

Federal Court



Cour fédérale

Date: 20250611

Docket: T-631-21

Citation: 2025 FC 1051

Ottawa, Ontario, June 11, 2025

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

COMMODORE'S BOATS LTD.

Plaintiff

(Defendant by Counterclaim)

and

**THE OWNERS AND ALL OTHERS
INTERESTED IN THE SHIP (*TYEE SHEPARD*)
and TYEE PACIFIC MARINE OPERATIONS
LTD.**

Defendants

(Plaintiffs by Counterclaim)

REASONS AND ORDER

I. INTRODUCTION

[1] By a Statement of Claim issued on April 16, 2021, Commodore's Boats Limited ("Commodore" or the "Plaintiff") commenced an action *in rem* and *in personam* against the Ship "Tyee Shephard" (the "Ship"), the Owners and all others interested in the Ship, and Tyee Pacific Marine Operations Ltd. ("Tyee") (collectively "the Defendants"), in respect of three unpaid invoices for labour, materials, and storage costs incurred relative to the Defendant Ship. These invoices total \$88,303.59.

[2] Following the arrest of the Defendant Ship, the sum of \$88,303.59 was paid into Court on April 30, 2021, pursuant to Rule 487(1) of the *Federal Courts Rules*, SOR/98-106 (the "Rules") to secure the Plaintiff's claim. The Ship was subsequently released from arrest.

[3] The Defendants filed their Defence and Counterclaim on May 18, 2021, denying liability for the claim and counterclaiming for the recovery of \$140,046.41, the amount they claim to be the cost to repair Commodore's work. It also claims the amount of \$51,244.91 for alleged overpayments made in respect of the estimates provided by Commodore.

[4] The Defendants filed an amended Defence and Counterclaim on November 15, 2023. Their amended counterclaim changes the amount claimed for the costs to repair Commodore's work to \$153,218.20, and the amount claimed for overpayments to \$82,034.30.

[5] By a Notice of Motion filed on January 19, 2024, the Defendants moved for Summary Trial on all issues, seeking dismissal of the Plaintiff's claim and judgment against the Plaintiff in the amount of \$233,234.30 plus interest pursuant to the *Federal Court Act*, R.S.C. 1985, c. F-7 and costs.

II. THE PARTIES

[6] Commodore is a body corporate incorporated under the laws of British Columbia. It engages in the business of ship construction and ship repairs.

[7] Tyee is a body corporate incorporated under the laws of British Columbia. It engages, among other things, in the delivery of propane and cargo, along the coast of British Columbia. It is the registered owner of the Defendant Ship which it acquired in November 2016. It intended to use the Ship in that business.

III. THE EVIDENCE

[8] The evidence of the parties was submitted by affidavit. Although by an Order of Case Management Judge Coughlan issued on December 13, 2023, the parties were to conduct any cross-examination upon the affidavits by March 15, 2024, they did not do so. By letter dated March 12, 2024, Counsel for the Defendants advised that cross-examination upon the affidavits would take place during the hearing. That is what happened.

[9] Tyee filed the affidavits of Mr. David Kensall, Mr. Todd Braconnier, Mr. Ley Doctor, Ms. Sarah Lanigan and Ms. Veronica Chang.

[10] Commodore filed the affidavits of Mr. Dean Holonko, Mr. Ryan Galovich, Mr. Brendan Burgess, and Ms. Cynthia Tochkin.

[11] Mr. Kensall is the principal of Tyee. He provided two affidavits, the first sworn on January 20, 2024 and the second sworn on March 14, 2024 as a rebuttal affidavit.

[12] In his affidavits, Mr. Kensall set out the history of dealings with Commodore for repairs to the Ship, over the period from August 2020 to May 2021. He recounted his various discussions with Mr. Burgess about the work and various meetings about the progress, and increasing costs.

[13] Mr. Braconnier is a marine engineer. He holds an Engineer-Motorship Certificate issued by Transport Canada and has worked as a marine engineer aboard commercial vessels since 1996. He owns and operates TCB Marine Consulting Services, and works as an independent marine surveyor and consultant. He was engaged by Tyee to provide an opinion about the work carried out by Commodore.

[14] Mr. Braconnier swore two affidavits, the first sworn on January 19, 2023 and the second sworn on December 1, 2023. His expert report, dated December 5, 2022, is attached as an exhibit to the first affidavit.

[15] Mr. Braconnier was qualified to give opinion evidence as an expert witness, pursuant to Rule 52.1(1) of the Rules. He was accepted as an expert witness to address ship repair, the identification of relevant standards that apply to ship repairs, to identify defects and to address the costs of remediation of defects and deficiencies, in particular relative to the Ship.

[16] Mr. Doctor swore an affidavit on January 20, 2023. He is an administrative assistant in the law firm representing Tyee in this motion. He attached exhibits to his affidavit.

