

SUPREME COURT OF QUEENSLAND

CITATION: *Pix v Suncoast Marine Pty Ltd* [2018] QSC 235

PARTIES: **TREVOR KEITH PIX**
(plaintiff)
v
SUNCOAST MARINE PTY LTD (ABN 41 091 644 101)
(first defendant)
and
MICHAEL JOHN RIDER and KATE RIDER
(second defendants)

FILE NO: SC No 12976 of 2009

DIVISION: Trial

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 12 October 2018

DELIVERED AT: Brisbane

HEARING DATES: 5 – 7 March 2018; 12 – 13 June 2018

JUDGE: Holmes CJ

ORDERS: **The orders of the Court are that:**

- 1. The plaintiff’s claim against the first defendant is dismissed, with parties to make submissions as to costs.**
- 2. The plaintiff is to make further written submissions as to damages in his claim against the second defendants and any submissions as to the costs of that claim, to be filed and served by 4pm on 24 October 2018.**
- 3. The second defendants’ written submissions in reply are to be filed and served by 4pm on 2 November 2018.**

CATCHWORDS: TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – IN GENERAL – where the plaintiff purchased a catamaran from the second defendants – where the plaintiff claimed that the first defendant was the undisclosed principal in the sale – where the plaintiff claimed in negligence for what were said to be defects in the vessel’s paintwork, its susceptibility to water

ingress and a failure to meet commercial survey standards in its building – where the plaintiff claimed in negligence against the first defendant on the basis that it had breached a duty of care owed to him as purchaser from it, or alternatively as a subsequent purchaser of the vessel, to construct it with reasonable care – where the plaintiff claimed in negligence against the second defendants on the basis that they had assumed a duty of care to him to supply a vessel constructed with reasonable care – whether the first or second defendants owed the plaintiff a duty of care – whether the alleged defects were attributable to negligence by the defendants

CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – BREACH OF CONTRACT – where the plaintiff purchased a catamaran from the second defendants – where the plaintiff claimed that the first defendant was the undisclosed principal in the sale – where the plaintiff contended that the first defendant had breached a term implied by s 71 of the *Trade Practices Act 1974* (Cth) that the vessel would be of merchantable quality – where the plaintiff contended that both the first and second defendants had breached a term implied by s 17 of the *Sale of Goods Act 1896* (Qld) that the vessel would be of merchantable quality – whether the defendants were in the business of dealing in goods of the vessel's description – whether the plaintiff bought the vessel by description – whether the vessel was of merchantable quality

Sale of Goods Act 1896 (Qld), ss 17, 54
Trade Practices Act 1974 (Cth), s 71

Ashington Piggeries Ltd v Christopher Hill Ltd [1971] 1 All ER 847, followed

Australian Knitting Mills Ltd v Grant (1933) 50 CLR 387, followed

Beale v Taylor [1967] 3 All ER 253, followed

Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649, applied

David Jones Limited v Willis (1934) 52 CLR 110, followed

Jones v Just (1868) LR 3 QB 197, cited

Woolcock Street Investments Pty Ltd v CDG Pty Ltd & Anor (2004) 216 CLR 515, cited

Yates v Mobile Marine Repairs Pty Ltd & Anor [2007] NSWSC 1463, cited

COUNSEL:

S R Grant for the plaintiff

A W Duffy QC for the first and second defendants

SOLICITORS: Hall & Wilcox for the plaintiff
 Thynne & Macartney for the first and second defendants

- [1] The plaintiff, Mr Pix, was the purchaser of a 20 metre sailing catamaran, the *Jalun*. He brings an action in negligence and breach of contract arising from alleged defects in the vessel against the second defendants, Mr and Mrs Rider, and the first defendant company, Suncoast Marine Pty Ltd, of which Mr and Mrs Rider were the sole shareholders and directors. Suncoast Marine built the catamaran in 2004. Mr Pix's primary position in his pleadings was that the vessel was actually sold to him by Suncoast Marine as an undisclosed principal with the Riders acting as its agents, with the alternative position being that the Riders were the vendors. It was agreed that Mr Pix bought the vessel as a pleasure craft. The claim in negligence related to what were said to be defects in the vessel's paintwork, its susceptibility to water ingress and a failure to meet commercial survey standards in its building. The claim for breach of contract related only to the paintwork defects, because any cause of action in contract arising from the alleged water ingress problems or failure to meet standards fell outside the limitation period.

The plaintiff's evidence

- [2] Mr Pix became interested in buying the catamaran in 2007, when he saw an online advertisement, under the heading "Suncoast Yacht Mooloolaba", in relation to it. Advertised at a price of \$2,750,000, it was described as new, a 2006 vessel, "a sailing flybridge catamaran", and "professionally built...in Qld survey...". Its dimensions and specifications were set out. Mr Pix said that he was attracted to its size and extensive living areas, and by the fact that it was under survey, which meant that its building had been overseen by government authorities, assuring its safety of operation. Other appealing features were its twin motors, the fact that it could be sailed, and that it could be operated by two people. Mr Pix inspected the vessel at Mooloolaba in the company of Mr Rider. According to Mr Pix, he was impressed by its appearance – "it looked great" – but he noticed two very small flaws, which he described as "dots" no bigger than the size of the (non-writing) end of a pen, in the paintwork near the stairs onto the boat. Mr Rider told him that it was an inconsequential paint problem which would not spread.
- [3] Mr Pix said that of particular importance to him in entering a contract to buy the *Jalun* were the documentation in relation to its being under survey, which was, he said, his "security in regard to the quality of the boat", and a builder's warranty in relation to the vessel. He had requested such a warranty from Mr Rider, who replied in writing on 14 March 2007, advising that "we" normally included a three year warranty against structural defects, with some exclusions, which formed part of the contract between the builder and client. Mr Rider explained that the mast, rigging and equipment were covered by the manufacturers and the design by the designers. He continued by saying that "we" took out a builder's insurance policy to cover construction risks, but it was terminated when the construction of the *Jalun* stopped, "after the client could no longer proceed with the project". Mr Rider ended by advising that the builder, "Suncoast Marine P/L", could offer the usual three year warranty, with the "usual exclusions", from July 2006, which, he said, was the completion date of the vessel.

