SUPREME COURT OF QUEENSLAND

CITATION:	*Rider & Anor v Pix* [2019] QCA 182
PARTIES:	**MICHAEL JOHN RIDER** **KATE RIDER** (appellants) **v** **TREVOR KEITH PIX** (respondent)
FILE NO/S:	Appeal No 3665 of 2019 SC No 12976 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 235 and [2019] QSC 45 (Holmes CJ)
DELIVERED ON:	10 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	22 August 2019
JUDGES:	Sofronoff P and Morrison JA and Flanagan J
ORDERS:	**1. The appeal is dismissed.** **2. The appellants pay the respondent's costs of the appeal.**
CATCHWORDS:	SALE OF GOODS – SALE OF GOODS LEGISLATION – FORMATION OF CONTRACT – CONDITIONS AND WARRANTIES – IMPLIED CONDITIONS AND WARRANTIES – QUALITY OR FITNESS FOR PARTICULAR PURPOSE – SELLER DEALING IN GOODS OF RELEVANT DESCRIPTION – where there was a contract for the sale of a sailing catamaran – where the sellers had previously decided to undertake a boat-building venture – where the sellers were the directors and shareholders of a company that built the catamaran in question – where the catamaran was originally intended to be a demonstration model – where the company sent invoices to a partnership between the sellers for the construction of the catamaran – where the partnership recorded these invoices and the sale of the catamaran as capital expenses and sales of the partnership – where, prior to the sale, the sellers had decided to discontinue the boat-building venture – where, subsequent to the sale, blisters and cracking started to appear in the catamaran's paintwork – where the buyer commenced proceedings for, among other things, breach of contract and negligence –

where the learned Chief Justice held that the sellers had breached the condition term implied by s 17 of the *Sale of Goods Act* 1896 (Qld) that the catamaran would be of merchantable quality – whether the sellers, as distinct from the company that built the catamaran, were dealers in goods of the catamaran's description

DAMAGES – GENERAL PRINCIPLES – DIFFICULTY OF ASSESSING DAMAGES – where there was a contract for the sale of a sailing catamaran – where the catamaran was used for enjoyment – where subsequently, blisters and cracking started to appear in the paintwork – where the learned Chief Justice held that the sellers had breached the condition implied by s 17 of the *Sale of Goods Act* 1896 (Qld) that the catamaran would be of merchantable quality – where the catamaran was dry docked for repairs to the paintwork – where the buyer claimed among other things damages for being deprived from using the catamaran while it was being repaired – where the learned Chief Justice assessed the buyer's loss as reflecting the interest that could have been earned on the capital tied up in the catamaran during the period of repairs – whether the learned Chief Justice should have instead awarded damages reflecting the amount by which the value of the catamaran depreciated while being repaired

Partnership Act 1891 (Qld), s 5
Sale of Goods Act 1896 (Qld), s 17

Admiralty Commissioners v SS Chekiang [1926] AC 637, cited
Admiralty Commissioners v SS Susquehanna [1926] AC 655, cited
Ashington Piggeries Ltd v Christopher Hill Ltd [1971] 1 All ER 847, followed
Jones v Just (1868) LR 3 QB 197, cited
Lord Citrine (Owners) v Hebridean Coast (Owners) [1961] AC 545, cited
Mersey Docks and Harbour Board v Owners of the SS Marpessa (The Marpessa) [1907] AC 241, cited
Miller v Karaman Pty Ltd [2003] WASCA 249, distinguished
Owners of No 7 Steam Sand Pump Dredger v Owners of SS "Greta Holme" (The Greta Holme) [1897] AC 596, cited
Owners of Steamship "Mediana" v Owners, Master and Crew of Lightship "Comet" (The Mediana) [1900] AC 113, cited
Vautin v BY Winddown, Inc (formerly Bertram Yachts) (No 4) (2018) 362 ALR 702; [2018] FCA 426, cited
Yates v Mobile Marine Repairs Pty Ltd & Anor [2007] NSWSC 1463, cited

COUNSEL: A S Marinac (*sol*) for the appellants
G E Thompson QC SG, with S R Grant, for the respondent

SOLICITORS: Pacific Maritime Lawyers for the appellants

[1] **SOFRONOFF P:** I agree with the reasons of Flanagan J and the orders his Honour proposes.

[2] **MORRISON JA:** I have read the reasons of Flanagan J and agree with those reasons and the orders his Honour proposes.

