SUPREME COURT OF QUEENSLAND

CITATION:	*Larsson & Anor v Dudney & Anor* [2018] QCA 250
PARTIES:	**STEVEN WILLIAM LARSSON** (first appellant) **MARGARET GAYLE LARSSON** (second appellant) **v** **DINAH SUSAN DUDNEY** (first respondent) **WALDEMAR GEORGE REINTALS** (second respondent)
FILE NO/S:	Appeal No 11022 of 2017 DC No 86 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2017] QDC 248 (Reid DCJ)
DELIVERED ON:	3 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	9 May 2018
JUDGES:	Morrison and Philippides JJA and Daubney J
ORDERS:	**1. Appeal dismissed.** **2. The appellants pay the respondents' costs of and incidental to the appeal.**
CATCHWORDS:	TRADE AND COMMERCE – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – WHAT CONSTITUTES – where the respondents purchased a motor catamaran from the appellants – where the vessel seemed satisfactory, until a year later, when a starboard engine failed – where it was then discovered the vessel had an unrevealed history of engine failures – where the respondents commenced proceedings contending that the appellants had engaged in misleading or deceptive conduct – where it was submitted on appeal that there was no finding made by the learned primary judge of misleading or deceptive conduct on the part of the first respondent, only a finding of fraud – whether the learned primary judge erred MISLEADING OR DECEPTIVE CONDUCT GENERALLY – CHARACTER OR ATTRIBUTES OF CONDUCT OR REPRESENTATION – RELIANCE,

INDUCEMENT AND CAUSATION – where the learned primary judge found that the respondents would not have entered into the contract to purchase the vessel if they were aware of its true history – where prior to the sale a sea trial was held and friends of the respondents attended in order to advise as to the purchase of the vessel – where it was found that representations made by the appellants to one of the friends induced the respondents to enter into a contract of sale – where the appellants submitted that the finding made by the learned primary judge conflated the separate issues of reliance and causation and that reliance could not be established based on the evidence – where the evidence consisted solely of witness testimony – whether the learned primary judge incorrectly held that the respondents relied upon representations made by the appellants

MISLEADING OR DECEPTIVE CONDUCT GENERALLY – CHARACTER OR ATTRIBUTES OF CONDUCT OR REPRESENTATION – SILENCE AND NON-DISCLOSURE – where the sale agent acting on behalf of the appellants knew of the history of the engine failures – where following the sea trial, he asked the respondents whether they had been told of a problem with the engines and failed to correct their belief that there had been an issue with only one engine – where it was submitted by the appellants that there was no evidence to substantiate a finding that there was a duty on the part of the agent to correct this misunderstanding – whether the learned primary judge erred in finding so

APPEAL AND NEW TRIAL – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – WHERE FINDINGS BASED ON CREDIBILITY OF WITNESSES – where the appellants submitted that there was no reasonable evidentiary basis for several findings made by the learned primary judge – where evidence was accepted that the first appellant had said only one engine had been replaced due to engine mount issues which had been resolved – where the learned primary judge found that the history of the engine failures was such that it was not reasonable to think the change to the engine mounts had fixed the problem and to say so was reckless – where the appellants contended there was evidence to support such a belief but did not challenge the credibility findings – whether the learned primary judge erred

Competition and Consumer Act 2010 (Cth), Sch 2 s 18

Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31; [1992] FCA 557, cited
Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd (2010) 241 CLR 357; [2010] HCA 31, cited

COUNSEL: P Roney QC, with S Deaves, for the appellants

S McLennan for the respondents

SOLICITORS: Macrossan and Amiet for the appellants
Kelly Legal for the respondents

[1] **MORRISON JA:** In November 2011, the respondents purchased a motor catamaran, the "Belle de Jour", from the appellants. They intended that it be used for charter work. For a time the vessel seemed satisfactory but then, about a year after its purchase, the starboard engine failed. That led to the discovery that the vessel had an unrevealed history of engine failures. In March 2013 the respondents rescinded the contract.

[2] The respondents issued proceedings contending that the appellants, by not revealing the history of engine failures, had engaged in misleading or deceptive conduct, or conduct likely to mislead or deceive, under s 18 of the *Australian Consumer Law*, being part of Schedule 2 of the *Competition and Consumer Act* 2010 (Cth). They said they would not have purchased the vessel had they known the truth. They sought rescission of the purchase contract and damages for misrepresentation.

[3] The appellants denied making any misrepresentations regarding the history of the vessel, and further alleged that the respondents had not demonstrated that they relied upon any alleged misrepresentations in entering the contract of sale. They also contended that the respondents had affirmed the contract in November 2012. Finally, the appellants relied on an exclusion clause in the contract.

[4] The learned trial judge found that the appellants had misrepresented the vessel's condition in order to induce the respondents to purchase the vessel. His Honour ordered rescission of the contract and awarded $340,000 damages and interest.[1]

[5] The appellants appeal that decision.[2] For the reasons which follow the appeal should be dismissed.

[6] The Notice of Appeal sets out 14 grounds of appeal. Five of those[3] were not pressed at the hearing before this Court. The remainder can be collated into four categories:

(a) *reliance*: grounds (a), (b) and (g): whether the learned trial judge incorrectly held that the respondents relied upon misrepresentations made by the appellants;

(b) *fraud*: grounds (a) and (b): whether the learned trial judge erred by finding fraud;

(c) *reasonableness of belief*: ground (c): whether the learned trial judge incorrectly held that Mr Larsson could not have reasonably believed that the new engine mounts had solved the problem of the prior engine failures;

(d) *misrepresentation by silence*: grounds (d), (e) and (j): whether the appellants' sale agent (Mr Brooks) should have disclosed the history of the vessel to the respondents and whether the learned trial judge erred in rejecting his evidence; and

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1 *Dudney & Anor v Larsson & Anor* [2017] QDC 248. (**Reasons below**)

2 The appellants also filed an application to adduce further evidence but that was not pressed.

3 Grounds (h), (i), (l), (m) and (n). That meant there was no challenge to the form of relief in the event that other grounds failed.

(e) *misrepresentations via Mr Earea*: grounds (f) and (k): whether there was an evidentiary foundation to find that Mr Earea was told only one engine was replaced and whether he passed on that misrepresentation.

