

IN THE SUPREME COURT OF BELIZE A.D. 2009.

CLAIM NO. 559

	(JOHN QUAN	CLAIMANT
	(Trading as "JMQ MARINE INDUSTRIES"	
	(
BETWEEN	(AND	
	(
	(DAVLIN LIMITED	FIRST DEFENDANT
	(DAVID KALAI	SECOND DEFENDANT

BEFORE: Hon. Madam Justice Hafiz

Appearances: Mr. Zuniga SC for Claimant/Ancillary Defendant
Ms. Naima Barrow for Defendants/Ancillary Claimant

J U D G M E N T

Introduction

1. This is a claim for damages for breach of contract by John Quan, (hereinafter referred to as "Quan") trading as JMQ Marine Industries against Davlin Limited and David Kalai, who is one of the Directors of Davlin Ltd. Quan is in the business of building fiber glass boat and by agreement dated 3rd November, 2008, which was signed by Quan and Erlinda Farkas for Davlin Limited, Quan agreed to manufacture a twenty-three foot fibreglass boat. David Limited and David Kalai counter claim for damages for poor workmanship and defective work.

Statement of Case for Quan

2. Quan claims that in November, 2008 Kalai expressed interest in buying for himself a fiber glass boat to be built by Quan. That the agreement between himself and Kalai was that he would be the builder and seller

and Kalai himself would be the buyer. On or about the 17th day of November, 2008, Kalai drew up and produced a Purchase Order/Agreement which was executed by Quan and Erlinda Farkas acting for the Defendants. See **Exhibit "A"** for a copy of the Purchase Order.

3. Quan claims that the said Purchase Order after execution constituted a written Agreement between Kalai and himself whereby Kalai agreed to purchase and he agreed to manufacture and sell to Kalai, one Fiber Glass Boat at the price of \$51,000.00 payable by instalments.
4. Quan says that Davlin Limited executed the said Purchase Order/Agreement as buyer but it was understood between Kalai and himself that when completed, the said Fiber Glass Boat would be the property of Kalai.
5. Quan claims that the Defendants have breach the agreement as they have paid \$35,000.00 only towards the purchase price and therefore, the balance of the purchase price now due and payable is \$16,000.00. Further, that at the request of Kalai, he supplied to him additional items at a cost of \$1,878.74 as shown on an invoice dated February 10th, 2009. See **Exhibit J.Q. "B"** for Invoice showing the particulars.
6. Furthermore, at the request of Kalai, he paid to the Customs Department of the Government of Belize the sum of \$2,937.21 by way of deposit on the importation of one outboard engine complete with accessories and \$3,800.00 by way of deposit on the importation of another outboard engine with accessories, all for and to the account of the Defendants. Also, Quan said he paid for and to the account of both Defendants \$100.00 in brokerage fees in connection with the importation of the aforementioned outboard engines.

Particulars of deposit to customs

12 th November, 2008.	\$2,937.21
22 nd December, 2008.	<u>\$3,800.00</u>
Total	\$6,737.21

See **Exhibit C** for a copy of the Customs Provisional Entry dated 12th November, 2008, showing payment of \$2,937.21. See **Exhibit D** for a copy of the Customs Provisional Entry dated 22nd December, 2008, showing payment of \$3,800.00.

7. Quan claims that the total due and payable to him is \$24,715.95. That on or about the 12th day of February, 2009, Kalia personally took delivery of the said boat but despite demands from him the Defendants failed or refused to pay the said sum of \$24,715.95.

As such Quan claims:

- (1) *The sum of \$16,000.00 being the balance of the price of a boat sold and delivered by the Claimant to the Defendants;*
- (2) *The sum of \$1,828.74 being the price of goods, service and gasoline supplied by the Claimant to the Defendants at its request;*
- (3) *The sum of \$6,373.21 being the sum paid by the Claimant to the Customs Department of the Government of Belize for and on behalf of the Defendants at their request;*
- (4) *The sum of \$100.00 being the sum paid by the Claimant to a broker as brokerage fees for and to the account of the Defendants at their request;*
- (5) *Damages for Breach of Contract, Interest and Cost.*

8. In Defence to the Counterclaim of the Defendants, Quan says the Defendants has never complained to him or notified him that the boat was not done in a workmanlike manner or that there were any defective works. He further says that the contract did not provide for cushions, fire extinguishers or horns, which were extra items supplied at the request of the Defendant.

9. Quan further says that the delivery was to be on December 14th 2008 and the contract also provided that the buyer might not be available in Belize to accept delivery on that date and that the boat would be kept in the boat yard up to 30 days for buyer accepting delivery. In the circumstances, time was not of the essence. Further, the Defendants are estopped from alleging and claiming as is done in paragraph 40 of the Amended Counterclaim by reason of the following facts:
 - (1) *The Second Defendant who was co-buyer and agent of the First Defendant was frequently out of Belize.*
 - (2) *The First and Second Defendants refused to take delivery on the ground that the Second Defendant had not yet obtained a license for the boat.*
 - (3) *The Second Defendant did not get the license for the boat until on or about the 2nd day of February, 2009.*
 - (4) *The First and Second Defendants failed to pick up the boat until the 12th day of February 2009.*

10. Quan denies that he made the alleged representations that the upper part of the boat was built with nine layers of fiber glass and says that the upper part of the said boat was manufactured with five layers of fiber glass plus one layer of foam.

