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IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

A. No. 251/81

791

BETWEEN ARTHUR ABRAHAM DAVIS of  
Cairns, Australia, Retired  
Plaintiff

A N D IAN HEALY of 12 Amiria  
Street, Herne Bay,  
Company Director  
Defendant

Hearing: 7th, 8th, 9th March and 4th,  
and 5th April, 1984.

Counsel: E. T. Midlane for Plaintiff.  
C. W. Bright for Defendant.

Judgment: 9 July 1984

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JUDGMENT OF VAUTIER, J.

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The plaintiff to whom I will refer hereafter as Mr. Davis, entered into an agreement in April or May, 1979, with the defendant (Mr. Healy) for the sale to Mr. Healy of a large pleasure yacht called the Nam Sang. The terms of sale were reduced to writing and included after a description giving the dimensions and age of the vessel the words "as inspected and approved by the Purchaser". The price was \$39,000 which was to be satisfied by cash payments of \$15,000, the transfer of a motor car of an agreed value of \$6,000, and the balance of \$18,000 by Mr. Healy giving an instrument by way of security over the vessel to secure payment of this sum on 19th June, 1980, together with interest at the rate of 10% per annum by quarterly instalments. Clause 5 of the

agreement read:-

" The Purchaser hereby agrees to purchase the said vessel 'in as is where is' condition. "

A list of accessories belonging to the said vessel was referred to as attached and this list included items numbered 8 and 11 respectively described as "8 winches" and "1 G.M. 185 H.P. Motor".

Mr. Davis's statement of claim in the action, dated 25th March, 1981, pleaded the execution of the instrument abovementioned and payment of interest due thereunder up to 19th March, 1980, only, and he sought judgment for the sum of \$18,450 being the principal sum plus interest up to 19th June, 1980, and also interest in terms of the Judicature Act 1908, from 19th June, 1980, to the date of judgment.

Mr. Healy has proceeded in this action to counter-claim on the basis that oral representations were made at the time when he agreed to purchase the yacht these being "in addition to the written agreement" and that there were certain conditions which formed part of the agreement. It was pleaded that the agreement was entered into in reliance upon such representations and that these were false to the knowledge of Mr. Davis or made recklessly without caring whether they were true or false. It was further pleaded that there was a breach of terms of the agreement in that the engine in the yacht was not a 185 H.P. G.M. motor and 8 winches were not delivered to Mr. Healy, but only 6 winches and 2 winch drums with no gearing therein. The alleged misrepresentations to which I have

referred were (1) that the hull of the vessel had no worm or rot and the engine was in good condition and in working order.

On the basis of the amended statement of counterclaim filed by leave and by consent at the outset of the hearing, damages were claimed by Mr. Healy as under:-

(a) In respect of the misrepresentation and breach of contract regarding the engine...	\$20,359.11
(b) In respect of misrepresentation and breach of contract regarding the winches..	10,410.00
(c) In respect of misrepresentation and breach of contract regarding the soundness of the hull and its freedom from worm and rot....	<u>9,949.98</u>
	<u>\$40,719.09</u>

It should here be mentioned that Mr. Healy had prior to the commencement of this action issued a writ out of this Court claiming damages against Mr. Davis on the same grounds as those referred to above but he had been unable to effect service upon Mr. Davis within the 12 month period fixed by the Rules. The commencement of the present action enabled him to proceed by way of counterclaim instead and there being no dispute as regards the terms of the instrument by way of security and the payments made thereunder the matter proceeded in all respects simply as though Mr. Healy was the plaintiff in the proceedings.

The questions of fact involved were the subject of lengthy and very conflicting evidence. For Mr. Healy the

evidence in addition to that of Mr. Healy himself was that of a boat builder of very long experience, Mr. C. A. Smith, Mr. Stainton who was at the relevant times a machine shop foreman for Whangarei Engineering and Construction Limited, Mr. D. Brooke, Marine Architect and Surveyor and Mr. Honore, an employee of a firm of estate agents which acted in conjunction with the agents employed by Mr. Davis to effect the sale of the vessel.