General history of the Belle de Jour and its purchase

[7] Much of what follows is taken from the findings of the learned trial judge.[4]

[8] The Belle de Jour had been launched in late 2007. It was purchased by the appellants in May or June 2008 for $538,490, with the intention of putting it to charter with Cumberland Charter Yachts.

[9] After the vessel was delivered to Cumberland Charter Yachts it was discovered that prior to the purchase by the appellants, the vessel had "seized an engine or cracked a block"[5] and both its engines had been replaced. The original starboard engine was replaced on 29 January 2008, and the original port engine was replaced in January 2008.

[10] The Belle de Jour went immediately into charter. During its time under the appellants' ownership there were three further engine failures, the relevant engine being replaced under warranty each time:

(a) 12 October 2009: the port engine was removed after developing a crack and replaced on 16 October 2009;[6]

(b) 25 March 2010: the starboard engine was replaced;[7] and

(c) 12 August 2010: the port engine was replaced again.

[11] During that time two tachometers were also replaced under warranty.

[12] At the time of the replacement of the port engine in August 2010, a vibration was discovered and after a series of communications over the next five months, the manufacturer (Volvo Penta) eventually provided a new set of engine mounts to be installed.

[13] In April 2011 the Belle de Jour was listed for sale. The appointed sales agent was a firm, Maurice Drent Boating Services (**MDBS**), with Mr Neville Brooks as its director.

[14] In June 2011, the vessel was moved from Cumberland Yacht Charter to Queensland Yacht Charter on a 12 month contract. Then, in November 2011, the respondents expressed interest in the vessel.

[15] After the installation of the engine mounts on 3 June 2011 the appellants did not experience any further problems with the engines in the vessel. Thereafter the vessel operated using the starboard engine installed on 25 March 2010, and the port engine installed on 12 August 2010, and utilising new engine mounts. That was the set-up of the vessel at the time the respondents tested it during a sea trial on 12 November 2011.

[16] The appellants were in a partnership carrying on the business of pearl jewellery and chartering yachts in the Whitsunday region of Queensland. After viewing an

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4 Reasons below [5]-[9], [12]-[14], [16], [26], and [33]-[34].
5 Appeal Book (**AB**) 386 lines 25-37.
6 This was the port engine that replaced the original engine in January 2008.
7 This was the starboard engine that replaced the original engine on 29 January 2008.

advertisement in the window of MDBS, they approached Mr Brooks and that same day, met the appellants on the Belle de Jour. At this meeting a conversation took place in which Mr Larsson told the respondents that the Belle de Jour was a "great boat" and "it's easy to look after". It was agreed that a sea trial would be conducted, with the understanding that friends of the respondents would come along as the respondents themselves were novices in these types of boats.

[17] The sea trial occurred on 12 November 2011. Mr Larsson and Mr Brooks took the respondents and three guests, Mr Kerr,[8] Mr Earea and Mr Cockburn, out on the vessel. These three guests were very experienced mariners, whereas Mr Reintals was not.

[18] Following the sea trial, but the same day, Mr Reintals phoned Mr Brooks and made an offer for the Belle de Jour. A written sale contract was signed on 14 November 2011, and a bill of sale on 17 November 2011.

[19] Thereafter, the history of matters concerning the Belle de Jour was:

(a) the respondents signed an agreement retaining the charter of the vessel with Queensland Yacht Charters until 17 November 2012;

(b) on 3 November 2012 the starboard engine failed again, due to a crack that occurred at the same approximate point as the previous engine failures;[9]

(c) after this occurred the operations manager at Queensland Yacht Charters indicated to the respondents[10] that he was aware of at least two other previous engine failures and, acting on their behalf, reached an agreement with Volvo Penta that a discounted replacement engine could be supplied;

(d) the respondents sought legal advice;

(e) the charter agreement was extended with Queensland Yacht Charters; and

(f) at the time of the trial the vessel inoperable due to the cracked engine.

The meeting after the sea trial

[20] There was a dispute as to what happened immediately after the sea trial.

[21] The appellants alleged that Mr Reintals met with Mr Larsson and Mr Brooks, at which he was told of the previous engine failures. The respondents alleged that such a meeting did not occur, that they had had lunch with their three guests (Kerr, Earea and Cockburn) instead and then decided to make an offer.

[22] The learned primary judge found that the meeting following the sea trial, as claimed by the appellants, had not occurred. Instead, it was found that Mr Reintals, Ms Dudney and their three guests went to lunch, and after a discussion, Mr Reintals called Mr Brooks and offered to buy the vessel.

Approach of the learned trial judge and relevant findings

[23] The learned trial judge was confronted with differing accounts of what occurred, principally: (i) what was said during the sea trial; (ii) whether there was a meeting afterwards and who was party to it; and (iii) what was said or not said by the agent

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8 Who had died prior to the trial.

9 As found by the learned trial judge, Reasons below [7].

10 By email correspondence dated 7 November 2012: Exhibit 5, AB 823.

Brooks. The resolution of those matters involved the learned trial judge making findings of credit, then factual findings following that.

Findings of credit

[24] On the appeal Senior Counsel for the appellants made it clear that there was no attempt to challenge findings as to credit, though it was urged that the evidence nonetheless did not support the factual findings.[11]

[25] The learned trial judge accepted the evidence of Mr Moss as to the location of an oil leak when the engine failed in November 2012. That was the foundation of the finding that that failure was at the same location as that of the earlier failures.[12]

[26] Mr Larsson's evidence as to the retainer of Mr Brooks, that Mr Brooks was told about the history of engine failures, was accepted.[13]

[27] The evidence of Mr Earea as to what occurred during the sea trial was preferred to that of Mr Larsson and Mr Cockburn. His Honour found that his memory was clearer and he was accurate as to the events.[14]

[28] The evidence of Mr Cockburn as to the meeting after the sea trial was rejected as being mistaken.[15]

[29] Mr Larsson's evidence as to the conversations during the sea trial was rejected as inconsistent with that of Mr Earea, Mr Cockburn and the respondents.[16] Further, there was a significant difference between Mr Larsson's evidence and what had been put to Mr Earea in cross-examination about the conversations, which significantly and adversely reflected upon Mr Larsson's credit.[17]