- [4] In correspondence about a week later, Mr Pix's solicitors proposed a special condition by which the seller would warrant that "they" were the vessel's builder and would guarantee workmanship and equipment for three years. The Riders' solicitors responded that the condition was too wide and in its lieu proposed the following condition:

"The Seller warrants that it is the Builder of the vessel and will provide a Builder's Warranty in accordance with its standard conditions, a copy of which is attached to this Agreement as a separate Schedule B."

That condition was then incorporated, using precisely those words, in the Special Conditions Schedule, with the additional words

"...and the Seller shall provide to the Buyer warranty details in relation to all equipment referred to in the specifications".

No "Schedule B" was in fact attached to the contract at any stage. The solicitors for the Riders had advised that Mr Rider was prepared to give a builder's warranty in the "usual terms"; of which they enclosed a copy. That unexecuted document (or a copy of it), was then added to the contract in the form in which it was provided. It was a three year warranty on the letterhead of Suncoast Marine, with a space for signature by Mr Rider on behalf of Suncoast Marine (left blank), and was expressed to apply to structural defects only.

- [5] On 27 March 2007, Mr Pix executed a vessel sale agreement which identified the Riders as the sellers, and described the *Jalun* as a "2006 yacht", its purchase price being \$2,450,000. In fact, Mr Pix said, he paid \$2,430,000 because there had originally been an arrangement for the transfer of some property as part of the agreement, but in the event, the Riders gave him a \$20,000 discount on the price of the vessel in exchange for his paying cash. A special condition made provision for Mr Pix, if he wished, to have the vessel slipped for inspection, but he did not do so. The contract contains specifications for the vessel, generally conforming to its advertised description, setting out its dimensions, features, capacities, and the details of its designer and builder, the latter being identified as Suncoast Marine Pty Ltd.
- [6] The *Jalun* was delivered to Mr Pix at a marina at Hervey Bay on 27 April 2007. A local boat service undertook weekly maintenance of the vessel. In about July or August 2007, Mr Pix said, he took the vessel to Fraser Island. He and his wife removed the tender and observed a bubble of about 30 cm by 45 cm in the vessel's paintwork. Later on the same excursion, he noticed a large bubble on the boat's deck, underneath a barbeque. He asked a boat-builder to look at the bubbles; the latter pricked one of them and a gust of air emerged from it. A second boat-builder, Mr Ricketts, looked at the boat in 2008, both before and after Mr and Mrs Pix had taken a trip in it to the Whitsunday area. According to Mr Pix, as the weather became warmer on that voyage, both of the topsides of the boat – the outer surfaces above the water line – began to blister severely.
- [7] The relevance of Mr Rickett's involvement is that he gave evidence of telephoning Mr Rider to ask him about the apparent defects in the boat's paintwork. In doing so, he relied on a note he had made some days after the conversation. According to Mr Rickett, Mr Rider responded that he had used unskilled labour – in Mr Rickett's

recollection, backpackers – in the fairing and painting of the boat. (Fairing is the process of rendering a hull surface “fair”; ensuring the surface is level before it is painted. Battens, which may take the form of strips of filler, may be applied to ensure that an even level is maintained.) The fairing compound had been applied “too dry”, with the result that when it was being “screeded” (levelled), it had “pulled back” and caused voids or air pockets. Mr Rider speculated that the air voids might have caused some blistering, and he informed Mr Ricketts that he had sold the boat cheaply because of the painting and fairing problems.

- [8] In December 2008, Mr Pix wrote to the Riders about what he said was “faulty workmanship” on the vessel’s exterior. (According to the letter, which was tendered, it enclosed photographs and a report, but neither was put into evidence.) Mr Rider responded in writing by saying that the *Jalun*’s warranty covered only the vessel’s structural integrity, and fairing and painting matters were merely cosmetic. He went on to assert that the fairing and painting of the vessel were in fact correctly carried out with appropriate materials, but that since it was four years since it was originally painted, a requirement to repaint was to be expected. He said that at the time Mr Pix bought the boat, he had advised him that a repaint would be needed after about two years.
- [9] In mid-2009, the vessel was involved in a collision with another boat and required minor repairs. By that time, Mr Pix said, some cracks had appeared on the port side. While it was in dry dock, Mr David Slinger, the operations manager of the company which undertook the repairs, inspected it with Associate Professor Geoffrey Will. Both provided reports on that inspection, Mr Slinger in 2009 and Professor Will in 2011. (He had examined the vessel again in dry dock in 2011.)
- [10] Mr Slinger had a long background in working for companies which provided coatings for boats. His role had included ensuring that coatings were properly selected and applied. He had been involved in training programmes and trials of applications of coatings to boats, both of which involved the preparation and application of filler. He had held a coating inspections certificate, which involved training in analysing paint system failure. He had experience in failure analysis; and, in particular, his boatyard work had often, he said, involved the examination of under-cured filler. Professor Will was an Associate Professor in Chemistry, working in the fields of energy and process engineering. He was a coating inspector and an instructor in coating inspections, and for a decade had been engaged in research for defence agencies in determining the effective lives of paint coatings, including epoxies.
- [11] Mr Slinger reported that he and Professor Will used a chisel, hammer and razor blades to cut around blisters on the boat and examine them. The vessel had blisters all over its hull sides and transoms, above the water line. There were also areas where sections of the hull topside finish were raised in lines, because fairing battens (strips of filler) had not been removed. It appeared that epoxy fairing compound had been used. According to Mr Slinger, the appearance of the filler compound was soft and apparently under-cured. He could smell an amine smell, which also suggested that the filler was not properly cured. One blister had a small void at its base, which was likely to be its origin. The fibreglass substrate below the fairing material at the blister’s base appeared shiny, which might indicate that it had not been properly profiled so as to allow adequate adhesion. However, Mr Slinger conceded, there might be other possibilities. The underside of the blister was concave and soft, indicating that it had formed under pressure because of the void under the substrate, as a result of under-cured filler. There