For Mr. Davis there was evidence, in addition to his own, from a Mr. Malone, an automotive diesel mechanic who had carried out certain work on the engine of the yacht at the request of Mr. Davis, Mr. Newfield the solicitor who acted for Mr. Davis on the sale, and Mr. Pope to whom I will refer hereafter.

Some brief reference needs to be made to the history of the yacht concerned in the proceedings. The evidence showed that the Nam Sang was built in the United States in about 1934 as an ocean racing and cruising yacht. It visited New Zealand in about 1964 in the course of various world cruises made by its American owners. In the course of a further visit to New Zealand in 1972 or 1973 it was dismasted and damaged off the Northland coast (some time prior to December, 1973) and finally came to be sold by auction under conduct of the Marshall of the Admiralty Court of New Zealand in Whangarei in about May, 1976. The particulars and conditions of sale under which the vessel was so auctioned described it as being "fitted with a Detroit auxiliary engine believed to be 85 H.P." The vessel and its

equipment was offered for sale "as is", "where is", with all faults, defects and imperfections in description and with the condition that the purchaser, Messrs. [redacted] nor the vendor made any warranty whatsoever. A copy of the report was also made available to interested parties. The report was a lengthy report which had been prepared by [redacted] lawyer, the Mr. Pope to whom I have referred earlier. [redacted] a marine surveyor operating a company called [redacted] Limited. This report prepared by Mr. [redacted] with December, 1973. Mr. Davis purchased the yacht [redacted] with two other persons intending, as he stated, to repair and refurbish it and use it for a time and then sell it. He proceeded immediately after purchase to have the boat slipped and he and his co-purchasers proceeded to work on it. The work carried out was, he stated, to have the worm eaten areas of the hull and transom [redacted] anti-fouled, the top sides repaired and the yacht put back in the water after having been out of the water for at least three months. Thereafter the yacht was used in the Whangarei Harbour. Mr. Davis stated that he said until about six months before she was [redacted], but ceased doing so then because he usual [redacted] in the yacht was adversely affecting his [redacted]. Thereafter he did no further work at all [redacted] and neither it seems did [redacted] of his work.

Full details of the purchase Mr. Healy arranged for [redacted] company limited (WFO) to make an inspection [redacted] him regarding the engine.

He also arranged for the boat yard operated by Mr. Smith to undertake to assist him with the extensive renovation work which he knew was necessary in that he was well aware that the decks were in very bad condition and in need of refastening and recaulking and nearly all the interior joinery needed replacing or reconstructing. His evidence was to the clear effect that knowing that there was such a very large amount of work to be done in restoring the decks and refitting the whole interior and in the obtaining of new sails and standing and running rigging he was concerned to be sure that at least he was obtaining a yacht with a sound hull and an engine in running order. He was also concerned as to the power of the engine to drive the boat in adverse conditions and was accordingly reassured and influenced by the fact that the engine was stated to be of 185 H.P. The evidence showed that the engine was installed in such a position with no spare space around it that it could only be inspected with difficulty. He was also particularly interested in the coffee grinder type winches with which the vessel had been equipped. All the winches had been removed from the vessel but the pedestal and actuating handles of this equipment were still in position. Mr. Healy prior to purchase inspected the winches and other equipment then stored in Mr. Davis's garage. The winches were able to be inspected there but were stored, he said, in a fairly inaccessible position and although Mr. Healy saw the big coffee grinder winch drums standing among the other winches he did not attempt to pick these up or examine them in detail. On a visit made to inspect the yacht in the company of Mr. Honore, Mr. Healy said that he was assured that the hull was sound and free from worm and rot and that

the engine was a 185 H.P. G.M. engine and in good running order. He was further assured, he said, that the engine had been started at regular intervals. He admitted that, with hindsight, it would have been much more advisable for him to have obtained a survey and that he was keen to purchase the yacht because he admired its lines and wished to get a big yacht of this kind, having had a fairly large yacht previously. He further admitted that he relied upon the assurances given to him by Mr. Davis and did not insist upon the agreement drawn up by Mr. Newfield (which was really simply a land agent's form of agreement) <sup>being</sup> amplified so as to refer specifically to the warranties which he claimed Mr. Davis had given him with regard to the condition of the hull and the engine.