[30] Mr Larsson's evidence as to what was said at a meeting between him, Mr Brooks and Mr Reintals after the sea trial was rejected as inconsistent with that of Mr Earea, Mr Cockburn and the respondents.[18]

[31] Similarly, Mr Brooks' evidence as to the meeting after the sea trial, and what was said at that meeting, was rejected.[19]

[32] The evidence of Mrs Brooks as to the meeting after the sea trial was also rejected as being of doubtful accuracy.[20]

[33] The evidence of Mr Earea and the respondents was accepted (and that of Mr Brooks rejected) as to the meeting after the sea trial, and how the offer to buy the Belle de Jour evolved.[21]

[34] The learned trial judge said that he had "significant doubts about the credit" of both Mr Larsson and Mr Brooks.[22] His Honour rejected Mr Brooks' evidence that he

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11 Appeal transcript T1-7.
12 Reasons below [7]-[8].
13 Reasons below [53].
14 Reasons below [20]-[22].
15 Reasons below [7]-[8].
16 Reasons below at [18]-[19], [21], [42].
17 Reasons below [43]-[47].
18 Reasons below [22]-[24], [42].
19 Reasons below [42].
20 Reasons below [48]-[50].
21 Reasons below [51]-[52], [63].
22 Reasons below [53].

had no memory of the actual circumstances surrounding reaching the sale agreement of the Belle de Jour, finding that "he either has a surprisingly poor memory for the events or he was not being entirely truthful when giving his evidence". His Honour considered the latter more likely but it was not necessary to form a concluded view on that issue.[23]

[35] The learned trial judge expressly rejected the evidence of Mr Larsson and Mr Brooks that at a meeting after the sea trial Mr Reintals was told of the history of engine problems.[24] His Honour said:

> "If he [Mr Reintals] had been so told it is impossible for me to believe he would have told neither his wife nor his 'advisers', whom he had taken on the sea trial because of their experience and his lack of it, of that fact, or to believe he would have readily agreed to purchase the boat for a price only $5000 below the asking price".

[36] Mr Reintals' evidence as to what occurred during a phone call with Mr Larsson in December 2012 was accepted over that of Mr Larsson.[25]

Factual findings

[37] The learned trial judge found that representations had been made that the Belle de Jour was "a good boat", a "great boat" and "easy to look after". However, his Honour did not consider those to be of critical importance as they were not concerned with the engine issues.[26]

[38] On the basis of his Honour's acceptance of Mr Earea's and the respondents' evidence, and the rejection of Mr Larsson's and Mr Brook's evidence, the following findings were made.

[39] During the sea trial, when Mr Earea identified that the engine tachometers showed different hours of use, Mr Larsson said that there had been an engine mount issue and that one of the motors had been changed out.[27]

[40] Mr Larsson knew that Mr Earea was on board the Belle de Jour to advise the respondents about the vessel. He did not advise Mr Earea or the respondents of the history of engine failures. He said only that one engine had been replaced due to engine mount issues which had been resolved. That was repeated when he said that it was the starboard engine that had been replaced.[28]

[41] Consistent with Mr Earea's evidence was the admission that Mr Larsson said that one of the tachometers had been replaced so that it did not represent the total hours of service of the vessel.[29]

[42] The appellants did not attend the post-sea trial lunch meeting which was held between the respondents, Mr Kerr, Mr Earea and Mr Cockburn.[30]

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23 Reasons below at [57]-[62].
24 Reasons below at [69].
25 Reasons below [71]-[72].
26 Reasons below [13]-[15].
27 Reasons below at [17].
28 Reasons below at [42].
29 Reasons below at [18].
30 Reasons below at [22].

[43] When the Belle de Jour was listed for sale Mr Larson told Mr Brooks of the fact of the previous engine failures, and their replacement.[31] Mr Brooks was aware of the engine failures, evidenced by a letter he wrote on 19 May 2011 to the vessel's manufacturers, in which he referred to the vessel being "now on its third set of engines", and that the "history of the previous engines having to be replaced would have to be disclosed to any serious purchaser".[32] The letter went on:

> "Any prospective purchaser would certainly be suspicious of any reasons why the engines have had to be replaced at this early stage of the vessel's life and certainly to have the engines replaced twice would have a significant effect on their perception of the vessel and how reliable the engines are or indeed if there are any other serious issues with the vessel.
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> I feel the price of the vessel will be seriously affected if the Larssons cannot supply some form of written guarantee from Fountaine Pajot or Volvo that the now installed engines are fitted correctly and will provide the amount of service hours that are expected of them without any more similar problems such as cracks in the blocks.
>
> Without having any proof of why the previous motors suffered this problem it will be very hard to convince any purchaser that this will not happen again to the newly installed motors."

[44] Knowledge of the history of engine failures would be likely to seriously affect the price of the vessel, if no guarantee could be given by Volvo or Fontaine Pajot.[33] There was no such letter of guarantee. Any purchaser, knowing that history, would be very suspicious.[34]

[45] Mr Reintals was not told, after the sea trial, of the history of engine failures.[35]

[46] Had Mr Earea and Mr Cockburn been aware of the history of engine failures they would not have recommended the purchase.[36] Mr Earea would have considered that there was no point looking at the vessel had he known of the engine failures.[37]

[47] The history of the failure of the starboard engine[38] was such that it was not true to say, as Mr Larsson did, that it was reasonable to think the change to the engine mounts had fixed the problem. To say so was reckless.[39]

[48] The appellants had provided Mr Brooks with an inventory at the time the vessel was listed for sale. That falsely said the engines had done about 200 hours of service. That the inventory did not set out the different hours for each engine was because

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31 Reasons below at [53].
32 Reasons below at [54].
33 Volvo Penta was the manufacturer of the engines; Fontaine Pajot was the manufacturer of the vessel.
34 Reasons below at [55].
35 Reasons below at [69].
36 Reasons below at [55].
37 Reasons below at [56].
38 It failed in November 2012. It was: only 20 months old at the time of the sea trial; more than six months newer than the starboard engine which failed in March 2010; about the same age as the port engine that failed in October 2009; but older than the port engine that failed in August 2010: Reasons below [64].
39 Reasons below at [64]-[65], [111].

