AD-2018-000058

IN THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

LONDON CIRCUIT COMMERCIAL COURT (QBD)

B E T W E E N:-

MR PETER JACKSON

Claimant

-and-

MR EDWIN BUTTER

Defendant

PARTICULARS OF CLAIM

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1. The Claimant's claim is for damages due and owing to him in respect of the sale of the "ORION OF ABERDEEN" (the "Vessel"), which the Claimant ("Buyer") purchased from the Defendant ("Seller") in on or around 6 March 2017.

Background to the Sale

2. At all material times prior to the sale of the Vessel:

   (1) the Seller and his partner, Marjo Boertien ("MB") were, or held themselves out as, living on board the Vessel.

   (2) The Vessel was moored in Las Palmas, in the Canary Islands; but

   (3) The Seller and MB worked and/or operated a project entitled "Ocean Conservation and Research". They used the Vessel for the purposes of this project. The "Ocean Conservation and Research" project website stated that the

Vessel was used as a "*platform for research and education*"; and that the Seller and MB hosted marine scientists and documentary makers on board the Vessel, enabling them to collect data. The Vessel was said to be "*suitable to sail the oceans including the polar areas*" in order to carry out such research / education projects.

3. The Buyer was introduced to the Seller by a colleague, Erik Daljhuisen ("ED") who informed him that the Seller and MB were looking to sell the Vessel. ED referred him to the "Ocean Conservation and Research" website, from which the Buyer ascertained that the Vessel was a 52ft steel ketch. The Buyer expressed an interest in purchasing the Vessel, which interest ED communicated to the Seller and MB.

Pre-Sale Correspondence

4. In an email dated 13 December 2016, the Seller and MB emailed the Buyer to inform him that they would send him a link to a file of documents on the file hosting service, "Dropbox", "*from which you can download the facts and the photos.*" This email was sent in response to the Buyer's expressed interest in purchasing the Vessel. The information about the Vessel contained in the documents sent via the "Dropbox" link was communicated to the Buyer

5. In a further email dated 14 December 2016, the Seller and MB further emailed the Buyer to inform him that they were sending further photographs of the Vessel. The email further stated:

"*the Orion is indeed very seaworthy, stable, tough and easy to handle. We find her a very pleasant live aboard with ample space and good atmosphere.*

As far as the price is concerned we set this at EUR160.000"

6. The terms the email as aforesaid contained and/or constituted a representation made by and/or on behalf of the Seller, that the Vessel was "seaworthy". In the context of the correspondence between the parties, the representation that the Vessel was "seaworthy" was reasonably understood as a representation that the Vessel's structural integrity was such that she was fit to be sailed on sea and/or ocean voyages; and that it was safe to live aboard the Vessel for at least the duration of such voyages.

7. In an email sent to the Seller and MB on 15 December 2016, the Buyer noted that, "*Orion certainly <u>looks</u> to be in good condition*" (emphasis supplied), and stated that in

his experience, "*Dutch boats are always very well maintained and cared for and I imagine Orion is no exception*" but questioned, "*is she due for any refit work; for example, rigging, hull external / internal treatment, engine, electronics, etc.*"

8. In a reply sent the same day, MB sent the Buyer a link to an updated folder hosted on Dropbox, which contained (amongst other documents):

   (1) A document entitled "*Orion of Aberdeen, detailed survey for Pantaenius*" dated 15 August 2013 (the "Insurance Survey Report"); and

9. In the email of 15 December 2016, MB stated that the Seller had conducted the Insurance Survey Report, "*For Pantaenius Insurance. This survey was accepted, also because [the Seller] is a certified HSE and Lloyds surveyor.*" [sic]

10. By way of the 15 December 2016 email, MB therefore made the following express representations:

    (1) The Insurance Survey Report detailed the results of a survey carried out by the Seller for the purposes of obtaining Vessel insurance;

    (2) The Seller was a certified HSE and Lloyds surveyor.

11. In addition, the terms of the email and/or the context in which the email was sent were such that the 15 December 2016 email should reasonably be understood as containing the following implied representations:

    (1) In that the Insurance Survey Report was prepared for the purposes of obtaining insurance, was submitted to, and accepted by, the Vessel's insurer, the Insurance Survey Report was, to the best of the Seller (as surveyor)'s knowledge and belief, true and accurate at the time of being made.

12. These representations were made by MB for and on behalf of the Seller.

13. In a further email also sent on 15 December 2016, MB emailed the Buyer, referring to "*the link to Dropbox with additional photos and the survey report that Edwin made for the insurance company.*" The email continued:

    "*To answer your other questions:*

Yes, Orion was built on a Dutch warf [sic] (Derk Klein) and was certainly built for long voyages. The insurance report will also give you more information about the replacement of standing rigging and the engine. The engine works perfectly; it is strong indeed. We have installed Separ filters to make sure it always gets clean fuel.