[17] Ms. Lanigan is a former administrative employee of Tyee. She deposed about her attendance at a meeting on November 12, 2020. Mr. Kensall and Mr. Burgess together with Mr. Ryan Galovich and Mr. Spiller, also employees of Commodore, attended. The repair work upon the Ship was discussed.

[18] Ms. Lanigan deposed that she took notes of that meeting and that she left those notes in the Tyee office on her last day of employment but did not give the notes directly to Mr. Kensall. The meeting was recorded.

[19] Ms. Chang is a legal assistant with the law firm representing Tyee. She attached, as exhibits, copies of emails exchanged in February 2024 concerning the whereabouts of Ms. Lanigan. She also attached, as exhibits, a copy of the affidavit of Mr. Burgess sworn on January 19, 2024, filed in defence to this Motion, and exhibit E to that affidavit, which is a transcript of the meeting held on November 12, 2020.

[20] Mr. Burgess is the principal of Commodore. In his affidavit, sworn on January 19, 2024, he deposed as to his view of the agreement with Tyee, the work that was done on the Ship, and exchanges leading up to the commencement of this action.

[21] Mr. Holonko is also a marine surveyor. He was presented as an expert witness for Commodore. He was qualified as an expert to give opinion evidence, pursuant to Rule 52.1(1), about identifying the relevant standards for ship repairs, identifying defects and deficiencies in repairs done on marine vessels, and about assessing the costs of remediating any deficiencies. He prepared a report dated January 31, 2023 that was attached as an exhibit to his affidavit.

[22] Commodore also filed the affidavit of Mr. Ryan Galovich. He is the manager of Commodore and was responsible for overseeing the invoicing to Tyee in respect of the work done on the Ship.

[23] Mr. Galovich swore his affidavit on January 19, 2024. Among other things, he deposed that 10 invoices were issued to Tyee between August 31, 2020 and December 15, 2020. Copies of these invoices were attached to his affidavit as Exhibit A. These invoices total \$324,240.33, including applicable taxes.

[24] Mr. Galovich deposed that Tyee paid \$233,234.40. He deposed that Tyee did not pay 3 invoices totalling \$88,303.59, including the taxes. Non-payment of these invoices led to the commencement of this action, as Commodore seeks to recover judgment in that amount.

[25] Mr. Braconnier was given a mandate letter dated October 3, 2022, by counsel for Tyee. He was asked to provide an expert opinion report relative to this action, with particular reference to ship repairs and welding services. He was asked to address eight questions. Those questions related to compliance with industry standards to provide a seaworthy vessel.

[26] Mr. Braconnier attended upon the Ship and visually inspected the void spaces and ramp. He consulted various materials and reviewed estimates that were obtained by Tyee. He prepared a “Technical Review” as the basis for his report dated December 5, 2022. The Technical Review is an annex to that report.

[27] Mr. Braconnier also prepared his estimate of the costs of repair and that estimate is another appendix to his first affidavit.

[28] In his first report, Mr. Braconnier expressed the following conclusion:

It is the professional opinion of this surveyor that the deficiencies caused by the repair process conducted by Commodore do not meet the requirements set out in TP 1332E Construction Standards for Small Vessels, which states that a vessel’s structural strength shall conform to construction standards. With the adoption of the standards accepted from ISO or classification societies listed, they are all the same and used by Transport Canada

The deficiencies in the internal voids of the Vessel caused by Commodore render the Vessel unseaworthy. All repairs Commodore performed on the Vessel require attention- which includes but not limited to testing the welds, testing the bottom plate inserts, correcting the bulkhead inserts, and testing and remedying the fuel tank structure.

In summary of the preceding discussion, it is my opinion that it would be best to start over- the work conducted on the Vessel by Commodore in order to maintain a reasonable cost for remedying these defects and deficiencies. By attempting to repair in the

current condition will still require for the bulkheads to be cropped and replaced with associated scantlings (brackets, stiffeners, longitudinals) to be correctly installed as initially constructed. By attempting to repair as is rather than start over in the current condition, there will be an increase in costs, added to the budgets supplied, with attempting to correct the deficiencies.

[29] Mr. Holonko was also given a mandate letter and was asked to give an opinion. He reviewed the report of Mr. Braconnier and responded to that report. He mostly disagreed with the conclusions of Mr. Braconnier. He agreed in part with Mr. Braconnier's opinion about the purpose of painting the steel repairs, and on whether there are defects in Commodore's work.

[30] Mr. Braconnier prepared a second report, dated October 18, 2023, pursuant to a mandate letter dated July 24, 2023, asking him to provide an objective expert opinion about the expert opinion prepared for Commodore.

IV. THE BACKGROUND

[31] According to Mr. Kensall, he approached Mr. Burgess and Mr. Bo Spiller of Commodore in the summer of 2020, to inquire about getting work done to make the Ship seaworthy and in anticipation of a Canada Steamship Inspection ("CSI"). Critically, Mr. Kensall asked for welding and painting of the void spaces.

