case submitted that since possession of a crane does not pass to the customer under a wet hire arrangement, such an arrangement is not a hiring arrangement.[192]

[292] As to this argument in *Brambles*, Morling J (with whom Angel J agreed), held:[193]

> "This argument attributes to the words 'hiring arrangement' a more technical meaning than they have in ordinary English usage: cf the dictionary definition of 'to hire' referred to above. But even if the more technical meaning be adopted I think the arrangements made by the appellant for wet hires of its cranes come within the meaning of 'hiring arrangement' as defined in s 4 of the Act. … it is instructive to note how hiring arrangements of the type under consideration are categorised in *Palmer on Bailment*, (2nd ed, 1991). Palmer refers (at p 470) to cases where the owner of a chattel such as a machine makes it available, with an operator, to a third party and observes that contracts of this kind are 'normally designated a leasing or hiring of machinery'.

[293] Morling J went on to conclude:[194]

> "In a real sense what the operator of a crane does when it is on wet hire to a customer is done at the direction of the customer and not of the appellant. The fact that the operator remains the employee of the appellant does not mean that he is not acting under the direction of and on behalf of the customer, nor does it alter the essential nature of the arrangement made between the appellant and the customer, which is an arrangement for the hire of the crane."

[294] *Brambles* was considered under different legislation and according to the circumstances of that case (such as the contractual arrangements between the parties). Nonetheless, Bertram submitted that this decision of the Court of Appeal of the Northern Territory is sufficiently analogous to be persuasive in relation to any argument by Tarangau that the proposed use of the vessel for fishing charters was not a "hire" for the purposes of the TPA on the basis that possession did not pass to the charterer.

---

189 Macquarie Dictionary, Sixth edition, p 704.
190 The New Shorter Oxford English Dictionary, p 1238.
191 *Brambles Australia Ltd v Commissioner of Taxes (NT)* (1993) 92 NTR 1.
192 *Brambles* at 12. The argument was that a hiring arrangement cannot come into existence in the absence of a bailment, and a bailment cannot occur in the absence of the passing of possession of the chattel.
193 *Brambles* at 12.
194 *Brambles* at 12.

[295] The "wet hire" and "dry hire" distinction in *Brambles* has clear parallels to Tarangau's intent to charter the vessel as a "crewed" boat rather than a "bare boat".

[296] In reply, Tarangau submitted that this case is not concerned with cranes. It is concerned with an ocean-going vessel.

[297] There is a significant body of law both in the United Kingdom and Australia as to the charter of vessels.

[298] There are three forms of marine charterparty:

(a) charterparties by demise, by which the charterer takes control of the vessel (a bareboat charter);

(b) time charters, where the owner agrees to render services for a defined period, usually to transport goods. The owner of the vessel remains in possession; and

(c) voyage charters, where the owner agrees to carry persons or goods for a defined voyage, again a situation in which the owner of the vessel remains in possession.

[299] Tarangau submitted that only a charter by demise involves a hire. Thus, in *Carlton International PLC & Anor v Crayford Freight Services Ltd & Ors*[195] (reversed on appeal but not on this point), Tamberlin J said:[196]

> "In contrast to a demise charter, a time charter, like a voyage charter, is a contract for the rendering of services by the owner and not for the hiring out or parting with possession of the ship."

[300] The evidence before the court is that no bare boat charter was ever intended. Mr Pritchard in particular was emphatic that the vessel was never to be used as a bare boat charter vessel. The reason was that he and Mr Wong had known people who had been on bare boat charters and the charterer did not look after the vessel.

[301] Tarangau submitted that the court should conclude that it did not acquire, or hold itself out as acquiring, the vessel for the purpose of re-supply because:

(a) Tarangau's conditional purpose, which in the event was unfulfilled, was not a relevant "purpose" within the meaning of s 4B; and

(b) further, the proposed game fishing charter business did not involve a "hire" in any relevant sense.

[302] Tarangau submitted that the court would, accordingly, enter judgment in favour of the plaintiff on the claims under the TPA.

Consideration

[303] The plaintiff's case, as pleaded in paragraph 21(b) of the statement of claim, is that:

---

[195] (1997) 78 FCR 302 at 303.

[196] See also *Scandinavian Trading Tanker Co. A.B. v Flota Petrolera Ecuatoriana* ("*The Scarptrade*") [1983] 2 AC 694 at 700-701.

> "Prior to entering into the contract the plaintiff expressly or impliedly made it known to the first defendant [that] … the plaintiff proposed to spend money to make the yacht meet the requirements for, and to put the yacht into, commercial survey whereby the yacht could be chartered for commercial game fishing."

[304] The plaintiff particularised that material fact through discussions between Mr Wong and Mr Rodgers between late May 2006 and July 2006. Mr Wong's oral evidence referred to in this judgment also supports the pleaded case. It is a question of fact whether Tarangau purchased the vessel for the substantial purpose of re-supply as well as for personal recreational use.

[305] The Bertram 570 was acquired and held out to be acquired for a dual purpose, for personal recreational use and for the purpose of chartering for commercial game fishing. That the second purpose was a substantial purpose can be inferred from Mr Wong's actions both at the time of acquisition of the Bertram 570 and immediately afterwards. Mr Wong employed Mr Pritchard to manage his fishing charter business on the day he purchased the Bertram 570; Mr Wong took Mr Pritchard with him when considering which boat to buy; Mr Wong incorporated the company called Tarangau Game Fishing Charters Pty Ltd and executed the contract with that company as the nominee purchaser; Mr Wong, Mr Pritchard and Andew Yeh, were enrolled in courses that would enable them to operate the Bertram 570 as a commercial fishing vessel; Tarangau assiduously set about the task of putting the vessel into commercial survey; a brochure was created to be used to advertise the fishing charter business; the vessel was promoted on the trips to Lizard Island and Maroochydore; and Mr Wong made limited recreational use of the vessel before its latent structural defects were discovered.

[306] The question then becomes whether chartering the vessel for commercial game fishing falls within the definition of "supply" (which includes re-supply) in the TPA. In Bertram's submission, chartering for commercial game fishing is a "hire" within the meaning of the definition of supply. In the first instance, this is so on the plain English usage of the word "hire" defined above. Chartering a vessel for commercial game fishing is procuring the temporary use of that vessel for a stipulated charter fee. Further, as the decision cited above in *Brambles* suggests, the fact that a crew is provided to operate the vessel, does not change the fundamental nature of the arrangement as a "hire".

[307] There is significant debate about whether or not the supply of machinery with an operator, of which the chartering of a vessel with a crew is an example, represents a bailment of the vessel.[197]. But whether or not it operates as a bailment is not determinative of whether an agreement to do so, represents a hire for the purposes of the TPA. As Edelman J said in *Australian Competition and Consumer Commission v Valve Corp (No 3)*[198] bailment is not necessary for an agreement to use a chattel such as a ship to be a "hire".