Statement of Case for Defendants

11. Kalai said that his negotiations with Quan was done in his capacity as a director of Davlin Limited and on behalf of Davlin Limited. Further that the boat to be built by Quan was to be built for Davlin Limited and not himself. Also that Ms. Farkas executed the Purchase Order/ Agreement in her capacity as president and chairman of the Davlin Limited. Mr. Kalai says that he cannot be in breach of an agreement to which he was not a party. That it was always known and understood between the parties that the boat to be constructed would be the property of the Davlin Ltd.
12. Davlin Ltd admits that it has paid Quan \$35,000.00 towards the agreed purchase price but says that the balance of the purchase price is not due and payable and that Quan is not entitled to the \$16,000 claimed.
13. Davlin Limited says that it entered into a written agreement with the Quan in November 2008 by which he was to build a twenty-three foot (23') fiberglass boat in accordance with the terms of the written agreement and the sketch contained in appendix "A" of the said agreement ("the Contract"). However, Davlin Limited says that Quan has failed to build the boat in accordance with the terms of the contract and says that the works completed were not done in a workmanlike manner and were defective. The particulars are:

Breach and Deficient Work

- I. Failure to deliver the boat on the agreed delivery date*
- II. Failure to allow for the agreed three (3) hour sea trial before delivery of the boat*
- III. Failure to manufacture with the agreed upon layers of fiberglass*
- IV. Failure to provide proper electrical work*
- V. Failure to provide proper bilge pump*
- VI. Failure to build a center bench in the interior of the boat*
- VII. Failure to build steps specified in the sketch*

- VIII. *Failure to construct the pilot stand to the proper height*
- IX. *Failure to allow for adequate space between the captain's chair and the steering wheel*
- X. *Failure to provide agreed upon warranties*

14. Davlin admits that Quan provided them with a fire extinguisher, horn, boat cushions, boat license, boat registration and gasoline with the boat and that it was agreed that Davlin Ltd. would pay for the registration of the boat. However, it was agreed that the boat would be provided with seating and as such Quan is not entitled to be paid separately for the boat cushions which were provided. Also, that it is standard for a boat to have a fire extinguisher and horn and as such the Claimant is not entitled to be paid separately for the provision of those articles. Further, though it is standard for a boat to be delivered with gasoline it had, upon the request of the captain who delivered the boat for reimbursement, paid for the cost of the fuel used to deliver the boat.
15. Davlin Ltd says that Quan attempted to provide life vests but they never accepted delivery of the same because the Defendant had already purchased its own life vests.
16. Kalai says that he never requested Quan to pay the sum of \$2,937.21 or any other sum for the importation of any engine nor the accessories. Davlin Ltd. says that the engines provided with the boat were done so in accordance with the terms of the Contract which stipulated that two (2) Mercury 60 Horsepower four (4) stroke outboard engines 2008 model would be provided and installed and as such Quan is not entitled to be paid separately for the provision and installation of those engines.
17. Both Defendants say that Kalai was never obligated to pay Quan the sum of \$24,715.95 and as such any failure or refusal to pay the Quan is

that of Davlin Limited. Further, Davlin Ltd. says that Quan is not entitled to payment as he in breach of the Contract and the works completed were not done in a workmanlike manner and were defective.

18. Kalai says that he cannot be in breach of an Agreement to which he was not a party. Further, that the boat was registered in the name of Kalai in error.

Counter-claim

19. The Defendants says that it was an implied term of the Contract that the works were to be done in a workmanlike manner. That Quan failed to perform the works in a workmanlike manner. Further, that they remedied defective works by effecting remedial works over a period of six months at a total cost of BZ \$11,005.77. The particulars of those works are:

<i>i. Repairing electrical and mechanical system</i>	<i>\$1,417.59</i>
<i>ii. Replacing overheating engine</i>	<i>\$ 700.00</i>
<i>iii. Restarting boat after electrical failure</i>	<i>\$1,000.00</i>
<i>iv. Repairs to motors</i>	<i>\$3,468.18</i>
<i>v. Adjusting height of the pilot stand to the proper height</i>	<i>\$1,500.00</i>
<i>Boat pull and storage</i>	<i>\$2,150.00</i>
<i>vii. 4 trips to Belize city from San Pedro</i>	<i>\$ 520.00</i>
<i>viii. misc. Expenses</i>	<i>\$ 250.00</i>

Total \$11,005.77

20. The Defendants say that they suffered loss and damage and has expended \$11,005.77 in effecting remedial works. Further, it was a further term of the contract that the boat was to be delivered on or before the 30th November, 2008 with a sixteen (16) working day grace period or pay it BZ\$250.00) for any day delivery is delayed because of Quan. That in breach of the said term Quan failed to deliver the boat within the agreed time and was more than fifty-two (52) days late in delivering the

boat and as such owes the Defendant, BZ\$13,000.00 for the late delivery of the boat.

21. The Defendants say that prior to the delivery of the boat, Quan represented to them that the lower part of the boat was manufactured with eleven (11) layers of fiberglass and the upper part of the boat was manufactured with nine (9) layers of fiberglass. That they were thereby and in reliance on the representation induced to accept delivery of the boat from Quan.