the appellants did not wish to draw the attention of prospective buyers to the difference in the hours done.[40]

[49] Only after the purchase had been agreed did Mr Brooks say anything about the engines of the Belle de Jour,[41] and that was when Mr Brooks asked Mr Reintals whether Mr Larsson had told him that there was an engine problem, and Mr Reintals said "yes, he mentioned he put a new engine on the starboard side". Mr Brooks did not disabuse Mr Reintals of the notion that only one engine, on the starboard side, had been replaced. Mr Brooks' silence amounted to a representation that it was true that only one engine had been replaced.[42]

[50] The representations of Mr Larsson and Mr Brooks were made in order to induce the respondents to purchase the boat.[43]

[51] The respondents would not have entered into the purchase had they known of the history of engine failures.[44]

[52] The representations induced the respondents to purchase the vessel.[45]

Discussion of appeal grounds

[53] There were a variety of grounds of appeal. It is convenient to deal with them in the areas into which they can be grouped, though there is a degree of overlap.

What was said to Mr Earea on the sea trial – grounds (f) and (k)

[54] This issue concerned the exchange on the Belle de Jour, when Mr Earea asked Mr Larsson why there was such a difference in the hours of service revealed on the tachometers. Mr Larsson's response was that one engine had been replaced due to engine mount issues which had been resolved, and that it was the starboard engine that had been replaced: paragraphs [39] and [40] above.

[55] It was contended that:

(a) there was no evidence upon which the learned trial judge could find that Mr Earea passed on to the respondents (or either of them) the comment made to him by Mr Larsson;

(b) the statement that the starboard engine had been recently replaced was literally accurate; and

(c) the finding that there was no reasonable basis for concluding that the problems with the engines had been resolved was in error as the only finding against Mr Larsson was one of fraud, and there was no finding of misleading or deceptive conduct; the reasonable basis for that opinion was irrelevant to the fraud case and his Honour did not uphold the misleading or deceptive case in relation to Mr Larsson's conduct.

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40 Reasons below at [66]-[67].
41 Reasons below at [68].
42 Reasons below at [22], [75]-[77].
43 Reasons below at [74], [115].
44 Reasons below at [55]-[56], [78], [116].
45 Reasons below [78], [115].

[56] Examination of the evidence is necessary to resolve the contentions.

Mr Earea's evidence

[57] His evidence was that he noticed a significant difference in the engine hours on the tachometers. He asked Mr Larsson why there was such a difference. Mr Larsson said that "there was an issue with an engine mount or an engine mount issue with one of the motors that had been resolved. The motor had been changed out which included the new … tacho and display". He said only one engine had been replaced, and definitely did not mention two or more engines.[46] Once resolved the engine had been "running fine since".[47]

[58] After the sea trial they (Mr Earea, the respondents, Cockburn and Kerr) went to have lunch during which they discussed what Mr Larsson had said about the one engine being changed out. They all agreed "it was no big issue".[48]

[59] It must also be noted that when it was put to Mr Earea in cross-examination that he may have assumed that only one engine was referred to by Mr Larsson, the following exchange occurred between the learned trial judge and the appellants' trial counsel:[49]

> "HIS HONOUR: Mr Deaves, your case isn't that Mr Larsson ever spoke about a significant number of engine failures in front of this man, is it?
>
> MR DEAVES: Didn't run through the history with Mr Earea or Mr Cockburn.
>
> HIS HONOUR: Not in front of Mr – yes, okay. Thanks.
>
> MR DEAVES: And it's never been our case. Thank you, your Honour."

[60] Subsequently Mr Larsson gave evidence that he did tell Mr Earea the history of engine failures. It was that discrepancy which, the learned trial judge found, told adversely against Mr Larsson's credit.[50]

Mr Reintals' evidence

[61] Mr Reintals' evidence was that during the sea trial Mr Larsson told him that he had replaced one engine on the starboard side.[51] After the sea trial they went to lunch where they "discussed the engine" and Mr Earea told him what Mr Larsson had said.[52]

[62] Contrary to the appellants' submission, there was direct evidence from Mr Earea, whose evidence was generally accepted, that he did pass on Mr Larsson's response to the respondents. The submission that there was no basis to conclude he did is all

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46 AB 242 lines 5-15, AB 248 lines 26-38, AB 249 lines 1-5, AB 249 line 34.
47 AB 243 line 15.
48 AB 244 lines 4-9.
49 AB 249 lines 19-26.
50 Reasons below [43]-[47].
51 AB 31 lines 37-47, AB 60 lines 1-42, AB 61 lines 25-36.
52 AB 32 lines 5-44.

the more curious given Mr Larsson's evidence that he told Mr Earea the history, and thus the respondents were not misled.

[63] The statement that one engine had been recently replaced may have been literally accurate but the thrust of the case was that the appellants did not reveal the history of engine failures. That there had been a history of engine failures was undoubted, and Mr Brooks had been told about it. His view was that it was important information that a potential buyer ought to know. To mention one engine and not the others was plainly misleading.

[64] On appeal there was a submission that the evidence of Mr Reintals and Mr Earea was equivocal and did not go so far as to prove that Mr Larsson said that only one engine was replaced. That can be quickly dismissed. The evidence of Mr Reintals was that only one engine was referred to: "he basically just said … I had to replace … one of the engines. … One of the engines had to be replaced on the starboard side."[53] He adhered to that account in cross-examination.[54] Mr Earea's evidence is referred to in paragraph [57] above. It was open to the learned trial judge to find that only one engine was referred to.

[65] The learned trial judge did not mistake the nature of the case alleged, setting out the claims under the *Competition and Consumer Law*,[55] and identifying that the critical representations were alleged not only to be fraudulent or reckless, but also misleading or deceptive conduct under s 18 of the *Competition and Consumer Law*.[56] Similarly the case based on Mr Brooks' silence was also identified as coming under ss 18 and 139C of the *Competition and Consumer Law*.[57]

[66] It is true that the learned trial judge found that the representations were made fraudulently in order to induce the purchase,[58] and were deliberately deceptive.[59] However, the representation by silence was analysed on the basis of whether it was misleading or deceptive conduct.[60] Further, his Honour concluded that the conduct was in trade or commerce, and therefore constituted misleading or deceptive conduct under s 18 of the *Competition and Consumer Law*.[61] Significantly, the learned trial judge made this finding about the representations of both Mr Larsson and Mr Brooks:[62]

> "[87] In this case I find that the misrepresentation of Mr Larsson and the misrepresentation by silence of Mr Brooks, were misrepresentations engaged in "in trade or commerce", so that the relevant provision of the Australian Consumer Law contained in schedule 2 of the *Competition and Consumer Act* are engaged."