were vertical cracks representing sections of broken filler, which he opened further in order to examine them. There appeared to be a failure of adhesion along those cracks.

- [12] Mr Slinger concluded that the blistering and the delamination were caused by: incorrectly mixed fairing compound; voids within the fairing compound and at the interface of the substrate and fairing compound; possibly poor substrate preparation; and the failure to remove and refill fairing battens prior to painting. It was always essential to remove battens, replacing them with the same filling compound as used in the surrounding area, in order to avoid different rates of expansion and contraction in the material used. It was possible in this case that the filler used as fairing battens was applied at different times and different temperatures, so that there were different expansion rates between them and the filler applied to the hull in between them. There was no way, according to Mr Slinger's report, to ensure that all the blisters and cracked filler were removed from the boat without stripping the fairing material back to the fibreglass substrate and filling and fairing the entire vessel hull above the water line.
- [13] Professor Will gave evidence of his examination of the vessel with Mr Slinger, both orally and through an expert report. He inspected the hull to try and identify points of delamination – the areas of blistering were the points of suspected delamination – and also examined paint and fairing samples he had taken from the boat under a microscope. The outer paint coating was in good condition, was extremely durable, and could be expected to serve as a protective coating for more than ten years. Maintaining it in a high gloss state would improve its appearance and function, but would do nothing to address the blistering problem. From inspection of the blisters on the hull, he could determine that the source of delamination was either a lack of cohesion in the innermost fairing compound itself or a failure of adhesion between the fairing layers or between the fairing compound and the fibreglass hull. He could not conclude, however, precisely what had caused the failure.
- [14] Professor Will was able to say generally that blistering or delamination on boats was usually caused by one of a number of factors: inadequate substrate preparation between layers; failure to properly mix fairing materials; application of materials which were no longer effective because of their age; entrapment of thinners in layers (although he had been unable to smell thinners when the blisters were ruptured); or osmosis below the water line. Had it been osmosis, though, there would have been evidence of liquid. Having been informed that the affected areas were those exposed to sunlight, Professor Will's theory was that solvent or air entrapment coupled with inadequate surface preparation between fairing layers contributed to poor adhesion between the layers, resulting in the blisters. The solvent or gas would expand, the sun's heat causing pressure on the layers around it and deformation resulting in a blister.
- [15] In April 2012, Mr Pix obtained a valuation of the vessel from shipbrokers. A one page document, it gives the "approximate valuation of [the *Jalun*] as on 06/04/2012 \$2.250M based on as is where ...". The valuation came to light in cross-examination, when it was tendered through Mr Pix by counsel for the Riders. In 2012, the *Jalun* was delivered to a company, SprayTime Marine Services, for fairing and repainting. Before work was commenced, the vessel was inspected by a marine surveyor, Mr Behan, in company with a representative of the business and Mr Rider. Mr Behan noted and marked a number of blisters on the hull and observed the process of opening up some blisters. He noted that the surface under a blister removed from the flybridge was smooth and flat and there were three layers of filling compound; there appeared to be

little adhesion between the top two layers and the third. Blisters were removed from the port side of the hull, revealing air pockets in the second layer of filler in that area, of varying depths. There were raised vertical lines visible under the coating layers. They were removed together with some filler to reveal a line of darker filler in the surrounding lighter filler.

- [16] The *Jalun*'s mast and rigging were removed and it was placed in a shed. The vessel was first peeled, then filled, faired and painted. The hull topsides were painted, as were the cockpit area, the cabin, the flybridge and its floor. Mr Behan said that he regularly attended to inspect the yacht's hull and its skin to make sure that it was ready for the next stage of work. He did so by using a moisture meter and a light hammer, to sound out the skin. It was necessary to remove moisture from the insides of the hulls before the boat could be painted and faired. It was coming through the forward stanchions and into the collision bulkheads of both the port and starboard hulls. Mr Behan identified a number of photographs taken in his investigation of the entry of water into the bulkheads and its source. In particular, he pointed to photographs showing a piece of sealant which had come from a stanchion base, having failed and fallen inside the hull, and a stanchion cup, the base of which had fallen off.
- [17] Mr Behan said that while repairs were under way, he walked across the vessel's back deck and detected a difference in firmness in different areas. A core sample was taken from the deck. Mr Behan said that having measured it, he observed that it was undersized relative to the original drawings for the boat. This led to an objection that Mr Behan was not giving evidence as an expert, no report having been provided. That raised a further issue, of whether his observation required expertise in the interpretation of the drawings, or was so self-evident as to be a matter of fact. The drawings were not in fact tendered and I was not asked to reach any conclusion about the matter.
- [18] Mr Mathew Garlick, who oversaw the work, said that water was found in the vessel's collision bulkheads on both port and starboard sides. It was entering the bulkheads through the stanchion sockets on the bow, which held the stanchions supporting the lifelines around the vessel. The sockets were designed to sit below the decks; at the bottom of each was a cap. The bottom of the sockets had been knocked out. The water was pumped out and the stanchion sockets replaced. The caps which originally held them were made of epoxy glass; the new sockets were aluminium with a flange. They were encapsulated and recessed into the deck of the boat, where they were sealed.
- [19] Mr Mark Mellor, a shipping inspector, confirmed that he had issued a direction that the boat was not to be operated. The direction, signed in June 2012, read:

“hull breached/undergoing repairs due to water ingress into inna [sic] core material of hull.”