[3] **FLANAGAN J:** In 2007, the respondent, Trevor Pix, saw an advertisement for a 65 foot sailing catamaran, located in Mooloolaba, named the *Jalun*. It was described as being new, being built in 2006, and with survey certification. The advertisement identified Suncoast Marine Pty Ltd as the builder. The directors and shareholders of Suncoast Marine were the appellants, Michael and Kate Rider.

[4] In or around 2002, the Riders moved to the Sunshine Coast to begin a boat building venture. The boats would be built by Suncoast Marine. In that same year, the Riders engaged naval architects to design the *Jalun*. Construction commenced in 2003. Throughout construction, Suncoast Marine sent invoices to West Pacific Marine Services, a partnership between the Riders. Additionally, while it was being built, the Riders had interest from a third party for the purchase of the *Jalun*, but the deal fell through. Somewhat inconsistent with this fact was Mr Rider's evidence that he had intended for the *Jalun* to be a one-off demonstration model to showcase Suncoast Marine's capabilities.

[5] The *Jalun* was launched in 2004 and accrued approximately 70 hours of use for the purposes of survey certification. According to Mr Rider, Suncoast Marine subsequently built a motor equivalent of the *Jalun*, called the *Tintola*. Suncoast Marine sold the *Tintola* on a costs plus commission basis to a third party.

[6] Ultimately in 2006, the Riders, through their other company Suncoast Yacht Pty Ltd, advertised the *Jalun* for sale. This was because, according to Mr Rider, he and his wife had decided to discontinue building and selling boats. Having seen the advertisement, Mr Pix inspected the *Jalun* in Mr Rider's presence. He came away impressed, although he had noticed very small dots in the paintwork near the stairs onto the boat. In the event, on 27 March 2007, Mr Pix entered into a contract of sale to purchase the *Jalun*. The price was $2,450,000. The contract identified the Riders as the seller(s). The parties inserted a special condition into the contract whereby the seller warranted that it was the builder of the *Jalun*, and provided a builder's warranty in a form contained in a schedule to the contract. The Riders were clearly not the builders – Suncoast Marine was – and the builder's warranty schedule was left blank, although an unsigned document purporting to be a warranty from Suncoast Marine for "structural defects only" was appended to the contract. Ultimately, on appeal nothing turns on these discrepancies.

[7] Shortly afterwards, large blisters started to form in the *Jalun*'s paintwork, particularly where there was exposure to sunlight. There were also signs of cracking. At trial, the learned Chief Justice found that the blistering was caused by Suncoast Marine's negligent fairing of the *Jalun*, specifically, "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 [while the *Jalun* was faired]."[1]

[8] Mr Pix commenced proceedings against the Riders and Suncoast Marine in 2009. On 10 May 2012, the *Jalun* was put on a hardstand for fairing and repainting. It remained out of operation until 4 February 2013, that is, 270 days. While laid up for repairs, it became apparent that there was water ingress, and it was also opined that the *Jalun* did not meet commercial survey standards.

Mr Pix's claims

[9] First, Mr Pix claimed that Suncoast Marine was liable under the contract of sale as an undisclosed principal. Notably, Mr Pix claimed that there had been a breach of the condition as to merchantable quality implied by operation of s 17(c) of the *Sale of Goods Act* 1896 (Qld). In the alternative, he claimed that both Suncoast Marine and the Riders were liable in negligence.

The decision below

[10] As observed above, the learned Chief Justice found that Suncoast Marine was responsible for defects in the painting and fairing of the *Jalun*. Her Honour could not be so satisfied in respect of the water ingress.[2] Her Honour also concluded that the allegation concerning the *Jalun*'s failure to meet survey standards was unsubstantiated.[3]

[11] Her Honour found that the Riders were the sellers under the contract of sale; they did not enter into the contract as Suncoast Marine's agents. Further, as a subsequent purchaser, Mr Pix was not owed a duty of care by Suncoast Marine. The Riders were not otherwise liable in negligence. Her Honour did, however, conclude that they had breached the implied condition of merchantable quality by reason of the paintwork defects. The relevant part of her Honour's Reasons are [48] to [51]:

> "[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:
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> '(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—
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> …
>
> (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;

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1 *Pix v Suncoast Marine Pty Ltd* [2018] QSC 235 at [39].
2 [2018] QSC 235 at [40].
3 [2018] QSC 235 at [42].