> "[148] A contractual licence to use goods is, essentially, a hire without a bailment. In *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] UKHL 35; [2009] WLR 1375, 1380 [9] Lord Hope

---

197 See the discussion in *Palmer on Bailment* 2nd edition at pp 469-493; *The "Ruapehu"* (1925) 21 Ll L Rep 10 at 315-316.

198 (2016) 337 ALR 647at 678; [2016] FCA 196.

(with whom Lords Hoffmann, Rodger, Walker, and Baroness Hale agreed) said that a 'hire', without the accompanying baggage of 'bailment' of the thing was 'a contract by which the temporary use of a subject, or the work or service of a person, is given for an ascertained hire'. He quoted a definition from Bell GJ, *Commentaries on the Law of Scotland* (McLaren's ed, (7th ed, T&T Clark, 1870)), Vol I, 481:

> The contract of hiring, or *locatio conductio*, is that by which the one party agrees, in consideration of a certain hire or rent which the other engages to pay, to give to that other, during a certain time, the use or occupation of a thing; or personal service and labour; or both combined.

[149] The reference to a *locatio conductio* or, more accurately here, *locatio conductio rei* is to the Roman law concept of hire where the use and occupation of the thing gave no possessory right but only 'detention' of the thing as a personal right against the hirer. Apart from examples of *agreement to hire*, another example in English law of a hire that has no possessory effect is the hire of a ship (which is included in the inclusive list of goods in s 2). The hire of a ship is shorn from any association with bailment: *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146; [1958] 1 All ER 787 (Diplock J).

[150] There may be controversy about whether a hire of goods ever gives the hiree anything more than contractual licence. The better position is that the hiree does not obtain any proprietary right by the hire. In relation to goods (but not land) English and Australian law does not recognise a property right of 'exclusive control for a fixed period': McFarlane B, *The Structure of Property Law* (Hart Publishing, Oxford, 2008) 148-149; see also Swadling W, 'The Proprietary Effect of a Hire of Goods' in Palmer N and McKendrick E, *Interests in Goods* (2nd ed, LLP, London, 1998) Ch 20. But this controversy cannot be used to restrict the meaning of a 'supply' of goods because, on any view, a mere agreement to hire an ordinary chattel gives the hiree no more than a personal right against the hirer to the hire of the chattel."

[308] I am satisfied that the business of chartering the vessel with a crew would constitute a hire and hence a supply or re-supply of the vessel. The re-supply of the vessel was one of Tarangau's purposes in purchasing the Bertram 570. The evidence shows that it was a substantial purpose. Accordingly, Tarangau is not entitled to any remedy under the TPA.

Liability of Bertram under the warranty

[309] Tarangau pleaded its case as to Bertram's liability under the warranty in paragraphs 40 to 45 of the statement of claim as follows:

"40. On or about 22 July 2006, [Bertram] gave a written warranty to [Tarangau] in respect of the [Bertram 570].

41. The warranty is set out in a two page document headed 'Bertram yacht, Inc. Limited Warranty (USA)'.

42. By the warranty [Bertram] warranted (so far as presently relevant) that it would repair or replace defects in the [Bertram 570's] hull and its other fibreglass structural components for a period of five years.

43. On 11 November 2008 [Tarangau], by its solicitors, gave notice to [Bertram] pursuant to the Warranty of the defective condition of the hull and invited [Bertram] to appoint a marine surveyor to undertake an inspection of the [Bertram 570].

Particulars

The notice is contained in a facsimile dated 11 November 2008 from McCullough Robertson, Solicitors [Bertram] which was transmitted on 11 November 2008.

44. By email dated 13 January 2009, [Tarangau] provided a copy of its expert report to [Bertram], which report identified the structural failures in:

(a) the yacht's hull; and

(b) the yacht's fibreglass structural components.

45. On 5 March 2009 [Bertram] inspected the [Bertram 570]."

[310] All of these allegations were admitted by both defendants except that paragraph 44 was not admitted by Eagle Yachts.

[311] In paragraph 46 of the statement of claim Tarangau alleged that Bertram had failed to comply with its warranty, by failing to repair or replace the defects in the Bertram 570's hull and fibreglass structural components.

[312] To this Bertram said that it offered to undertake repairs to the Bertram 570 on or about 31 March 2009 and the offer was unreasonably refused by Tarangau.[199]

[313] In paragraphs 48 to 50 of the statement of claim, Tarangau pleaded what it alleged were the consequences of Bertram's failure to comply with the warranty. Each of those allegations was denied by Bertram.[200]

[314] The allegations made by Tarangau were as follows:

"48. As a consequence of the failure to comply with the warranty … [Tarangau] suffered loss and damage.

…

[199] Second defendant's defence para 18.
[200] Second defendant's defence paras 20-22.

49. In the premises … [Bertram] is liable pursuant to s 74G of the TPA to compensate [Tarangau] for the losses pleaded.

50. Alternatively, [Tarangau] says:

(a) [Bertram] in its … defence pleads that the warranty constitutes a contract between [Tarangau] and [Bertram];

(b) if that allegation is established, then [Tarangau] says that [Bertram] acted in breach of the terms of that contract by failing to repair or replace the defects in the [Bertram 570];

(c) by reason of that breach, [Tarangau] has suffered loss …"

[315] Bertram's case with regard to the warranty was pleaded in its defence as follows:[201]

(a) In consideration of receipt of the Bertram Warranty Card executed by Tarangau, Bertram agreed to warrant the vessel from 22 July 2006 and became bound to do so for the benefit of Tarangau in accordance with the terms of the Bertram Yacht Inc Limited Warrant (the Bertram Warranty);[202]

(b) In the premises, Tarangau had the benefit of a contractual warranty in respect of the vessel.[203] (This was admitted by Tarangau).[204]

(c) By signing the Bertram Warranty Card, Tarangau expressly acknowledged that:

(i) it had received the Owner's Manual;

(ii) "that said Warranty becomes effective upon receipt by Bertram Yacht, Inc. of this Warranty Card"; and

(iii) "that there is no other Warranty by Bertram Yacht, Inc. applicable to" the Bertram 570.[205]

(d) Material terms of the Bertram Warranty were that:

(i) Bertram "will repair or replace defects in

(a) items manufactured by Bertram for one (1) year and

(b) the yacht's hull and its other fibreglass structural components for five (5) years;"

(ii) "The foregoing is the Owner's SOLE AND EXCLUSIVE REMEDY".