22. The Defendants further say that Quan's representations was not true as the upper part of the boat was not manufactured with nine layers of fiberglass, but was manufactured with five layers of fiberglass. As such, the boat is worth far less than BZ\$51,000.00 and they counterclaim as follows:

- (1) *Rescission of the agreement on the ground of fraud with all proper consequential directions;*
- (2) *Repayment by the Claimant of the BZ\$35,000.00 paid by the Defendant to the Claimant;*
- (3) *Interest upon the said sum of BZ\$35,000.00 at such rate and for such period as this Honourable Court shall think fit;*
- (4) *In the alternative, Special Damages*
- (5) *Damages for fraudulent misrepresentation;*
- (6) *Damages for breach of contract, Interest and Cost.*

Witnesses

23. There are two witnesses for the Claimant, Mr. Quan himself and Mr. Keating. For the Defendants there are David Kalai and Erlinda Farkas. They all filed witness statements and were cross-examined.

23 A. Issues for consideration

- (1) Whether Mr. Quan is entitled to \$6,373.21 duties paid to Custom
- (2) Whether Mr. Quan is entitled to \$1,878.74 as shown in particulars.
- (3) Whether Davlin Ltd. or David Kalai or both of them is/are the Purchaser(s) of the boat.
- (4) Whether or not Mr. Quan failed to build the boat to the specifications contained in the contract and whether he failed to do so in a workmanlike manner. If so, what are the damages
- (5) Whether there was fraudulent misrepresentation by Mr. Quan.
- (6) Whether the Defendants are entitled to \$13,000. for delay in delivery of the boat.
- (7) Whether Mr. Quan is entitled to the balance of the purchase price, being \$16,000.00

Issue 1: Whether Mr. Quan is entitled to \$6,373.21 duties paid to Custom Department

24. Mr. Quan claims \$6,373.21 being the sum paid to the Customs Department of the Government of Belize for importation of two engines. He also claims \$100.00 being the sum paid by him to a broker as brokerage fees. Mr. Quan in his witness statement said that at the request of Mr. Kalai, he paid to the Customs Department of the Government of Belize the sum of \$2,937.21 by way of deposit on the importation of one outboard engine complete with accessories and \$3,800.00 by way of deposit on the importation of another outboard engine with accessories, totalling \$6,737.21. See **Exhibit J.Q. "C"** for Customs Provisional Entry dated 12th November, 2008, showing payment of \$2,937.21 and **Exhibit J.Q. "D"** for a copy of the Customs Provisional Entry dated 22nd December, 2008, showing payment of \$3,800.00. Further, Mr. Quan states that he also paid \$100.00 in brokerage fees in connection with the importation of the aforementioned outboard engines.
25. Learned Counsel, Ms. Barrow in written submissions drew the Court's attention to page two (2) of the Agreement under the heading "*The Engines*" that "*2 (two) Mercury 60 Horsepower 4 stroke outboard engines 2008 model shall be provided and install/ The engines shall be of the top of the line engines produced by Mercury.*"; and at page six (6) under item 64 "*2 Mercury 60 HP all Taxes Free*". Learned Counsel contends that in light of the provisions of the Contract it could not have been for Davlin to pay for the boat engines. I do agree with Learned Counsel, Ms. Barrow that Davlin did not have to pay for the boat engines. This is a contract to build a boat for the sum of \$51,000.00. There is nothing in the contract which points to a separate payment for the engine.
26. The contract has the "*List of Items to be Provided by Seller as Part of the Purchase*" and at Item 64 it states that Mr. Quan had to provide two

“Mercury 60 HP all Taxes Free.” I find Mr. Quan’s evidence credible that he had discussions with Mr. Kalai and Ms. Farkas about their tax free status and hence the reason the contract was written in that form. However, it is my view that the discussion that Mr. Quan had with them about their tax free status under the BTB Qualified Retired Persons Program should not have influenced him to import the engines and expect to get an exemption. Mr. Kalai and Ms. Farkas are entitled to import personal effects free of import duties but they are not the ones who imported the engines as the disclosures show that it was Mr. Quan who imported the engines. In my view, he has acted to his detriment by not including the taxes in his contract price for the boat. I find that since Mr. Quan’s selling price for the boat is \$ 51,000.00 he is not entitled to claim \$6,373.21 as duties paid to customs for the engines. It follows that he is not entitled to \$100.00 as brokerage fee.

Issue: 2 Whether Mr. Quan is entitled to \$1,878.74 as shown in particulars.

27. Mr. Quan claims \$1,878.74 for various items as follows:

<u>Particulars</u>	
Fire Extinguisher	\$ 53.00
Life Jackets	\$246.40
Horn	\$ 33.00
Boat License	\$ 50.00
Boat Registration	\$ 35.00
Gasoline (gallons)	\$271.35
Boat Cushions (3)	\$789.99