The hull was burnt off under Mr. Healy's instructions for complete repainting during the course of the work being undertaken to repair the decks and the other obvious damage which evidently had been occasioned during the dismasting. When the hull had been bared in this way it was found to be extensively affected by toredo worm and rot particularly round the area of the waterline and around the chain plate areas and the skin fittings and in other parts. Very extensive work was necessary by way of complete replacement of affected hull timbers and treatment of the worm infestation to overcome the damage he so found.

As regards the engine, the employees of WECO, after a good deal of delay, came to inspect the engine. Mr Healy had been advised not to try to start the engine until

the mechanics had made a proper examination of it because of the fact that the vessel had been standing moored and out of use for a considerable period. They finally did not commence on the work of servicing the engine until November 1979. On removing the injectors in order to send them away for testing they found rust on the bottom of the injectors and then on looking in to the bore of the cylinders they found water in two of them. They then removed the exhaust manifold and water, it is said, poured out of this area. Mr Healy was then advised it would be necessary to remove the engine so that it could be completely stripped down in the workshop. Mr Stainton expressed the view that the rusting found indicated that the water had been present for a considerable time. Further examination following the complete stripping down of the motor showed that it had been "hydraulicized", that is to say an attempt had been made to start it with water in the cylinder areas above the pistons. The result was that more water was drawn in and owing to the impossibility of compressing water the crank shaft and the connecting rods were bent and it was considered probable that as a result, strain and possible damage had been caused to all rotating parts of the engine through the stress placed upon them. The estimates of cost of repair and overhauling the engine were so high that Mr Healy deemed it uneconomic to undertake this and sought and eventually obtained a second-hand replacement engine. The 185 H.P. model which the evidence showed General Motors Limited class as the 671 engine, is a six cylinder engine, but it was the smaller 453 four cylinder engine which was in fact the engine which was in the yacht as sold to Mr Healy. The second-hand engine which Mr



Healy eventually purchased was also a 453 G.M. engine but by means of turbo-charging, he was able to obtain a greater power output although not as much as would have been delivered by the 185 H.P. engine.

As regards the winches, Mr Healy found when he came to pick these up from Mr Davis that the two winch drums he had seen were all that were made available and delivered to him. The gearing was entirely missing and Mr Davis claimed at this time that he had never had any gearing for these winches. It was not disputed that the drums without the gearing had no value other than scrap metal. Extensive enquiries made by Mr Healy indicated that it would cost an astronomical sum to have new gearing specially built to fit the two winch drums and the gearing of the pedestal and enquiries for a new coffee grinder winch system of a similar capacity showed that this might cost as much as \$54,000. Mr Healy, fortunately, ultimately was able to obtain the second-hand winches from the badly damaged yacht Condor, then being repaired in New Zealand, and have these adapted, reconditioned and fitted to the Nam Sang.

The evidence of Mr Healy as to representations made to him at the time of sale with regard to the condition of the hull and the engine was supported in a number of material respects by the evidence of Mr Honore.

When Mr Davis came to give evidence his statements with regard to the condition of the hull and the engine and what was said preceding the sale were somewhat equivocal.

He claimed that he had, when the boat was slipped, carried out a considerable amount of work himself on the hull to rectify the worm infestation which he had found and of which he was, he admitted, well aware, because of the fact that he had had from the beginning Mr Pope's survey report of 1973, which made reference to the extensive worm infestation and rot and the particular locations of this. He claimed that he had repaired and eliminated these defects by renewing some of the planking and engraving into other planking. He claimed to have replaced quite a considerable amount of planking and in some cases the pieces of planking were six feet long or longer.