Since we have had Orion, we have put a lot of work in her, we think the pics show for themselves. And yes, of course as with any other boat there is always a 'to do-list'. this was still on our list:

- *Finishing the paint jobs in the cabins and heads (this is purely a cosmetic thing, everything is in working order)*

- *Because the original autopilot was not working we decided to replace it. The current status is: we bought a new Vetus autopilot including a new pump. The electronics is installed (see picture). Our plan was to replace the current hydraulic lines and cylinder for a Vetus system (cylinder and tubes) that are easily compatible with the new autopilot pump. However, the current hydraulic system is in working order.*

- *The condition of the genua [sic], stormjib (brand new) and spinnaker is good. The main sail and mizzen each need a minor repair at the sail maker. As you can see on the pictures they are in working order.*"

14. By the terms of this email of 15 December 2016, MB represented that:

(1) The Vessel was fit for long voyages;

(2) The engine was in good working order;

(3) EB and the Seller had carried out works on the Vessel. In that the Seller was, or was represented to be, a Lloyd's certified surveyor, a statement that works were carried out by him contained implied representations:

a. that he considered such works to have been reasonably fit for purpose; and

b. His view as to the fitness for purpose of such works was one on which the Buyer was reasonably entitled to rely.

(4) A new Vetus autopilot and pump had been installed.

(5) The hydraulic system attached to the new Vetus autopilot pump was in working order.

(6) The genoa, stormjib, and spinnaker sails were in good condition.

(7) The stormjib was new.

(8) Save that the main sail and mizzen sail required minor repairs, no maintenance work on the Vessel was necessary.

The Insurance Survey Report

15. The Insurance Survey Report provided that, "*The Survey should have been carried out within the last five years by a qualified Surveyor or Naval Architect with Professional Indemnity Insurance.*" Typed onto this form was the statement that, "*All the data mentioned below are from July and August 2013, and made by Mr Butter (HSE certified).*"

16. The Insurance Survey Report, on which the Buyer will rely for its full terms and legal effect, provided in relevant part as follows:

"*The compete hull has been inspected, cleaned, rust treated where necessary, the same goes for the topsides. Three new layers of antifouling were put on the hull beneath the waterline. The topsides were painted. The thickness of the steel was measured with ultrasonic equipment (Dakota Ultrasonics); the average is 6,5 to 7,2 mm. the photo shows a part of the hull that was taken out in order to install a new depth sensor.*"

The keel and keel join, "*were all found in good order. The thickness of the steel between hull and keel is 8 mm. keel bottom is 150 cm wide.*"

The rudder and stern gear, "*were thoroughly inspected and found in good working condition.*

The average thickness of the steel on deck and of the superstructure is 4 mm. clamp constructions are welded on the extension of the hull, see pictures below

The standard rigging was replaced 5 years ago. It is all in good condition. Thickness of cables is 12mm….

Anchor winch got a new motor (Lofrans 1700). New CQR-anchor (with certification by Dutch Marine standards) was installed. Chain and attachments had a thorough inspection, and are all in good order. New stern anchor and line. …

Hydraulic steering by wheel, which works as it should. There is an emergency tiller. Picture shows place on deck where emergency tiller comes out.

…

The engine is a Mercedez Benz, 150HP. It was installed in 2010 after it was thoroughly overhauled. The diesel is stowed in a main tank (app. 1.000 litres), beneath the engine. There is a 90 liter day tank. The fuel hoses are new. Separate filters were installed between daytank and motor. …

All the sea valves have been renewed during the refit in July 2013."

17. By sending these documents to the Buyer in the circumstances set out above (and/or by MB's sending such documents for and on behalf of the Seller), the Seller represented that as at August 2013, the Vessel was in the condition set out in the Insurance Survey Report.

18. Each and every statement as to the Vessel's condition, as set out in the Insurance Survey Report, took effect as a representation by the Seller to the Buyer as to the condition of the Vessel; alternatively as a representation as to the condition of the Vessel as at August 2013.

19. In sending the Insurance Survey Report to the Buyer in response to his email of 15 December 2016, in which the Buyer expressly queried the maintenance status of the Vessel, and whether any maintenance work was due, the Seller represented that the statements / representations as to the Vessel's condition contained in the Insurance Survey Report could reasonably be relied upon as a guide to the condition of the Vessel as at the date of the Buyer's queries as aforesaid.

January 2017 inspection and representations

20. In or around January 2017, the Buyer travelled to Las Palmas with his wife, to visit the Vessel and further discuss the proposed sale with the Seller.

21. The Buyer and his wife were in Las Palmas, and met with the Seller and MB, during the week of 15-22 January 2016. During the course of this visit, the Buyer and Seller met a number of times, and discussed the Vessel and the proposed sale. During the course of these conversations, the Seller informed the Buyer:

    (1) That the Vessel was being used by him and MB for the purposes of his work on the "Ocean Conservation and Research" Project.

    (2) This work included the hosting of scientists and researchers on-board the Vessel, and sailing the Vessel into the Atlantic Ocean, so that the scientists and researchers could conduct experiments and carry out surveys. In stating that the Vessel was used for this purpose, the Seller impliedly represented that the Vessel was fit to encounter the ordinary perils of sailing in the Atlantic Ocean for the purposes of such research trips.

(3) The Seller and MB had lived on board the Vessel for 4 years, from where they carried out continual maintenance to ensure that the Vessel was kept in a good condition.