Boat Driver	<u>\$400.00</u>
Total	\$1,878.74

28. Both Mr. Kalai and Ms. Farkas testified that Mr. Quan had provided, as agreed, a fire extinguisher, a horn, boat cushions, boat license, boat registration, gasoline and two engines. This evidence is not entirely accurate as will be seen by the evidence.
29. Mr. Quan claims \$50.00 for boat licence and \$35.00 for boat registration. The evidence however shows that he is not the one who obtained the licence for the boat and registered the boat and that it was in fact Mr. Kalai who had done this. In cross-examination, Quan explained that these are monies for starting the process and may have been payment made to the broker for doing so. Mr. Quan did not produce any receipts to verify these payments to the broker and it is unclear whether any of these monies were expended for the boat licence and boat registration. As such, the court denies the claim for \$50.00 and \$35.00 for boat licence and boat registration.
30. The claim for \$271.35 for gasoline is denied as Mr. Keating who drove the boat to San Pedro on the date it was delivered testified that it was Mr. Kalai himself who bought the gasoline. The court also denies the claim for \$ 400.00 for the Boat Driver as Mr. Keating testified that up to the date of the hearing he was not paid for driving the boat that day to San Pedro and he did not make any claim to Mr. Quan to be paid. Mr. Quan did not pay Mr. Keating and as such he is not entitled to the \$400.00.
31. Mr. Quan makes a claim for \$246.00 for life vest. The evidence of Mr. Kalia which I find credible is that when Mr. Keating delivered the boat

they gave him the vests as they had brought their own. As such, the claim for \$246.00 is denied.

32. There is no evidence that the fire extinguisher, horn and boat cushions were returned. Also, the list of items to be provided by Seller does not include these items. As such, I award Mr. Quan BZ \$53.00 for the Fire Extinguisher, BZ\$33.00 for the horn and BZ\$789.99 for the boat cushions, being a total of BZ\$875.99.

Issue 3: Whether Davlin Ltd. or David Kalai or both of them are the Purchaser(s) of the boat.

33. The Agreement dated 3rd November, 2008 between the parties shows that “Davlin Ltd” is the buyer and JMQ Marine Industries and/or Williams John Quan as the seller. It is shown by the agreement that Erlina A. Farkas executed the agreement for Davlin Ltd and William John Quan executed same for JMQ Marine Industries and for himself. The evidence before the court is however, not so clear cut as to whether Davlin Ltd. is the sole buyer.
34. Mr. Quan in his witness statement said that during the month of November, 2008, or thereabouts Kalai called him by telephone and told him that he wanted to buy a boat. That all communications between himself and Mr. Kalai was on the basis and understanding that he would be the builder and seller and Mr. Kalai, would be the buyer. Further, there was no mention by him of a company or any other person.
35. Mr. Quan states that Mr. Kalai told him that he was a retiree and that he obtains tax relief from the Government of Belize through the retiree programme of the Government. As a result, he quoted the tax and duty

- free price on the two engines for the boat because Mr. Kalai said that he would get tax and duty exemptions based on his status as a retiree.
36. He further stated that on or about the 17th day of November, 2008, Mr. Kalai drew up and produced a Purchase Order/Agreement which was executed by Erlinda Farkas. Mr. Quan said that he read and then signed the Purchase Order without realising that he was doing an agreement with a Company. He thought he was dealing with Mr. Kalai because he had stressed his status as retiree.
37. In written submissions, Learned Senior Counsel, Mr. Zuniga submits that it is clear that the Agreement or "Purchase Order" was drawn up by or on behalf of both Defendants. That the court should consider the circumstances under which it was signed. That the Agreement was produced by Mr. Kalai and Ms. Erlinda Farkas at the International Airport for signature and that since it was drawn up by Mr. Kalai or Ms. Farkas, they would be very familiar with its contents. Therefore, if any ambiguity arises in relation thereto it must be constructed in favour of the Claimant and against the Defendants. Learned Counsel relied on paragraphs **12-083** and **12-085** of **Chitty on Contracts, Volume I, 29th Edition, Vol 1**.
38. Further, Learned Counsel submits that though the agreement purports to be between John Quan and Davlin Ltd, the real purchaser is David Kalai for the following reasons:
- (1) *Neither David Kalai nor Linda Farkas are aware of any distinction between each of them and Davlin Ltd. For example, Linda & Kalai stated in cross-examination that "Davlin Limited is me, President and Chairman and General Manager". (see page 95 of the transcript)*
- During cross-examination, David kalai similarly said: "Davlin Limited is me". (see page 110 of the transcript)*

- (2) *There were no meetings or resolutions by the company regarding the purchase of a boat.*
- (3) *There were no meetings or resolutions regarding payment.*
- (4) *There were no meetings or resolutions to decide whether this Claim was to be defended.*
- (5) *There were no meetings or resolutions concerning the boat after it was brought to Mr. Kalai. (see page 111 of the transcript)*
- (6) *The Second Defendant sought to purchase the engine tax free in order to take advantage of certain tax privileges accorded to retirees. He, not Davlin Limited, is a retiree.*
- (7) *The vessel was registered showing David Kalai, not Davlin Limited, as owner. Neither Defendant did anything to change the ownership status by transferring same to Davlin Limited.*

39. Further, Learned Senior Counsel, Mr. Zuniga submits that even if there was an agreement between John Quan and Davlin Limited, there was also a Collateral Agreement¹ existing between John Quan and David Kalai. He relied on the evidence of Mr. Quan at paragraphs 2, 3, 4 and 5. Learned Senior Counsel further submits that the agreement was drawn up and produced by Mr. Kalai and Ms. Farkas at the International Airport for signature and Mr. Quan had only moments to quickly scan and sign the same before Mr. Kalai departed. This, according to Mr. Zuniga shows that Mr. Kalai had ulterior motives. He negotiated the agreement but cleverly produced it for signature under circumstances that caused Mr. Quan to not notice that he was signing an agreement with a limited liability company.