(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*,[4] 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*[5] 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"'.[6]

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'.[7]

As had Lord Guest and Viscount Dilhorne, Lord Wilberforce held that the words, 'goods of that description' simply meant 'goods of that kind'.[8]

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4 [1971] 1 All ER 847.
5 (1868) LR 3 QB 197.
6 [1971] All ER 847 at 859.
7 [1971] All ER 847 at 875.
8 [1971] All ER 847 at 859, 868 and 876.

> [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."

[12] Her Honour then invited the parties to make submissions on quantum. In a separate judgment,[9] her Honour assessed damages at $544,000 plus interest, totalling $988,458. Of the $544,000, $418,000 was attributed to the difference between the *Jalun*'s value had it been of merchantable quality (ie, without the paintwork defects) and its actual value at delivery. The Riders do not dispute her Honour's reasoning in this respect.

[13] The remaining amount of $126,000 was awarded as compensation for Mr Pix's loss of the use of the *Jalun* while it was being repaired. For the purposes of assessing damages for loss of use, her Honour undertook a comprehensive review of the authorities, ultimately summarising the position at [25]-[27]:

> "[25] The principle which emerges from the cases is that the owner of a vessel deprived of its use for a period by the wrongful act of another is entitled to general damages, whether that act is a tort or a breach of contract. It does not matter that the vessel was not being used in profit-making or that its owner has not been put to any expenditure to replace it. It is not necessary for a plaintiff to establish what particular use he or she would have made of a chattel in order to recover damages for the loss of its use. The point is made in *The Mediana* that it is the deprivation of the chattel which gives rise to the right to damages, and the defendant cannot diminish that right by showing that the plaintiff did not usually use the item. (It was unnecessary, then, for the plaintiff here to prove that he would have made any particular use of the vessel during the period it was under repair.) Calculating interest on the capital invested in the chattel (after depreciation) is a suitable method of assessing damages; the point is that an investment has been made in the item which is capable of yielding nothing by way of return in terms of profit or, in this case, enjoyment, during the period it is incapable of being used.
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> [26] I accept, then, the plaintiff's submission that he is entitled to general damages assessed by reference to interest on the (depreciated) value of the *Jalun* for the period it was unavailable to him by reason of the fairing and painting work. That was not the entirety of the repair period; once again, I will proceed on the basis that about 85% of the time taken was attributable to the breach-related work: 230 days. And again, I see no reason to suppose that there was anything untoward about the time taken in the work.
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> [27] That brings me to consideration of what figure I should adopt as the *Jalun's* value during the repair period, once allowance is

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9 *Pix v Suncoast Marine Pty Ltd & Anor* [2019] QSC 45.

> made for depreciation. The plaintiff proposed, with considerable chutzpah, that I should rely on the 2012 shipbroker's valuation; the same valuation he had submitted was unreliable for the purpose of considering diminution in value. I do not consider, however, that the difference in context lends the valuation any additional weight. The second defendants had suggested that it would, in assessing diminution in value, be reasonable to adopt the Australian Taxation Office's rate for charter vessels, of 5%. However, that may be too high, given that one would expect greater wear and tear on a charter vessel than a privately owned and used craft. In the absence of better information, I will proceed on a depreciation rate for the *Jalun* of 4%. At that rate, applied over the five years between the execution of the contract for its purchase and the commencement of the repairs, the *Jalun*'s value in May 2012 would be approximately $1,997,000. Allowing interest at 10% (the practice direction rate) for 230 days, the plaintiff is entitled to $126,000 for this head of damages."

Grounds of appeal

[14] The Riders' grounds of appeal are that:

1. the learned Chief Justice erred in finding that the second defendants or either of them were a "seller who deals in goods of that description" (that is, a seller dealing in boats) for the purposes of s 17(c) of the *Sale of Goods Act* 1896 (Qld);

2. the learned Chief Justice erred by failing to turn her mind to the appropriate mechanism for calculating damages for loss of the use of the *Jalun*; and

3. the learned Chief Justice erred by failing to turn her mind to the proportionality of the damages for loss of use, and that in consequence those damages were disproportionately high.

[15] The written and oral submissions for the Riders did not distinguish between appeal grounds 2 and 3: the crux of both grounds is that her Honour adopted the wrong approach in assessing damages for Mr Pix's loss of the use of the *Jalun*. These reasons will address them together.

