In The Supreme Court of Bermuda

CIVIL JURISDICTION

2006: No. 26

BETWEEN:

ROBERT SOUSA
(trading as AMR Auto Marine Repairs)

Plaintiff

-and-

CHARLES RICKETTS

Defendant

JUDGMENT

Date of Hearing: 3, 4, 5 and 20 December 2007
Date of Judgment: 11 January 2008

Mr Craig Rothwell, Cox Hallett Wilkinson, for the Plaintiff
Mr Richard Horseman, Wakefield Quin, for the Defendant

Introduction

1. These proceeding concern repairs to a boat owned by the defendant ("Mr Ricketts") undertaken by the plaintiff ("Mr Sousa"). The repairs have had a long and unhappy history, and concluded with a situation where the balance of Mr Sousa's bill remains unpaid, and Mr Ricketts has no wish to retain the boat in its repaired state, claiming that it had been "rendered useless" by Mr

Sousa's repairs, such that he wishes the boat to be returned to Mr Sousa in exchange for an award of damages in his favour.

History of the Repair Work

2. Mr Ricketts bought the boat, a 22 foot Aquasport with a Ford V8 gasoline powered inboard engine, in 2001, and says that he paid $19,500 for it. The boat was then more than 25 years old, and Mr Ricketts could not say whether the engine was the original. Although he said that the engine was working when he bought the boat, and that he could have put it overboard the day that he bought it, Mr Ricketts did not choose to do so. Instead he kept the boat in his yard from June 2001 until April 2004, turning the engine over "at least once per month" and running it for an hour or so. There is a conflict as to the condition of the boat when it was delivered to Mr Sousa's yard in April 2004, but the estimate which Mr Sousa prepared dated 13 April 2004 quoted a figure of $2,500 for engine and electrical repairs, as part of a total estimate of $10,470, the other major item being $6,000 for spray painting the boat, both internally and externally.

3. Following delivery of the boat by Mr Ricketts to Mr Sousa in April 2004, nothing was done for a substantial period. Mr Sousa's case was that Mr Ricketts was in no hurry to have his boat repaired, not having used the boat at all in the previous three years, and in the event Mr Sousa did not begin work on the boat until 2005. Mr Ricketts' evidence in both his witness statement and oral testimony was that although he had said that he did not expect to have the boat in the water for 24 May 2004, he had wanted it in the water by the Queen's Birthday holiday in June, and that while the boat sat in Mr Sousa's yard without any work being undertaken, he had attended in person every two weeks or so, pressing for work to commence. I pause here to note that there is a material discrepancy between Mr Ricketts' evidence, in both his witness statement and oral testimony on the one hand, and his pleaded case in regard to the time within which he says Mr Sousa agreed to complete the repairs on the other. I will deal with this further in due course.

4. When work did eventually commence, further difficulties quickly arose. Having spent some 88 hours working on the engine, and having succeeded in getting it running, the old engine "blew up", to use Mr. Sousa's term. The oil pan, which Mr Sousa said had been rusty, blew out, so that the oil immediately drained into the bilges. Mr Sousa said that when the oil pan blew, the crank shaft bearing broke, and Mr Ricketts' understanding was that the pistons had seized in the block. Either way, there was then no question of restoring this particular engine, and at this point the parties had very different ideas as to the appropriate course to be followed. Mr Ricketts' case was that he wanted a replacement diesel inboard installed, and at least initially there seems to have been agreement between the parties that this course would be followed, notwithstanding that Mr Sousa's advice to Mr Ricketts from the outset had been that rather than attempt to repair the old inboard engine, he should switch to a new outboard engine. Mr Ricketts had declined to follow this advice and Mr Sousa's evidence was that in view of Mr Ricketts' insistence on securing a new inboard engine for the boat (and it was common ground that this would be a diesel engine), he would look into the price and the measurements. Mr Sousa's witness statement evidence was that having researched the likely price of a new inboard diesel engine, he asked Mr Ricketts to provide a further payment of $25,000 "towards" the cost of a new inboard engine, and Mr Ricketts promptly made this sum available, by bank cheque dated 7 April 2005.

5. As I have said, there seemed to have been an initial agreement between the parties that a replacement diesel engine would be installed, but apart from that very broad agreement, there is a dispute between the parties as to the detail of their agreement at this stage. Mr Ricketts said in his witness statement that he asked Mr Sousa if a 185 horsepower Mercury inboard diesel would fit in his boat, and that Mr Sousa told him that it would, and that he was bringing in the same engine for another boat. Mr Ricketts' oral testimony was that in their conversation, Mr Sousa had said that he was purchasing an engine for someone else, and got on his cell phone to call a supplier in the United States, Mr Ricketts had been informed that the engine in question was a

Hammerhead. The Hammerhead is made by Marine Diesel, and generates some 330 horsepower, so that this is an engine in a very different category to the 185 horsepower Mercury inboard diesel that Mr Ricketts had referred to in his witness statement. Indeed, there was no reference in the other evidence to any engine of this description, and the impression I had from Mr Ricketts during his oral testimony was that he was not particularly knowledgeable as to the appropriate type of diesel engine to serve as a replacement for the old gasoline engine. This impression was supported by the evidence of Mr Tavares, who confirmed that Mr Ricketts had said that he wanted a new diesel, but then added that he did not recollect Mr Ricketts saying that he wanted any particular sort, and in relation to the type of engine which the evidence showed would have been appropriate, the Yanmar 4 cylinder diesel, Mr Ricketts said that he had not even heard of Yanmar until after these proceedings had been commenced. So there is a conflict between Mr Ricketts' witness statement and his oral evidence, as well as between Mr Ricketts and Mr Sousa.

6. As for Mr Sousa, he said that he had agreed to do nothing more than to look into the price and measurements, and then said that after researching the likely price of a new inboard diesel engine, he had asked Mr Ricketts to provide a further payment of $25,000. Unfortunately, I do not find the statement made in Mr Sousa's witness statement to be credible. If Mr Sousa had indeed researched the likely price of a new inboard diesel engine, he could not have done so, or at least could not have done so in accordance with the duties that he owed to Mr Ricketts, without some knowledge as to the requirements in regard to both size and power for a diesel engine to replace the old gasoline powered engine. I do not accept that Mr Sousa was able to put a figure on the cost of a new diesel inboard engine when he had not established what type of engine would fit into the boat. As it happens, the Yanmar 4 cylinder diesel inboard cost $23,000, according to Mr. Ricketts' expert Stuart Lunn, whereas Mr Sousa himself said that he never priced the Yanmar, but that a V8 Marine Diesel cost $32,000. I am sure that Mr Sousa would not have accepted $25,000 from Mr Ricketts if he genuinely intended to instal a $32,000 V8.

And while the evidence is confusing, I am satisfied that Mr Ricketts would not have paid Mr Sousa $25,000 when he did, if he had not believed at that time that in return for the payment of this amount, Mr Sousa would acquire and instal a suitable diesel inboard engine.

7. It was after the payment of $25,000 that Mr Sousa said that having carried out further research on the inboard engines then available (and here I quote from Mr Sousa's witness statement), he "discovered that the new models were too large to fit in Mr Ricketts' boat". In fact, there was clear evidence that a 4 cylinder Yanmar diesel had virtually identical measurement to the old Ford V8 gasoline engine which had failed, although this engine did not appear to have been seriously considered by Mr Sousa. He said that Mr Ricketts had wanted performance, and referred to having pointed out to Mr Ricketts that the 300 horsepower engine that he wanted was too big for the boat. Whether this was the 6 cylinder engine which would have been the same width but marginally longer than the old gasoline engine, or the V8 engine which was substantially bigger and would have required much more extensive (and expensive) modification to the console, Mr Sousa did not say. But contrary to the submissions made on behalf of Mr Sousa, there was no evidence to suggest that Mr Ricketts had ever been given the option of having the 4 cylinder diesel inboard engine installed, with whatever performance characteristics that would have entailed.