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53 AB 31 lines 37-45.
54 AB 60 lines 37-42, AB 61 lines 29-33.
55 Reasons below [2].
56 Reasons below [37].
57 Reasons below [38].
58 Reasons below [74].
59 Reasons below [115].
60 Reasons below [76], referring to *MacFarlane v Heritage Corp (Aust) Pty Ltd & Ors* [2003] QSC 350, itself referring to *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.
61 Reasons below [85]-[92].
62 Reasons below [87].

[67] Finally, the relief granted was that available under the *Competition and Consumer Law*, namely an order rescinding the contract. The finding that the representations were deliberately deceptive was a relevant factor in his Honour's conclusion that court ordered rescission was appropriate.[63]

[68] The submission that the only finding against Mr Larsson was one of fraud, and that there was no finding of misleading or deceptive conduct on Mr Larsson's part, must be rejected.

Mr Brooks' silence – grounds (d), (e) and (j)

[69] It was contended that there was no evidence to substantiate a finding that there was a duty on Mr Brooks' part to speak up, or a reasonable expectation that Mr Brooks would give the respondents a history of the Belle de Jour.

[70] The findings were that Mr Brooks asked Mr Reintals whether Mr Larsson had told him that there was an engine problem, and Mr Reintals said "yes, he mentioned he put a new engine on the starboard side". Mr Brooks did not disabuse Mr Reintals of the notion that only one engine, on the starboard side, had been replaced. Those findings were not challenged.

[71] It was also uncontested that Mr Brooks knew the history of the engine failures, and held the view that such information was important to a prospective buyer as it would affect willingness to buy and the price that might be offered: see paragraph [43] above. Indeed, prior to the day of the sea trial Mr Brooks held the view that the "history of the previous engines having to be replaced would **have to be disclosed** to any serious purchaser".[64]

[72] For several reasons the appellants' contentions should be rejected.

[73] First, this is not a case where one can shelter behind the proposition that in commercial dealings there is no duty to volunteer information. By what he asked, Mr Brooks volunteered that there had been an "engine problem". Thus he initiated the discussion on an area he already knew would be of vital interest to a purchaser. He did so relatively broadly, but the answer he received related to only one engine, and plainly signified that the owner had not revealed the whole history. Knowing that the missing information was vital to a prospective purchaser, and that the purchaser was being misled, Mr Brooks said nothing. This is a case where the agent remained silent when it was clear that the owner has misled the purchaser on a vital area.

[74] Secondly, Mr Brooks' evidence was that when Mr Larsson told him the history in the context of his appointment as agent for sale, he told Mr Larsson that he (Mr Brooks) would have to disclose that information to prospective buyers:[65]

> "And … I just said I'd have to disclose anything he tells me – or anything I knew about the boat I will be disclosing to any prospective buyers, which, you know, could affect the price significantly, if the problem remained as it had been."

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63 Reasons below [115].
64 Emphasis added.
65 AB 325 lines 19-22.

[75] The learned trial judge stopped short of finding that there was an authorisation from Mr Larsson to make those disclosures, but the more significant fact is that there was no direction to keep the information from prospective purchasers. In the circumstances Mr Brooks had a duty to speak up if it was apparent that the owner was misleading a prospective purchaser by not revealing or obscuring the real engine history.

[76] Thirdly, *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd*[66] was relied upon, but that case does not assist the appellants' contention. In *Demagogue Pty Ltd v Ramensky* Gummow J referred to the limitation, in silence cases, that "unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist".[67]

[77] In *Miller* French CJ and Kiefel J considered the question whether it was necessary for there to be a reasonable expectation that if some relevant fact existed it would be disclosed, and said:[68]

> "[20] In commercial dealings between individuals or individual entities, characterisation of conduct will be undertaken by reference to its circumstances and context. Silence may be a circumstance to be considered. The knowledge of the person to whom the conduct is directed may be relevant. Also relevant, as in the present case, may be the existence of common assumptions and practices established between the parties or prevailing in the particular profession, trade or industry in which they carry on business. The judgment which looks to a reasonable expectation of disclosure as an aid to characterising non-disclosure as misleading or deceptive is objective. It is a practical approach to the application of the prohibition in s 52.
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> [21] To invoke the existence of a reasonable expectation that if a fact exists it will be disclosed is to do no more than direct attention to the effect or likely effect of non-disclosure unmediated by antecedent erroneous assumptions or beliefs or high moral expectations held by one person of another which exceed the requirements of the general law and the prohibition imposed by the statute. In that connection, Robson A-JA in the Court of Appeal spoke of s 52 as making parties "strictly responsible to ensure they did not mislead or deceive their customer or trading partners". Such language, while no doubt intended to distinguish the necessary elements of misleading or deceptive conduct from those of torts such as deceit, negligence and passing off, may take on a life of its own. It may lead to the imposition of a requirement to volunteer information which travels beyond the statutory duty "to act in a way which does not mislead or deceive". Cicero, in his famous essay *On Duties*, seems to have contemplated such a standard when he wrote:

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66 (2010) 241 CLR 357; [2010] HCA 31.

67 Per French J in *Kimberley NZI Finance Ltd v Torero Pty Ltd & Ors* [1989] FCA 400 at 49; cited in *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 41.

68 *Miller* at [20]-[23]; internal citations omitted.

> 'Holding things back does not always amount to concealment; but it does when you want people, for your own profit, to be kept in the dark about something which *you* know and would be useful for *them* to know.'