Appeal ground 1: Were the Riders sellers dealing in goods of the *Jalun*'s description?

[16] The first ground of appeal is that her Honour erred in finding that the Riders were sellers who "deal[t] in goods of [the *Jalun*'s] description", that is, boats, for the purposes of s 17(c) of the *Sale of Goods Act*, so as to justify the implication of the implied condition of merchantable quality. In that respect, the Riders draw attention to paragraphs [49] to [51] of the learned Chief Justice's Reasons, which are excerpted above.

[17] The Riders submit that while it may have been appropriate to conclude on the evidence that Suncoast Marine dealt in boats, the same could not be said of themselves personally.[10] This is because, while Suncoast Marine was in the business of selling boats, they were not a part of that business. This submission

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10 Appellants' Outline of Submissions filed 19 July 2019, paragraph 2.

draws upon Lord Guest and Lord Wilberforce's speeches in *Ashington Piggeries*[11] excerpted above where their Lordships reasoned that a finding that a person is a dealer of goods turns upon a dichotomy of those who conduct a business of selling the goods concerned, and those who sell in a private capacity. Ultimately, the Riders contend that her Honour failed to distinguish between them and their company.

[18] The Riders also point to two further facts that should have prevented her Honour from finding that they were sellers dealing in boats. First, they emphasise that the *Jalun* was originally intended to be a demonstration model. Secondly, they argue that, even if they were at some stage dealing in boats, this was no longer the case when they sold the *Jalun* to Mr Pix, given their earlier decision to discontinue building and selling boats.[12]

[19] The ground of appeal can be distilled as follows. Assuming Suncoast Marine was in the business of building and selling boats, were the Riders also, in their own right, participants in the business such that they could be described as sellers dealing in goods of the *Jalun*'s description? Further, what can be made of the fact that the *Jalun* was a demonstration model? Finally, assuming the first question is answered in the affirmative, were the Riders no longer dealing in boats when they sold the *Jalun* to Mr Pix? These questions will be addressed in turn.

Were the Riders in the business of selling boats?

[20] Throughout the hearing of the appeal, the key theme of the Riders' submissions was that the evidence did not definitively show that the Riders – as distinct from their company Suncoast Marine – were in the business of selling boats. As to that, it can be immediately appreciated that there were at least two problems with the evidence. First, given that the business venture was short-lived, it is difficult to discern a pattern of conduct that would illustrate the respective roles of the Riders and Suncoast Marine. Secondly, it is difficult to rely upon the oral testimony to make distinctions between the Riders and their company. Throughout his evidence, Mr Rider used the pronoun "we" when describing his and his wife's and Suncoast Marine's conduct and intentions. On one view, some of Mr Rider's answers to questions might be seen as inculpating him and his wife as being involved in the business of selling boats. On the other hand, if "we" is taken to be referring to Suncoast Marine, or him and his wife as directors of Suncoast Marine, his evidence goes the other way. Ultimately, Mr Rider may not at all times have fully appreciated these distinctions and his evidence, viewed alone, should be treated with caution.

[21] That then leaves the objective circumstances and the documentary evidence. It is accepted that, sometime prior to the commencement of the construction of the *Jalun* in 2003, the Riders decided to move to the Sunshine Coast to establish a boat building venture.[13] Suncoast Marine built two boats as part of that venture: the *Tintola* and the *Jalun*. The only reference to the *Tintola* is in Mr Rider's oral testimony, and it seems to be accepted that Suncoast Marine sold it to a third party.[14] In respect of the *Jalun*, however, contemporaneous documents demonstrate

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11 [1971] 1 All ER 847 at 859 (Lord Guest) and 875 (Lord Wilberforce).

12 Appellants' Outline of Submissions filed 19 July 2019, paragraph 14.

13 Appeal Record Book 2, page 296: Transcript of Proceedings on 6 March 2018, T2-88 lines 16 to 33.

14 Appeal Record Book 2, pages 392-393: Transcript of Proceedings on 13 June 2018, T4-78 line 42 to T4-79 line 1: the Appeal Record Book does not reveal when the *Tintola* was sold.

the involvement of West Pacific Marine Services, the partnership between the Riders. Throughout the period of 31 March 2003 to 27 April 2007, Suncoast Marine invoiced the partnership for the costs of building the *Jalun*.[15] The partnership's Business Activity Statements[16] in the period of 1 January 2003 to 30 June 2007 show that the costs of building the *Jalun* were treated as a capital expense of the partnership.[17] The Business Activity Statement for the period of 1 April to 30 June 2007 also records the partnership's total sales as $2,438,000, which reflects the price paid by Mr Pix.[18] Evidently, the *Jalun* was property of the partnership. By definition, the members of the partnership, being the Riders, must have carried out a business with a view to profit – otherwise it would not have been a partnership at all.[19] What was that business? The natural inference arising from the circumstances above is that the partnership was involved in the business of constructing vessels with a view to profit, namely by way of sale.