[32] The Ship was built as a Landing Craft Mechanized Mark 8, and is now used as a barge. The Ship is Canadian-flagged and is registered with the Transport Canada Vessel Registry with registration number O.N. 836996.

[33] The Ship is divided into seven watertight void compartments separated by bulkheads.

The fifth void compartment from the stern contains fuel tanks to port and starboard. The Ship has a ramp for loading equipment at her bow.

[34] The Ship was moved to Commodore's shipyard where she remained until December 7.

2020. Mr. Kensall testified that upon the recommendation of Commodore, the Ship was "surveyed" to detect any issues. After Commodore conducted the "survey" on or about August 24, 2020, it provided a hull-thickness report to Tyee.

[35] Mr. Burgess testified that Commodore performed an ultrasound test for the purpose of identifying the thin parts of the plating on the Ship's hull.

[36] On or about August 27, 2020, the parties agreed on the work to be done. Tyee refers to this as the "Original Scope of Work", as follows:

- (a) Cut out and re-plate all compromised hull plating in void spaces 5, 6, and 7, including bulkheads;
- (b) Inside framing;
- (c) Repair port bow, side and wingwall bulkhead;
- (d) Repair the rusted out plates in the port and starboard bow upper sections, where ramp cables and pulleys are housed;
- (e) Fabricate port and starboard integral fuel tanks in the outer portions of void space #5;
- (f) Build and install a new front-loading ramp; and
- (g) Paint the void spaces

[37] Commodore quoted the sum of \$75,000.00 to perform this work.

[38] Commodore advised that it would bill on an hourly rate and discount the charges for the first two weeks of work. Materials would be billed at cost, plus a certain percentage.

[39] Commodore, through Mr. Burgess, admits that it represented to Tyee, through Mr. Kensall, that it had the expertise to perform the work requested.

[40] According to the evidence, Commodore worked on the Ship at its shipyard from August until December 2020. Commodore sent invoices to Tyee every one to three weeks, and Tyee paid the invoices, up to the amount of \$324,240.33.

[41] The original work was expanded, the “Expanded Scope of Work”, to include the following:

- (a) Cut out and replace portions of the hull plating for voids #1-4;
- (b) Forward bulkheads of voids #2, 3, and 4;
- (c) Weld in deck hatch(es), already fitted and tacked in place on void spaces #3 and 5; 518 7
- (d) Weld small crack identified in stuffing box;
- (e) Cut out and replace side hull plate on port side of Lazarette;
- (f) Paint Lazarette;
- (g) Fabricate and weld sea chests into engine room;
- (h) Fabricate and weld in transducer housing;
- (i) Cut out and replace forward fuel tank tops; and
- (j) Bend back existing port side pulley

[42] The parties then agreed to exclude certain items from the work. The following “Exclusions” were agreed upon:

- (a) Pipe work originally estimated at \$5,000.00;
- (b) Hydraulic pump and hoses originally estimated at \$10,000.00;
and
- (c) A ramp pulley system originally estimated at \$2,500.00

[43] In October, Commodore provided an “Updated Estimate” in respect of the work on the Ship, as described in the “Original Scope of Work” and the “Expanded Scope of Work”. The excluded work did not figure in the October estimate which was \$135,000.00.

[44] Mr. Kensall deposed in his affidavit affirmed on January 20, 2023 that he was satisfied with this estimate.

[45] On or about November 9, 2020, Commodore contacted Tyee about two outstanding invoices, that is invoice #1587 dated September 25, 2020 in the amount of \$37,655.21 and invoice #1598 dated October 15, 2020 in the amount of \$32,262.28.

[46] Tyee advised that it had not received these invoices and Commodore provided them on or about November 10, 2020.

[47] Tyee, upon receiving these invoices, determined that the amounts of these two invoices put the cost of the work at \$208,244.91, that is well over the October estimate of \$135,000.00.

[48] On November 12, 2020, Mr. Kensall met with representatives of Commodore, including Mr. Burgess, to discuss the costs to date. With the consent of all participants, the meeting was recorded. A transcript of the recording is Exhibit E to the affidavit of Mr. Burgess.

[49] In addition to expressing his concerns about the higher costs of the repairs, Mr. Kensall asked for an estimate of the cost of completing the work in a “timely manner”.

[50] Commodore provided an estimate of \$22,000.00, with completion by November 24, 2020. Commodore held out that the following tasks would be completed by that date:

- Complete the tanks, expected to take three days;
- (b) Mount pulleys, expected to take four days;
- (c) Fit a cable guard, expected to take two days;
- (d) Mount a winch, expected to take one day;
- (e) Finish the ramp latches and fit the same, expected to take two days;
- (f) Remove and re-fit the ramp for blasting and painting, expected to take one day;
- (g) Fit retaining washers on hinge pins, expected to take one day;
- (h) Finish welding, expected to take three days; and
- (i) Paint the Vessel, expected to take eight days.