¹ See **paragraph 12-007 of Chitty on Contract, Volume I, 9th Edition** relied on by Counsel on collateral contracts.

Learned Senior Counsel contends that the circumstances point to the fact that the arrangement was really between John Quan and Kalai. Further, that Kalai used the company as an instrument behind which he can hide. He now owns the boat and there was a collateral contract with him. As such, Counsel submits that both Defendants are liable to Mr. Quan for payment.

40. Learned Counsel, Ms. Barrow, submits that Mr. Quan admits in his witness statement that “he read and signed the Purchase Order” dated the 17th day of November, 2008 but goes on to state that he did so “*without realizing that I was doing an agreement with a Company*”. However, she contends that as evidenced by the Purchase Order signed by Mr. Quan and Ms. Farkas on behalf of Davlin Limited, Mr. Quan entered into an agreement to build a boat for Davlin Limited.
41. Learned Counsel also referred to the Agreement itself which states at page seven that the written agreement was the full and only agreement between Davlin Limited and Mr. Quan which states:

Seller and buyer declares that they read the document thoroughly and fully understand and agreed that this the full and the only agreement between both parties and any changes and modification will be done in writing and properly signed by both parties.

42. As such, Learned Counsel submits that the fact that Mr. Quan was operating under a mistaken belief does not invalidate the Contract he signed with Davlin.

Determination

43. I have considered the evidence before the court and I find Mr. Quan's evidence credible that when he and Mr. Kalai held discussions about the purchase of the boat that there was no mention that Davlin Ltd was the purchaser. I have taken into consideration also the nature of the discussions which involved Mr. Kalai's tax free status and the negotiations for tax free engines and I am convinced that it was Mr. Kalai who was doing the negotiations as Davlin Ltd. cannot have tax free status. The evidence also shows that Mr. Kalia is registered as the owner of the boat. However, since the agreement which Mr. Quan executed states that Davlin Ltd is the Purchaser, then Davlin cannot be excluded as the Purchaser. In my view, Kalai and Davlin Limited are so intertwined in the purchasing of the boat, that the two cannot be separated. Under such circumstances, I find that both Davlin Ltd and Mr. Kalai are the purchasers of the boat.

Issue 4: Whether or not Mr. Quan failed to build the boat to the specifications contained in the contract and whether he failed to do so in a workmanlike manner. If so, what are the damages.

44. The agreement between the parties which is Exhibited at "A" of John Quan's affidavit shows the description of the boat as follows:

Description of boat

The boat to be purchased is a 23' fibreglass boat to be manufactured by seller in his or related parties facilities. The boat is known as a 23' fishing boat and will be produced using the current mold used by seller as was presented to buyer in seller yard facilities.

The boat height will be extended by additional 8" height above the standard boat produce by the mold specified

above.

The boat haul (lower part) to be manufactured by using 11 layers of fibreglass, all seating and steps will be made out of the same 11 layers. The upper part of the boat will be made out of 9 layers. All fiber materials and resin to be used in the construction of the boat will be of the highest standard available.

The fiberglass will be laid in the most professional way avoiding any air bubble within the fibreglass layers.

The boat will be painted mostly white with a blue trim at the top....

A rough sketch of the interior set up of the boat is attached as Appendix "A" not drawn to any scale.

A pilot stand will be installed in the back part of the boat in an acceptable place. The pilot stand will include an hydraulic steering of the boat back and forth gear as well as fuel acceleration handles. The pilot stand will have operating gadgets normally being installed on the pilot stand like a engine temperature gauge and other things common for such a boat.

45. Mr. Kalai and Ms. Erlinda Farkas at paragraph 15 of their witness statement said that they discovered after the boat was delivered that Mr. Quan failed to build the boat in accordance with the terms of the Contract and failed to do the work on the boat in a workmanlike manner. They identified the following failures:

- a) *was not built with the agreed upon layers of fiberglass,*
- b) *did not have proper electrical work,*
- c) *did not have a working bilge pump,*
- d) *did not have a center bench in its interior,*

- e) *did not have the agreed upon steps,*
 - f) *did not have a pilot stand at the proper height; and*
 - g) *did not allow adequate space between the captain's chair and the steering wheel.*
46. Mr. Quan in his supplementary witness statement said that the sketch was not drawn to scale so everything had to be scaled down to fit because the boat was to be a twenty-three feet fibreglass boat. That if the bench was 8 feet long as shown on the sketch, it would have passed the front of the Pilot Stand. There would then have been no space to work, or move around. Further, that the center bench for the interior of the boat could not be built because it could not fit as there was no space for the bench. He further stated that when Mr. Kalai came to inspect the boat, he did not say that he needed a bench because it was obvious that it could not fit. Mr. Quan says that after Mr. Kalai took delivery of the boat he did not complain, but after the this claim was instituted against him he suddenly found faults with the boat.

Submissions for Claimant

47. In written submissions, Learned Senior Counsel, Mr. Zuniga submits that the agreement to build the boat with 11 layers of fiberglass was not a fundamental term of the contract in light of the fact that Mr. Quan *"used a different construction technique called the sandwich construction"* which he explained as follows:

It means it's constructed with layers of fibreglass on both sides of the panel and there's a foam core in the middle. It makes the product a lot stronger...

