1315 words (excluding bio at bottom)

Buying Marine Merchandise – Death of the Implied Warranty of Fitness

The purchase and sale of marine merchandise gives rise to a significant portion of my work as a marine lawyer. Claims by purchasers, and defences for vendors, in respect of items such as engines, transmissions, gear, electronics, even entire ships, that are alleged to be defective are not uncommon, particularly in light of the high cost of many of these items. Indeed, there are few mariners that can say they have bought marine merchandise and not, at some time, found they have not received what they bargained for.

Historically, purchasers of marine goods have had several possible arrows in their legal quiver. Buyers who found themselves as the recipient of faulty marine goods could, in many cases, sue for such things as: *breach of contract*, *breach of warranty*, *negligent misrepresentation*, and *breach of implied warranty*. Recently however, it has become quite unlikely that buyers can rely on the remedy of *breach of implied warranty of fitness*, as provided by the B.C. *Sale of Goods Act*. While bad news for purchasers, this is good news for vendors.

What is an Implied Warranty of Fitness?

Many mariners will know that a *warranty* is a term of a contract the breach of which allows the purchaser to put themselves back in the position they would have been in had the breach not occurred. For example, many new engines come with express (written) warranties over their parts for a number of years – if a part breaks during this time the warranty will likely provide for repair or replacement of the parts. These warranties are, of course, often subject to exclusions for things like *consequential loss* (*consequential loss* is loss that flows from the breakdown, such as lost towing time or excess moorage costs).

If, however, the documentation to the above engine (for example) does not include a written warranty clause, the provincial *Sale of Goods Act* provides that there may be an *implied warranty*, that is, a warranty will be 'read into' the contract even though it is not there on paper. This has provided an extra layer of protection for purchasers.

The implied warranty under the *Sale of Goods Act* provides that the goods are "reasonably fit for the purposes intended". Specifically, and it is worth noting, the *Act* provides at section 18:

- That if the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply, there is an implied condition that the goods are reasonably fit for that purpose.

- That if goods are bought by description (that is, without viewing them) from a seller who deals in goods of that description, there is an implied condition that the goods are of merchantable quality;

- That if the buyer has examined the goods there is no implied condition as regards defects that the examination ought to have revealed;

- That there is an implied condition that the goods will be durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale or lease.

The implied warranty and statement above apply equally to goods that are leased as well.

This implied warranty of fitness has been a powerful weapon for purchasers. For example, in the 1989 case of *Finning Tractor v. Mackay*, the BC Supreme Court found that although Finning was not liable in breach of contract for supply of a marine propulsions system that failed several times over a period of four years, they were liable for breach of implied warranty under the B.C. *Sale of Goods Act*. In short, the Court found that a series of failures in the transmission gear oil cooling system amounted to the system not being "fit for the purpose intended" even though the owner had approximately three and a half out of four years of good service.

The Court in the above case went on to find the breach of the implied warranty was a *fundamental breach* of the contract of sale which prevented Finning from relying on the exclusion clause in respect of consequential loss. Readers will recall that consequential loss is loss that is not directly related to the failure, but that flows from the failure, such as lost towing time. Fortunately for Finning, the consequential loss in the above case was loss of pleasure, as the subject vessel was a pleasure boat, and the plaintiff was awarded $3,000. The result could have been vastly more costly for the defendant had the vessel been a tow boat or other commercial vessel in which case the consequential loss would have been lost profits.

We can see then why the implied warranty of fitness is beneficial to purchasers (and onerous to vendors) - because it provides a remedy that is not otherwise stated on the contract or agreed between the parties.

Demise of the Implied Warranty: Good News for Vendors

Since the Supreme Court of Canada's 1998 decision in *Ordon v. Grail*, it has become increasingly unlikely that purchasers of marine merchandise can rely on the implied warranty of fitness provided for in the *Sale of Goods Act*. In *Ordon v. Grail* the Supreme Court found that several provincial statutes, relating to the rights of family members of deceased persons, were constitutionally inapplicable to negligence claims arising from a boating accident because maritime negligence was a core element of the Federal

government's exclusive jurisdiction over maritime law. In other words, provincial legislation that stepped into the Federal government's domain, was unlawful.

What does this have to do with the BC *Sale of Goods Act*? Like the provincial legislation in *Ordon v. Grail*, B.C.'s *Sale of Goods Act*, as it relates to transactions of marine merchandise, may also be viewed as an unlawful infringement on the Federal government's jurisdiction over "Canadian maritime law". This is not to say that the *Sale of Goods Act* will not apply to all transactions that involve, in some way, a marine component, but in my opinion, transactions between marine vendors and vessel owners for goods or services that relate directly to navigation and shipping are unlikely to be caught by the *Sale of Goods Act*.

This represents a significant loss for purchasers of marine goods, and a new advantage for vendors. Had the *Finning* case above been decided today, the Court would likely not have found there was an implied warranty of fitness, and because the Court had dismissed the claim for breach of contract generally, Finning would not have been liable in any respect. Moreover, without a finding that there was a breach of implied warranty, and therefore a fundamental breach of the contract, the exclusion clause covering consequential loss would have remained effective against the plaintiff purchaser and the $3,000 would not have been awarded. In other words, had the case been tried today, Finning would likely have come out smelling like roses. Diesel roses, that is.

With the likely loss of the implied warranty of fitness, purchasers of marine goods are best advised to inspect carefully the terms of sale for marine merchandise, and not to assume that, simply because what they get does not work, they will be able to recoup their losses. Vendors, on the other hand, can breathe a little easier that a warranty of fitness of a product will not likely be read into the contract for sale if it is not explicitly stated.

That being said, vendors may still be sued for breach of implied warranty of fitness, and their lawyers may proceed to defend against the claim without understanding (and arguing to the Court) that the implied warranty likely does not apply. This is because the argument that the *Sale of Goods Act* is constitutionally inapplicable is unique to maritime law. In respect of such matters, I suggest you are best advised by a maritime lawyer.

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