His reference to the hull being breached, he explained, was to the destructive methods which had been undertaken to establish the cause of the water problems. The direction would not be lifted until approved repairs had been undertaken.

The defendants' evidence

- [20] Mr Rider said that he had been engaged in boat-building since 1986, overseeing the construction of four vessels and the “updating” of some others. Those vessels required

fairing and painting. In 2002, he and Mrs Rider decided to embark on a new boat-building venture through Suncoast Marine. Their partnership, West Pacific Marine Services, paid Suncoast Marine for the building of the *Jalun*. (Invoices for the vessel's building and business activity statements for the partnership were tendered.) A naval architect designed the catamaran and Suncoast Marine commenced construction of it in March 2003. The boat had a fibreglass hull. Battens in the form of vertical lines of filler six millimetres in width were applied down the sides of the boat to guide the fairing process. The fairing material was an epoxy resin with a powder additive to add stiffness. Mr Rider was the supervisor of the project, with employees or subcontractors undertaking the work.

- [21] The *Jalun* was launched in 2004, having undergone sea trials for survey purposes over about 70 hours. (The vessel sale specifications, however, said that it was completed in July 2006 and had logged 70 hours as at 1 October 2006.) The boat had been built as a "one-off" demonstration vessel to demonstrate the company's ability, but the Riders decided that they would not continue to build vessels and would advertise the catamaran for sale. They used another of their companies, Suncoast Yacht Pty Ltd, to act as broker on the sale.
- [22] Mr Rider said that he had discussed the blisters with Mr Pix before the latter purchased the *Jalun*. There were about 50 along the length of the vessel on the outboard side of both hulls, in the area which got most sunlight. He had explained to Mr Pix that the blisters were the result of the hulls' dark colour, which caused the air pockets in the vessel's fairing to expand when they became heated by sunlight. It was, he said, a common problem with vessels faired as this one was. He had told Mr Pix that the boat had been painted a number of years previously and it would require repainting in two years' time. Mr Pix indicated that he would offer less than the asking price of \$2,750,000 for the boat because of the blistering, but he did not say by how much he would reduce the buying price. Eventually he offered \$2,450,000. At some point there was a change in the contract price, which to the best of Mr Rider's recollection related to the offer of a property as part-consideration, the provision of which was later dispensed with by agreement.
- [23] In his letter written to Mr Pix about the provision of a warranty, before the vessel sale agreement was executed, Mr Rider had mentioned a client who was proposing to purchase the vessel during the construction period. He confirmed the existence of that earlier client. He said that he was unaware that the special condition represented that he and his wife were the builders of the vessel.
- [24] Mr Rider had seen the *Jalun* again in the marina at Hervey Bay, when he had looked at it from the wharf. It did not appear to be well-maintained. He observed then that the paint blisters which he had identified to Mr Pix were "probably a little bit worse" than they had been when the latter bought the vessel. In late 2007, he went aboard the vessel to explain something about it (presumably to Mr Pix); he could not recall what. No problem was raised in relation to the boat until early 2009, when Mr Pix's letter complaining of the paint work was received. Subsequently he had inspected the boat when it was on the slip at the Coomera boat yard, when he had taken some photographs of the paintwork after it had been damaged.
- [25] Mr Rider said that he had spoken to Mr Ricketts about the paints and material used on the vessel so that if Mr Ricketts were to do any repair work he could use the same

materials. He denied having told Mr Ricketts that backpackers were involved in the construction of the boat. He conceded under cross-examination that he had not supervised his employees at all times while they did the fairing. He agreed that the fairing battens were created from fairing compound; after the rest of the compound was applied, the battens were not ground out. He agreed also that in his letter to Mr Pix of 14 March 2007 in response to his enquiry about the warranty he had made no mention of excluding paintwork defects. He did not recall having told his solicitors about the blistering, and in his later letter of 10 January 2009 to Mr Pix he had not mentioned having told the latter about the blistering. He acknowledged it was a mistake on his part to build a demonstration boat using dark colours which could cause blistering.

- [26] Mrs Rider gave brief evidence confirming that Suncoast Marine had built the vessel for the partnership consisting of her and her husband.