[22] In my view, and subject to the matters below, the evidence provided a sufficient foundation to infer that the Riders were in the business of selling, and were open to orders for the purchase of, goods of the *Jalun*'s description.

What is the significance of the Jalun being a demonstration model?

[23] As a preliminary matter, it should be observed that the implied condition as to merchantable quality is not displaced merely where the goods subject to the contract of sale are a demonstration model. That would be a strange outcome given that demonstration models are routinely sold in the course of business. Indeed, I did not understand the Riders to be advancing a proposition of that nature.

[24] Rather, the Riders contended that the partnership's treatment of the *Jalun* was not probative of the nature of the partnership's business, owing to the fact that, according to Mr Rider, the *Jalun* was originally intended to be used as a demonstration model.[20] It was submitted that the partnership owned the *Jalun* to allow Suncoast Marine to have access to her for the purposes of demonstrating Suncoast Marine's capability. In contrast, it was Suncoast Marine, and not the Riders, who had sold the *Tintola*.[21]

[25] This submission is premised on the proposition that the *Jalun* was intended to be a demonstration model, however, there are several factors pointing to the contrary. First, there is Mr Rider's evidence that they had a buyer lined up to purchase the *Jalun* while it was being built but the deal subsequently fell through.[22] Secondly, there is the advertisement of the *Jalun*, which described the boat as "new", as opposed to, for example, a "demo".[23] Finally, if the *Jalun* was meant to be a demonstration model, why did it have to be transferred from Suncoast Marine to the partnership?

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15 Appeal Record Book 2, pages 88-102.
16 The Business Activity Statements were prepared by Mr Rider.
17 Appeal Record Book 2, pages 103-117.
18 Appeal Record Book 2, page 107.
19 *Partnership Act* 1891 (Qld) s 5(1).
20 Appeal Record Book 2, page 374: Transcript of Proceedings on 13 June 2018, T4-60 lines 1-4.
21 Appeal Record Book 2, page 393: Transcript of Proceedings on 13 June 2018, T4-79 lines 15-16.
22 Appeal Record Book 2, page 87: Letter from Mr Rider on behalf of Suncoast Yachts Pty Ltd to Mr Pix dated 14 March 2007; Appeal Record Book 2, page 402: Transcript of Proceedings on 13 June 2018, T4-88 lines 33-36.
23 Appeal Record Book 2, page 66.

[26] In any event, even accepting that the *Jalun* was a demonstration model, the fact remains that there existed a partnership. This necessarily means that there was a business between the Riders. The Riders readily concede that Suncoast Marine's business was the construction and selling of boats. On their case, that involved using the *Jalun* to showcase Suncoast Marine's capabilities. The invoices to the partnership and the Business Activity Statements demonstrate that the partnership was involved in the business of selling boats manufactured by Suncoast Marine.

Were the Riders no longer dealers of boats when they sold the Jalun to Mr Pix?

[27] Mr Rider's evidence was that he and his wife had sold the *Jalun* to Mr Pix after deciding that they would discontinue their business of building and selling boats.[24] The learned Chief Justice accepted that evidence, but nevertheless was satisfied that the Riders sold the *Jalun* as sellers dealing in goods of the *Jalun*'s description.[25]

[28] The Riders submit that her Honour erred in reaching that conclusion in light of the fact that the Riders had decided to discontinue building and selling boats. At its core, the Riders' submission is that a dealer of goods who decides to liquidate his or her existing stock is no longer in the business of selling goods once he or she decides to wind up the business.