(4) As part of this ongoing maintenance programme, MB and the Seller had hauled the Vessel out of the water in February 2016, to inspect and maintain the hull. They had carried out painting and anti-fouling work, and replaced the Vessel's anodes.

(5) The Seller was looking to purchase a wooden vessel, the "GRACE OF FALMOUTH" (the "Grace"), to replace the Vessel.

(6) The Seller and MB's intention to replace the Vessel with the Grace was based on their desire to ensure that their work was eco-friendly and sustainable. He wished to purchase the Grace with the proceeds of sale of the Vessel

22. The Buyer visited the Vessel on 19 January 2017. At the time of such visit, the Seller and MB were still living on board the Vessel, and their personal belongings were therefore on board. This meant that it was not feasible for the Buyer to thoroughly inspect all areas of the Vessel.

23. The Buyer asked the Seller whether the Vessel had ever grounded, or experienced any structural damage. The Seller stated that she had not. There was, however, a dent in the hull in the forward bathroom, which could be seen below the floor on the port side. MB stated that this had occurred before the Seller owned the Vessel, and was the result of the Vessel's having hit a metal buoy.

24. The Buyer stated that he would like to have the Vessel surveyed, in order to obtain information about her condition, prior to proceeding with any purchase. However, the Seller informed the Buyer that this was not necessary because:

(1) The Vessel was incredibly sound and seaworthy, and easily capable of crossing the Atlantic.

(2) The Seller had good and detailed knowledge of the condition of the Vessel, as a result of having lived on board for the past 4 years.

(3) He was a certified HSE and Lloyd's surveyor.

(4) The survey carried out by him for the purposes of obtaining insurance had been accepted by the Vessel's insurer.

(5) The Seller had thoroughly inspected the Vessel when it had been out of the water in February 2016.

25. The Seller also informed the Buyer that the life raft had been serviced in 2014, and that the next service was scheduled for August 2017.

26. During the course of the conversations, the Seller therefore represented that:

(1) By reason of having:

a. Carried out a full survey of the Vessel when she was out of the water in the summer of 2013;

b. Lived and worked on board the Vessel since that date;

c. Carried out repairs and maintenance on an ongoing basis; and

d. Carried out a full out-of-water inspection of the Vessel in February 2016

The Seller had comprehensive knowledge of the condition of the Vessel.

(2) His knowledge of the Vessel was such that he was in a position to have knowledge of any defects, and in at least as good a position to speak to the condition of the Vessel as would have been an independent third party surveyor.

(3) In that he had surveyed the Vessel for the purposes of obtaining insurance, and provided a copy of that survey report to the Buyer, it was reasonable of the Buyer to accept that the Seller was being truthful and accurate in making statements about the condition of the Vessel.

(4) The condition of the Vessel as at August 2013 was as stated in the Insurance Survey Report;

(5) The Seller's knowledge of the Vessel was such that he would reasonably be expected to have discovered any material alteration in the condition of the Vessel occurring between August 2013 and January 2017, whether by reason of wear and tear or otherwise.

(6) The Vessel was in materially the same condition as she was represented to be in the Insurance Survey Report.

(7) The Vessel was seaworthy, and her condition was such that she was reasonably fit to withstand the perils to be encountered in sailing across the Atlantic (the "Seaworthiness Representation").

(8) The fact that the Seller was an HSE and Lloyd's certified surveyor meant that it was reasonable to rely on his statements of opinion as to the condition of the Vessel.

27. The circumstances of the Seller's reference to the Insurance Survey Report were such that the statements made about the condition of the Vessel in that report took effect as representations about the condition of the Vessel made by the Seller to the Buyer (the "Survey Condition Representations").

28. The above representations were made expressly, and/or by necessary implication from the statements made and information provided by the Seller.

29. Such representations were made in order to induce the Buyer to purchase the Vessel; and, in particular, to do so without having first carried out a survey of the condition of the Vessel.

The Repair Schedule Agreement

30. During the course of his attendance on board the Vessel on 19 January 2017, the Buyer observed some minor defects. These were identified to the Seller, who informed him that the Vessel was in an, "*unprepared state*" and that he would carry out repairs and maintenance to bring it up to "*sale condition*" prior to its sale. In particular, the parties agreed that, in the event that the Buyer purchased the Vessel, the Seller would carry out and/or procure the following repairs prior to its sale, and/or the Buyer's taking over possession thereof:

1. *Bollard: Stb'd bow bollard, lost during bad swell in marina to be welded back in place*
2. *Engine: Engine space very dirty and cluttered. To be cleaned, tidied, and trash removed.*
3. *Bimini: Small tear to bimini cover to be stitched.*
4. *Cushion: Small tear in cushion cover seam to be stitched.*
5. *Hinges: Several lower cupboard hinges broken. To be repaired*

6. *Hinges: Forward head shower door only had one hinge. To be repaired*
7. *Hinges: Door hinges to chain locker area to be repaired*
8. *Hinges: Door between saloon and workshop had only one hinge. To be repaired.*
9. *Hinges: Plastic hinges on cockpit portlights broken. To be repaired.*
10. *Autopilot: New pump onboard, to be installed to the Vessel's hydraulic and electrical systems, and connected to the cockpit autopilot system.*
11. *Hatches: Wood finish surrounds to be added to small window hatches above galley and chart table.*
12. *Gangplank: handrail to be fixed and attached.* (the "Repair Schedule")

The Sale Agreement

31. In reliance on the representations as aforesaid, the Buyer agreed to purchase the Vessel (the "Sale Agreement"). In particular, in agreeing to enter into the Sale Agreement, the Buyer relied on the Seaworthiness Representation and the Survey Condition Representations.