The plaintiff's claims

- [27] Mr Pix claimed in negligence against Suncoast Marine on the basis that it had breached a duty of care owed to him as purchaser from it, or alternatively as a subsequent purchaser of the vessel, particularised as the duty to construct it with reasonable care. As against the Riders, it was claimed that by agreeing to the special condition by which they warranted that they were builders of the vessel, they had assumed a duty of care to Mr Pix to supply a vessel constructed with reasonable care; which, again, they had breached.
- [28] The particulars of Suncoast Marine's breach were the failure to properly apply paint and fairing products; the failure to ensure that the vessel was adequately sealed to avoid water ingress; and the failure to ensure that the vessel complied with commercial survey standards. As a result of that negligence in the construction of the vessel it had developed blistering across its outer surface, it was not watertight, and it did not meet the requirements of commercial survey. The particulars of the Riders' failure to supply a vessel constructed with reasonable care were said to be those matters particularised at certain paragraphs of the statement of claim. Those paragraphs plead (in summary) that paintwork defects in the form of blistering and cracking became apparent in the vessel over time; that it had latent water ingress defects; that it did not comply with commercial survey standards because it was not built in accordance with certificate of design drawings, or the standards imposed by the Uniform Shipping Law Code, and core checks had not been completed; and that rectification works were undertaken.
- [29] The contract claim against Suncoast Marine was based on the contention that it was the vessel's undisclosed vendor; in the alternative, the claim was brought against the Riders. Suncoast Marine had (it was pleaded) breached a term implied by s 71 of the *Trade Practices Act 1974* (Cth) that the vessel would be of merchantable quality. Both Suncoast Marine and the Riders had breached a term implied by s 17 of the *Sale of Goods Act 1896* (Qld) that the vessel would be of merchantable quality, the *Jalun* having been bought by description. In addition, the Riders had, by the special condition, warranted that they were the builders of the vessel and consequently owed a duty of care to provide a vessel constructed with reasonable care.¹

¹ In written submissions for Mr Pix, a pleading of an implied term of fitness for purpose was abandoned, and breach of warranty claims were not pursued, it being conceded that the paintwork defects were not structural defects.

The defences

- [30] In their defences, both Suncoast Marine and the Riders admitted that there were some defects in the fairing, which Mr Pix had inspected before signing the contract, but denied that the paintwork defects or any alleged water ingress defects were latent at the time of sale. They denied that the vessel failed to comply with survey standards when the contract was entered. Suncoast Marine denied that it was a party to the contract or gave any warranty. The Riders denied that any condition was implied by s 17 of the *Sale of Goods Act*, on the bases that they were not in the business of dealing in goods of the vessel's description and that Mr Pix had examined the vessel prior to sale. They also denied the allegations that the vessel was not of merchantable quality, or that they had breached any duty of care by reason of the provision of the warranty.

The identity of the Jalun's vendor(s)

- [31] The basis for the contention that Suncoast Marine had sold the *Jalun* as undisclosed principal was the special condition to the vessel sale agreement in which the "seller" warranted that "it" was the builder of the vessel. That, it was said, amounted to the Riders' identifying themselves as agents for Suncoast Marine in the sale. But the special condition was at odds with other parts of the contract: the vessel specifications attached to the contract identified Suncoast Marine as the builder, as did the builder's warranty. And in any event, the statement did not amount to a representation of its converse; that is, it did not amount to the builder of the vessel saying that it was the seller, as opposed to the seller wrongly saying it was (they were) the builder. The vessel sale agreement clearly identified the sellers of the vessel as the Riders. The unchallenged evidence was that it was built for the Riders' partnership. They owned the *Jalun*, so whatever representation was made in the contract about who had built it, nobody but they could have sold it. There is no basis for concluding that they were acting as agents for Suncoast Marine, or that it was an undisclosed principal in the contract. Accordingly, s 71 of the *Trade Practices Act*, which applies where a corporation supplies goods, has no application here.

The condition of the vessel at sale

- [32] I accept the evidence given by Mr Pix's witnesses as to the appearance of blistering and cracking on the boat's hulls. I accept, too, Mr Pix's evidence that there were no significant flaws in the paintwork of the *Jalun* when he acquired it in April 2007, but that blistering became apparent subsequently as the boat was exposed to heat. There are a number of reasons for my rejecting Mr Rider's evidence that the blisters were apparent and discussed between the two men, with the result that Mr Pix reduced the price he offered for the boat to reflect the paintwork defects.
- [33] Firstly, Mr Rider's evidence that he told Mr Pix that the boat had been painted a number of years before he (Mr Pix) purchased it and would require painting in another two years' time is implausible, given that the *Jalun* was being sold in early 2007 as a 2006 vessel. Secondly, had the discussion taken place, one might have expected Mr Rider to establish, prior to contracting, precisely what Mr Pix's price reduction to reflect the defects was. Thirdly, one might also have expected Mr Rider to raise the existence of the blistering problem in his letter to Mr Pix about what a warranty would and would not cover. And fourthly, one would certainly have expected any reduction in purchase price to reflect the blistering defect to be the subject of provision in the contract.

- [34] Mr Rider, however, conceded that he had not raised the subject of the blistering, or any resulting price discount, with his solicitors. And even had he somehow overlooked the prudence of reflecting the discussion in the contract, it is impossible to accept that, had it occurred, he would have failed to mention it in his response to Mr Pix's letter of complaint about the condition of the boat's exterior. Mr Rider made a number of points of rebuttal, forceful in tone, in that response, but he did not suggest that Mr Pix had been made aware of the blistering. My conclusion is that the blisters were not evident at that time; and neither they nor any prospect of their emergence were made known to Mr Pix when he bought the boat.