[29] In support of this submission, the Riders rely on *Miller v Karaman Pty Ltd*.[26] In that case, the operator of an amusement park decided to sell its business. The buyer refused to pay an instalment, arguing *inter alia* that the amusement rides were not of merchantable quality. The Western Australia Court of Appeal held that a term of merchantable quality could not be implied. Although it had occasionally sold amusement rides, the seller was not in the business of selling amusement rides. Rather, the seller's business was to operate an amusement park; the sale of the rides was a part of the disposition of that business.[27] *Miller v Karaman Pty Ltd* is readily distinguishable. Whereas the seller there was never in the business of selling amusement rides, the Riders were, as demonstrated above, in the business of selling boats. And they continued to be in that business while they disposed of their existing stock, namely the *Jalun*.

[30] An analogy can be drawn between the present facts and a closing down sale. It cannot be suggested that a dealer liquidating its existing stock can eschew its label as dealer simply because it does not intend to source more stock once its existing stock is sold. The only wrinkle in the facts here is that the Riders' decision to discontinue building and selling boats seems to have occurred soon after the beginning of their business venture. However, that fact, in my view, is immaterial.

Conclusion

[31] It was open on the evidence for her Honour to conclude that the Riders were dealers in goods of the *Jalun*'s description when they sold it to Mr Pix. The Riders have failed to demonstrate any error in her Honour's reasoning in this respect. It follows that the condition as to merchantable quality was implied into the contract.

Appeal grounds 2 and 3: did the learned Chief Justice err in assessing Mr Pix's damages for his loss of the use of the *Jalun*?

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24 Appeal Record Book 2, page 373: Transcript of Proceedings on 13 June 2018, T4-59 lines 39-44.
25 *Pix v Suncoast Marine Pty Ltd* [2018] QSC 235 at [51].
26 [2003] WASCA 249.
27 [2003] WASCA 249 at [23].

[32] The learned Chief Justice awarded Mr Pix $126,000 for being deprived from using the *Jalun*. This figure was the product of applying the practice direction rate of interest (10 per cent per annum) on the then-capital value of the *Jalun* for the period during which the boat was being repaired. The Riders submit that her Honour erred in adopting this method of calculation, primarily because the *Jalun* was a pleasurecraft. Taking this into account, the Riders submit that the maximum that could be awarded was the amount by which the *Jalun* depreciated in value while being repaired, producing a lesser amount of $50,335.50.

[33] Before considering this ground of appeal, it is important to identify two relevant matters that the Riders do not agitate. First, they do not dispute the period of the repairs that her Honour attributed to the breach-related work, being 230 days out of the total period of 270 days. Secondly, they do not dispute that, at the time the *Jalun* was docked for repairs, her capital value was $1,997,000, having depreciated at a rate of four per cent per annum. (Indeed, the Riders have relied upon this rate of depreciation in submitting an alternative assessment of Mr Pix's loss.) Rather, the only issue in dispute as to quantum is whether her Honour erred in adopting the method of calculation that she did.

Damages for loss of use

[34] As the learned Chief Justice observed,[28] it is a settled principle that an owner of a chattel is entitled to general, and not nominal, damages when he or she is deprived of the use of his or her chattel for a period of time because of another's wrongful conduct. The breadth of this principle is broad. Damages for loss of use do not depend on the form of action.[29] Nor does it depend on what the chattel is used for: it can be used to make a profit, to discharge a public function, or simply for enjoyment.[30] There is also no need to show specific financial loss; what is being compensated is the deprivation of the use of the chattel per se.[31] Of course, if there is evidence of specific financial loss then that may result in a greater award of damages.[32]

[35] The question that then arises is how such a loss is quantified. The difficulty here is that the owner's loss of use is incapable of precise calculation where there is no specific financial loss beyond being deprived of the use of his or her chattel.[33] Recognising this difficulty, the courts have not laid down a definitive measure of loss: "There is no special sanctity about any particular method of arriving at the appropriate sum".[34]

[36] One approach is the "interest on capital value method", which is what her Honour did here. The interest on capital value method was approved in a series of House of Lords cases concerning vessels used to discharge a public function.[35] Notably, this

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28 *Pix v Suncoast Marine Pty Ltd & Anor* [2019] QSC 45 at [20]-[25].

29 *Owners of Steamship "Mediana" v Owners, Master and Crew of Lightship "Comet" (The Mediana)* [1900] AC 113 at 118 (Earl of Halsbury LC).

30 *The Mediana* [1900] AC 113 at 117 (Earl of Halsbury LC): the Lord Chancellor's chair hypothetical illustrates the point.

31 *The Mediana* [1900] AC 113 at 116 (Earl of Halsbury LC).