[51] Commodore performed work between November 13 and December 7, 2020. By December 7, 2020, Commodore had completed the hull painting.

[52] The Ship was returned to Tyee on or about December 7, 2020 and Commodore has done no work on her since then.

[53] After the return of the Ship, Tyee discovered deficiencies in the work. It also discovered that it had paid for materials that Commodore had not used in the repair work.

[54] According to the affidavit of Mr. Kensall, Commodore had invoiced Tyee the sum of \$287,087.32, before taxes.

[55] Tyee has paid Commodore \$233,234.30 in connection with the repairs. It has paid the sum of \$88,303.59 into Court in respect of the outstanding unpaid invoices. These figures include applicable taxes.

[56] On January 14, 2021, Mr. Kensall, Mr. Burgess and Mr. Spiller met to discuss the deficiencies identified by Mr. Kensall. Again the meeting was recorded with the consent of the participants.

[57] According to Exhibit G to the Affidavit of Mr. Kensall, 20 January 2023, Mr. Spiller said at that meeting that "... if something is not right and it wouldn't pass Transport Canada in the work we did, then I'll fix it. We'll make sure it gets fixed".

[58] Mr. Kensall's evidence is that Commodore admitted some of its employees who did welding work were still apprentices and had not been qualified as welders.

[59] In February 2021, Commodore prepared and signed an “Executed Deficiency List”. This document is attached to the January 20, 2023 affidavit of Mr. Kensall as Exhibits K to N. Commodore assessed the cost of repairing the deficiencies and “warranty work” to be \$28,770.00. At this time, Tyee and Commodore were still discussing potential resolution of the problems.

[60] Later in February 2021, Commodore stopped talking about a possible resolution and demanded payment of its unpaid invoices. According to Mr. Kensall, he remained open to a resolution but he required a definite plan for remediation of the deficiencies before he would consider payment.

[61] In March 2021, Tyee engaged Prestige Fabrication Limited to assess the work and to give an estimate of the costs of repairing it. That company provided an estimate of \$140,046.41, before taxes.

[62] Tyee obtained another estimate from Darby’s Welding Ltd. dated March 22, 2021, for potential welding work to repair the vessel. That company provided an estimate of \$45,927.00 for the work it was able to do.

[63] In October 2021, Tyee obtained an estimate from Bracewell Marine Group Ltd. in the amount of \$178,153.39, before taxes.

[64] In November 2021, Arrow Marine Services provided an estimate in the amount of \$125,138.39, before taxes.

[65] Mr. Kensall deposed, in his affidavit of January 20, 2023, that Kova Engineering inspected the Ship and criticized the welding work. However, Kova did not give an estimate of the repair costs in its report.

[66] As noted above, this action was begun on April 16, 2021 with the issuance of a Statement of Claim by Commodore seeking the recovery of \$88,303.59, being the total of three unpaid invoices: invoice #1619, issued on or about November 12, 2020 in the amount of \$31,842.20; invoice #1622, issued on or about November 23, 2020 in the amount of \$32,766.62; and invoice #1637, issued on or around December 15, 2020 in the amount of \$26,393.91.

[67] All the invoices relate to the supply of labour, materials, services, equipping and storage of the Ship.

V. LITIGATION HISTORY

[68] Tyee filed a Statement of Defence and Counterclaim on May 18, 2021 denying liability, on the grounds that the work was inadequate for the purpose and exceeded the costs estimates.

[69] Tyee filed an amended Defence and Counterclaim on November 15, 2023. It continued to deny liability and counterclaimed in the amount of \$153,218.20 representing the reasonable cost of repairing the deficiencies. It also alleged that Commodore overcharged for materials

relating to the expanded scope of work in the amount of \$82,034.30, pleading unjust enrichment. Its total claim is in the amount of \$233,234.30, together with interest and costs.

[70] Commodore filed a Defence to the Counterclaim on August 9, 2021.

[71] On December 5, 2022, Tyee delivered the expert report of Mr. Braconnier to Commodore.

[72] On February 2, 2023, Commodore delivered its expert report of Mr. Holonko to Tyee.

[73] On October 27, 2023, Tyee delivered a second report from Mr. Braconnier to Commodore. This report was prepared in response to the report of Mr. Holonko.

[74] On January 19, 2024, Tyee filed its Motion for a Summary Trial, with supporting affidavits.

[75] Although Commodore filed its own Motion for Summary Trial on January 19, 2024, it subsequently withdrew that Motion. It filed a responding motion record on March 11, 2024, including the affidavits mentioned earlier.