The cause of the faulty paintwork

- [35] It was submitted that the evidence of Mr Slinger and Professor Will should be given little weight. I am satisfied, though, that Mr Slinger's substantial experience in the preparation of boats prior to painting by way of fairing and filling and his formal training in coatings inspection, meant that his opinion as to the causes of the problems on the *Jalun* was expert and was of evidentiary value. Particular issues were raised about the evidence of Professor Will; it was said that he had not identified a field of specialised knowledge which he possessed in relation to the subject matter of his report; that he had not identified particular studies in the body of work on which he said he relied to give his evidence about the major causes of blistering or delamination of boats; and that he had not himself done any such studies. I am satisfied, however, that Professor Will's expertise in coating analysis, and it followed, reasons for coating failure, provided a proper basis for his opinion evidence. He was not challenged as to the existence of the body of information on which he relied as to the causes of blistering or delamination or called on to identify particular studies.
- [36] It was also suggested that there was some uncertainty about what samples of paintwork Professor Will had relied on and it was said that his opinion as to expected paint life was unreliable because he had not considered the paint system or the type of fairing used. As to the first Professor Will explained that he had been given some paintwork samples by Mr Pix's representatives but had obtained his own samples, which, his report shows, he subjected to microscopic examination. The confusion about the number of samples examined may result from the fact that he provided a photographic image of only one such sample. His view about the expected paint life was based on an examination of the existing state of the paint applied, with information as to its components, and was, rationally, not predicated on variables such as inadequate fairing or application.
- [37] Another objection was that Professor Will's opinion was based on his having being told what the affected areas were; those exposed to the sun. I am satisfied, in fact, from Mr Pix's description of the blistering as manifesting on the outer surfaces above the water line, and from Mr Rider's own evidence that the blistering emerged on the outboard sides of the hulls which got most sunlight, that Professor Will's opinion had a proper evidentiary foundation.
- [38] Even had I accepted the submission that their evidence should not be given much weight, the evidence of admissions by Mr Rider would have supplied any deficiency as to the nature of the fairing problems and the resulting paintwork defects. Mr Rider's evidence was signally without detail as to by whom, and with what level of expertise, the filling and fairing of the boat was undertaken. But I accept Mr Ricketts' evidence

that Mr Rider conceded to him that the “main contributor” to the paint work problem was that unskilled workers undertook the fairing. I find that Mr Rider also made the further statement, that the workers had applied the fairing compound in too dry a mix, with the result that voids had occurred. His view that the voids were the cause of the blistering may have been speculative on his part, but it seems to me highly likely to reflect what in fact occurred. He acknowledged, too, that the filler battens had not been removed.

- [39] Having regard to those admissions, to the observations of Mr Slinger, Professor Will and Mr Behan, and to the expert evidence of Mr Slinger and Professor Will as to the likely sources of the blistering problem, I find on the balance of probabilities that the source of the blistering was to be found in the fairing layers and that it resulted from inadequate preparation of the surfaces between layers and inexpert mixing of the fairing compound. The vertical cracking and blistering was caused by the filler in the fairing battens expanding at different rates from the rest of the compound and was the result of a negligent failure to remove the battens. But for the deficiencies in the preparation for, mix of and application of the fairing compound, the *Jalun*'s paintwork could have been expected to last in good condition for at least ten years.

Water ingress

- [40] I accept that Mr Pix's allegations are made out so far as he complains of water ingress into the vessel's bulkheads. It is also likely to be the case that the water entered through the stanchion sockets. But that is as far as the evidence went. No expert opinion was called as to how or when that state of affairs was likely to have arisen; I was simply asked to infer negligence from the fact that it existed when work was done on the boat in 2012. The fact that water ingress was occurring in that way in 2012 does not establish that the defects existed at the time of sale in 2007 or that they resulted from some negligence in the construction of the boat. Mr Garlick's reference to the bottoms of the stanchion sockets as having been knocked out makes it clear that they were not in their original state. The evidence was silent as to what methods of sealing might have been applied to the stanchion sockets by a boat-builder applying reasonable care. It might be, for example, that the vessel was properly sealed when built, but that normal wear and tear could be expected to produce the results seen in 2012. That might not be the case at all; the point is that there is no evidence to assist in this regard. I am, in consequence, not prepared to make any finding of negligence in relation to the water ingress problems.

Failure to comply with commercial standards

- [41] I do not consider that the allegation of failure to comply with commercial survey standards adds anything to the allegation of negligence. Either the failures which are said to constitute non-compliance with those standards themselves constitute negligence or they are irrelevant. In submissions, it was said that the relevant failures were to build the vessel so that water did not enter its hull and to make the collision bulkheads watertight. This was said to be manifested by the fact that the “stanchions as fitted allowed water to ingress the hull”. In fact, as I have already remarked, there was no evidence to show at what stage the stanchion fittings reached that condition.
- [42] It was also submitted that I should find that the construction of the vessel was not in compliance with the design plans. Those plans were not placed before me. The highest

the evidence rose was Mr Behan saying that he had observed the core sample from the deck to be undersized relative to the drawings. It was not, in the event, established whether this was in the nature of expert opinion, in which case it was inadmissible because no report had been provided or leave given for it; or an observation of fact (which might have been apparent from the design drawings; but they were not in evidence). In the circumstances, I conclude there is no admissible evidence that would warrant a finding that the construction of the vessel did not comply with the design plans. Nor was there any evidence of the remaining particular in this regard, that core checks had not been completed.

Was there a duty of care owed by either Suncoast Marine or the Riders?