32. In or around late January 2017, the Seller informed the Buyer that he had agreed to purchase the Grace, and intended to do so using the purchase moneys from the sale of the Vessel. The parties therefore agreed that:

    (1) The Buyer would discharge the Seller's obligation to pay a deposit on the Grace by making payment of the required deposit amount to the Grace's seller;

    (2) By making such payment, the Buyer would discharge his obligation to the Seller to pay a deposit on the sale of the Vessel.

33. In an email dated 27 January 2017, and pursuant to this agreement, the Seller sent the Buyer the bank details of "Wooden Ships", as the seller of the Grace. The email of 27 January 2017 further stated that, "*What we will do is make a contract for the buying and selling of Orion based on Wooden Ships' contract and send it to you for approval. …*"

34. Such a document was duly prepared and sent to the Buyer by email. It was dated "*Agreement for the Sale of the Sailing Yacht 'Orion of Aberdeen'*", and provided in relevant part as follows:

"*1. The Vendor shall sell and the purchaser shall buy the vessel Orion of Aberdeen, UK registration Part I number 919498, currently lying afloat in the Muelle Deportivo in Las Palmas de Gran Canaria, Spain, for the sum of £125,000 (say one hundred*

and twenty five thousand pounds) free from all debts and encumbrances whatsoever according to the terms of this agreement. …

2. The vessel shall be sold as seen and the Vendor offers no guarantees as to the condition of the vessel or her equipment.

3. The vessel shall be sold with all gear and equipment as seen permanently fitted on board, described in Appendix I (with the exception of the Schenker Watermaker)

4. The purchaser has paid a deposit of £10,800 (say ten thousand eight hundred pounds) to Wooden Ships Client Account, to be held by Wooden Ships in a Clients Account with the Natwest Bank, Dartmouth as stakeholder according to the terms of this agreement.

5. The balance of the purchase price hall be paid [sic] in full to the Vendor within 3 days upon request of the Vendor. On receipt of cleared funds the Agent shall obtain from the Vendor a Bill of Sale in favour of the Purchaser.

6. Completion and change of ownership shall take place on receipt of cleared funds."

35. On a proper construction of the Sale Agreement, which was contained and/or evidenced in part by the written agreement as aforesaid, the following representations became terms of the Sale Agreement, and/or took effect as collateral warranties:

(1) The Vessel's condition was such that she was fit to withstand such perils as would ordinarily be encountered sailing her across the Atlantic;

(2) The Vessel was in materially the same condition as represented by the Insurance Survey Report representations. In particular:

a. The hull was constructed of steel, which was in good condition and had been rust treated. The average thickness of the hull was between 6.5 and 7.2mm;

b. The keel and keel join were in good order and condition.

c. The steel between the hull and the keel was 8mm thick.

d. The keel bottom was 150cm wide.

e. The rudder and stern gear were in good working condition.

f. The deck was constructed of steel, with an average thickness of 4mm. In that these particulars were provided in response to a question in the insurance survey report form about the condition of the decks, superstructure, and deck

fittings, it was reasonably to be inferred from this answer that the deck, superstructure, and fittings were in good order and condition.

g. The standard rigging was in good condition. The steel cables were 12mm thick.

h. The anchors, anchor winches, chain and attachments were in good order and condition.

i. The hydraulic steering was in good working order.

j. There was an emergency tiller.

k. The Vessel was fitted with a Mercedes Benz engine of 150HP, which was in good order and condition.

l. The sea valves were in good order and condition.

m. There were bilge pumps fore and aft, a manual bilge pump, and an emergency high volume bilge pump which ran on an emergency generator.

n. The firefighting equipment on board was adequate for the type of vessel. The fire extinguishers and emergency flares were within the service date.

(3) The repairs and/or works set out in the Repair Schedule would be carried out prior to completion of the sale.

36. In particular, on a proper construction of the provision that the Vessel was "*sold as seen*", it was agreed that:

(1) The Vessel was sold in the condition in which she was represented to be at the time the Buyer saw and/or inspected her on or around 19 January 2017, and as set out in sub-paragraphs 35(1) - (3) above, save that the Seller would have performed and/or procured the performance of the repairs set out in the Repair Schedule (the "Warranted Condition").

(2) Thus, the Seller would not be in breach of the Sale Agreement if and to the extent that the Vessel was not in the Warranted Condition at the time of completion, by reason of fair wear and tear occurring between 19 January 2017 and completion of the sale.

37. Alternatively, to the extent that the provision set out in paragraph 2 of the written agreement is inconsistent with the warranties given as to the seaworthiness of the Vessel, the warranties override that paragraph.

38. The Buyer has complied with his payment obligations under the Sale Agreement. Payment in full was made by March 10 2017. However, the Vessel remained in the possession and control of the Seller until May 2017, when the Buyer arrived in Las Palmas to take delivery of the Vessel.