VI. ISSUES

[76] In my opinion, the pleadings filed in this action raise the following issues:

- (1) Is money due to the Plaintiff for three unpaid invoices for work done upon the Ship pursuant to an agreement to effect repairs?
- (2) Is Tyee entitled to recovery of monies paid to Commodore because the work done was defective and cannot be reasonably remediated?
- (3) Is Tyee entitled to recover monies paid for material that was not used for repairs on the grounds of unjust enrichment?

VII. DISCUSSION

[77] Tyee has moved for summary judgment on all issues raised in the pleadings, that is the claim for monies set out in the Statement of Claim issued by Commodore and the counterclaim it filed, seeking recovery of monies already spent.

[78] A motion for summary judgment is governed by Rules 213 to 216 of the Rules. The pertinent parts of those Rules are set out below:

Motion and Service

Motion by a party

213 (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.

Requête et signification

Requête d'une partie

213 (1) Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l'égard de toutes ou d'une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l'instruction soient fixés.

...

Summary Judgment

Facts and evidence required

214 A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.

If no genuine issue for trial

215 (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

Genuine issue of amount or question of law

(2) If the Court is satisfied that the only genuine issue is

...

(b) a question of law, the Court may determine the

[...]

Jugement sommaire

Faits et éléments de preuve nécessaires

214 La réponse à une requête en jugement sommaire ne peut être fondée sur un élément qui pourrait être produit ultérieurement en preuve dans l'instance. Elle doit énoncer les faits précis et produire les éléments de preuve démontrant l'existence d'une véritable question litigieuse.

Absence de véritable question litigieuse

215 (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

Somme d'argent ou point de droit

(2) Si la Cour est convaincue que la seule véritable question litigieuse est :

[...]

b) un point de droit, elle peut statuer sur celui-ci

question and grant
summary judgment
accordingly.

Powers of Court

(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may

(a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or

(b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.

et rendre un jugement
sommaire en
conséquence.

Pouvoirs de la Cour

(3) Si la Cour est convaincue qu'il existe une véritable question de fait ou de droit litigieuse à l'égard d'une déclaration ou d'une défense, elle peut :

a) néanmoins trancher cette question par voie de procès sommaire et rendre toute ordonnance nécessaire pour le déroulement de ce procès;

b) rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

[79] In *Canada (Citizenship and Immigration) v. Mahendran*, 2024 FC 30, Justice Southcott reviewed the principles applicable to a motion for summary judgment at paragraphs 20 to 22 as follows:

[20] ... Recently, in *Canmar Foods*, the Federal Court of Appeal stated that the underlying rationale of summary judgments is that a case ought not to proceed to trial, with all the consequences that would follow for the parties and the costs involved for the administration of justice, unless there is a genuine issue that can only be resolved through the full apparatus of a trial (at para 24).

[21] Rule 215(1) of the Rules provides that the Court shall grant summary judgment where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence. The test on a motion for summary judgment is not whether a party cannot succeed at trial, but rather whether the case is clearly without foundation (*Canmar Foods* at para 24) or that the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial (*Orij* at para 35; *Milano Pizza* at para 33; *Kaska Dena Council v Canada*, 2018 FC 218 at para 21; *Canmar Foods* at para 24). As such, claims that are clearly without foundation should not take up the time and incur the costs of a trial (*Orij* at para 35).

[22] Summary judgment can only be granted where the necessary facts to determine questions of fact and law are found in the material before the Court (*AMR Technology Inc v Novopharm Limited*, 2008 FC 970 at para 6)...

[80] This action is about a claim in respect of repairs to the Ship. Tyee claims the work is deficient to the point of breach of contract; Commodore pleads that although deficiencies were identified, Tyee did not give it the opportunity to fix them and in any event, monies paid to date were due and the outstanding balance is likewise due and owing.

[81] This is a motion for summary trial and a preliminary issue is whether the claims can be disposed of on that basis.

[82] It is recognized that where there are issues of credibility, disposition by summary trial may not be appropriate; see the decision in *0871768 B.C. Ltd. v. "Aestival" (The)* (2014), 467 F.T.R. 1.

[83] However, in this case, the issues are well-defined. Several deponents to affidavits were cross-examined in open Court and those examinations provide the opportunity to assess credibility.

[84] The parties requested disposition by way of summary trial and raised no objections to that process in their written and oral submissions.

[85] In its decision in *Mud Engineering Inc. v. Secure Energy Services Inc.*, 2024 FCA 131, the Federal Court of Appeal confirmed that issues in a summary trial are to be decided on the balance of probabilities.

[86] The parties were given the opportunity to comment on this decision, on the “live issue” of the burden of proof in summary trials. Commodore and Tyee both filed submissions in response. In effect, each party agreed as to their respective burden.

[87] Each party carries the burden of establishing its claims upon the civil burden of proof, that is proof on the balance of probabilities; see the decision in *F.H. v. McDougall*, [2008] 3 S.C.R. 41.

[88] The parties had an agreement, whether it is called a “contract” or simply an agreement. Commodore was engaged to do certain work on the Ship, on a labour and materials basis. Tyee paid all invoices except for three invoices, totalling \$88,303.59. Commodore commenced this action seeking judgment in that amount.