- [43] The damage Mr Pix suffered because of the failure properly to prepare the boat for painting was pure economic loss. As was acknowledged on his behalf, success in negligence against either Suncoast Marine or the Riders required the finding of a novel duty of care. In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd & Anor*² Gleeson CJ, Gummow, Hayne & Heydon JJ observed that:

“Damages for pure economic loss are not recoverable if all that is shown is that the defendant’s negligence was a cause of the loss and the loss was reasonably foreseeable.”³

In that case, the vulnerability of the plaintiff, in the sense of its inability to protect itself from the economic consequences of the putative wrongdoer’s negligence had emerged as an important requirement.⁴

- [44] A useful, although non-exhaustive, list of “salient features” to be considered in determining whether a novel duty of care should be found was set out in the judgment of Allsop P in *Caltex Refineries (Old) Pty Ltd v Stavar*.⁵ For present purposes, it is relevant to consider the nature of the harm in this case, its foreseeability and the respective defendants’ control over it; the relationship between them and Mr Pix in terms of reliance, assumption of responsibility, vulnerability and knowledge of the potential for harm; as well as the consistency or otherwise of such a duty with contractual obligations. The potential indeterminacy of liability, should such a finding be made, is also a consideration.
- [45] As best I can understand the pleadings, the allegation that the Riders owed a duty of care in the supply of the vessel because of the warranty that they were its builders entails reasoning that they were, therefore, actually its builders; a proposition I have rejected. Notably, the pleadings identified nothing which actually amounted to negligence on their part, sliding from the allegation of a duty of care to the allegation that the boat had defects, without elucidating the breach of the proposed duty. The submissions made for Mr Pix at the trial’s close argued that a duty of care should be found because the Riders controlled the operations of Suncoast Marine and, because its knowledge was their knowledge, were aware that defects in the boat’s manufacture were likely to cause loss to the purchaser, which they were in a position to avoid. But all of this ignores the fact that as a matter of law the Riders did not manufacture the

² (2004) 216 CLR 515.

³ At 530.

⁴ At 530.

⁵ (2009) 75 NSWLR 649 at 676.

boat; their role was to supply it to a purchaser. It would be an extraordinary thing to infer a common law duty of care in every supplier of goods requiring it to provide a product free from defect.

[46] If it is suggested that the special condition in some way amounted to a holding out to Mr Pix, which he relied on, that the Riders had a different role and were the manufacturers, the simple answer is that it was made apparent both in the contract itself and in the correspondence from Mr Rider that Suncoast Marine was in fact the builder. Mr Pix himself said nothing to suggest that he placed any reliance on the special condition or was under any apprehension that the Riders were the builders of the *Jalun*. So far as the degree of danger is concerned, given my finding that the evidence supports only a conclusion that the paintwork was defective, it can be said immediately that no significant degree of hazard was involved. Those defects did not present any actual danger or even render the boat unusable. And importantly, it was open to Mr Pix to ensure that protection against such defects, as between him and the Riders, be the subject of provision in the vessel sale agreement. Instead, he accepted the builder's warranty, limited in its scope to structural defects. There is no basis for finding that the Riders owed a common law duty of care.

[47] It is the case that Suncoast Marine was in a closer relationship of proximity to Mr Pix than the ordinary manufacturer to an ultimate purchaser; the company's guiding minds were the Riders, who were well aware of his position. The company was also in a position through the exercise of the proper supervision of its workers to avoid Mr Pix's suffering of loss through the boat's defects; no great difficulty would have entailed in doing so. But again, there was no particular hazard involved in the paintwork defects. Mr Pix was made aware in the form of the unexecuted builder's warranty of the extent of obligation which Suncoast Marine was prepared to assume; that was, liability for structural defects only. To find a duty of care in this case would be to go beyond the terms of that warranty. Mr Pix was in a position to insist on a more extensive warranty, preferably one actually signed on behalf of the boat's builder, Suncoast Marine, and the benefit of which was expressly assigned to him. The circumstances of this case do not warrant a finding that Suncoast Marine owed any duty of care.

Implication of term as to merchantable quality – s 17 Sale of Goods Act

[48] Relying on s 17(c) of the *Sale of Goods Act*, Mr Pix contended that there was to be implied into the contract a condition that the *Jalun* would be of merchantable quality. Section 17, so far as is relevant, provides:

“(1) 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—

...

(c) when goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not) there is an implied condition that the goods shall be of merchantable quality;

(d) however, if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed.”

For the Riders, it was said that the sale was not by description; that Mr Pix had inspected the boat; and that the Riders were not shown to have dealt in goods of the *Jalun's* description.

- [49] Mr Rider's evidence was that he and his wife had decided to build boats through the vehicle of Suncoast Marine, and I draw the inference from the evidence that their purpose was to sell the vessels built by that company. They had a client for the purchase of the boat while it was still in construction; ultimately, of course, they sold to Mr Pix. By the time that sale took place they had decided not to go further with the boat-building business and hence had no more vessels to sell. But it does not follow that they did not undertake the transaction as dealers in boats of the *Jalun's* general description.
- [50] In *Ashington Piggeries Ltd v Christopher Hill Ltd*,⁶ Lord Guest, in the majority, considering the expression "deals in goods of that description" used in the cognate section of the English *Sale of Goods Act* 1893, referred to the judgment of Mellor J in *Jones v Just*⁷ as the basis of the provision, before accepting a submission that the words were intended:

"...to confine the section to a dealer in the way of business as opposed to a private capacity [so that] a fair interpretation of the words would be 'who deals in goods of that kind'".⁸

In a similar vein, Lord Wilberforce observed:

"A seller deals in goods of that description if his business...is willing to accept orders for them. I cannot comprehend the rationale of holding that the subsections do not apply if the seller is dealing in the particular goods for the first time or the sense of distinguishing between the first and the second order for the goods or for goods of the description. ... Consideration of the preceding common law shows that what the Act had in mind was something quite simple and rational: to limit the implied conditions of fitness or quality to persons in the way of business, as distinct from private persons".⁹

As had Lord Guest and Viscount Dilhorne, Lord Wilberforce held that the words, "goods of that description" simply meant "goods of that kind".¹⁰

- [51] The Riders may have abandoned any idea for the future of building and selling boats, but that had been their business. This was no private sale. I am satisfied that they are properly characterised as sellers dealing in goods of the *Jalun's* description.
- [52] As to whether the sale was by description, in *Australian Knitting Mills Ltd v Grant*,¹¹ Dixon J said that

⁶ [1971] 1 All ER 847.