Events Subsequent to the Sale

39. The Buyer took delivery of the Vessel on or around 16 May 2017. Upon taking delivery of the Vessel, the Buyer discovered that the Seller had only carried out items numbered 4 and 5 in the Repair Schedule, namely, repairs to the bimini and cushion cover. In breach of his obligations under the Sale Agreement, the Seller had failed to carry out, and/or procure the repairs identified as items numbered 1-3, and 6-12, not been carried out.

40. On taking delivery of the Vessel, the Buyer further discovered that many of the Seller and MB's personal effects were still on board the Vessel. The engine compartment was dirty, and required cleaning. A bilge sensor in the forward head and shower compartment was dirty and broken. The secondary starboard winch in the cockpit was seized.

41. In or around the 3rd week of June 2017, the Buyer met with the Seller and MB, and complained about the state of the Vessel. In particular, the Buyer stated that the Seller had failed to carry out the repairs identified in the Repair Schedule (save for the minor repairs to the bimini and cushion covers, as set out above).

42. In or around the middle of June 2017, the Buyer removed the chain from the chain locker area in order to inspect the area. On doing so, he discovered corrosion. The Buyer borrowed an ultrasonic steel thickness measurement instrument from ED, in order to check the condition of the area. However, the steel surface was too uneven for the Buyer to be able to take steel thickness measurements. The steel was visibly pitted.

43. The Buyer contacted Rolnautic Las Palmas ("Rolnautic"), a yard in Las Palmas, in order to arrange an inspection of the Vessel, and in particular in the area of identified

corrosion around the chain locker; and to obtain an estimate for the cost of such inspection. Rolnautic informed him that there was a long waiting list to get into the Yard, as a result of the annual Atlantic Rally for Cruisers ("ARC").

44. The ARC is an annual sailing event, in which yachts depart from Las Palmas to sail across the Atlantic Ocean. Vessels participating in the ARC were due to depart from Las Palmas in November 2017. The person at Rolnautic with whom the Seller spoke stated that Rolnautic gave priority to vessels participating in the ARC when booking in vessels for repair and/or inspection. He stated that, as a result of this policy, he was not able to confirm a date by which Rolnautic would be willing and able to book the Vessel in for inspection and repair. There were no other yards in Las Palmas. As a result of this conversation, the Seller therefore understood that it would be possible for the Vessel to be taken out of the water to be inspected for at least a few weeks.

45. On or around 20 June 2017, the Buyer started cleaning the area around the chain locker in order to be able to better inspect the condition of the steel. During the course of this cleaning, the Buyer discovered a patch of epoxy resin. The Buyer tapped the area, which caused the epoxy to come away from the steel, and water ingress occurred.

46. In order to prevent further damage to the Vessel, the Buyer rigged up a bilge pump to pump out the water that was entering the Vessel through the area where the epoxy resin patch had been disturbed; and carried out makeshift repairs to stem the ingress of water.

47. The Buyer visited the Seller to inform him that he had discovered a patch of epoxy resin, which had come away and that water was now entering the Vessel. The Seller and/or MB stated that they were not aware of the such an epoxy resin patch.

48. On or around 26 June 2018, the Buyer went to Rolnautic in order to arrange an inspection of the Vessel. However, he was again informed that the yard was fully booked, and that this would not be possible.

49. At or around the beginning of July 2018, the Buyer returned to the UK. The Vessel remained at the marina in Las Palmas, until he returned on or around 14 August 2018.

50. Prior to his departure from Las Palmas, the Buyer arranged for the persons who owned the vessel moored on the same pontoon to check on the Vessel every day until he returned. No problems were reported by them.

51. The Buyer returned to the Vessel on 14 August 2017. He spoke to Rolnautic to arrange a full inspection of the Vessel, including in particular an inspection of the rudder, propeller, and chain locker area. He was informed that this would not be possible until on or around 9 September 2017.

52. Meanwhile, on or around 26 August 2017, water started leaking into the Vessel. This caused the bilge pump to activate every 12 minutes, in order to pump out the water. The Buyer again contacted Rolnautic, and was again informed that there was no space for the Vessel in the yard.

53. On or around 30 August 2017, the Buyer arranged for the Vessel's rigging to be inspected, by Alisios Sailing. The Vessel's rigging was inspected on or around 31 August 2017. As a result of such inspection, it was discovered that:

    (1) Two shrouds on the main mast required replacement;

    (2) All shroud caps were in poor condition.

    (3) The lower starboard main spreader cap was missing, and the steel cable was resting on the exposed end of the spreader.

    (4) The windex vane at the top of the mast was seized.

The Vessel's transfer to Rolnautic

54. The Vessel was transferred to Rolnautic on or around 9 September 2017.

55. Once the Vessel arrived at Rolnautic, the hull was pressure washed. This washing removed some areas of paint. Itcould be seen that there was a large steel jacket covering the front half of the keel, and a large dent to the bottom of the diesel tank area.