32 *Admiralty Commissioners v SS Susquehanna* [1926] AC 655 at 661 (Viscount Dunedin).

33 O*wners of No.7 Steam Sand Pump Dredger v Owners of SS "Greta Holme" (The Greta Holme)* [1897] AC 596 at 604 (Lord Watson).

34 *Lord Citrine (Owners) v Hebridean Coast (Owners)* [1961] AC 545 at 559 (Wilmer LJ).

35 *The Greta Holme* [1897] AC 596; *The Mediana* [1900] AC 113; *Mersey Docks and Harbour Board v Owners of the SS Marpessa (The Marpessa)* [1907] AC 241; *Admiralty Commissioners v SS Chekiang* [1926] AC 637; *Admiralty Commissioners v SS Susquehanna* [1926] AC 655; *The Hebridean Coast* [1961] AC 545.

method was adopted by Palmer J in *Yates v Mobile Marine Repairs Pty Ltd & Anor*,[36] which concerned a game fishing vessel used for recreational purposes. The rationale for the interest on capital value method is that it reflects the loss of the use of the money invested in the chattel while it remains out of use.[37]

[37] Another approach is what might be described as the "depreciation method", which entails an assessment of the amount by which the chattel depreciated in value while it could not be used. In this respect, the Riders draw the Court's attention to *Vautin v BY Winddown, Inc (formerly Bertram Yachts) (No 4)*,[38] a case concerning a yacht, where Derrington J would have awarded damages for loss of use on this basis. Justice Derrington once again adopted this approach in *Wyzenbeek v Australasian Marine Imports Pty Ltd (No 2)*.[39]

[38] Neither approach is free from criticism. In *Admiralty Commissioners v SS Chekiang*, Lord Sumner observed that the interest on capital value method was "a very uncertain test of the true daily value of the user lost" and that interest rates are a somewhat fictitious factor in assessments of this kind.[40] Nevertheless, the interest on capital value method, despite its flaws, has become the orthodox approach[41] and, indeed, in *SS Chekiang* neither Lord Sumner nor the rest of the House disturbed the registrar's assessment on this very basis. As for the depreciation method, it can be immediately observed that normal depreciation occurs regardless of whether the chattel is used. It is otherwise difficult to discern any intrinsic reason why the depreciation method fairly reflects the loss sustained.

[39] In the final analysis, an assessment of damages for loss of use is necessarily imprecise and, depending on the nature of the case, a range of approaches may be adopted. On each occasion it should be remembered that the object of general damages is to adequately compensate the innocent party for the loss sustained. Bearing this in mind, this Court should be slow to disturb a trial judge's assessment of damages for a loss of use unless it is plain that the approach adopted does not fairly reflect the plaintiff's loss. Having outlined the body of principles in this area, it is now convenient to directly address the Riders' grounds of appeal.

Consideration

[40] The Riders submit that the English authorities, and in particular the authorities of *Admiralty Commissioners v SS Susquehanna*[42] and *Lord Citrine (Owners) v Hebridean Coast (Owners)*,[43] establish the following propositions:[44]

> "1. General damages may be awarded to the owner of a pleasure vessel for loss of use.
>
> 2. The general damages may be substantial and not merely nominal;

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36 [2007] NSWSC 1463 at [77] and [85].
37 *The Greta Holme* [1897] AC 596 at 605 (Lord Herschell).
38 (2018) 362 ALR 702 at 771-774 [308]-[317].
39 [2018] FCA 1517 at [330].
40 [1926] AC 637 at 647.
41 *Admiralty Commissioners v SS Susquehanna* [1926] AC 655 at 669 (Lord Blanesburgh).
42 [1926] AC 655.
43 *The Hebridean Coast* [1961] AC 545.
44 Appellants' Outline of Submissions filed 19 July 2019, paragraph 31.

3. The position of the owner of a pleasure vessel is different to the position of a profit-earning vessel in terms of quantum because the owner of a profit-earning vessel has lost the chance to make profit from the vessel, while the owner of a pleasure vessel has not.

4. The calculation of damages to the owner of a pleasure vessel should 'begin at the bottom… by counting the costs'.[45] The costs claimed may then be adjusted by the finder of fact (then a jury, now a judge) bearing in mind the usual common law principle that the purpose of damages is compensatory."