(iii) the law governing the Bertram Warranty is the law of Florida, United States of America.[206] (This was admitted by Tarangau).[207]

---

[201] Second defendant's defence para 11F.
[202] Second defendant's defence para 11F(f).
[203] Second defendant's defence para 11F(g).
[204] Reply to the second defendant's defence para 3(d).
[205] Second defendant's defence para 11F(h).
[206] Second defendant's defence para 11F(i).
[207] Reply to the second defendant's defence para 3(d).

[316] To these allegations, Tarangau replied as follows:[208]

(a) It admitted that on or about 22 July 2006 Tarangau, by Mr Wong, filled out the Bertram warranty card in respect of the Bertram 570, and gave it to Mr Rodgers of Eagle Yachts;

(b) If the warranty card comprised a contract between Tarangau and Bertram as alleged (which was admitted), then the terms of the warranty relied on by Bertram to avoid or limit its liability to Tarangau were void pursuant to s 74K of the *Trade Practices Act*.

Save for admissions made, it did not otherwise admit the allegations.

[317] At the time the warranty was signed s 74G of the TPA provided:

"**74G Actions in respect of non-compliance with express warranty**

(1) Where:

(a) a corporation, in trade or commerce, supplies goods (otherwise than by way of sale by auction) manufactured by the corporation to a consumer; or

(b) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply and a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer;

and:

(c) the corporation fails to comply with an express warranty given or made by the corporation in relation to the goods; and

(d) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason of the failure;

the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.

(2) For the purposes of any action instituted by a person against a corporation under this section, where:

(a) an undertaking, assertion or representation was given or made in connection with the supply of goods or in connection with the promotion by any means of the supply or use of goods; and

---

[208] Reply to the second defendant's defence para 3.

> (b) the undertaking, assertion or representation would, if it had been given or made by the corporation or a person acting on its behalf, have constituted an express warranty in relation to the goods;
>
> it shall be presumed that the undertaking, assertion or representation was given or made by the corporation or a person acting on its behalf unless the corporation provides that it did not give or make, and did not cause or permit the giving or making of, the undertaking, assertion or representation."

[318] Bertram's liability under the TPA in respect of the warranty depends on Tarangau's being a consumer and so, for the reasons already given, Tarangau has no TPA remedy. Section 74K has no effect for the same reason. Its remedy, if any, against Bertram depends on the contract created by the express warranty.

Tarangau's submissions

[319] Tarangau submitted that the claim against Bertram pursuant to the express warranty may readily be decided in favour of Tarangau.

[320] It submitted that in the event that the court accepted Tarangau's submissions as to the expert evidence and also found that Tarangau did not unreasonably refuse Bertram's inadequate offer to repair the vessel, Bertram's single point of resistance appeared to be an argument that its obligation was limited to repairing or replacing items "found by Bertram to be defective", such that it did not oblige Bertram to repair or replace items founds by other persons to be defective.[209]

[321] The logical corollary of Bertram's contention is that if a defect is manifest but Bertram did not want to repair it, the express warranty did not require it to do so. That is, of course, the factual situation under consideration in this case.

[322] Tarangau submitted that Bertram's argument is entirely lacking in merit. It is well established that contractual powers and discretions fall to be exercised honestly and reasonably, and not arbitrarily or capriciously.[210]

[323] Further, Bertram's argument is one of construction, and the propounded construction is a profoundly uncommercial presumed intention to impute to the contracting parties. Were Bertram's argument to be correct, the purchaser would be substantially deprived of any real benefit under the express warranty. Accordingly, the court would not interpret the express warranty in the way urged. Rather, the express warranty is to be read so as to oblige Bertram to repair items "found by Bertram to be defective, acting reasonably", or to repair defective items that are reasonably discoverable upon inspection and require repair.

[324] It follows that the court would enter judgment against Bertram for breach of the express warranty.

---

[209] Outline of Submissions of the second defendant, para 122-123.

[210] See, for example, *Cheshire & Fifoot Law of Contract* (10th Australian ed.), at [10.48], citing *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 96 among other authorities.

Bertram's submissions

[325] Bertram submitted that Tarangau's claim in relation to breach of warranty is made on two bases, these being, breach of s 74G of the TPA, and alternatively, a claim for breach of contract. The breach of s 74G of the TPA is not maintainable in view of my finding that Tarangau was not a consumer.

[326] In the present case, the express warranty relied on by Tarangau is contained in the warranty. That express warranty is that Bertram will repair or replace defects in the yacht's hull and other fibreglass structural components for a period of five years.[211]

[327] It is uncontroversial that the warranty contains that term. However, that undertaking by Bertram to repair defects in the hull and structure for a period of five years is not unqualified. Importantly, that term should not be read in isolation from the remainder of the terms of the warranty. The warranty must be construed as a whole.

[328] Before considering whether Bertram failed to comply with the warranty, it is necessary to deal with several matters which arise on the terms of the warranty.

[329] The warranty provides as follows:

> "Bertram's obligation is limited to repairing or replacing at its option, any covered items found by Bertram to be defective at a facility designated by Bertram. The foregoing is the Owner's SOLE AND EXCLUSVIE REMEDY. Repaired or replaced items shall be warranted as provided herein for the remainder of the applicable warranty period above."

[330] The "covered items" under the warranty are "the yacht's hull and other fibreglass structural components" and the applicable warranty period is five years. It is not controversial that this five year period ran from 22 July 2006 to 22 July 2011.

[331] Bertram submitted that the provision makes clear that Bertram's obligation is limited to repairing or replacing items "found by Bertram to be defective". It is also made clear that this is the only remedy available to the parties under the warranty. Bertram submitted that it steadfastly endeavoured to comply with its obligation under the warranty.

Consideration

[332] Bertram pleaded that it agreed to warrant the vessel and became bound to do so for the benefit of Tarangau in accordance with the terms of the warranty, which gave Tarangau the benefit of a contractual warranty in respect of the vessel. It then pleaded what it said were the material terms of the warranty being:

(i) that Bertram would repair or replace defects in

(a) items manufactured by Bertram for one year; and

---

[211] As pleaded at para 42 of the statement of claim.

(b) the yacht's hull and its other fibreglass structural components for five years; and

(ii) that "the foregoing is the Owner's SOLE AND EXCLUSIVE REMEDY".

[333] It did not plead that the following term was a material term of the warranty:

> "Bertram's obligation is limited to repairing or replacing, at its option, any covered items found by Bertram to be defective at a facility designated by Bertram."

[334] Reference was however made to this restriction on liability in Bertram's final submissions.

[335] Its submission essentially was that this term is entirely subjective and there is no obligation on it to recognise the objective facts and repair or replace items which are defective unless it asserts that it has subjectively found them to be so. This cannot be the objective meaning of the contract.