[89] Commodore pleads that Tyee failed to mitigate its damages, if any, by removing the Ship from its shipyard and denying it the opportunity to remedy the defects.

[90] Tyee defended that claim and advanced a counterclaim. It denied liability for Commodore's claim on the basis that the work was deficient, that the charges exceeded the estimates for Commodore's work and that payment of the further invoices would amount to unjust enrichment to Commodore. It also alleged negligence in the performance of the work.

[91] Tyee also counterclaimed for recovery of \$ 233,234.30 representing the amount it has paid to Commodore, on the basis that the work was inadequate and unfit for the purpose. Further and in the alternative, it seeks judgment in the amount of \$ 153,218. 20 for the reasonable costs of repairing the work done by Commodore. As well, it seeks recovery of the amount of \$82,034.30 for alleged overpayments made beyond the agreed estimates for the performance of the work and pleads unjust enrichment against Commodore.

[92] The substantive issues that arise are whether there was a breach of contract, whether Commodore was negligent in its performance of the contract, whether payment of amounts exceeding the estimates has unjustly enriched Commodore, and if liability is established, what is the appropriate measure of damages.

[93] There can be no dispute that the parties had an agreement that Commodore would carry on work on the Ship. It describes the agreement as a contract for "labour and materials" where

Commodore would perform work and Tyee would pay for the labour and materials. The dispute relates to the quality of the work and its cost.

[94] Mr. Kensall, on behalf of Tyee, maintained his position that Commodore was to carry on certain repairs to make the Ship seaworthy and put her in such condition that she would pass a CSI.

[95] Mr. Burgess, on behalf of Commodore, argued that it conducted the work in an acceptable manner, that the defects in its work did not amount to a fundamental breach of its agreement with Tyee and in any event, Tyee failed to mitigate its damages because it did not allow remedial work to be done.

[96] The expert witnesses retained by the parties reached different conclusions about the work and about the costs of remediation.

[97] Mr. Braconnier, who had visited the Ship and conducted a “technical assessment”, ultimately concluded that Commodore’s work was useless, and that it would be more cost-efficient to begin again, rather than attempt to repair the work.

[98] Although Mr. Burgess, on behalf of Commodore, admitted that there were problems with the welding, generally he denied that the work done on the Ship failed to meet the standard of care expected. Commodore made arguments about the age of the Ship, the failure of Tyee to provide detailed drawings, and pressure to finish the job.

[99] It is clear that Tyee was dissatisfied with the final product. However, it must show more than “dissatisfaction” in order to succeed either upon a claim of negligent performance of the work or upon a claim of breach of contract.

[100] All deponents to the affidavits filed in this motion were cross-examined upon their affidavits in open Court. This means that the Court had the opportunity to assess credibility in a different manner than if simply reading transcripts of their cross-examinations.

[101] Mr. Kensall and Mr. Burgess were the witnesses to the events leading up to the agreement and the conduct of the work.

[102] I found Mr. Kensall to be credible. He was answered the questions in a straight-forward manner.

[103] Mr. Burgess was less credible. On occasion he seemed to avoid answering questions that were put to him.

[104] Mr. Braconnier and Mr. Holonko were not “personally” involved in the circumstances about the work on the Ship. They were asked to provide their professional opinion about the work.

[105] Both Mr. Braconnier and Mr. Holonko attended on board the Ship. They looked at the work done and formed opinions about it.

[106] In my opinion, Mr. Braconnier and Mr. Holonko delivered their evidence upon cross-examination appropriately by answering the questions raised. However, since they reached different conclusions upon the same questions, the probative value of their evidence has to be assessed.

[107] The Ship is steel-hulled. As built, the steel was 3/16th thick.

[108] Mr. Braconnier noted deficiencies in the insert plates that were installed in the void spaces, notable that they were too short and did not meet the required height of 12 inches.

[109] Mr. Braconnier also observed failures in the work done inside the void spaces with the “stiffeners”. These are bars that run horizontally and vertically, and are welded into place. The stiffeners contribute to the stability of the vessel. According to Mr. Braconnier, in his opinion the defects in the construction of the bulkheads and the welding undermined the seaworthiness of the Ship and the work done is unfit for the purpose.

[110] The painting of the repairs meant that this work could not be “remediated”, it would have to be redone.

[111] According to Mr. Braconnier, painting is the “last” part of any repair work. It should not be done until the work is done and found to be adequate.

[112] Mr. Holonko largely disagreed with the opinions of Mr. Braconnier. However, in my opinion, Mr. Braconnier provided a detailed report and remained unswayed upon cross-examination.

[113] Indeed, Mr. Braconnier tendered three reports – that is the report, dated December 5, 2022 attached to his first affidavit; the “technical review” dated December 5, 2022 that is an annex to that report; and the report dated October 18, 2023, responding to the report of Mr. Holonko.