8. Mr Rothwell submitted that the Yanmar 4 cylinder diesel engine had been discussed with Mr Ricketts, and that Mr Ricketts had indicated that he did not want this engine as it did not give the performance that he was looking for. During oral closing submissions, I indicated to Mr Rothwell that my notes (and indeed my recollection) were not to this effect, and matters were left on the basis that I would review the CourtSmart tape. I have done that. In Mr Sousa's evidence after lunch on the first day of hearing, he had referred to the fact that Mr Ricketts had wanted the 300 horsepower Marine Diesel, which would have been the Hammerhead. Mr Sousa carried on to repeat that that was what Mr. Ricketts wanted, and said that was what he went after. A short

time after this there was a reference to the 4 cylinder Yanmar, but only in terms of Mr Sousa mentioning the 4 cylinder Yanmar, and saying that that had already been referred to earlier that day. There was nothing said at this point in Mr Sousa's evidence to the effect that Mr Ricketts had indicated that he did not want the 4 cylinder Yanmar. And the earlier evidence by Mr Sousa in relation to the 4 cylinder Yanmar simply involved Mr Sousa expressing his view that the 4 cylinder diesel would not perform like the V8 gasoline engine that had been on the boat before, and that the 4 cylinder diesel would not have given the performance of the 6 cylinder or the V8 diesel. He said nothing about Mr Ricketts indicating that he did not wish to have the 4 cylinder Yanmar. And this of course accords with Mr Sousa's witness statement, which said nothing about having discussed the Yanmar 4 cylinder diesel with Mr Ricketts. So Mr Rothwell's submission is not supported by the evidence.

9. I have already referred to the fact that the evidence at the time of this discussion was confusing. In the event, I do not believe it is necessary for me to seek to resolve the confusion. But it is clear that Mr Sousa identified the 300 horsepower Hammerhead engine, and the factory that he was in telephone communication with was Stillwater Marine, the manufacturer of Diesel Marine engines, including the Hammerhead. So for the avoidance of doubt I reject Mr Sousa's evidence that he had presented the 4 cylinder Yanmar diesel as a possible option, and that this engine had been rejected by Mr Ricketts.

10. While the V8 diesel inboard engine would have created considerable logistical difficulties in terms of installation, and would have substantially exceeded the maximum horsepower recommended by the manufacturer, the 6 cylinder diesel inboard might well have presented an option in terms of its size, although that engine too appeared to be substantially overpowered for this boat. The position then was that after Mr Sousa had said that the new diesel engines were too large, Mr Ricketts had accepted this advice. At this point, Mr Sousa's evidence accorded with that of Mr Ricketts in regard to the former's advocacy of an outboard engine, rather than a replacement diesel inboard, although with a slightly different emphasis. Mr Sousa simply said

that Mr Ricketts had advised him that he had spoken with friends who had given him the same advice as had Mr Sousa, and that Mr Ricketts had then instructed him to purchase an outboard engine and proceed to fit this by way of replacement for the defunct inboard. Mr Ricketts agreed that he instructed Mr Sousa so to proceed, but said that he did so in reliance upon Mr Sousa's advice, and that by this time he was both frustrated and annoyed by the length of time which had passed. I accept Mr Ricketts' evidence in this regard.

11. Thereafter Mr Sousa did proceed with the conversion from inboard engine to outboard, although for most of the time that this work was being done Mr Ricketts was off the Island, having left in May 2005, and not returning until after the work had been completed. In fact, the work was completed in August 2005 (Mr Sousa's bill is dated 19 August 2005), but Mr Ricketts did not find out that the boat had been completed until October, and then made immediate plans to return to Bermuda. Upon arrival, Mr Ricketts said that he drove directly to the yard, and delivered a part for the GPS navigation system which had gone missing.

12. I should mention here that Mr Ricketts had appreciated before he left on his trip that the conversion into the outboard had not involved attachment of the outboard to the transom, as he had originally anticipated, but involved the addition of a bracket or platform at the stern of the vessel, to which the outboard was attached.

The Test Run

13. There is then a dispute between the parties as to the date of the test run, but this took place either on Saturday 15 October 2005, or Saturday 29 October. It was an unusual feature of the test run that no one from Mr Sousa's yard accompanied Mr Ricketts on the test, something which surprised Mr Sousa's expert Sean White. Another unusual feature of the test run is that, at least so far as Mr Sousa was concerned, he had not undertaken any comprehensive final check to ensure that the work undertaken by his employees had been completed in a satisfactory manner. He said in his witness statement that he

had "looked over the boat to check that it was in a suitable condition for its initial test ride", but carried on to say that he would expect the boat to have been returned to the yard following the test run, so that he could deal with any issues that might have arisen during the test. He said that this would also enable him to review thoroughly the work carried out by his team, before handing the boat finally over to the customer. There was a conflict on the evidence as to why no one from Mr Sousa's yard went on the test run, but no question but that Mr Ricketts took the boat out alone.

14. There is also no question but that such check as Mr Sousa carried out following completion of the work by his team was inadequate in at least one highly material respect. That was in relation to the venting of the fuel tank, which was the subject of strong criticism by all the experts. The venting was effected with inadequate quality hose, and instead of being vented to the side of the boat, was a cut off piece of hose which left the fumes in a relatively enclosed area under the centre console, in close proximity to the batteries, the ignition and other gauges. One can well understand why Mr Ricketts' expert, Mr. Lunn described it as "extremely dangerous", and also said that he did not see how it could be described as "an oversight", the expression which Mr Sousa had used to describe it, when clearly the hose had been pushed up through the deck, and as Mr Lunn said, the hole in the deck appeared to have been specifically drilled for that purpose. Mr Lunn also commented that he noticed it right away, it being a "plainly obvious fault". Tyrone Sampson, Mr Ricketts' second expert, said that without a vent to the exterior, serious problems were created, and even Mr Sousa's expert Mr White conceded that neither the location nor the hose itself was proper, and in the result constituted a fire hazard. Mr Sousa accepted the experts' criticisms and conceded that his check did not even involve looking under the console.

15. I will analyse the various allegations of deficient work in more detail in due course, but now return to the test run and perhaps its most bizarre aspect. This was that as Mr Ricketts reversed into the water, which he acknowledged was at a relatively high rate of speed, the boat took on water to the extent that

water was above Mr Ricketts' feet. He said that he turned the bilge pump on, which started bailing the water out, and then took a short trip before returning to shore, putting the boat on the trailer and transporting it to a property in Devonshire. The boat has apparently only been in the water once since then, and what is most curious about the test run is that Mr Ricketts did not make complaint to Mr Sousa that the boat took on a significant volume of water as soon as it entered the water. Further, not only did this complaint not feature in the complaints made by Mr Ricketts' attorneys in their letters of 14 November 2005 and 24 January 2006, the subject did not even come up in Mr Ricketts' witness statement dated 2 October 2007. In the normal course that might cause one to take a deeply cynical view as to the truth of the statement, but I do accept it as being a true statement, taking into account the evidence given by Scott Johnson as to his trip in the boat in early 2007, and the expert opinions, particularly of Mr Lunn and Mr Sampson. These were to the effect that Mr Sousa's work would cause the stern of the boat to sit lower in the water, with obvious consequences when the through hull fittings were then below the waterline. Mr Sousa took no steps to determine what the effect of his work was on the trim of the boat.

The Conflicts in the Evidence

16. As will be plain from the narrative set out above, there are any number of instances where I did not find the evidence of either Mr Sousa or Mr Ricketts to be persuasive. In the case of Mr Ricketts, I would also note that his witness statement appeared to be quite carelessly drawn in a number of aspects. There were three references on the first page to the year 2003, which was a mistake for 2004, and which Mr Ricketts corrected at the start of his evidence. Similarly, he corrected the fact that he had said in his witness statement that he had written Mr Sousa a cheque for $7,000, when the correct figure was $6,000. Lastly he corrected the price he had paid for the boat from $21,500 to $19,500. One might have expected him to get these matters right first time.

17. Then there is the cost for the proposed replacement diesel engine, which Mr Ricketts said in his witness statement was to be $19,500; in his oral testimony,

Mr Ricketts said that he had been told by Mr Sousa that he was bringing in a Hammerhead for someone else and that was what Mr Ricketts should have. Mr Ricketts says that he asked for an estimate, and Mr Sousa came up with a figure of $20,000 to $21,000. Against this background, it is somewhat strange that Mr Ricketts should have paid Mr Sousa $25,000. And the reference to the Hammerhead engine in Mr Ricketts' oral testimony also conflicts with his witness statement, which referred to a Mercury inboard diesel. Mr Ricketts made no mention of a Mercury inboard in his oral testimony.