[336] A commercial contract should ordinarily be given a commercial meaning unless a contrary intention is indicated. In considering the correct approach to construing a commercial contract, the High Court observed in *Electricity Generation Corporation v Woodside Energy Ltd*:[212]

> "this Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean…. As Ardern LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption 'that the parties … intended to produce a commercial result'. A commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience". (citations omitted)

[337] Bertram's submissions that it was not in breach of the express warranty must been seen in light of what it actually knew or must have known at the time that the claim was made under the warranty in November 2008. At that time, as the responsible boat manufacturer, Bertram must have known that it had not manufactured the vessel in conformity with the plans. It must also have known that the fibreglass hull was not manufactured in such a way as to ensure the vessel was seaworthy for the purpose for which it was manufactured and sold – as a deep sea fishing vessel. It also knew all of the numerous structural defects explicitly set out by Mr Harvey in his first report, the details of which have been referred to in these reasons, defects which were inherently likely to lead to further structural failings. An inadequate repair proposal by Bertram's employees, which did not deal with all of the structural failings of the vessel of which it knew or must have known, did not conform with Bertram's contractual duties under the express warranty. Tarangau was entitled to reject Bertram's completely inadequate proposal as to repair.

---

[212] (2014) 251 CLR 640 at 656-657.

[338] It is no answer for Bertram to say that it was entitled under the warranty to only cover items subjectively "found by it to be defective". It could not avoid liability by refusing to acknowledge known structural defects which rendered the vessel unseaworthy. The limitation does not mean "items unreasonably declared by it not to be defective when it knew that they were". Bertram's obligation was to act reasonably in fulfilling its contractual duties under the warranty and not to act arbitrarily or capriciously.[213] To construe the contract in the way sought by Bertram in its final submissions would be to deprive the warranty said to be for the benefit of Tarangau of any meaning or content and would be to give a distinctly uncommercial meaning to a commercial contract.

[339] Bertram failed to comply with its contractual duty under the warranty to repair and replace the Bertram 570's hull and other fibreglass structural components which it knew to be defective and is liable for its breach of contract.

Duty of care owed by Bertram

[340] It is not necessary in the circumstances, where contractual liability has been found, to deal with potential tortious liability but in view of the pleadings and the submissions of the plaintiff and the second defendant on this topic, I propose to deal with it. It was uncontested that if the vessel was manufactured in Florida, it was governed by Florida law.

[341] Tarangau alleged that there were a number of circumstances that were known or ought to have been known by Bertram at the time of manufacturing the Bertram 570.[214] Bertram's response is shown in parenthesis after each allegation.[215]

(a) Bertram is and held itself out as an experienced designer and builder of motorised cruising yachts, with specialist skills in the design and manufacture of luxury sport fishing yachts. (This was admitted by Bertram).

(b) The Bertram 570 would be used in open water at sea. (This was admitted by Bertram).

(c) The Bertram 570 needed to be designed and manufactured so that it would be structurally sound in conditions of operating in open waters at sea. (This was admitted by Bertram).

(d) The first retail buyer of the Bertram 570 would be at risk of personal injury, damage to property and economic loss, if the Bertram 570 was not structurally sound.

(e) It may be difficult or impossible for the first retail purchaser to be able, by reasonable examination, to identify latent defects in the structure of the Bertram 570 prior to purchasing it. (This was not admitted by Bertram).

(ea) The first retail purchaser would rely upon Bertram ensuring that the Bertram 570 was manufactured so that it was structurally sound.

---

[213] *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 96.
[214] Statement of claim para 31.
[215] Second defendant's defence para 11E.

(eb) Bertram was in a position to control whether the Bertram 570 was manufactured so that it was structurally sound. (To this and the allegation in (d) above, Bertram did not admit the allegations as the meaning of "structurally sound" was not adequately identified or sufficiently described and otherwise denied the allegations and said that the Bertram 570 was designed to meet European safety requirements for pleasure craft being used in the open sea.)

(ec) Bertram assumed a responsibility toward the first retail purchaser by offering a written warranty whereby Bertram warranted that it would replace or repair defects in the hull and other fibreglass structural components for five years. (Bertram denied this allegation and the allegation in (ea) and said its responsibility to the first retail purchaser was limited to the contractual terms and conditions contained with the written warranty provided to the first retail purchaser.)

[342] Tarangau alleged that in the premises, Bertram owed a duty of care to Tarangau, as the first retail purchaser of the Bertram 570, to use reasonable care in the design and manufacture of the Bertram 570 so as to prevent it causing injury or loss to Tarangau.[216]

[343] Bertram denied[217] that it owed such a duty of care to Tarangau because:

(a) a duty of care does not arise between a manufacturer and a third party purchaser in circumstances where the only damage suffered is pure economic loss as claimed by Tarangau;

(b) its responsibility to the first retail purchaser was limited to the contractual terms and conditions contained in the written warranty;[218]

(c) that the existence of any duty of care is to be determined by reference to the *lex loci deliciti* of the alleged tortious conduct, which is the State of Florida in the United States of America.

Particulars

(A) Under Florida law, as set out in *Tiara Condominium Association v Marsh & McLennan*, 110 So.3d 399 (Fla. 2013), citing and adopting *East River Steamship Corporation v Transamerica Delaval, Inc*, 476 U.S. 858, 106 S.Ct. 2295 (1986) the doctrine of Economic Loss Rule applies.

(B) Pursuant to the Economic Loss Rule, a manufacturer of a product, who issues a warranty, cannot be sued in tort for a defect in the property that does not damage anything other than itself, which is true whether there is privity between the owner of the product and the manufacturer or not.

---

[216] Statement of claim para 32.
[217] Second defendant's defence para 12.
[218] See first defendant's defence paras 11E(d), 11F, 12(b).

[344] To this Tarangau said that if, which it denied, Florida law governs its claim in negligence, then it admitted that that is an accurate statement of the law of Florida.[219]

[345] In paragraph 33 of the statement of claim, Tarangau alleged that Bertram breached its duty of care owed to Tarangau by:

(a) failing to securely bond the hull shell and the transverse and longitudinal structural members;

(b) failing to properly prepare the surface of the hull shell before applying the adhesive resin (so as to bond the transversal and longitudinal members to the hull shell) in such a way as to achieve lasting adhesion;

(c) failing to securely bond the structural liner sole to the transversals and to the hull shell;

(d) failing to adequately achieve bonding which contributed to the failure of other structural components of the Bertram 570;

Particulars

(i) The particulars relied on in (d) include the pulpit and foredeck and area of the anchor locker and cockpit sole which were inadequate due to poor design and/or construction detailing, specifically inadequate connection laminates between pulpit and hull/deck, small corner radii at connections leading to high stress concentrations in all itemised areas, hard spots where there is an abrupt change in the stiffness of two connected structural elements, poor gelcoat application that is intolerant of surface stresses, poor yard detail, particularly poor laminating practice, excessive gap bridging by sealant between assembled mouldings leading to cracking of sealants and loss of watertight integrity as well as generally, a contribution from those factors at (a) and (b).