[114] Although Counsel for Tyee argued that Mr. Holonko was not neutral and appeared to advocate for Commodore, I am not persuaded that such is the case. I prefer the evidence of Mr. Braconnier because it is more comprehensive.

[115] Both experts addressed Department of Transportation standards about ship repairs.

[116] Tyee obtained quotations from businesses who could also do the work requested from Commodore. Following commencement of litigation, it engaged a marine surveyor to assess the work and give an opinion about the quality of work and the costs of repairing the defects. The focus of the mandate letter was upon seaworthiness and the work requested from Commodore.

[117] Mr. Kensall, on behalf of Tyee, was clear that he had two requirements: that the Ship be seaworthy and that she would “pass a CSI inspection”. “CSI” stands for “Canada Steamship

Inspection” and according to the evidence of Mr. Braconnier, the name of these inspections has changed to “Transport Canada Safety”.

[118] There was much evidence about Department of Transport standards and publications, including “Technical Publications”. The question is whether the work performed by Commodore was adequate for the purpose.

[119] Both Mr. Braconnier and Mr. Holonko addressed the Department of Transport publications. Their evidence was largely solicited in response to questions about classification of the Ship.

[120] Mr. Braconnier was clear in his evidence that the Ship was “registered” but not “classed”. He testified about classification societies and the International Association of Classification Societies (“IACS”).

[121] The evidence of Mr. Braconnier, which I have accepted over the evidence of Mr. Holonka, shows that the work was not performed in a manner that complies with applicable standards, as set out in various documents published by the Department of Transport for the repair of ships. Mr. Braconnier expressed the opinion that it would be more cost effective to re-do the work than to attempt to repair it.

[122] In my opinion, the evidence of Mr. Braconnier establishes that Tyee did not get the work it bargained for, and for which it paid.

[123] This finding relates to the claim advanced by Commodore for payment of its three unpaid invoices which are the basis for Commodore's action. Those invoices claim payment for the supply of labour, goods, materials, services and storage for the period of October 30, 2020 to December 9, 2020.

[124] The invoices do not give a break-down between the labour and materials, and storage costs. Invoice number 1637, dated December 15, 2020, reflects a credit in the amount \$4230.48 for "materials previously invoiced and not utilized". This figure appears to be exclusive of taxes.

[125] Commodore argues that in the absence of a fundamental breach of the repair contract, it is entitled to be paid for the outstanding invoices. It also submits that it was entitled to a reasonable opportunity to repair the defects and its loss of that opportunity should be taken into account in assessing any damages due to Tyee.

[126] Mr. Braconnier's opinion, as to the unfitness of the work, includes his assessment of the work covered by those three invoices. It follows that, in his opinion, that work is also unfit for the purpose.

[127] In my view, the liability for the three outstanding invoices is related to Tyee's claim for repayment of monies paid to date, which puts in issue the fitness of the work done. It seems appropriate to assess the liability for these invoices as part of the assessment of Tyee's claims about the fitness of the work.

[128] Mr. Braconnier provided detailed descriptions of the work done, and of the deficiencies he found, including improper cuts of steel, improper cuts of bulkheads, and defective welding. Mr. Burgess admitted that some welding was done by apprentices, not fully qualified welders.

[129] It follows, in my opinion, that Tyee is not liable for the payment of the three outstanding invoices, since the work done was unfit for the purpose.

[130] Mr. Braconnier addressed, in detail, the repairs to the structure of the Ship, including the bulkheads and the welding.

[131] The parties had prepared lists of deficiencies. On February 7, 2021, Mr. Burgess signed a document entitled “Tyee Shepard Refit Deficiency revised”. However, in his affidavit, he deposed that he did not agree that every deficiency identified was caused by Commodore.

[132] I acknowledge the submissions of Tyee that the issue of “fitness for purpose” in this case largely depends on the opinions of the two expert witnesses. Each of them went on board the Ship and had the opportunity to make observations. They relied on their observations, together with review of relevant documents and their experience, in reaching their conclusions.

[133] As noted above, I prefer the evidence of Mr. Braconnier to that of Mr. Holonko.

[134] Commodore disputes Tyee’s claim for recovery of monies paid that exceeded the estimated costs of the repairs. It relies on the decision in *Dunn v. Vicars*, 2007 BCSC 1598 to

argue that there are several factors that a Court may consider in finding if an estimate is intended to have contractual effect. It also argues that Tyee, through Mr. Kensall, was aware that the work was not commissioned on a fixed-price basis and that the charges could change.

[135] In response, Tyee submits that it required that the work stay within a certain amount and it relied on the estimates when extra work was suggested and when it agreed that it be done. It resisted payment of the three outstanding invoices on the grounds that it would be payment of “good money after bad”.