It would no doubt be regarded as an unrealistic expectation, inconsistent with the protection of that "superior smartness in dealing" of which Barton J wrote in *W Scott, Fell & Co Ltd v Lloyd*, that people who hold things back for their own profit are to be regarded as engaging in misleading or deceptive conduct. As Burchett J observed in *Poseidon Ltd v Adelaide Petroleum NL*, s 52 does not strike at the traditional secretiveness and obliquity of the bargaining process. But his Honour went on to remark that the bargaining process is not to be seen as a licence to deceive, and gave the example of a bargainer who had no intention of contracting on the terms discussed and whose silence was to achieve some undisclosed and ulterior purpose harmful to a competitor.

[22] However, as a general proposition, s 52 does not require a party to commercial negotiations to volunteer information which will be of assistance to the decision-making of the other party. A fortiori it does not impose on a party an obligation to volunteer information in order to avoid the consequences of the careless disregard, for its own interests, of another party of equal bargaining power and competence. Yet that appears to have been, in practical effect, the character of the obligation said to have rested upon Miller in this case.

[23] Reasonable expectation analysis is unnecessary in the case of a false representation where the undisclosed fact is the falsity of the representation. A party to precontractual negotiations who provides to another party a document containing a false representation which is not disclaimed will, in all probability, have engaged in misleading or deceptive conduct. When a document contains a statement that is true, non-disclosure of an important qualifying fact will be misleading or deceptive if the recipient would be misled, absent such disclosure, into believing that the statement was complete. In some cases it might not be necessary to invoke non-disclosure at all where a statement which is literally true, but incomplete in some material respect, conveys a false representation that it is complete."

[78] What follows from the original statement in *Demagogue Pty Ltd v Ramensky* and *Miller*, applied to this case, is this:

(a) this is not a case of "mere silence"; Mr Larsson represented that only one engine had been replaced; then Mr Brooks asked if the purchasers knew about the engine problem, only to be told something that revealed the purchasers had been misled;

(b) this is not a case of s 18 requiring a silent party to volunteer information; Mr Larsson volunteered information on the critical area, but misleadingly so;

that was apparent to Mr Brooks when he also volunteered that there was an engine problem by asking if Mr Reintals had been told about it;

(c) whether there is a reasonable expectation of disclosure is determined objectively, and in any event that determination is an aid to characterising non-disclosure as misleading or deceptive; the facts objectively establish that there was a reasonable expectation of disclosure: see paragraphs [40], [43] to [45] and [49] above; and

(d) in any event, reasonable expectation analysis is unnecessary in the case of a false representation where the undisclosed fact is the falsity of the representation; that is the case here, where Mr Larson told only part of the truth, and Mr Brooks did not correct what he knew to be untrue.

[79] In my view, the findings as to what was represented to the respondents, by what was said, the failure to correct the misleading nature of what was said, and that the representations were misleading or deceptive, were justified by the evidence. The challenge to them should be rejected.

Rejection of Mr Brooks' evidence

[80] These grounds challenged the rejection of Mr Brooks' evidence on the basis that the learned trial judge devoted little analysis to his conclusion,[69] and did not consider the absence of a motive to lie on his part.[70] The contentions were not developed in oral submissions.

[81] The learned trial judge did offer several reasons why he rejected Mr Brooks' evidence:

(a) his Honour had significant doubts about his credit;[71]

(b) Mr Brooks professed to have no memory whatsoever of the circumstances surrounding the reaching of an agreement for the purchase; that was unlikely given the unusual features of this transaction;[72] his inability to recall indicated either a surprisingly poor memory or that he was not being entirely truthful, though his Honour did not have to decide which;[73] and

(c) Mr Brooks' evidence was that it was Mr Larsson who disclosed the multiple engine failures in the meeting after the sea trial; the contrary was accepted, based on Mr Reintals' evidence;[74] one of the reasons that Mr Brooks' evidence on this point was rejected was that if it was true it was impossible to believe that Mr Reintals would not have told the others.[75]

[82] There were other identifiable reasons why the learned trial judge could have rejected Mr Brooks' evidence. According to him Mr Reintals was told the history of engine failures yet he did not tell the others (especially his wife who was a co-purchaser) and quickly agreed to buy the Belle de Jour for nearly the asking price. As the learned trial judge said, that was inherently unlikely. Further, the inventory typed up by Mr Brooks to give to the respondents listed the two engines as having done the same hours. Based on what Mr Brooks knew about the engine failures that must

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69 Appellants outline paragraph 52.
70 Appellants' outline paragraph 57.
71 Reasons below [53].
72 Reasons below [57]-[60].
73 Reasons below [62].
74 Reasons below [61].
75 Reasons below [69].

have been false, and evidently so. Finally, on the findings made as to the post sea trial meeting, Mr Brooks stood by knowing that the prospective buyers had been misled on critical information which he had opened up by asking Mr Reintals if he had been told there was an engine problem. In such circumstances to tell, or fail to qualify, such a truncated set of facts indicates discreditable conduct.

[83] That is sufficient to demonstrate that there is no merit to this ground.

Reliance – grounds (a), (b) and (g)

Submissions

[84] Mr Roney QC submitted that the finding that the respondents would not have entered into the contract to purchase the vessel if they were aware of its true history conflates the separate issues of reliance and causation. It was further submitted that the learned trial judge reversed the doctrine of *caveat emptor* by asking what the respondents would have done had they been aware of the full history of the vessel. This approach was not raised with Counsel during the course of the evidence, and was in fact, contrary to what the learned trial judge had indicated during the opening. Determining the case on this basis was a basis not pleaded or opened. In oral argument, it was also submitted that the evidence did not go far enough to discharge the respondents' onus to establish that they relied upon any representation by the appellants, whether made to them directly, or to their friends.

[85] During oral submissions the contention was expanded to say that the evidence from the respondents could not supply a sufficient basis for a finding of reliance because they were mere assertions without any independent corroborative support such as contemporaneous records, diary notes, file notes and the like.[76]

[86] The appellants' ultimate contention was that reliance upon what was said about only one engine being replaced could not be established, in part because Mr Reintals gave evidence that he did not rely upon it.

[87] Mr McLennan of Counsel, for the respondents, submitted that the learned trial judge's findings were entirely unremarkable, as both respondents gave evidence of their reliance on the representation made directly to them by Mr Larsson during the sea trial, and their reliance on the representation made to Mr Earea. It was submitted that the doctrine of *caveat emptor* is not applicable in this situation as the appellants deliberately made false statements about the history of the vessel. It was not accepted that the pleadings were inadequate, and it was submitted that the learned primary judge referenced whether the non-party misrepresentations had acted as an inducement or not in the mind of the respondents. Finally, even if Mr Earea and Mr Cockburn were not involved, the respondents would still be successful based on the misrepresentation made directly to them.