18. And lastly there is the conflict between Mr Ricketts' pleaded case that there was an express term that the work would be done by Cup Match, when his witness statement said that Mr Sousa had assured him that the boat would be in the water for the Queen's Birthday holiday. In fact, in his oral testimony, Mr Ricketts did not say that Mr Sousa had given any assurances; he simply said that he had told Mr Sousa that he wanted the boat for the Queen's Birthday holiday, and that when it was not ready he asked if it would be ready for Cup Match, without stating that he had received any kind of assurance in this regard from Mr Sousa.

19. So there are any number of unsatisfactory aspects of the evidence, and more, it has to be said, on the part of Mr Ricketts than on Mr Sousa's part.

The Pleadings

20. No doubt it is convenient to turn at this stage to the pleaded case of the parties. The statement of claim simply claimed monies due in accordance with the invoice. The defence and counterclaim then set out Mr Ricketts' case, and started with an averment that it was an express term of the contract that the repairs would be completed "prior to the Cup Match holiday in 2004 or the end of July 2004". The defence carried on to say that it was a breach of that express term that Mr Sousa did not commence work on the boat until December 2004, although this was later put as February 2005.

21. There is then a complaint in relation to the work on the original engine, a claim which Mr Horseman indicated during the second day of hearing was not pursued. In relation to the replacement of the failed inboard engine, Mr Ricketts pleaded

    (i) that there had been an agreement that Mr Sousa would order a new inboard engine to replace the original engine,

    (ii) that Mr Sousa had advised Mr Ricketts that upon reviewing the specifications, the new inboard engine could not be installed. In this regard Mr Ricketts pleaded that there were inboard diesel engines that could have been installed, and

    (iii) that out of frustration, and relying upon Mr Sousa's advice, Mr Ricketts had agreed that Mr Sousa could instal an outboard engine.

22. There were then complaints as to the installation of the outboard engine, in terms of the extent of the necessary work, as well as a complaint that the work undertaken fell below the requisite standard of care. In terms of the detail, this was not set out in the pleading, which simply referred to the experts' reports which had been exchanged between the parties. Although Mr Ricketts had originally claimed the cost of making the boat seaworthy in an amount of approximately $10, 000, shortly before trial he had amended his counterclaim, pleading that the boat had been "rendered useless" by Mr Sousa's actions, and claiming damages representing the purchase price of the boat and the return of the funds he had paid to Mr Sousa. In fact, Mr Ricketts explained in his evidence where the figure of $10,000 had come from, and this was not a figure for the cost of work which would make the boat seaworthy. It was a figure that had been quoted to Mr Ricketts to replace the bracket to which the outboard engine had been attached, so that the outboard engine could be attached directly to the transom. That figure was never intended to cover the cost of dealing with the many other defects mentioned in the experts' reports. And although the newly pleaded claim for damages covered the purchase price of the boat and the return of funds paid for the work done by Mr Sousa, the figure of $21,500 was inaccurate, as previously stated. Even then, the counterclaim contained an arithmetical error which increased Mr Ricketts'

claim by $10,000; the proper amount of the counterclaim is $50,500. Mr Ricketts indicated that on payment of this sum, he would transfer title in the boat to Mr Sousa. Finally, Mr Ricketts claimed damages for his loss of use and enjoyment of the boat.

23. In his reply and defence to counterclaim, Mr Sousa took issue on a number of matters, in relation to the condition of the boat at the time he received it, and in relation to the work done on the old inboard engine, which is no longer an issue. Mr Sousa agreed that he had recommended a switch to a new outboard engine even before the question of repairs to the old inboard had arisen, and that this recommendation was repeated when the old inboard engine had failed. However, in relation to the installation of a replacement inboard, Mr Sousa pleaded that Mr Ricketts had specifically instructed him to instal a V8 diesel engine, that such engines could not be installed without a significant rebuild, and that Mr Ricketts had not wanted a 6 cylinder diesel engine or gas inboard installed. In relation to the installation of the outboard, Mr Sousa pleaded that Mr Ricketts sought and relied upon the advice of others. He maintained that the installation of the outboard was properly undertaken, and maintained that the installation of an outboard required less work and cost less than adapting the boat to fit the type of inboard engine that Mr Ricketts wanted.

Experts' Reports

24. There were three experts called at the trial, one for Mr Sousa and two for Mr Ricketts. The problem that each of these experts faced was that none of them had had an opportunity to test the boat in the water, and their examinations took place some time after Mr Ricketts had taken the boat on its test run following completion of the work. In the case of Mr White and Mr Lunn, the delay was approximately six months, whereas in the case of Mr Sampson, the delay was something like fifteen months.

25. All of the experts recognised a variety of problems in the work which had been undertaken on the boat, and these defects varied, as one would expect, in

terms of their seriousness, the danger that they created, the extent to which they affected the seaworthiness of the boat, the ease or difficulty of rectifying them, and the expense of rectification, which of course largely tied in with the last issue.

Experts' Qualifications and Comments

26. Mr White is the manager of a business similar to Mr Sousa's, with experience of working in the field and having completed various factory training courses. Mr Lunn on the other hand, as well as having experience working in the field, is qualified as a marine surveyor, and has extensive experience. Similarly, Mr Sampson is a marine surveyor, also with considerable experience, and with no disrespect to Mr White, I found the evidence of these two experts to be persuasive. By way of summary, Mr Sampson said:

> "The boat cannot be used in the water without danger of sinking. In my opinion the work which I inspected was poorly executed and frequently indicated ignorance of marine standards."

And Mr Lunn, having noted 13 specific deficiencies, said:

> "The vessel is noted to be in a dangerous condition with regard to watertight integrity. Fuel tank arrangements pose a potential fire hazard. General standard of workmanship is found to be at a poor professional level with inadequate attention to safety and detail."

Mr Lunn expanded upon his comments in his conclusion, which was in the following terms:

> "Although the installation of the engine, engine controls and mounting bracket appear satisfactory most other areas of the boat have not been satisfactorily completed. Furthermore while the installation of the outboard engine appears satisfactory as examined on land it is noted that this is not considered an entirely satisfactorily resolution to the problems regarding repair of the original inboard engine.

> The fact that there are hoses not attached to two forward through hull fittings at waterline level means that the vessel cannot be considered delivered in condition for safe usage. The vessel should not be launched and used at all until this is remedied.
>
> The installation of the fuel filling and venting system is not in accordance with accepted best practice and appropriate design safety requirements. This installation allows for a potentially dangerous situation with regard to fire. It is strongly recommended that these arrangements be modified before the vessel is put in service.
>
> Poorly attached bow and stern cleats are prone to failure resulting in hazardous situations where people might be injured or the vessel damaged.
>
> In general it is considered that the work has been completed at a poor professional level with inadequate attention to safety and detail."

Particular Defects – the Fuel Venting

27. All three of the experts recognised the deficiency of the fuel vent hose, as indeed did Mr Sousa, although he described it as an oversight. Mr White said that it was certainly that, and could pose a fire hazard. Mr Sampson described it as "extremely hazardous", while Mr Lunn called it "extremely dangerous."

28. On any basis, the condition of the fuel vent when the boat left Mr Sousa's yard for the test run at the end of October 2005 was indeed extremely dangerous, and I entirely agree with Mr Lunn that the condition of the vent hose could not properly be described as an oversight. I have already referred to the fact that inadequate non marine hose was used, which vented the fumes from the gas tank into a relatively enclosed area where there were also batteries, the ignition and other gauges. Mr Sousa said in his witness statement that he had looked over the boat to check that it was in a suitable

condition for its initial test ride on the water. With respect, he cannot conceivably have done this, because the most cursory examination would have shown that the wrong type of hose had been used, and that it had been cut off instead of being vented to the outside. Mr Sousa's "check" did not begin to meet the requisite standard, not least because he acknowledged it did not include looking under the centre console. I find that the fuel vent was, as described by Messrs Sampson and Lunn, extremely hazardous or dangerous, and that when the boat left Mr Sousa's yard for the test run, it represented a real fire hazard. I would also note that there is no reason to assume that Mr Sousa would have detected the fault had the boat been brought back to him as he apparently expected. Although Mr Sousa referred in his witness statement to "then being able to review the work" carried out by his team, clearly this should have been done before the boat was handed over for its test run, and the reality no doubt is what Mr Sousa had said a little earlier in his witness statement; the return of the boat to the yard following the test run was so that he could "deal with any issues which might have arisen" during the test run. Mr Ricketts did not make complaint of this failure at the time, as indeed he did not make complaint of many other failures until they had been identified by the experts. I turn now to consider some of the other more serious ones.