[136] In my opinion, the status of the estimates is subsumed in the primary question, that is whether the work done by Commodore, for which Tyee paid, was fit for the purpose. If it was not, did Tyee fail to mitigate its damages when it did not allow Commodore to repair the deficiencies.

[137] Tyee argues that there is a fundamental breach of the contract with Commodore. It relies on the decisions in *Sail Labrador Ltd. v. Challenge One*, [1999] 1 S.C.R. 265 and *Cherris Estate v. Bossa Development Corp.*, 2001 BCSC 228 in support of its submissions that a fundamental breach of a contract occurs when there is a “substantial failure” of the bargain made. A remedy in damages can be available.

[138] I am satisfied that a fundamental breach of contract occurred here. That finding impacts Commodore’s claim for payment of the three unpaid invoices. However, in determining the quantum of damages due to Tyee, the question of mitigation must be considered.

[139] Commodore relies on the decision in *Jozsa v. Charlwood-Sebazco*, 2016 BCSC 78 to argue that Tyee's refusal to let it remediate the work affects entitlement to damages.

[140] In *C.S. Bachly Builders Ltd. v. Lajlo*, 2008 CanLII 57444 (ONSC), the Court addressed the consequences of the failure of the homeowner to allow a contractor to perform remedial work and dismissed a claim for damages.

[141] In the circumstances of this case, Commodore had exceeded the estimated costs of the work and acknowledged defects in its work. Its offer to repair the deficiencies was conditional upon payment of the outstanding invoices. Tyee was not prepared to make those payments.

[142] In my view and considering the totality of the evidence, Tyee reasonably withdrew the Ship from Commodore's possession. Both Mr. Braconnier and Mr. Holonko agreed that it would be cheaper to begin again rather than to repair Commodore's work. There was no failure to mitigate.

[143] I have found that there was a fundamental breach of the contractual agreement between Commodore and Tyee. Tyee frames its prayer for relief first for recovery of the monies it has paid to Commodore, without paying the three unpaid invoices. Although Tyee also pleads negligence in performance of the contract, it is not necessary to address that plea in detail.

[144] In the alternative, it seeks recovery of the amount estimated by Mr. Braconnier for repairing the defects, together with recovery of amounts that it claims were improperly charged by Commodore in excess of the estimated cost of \$135,000.00.

[145] I acknowledge the submissions of Tyee about difficulty in assessing damages, as addressed in *Ramey v. Wilder Mobility Ltd.*, [2004] O.J. No. 2674 (O.N.S.C.) and *Miller v. Advanced Farming Systems Limited*, [1969] S.C.R. 845.

[146] In these decisions, the Courts addressed the role of damages, that is to restore an “injured” party to the same position it would have been in, had the tortious act or breach of contract not occurred.

[147] I also acknowledge the guidance provided by the decision in *Penvidic Contracting Co. v. International Nickel Co. of Canada*, 1975 CanLII 6 (S.C.C.) where the Supreme Court of Canada determined that although the calculation of damages may be difficult, that difficulty does not relieve the wrong-doing party of liability and a Court must do its best with the evidence available.

[148] In this case, the “wrongdoing” is the result of a fundamental breach of contract.

[149] In my view, the simplest way to award damages is by an order that Commodore repay the monies paid to it by Tyee, with no further payments due from Tyee.

[150] Tyee responded to Commodore's claim for payment of three invoices with a counterclaim. As argued by Tyee, this is in the nature of a legal set-off, such that in the circumstances, it would be unjust for Commodore to obtain judgment upon its claim. I refer to the decision in *M3 Steel (Kamloops) Ltd. v. RG Victoria (Construction) Ltd. et al*, 2005 BCSC 1375 at paras 28-29.

[151] In the result, Commodore's action will be dismissed and judgment will enter for Tyee in the amount of \$233,234.30, together with interest pursuant to the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[152] The parties will have the opportunity to address costs and a Direction will issue in that regard.

ORDER IN T-631-22

THIS COURT'S ORDER is that the Plaintiff's action is dismissed and judgment is granted in favour of the Defendants in the amount of \$233,234.30, together with interest pursuant to the *Federal Courts Act*, R.S.C. 1985, c. F-7.

The parties will have the opportunity to address costs and a Direction will issue in that regard.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-631-21

STYLE OF CAUSE: COMMODORE'S BOATS LTD. v. THE OWNERS
AND ALL OTHERS INTERESTED IN THE SHIP
(*TYEE SHEPARD*) and TYEE PACIFIC MARINE
OPERATIONS LTD.

PLACE OF HEARING: VANCOUVER, BC

DATE OF HEARING: MARCH 26-28, 2024, APRIL 2, 2024, AND APRIL 8,
2024

**FURTHER SUBMISSIONS
RECEIVED:** OCTOBER 8, 2024 AND NOVEMBER 7, 2024

REASONS AND ORDER: HENEGHAN J.

DATED: JUNE 11, 2025

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