⁷ (1868) LR 3 QB 197.

⁸ [1971] All ER 847 at 859.

⁹ [1971] All ER 847 at 875.

¹⁰ [1971] All ER 847 at 859, 868 and 876.

¹¹ (1933) 50 CLR 387.

“...the distinction is between sales of things sought or chosen by the buyer because of their description and of things of which the physical identity is all important.”

He continued:

“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”.¹²

- [53] Not long after *Grant*'s case was decided in the High Court, Rich J observed, in *David Jones Limited v Willis*,¹³ that the effect of the authorities referred to in the High Court's judgment in *Grant* and also of that judgment was that

“whenever the description of the goods enters into the transaction, so that the buyer must be taken to rely upon it to a substantial degree as well as upon the identity of the goods, it is a sale by description.”¹⁴

The fact that the buyer has seen the goods does not mean that the sale is not one by description

“if the deviation of the goods from the description is not apparent.”¹⁵

- [54] In the present case I am satisfied that Mr Pix relied on the description of the *Jalun* – as a large, twin-motored sailing catamaran built under survey – to a substantial degree. Although he inspected the vessel, and plainly did so with a keen eye, he could not have ascertained the fairing defects which led to the substantial blistering of the vessel over the next few months. I find that Mr Pix bought the *Jalun* by description.
- [55] Accordingly, there is to be implied into the vessel sale agreement a condition that the *Jalun* would be of merchantable quality. Again, one can turn to the judgment of Dixon J in *Grant*:

“... [t]he 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 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 and without special terms.”¹⁶

- [56] There is no prospect, in my view, that any buyer who knew that the *Jalun*'s paintwork, because of the defects in its fairing, would sooner or later become subject to the blistering and cracking that subsequently emerged would have bought the yacht without demanding a price reduction. The *Jalun* was not of merchantable quality.

The builder's warranty

¹² (1933) 50 CLR 387 at 417.

¹³ (1934) 52 CLR 110.

¹⁴ (1934) 52 CLR 110 at 119.

¹⁵ *Beale v Taylor* [1967] 3 All ER 253 at 255.

¹⁶ (1933) 50 CLR 387 at 418.

- [57] There remains the pleading concerning the special condition by which the Riders had warranted that they were the builders of the *Jalun*. From that, it was said, should be implied a duty to provide a vessel manufactured with reasonable care. Implication of such a term (it was argued) was reasonable and equitable, necessary to give business efficacy to the contract, obvious, capable of clear expression and not in contradiction of any express term of the contract.
- [58] I do not consider that any such implied term follows from the existence of the special condition. It did warrant that the Riders were the builders, inexplicably in light of other contrary indications in the contract, but nothing further followed from it. It did not amount to a warranty of any kind about the condition of the vessel. It provides no basis for regarding the contended-for acceptance of a duty as reasonable or necessary.

Damages

- [59] I had foreshadowed in the course of closing addresses at trial that further submissions might be required on quantum. As it transpires, I have made a finding upholding one aspect only of Mr Pix's claim against the Riders, in relation to the breach of an implied term that the *Jalun* would be of merchantable quality. Section 54 of the *Sale of Goods Act* provides for damages for a breach of warranty:

Remedy for breach of warranty

...

- (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.
 - (3) In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value which they would have had if they had answered to the warranty.
- [60] The primary rule, then, is that the party who has suffered damage from such a breach is entitled to the loss directly and naturally resulting from the breach, which is presumed to be the difference between the goods' value in their warranted condition and their actual value as delivered. However, that is a presumption which may be displaced in an appropriate case. In the present case, there is no evidence of the actual value of the *Jalun* at the time it was delivered to Mr Pix. Instead, he contended that the appropriate measure of damages was the cost of repairs to the vessel. A complicating factor is the 2012 valuation of the vessel at the figure of \$2,250,000, which, if it were accepted as accurate, (the defendants pointed out that the vessel would have depreciated in the ordinary course since its purchase) would set an outer limit of loss of \$180,000.
- [61] Mr Pix also claimed damages for loss of use of the vessel over a period of 270 days when it was under repair. Reference was made to *Yates v Mobile Marine Repairs Pty Ltd & Anor* [2007] NSWSC 1463, in which Palmer J awarded damages for loss of use of a pleasure craft by applying the Supreme Court rate of interest (9% p.a. in that case) to the value of the vessel at the relevant time, for a period of 11 or so months over which it could not be used. But if the cost of repair is not an appropriate measure of

loss, as opposed to the reduction in the value of the boat, it is difficult to see why damages should be given for the loss of use of the boat during repairs.

Directions and orders

- [62] Further submissions are required on these issues. In addition, since Mr Pix relies on the cost of repairs as the appropriate measure of damages, a schedule of the amounts claimed should be provided, setting out the evidence in relation to each item of expense, with transcript references, and the relevant information contained in the invoices, with exhibit numbers. If either party contends that costs should not follow the event, on the standard basis, submissions should also be addressed to that matter.
- [63] The plaintiff's submissions are to be filed and served by 4 pm on 24 October 2018, with submissions in reply by the second defendants to be filed and served by 4 pm on 2 November 2018.
- [64] The first defendant, Suncoast Marine, is entitled to have Mr Pix's claim against it dismissed. I will hear the parties as to costs in that regard.