The Cleats

29. Neither the bow cleat nor the aft cleats were satisfactory. The bow cleat was not even properly screwed in place, with only two of four bolts in place, but more importantly it did not have a proper backing plate. As for the aft cleats, all three experts had the same criticism in terms of the cleats not being fastened to a secure and suitable part of the boat. Instead there was an arrangement which was obviously unsatisfactory (Mr Sampson called it "low tech"), and which was not able, according to the experts, to take any real strain. Mr Sousa's response was to blame Mr Ricketts for having wished to have the cleats under the gunwhale. With respect, it was up to Mr Sousa either to comply with that request in a professional and competent manner or to indicate, if such were the case, that it was not possible to comply with Mr Ricketts' request. I find that neither the bow cleat nor the aft cleats were fitted

satisfactorily, insofar as the bow cleat was not attached with the benefit of a backing plate, and the aft cleats were not secured, as they should have been, to the main structure of the boat. The effect was that the cleats now have the potential to fail, resulting in the hazard envisaged by Mr Lunn in terms of damage to the vessel or injury to those on board.

Through Hull Fittings

30. The next defect in workmanship on which all three experts were agreed was in relation to the through hull fittings, which were either no longer in use, or no longer connected to hoses, and which had not been capped off or removed and fibreglassed over, posing a risk of water intrusion. Mr Lunn, particularly, gave detail in his evidence as to how the hoses which had originally been attached to the holes in the hull forward on the waterline had been cut off. He said that originally, when the vessel had been at rest it would drain through these forward scuppers, but there were now open holes at or close to the waterline in the forward section of the boat, such that there was the potential for water to enter the hull. Although Mr Sousa had not been prepared to accept that the boat was originally a self-bailing boat, all three experts agreed that this had been the case, but that it was no longer the case following Mr Sousa's work. The consequence was, as Mr Lunn said in his general remarks in relation to the through hull fittings:

> "open ended through hull fittings in the vicinity of the waterline are dangerous. Under adverse loading and sea conditions such openings may allow ingress of water to such a point that the vessel could become unstable and sink."

31. I accept the validity of this criticism. Obviously, the boat did have a bilge pump, but as Mr Sampson said, it is not good for a boat to be dependent on the operation of the bilge pump, because typically on smaller boats, bilge pumps do fail, either because the batteries run down or for other reasons, and it is obvious that if the bilge pump fails and the boat is still taking in water, it will sink. I might say that Mr Sampson was similarly critical of the presence of the holes at or close to the waterline. He said that if the holes were not going

to be used they should be taken out; if they were going to be used, they needed to have a seacock installed. As he said, these holes let water in and out at will. And even Mr Sousa's expert Mr White said that he thought that water would come in through these fittings in the right conditions, and that he would prefer to see them blanked off or fibreglassed over. And whilst he said that the bilge pump should be able to cope, provided that the fittings were not below the waterline, Mr White added the caveat that one simply could not tell whether that would be the case, without seeing the boat in the water. Since I have found (below) that the stern through hull fittings were below the waterline in consequence of the change from inboard to outboard, I find that such work as was undertaken in relation to the through hull fittings, and their condition generally, represented negligent work on Mr Sousa's part when taking the changed trim of the boat into account. Mr Sousa had taken no steps to satisfy himself that these holes were above the waterline, and in the event he delivered to Mr Ricketts a boat that was liable to sink when not in forward motion.

The Location of the Fuel Tank and Fuel Fill-up

32. It was Mr Lunn who was most critical of the location of the fuel tank, and particularly the location of the fill-up on the centre console. Mr White agreed, saying that although he had seen the gas fill-up located on the console on other boats, that was not the most desirable place to put it, and he would prefer to see the fuel fill-up located on the gunwhale, which was also Mr Lunn's preferred location. Mr White also agreed that batteries and flammable material ideally should be separated, while conceding that sometimes there was no choice. Mr Sampson similarly conceded that there were not many places to put the batteries in this boat.

33. In my judgment the location of the fuel tank and the batteries together under the console is inherently dangerous, and the problem was compounded by having the fuel fill-up on the console. A satisfactory solution would be to have a fuel tank fabricated which could fit under the deck and which could have had a fuel fill-up either on or adjacent to the gunwhale, as suggested by

Mr Lunn, who had a "major issue" with the fuel tank and the fuel fill-up location. I appreciate that this would involve some additional work to make a sufficiently large hole for a fuel pipe of marine quality to be fitted under the deck, but such work is, in my view, clearly necessary.

Condition of Deck Flooring

34. All three experts agreed that this was "springy", something which Mr Sousa himself recognised, although he said that Mr Ricketts had been unwilling to pay for the cost of a replacement floor, which would have been reasonably substantial – as much as $10,000 according to Mr White. Although Mr Sampson said that eventually the T tower would pull away from the floor, taking the centre console with it, Mr White said that it was difficult to say when that would happen. But the main factor in regard to the deck is that its "springiness" was no doubt a product of the boat's age. If Mr Ricketts had wanted a new floor, he would have had to pay substantial moneys for it. There is no evidence that he did so wish. In the circumstances I make no finding in respect of this complaint.

Wiring with Particular Reference to the Bilge Pump

35. All three experts said that the wiring needed to be tidied up, something which was obvious from the photographs. There was an issue as to the condition of the wiring when it left Mr Sousa's yard, but certainly in one area it seemed to me that the wiring was deficient, and this was in relation to the wire coming from the bilge pump. Mr Sousa had said that this wire was on a stringer about one to one and a half inches above the bottom of the boat, and the wire would not get wet before the bilge pump kicked in. Mr White said the wiring had been off the bottom by one to two inches, but this does not seem to be the case, particularly from the photograph exhibited to Mr Sampson's report. Even then, Mr White said he would want to see the wiring higher. I accept the evidence that the bilge pump wire (which Mr Sampson said should have gone directly upwards from the pump), and some auxiliary wiring, are running through the bottom of the bilge with the potential of being under water. This includes wiring covered in electrical tape, which would indicate a connection,

as Mr White said. Generally, the wiring under the centre console does not meet marine standards and has been untidily executed. I so find.

The T-top

36. The complaint in regard to the T-top (apart from its attachment to the cockpit floor) is that this was not a custom-made T-top, as Mr Sousa said it was, and for which he charged. Mr Lunn pointed out that this was a kit T-top, not custom-built for this boat, but made so that the attachments could slide up and down so as to adjust to any console. That said, Mr Lunn's evidence was that the last T-top that he had built had cost in the region of $5,500; Mr Sousa had apparently charged approximately $6,600 for this T-top, and this figure did not include the labour for fitting the T-top, for which a figure was not given. Mr Sousa did say that the T-top had to be altered three or four times because of the work that Mr Ricketts was having done at the base of the console. He also said that he thought his mark-up was between 50% and 75%, but the supporting documentation had not been available upon discovery.

37. Since I do not know anything about the T-top which Mr Lunn produced for $5,500, and since Mr Sousa's mark-up appears to have been accepted, I cannot be satisfied that this charge was excessive, and therefore make no finding in relation to it.

The T-top Spacer Blocks

38. This was a complaint which seems to me to have been overstated from the outset. In the first letter written on Mr Ricketts' behalf on 14 November 2005, his attorney said that "the four wooden space cogs you installed on the boat all broke", when this is patently not the case; they have cracks in the surface of the wood. The complaint was not repeated in the subsequent letter of 24 January 2006, and while the photographs show some surface cracking, which might have led to a need for replacement at some future stage, this was a minor problem, which could have been easily remedied, not least by fitting the correct spacers which Mr Sousa said the manufacturer had, and which he could no doubt have secured.