(e) departing from the design of the Bertram 570, such that it was incapable of performing as designed;

Particulars

(ii) The particulars relied on in (e) include:

(A) The lack of complete bonding of the internal transverse and longitudinal members to the hull shell. Complete bonding is shown on the design drawing but there are failure of the bonds between the M3, M4, M5 and M6 transversals and the hull shell outboard of the longitudinal L2.

(B) Inadequately bonded and fastened 5083-grade aluminium angle used to secure structural liner sole to floor at bulkhead P2.

---

[219] Reply to the second defendant's defence para 4A.

(C) Watertight bulkhead P1 is not watertight.

(D) Structural liner sole not fully bonded to the transversals and hull shell.

(E) Transversals in way of the forward WC and shower sump region structural liner sole have been removed.

(F) Hull bottom strakes are concave in the bilge rather than filled with flush hull shell laminate continuing over them.

(G) Hatch fitted in watertight bulkhead P1 is not a suitably rated watertight bulkhead.

(H) Unsealed cutaways and penetrations in foam cored and timer panels not in accordance with standard GRP boatbuilding practice.

(I) Bertram departed from the design of the 570 Flybridge Cruiser in the respects identified in the document styled 'Experts' Conclave Report 27 July 2016' at Annexure A, pages 16 to 19, items 1 to 9 inclusive.

(f) constructing the structure of the Bertram 570 in such a way that contributed to other parts of the yacht not being able to contain normal movement and flexure within the intent of the design.

(iii) The particulars relied in with respect to (f) are those set out in (a) – (c).

[346] All of these allegations were denied by Bertram.[220]

[347] Tarangau alleged that all of these breaches led to the defects and the consequences of the defects referred to in its statement of claim.[221] This was denied by Bertram.[222]

Bertram's submissions

[348] As a threshold issue on Tarangau negligence claim, Bertram submitted that its liability, if any, to Tarangau must be determined by the application of foreign law. All of the alleged negligent acts or omissions of Bertram in Tarangau's claim occurred in the State of Florida in the United States of America (if at all). Tarangau's claim in negligence is thus, it was submitted, governed by Florida law as the *lex loci delicti*.

[349] In the present case, the location of the alleged negligent acts by Bertram is, it was submitted by Bertram, unequivocal. All of the acts of defective design and/or construction of the vessel alleged in the statement of claim occurred in the US State of Florida. The losses alleged in the statement of claim were felt by Tarangau in Australia. Nevertheless, the place of the alleged tort was Florida. Once it is accepted that the

[220] Second defendant's defence paras 11A, 11D, 11E, 11F, 12 and 13.
[221] Statement of claim paras 28, 29 and 34.
[222] Second defendant's defence paras 11A and 13A.

alleged negligent acts of Bertram took place in Florida, the law governing Tarangau's claim in negligence is the law of Florida.

[350] As to the application of the law of Florida to the negligence claim in this case, the only evidence before the Court is the expert legal opinion of Mr von Spiegelfeld:

> "Florida law is very clear on the issue of recoverable damages in a matter where the purchaser of a product asserts that the product is defective and the defect has damaged only the product, as opposed to causing personal injury or third party damages. Under Florida law, as set forth in the case of *Tiara Condominium Association v Marsh & McLennan*, 110 So.3d 399 (Fla. 2013), citing and adopting *East River Steamship Corporation v Transamerica Delaval, Inc*, 476 U.S. 858,106 S.Ct. 2295 (1986) adopts the doctrine of Economic Loss Rule. Pursuant to the Economic Loss Rule, a manufacturer of a product, who issues a warranty, cannot be sued in tort for a defect in the property that does not damage anything other than itself, which is true whether there is privity between the owner of the product and the manufacturer or not."

[351] It was submitted by Bertram that Mr von Spiegelfeld's opinion as to the law in Florida is based on the decision of the Supreme Court of the United States in *East River Steamship Corporation v Transamerica Delaval, Inc*.[223] Given the centrality of this judgment in the United States as to the liability of product manufacturers in negligence for pure economic loss, while not binding, it was submitted that in this court the decision of the Supreme Court in *East River Steamship* may be illustrative of the preferred approach to be taken in a negligence claim against a product manufacturer for pure economic loss.[224]

[352] *East River Steamship* was a case brought by the charterers of supertankers against the manufacturer of defective turbines that were the main propulsion units of those vessels. The charterers alleged negligence by the manufacturer and sought damages for the cost of repair to the turbines and lost income while the ships were out of service. The defendant manufacturer had sought summary judgment on the basis that the plaintiff's claim was not cognizable in tort.

[353] In unanimously upholding the defendant's motion, and after considering preceding cases, the Supreme Court stated:[225]

> "We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous …But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain – traditionally the core concern of contract law."

---

[223] *East River Steamship Corporation v Transamerica Delaval, Inc*, 476 U.S. 858,106 S.Ct. 2295 (1986).

[224] Of note, *East River Steamship* was referred to by the High Court in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 at [121] per Crennan, Bell and Keane JJ.

[225] *East River Steamship Corporation* at 870.

The Supreme Court went on to state:

> "…we adopt an approach similar to Seely and hold that a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself. 226
>
> …When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong.227
>
> … Damage to a product itself is most naturally understood as a warranty claim. 228
>
> … Recovery on a warranty theory would give the charterers their repair costs and lost profits, and would place them in the position they would have been in had the turbines functioned properly …Thus, both the nature of the injury itself and the resulting damages indicate that it is more natural to think of injury to a product itself in terms of warranty.229

[354] The judgment of the Supreme Court of the United States in *East River Steamship Corporation* makes its position plain that the liability of product manufacturers for pure economic loss is the province of contract (ie the warranty) and not negligence. Further, and as Mr von Spiegelfeld notes, following *Tiara Condominium Association v Marsh & McLennan*,[230] the Supreme Court of Florida has adopted that approach for pure economic loss in the products liability context.

[355] Bertram submitted that in the event this court is not persuaded that the law of Florida applies to defeat the negligence claim against Bertram, then it is submitted that Tarangau's negligence claim also fails under Australian law. Specifically, Bertram submitted that no duty of care arose between Bertram and Tarangau. Establishing such a duty of care is, of course, a necessary element of Tarangau's claim in negligence.

Tarangau's submissions

[356] Tarangau submitted that there was no evidence before the court establishing that the negligent acts or omissions in the course of manufacture happened in Florida.