56. Inspections of the rudder, shaft bearings and seals, propeller shaft, and propeller shaft bearings and seals, revealed defects and deficiencies in both. In particular:

(1) There were no upper or lower rudder bearings. It was necessary to remove the rudder to further investigate. The rudder stock was totally seized, such that it took two days to remove the rudder. It was necessary to remove the rear cabin woodwork to access the upper housing of the rudder.

(2) The propeller shaft was not in good order or condition. It was not possible to remove the coupling between the hydraulic coupling and the propeller shaft, such that it was necessary to cut the propeller shaft in half. There was no marine cutlass bearing. The propeller shaft was damaged and scored. The propeller shaft was 50mm wide near the flex-coupling, and 47mm wide (on average) over the damaged section. The stern tube was not large enough to accommodate a cutlass bearing for a 50mm propeller shaft.

(3) The steel in the upper and lower bow section was severely corroded. The yard mechanic tested the integrity of the hull in the lower and upper bow area, penetrating the hull with a chisel in the lower bow and directly below the bow sprit. Daylight could be seen through pinholes in the lower port bow area. An external metal patch with epoxy covered a 10mm diameter hole in the starboard lower bow. The lack of structural integrity in the bowsprit/pulpit area was such that there was a risk of mast collapse. The corroded area had to be removed so that the bowsprit could be secured with chains.

57. After consultation with the yard manager it was agreed that the deficiencies in the Vessel were such that she was not seaworthy, and that a naval architect should be consulted in order to survey the Vessel and identify any defects.

58. On or around 5 October 2017, the naval architect Daniel Rodriguez Zargoza attended the Rolnautic yard to survey and inspect the Vessel. The Buyer will rely on the survey report of Mr Zargoza for the particulars of deficiencies with the Vessel; and as evidence of the condition of the Vessel as at 5 October 2017.

59. As a result of Mr Zargoza's survey, it was ascertained that:

(1) The hull condition below the waterline was poor. The hull was corroded and damaged. The level of corrosion and damage was such that the Vessel was not seaworthy.

(2) There were minor defects in the hull above the waterline, requiring repair.

(3) The heavy corrosion and loss of material in the forward part of the deck was such that that Vessel was unseaworthy.

(4) The steering systems were in such poor condition that they rendered the Vessel unseaworthy.

(5) The propeller shaft was in a poor condition.

(6) The electrical installations had not been installed to a proper standard.

(7) The safety installations had not been properly serviced, and were out of date.

(8) The mainsail was not fit for use.

(9) The main boom was in poor condition, and not fit for use.

60. These defects and deficiencies were such that the Vessel was not reasonably fit to withstand the ordinary incidents of being sailed in open water.

61. In his survey report, Mr Zargoza recommended further ultrasonic testing of the hull. However, the hull was in such poor condition that this was not possible.

Breach and Misrepresentation

62. In breach of the Sale Agreement, and/or the collateral warranties given by the Seller to the Buyer as to the condition of the Vessel, the Vessel was not the Warranted Condition, either in January 2017 when such representations were made, or on completion of the sale in March 2017, or in May 2017 when the Buyer took delivery of the Vessel.

63. Yet further, and / or in the further alternative, representations made by the Seller as to the condition of the Vessel were false.

64. A schedule of deficiencies in the Vessel is appended hereto.

65. The Claimant relies on the facts and matters set out above, and as further set out in the schedule appended hereto (which forms part of these particulars of claim) as constituting particulars of the Seller's breach of the Sale Agreement; alternatively of the collateral warranties given by the Seller as to the Vessel's condition.

66. The Buyer entered into the Sale Agreement as a result of his reliance on the representations made by the Seller as to the condition of the Vessel. In particular, in entering into the Sale Agreement, the Buyer relied on the Seaworthiness Representation; and the Insurance Survey Representations.

67. The circumstances in which such representations were made were such that it was reasonable of the Buyer to so rely. In particular, the Buyer's reliance was reasonable in circumstances where the Seller was, or represented himself to be:

    (1) A qualified surveyor; who

    (2) Had made the same representations as to the Vessel's condition to his insurance company, for the purposes of obtaining insurance.

68. The defects in the Vessel are of such a nature that it can reasonably be inferred that they were present as at 19 January 2017. Thus, representations made by the Seller as to the Vessel's condition - and in particular the Seaworthiness Representation, and the Survey Condition Representations - were false.

69. As a result of:

    (1) entering in the Sale Agreement; and/or

    (2) the Seller's breaches as aforesaid

    The Buyer has suffered loss and damage, and has been put to expense, and is entitled to be compensated for the same.

70. In particular, the Buyer is entitled to, and claims the cost of such repairs to the Vessel as are necessary to put her in the condition she was represented and/or warranted to be prior to and/or pursuant to the Sale Agreement.

71. The total amount of incurred and estimated costs of repairs as at today's date is €167,732. Particulars of the costs of such repairs and works that were necessary in order to render the Vessel seaworthy and/or in such condition as the Seller warranted and/or represented her to be are contained in the schedule appended hereto, which forms part of these particulars of claim.

72. The Buyer is further entitled to, and claims, interest on such sums as may be awarded to him, pursuant to s35A of the Senior Courts Act 1981, at such a rate and for such a period as the Court thinks fit.