[41] They argue that this Court should not follow Palmer J's approach in *Yates* because the overall effect of the authorities was not brought to his Honour's attention.[46] In response, Mr Pix submits that Palmer J was properly informed of the authorities.[47] For the purposes of deciding this appeal, it is unnecessary to descend into the minutiae of the parties' submissions in this regard.

[42] Ultimately, the Riders invite this Court, in the absence of Australian appellate authority, to confine damages for the loss of use in the case of chattels owned for enjoyment to the amount by which the chattel depreciates in value while it cannot be used. This is on the basis of the propositions advanced above, and because of the supposed distinction between chattels used for enjoyment, like the *Jalun*, and chattels used to make money, or to discharge a public function.[48] It is said that, in respect of the latter two classes of chattels, the loss sustained is not merely the loss of use of the chattel. Additionally, the owner loses out on profits that might have been generated by the chattel, or, as the case may be, incurs additional expenses to discharge the public function. The Riders submit that the interest on capital value method is an appropriate measure of the owner's loss in these instances. In contradistinction are chattels used for enjoyment, where, according to the Riders, the loss is simply that the vessel has continued to depreciate in value while it remains unavailable.

[43] There are a number of problems with this argument. First, the Riders are essentially arguing that a lower measure of damages should be adopted in the case of chattels used for enjoyment. They perceive it to be convenient to adopt the depreciation method as it yields a lower amount in this particular case. But that will not always be so.

[44] Secondly, and more fundamentally, the Riders' submissions misunderstand the nature of an award of damages for loss of use. The cases make clear that, absent evidence of specific financial loss, what is being compensated is the loss of the use of the chattel per se. If there is such evidence, which is more likely to be present in factual patterns concerning chattels used for profit (a commercial tanker, for example), then that will sound in additional damages or in a different measure of damages. However, absent such evidence, the Court nevertheless compensates the owner of the chattel for the loss of use. Typically, this will be done by applying the

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45 *The Hebridean Coast* [1961] AC 545 at 563 (Devlin LJ).
46 Appellants' Outline of Submissions filed 19 July 2019, paragraph 33.
47 Respondent's Amended Outline of Argument filed 15 July 2019, paragraph 10.
48 Appellants' Outline of Submissions filed 19 July 2019, paragraphs 36-39.

interest on capital value method. That is the effect of *Admiralty Commissioners v SS Susquehanna*[49] and was made clear by Lord Reid in *The Hebridean Coast*:[50]

> "I do not proceed on any supposed distinction in principle between a profit-earning ship and a non-profit-earning ship. The task of assessing damages is easier with a profit-earning ship and depends on the probability that she would have earned so much money if her owner could have used her. With a non-profit earning ship there is no direct financial loss and one must ask what harm was done to the owner by his being deprived of the use of his ship. Then comes what may be a very difficult task, to put a value in money on the harm which the owner has suffered. But you must first prove the harm. If no harm is proved beyond the mere fact that the owner is deprived of the services of his ship during the period of repairs, the opinion of Lord Herschell in *Steam Sand Pump Dredger No. 7 (Owners) v Greta Holme (Owners)* appears to have given rise to the practice of awarding damages based on interest on the value of the ship."

[45] Thirdly, the basis of the Riders' contended distinction between the different types of chattels is flawed. As observed above, the Riders submit that the interest on capital value method is justified in the case of profit-earning chattels and chattels used to fulfil a public function because the owners of such chattels will suffer additional losses, for example, lost profits or the expense of hiring replacement equipment. In contrast, such additional loss is non-existent in the case of personal chattels. This submission fails to appreciate the significance of additional loss in this area of law. The existence of additional loss justifies an additional award of damages; it does not justify the interest on capital value method. Rather, the true justification for the interest on capital value method is that the money invested in the chattel is tied up while the chattel remains out of use. That applies equally to personal chattels like the *Jalun*.

[46] The foregoing analysis demonstrates that the authorities allow for a range of approaches to be taken when assessing damages for the loss of use of a chattel if there is otherwise an absence of specific financial loss. Her Honour's assessment of Mr Pix's loss of the use of the *Jalun* was based upon established facts and adopted a method of assessment that was supported by authority. I am not satisfied that the Riders have established any error in her Honour's reasoning in this respect.

Disposition

[47] I would dismiss the appeal and order the appellants to pay the respondent's costs of the appeal.

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49 [1926] AC 655.

50 [1961] AC 545 at 577.