This is a stronger product and safer too because it could cause buoyancy in case of sinking. So that's the new technique that's being used.

48. As such, Learned Senior Counsel, Mr. Zuniga contends that the Defendants received a stronger and more buoyant boat than they expected. He further submits that the Defendants' Counterclaim has not been established in the light of the above and also taking into account the following:

- (1) *The Defendants could have refused to take delivery if they saw any reason to do so.*
- (2) *They did not ask for a test run.*
- (3) *Mr. Quan testified that he did the test runs himself and that Mr. Kalai never brought anyone to do a test run. Therefore, the Claim by the Defendant of not being allowed to test the boat is false. They could have at least mentioned it on the date of delivery but they did not.*
- (4) *After they accepted delivery of the boat, they made no complaint.*
- (5) *Given the combative and uncompromising demeanor of Mr. Kalai, it is clear that he is not a person who would have failed to complain if he had reason to do so.*

49. Mr. Zuniga further contends that having regard to the testimony of Mr. Sean Keating, it is clear that after the boat was delivered it was misused by Mr. Kalai.

Submissions by Defendants

50. Learned Counsel, Ms. Barrow submits that Mr. Quan failed to build the boat in accordance with the terms of the contract as shown by the evidence of the Defendants. That when Mr. Quan was asked under cross-examination about his failure to construct the boat to the specifications evidenced in the sketch attached to the contract, Mr. Quan stated that it was "physically impossible" to build the boat according to the specifications evidenced in the sketch. As such Learned Counsel contends that this statement made by Mr. Quan amounts to an admission that he made representations which he knew were untrue with the intention that Davlin should be induced thereby to make payments in reliance on the representations.
51. Further, Learned Counsel contends that since Davlin paid Mr. Quan monies based on his misrepresentations that the boat it wanted could be built, Davlin is entitled to rescind the contract. Ms. Barrow relied on the learned authors of **Halsbury's Laws of England, Volume 9: Contract** at **paragraph 536** which provides that:

Where a person has entered into a contract as a result of a misrepresentation made to him by another party thereto he may, subject to certain limitations, rescind the contract and in addition, or as an alternative, he may have a claim for damages.

52. Ms. Barrow further contends that Mr. Quan admitted that the boat was not manufactured with eleven layers of fiberglass on the lower part and nine

layers on the upper part of the boat and sought to justify this failure to follow the specifications contained on page two of the contract by arguing that the technique he employed made the boat stronger. Learned Counsel submits that it was not open to Mr. Quan to unilaterally alter the manner in which the boat was constructed and that his failure to construct the boat as agreed amounts to a material breach of the Contract which also justifies the rescission of the contract. Ms. Barrow relied on **Halsbury's Laws of England, Volume 9: Contract** at **paragraph 538** which provides that:

Where one party to a contract has committed a serious breach by a defective performance or by repudiating his obligations under the contract, the innocent party will have the right to rescind the contract; that is to treat himself as discharged from the obligation to tender further performance, and to sue for damages for any loss he may have suffered as a result of the breach.

53. Learned Counsel, Ms Barrow submits that the Defendants are aware that there are limits on the right to rescind for fraud² but submit that those limits are not operative in the instant case as Davlin is capable of returning the boat built to Mr. Quan as it has been stored in a boatyard in San Pedro since the institution of these proceedings in June 2009 (four months after the boat was delivered) and it was only then that Davlin learned about the failure of Mr. Quan to build the boat with the agreed upon layers of fiberglass.

Determination

Fiberglass

54. The Claimant, Mr. Quan has not denied that he failed to build the boat with 11 layers of fibreglass. The question is whether this is a

² See para 29-054 of Chitty on Contracts, 27th Edition, Volume 1, General Principles

material breach which justifies rescission of the contract as argued by Learned Counsel, Ms. Barrow. Learned Counsel, Mr. Zuniga argues that the agreement to build the boat with 11 layers of fiberglass was not a fundamental term of the contract in light of the fact that Mr. Quan used the 'sandwich construction' which he explained as a stronger product and it could cause buoyancy in case of sinking. I find that though there is a breach of the terms of the contract, it is not a material breach as it does not go to the root of the contract. The boat is serviceable and was being used by the Defendants and their agents, namely Jason who had control of the boat. As such, the Defendants are not entitled to rescission but are entitled to damages for this breach. I will now assess the damages.

55. Mr. Quan is in the business of manufacturing fiber glass boats and was the only witness in this matter with such experience. I have no other evidence which contradicts his statement on the sandwich construction and the Defendants have not shown to the court that as a result of this type of construction there is a defect with the boat. In their counterclaim, however, the Defendants say that the boat is worth far less than BZ\$ 51,000.00 because the upper part of the boat was not manufactured with nine layers of fiber glass but instead five layers of fiber glass were used. But, the Defendants led no evidence which shows that the use of less fiber glass decreased the value of the boat. If it was proven that the boat valued less than \$51,000. the Defendants would have been entitled to the difference in value.
56. Nevertheless, Mr. Quan breached the contract by unilaterally changing the specifications as agreed and as such the Defendants are entitled to nominal damages. The court awards the Defendants BZ \$ 2,000.00 as nominal damages for this breach.