Relevant findings

[88] The learned trial judge's findings in respect of the issue of reliance were as follows:[77]

> "[42] I find that during the sea trial Mr Larsson did not advise Mr Earea or the plaintiffs of the history of engine failures. I accept

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76 Appeal transcript T1-38 lines 4-33.

77 Reasons below [42], [55], [78], [80], [83], [115]-[116]; emphasis added.

> Mr Earea's evidence that Mr Larsson said only one engine had been replaced due to engine mount issues which had been resolved although there may also have been further general discussion about the boat. … Moreover, I find he repeated this representation, effectively, when he told the plaintiffs a little while later that it was the starboard engine which had been replaced. …
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> …
>
> [55] … I accept the evidence of Mr Earea and Mr Cockburn that if they knew of the real history, they would not have recommended the purchase. I find the plaintiffs would not have entered into the contract they did if they were aware of that history.
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> …
>
> [78] [Mr Brooks' representation by silence] … was therefore an inducement to the plaintiffs subsequently signing the written contract and completing the transaction, including paying the $360,000 purchase price.
>
> …
>
> [80] Whilst I accept that the plaintiffs determined not to have the vessel formally inspected that is, in my view, irrelevant. They relied on the inspections during the sea trial carried out by their friends, who were experienced in boats …
>
> [83] Consideration of such issues, in this case, leaves me in no doubt that in the circumstances of this case there was a clear nexus between the misleading and deceptive conduct of Mr Larsson and Mr Brooks, and the fact that the plaintiffs entered into a contract to purchase the vessel …
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> [115] … In so determining I am significantly influenced by the fact that the defendants' misrepresentations were clearly designed to induce the plaintiffs to purchase a vessel which Mr Larsson knew, or ought have strongly suspected, was likely to contain a significant fault which, based on his own experience, was extremely difficult to resolve. In my view that conduct was deliberately deceptive. **It did induce the plaintiffs to purchase a boat** at close to the asking price …
>
> [116] But for the misrepresentation by Mr Larsson and Mr Brooks, the plaintiffs would not have purchased the Belle de Jour."

Discussion

[89] The respondents gave evidence that they did rely upon what they had been told about only one engine being replaced, and that had they known the history of engine failures they would not have purchased the Belle de Jour. That evidence was accepted.

[90] The evidence to which the appellants pointed as suggesting no reliance does not establish that at all. What was relied upon were a series of answers by Mr Reintals

to his reaction to what Mr Moss had said, namely that it was "a good boat".[78] Mr Reintals said he would not buy a boat on such an opinion, coming from the owner or a mechanic who was an ex-customer. He was pressed as to what he would rely upon and whether he would rely upon the owner. Two things should be noted. First, those questions were directed at the "good boat" comment and the "condition of the boat", and in that context Mr Reintals said that he would "possibly" not rely upon the owner.[79] Secondly, seen in context that answer was coloured by his views of Mr Larsson as having perpetrated a fraud in the sale. However, he said that he relied on Mr Larsson,[80] and "would've relied more on Neville Brooks".[81]

[91] Those responses, given in cross-examination, have to be seen in light of Mr Reintals' other evidence. His impression of the vessel before the sea trial was that it was "immaculately cleaned and in top nick … well looked after".[82] However, he took three experienced mariners on the sea trial to give an opinion on the vessel, because he was inexperienced.[83] During the sea trial the representation was made that only one engine had been replaced. At the lunch after the sea trial the engine problem was discussed with those three experienced persons. The view was that if it was only one engine that was acceptable.[84]

[92] Mr Reintals said that the representations by Mr Larsson, to himself and to Mr Earea, that only one engine had been changed out, were relied upon in buying the vessel.[85] So did Ms Dudney.[86]

[93] Further, the evidence of Mr Earea was that he would not have considered the vessel had he known of the history of engine failures, and he advised that if it was only one engine that was acceptable. Hence, his endorsement of the vessel at the lunch was plainly significant. That is supported by the evidence of Ms Dudney in cross-examination: "If your friends hadn't given the boat the thumbs up you wouldn't have purchased it, would you?" to which she replied: "No, not if we'd been told about the engines, too."[87] She said that had they been in possession of the proper facts there "was no way … that we would have bought that boat".[88]

[94] Given those matters it was, in my view, open to the learned trial judge to find that there was reliance upon the representations. His Honour did so, especially at [78] and [115] of the Reasons below. The contention that the learned trial judge conflated reliance and causation cannot be supported.

[95] The contention that reliance was not shown or found is even more difficult to sustain considering that: (i) misrepresentations were made as to critical information about the engines of the vessel; (ii) they were designed to induce the contract; (iii) they were made for that purpose; (iv) the state of belief as to the engines, generated by the misrepresentations, was influential in the decision to buy; and (v) the misrepresentations did, in fact, induce the contract.

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78 AB 64-65.
79 AB 65 lines 15-17.
80 AB 65 line 5.
81 AB 65 line 42.
82 AB 28 lines 42-43
83 AB 30-31, AB 123 lines 35-39.
84 AB 32 lines 27-33.
85 AB 33 line 42 to AB 34 line 4.
86 AB 124 lines 15 to AB 125 line 10.
87 AB 157 lines 28-30.
88 AB 158 lines 3-27, AB 159 lines 18-20.

[96] The further contention that a case based on reliance upon what the respondents' friends told them at the lunch was a departure from the pleaded case, and what had been discussed at the opening, should also be rejected. Reliance on the friends' advice does not mean that there was no reliance upon the misrepresentations. What was being debated at the lunch was the believed state of affairs generated by the misrepresentations. And, Mr Brooks' misrepresentations came after the lunch. The respondents gave evidence that they relied upon the misrepresentations of both Mr Larsson and Mr Brooks, and the learned trial judge accepted that evidence, and found that the contract was induced by the misrepresentations. There was no denial of procedural fairness.