Other Minor Problems

39. The photographs do demonstrate a relatively poor level of workmanship in any number of different areas. Mr Lunn criticised the quality of the fibreglass work, but there were also holes left from old fittings which had been removed without the holes having been filled. The rubbing band was identified by Mr Sampson as having been poorly fitted. There remained broken fittings, and some of the finished work did seem to be of a very poor standard. In summary, I accept the various complaints made by Messrs Sampson and Lunn in their expert reports as to the deficient workmanship undertaken by Mr Sousa. Specifically, I reject the contention that these matters were caused by children playing in the boat after it had been moved to Devonshire, given that Messrs Lunn and White produced their reports (including photographs) only six months after the boat left Mr Sousa's yard, and there was no evidence to suggest that the broken fittings had been caused by children playing on or near the boat.

Conversion to an Outboard Engine

40. But these more minor problems pale into insignificance when compared with what I regard as the fundamental question, namely whether it was a breach of duty of care on Mr Sousa's part to recommend and fit an outboard engine, as compared with a replacement inboard.

41. First, there is a dispute between Mr Sousa and Mr Ricketts as to Mr Ricketts' wishes in relation to a replacement inboard, which I have dealt with above. As I have said, both the 6 cylinder and the V8 diesel were substantially overpowered for this boat, and should not have been seriously considered. If they had been installed, there would have been minor size difficulties for the 6 cylinder and major size difficulties for the V8 diesel, but there would also have been substantial other work required in terms of a bigger shaft, a bigger propeller, and a different strut to provide a different angle. None of this made any sense, because simply put, neither of these bigger engines was appropriate as a replacement for the engine in this boat. If Mr Ricketts had been given a

proper, informed choice between a 4 cylinder Yanmar diesel and an outboard engine, I have no doubt that he would have ordered the Yanmar 4 cylinder diesel, and I so find.

Breach of Duty

42. The next question is whether it represented a breach of Mr Sousa's duty of care to Mr Ricketts to recommend and instal the outboard engine. It was accepted in the pleadings that it was an implied term of the agreement that Mr Sousa would perform all work in a workman-like manner and exercise the degree of skill and care of a professional mechanic. In my view, this extends to his recommendation for the installation of an outboard engine, and to my mind the critical factor here is not the installation of the outboard engine. It is that Mr Ricketts wanted a replacement inboard engine, that Mr Sousa knew this, and that instead of identifying and recommending a suitable 4 cylinder diesel engine, Mr Sousa advised, according to his witness statement "that the new models were too large to fit in Mr Ricketts' boat". This was demonstrably not the case, and represented a breach of duty on Mr Sousa's part. Even his expert Mr White said that the Yanmar 4 cylinder diesel was comparable to the gasoline powered engine that was there before. The owner of a marine repair business such as that run by Mr Sousa, exercising the skill and competence to be expected from the ordinarily competent practitioner in that business field, should have known that a Yanmar 4 cylinder diesel was not too large to fit in Mr Ricketts' boat, but in fact had virtually identical dimensions and generated very much the same level of power as the old gasoline-powered engine. That was the breach of duty, and the ill-conceived installation of the outboard engine followed from that breach. I therefore find Mr Sousa in breach of his duty owed to Mr Ricketts in regard to the recommendation to instal an outboard engine, based as it was on the false premise that the new models of inboard engine were too large to fit Mr Ricketts' boat.

43. But there is a further reason why Mr Sousa's advice to instal an outboard was such poor advice that it constituted negligence on Mr Sousa's part. This was that conversion to an outboard engine was an extremely poor option for this

boat, because of the effect that it had on the way which the boat sat in the water. I appreciate that none of the three experts saw the boat in the water, but I do accept what both Mr Lunn and Mr Sampson had to say as to the obvious consequences if one took nine hundred pounds out of the centre of the boat, and added between five and six hundred pounds some three feet behind the transom. Even if that dramatic weight shift were to be offset in part by moving the gas tank from the back of the boat to the middle, it is obvious that such a weight benefit will diminish as the gas is used. And the consequences then are also obvious. As Mr Sampson said, as the gas tank empties, the stern will tend to go deeper into the water. Mr Sampson also said that was not a problem if the cockpit was 100% watertight, but that he hadn't found one such yet, and the truth was that water does go into the bilges. He carried on to say that this boat was not watertight at all, with the result that the bilge pump will cut in and out and drain the battery, so that the boat will sink. Mr Sampson also pointed out that the bracket to which the outboard engine was attached was not recommended for boats smaller than 25 feet. Even scupper valves would not be sufficient for this boat, because they do not succeed 100% in terms of preventing water getting into the boat. As it was, without scupper valves, water was able to go in and out of the holes through the hull of this boat "at will".

44. And Mr Lunn was every bit as damning in his evidence. He pointed out that the version of this boat built for an outboard engine had that engine mounted directly on to the transom, and described what had been done in the case of this conversion as "extreme". He did not accept that the boat would sit that much higher in the water after the conversion to outboard, and said that the floatability of the bracket mitigated only a little, and the effect of the conversion would have been to change the boat's trim dramatically.

45. And while Mr White said that he did not see how Mr Sampson had been able to say what he did without having seeing the boat overboard, he was of the view that water would come in through the fittings in the right conditions, that there were deficiencies with regard to water intrusion into the hull, and that

there were places for the water to go into the bilge area. He felt that the weight could be adjusted, but said more than once that he would have to see the boat in the water before deciding what needed to be done. To my mind that makes it all the more surprising that Mr Sousa should not have seen fit, having made such a major conversion, to see what was the effect of that conversion by putting the boat overboard himself.

46. And of course the reality was that when there were two people in the vessel, in the form of Mr Ricketts and Mr Johnson, the boat immediately started to take on water, as it had when Mr Ricketts had reversed at speed at the time of the test run. On that occasion, Mr Ricketts had put the incoming volume of water down to the fact that he had reversed at speed. On the second occasion, he simply said that when they had put the boat overboard it started sinking, and said very little more in cross-examination. Mr Johnson, however, did give a more detailed account. He said that when he was in the boat and it was just sitting in the water having left the trailer, water was coming into the boat. He managed to get the bilge pump working so that water was being pumped out, but as he said, water was still coming into the boat in consequence of the weight of the two people who were in it. Mr Johnson indicated that when they had taken the boat for a run, as they started moving forward the water stopped coming in, but he added that every time they stopped during that run, water would start coming in.

47. I accept Mr Johnson's evidence. I note that Mr Ricketts had said that prior to the test run, he had been planning to put the boat on its moorings on Coney Island, and he carried on to say that if he had followed that course, the boat would have sunk. I have no doubt that that would indeed have happened, and I so find. I appreciate that when Mr Ricketts undertook his test run, the bilge pump was working, unlike the situation some fifteen months or more later, when it did not work without Mr Johnson's intervention. But clearly, given the quantity of water the boat was taking on board, it would not have been long before the battery had drained and the bilge pump failed to operate, with obvious consequences.

48. So there are four particularly serious defects in relation to the work undertaken by Mr Sousa. First there was the danger posed by the inadequate venting from the fuel tank. This no doubt could have been and can now be rectified at a relatively modest cost, but such modification should not be needed because of my next comments. The second serious matter is the location of the fuel tank beneath the centre console, and the fuel fill-up on the console. The fuel console should have been in any event on the gunwhale, and the fuel tank itself should not have been under the console close to the batteries, ignition and other gauges, and should have been a purpose-built tank of the type described by Mr Lunn in his evidence, situate under the floor, which would enable fuel fill-up to take place on the gunwhale.

49. The third serious matter is the number of holes in the hull, close to the water line, which the experts feared would cause the boat to take on water, and which in the event did just that. Fixing that problem would no doubt involve some significant but not overly substantial expenditure, taking out the redundant fittings and fibreglassing over the holes.