[357] Tarangau submitted that there are contrary indications. In *Vautin v BY Winddown, Inc (No 2)*,[231] Rares J made the following findings of fact:

> "[24] Bertram's solicitor gave evidence on information and belief based on what a former vice-president of Bertram and Florida resident, Donald Jones, told him. Mr Jones said that:
>
> He had retired in 2014;

---

226 *East River Steamship Corporation* at 871.
227 *East River Steamship Corporation* at 871.
228 *East River Steamship Corporation* at 872.
229 *East River Steamship Corporation* at 873 to 874.
230 *Tiara Condominium Association v Marsh & McLennan*, 110 So.3d 399 (Fla. 2013).
231 [2016] FCA 1235.

> Bertram's office was in Florida;
>
> All of Bertram's personnel, including builders, were located in Florida or elsewhere in the United States."

[358] Tarangau submitted that Bertram bears the onus[232] and was in a position to lead evidence on this issue but chose not to do so. It failed to establish that the negligent acts or omissions occurred in Florida. This disposed, it was submitted, of Bertram's contention that the claim is governed by Florida law, and it is not necessary to canvass conflict of law principles. The governing law is presumed to be that of Queensland.[233]

Consideration

[359] In *Regie Nationale des Usines Renault SA v Zhang*,[234] the High Court held that the law governing a claim in relation to a tort committed in another country is the *lex loci delicti*, the law of the place of the alleged wrong. The High Court held:[235]

> "The submission by the Renault companies is that the reasoning and conclusion in *Pfeiffer* that the substantive law for the determination of rights and liabilities in respect of intra-Australian torts is the *lex loci delicti* should be extended to foreign torts, despite the absence of the significant factor of federal considerations, and that this should be without the addition of any 'flexible exception'. That submission should be accepted."

[360] In *Dow Jones & Co Inc v Gutnick*,[236] Gleeson CJ, McHugh, Gummow and Hayne JJ held:

> "locating the place of commission of a tort is not always easy … In the end the question is 'where in substance did this cause of action arise'? In cases, like trespass or negligence, where some quality of the defendant's conduct is critical, it will usually be very important to look to where the defendant acted, not to where the consequences of the conduct were felt."

[361] It is uncontroversial in this case that Bertram issued the warranty for the vessel.[237] Further, it is clear on the evidence that Tarangau, by Mr Wong, completed the Bertram warranty card, returned it to Bertram and thereby became the beneficiary of a five year warranty in respect of the vessel's hull and structural components. The only damage claimed in this matter is to the vessel itself. In those circumstances, Mr von Spiegelfeld's summary above makes it plain that, pursuant to the economic loss rule, the law of Florida is that Bertram cannot be sued in tort for defects in the vessel that do not damage anything other than itself. This is so even in the event that the defects to the vessel caused a risk of injury.

[362] Tarangau's argument that Bertram failed to prove that the vessel was constructed in Florida can be relatively easily disposed of. The reference to a finding made in *Vautin v*

---

[232] *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 518-519.
[233] *Neilson v Overseas Projects Corp of Victoria* (2005) 223 CLR 331, 372.
[234] *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.
[235] *Zhang* at 515 and 520 at [75] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.
[236] *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 606, [43] per Gleeson CJ, McHugh, Gummow and Hayne JJ.
[237] Exhibit 73.

BY Winddown, Inc (No 2) on the evidence led in that case is irrelevant to the determination of the facts on the evidence led in this case.

[363] It was an agreed fact that the country of manufacture was the United States of America.[238] Mr Campagnuolo's cross-examination by Tarangau's counsel proceeded on the factual basis that the place of manufacture of the Bertram 570 was in Miami, Florida and it was never suggested to him that it was manufactured anywhere else. So Tarangau's submission is not supported by the evidence in this case. The law of Florida is the *lex loci delicti*. The law of Florida does not admit of any tortious liability in the factual situation of this case and so Tarangau has no claim in negligence against Bertram.

Loss to the plaintiff

Eagle Yachts

[364] Tarangau alleged that by reason of Eagle Yachts' breaches of contract, Tarangau has suffered the following loss:[239]

(a) loss of the market value of the Bertram 570 would have had if it had conformed to the contract $2,200,000

less the market value of the Bertram 570 at time of delivery: $266,100

$1,933,900

[365] Tarangau also claimed interest pursuant to s 47 of the *Supreme Court Act* 1995 and costs.

[366] The measure of damages for the sale of a product which is not fit for its purpose or not of merchantable quality at common law as codified in sale of goods legislation is:[240]

> "The measure is the market price of goods at the contractual time for delivery, less the contract price (if the latter has not been paid to the seller). This is the amount of money theoretically needed to put the promisee in the position that would have been achieved if the contract had been performed."

[367] Accordingly, Tarangau's entitlement to damages is the difference between actual market value of the Bertram 570 and the actual price paid. As against Eagle Yachts, Tarangau is entitled to damages in the sum of $1,933,900 plus interest pursuant to the *Supreme Court Act*.

Bertram

[368] Tarangau's claim against Bertram was:

(a) $1,933,900 alternatively $1,239,919 or $852,950, damages for negligence;

---

[238] List of facts and matters not in issue paragraph 3.
[239] Statement of claim paras 37, 51.
[240] *Clark v Macourt* [2013] HCA 56 at [28]; (2013) 233 CLR 1 at 12.

(b) $1,933,900 compensation, alternatively $1,239,919 or $852,950 pursuant to each of sections 74B and 74D of the TPA;

(c) $1,933,900 compensation, alternatively $1,239,919 or $852,950 pursuant to s 74G of the TPA;

(d) Alternatively, $1,933,900 or $1,239,919 or $852,950 damages for breach of contract;

(e) Interest pursuant to s 47 of the *Supreme Court Act* 1995 (Qld); and

(f) costs.

[369] Tarangau was successful in its claim for damages for breach of contract so I will consider what damages should be awarded under paragraph (d).

Tarangau's submissions

[370] It was submitted that the appropriate measure of damage on the claim as against Bertram under the express warranty is the repair costs put forward by Mr Wright, whose evidence would be accepted.

[371] The argument of Bertram that loss should be assessed as at 8 April or 4 June 2009 as the dates of breach of the express warranty is misconceived.[241] The express warranty imposed a continuing contractual obligation on Bertram. In the case of failure to perform a continuing contractual obligation, every daily breach gives rise to a separate cause of action.[242] Thus, there was an ongoing breach of the express warranty by Bertram every day upon which it failed to honour its obligation until expiry of the express warranty in 2011. When the warranty expired, Bertram had an accrued obligation to repair the vessel. That obligation has been quantified as at 2016 by Mr Wright. The measure of damages is his repair costs at the date of Wright Report 2, plus interest from that date.

[372] In these circumstances, there is no sound reason in principle as to why quantum would not be assessed on the basis of the assessment of Mr Wright.