Remedial works

57. The Defendants in their counter-claim say that they have expended \$ 11,005.77 for remedial works over a six months period. As shown in their counterclaim they itemised all the works that had to be done. Both Mr. Kalia and Ms. Farkas stated in their witness statement that they spent \$11,005.77 on remedial works. The question is whether they are entitled to the \$11,005.77. since some of these expenses occurred after the twelve month “back up warranty by the seller”, Mr. Quan. See page 3 of contract for provisions on warranties. There is also the warranty by the manufacturer but the court is not concerned with the manufacture warranty since no issue was raised on same. The seller’s warranty starts from date of delivery extending to one year later, being sometime in January 2010.
58. The disclosures show that the receipts are dated from July, 2008 up to April, 2010. I will address each one of the receipts as shown by the disclosures.
- (i) Disclosure 3 dated July 8th 2009
59. This disclosure dated July 8, 2009 is for \$ 3,468.18 and is within the seller’s warranty period. It shows that Accessories valuing \$ 1,587.00 had to be replaced and the labour for replacing same is \$1,425.00. The parts that had to be replaced includes the bilge pump and electrical parts. The balance is for other expenses in relation to the replacement of the parts. The evidence shows that there was poor workmanship in respect to the electrical work and the bilge pump was not working. As such, the court awards BZ \$3,468.18 expended by Defendants for electrical works as shown in Disclosure 3.

(ii) Disclosure 4 dated November, 2009

60. This Disclosure dated 4th November, 2009 is a Purchase Order given to James Ritchie for services to be performed on the boat. This includes to remove the Captain chair and place it at a different location and building a platform. The evidence shows that the pilot stand was not of a proper height and there was not adequate space between the captain's chair and the steering wheel and therefore the Defendants are entitled to the cost of remedying this defect. The court awards BZ\$1,500.00 for remedying the pilot stand and the space between the captain's chair and the steering wheel, as claimed..

(iii) Disclosure 6 - Boat Pull and storage

61. Disclosure 6 shows a receipt dated 4th January, 2010 from Captain Shark's Boatyard for Boat Pull and storage. The date of the boat pull is 07/02/09. There are various dates for storage, that is when repairs were being done to the boat. I noticed there are two charges of \$250. each for the same day, being 10/01/09. Since that is double charging only \$250.00 can be taken into consideration. The court will grant the \$150.00 for the Boat Pull, and storage done on 08/01/09, 10/01/09, 11/04/09, 12/01/09, 12/31/09, which are dates within the Seller's warranty. Accordingly, the court awards \$1,400.00 for the boat pull and storage.

Replacing overheating engine

62. The Defendants claim \$ 700.00 for replacing an engine that overheated. According to the agreement between the parties, under the heading of 'Warranties' the engine will be sold with a three year manufacture warranty backing up by seller Warranty from the date of delivery. The evidence shows that the engines were running hot a week after the boat was delivered. It has not been proven however, what caused the overheating. Mr. Keating testified that there may have been some

sabotaging by Mr. Kalai's neighbour but that has not been proven. But, since there was a seller's warranty, I award the Defendants BZ \$700.00 for the engine.

Failure to build bench and steps

63. The Defendants say Mr. Quan failed to build a center bench in the interior of the boat and also he did not build the steps as shown in the sketch. The sketch which is attached to the Agreement was drawn up by the Defendants and it was not drawn to scale. Mr. Quan being the expert should have been the one to prepare the plan and he should have refused the sketch given to him. But, he did not and he accepted same and agreed to build according to sketch. He is responsible for any problems he encountered and must compensate the Defendants for their loss. The Defendants did not build the bench and steps and so the court does not have any evidence as to the value to build same. Had they done so, they would have been entitled to the monies spent to build same. In any event, they are entitled to some damages for the loss of these amenities. I award nominal damages in the sum of \$1,000.00.

Issue 5: Whether there was fraudulent misrepresentation by Mr. Quan.

64. I am not satisfied on the evidence that there was fraudulent misrepresentation by Mr. Quan as claimed by the defendants. Mr. Quan is an expert in building fibre glass boats and he did build a boat that was serviceable and which was being used by the Defendants. Further, they remedied defective works on the said boat. However, since Mr. Quan did not comply with all the terms and conditions of the contract he is liable to pay damages. I find that there is no evidence of fraudulent misrepresentation by Mr. Quan.

Issue 6: Whether the Defendants are entitled to \$13,000. for delay in delivery of the boat.

65. The Agreement between the parties in respect to the delivery date states:

The boat will be delivered by seller to buyer not later than November, 30, 2008 6:00 p.m., however, buyer might not be available in Belize to accept delivery on that date and the boat will be kept in the boat yard up to 30 days for the buyer accepting delivery....

If the seller will be behind delivery for more than 16 working day (grace period), any delay thereafter will be subject to \$250.00 for any day delivery is delayed by seller.

66. On the agreement it can be seen that November 30th, 2008 for the date of delivery was scratched and December 14th was written in ink instead. The Defendants say that Mr. Quan failed to deliver the boat within the agreed time and was more than fifty two days late in delivering the boat and as such they claim \$13,000.00.
67. Mr. Quan says that the Defendants are estopped from claiming damages for late delivery because (i) Mr. Kalai was frequently out of Belize, (ii) the Defendants refused to take delivery on the ground that the Mr. Kalai had not yet obtained a license for the boat; (iii) Mr. Kalia did not get the license for the boat until on or about the 2nd day of February, 2009 and the Defendants failed to pick up the boat until the 12th day of February 2009. Further, Mr. Quan's evidence is that he could not finish the boat on time because his boatyard was flooded as a result of a hurricane.