[97] Finally, the contention developed in oral submissions that reliance should not have been found because of the lack of independent support, should be rejected. The evidence of the respondents was accepted based on credit findings. That was enough to make the finding. But, such a finding was, in my view, almost inevitable given the evidence from Mr Brooks that the true history of engine failures was information vital to prospective purchasers, which would affect the price that might be paid, and something which he considered he would have to reveal. Once the finding was made that the misrepresentations were made in order to induce the contract, it was a short step to find reliance, and one not hindered by the lack of independent documents.

[98] These grounds lack merit.

Reasonableness of Mr Larsson's belief – ground (c)

[99] This ground relates to the learned trial judge's finding that the history of engine failures was such that it was not reasonable to think the change to the engine mounts had fixed the problem, and to say so was reckless.[89] The contention was that there was no evidentiary basis upon which the finding could be made.

[100] The relevant finding was that the history of the failures in the engines rendered that belief unreasonable. The history was:

(a) first failure of the starboard engine in January 2008; both engines replaced, the port engine as a precaution;[90]

(b) second failure on 12 October 2009; the port engine was removed after developing a crack and replaced on 16 October 2009;[91]

(c) third failure on 25 March 2010; the starboard engine was replaced; and[92]

(d) fourth failure on 12 August 2010; the port engine was replaced again.

[101] The failure was due to cracking at the oil galley between the oil filter and centre unit. Mr Larsson said the pre-November 2011 failures were all at the same location.[93]

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89 Reasons below at [64]-[65], [111].
90 Reasons below [7].
91 Reasons below [9]; this was the port engine that replaced the original engine in January 2008.
92 Reasons below [9]; this was the starboard engine that replaced the original engine on 29 January 2008.
93 Reasons below [7]-[8].

[102] The learned trial judge also found that experts from the manufacturers of the vessel and engines had carried out testing to try to rectify the problem:[94]

> "[12] It is also common ground that between 5 July 2010 and June 2011 various experts from Volvo Penta, the engine manufacturer, and Fountaine Pajot, the vessel manufacturer, attempted to ascertain the cause of the engine failures. They conducted, inter alia, metallurgical testing, and reviewed the engineering of the engine installation. Whilst the outcome of such investigations is not clear, a recommendation was ultimately made to change the engine mounts of the vessel. On 3 June 2011 such a change was effected. Thereafter the engine operated, using the starboard engine installed on 25 March 2010, and the port engine installed on 12 August 2010 and utilising new engine mounts. That was the set-up of the vessel at the time the plaintiffs tested it during a sea trial on Saturday 12 November 2011 and thereafter."

[103] The evidence accepted by the learned trial judge was that Mr Larsson only said that one engine had been replaced "due to engine mount issues which had been resolved".[95] His Honour also had regard to the letter written by Mr Brooks to the manufacturer in May 2011 in which he: (i) referred to the "quite serious history of engine replacements"; (ii) urged "some sort of written guarantee … that the now installed engines are fitted correctly and will provide the amount of service hours that are expected of them without any more similar problems"; and (iii) that "Without having any proof of why the previous motors suffered this problem it will be hard to convince any purchaser that this will not happen again to the newly installed motors".[96] His Honour noted that no such letter was provided.

[104] The relevant finding was expressed in paragraphs [64] and [65] of the Reasons below:

> "[64] The starboard engine, which ultimately failed in November 2012, was itself only about 20 months old at the time of the sea trial, more than 6 months newer than the starboard motor which failed on 25 March 2010 and about the same age as the port engine which failed in October 2009, although older than the port engine which failed in August 2010. In such circumstances it does not seem to me that in November 2011 at the time of the sea trial it was true to say, as the male defendant said in evidence and his counsel asserted in submissions, that at that time it was reasonable to think the change to the engine mounts in June 2011 had rectified the previous problem.
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> [65] Any assertion it had been rectified was, in my view, one made recklessly, having regard to the history of prior engine failures. The evidence that the motor had then done about 1000 hours, more than any of the previous motors, is in my view

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94 Reasons below [12].
95 Reasons below [42].
96 Reasons below [54].

> inconsistent with the prior history of the motors and not supported by cogent evidence which I accept."

[105] It is apparent that the statement by Mr Larsson was intended to refer to all previous engine problems. Therein lies a difficulty with the challenge mounted on this point. There was no finding that Mr Larsson said anything about the other engine or other failures. At the heart of the misrepresentation case was that the respondents had not been told the history of engine failures. Mr Larsson's evidence as to what was said was largely rejected, based on adverse credit findings. Mr Earea's evidence was accepted, resulting in the finding that Mr Larsson said only one engine had been replaced due to engine mount issues which had been resolved.[97] As such, all that was said was that the mounts of one engine had solved the issues with that engine, and therefore, the finding in paragraphs [64] and [65] were not central to the learned trial judge's resolution of the issues in the trial.

[106] In that respect Mr Roney QC, for the appellants, conceded that if the appeal did not succeed on the challenge to the central point, misleading or deceptive conduct as to the history of engine failure, this point did not assist the appellants.[98]

[107] The contention was that there were two major difficulties with the finding. One was that "it appears to be permeated by his Honour's acceptance that each and every failure had the same cause". The second was that it "ignores the fact that the installation of the engine mounts had been recommended by experts appointed by the manufacturer of the boat and the manufacturer of the engines".[99]

[108] The first point is not apparent from a reading of his Honour's reasons. True it is that his Honour made findings to that effect elsewhere,[100] but it is by no means clear that those findings affected the finding that it was unreasonable to believe the mounts had solved the issues. To the contrary, what his Honour seemed to focus upon was the general history of repeated failures of engines at a young age.

[109] The second is irrelevant for the reasons already given.

[110] This ground lacks merit.

Conclusion

[111] The appeal grounds lack merit for the reasons given above. The appeal should be dismissed.

[112] I propose the following orders:

1. Appeal dismissed.
2. The appellants pay the respondents' costs of and incidental to the appeal.

[113] **PHILIPPIDES JA:** I agree with the reasons of Morrison JA and with the orders proposed by his Honour.

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97 Reasons below [42].
98 Appeal transcript T1-34 lines 5-17.
99 Appellants' outline paragraph 41.
100 Reasons below [7]-[8].

[114] **DAUBNEY J:** I respectfully agree with Morrison JA.