Bertram's submissions

[373] Bertram submitted that if Tarangau's claim under the warranty for breach of contract is established then arguably the breach occurred by the second defendant on either:

(a) 8 April 2009 when the alleged insufficient repair offer was made by Bertram to Tarangau; or

(b) 4 June 2009, when Tarangau refused the offer of repair as inadequate.

[374] It was submitted that the measure of damages for the alleged breach of contract outlined above, is the difference between the market value of the yacht (fully functional and completely repaired) as at either 8 April 2009 or 4 June 2009 and the market value of

---

[241] Outline of Submissions of the second defendant para 161-164.

[242] *Larking v Great Western (Nepean) Gravel Ltd* (in liq) (1940) 64 CLR 221; *Shaw v Shaw* [1954] 2 QB 429.

the yacht in its actual condition as at those dates (noting that the valuation dates will depend upon when the alleged breach of contract is found to have occurred).

[375] It is further submitted that the diminution in value of the yacht (notwithstanding any alleged defects), is a relevant consideration for the assessment of damages.

[376] On the other hand, the cost of repairing the yacht as at the date of trial is not a relevant consideration for determining the appropriate measure of damages in relation to the warranty claim. Such a consideration is more akin to assessment for purposes of orders for specific performance (for example, orders to repair the yacht at the present time). Specific performance is only available if damages are an inadequate remedy.

[377] Tarangau has the onus of proof in respect of a claim for contract damages. Presently, there is no evidence before the Court in respect of the valuation of the yacht as at 2009 in either a repaired or unrepaired state.

[378] It was submitted that neither the purchase price of the yacht or the cost of performing repairs has any direct connection the value of the yacht at the relevant times.

Measure of damages under breach of contract/warranty

[379] Damages for breach of contract should be such as to put Tarangau in the position that it would have been if the warranty contract had been performed. The principle to be applied to the assessment of damages for breach of contract has been confirmed by the High Court in *Clark v Macourt*.[243] Hayne J set out the applicable principle about which there was no dispute:[244]

> "a plaintiff who sues for breach of contract is to be awarded as damages 'that sum of money which will put the party who has been injured … in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'.[245] … when a contract has been breached, the position in which the plaintiff is to be put, by an award of damages, is the position in which the plaintiff would have been *if the contract had been performed*.[246]

[380] His Honour held that the measure of the plaintiff's loss in that case was "the loss of the value of what the *promisee would have received* if the promise had been performed."[247] The plaintiff should have received "the value of what should have been, but was not, delivered under the contract."[248]

[381] Crennan and Bell JJ held:[249]

---

[243] (2013) 253 CLR 1, 6; [2013] HCA 56.
[244] At [7], p 6.
[245] *Livingstone v Rawyards Coal Co* (1880) LR 5 App Cas 25 at 39.
[246] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 286 [13]. See also *Robinson v Harman* (1848) 1 Ex 850 at 855 [154 ER 363 at 365].
[247] At [10], p 7.
[248] At [13], p 8.
[249] At [26]-[27], p 11.

> "The applicable principle, confirmed in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* and traceable to *Robinson v Harman*, is that damages for breach of contract are to put the promisee, so far as money can do it, in the same situation as if the contract had been performed as promised. Different, even cumulative, heads of damage may be pleaded by a plaintiff, depending on the type of contract involved and the kinds of breach and damage occasioned, provided there is no double recovery."

[382] There is evidence before the court, in Wright Report 2, that the vessel can be restored to the position it ought to have been in if Bertram had performed its obligation under the warranty for $1,239,919 (as at 7 March 2016). The cost of the repairs which should have been carried out at the date of breach was $852,950 and usually damages are assessed as at the date of breach in the performance of the contract at the time that performance was promised. But a breach of warranty is a continuing breach and the breach led to further consequences to the condition of the vessel. Had the vessel been properly repaired in accordance with Bertram's contractual duties under the warranty it would not have continued to deteriorate. The failure of Bertram to repair the vessel in accordance with its contractual duties has led to further damage for which Bertram must be held responsible. This is the loss sustained by Tarangau because of Bertram's breach of warranty and therefore is the measure of damage which is appropriate to place it in the same position it would have been in if the contract found in the express warranty had been performed.[250]

[383] As against Bertram, Tarangau is entitled to be awarded damages in the sum of $1,239,919 and interest pursuant to s 47 of the *Supreme Court Act* from the date of that estimate of repair costs (7 March 2016) until the date of judgment.

Proportionate liability

[384] As to proportionate liability, Eagle Yachts pleaded that the *Civil Liability Act* 2002 (NSW) applies to this claim.[251]

[385] Eagle Yachts alleged[252] that the claim brought by Tarangau against it:

(a) is a claim for economic loss;

(b) arose from the alleged failure of Eagle Yachts to take reasonable care to ensure that the Bertram 570 complied with the implied terms that it was reasonably fit for its purpose and of merchantable quality.

[386] Eagle Yachts alleged[253] the claims brought by Tarangau against Bertram are claims for economic loss and arose from the alleged failure of Bertram to take reasonable care in the design and construction of the Bertram 570. In fact, as I have found, Tarangau has succeeded against Bertram for the economic loss caused by Bertram's breach of warranty.

---

[250] *Robinson v Harman* (1848) 1 EX 850 at 855 [154 EX 363 at 365]; *Clark v Macourt* [2013] HCA 56 at [106] per Keane J.
[251] First defendant's defence para 54.
[252] First defendant's defence para 56.
[253] First defendant's defence para 57.

[387] Eagle Yachts alleged that as each of the defendants is alleged to have caused the damage or loss suffered by Tarangau, they are (in the event Tarangau's case succeeds) concurrent wrongdoers within the meaning of s 34 of the *Civil Liability Act*.[254]

[388] Eagle Yachts alleged that it was not responsible for the design and manufacture of the Bertram 570 and any defects were manufacturing issues that it could not have identified prior to the sale of the Bertram 570 to Tarangau.[255]

[389] Further and in the alternative, Eagle Yachts alleged:[256]

(a) the *Civil Liability Act* 2003 (Qld) applies to this claim;

(b) it repeated and relied upon paragraphs 55 to 61 of its defence save that Bertram's acts or omissions were an independent cause of Tarangau's loss.[257]

[390] Tarangau joined issue with those allegations.[258]

[391] Eagle Yachts submitted that whether the *Civil Liability Act* of New South Wales or Queensland applies to this claim the result would be the same as their content and application are substantially the same.

[392] In this case Eagle Yachts submitted that the court should apportion any damages to Bertram. It submitted that when considering this question the court should take into account that Eagle Yachts terminated its dealer agreement with Bertram in around 2013. The termination was due to not selling many boats over a period of time. It submitted that to the extent that the court finds that Bertram is responsible for any damage to Tarangau, it would be unjust to fail to apportion all liability to Eagle Yachts.