50. But these three problems, significant though they are, pale into insignificance when compared with the problem caused by the conversion of the boat from an inboard engine to an outboard engine. I have found that Mr Sousa was in breach of his duty owed to Mr Ricketts in his recommendation that it was appropriate to modify the boat and instal an outboard engine, as opposed to fitting a replacement inboard such as the Yanmar 4 cylinder diesel, which approximated to the original engine both in terms of size and power, and would have required little or no adjustment to the engine bed, or the shaft, propeller and strut. I find it strange that Mr Sousa should have considered the Hammerhead diesel engine, if indeed this was the engine he mentioned to Mr Ricketts. The Hammerhead was far too powerful a replacement engine, and if Mr Sousa was prepared to consider an engine generating this level of power, as he apparently was, I do not understand why he did not seek a replacement diesel engine of identical size and comparable power to the old gasoline

engine, something which the evidence has shown was available. This was his obligation, given Mr Ricketts' wishes in the matter, and the inappropriateness of trying to instal an overpowered engine. Hence my finding that Mr Sousa breached the duty of care which he owed to Mr Ricketts in recommending and proceeding to fit the outboard engine instead of a replacement inboard diesel engine.

Other Findings – the Express Term

51. Although Mr Rothwell urged that Mr Sousa's evidence should be preferred to that of Mr Ricketts, as I have already indicated I found neither one to be completely reliable in terms of his evidence. There are, however, certain findings of fact which still need to be made, and the first of these is in relation to the question whether there was an agreement that the repairs should be completed by a given date, such as to form an express term of the contract. I have already referred to the conflict between Mr Ricketts' pleaded case and his evidence. Clearly, the evidence did not support the pleaded case, and that therefore is an end to that aspect of matters. However, I should also make it plain that in any event I reject the evidence in Mr Ricketts' witness statement that Mr Sousa had given him an assurance that the boat would be in the water for the Queen's Birthday holiday. I bear in mind that the witness statement starts by saying that Mr Ricketts had told Mr Sousa that he should not rush the job for the 24th of May holiday. It was only after that date had passed that Mr Ricketts asked if the boat would be in the water for the Queen's Birthday holiday, and says that Mr Sousa assured him that it would be. Given that there is only three weeks or so between the two holidays, I do not find this evidence on Mr Ricketts' part as being remotely believable. There was no possibility of Mr Sousa being sure he could complete the work within this timeframe, even if he worked on nothing else. I do not believe for a moment that, having done nothing for months, Mr Sousa would have agreed to such a tight schedule, and then done nothing at all during the period in question. And there was clearly no subsequent agreement between the parties which involved fixing a time by which the repairs should be complete.

The Terms of the Agreement to Instal a Replacement Diesel

52. Next, by way of finding, I refer to what I have said above in relation to the agreement reached between Mr Sousa and Mr Ricketts after the original engine had failed. I have found that there had been an agreement that Mr Sousa would acquire and instal a suitable inboard diesel and that Mr Sousa had resiled from this agreement. Whether that was because he did not believe that such a suitable inboard diesel could be found is really not relevant. The evidence clearly shows that it could have been found, and I repeat that Mr Sousa was in breach of the duty of care that he owed to Mr Ricketts in relation both to his failure to locate and recommend to Mr Ricketts the Yanmar 4 cylinder diesel engine or its equivalent, and in his advice to Mr Ricketts to instal an outboard engine. Mr Ricketts' acceptance of the outboard engine alternative was, I find, very much the poorer option from his perspective, and one which he only agreed to because of Mr Sousa's negligent advice that a diesel inboard engine could not be fitted to Mr Ricketts' boat without very extensive modification, which would have been unrealistic by any standards.

The Condition of the Boat when taken to Mr Sousa's Yard

53. I would also comment on Mr Ricketts' assertion that the engine was working when he took the boat to Mr Sousa. By this time the boat had not been in the water for almost three years, and I have commented on how strange it is that Mr Ricketts should have taken his boat to Mr Sousa for the engine to be repaired if it was in fact working. I note that in his evidence Mr Ricketts had said that the boat needed more work than he had knowledge, or tools to do the job correctly. The fact is that Mr Sousa and his team had worked on the engine for a considerable time (88 hours) before they regarded it as repaired, which of course was before it blew up in testing. Although Mr Ricketts referred to having turned the engine over regularly, this is no substitute for taking the boat out on to the water, and I reject Mr Ricketts' evidence that the engine was in working order when delivered to Mr Sousa. I do not believe that Mr Ricketts had any means of knowing whether the engine did or did not work at this point in time, and I therefore do accept Mr Sousa's evidence that the engine was not in running order when delivered to him. And this finding is

relevant when it comes to considering the value of the boat, insofar as it may be necessary to do this.

The Test Run

54. Next, in terms of these additional findings, I find that there was an obligation on Mr Sousa for he or one of his employees to accompany Mr Ricketts on the test run. They were the professionals who had just completed extensive repairs to Mr Ricketts' boat; it was they who should have gone out with Mr Ricketts so that a proper assessment could be made as to the efficacy of their work. In this regard I reject Mr Sousa's evidence that no-one in his position would take the boat for a test run. His expert Mr White, for one, said that he would take boats for a test run when the work was completed, for the most part, to ensure that the repair work had been done satisfactorily.

Mr Sousa's Claim – the Cost of the Work Done

55. It is of course necessary to deal to deal both with Mr Sousa's claim and with Mr Ricketts' counterclaim, and Mr Sousa's claim is for the balance due for the work he and his employees did, taking the total cost of repairs and giving credit for payments made, to leave a figure of $32,941.21. This figure is net of the discount which Mr Sousa had offered of $5,000, but that is his claim.

56. The question then is what is the figure that Mr Sousa would be entitled to if he had acted in accordance with his duty of care, and fitted the Yanmar 4 cylinder diesel, as I have held he should have. In regard to this question, there was a conflict of evidence between Mr White on the one hand, and Mr Lunn and Mr Sampson on the other, as to the extent of work required for the installation of a replacement inboard diesel, when compared with conversion for the installation of an outboard engine. However, even Mr White conceded that putting in the new diesel would involve less work than fitting the new outboard, although he said that this would not be a lot less in terms of hours, a statement which I found surprising, when he had said that there were inboard engines which could have gone into this boat with little or no modification, and that the Yanmar 4 cylinder engine would "drop right in". When one takes

into account the changes which were necessary for the installation of an outboard engine, involving removal of the shaft, strut, rudder, changes to the steering system, moving the fuel tank and fixing the bracket, it is hard to see how the two are comparable. On the other hand, in regard to Mr. Sampson's statement that to fit the replacement engine should be one hour's work, that did seem a surprisingly small amount of time. But Mr Sampson did say that it was not expensive to modify the engine bed, and that it was more expensive to go from inboard to outboard than to change the inboard, pointing out the other work which would have to be done to which I have just referred. Lastly, Mr Lunn said that even installing the Yanmar 6 cylinder diesel would involve less work than installing the outboard, although he cautioned that he would never have recommended that the 6 cylinder engine be installed, even if that were possible, because it was just too powerful, exceeding the manufacturer's recommendation by almost 50%, and he graphically described the problems that that would create. His view was that the appropriate engine would be the Yanmar 4 cylinder diesel, and this would have involved less work even than the Yanmar 6 cylinder engine, which was a few inches longer than both the 4 cylinder and the original gas engine.

57. I accept the evidence of both Mr Sampson and Mr Lunn that there would be a lot less work involved in installing the 4 cylinder diesel inboard than converting this boat so that an outboard engine could be attached. The critical question is the cost difference between the two, and in this regard I reject the figures put forward by Mr White, who had said that the outboard would cost about $15,000, whereas the Yanmar 4 cylinder would cost in the high $20,000s, and possibly $30,000. I accept Mr Lunn's evidence that the cost of the Yanmar 4 cylinder diesel was approximately $23,000, and in relation to the cost of the outboard, it is of course overly simplistic to look simply at the cost of the engine. In his closing submissions, Mr Horseman listed the items necessary for conversion to the outboard, which included the bracket, the fuel tank and related items, as well as a figure for the hydraulic steering. There was also the total cost of labour, and even if one restricted this figure to the 81.5 hours said to have been worked by the more junior members of Mr Sousa's

team on the installation of the engine, that would produce a figure of $37,350. It is important to note that that last figure was said to be labour on the new engine. There would also have been work done to remove the shaft, strut, propeller and rudder.