Submissions by Mr. Zuniga SC

68. Mr. Zuniga submits that even if the date for completion was not varied, time was not of the essence of the agreement. Further Learned Counsel submits that the wording in the agreement, that *"the buyer might not be available in Belize to accept delivery"* on the delivery date and that *"the boat will be kept in the boat yard up to 30 days for the buyer accepting delivery"* shows that time was not of the essence. Further, Learned Counsel Mr. Zuniga submits that the Defendants had refused to take delivery on the ground that they had not yet obtained a licence for the boat and which they obtained on the 2nd day of February, 2009. Furthermore, it was not registered until the 9th day of June, 2009. See **Exhibit J.Q. "F"** for copy of Vessel Registration Certificate.

Submissions by Ms. Barrow

69. Learned Counsel Ms. Barrow submits that the amendment made to deliver the boat on the 14th December was not agreed to by the Defendants and as such the boat had to be delivered on 30th November, 2008.
70. Learned Counsel Ms. Barrow submits that it matters not that Mr. Quan's boatyard had been flooded during the period of time he had scheduled for building the boat because as Mr. Kalai stated under cross-examination, it was no business of Davlin where the boat was built and as such it was the responsibility of Mr. Quan to find an alternative location to construct the boat if necessary to comply with the agreed upon deadline specified in the Contract. Further, Mr. Kalai also testified that at the time the Contract was signed Mr. Quan's boatyard was under water and as such Mr. Quan ought to have factored in the conditions of his boatyard when negotiating the contract with Davlin.

71. Ms. Barrow further contends that since it was a term of the contract that "The boat will be delivered to the buyer after gaining all licenses, permits, documents etc. required by the State of Belize.", it was justified in expecting and requiring that the boat would be licensed before being delivered.

Determination

72. I do agree with Ms. Barrow that the amendment on the agreement to change the date of delivery was done unilaterally by Mr. Quan. There was no agreement between the parties to change the date and so the delivery date according to the contract is 30th November, 2008 and not December 14, 2008.

73. The question that follows is whether time was essence of the term in the contract which states that:

The boat will be delivered by seller to buyer not later than November, 30, 2008 6:00 p.m., however, buyer might not be available in Belize to accept delivery on that date and the boat will be kept in the boat yard up to 30 days for the buyer accepting delivery....

74. In my view, time was not of the essence as this term of the contract shows that the buyer might not have been available to accept delivery. Indeed, the evidence shows that Mr. Kalai and Ms. Kara were out of Belize most of the time. Further, the contract provides that the boat will be delivered to the buyer after gaining all licenses, and permits as required by the laws of Belize. Mr. Kalai, being the owner of the boat had to be here in Belize for this process to be completed. Mr. Kalia did not get the license for the boat until the 2nd day of February, 2009 and the

Defendants picked up the boat on the 12th day of February 2009, the day Ms. Karas arrived into the country.

75. Further the evidence shows that at the time the contract was signed there was a flood and the boat yard of Mr. Quan was flooded. Both parties confirmed this fact. Mr. Quan's evidence which I find credible is that the boat yard was flooded for about two to three weeks. As such, I do not find that there was an undue delay.

76. For all these reasons, I deny the claim for \$13,000.00. for the delay in delivery of the boat.

Issue 7: Whether Mr. Quan is entitled to the balance of the purchase price, being \$16,000.00

77. It has been determined above that the Defendants are not entitled to rescission of the contract but are entitled to damages for defective works and works not done. Accordingly, Mr. Quan is entitled to the balance of the purchase price, being 16,000.00 less damages awarded to Mr. Kalai and Davlin Limited.

78. Conclusion

The following are the court's findings:

Mr. Quan's selling price for the boat is BZ\$ 51,000.00 and as such he is not entitled to claim BZ\$6,373.21 duties paid to custom. It follows that he is not entitled to BZ\$100.00 as brokerage fee.

Mr. Quan is awarded BZ\$53.00 for the Fire Extinguisher, BZ\$33.00 for the horn and BZ\$789.99 for the boat cushions, being a total of BZ\$875.99.

Both Davlin Ltd and Mr. Kalai are the purchasers of the boat.

Mr. Quan failed to build the boat to the specifications contained in the contract and also he failed to do so in a workmanlike manner. As such, Mr. Kalai and Davlin Limited are entitled to BZ\$10,068.18 in damages.

There is no evidence of fraudulent misrepresentation by Mr. Quan.

Mr. Kalia and Davlin Limited are not entitled to damages for delay in delivery of the boat.

Mr. Quan is entitled to the balance of the purchase price, being 16,000.00 less damages awarded to Mr. Kalai and Davlin Limited.

79. Order

Mr. Quan is awarded BZ\$16,000 being the balance of the purchase price for the boat and BZ\$875.99 for accessories not provided for by the contract.

Mr. Kalia and Davlin Limited are awarded BZ\$10,068.18 damages for breach of contract.

The sum of BZ\$6,807.81 is to be paid to Mr. Quan by David Kalai and Davlin Limited after set-off of damages.

Each party is to bear its own cost.

.....

Minnet Hafiz

Supreme Court Judge

Dated this7th....day of December, 2011.