Consideration

[393] Sections 34 and 35 of the *Civil Liability Act* (NSW) relevantly provide:

"**34 Application of Part**

(1) This Part applies to the following claims (*apportionable claims*):

(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury,

(b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 42 of that Act (as in force before its repeal by the *Fair Trading Amendment (Australian Consumer Law) Act 2010*) or under the *Australian*

---

254 First defendant's defence paras 57 and 58.
255 First defendant's defence paras 60, 61, 25(h).
256 First defendant's defence para 62.
257 First defendant's defence para 62.
258 Reply to first defendant's defence para 6.

Consumer Law (NSW) for a contravention of section 18 of that Law.

(1A) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

(2) In this Part, a *concurrent wrongdoer*, in relation to a claim, is a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

(3) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).

…

(4) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

35 Proportionate liability for apportionable claims

(1) In any proceedings involving an apportionable claim:

(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss, and

(b) the court may give judgment against the defendant for not more than that amount.

(2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:

(a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part, and

(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

(3) In apportioning responsibility between defendants in the proceedings:

(a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law, and

(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

(4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.

(5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise."

[394] Sections 30 and 31 of the *Civil Liability Act* (Qld) provide:

"**30 Who is a concurrent wrongdoer**

(1) A concurrent wrongdoer, in relation to a claim is a person who is 1 of 2 or more persons whose acts or omissions caused, independently of each other, the loss or damage that is the subject of the claim.

(2) For this part, it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or had died.

31 Proportionate liability for apportionable claims

(1) In any proceeding involving an apportionable claim —

(a) the liability of a defendant who is a concurrent wrongdoer in relation to the claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just and equitable having regard to the extent of the defendant's responsibility for the loss or damage; and

(b) judgment must not be given against the defendant for more than that amount in relation to the claim.

(2) If the proceeding involves both an apportionable claim and a claim that is not an apportionable claim —

(a) liability for the apportionable claim, to the extent it involves concurrent wrongdoers, is to be decided in accordance with this part; and

(b) liability for the other claim and the apportionable claim to the extent it is not provided for under paragraph (a), is to be decided in according with the legal rules, if any, that, apart from this part, are relevant.

(3) In apportioning responsibility between defendants in a proceeding the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceeding.

(4) This section applies to a proceeding in relation to an apportionable claim whether or not all concurrent wrongdoers are parties to the proceeding."

[395] In *ABN AMRO Bank NV (ARBN 84 079 478 612) v Bathurst Regional Council*[259] the Federal Court of Australia considered the application of the *Civil Liability Act* (NSW) to a contract claim and said:

> "[1508] The question of apportionment of loss is a matter of judgment and discretion on which reasonable minds might differ.
>
> [1509] In *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALR 529 at 532; 59 ALJR 492 at 493–4, the High Court stated, in context of contributory negligence, that:
>
> > A finding on a question of apportionment is a finding upon a 'question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds': *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197 at 201; [1943] 1 All ER 33 at 35. Such a finding, if made by a judge, is not lightly reviewed.
>
> [1510] Here, the primary judge assessed the correct questions, principally:
>
> > (1) the relative culpability of the conduct of each of LGFS, S&P and ABN Amro. In other words, the nature of each one's wrongdoing and its seriousness relative to that of the others; and
> >
> > (2) the relative importance of the conduct of each of those parties in causing the loss."

[396] The application of the provisions of the Queensland act was considered in *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd as trustee for the G & M Geldard Family Trust*[260] where the court determined that to be a concurrent wrongdoer within the meaning of s 30 of the *Civil Liability Act* the acts must be independent of each other and must independently cause damage:

> "… It follows that proof that an act or omission of a person other than a defendant was an independent cause of the claimed loss or damage is necessary before any occasion arises to consider whether or how a defendant's liability should be limited under s 31. A plaintiff's cause of action is complete without any evidence that there is a concurrent wrongdoer; the plaintiff is entitled to recover its proved loss in full from a defendant who is proved to be legally liable for that loss. If a defendant wishes to achieve a different result, the onus must be on the defendant to prove the necessary facts. As McDougall J explained in the paper cited earlier,[261] that conclusion is also suggested by the circumstance identified by

---

[259] (2014) 99 ACSR 336 at 642.
[260] [2013] 1 Qd R 319.
[261] Justice Robert McDougall, "*Proportionate Liability in Construction Litigation*" (2006) 22 BCL 394, 400.

> Professor McDonald in an earlier paper[262] that in some cases the defendant will be in a better position than the plaintiff to identify concurrent wrongdoers, and by Kirby P's observation in *Platt v Nutt*[263] that '… the general rule which obtains in our courts, namely that those who assert must prove'. It is necessary to add only a reference to s 32, which was discussed in the parties' submissions. Subsection 32(1) imposes upon a claimant an obligation to claim against every person 'the claimant has reasonable grounds to believe may be liable for the loss or damage'. If a concurrent wrongdoer contends that the claimant has failed to comply with that obligation, the concurrent wrongdoer may apply under s 32(4) for orders the court considers just and equitable 'on … apportionment of damages proven to have been claimable' and costs thrown away by the failure. These provisions are consistent with the trial judge's conclusion that the onus lay upon the appellants to prove the facts necessary for any application of the legislation.[264]

[397] The submission that there is an apportionable claim under the *Civil Liability Act* must be rejected, because in order for there to be an apportionable claim, the court would in the first place need to make a finding that the claim against Eagle Yachts is one arising from a failure on its part to take reasonable care: *Civil Liability Act* 2002 (NSW), s 34(1). There is no basis for a finding that Eagle Yachts failed to take reasonable care. None of the information before it prior to the sale to Tarangau suggested that the vessel was defective. Indeed, such evidence as to the condition of the vessel as was before Eagle Yachts provided confidence that the vessel was sound.

Conclusion

[398] Tarangau is entitled to succeed against Eagle Yachts for its breach of terms implied into the contract of sale that the Bertram 570 would be fit for its purpose and of merchantable quality. The measure of its loss is $1,933,900 together with interest pursuant to s 47 of the *Supreme Court Act* 1995 from 22 July 2006 until the date of judgment.

[399] Tarangau is entitled to succeed against Bertram for its breach of the terms of the express warranty. The measure of damages is $1,239,919 together with interest pursuant to s 47 of the *Supreme Court Act* 1995 from 7 March 2016 until the date of judgment.

[400] I shall hear the parties as to the precise form of orders and any consequential orders to be made and as to costs.

---

[262] B McDonald, "Proportionate Liability in Australia: The Devil in the Detail" (2005) 26 Aust Bar Review 29.
[263] (1988) 12 NSWLR 231 at 238.
[264] *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd* [2013] 1 Qd R 319 at [61].