Marine Life – Legal Desk

Buying & Selling Marine Merchandise – Part II

Caveat Emptor: The Rule of "Buyer Beware" Prevails

(1285 words, not including header above and bio at end)

The rule of "buyer beware", or *caveat emptor*, remains good law in Canada and mariners are wise to understand its principles.

In last month's Legal Desk I described how, in light of the evolving definition of "Canadian maritime law", mariners may no longer be able to rely on an *implied warranty of fitness* for goods sold by dealers of marine merchandise. The lose of which is a new advantage for dealers of such goods, the *implied warranty of fitness* (as a requirement of the B.C. *Sale of Goods Act*) was read into a contract for sale of goods and provided purchasers with an extra layer of protection by warranting the goods were "fit for the purposes intended" and of "merchantable quality", even if the written contract did not provide such a warranty. As a result, I suggest mariners must now be more vigilant in their inspection of used goods before making payment and accepting delivery – the rule of "buyer beware" holds fast.

The rule of *buyer beware* places an onus on purchasers of goods, including purchasers of marine merchandise, to inspect and make inquiries as to the quality of the goods. In *McCallum v. Dean* the Court, speaking generally, said "a purchaser should make an inspection and should inquire as to that which he is proposing to buy". Failing in this obligation may mean having little, if any, recourse against a vendor when the goods delivered are not what the purchaser thought they had bargained for. When purchasing used vessels, engines, gear or other expensive items, keep the following principles in mind.

Patent & Latent Defects:

Defects in marine merchandise are of two varieties: *patent* defects and *latent* defects. A purchaser receiving defective goods may have recourse against the vendor for goods that are later discovered to have *latent* defects, but will have no recourse for goods with *patent* defects. Basically, latent defects are hidden, and patent defects are obvious.

The law says that patent defects are defects that may be discovered by inspection and "ordinary vigilance" on the part of a purchaser. Latent defects are hidden defects, or defects that could not have been discovered by reasonable inspection. In *Eberts v. Aitchison* the B.C. Supreme Court held that "there is no remedy at law for a patent defect and the rule of caveat emptor is still the law".

Take for example the purchase of a used barge. Extensive corrosion on the outer-plating is a patent defect. Corrosion in inaccessible or hidden areas may be a latent defect. Having purchased the barge, a mariner could not claim against the vendor for the exterior corrosion, but *may* be able to claim for the hidden corrosion. I say "may" because the purchaser's success in claiming against the vendor will depend on the standard of inspection that he is held to and the actual efforts he makes to inspect the goods. This is discussed below.

Standard of Inspection: Ordinary Vigilance

All defects are discoverable depending on how hard you look. For example, an internal defect in an engine (that may cause the engine to fail two weeks after purchase) may be discoverable if you tore the engine down completely, but obviously the cost and inconvenience of doing so may negate the cost advantages of buying the used item. This level of inspection (tearing the item down to an unusable state) is likely not reasonable, therefore the defect referred to wound be latent. Conversely, an engine with a large crack in exhaust riser needs little effort to discover the defect, and therefore the defect is patent. The obvious question is, how thorough must the inspection be before a defect that goes undiscovered can be considered a latent defect, and thus sued on? There answer to this will change on a case by case basis, and will depend on many factors, including the nature of the item being bought.

In *Broadloom v. NMC Canada Inc.* the Court held that a purchaser will be held to a fairly high standard of inspection. Going back to our example of the used barge, it is likely a Court would find that the duty of the purchaser of an expensive item, such as a barge, includes hiring a marine surveyor to make an inspection of the compartments of the barge. Corrosion in accessible compartments may therefore be considered a patent defect and not claimed for (though if the surveyor misses this accessible corrosion in their survey you may have a claim against the surveyor). Corrosion in inaccessible compartments, where a reasonable inspection cannot lead, may be considered a latent defect. Importantly though, the vendors liability for this latent defect will depend on their knowledge of it, as discussed below.

For less expensive items, where the cost of a survey relative to the cost of the item makes a survey uneconomical, a survey is likely not necessary to fulfill your obligation of "ordinary vigilance" in inspection. However, you are still required to make thorough examination of the item yourself. Do not rely on statements that the good is "as good as new" or other subjective comments by the vendor – such statement of opinion will not likely be considered a term of the contract and you will be held to rule of "buyer beware".

Latent Defects: Knowledge by the Vendor

I have said that buyers may only recover for defects to goods if the defects are latent. Importantly though, a buyer may not recover for a defect simply because it is latent, or undiscoverable upon reasonable inspection. Rather, the purchaser must show that the vendor knew or had reason to believe that the defect existed and that he failed to provide this information to the buyer.

Take for example the sale of a small workboat. The vendor of the workboat knows that the vessel grounded and sunk to its wheelhouse two months prior. The engine was completely submerged. The workboat was raised, the engine flushed and restarted. "Good as new" says the owner. In this situation it is reasonable for the vendor to expect that the submersion of the engine caused damage that may not be discoverable upon a short trial run by the purchaser. The vendor has a duty to inform the purchaser of this likely defect. Failing to do so may entitle the purchaser to claim against the vendor for the latent defect (damage caused by internal corrosion of the engine), should it later arise.

In respect of latent defects that the vendor has, or reasonably should have knowledge of, the vendor must not act to mislead the purchaser or allay his suspicions of any possible defect. Further to the example above, the purchaser may have vague information that the workboat had grounded previously, and in reply to the purchaser's inquiries, the vendor may state "it was nothing really, the wheelhouse was bone dry". Attempts to lull the suspicions of the potential for latent defects may cause the vendor to liable for these defects.

In conclusion, mariners must exercise ordinary vigilance in inspecting goods prior to taking delivery of them. In all cases of significant purchases, you are well advised to hire a surveyor (mechanical or vessel or both as appropriate) to comply either your duty to make reasonable inspection of the goods. When negotiating the sale of an expensive item, it is best to keep the negotiations in written form (even by email), so that there is a written record of the representations made by the vendor. If there is later discovered a defect with the good, these records will go to whether or not the vendor knew or ought to have known of the defect, and to what extent he allayed the purchaser's suspicions of these defects. In all circumstances though, remember, buyer beware.

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