58. Mr Horseman then proposed a figure of ten hours' labour for the installation of the Yanmar 4 cylinder diesel engine, and gave a figure of $2,000 in respect of incidentals. The figure for labour may be on the low side, but doing the best that I can, the view that I take is that the cost of installing the replacement diesel inboard would have been approximately $10,000 less than the cost of conversion to the outboard engine. I would therefore give Mr Sousa judgment on his claim in the sum of $32,941.21, less $10,000, i.e. $22,941.21.

The Relief Sought by Mr Ricketts

59. Mr Ricketts seeks damages representing the purchase price (or value) of the boat, together with the return of the monies paid by him to Mr Sousa, and then pleads that upon payment of this sum, he will transfer the title of the boat to Mr Sousa.

60. The difficulty with the grant of this relief is that it ignores the fact that the boat has at all material times belonged to Mr Ricketts, and there was nothing in the contractual relations between the parties which ever envisaged that ownership of the boat should be transferred from Mr Ricketts to Mr Sousa. Hence there can be no question of any order by way of specific performance, which orders are available to compel a person to perform a contractual obligation which he has undertaken. No such contractual obligation exists in this case.

61. That leaves only an award of damages, and I do not see how Mr Ricketts can be entitled to anything beyond such an award. Even then, all sorts of difficulties arise in relation to fixing the level of such an award. Firstly, there seems to be no doubt but that the money spent on repairs to the boat was not reflected in the value of the boat following completion of the repairs /

conversion to an outboard engine. The total of Mr Sousa's invoice was almost $64,000, which of course does not include the value of the boat before he started work, and it was Mr Ricketts' evidence that he could have bought a brand new Aquasport inboard, albeit last year's model, completely rigged out for $63,000. So even if a replacement inboard engine had been fitted (what Mr Ricketts wanted), the likelihood is that he would have spent considerably more than the boat was worth, because inevitably he would have finished up with a new engine in a 30 year old hull. The notion that Mr Ricketts would at the end of the day have had the equivalent of a brand new boat for $35,000 as he said in evidence, strikes me as being naive at best.

62. Mr Horseman submitted that the work undertaken by Mr Sousa "completely destroyed the design and the structural integrity of the boat", and said that since the boat had been "irreparably damaged", the only proper way to compensate Mr Ricketts was to award him the purchase price of the boat and the return of the funds paid by him to Mr Sousa, in return for which he would transfer the boat to Mr Sousa. I have already said that I do not see how I can do other than award Mr Ricketts damages, and I find that I have no power to order the transfer of the boat from Mr Ricketts to Mr Sousa. Then no doubt the first question to be answered in relation to the basis for quantifying the damages to which Mr Ricketts is entitled is whether the boat is now irreparably damaged.

63. In my judgment it is not. I appreciate that it still needs considerable further work to be undertaken to make it both safe and seaworthy, and even then it will be a boat of a type that Mr Ricketts does not want. He wanted a self-bailing boat, and it will be a boat that will be dependant upon the operation of its bilge pump. I do not regard that as being a major factor, once the through hull fittings have been properly sealed. But it will be a boat with an outboard engine as opposed to one with an inboard engine. That no doubt was more important to Mr Ricketts.

64. Arguably, the preferable way of calculating damages which would compensate Mr Ricketts properly for the position in which he finds himself would be to take the difference between the present value of the boat, and the value of the boat as it would be if the contract had been properly performed and an inboard diesel engine installed instead of an outboard. No doubt that latter valuation would pose some difficulty, but difficulties in valuation are not per se a reason for the Court not to reach a conclusion. But in this case, I have no evidence as to either figure; no evidence as to the present value of the boat, and none as to the likely value if the contract had been properly performed.

65. In these circumstances it seems to me that the only course which I can follow is to calculate, first, the cost of putting the boat in a safe and seaworthy condition, and, secondly, to consider whether it is appropriate to make a further award of damages to reflect the fact that Mr Ricketts does not have the boat which he would have had if the contract had been properly performed.

66. Of the three experts, Mr Sampson had not tried to estimate the cost of putting the defects right, and although he commented on the cost of some of the more minor matters, he did not give a figure for the more major items. Mr White had said in this report that the cost of repairs in total would be approximately $3,800 in labour, and approximately $600 in materials, but said that this would not include the fibreglass work or painting. Neither did it include all of the items which Mr Lunn in his evidence endeavoured to give a cost for. For instance, it would not have included the replacement gas tank, which Mr Lunn estimated would cost between $5,000 and $6,000. In the circumstances, in terms of an estimate of the cost of putting the defects right, I have no evidence other than that of Mr Lunn, whose evidence I have accepted in other regards. I similarly accept his evidence as to the cost of repairing the defects. Mr Lunn did his best to put dollar figures on the cost of remedying the various defects. He approximated these to $16,000, in total, but this was a rough estimate on his part, and in fact the dollar figures that he gave frequently included a range, which according to my calculation gives a figure of $12,700 at the low end of

the scale and $15,900 at the high end, together with two items of nominal cost. The midpoint between those numbers is $14,300. However, it does seem to me that in respect of at least two of the items, those of the gas tank and the through hull fittings, Mr Sousa did not charge for the level of work recommended by Mr Lunn. In relation to the custom-made gas tank, I expect that that would always have been more expensive than the inadequate route followed by Mr Sousa. Similarly, in relation to the through hull fittings, this is work that Mr Sousa did not do and did not charge for. It does, therefore, seem to me that the figure of $14,300 needs to be reduced, and doing the best that I can with the figures that I was given, I would reduce the figure to $12,000. I would therefore make an award of damages to Mr Ricketts on his counter claim in this amount.

Damages for Loss of Amenity

67. In his closing submissions, Mr Horseman used the phrase "loss of amenity" when referring to the claim for loss of use and enjoyment, but this does appear to be the correct way to characterise the claim by Mr Ricketts to reflect the fact that he does not have the type of boat which he would have had if Mr Sousa had properly performed the contract. However, I remain in some considerable difficulty in putting a dollar figure on such a loss. In the case of *Farley v Skinner* [2002] 2 AC 732, the House of Lords considered the question of a plaintiff's entitlement to damages for loss of amenity. In that case, the plaintiff had bought an expensive property following a negligent survey report which said that he was not likely to suffer greatly from aircraft noise, when this proved not to be the case. The trial judge had made an award of £10,000; this had been overturned by the Court of Appeal, and the trial judge's award was restored by the House of Lords.

68. I have referred to the fact that it did not seem to me to be a major matter that this was no longer a self-bailing boat. As Mr White said, 90% of boats in Bermuda are equipped with bilge pumps, and he also conceded that these experienced regular problems in terms of the automatic feature failing. But I suspect that even with a self-bailing boat, some measure of supervision is

necessary. The more important factor is that Mr Ricketts has a boat with an outboard engine, which he did not want, rather than with an inboard. But in relation to the issue of performance, Mr Ricketts agreed that he had told Mr Sousa after the test run that the boat was fast, something which he had apparently been concerned with from the outset.

69. In the case of *Farley v Skinner,* there was nothing that could be done about the aircraft noise, or as the trial judge said, nothing short of buying Gatwick Airport and closing it down. On the other hand, in *Ruxley Electronics and Construction Ltd. v Forsyth* [1996] 1 AC 344, the House of Lords was faced with a situation where it was possible to remedy the defect, but at a cost which was quite unrealistic. That case had concerned the construction of a swimming pool, which the owner had wished to be seven foot six inches deep at the deep end. In the event, the deep end had been constructed only six foot deep. The cost of remedying that defect by demolishing the work done and starting again from scratch was clearly unrealistic, and the House of Lords rejected the notion that the owner's damages should be based on the cost of reinstatement which had not taken place. The appeal on the trial judge's award of £2,500 for loss of amenity was not fully argued in the House of Lords, since counsel for the defendant (the owner of the swimming pool) was seeking to justify the Court of Appeal's award of damages based on the estimated cost of rebuilding the pool. For forensic reasons, he did not pursue the issue of the trial judge's award in the House of Lords.

70. But I am satisfied that on the authority of *Farley v Skinner* that there may be an award of damages for loss of amenity in the circumstances in which Mr Ricketts finds himself. As with the reconstruction of the swimming pool, all the experts agreed that it was financial folly to re-convert the boat from outboard to inboard. However, given that I have made an award of damages which will bring the boat back into a safe and seaworthy condition, I do not think that such an award should be more than relatively nominal. Given the high cost of living in Bermuda, I would fix the level of such a nominal award

at $5,000 in respect of loss of amenity, and I therefore award Mr Ricketts damages in this amount.