AND the Claimant claims:

(1) €167,732 alternatively
(2) damages
(3) interest as aforesaid;
(4) costs

CLAUDIA WILMOT-SMITH

Statement of Truth

~~I believe /~~ the Claimant believes* that the facts stated in these Particulars of Claim are true

*I am authorised by the Claimant to sign this statement

Signed: 

Name and position: Solicitor; Thomas Miller Law

Date: 8 October 2018

AD-2018-000058

MR PETER JACKSON

Claimant

-and-
MR EDWIN BUTTER

Defendant

SCHEDULE to PARTICULARS OF CLAIM

Contract term / representation	**Defect**	**Cost of repair**	**Defendant's case on breach**	**Defendant's case on quantum**
Hull and Deck				
The hull was in good condition, and had been adequately rust treated so as to protect it from corrosion. The average thickness of the steel hull was 6.5-7.2mm. The Seller had properly and/or competently maintained the Vessel. The Vessel had been properly and competently maintained The Vessel was seaworthy.	The hull was not in good condition, and had not been rust treated, and/or had not been adequately rust treated so as to protect it from corrosion. The hull was severely corroded in several areas: 1. The lower port side of the bow chain locker was so severely corroded that daylight was visible through small holes in the steel. 2. There was a hole in, and severe corrosion to, the hull plate on the lower starboard bow. 3. The steel hull below the bow sprit was severely corroded. with no structural integrity. Holes could be pushed through the steel by hand with a chisel. There was heavy corrosion to the collision bulkhead. 4. The frames around the side windows showed corrosion. 5. There was heavy corrosion to areas near the discharges in the port side, and areas near the waterline filler Hull thickness measurements taken on or around October 2017 showed hull thickness values as follows: 1. 4.2mm on the port side, aft, between the intermediate and lower chine; 2. between 3.8 and 4.5mm on the port-side aft, between the intermediate and lower chine, near an overboard discharge;	**€ 9,259** to repair lower bow, port and starboard. **€6,878** to repair upper bow and bow sprit **€23,187 t**o repair starboard lower hull mid-ships. **€19,995** to repair port forward quarter, and port hull stern quarter. **€ 33,000 (estimated)** to repair / restore		

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-and-

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SCHEDULE to PARTICULARS OF CLAIM

The Vessel was fit to cover the perils to be expected in crossing the Atlantic and/or in sailing in open water. The deck was in good order and condition.	3. 3.0mm at the port side, centre, between the intermediate and lower chine. 4. 4.0mm at the port side, forward, over the intermediate chine. 5. 2.7-3.6mm at the port side, forward, between the intermediate and lower chine. 6. 4.36mm at the starboard side, aft, between the upper and intermediate chine. 7. 4.5m at the starboard side, between the intermediate and lower chine, midship. Between 4.5 and 4.47mm at the starboard side, forward, between the intermediate and lower The level of corrosion was such that the Vessel was not reasonably fit to withstand the ordinary perils of sailing in open water and/or sailing across the Atlantic. The forward deck was not in good order and condition. The condition of the deck was such that sailing the Vessel in open water would have posed a risk to the structural integrity of the Vessel: The original main forward deck was in a poor and wasted condition. A steel “over-deck” had been fitted over the original main deck. This “over-deck” had not been correctly welded or joined to the sides. It had not been internally reinforced.	the internal wood fittings which had to be removed in order to inspect / repair the Vessel.		

	It had not been joined to the centerline forward piece. Steel plating on the starboard side of the upper bow had been removed and replaced with plywood. This plywood was concealed with epoxy filler, such that it was not reasonably apparent on an ordinary inspection of the Vessel. A small bulkhead associated to the deck had been removed. This meant that: 1. the strength of the bow was reduced. 2. The loads expected in the forestay of the Vessel would not be distributed properly (because the forward platform supporting structure, deck, and bulkhead were not intact). The resultant increased stress that would be transferred to the side plates whilst sailing, and the level of corrosion of such side plates, meant that the structure was not fit to encounter the perils to be encountered during the ordinary course of sailing in open water, because of the risk that the structure would collapse.			
Water Tank				
The Vessel had been properly maintained.	The water tank coating was failing, and the corroded steel was showing through.	**€ 2,736 +** shipping (estimated)		

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SCHEDULE to PARTICULARS OF CLAIM

Diesel Tank and Keel				
The hull was in good order and condition. The Vessel was seaworthy. The Vessel had been properly and competently maintained.	A steel jacket had been fitted to the hull to make good severe structural damage suffered as a result of a grounding incident in 1998. The steel plating was buckled and fractured, and required replacement. The steel jacket was not fit for purpose: there was a risk of water ingress. There was severe internal structural damage to the diesel tank. There was a build up of sludge in the bottom of the diesel tank. The internal damage to the diesel tank was such that this sludge had entered the rear of the keel body. There was a drilled hole in the engine bilge sump which emptied directly into this space, allowing bilge water to mix with the diesel fuel in the tank, causing a build up of sludge.	**€ 35,343** to replace the keel ballast section (including an estimated **€550** to reinstall both masts, which had to be removed so that this work could be done.)		
Rudder and Steering Gear				
The Vessel was seaworthy. The Vessel was fit to withstand the ordinary incidents of open water sailing. The rudder and stern gear	The rudder was not in good working order. It was in such a poor condition as to be un-usable, and/or unfit and/or unsafe to use. The rudder stock was heavily corroded. This corrosion was such that the rudder stock was not fit to withstand the ordinary incidents of sailing in open water. There was a risk of rudder / steering failure, and/or water ingress.			