Loss of Use and Enjoyment

71. The position here is that the claim is entirely dependant upon Mr Ricketts establishing the express term for which he contended, a contention which I have rejected. It follows that Mr Ricketts is not entitled to any award of damages in respect of his claim for loss of use and enjoyment. If I were to be wrong on my rejection of the express term, I would still have been in some difficulty in putting a dollar figure on the claim. This is particularly the case in circumstances where three years had passed between the time that Mr Ricketts had purchased the boat, and when he took it to Mr Sousa for repair. This does not suggest any anxiety on Mr Ricketts' part to have the boat repaired so that he could go fishing. Indeed, more than two years have now passed since Mr Ricketts collected the boat, but the reason for his lack of action in that regard has been his concern that anything that he might do to fix the boat's problems would compromise these proceedings.

72. It does seem to me that if I were obliged to reach a figure for an award of damages based on loss of use and enjoyment, on the basis that there had indeed been an express term that Mr Sousa would complete the repair work by a given date, I would necessarily be picking a figure out of the air. I would not wish to do this and would decline to provide such a figure, on the basis that if there were to be such a need, an appellate court could do as well as I could in fixing the appropriate measure of damages.

Summary

73. The position in relation to Mr Ricketts' claim, is therefore that he is entitled to $12,000 in respect of the cost of correcting the defects, and $5,000 for loss of amenity, to give a total of $17,000. This sum has to be set off against the award of damages in Mr Sousa's favour of $22,941.21, leaving the sum of $5,941.21 to be paid by Mr Ricketts to Mr Sousa.

74. I do understand that the consequence of this judgment is that Mr Ricketts will have paid a total of something like $60,000 for this boat in its repaired state, when he could have bought a new one for $63,000. But I suspect that he paid more than the boat was worth when he bought it; it will have lost value in the three years which passed while it sat unused in his yard. There was a substantial bill for which he received no benefit in consequence of the original engine blowing up. And finally, I doubt that it ever made sense to embark on a major renovation of such an old boat.

Mitigation of Damages

75. It was Mr Rothwell's submission that Mr Ricketts had taken no steps to mitigate his loss, and that as a consequence any damages available to him should be severely reduced. The basis for this submission started with Mr Sousa's evidence that he had offered to correct the problem of the wooden spacer cogs without charge. As I have said, the complaint in relation to the spacer cogs seems to have been overstated from the outset. In relation to the fuel tank venting, while Mr Sousa accepted that the fuel tank had not been properly vented, he did not accept blame or responsibility for the inherently dangerous location of the fuel tank and the batteries together; even in relation to the inadequate fixing of the stern cleats, Mr Sousa had sought to put the blame on Mr Ricketts, rather than accepting it himself. And in relation to the through hull fittings, Mr Sousa had said that if the boat took in water on its own with two people standing in it, he could fix that within twenty minutes by putting in scuppers. Mr Sampson had of course said that scupper valves would not be sufficient for this boat, and I accept his evidence in this regard. The main problem from Mr Sousa's perspective is his evidence in relation to the compromised trim of the boat, which caused the stern to sit lower in the water than had been the case before conversion to outboard. In this regard, Mr Sousa was prepared to concede that when gas was low the boat would sit down a little more, but he would not accept that water would come in through the self-bailers. Specifically, he refused to accept that the work that he had done compromised the stability of the boat.

76. In short, there was no evidence that Mr Sousa had offered to correct any of the principal defects in his workmanship without charge, so that I do not think that Mr Ricketts can be criticised for failing to ask Mr Sousa to undertake the necessary remedial work. This is all quite apart from the fact that, as I have found, Mr Sousa and his team had produced a relatively poor level of workmanship in many areas. Mr Ricketts is required only to act reasonably in relation to this issue, and given all of the underlying circumstances, I find that Mr Ricketts did not fail to mitigate his loss, and there should be no reduction in the damages to be awarded to him.

Alternative Finding

77. In case I am wrong in regard to my finding that it is not open to me to order that the boat should be transferred from Mr Ricketts to Mr Sousa, on payment by Mr Sousa of a sum representing the value of the boat and the return of the monies paid by Mr Ricketts, I should deal with the merits of that damage claim by Mr Ricketts. In this regard I would have had two material adjustments which I would make to the figures put forward by Mr Ricketts. First, there is the value of the boat, which he now puts at $19,500, this being the amount that he says he paid for the boat in June 2001. I do not accept that the boat would have been worth anything like this figure after it had sat out of the water for some three years before it went to Mr Sousa's yard, and for a good nine months or so before any work was undertaken by him. Mr Sousa said that he would not have valued the boat at more than $2,000 when it came into his yard, and Mr Sampson commented, in relation to the boat's value that "hulls don't fetch much". As I have said, if the engine was in fact in working order, I would have expected Mr Ricketts to have put the boat overboard, rather than take it to Mr Sousa for engine repairs.

78. I have very little evidence as to the appropriate figure for the value of the boat before any repairs were undertaken. Certainly, I regard the figure of $19,500 as being way too high; even if the engine had been working, I cannot believe that after sitting in Mr Ricketts' yard for three years, the boat would have had the same value as when purchased. The basis on which I must approach this

issue is on the basis that the engine was not working, as I have found, and taking into account Mr Sampson's evidence as referred to above. It does seem to me that Mr Sousa's figure of $2,000 seems to be a "throwaway" number, rather than a considered view. In the circumstances, had it been necessary for me to do so, I would have assessed the value of the boat when it went into Mr Sousa's yard at $5,000.

79. The other issue is the question of the work done on the original engine, because Mr Ricketts' claim assumes that he owes nothing to Mr Sousa for work done on the original engine. Mr Horseman for Mr Ricketts has now withdrawn the allegation of negligence in relation to this work, so that there clearly would be an amount payable by Mr Ricketts to Mr Sousa. The invoice showed an amount of $8,360 for labour on the old engine, with a discount offered of $5,000 because of Mr Sousa's sympathy for the fact that the old engine had blown up. There are a number of items relating to the old engine identified in the invoice, being spark plug leads, rotor, distributor cap, condenser, points, fuel filter, fuel tank sender, engine water hose, engine breaker switch, steering cable and the cost of taking the old engine to the dump. These items total $1,262.31, and taking the discount as offered, the figure for labour on the old engine of $3,360 gives a figure of $4,622.31. Rounding this to $4,625, I would therefore adjust Mr Ricketts' figures so that he would only be entitled to the return of $1,375 of the initial payment of $6,000. The total damages would then be $31,375, to be paid by Mr Sousa to Mr Ricketts. This sum is calculated as to $5,000 for the value of the boat, and $26,375 being the total sum paid by Mr Ricketts to Mr Sousa, taking into account the adjustment referred to above. Upon payment of this sum by Mr Ricketts to Mr Sousa, Mr Ricketts would be obliged to deliver the boat to Mr Sousa, together with documents evidencing transfer of title. However, I reiterate that in my view this is not the correct approach, and if I am right in that regard, these paragraphs are of academic interest only.

Costs

80. In relation to costs, I will of course hear counsel, but it may assist them if I make some general comments by way of preliminary observations. First, Mr

Sousa has succeeded in his claim, but in an amount of approximately two thirds of that claim. Secondly, Mr Ricketts has succeeded on his counterclaim so far as Mr Sousa's breach of duty is concerned, but has not established anywhere near the level of damages he sought. On the other hand, more of the case was concerned with Mr Ricketts' counterclaim than Mr Sousa's claim. In regard to the latter, there were only two issues; the basis of calculating damages (which meant that the boat was not returned to Mr Sousa and he was entitled to be paid as if he had carried out the contract), and the difference in cost between a replacement inboard and the conversion to outboard.

81. In these circumstances, I suspect that an order for costs in Mr Sousa's favour would in broad terms be equivalent to a reduced order in favour of Mr Ricketts on the counterclaim. It may well be appropriate, therefore, to make no order as to costs.

82. But those are observations, not findings, and I will hear counsel on costs.

Dated the 11th day of January 2008.

Hon. Geoffrey R. Bell
Puisne Judge