were in good working condition. The steering equipment works "as it should". The Vessel had been properly and competently maintained.	There were no upper or lower rudder stock bearings. The rudder stock was seized inside the rudder. The rudder had to be cut open to remove the rudder stock. There was heavy corrosion internal to the rudder. The rudder pack-off grease pump did not function. The piston O-ring had failed.	**€ 4,000** (estimated, of which €3,065 already incurred for works carried out to date.)		
Propeller and Stern Tube				
The Vessel was seaworthy. The Vessel was fit to withstand the ordinary incidents of sailing in open water. The Vessel was fit to sail across the Atlantic. The Vessel had been properly and competently maintained.	The condition of the propeller stern tube was such that it was not fit to withstand the ordinary incidents of sailing in open water. There was a significant risk of propulsion failure and/or flooding: The stern tube was corroded and pitted. A homemade 'seal' had been installed inside the vessel, and a plastic tube substituted for a proper cutlass bearing. The propeller shaft had been reduced in diameter to fit inside the make-shift bearing. The make-shift bearing had caused severe damage to the propeller shaft, which was damaged and scored. The propeller shaft couplings were also badly corroded.	€ 2,205		

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SCHEDULE to PARTICULARS OF CLAIM

Engine				
The engine was in good working order. The Vessel had been properly and competently maintained.	Every bearing within the engine water pump was seized. The seals in the engine water pump had perished. The water-pump flywheel had been attached to the water pump shaft with a makeshift steel tube which was not fit for purpose: it could not be removed, such that it was not possible to access the bearings. The misalignment and damage to the pulley wheel was such that the engine could not be used: such use would have resulted in premature drive belt failure	€ 198		
Electrical				
Electrical wiring had been renewed in 2012/13. The Vessel had been properly and competently maintained.	The electrical installation was in a poor condition	€ 2,000		
The Vessel had been properly and competently maintained	The batteries used in the battery bank were not compatible with the Vessel's charger. One of the batteries exploded whilst the Vessel was at Rolnautic. It was necessary to replace the battery bank.	€ 660 (estimate)		
Boom				
The Vessel had been properly and competently maintained	The boom was in a poor condition, and required maintenance and renewal of its fittings.	€850		

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SCHEDULE to PARTICULARS OF CLAIM

Sails				
The mainsail required only minor repair to be restored to good working order and condition.	The mainsail was so weathered as to be unusable	€2, 900		
The genoa was in good condition.	The genoa was so weathered that the it were not fit to withstand the perils of an Atlantic crossing	€ 2700 (estimated)		
The mizzen required only minor repair to be restored to good working order and condition.	The mizzen sail was so weathered that it was not fit to withstand the perils of an Atlantic crossing	€ 600 (estimated)		
Spars and Rigging				
The Vessel was seaworthy. The Vessel was fit to withstand the ordinary incidents of open water sailing. The Vessel had been properly and competently maintained.	The pulley wheels in the main mast were broken and seised. There were cracked spreader tips and damaged base inserts, and fractured mast footings. The upper interconnection between masts and one main mast diagonal steel wire in the rig was broken and required replacement. Four strands of the steel rigging cable between main and mizzen were broken. Two shrouds on the main rig required replacement. Damaged spreader tips had caused steel cable armour abrasion.	Pulley wheels: € 390 (estimate) Mast inserts and mast footing: €**5,631** Fixed steel rigging:€ 1,950		

	The shroud cap at the end of the lower main starboard spreader tip was fractured and the shroud cable retainer broken. This meant that the steel cable was resting on the exposed end of the spreader. This posed a hazard:With nothing securing the main shroud, unseating it would likely result in mast collapse. The halyards were in a wasted condition and required replacement The spreader terminal was in a wasted condition and required replacement Refurbishment of the main and mizzen mast assemblies required.	(estimated) Spreader tips: € 660 (estimated) Running rigging: € 1,600 (estimated) €7,000 (Alisios refurb. Estimate)		
Safety Equipment				
The Vessel had been properly and competently maintained. The fire extinguishers and emergency flares were in service date.	The safety equipment was not up to date, and had not been up to date at the time of the Insurance Survey Report. There were 4 fire extinguishers on board, with dates as follows: 1. A 2 kg Halon 12 extinguisher, dated November 1991 2. A 1kg ABC Powder extinguisher, dated May 1994. 3. A 6kg ABC Powder extinguisher, dated September 2003 4. A 0.6kg ABC Powder extinguisher dated January 2013.	€ 160 (estimated)		

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SCHEDULE to PARTICULARS OF CLAIM

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The Vessel had been properly and competently maintained. The liferaft had been serviced in August 2014.	The liferaft had never been serviced, and required replacement	€2000 (estimated)		
Total Cost incurred **Total cost estimated** **Total amount claimed**		€112,791 (incurred) €54,941 (estimated) €167,732		