At first he said that he did not remember whether or not Mr Healy asked him on the inspection as to whether or not the hull was sound. He then said that he did not tell Mr Healy that the hull was sound. Later, however, in cross-examination, his evidence went this way:

"Q. You told him that in your opinion the hull was sound?

A. In my opinion the hull was to my satisfaction sir.

Bench: Do you mean that is what you told him?

A. Yes sir.

Q. Just a moment ago you told him it was sound to your satisfaction?

A. Yes, to my satisfaction."

At the same time he admitted that Mr Healy had asked about worm in the hull and that in response to that

enquiry he, Mr. Davis, had related what he had done to the hull when it was slipped. He specifically referred to replacing planks as he had considered it necessary when he found they were infested. This evidence, however, has to be compared with what was later said in a letter from the solicitor Mr. Newfield to Mr. Healy's solicitors dated 1 October, 1980. In this, Mr. Newfield referred to having spoken to his client in the previous week and this letter said:

"My client instructs me that your client never asked him about the presence of rot or worm in the vessel."

The evidence of Mr. Davis, to which I have referred, has also to be considered with that of Mr. Smith, the boat builder. Mr. Smith, referring to the situation revealed when the hull had been stripped of paint, said it could be seen where there had been filling carried out with Epifill but there was visible and obvious worm infestation as he described, and although he and his men carried out extensive work on the vessel, he saw no sign of any planking having been removed or of any engraving put in and indeed he saw nothing but the Epifill treatment.

In relation to the question of the rot and worm infestation in the hull, it has to be mentioned also that although Mr. Davis admitted having the 1973 report of Mr. Pope in his possession throughout, he made an affidavit of documents in the proceedings in which he made no reference to this report. There was also equivocation and contradiction

evidenced in what he had to say with regard to his experience in the boating field. At first, in reply to his counsel, his answer was simply that he had had no such experience. His own counsel, however, pressed him further and he then admitted that he had assisted in the building of a boat at one stage. Later, he admitted having worked on the fitting out of a 45-footer and to having built a smaller boat. Then, in cross-examination, he admitted that he had sailed for two and a half years on a yacht.

As regards the engine, he admitted having in his possession the conditions of sale showing the horse power of the engine as 85 and notwithstanding this, he had written out the list of equipment items showing the horse power as 185 and handed this list to his solicitor for incorporation in the agreement. His explanation for this was that his mechanic, Mr Malone, had spoken of the model of engine in the yacht as one which could deliver up to 120 H.P. and he thought that in writing out the list using the conditions of sale, he must simply have mistakenly written 185 instead of 85. With this evidence, however, there had to be contrasted the evidence of Mr Malone who claimed to have specifically told Mr Healy that the engine was an 85 H.P. 453 motor. Mr Davis also admitted in his evidence that he told Mr Healy that the engine was "running". He said he could not remember whether he said it was in good running order.

With regard to work done on the engine, Mr Davis's evidence was that when the work he had carried out with the yacht on the hard stand was finished, he engaged Mr Malone to

look at the engine and get it going prior to the yacht being put back in the water and he said that Mr Malone did this. Mr Davis's evidence was that the boat which had been, he said, slipped immediately after the purchase, had been on the slipway for "at least three months". Three months would, in these circumstances, have taken the relaunching time to about August. He was then asked with regard to the relaunching, the question:

"Would that have been about the beginning of 1977?"

And he answered:

"Yes sir."

Understandably, there was in the circumstances an objection to the leading nature of the question.

When Mr Malone came to give evidence, he referred to having been approached to look at the engine in 1977 and this, combined with the tenor of his other evidence, would clearly indicate to me that the first approach to Mr Malone was when the vessel was back in the water and not on the slipway. The further evidence of Mr Malone was to confirm Mr Davis's statement that he started the engine on a regular basis while Mr Davis was living on board but did not go near it after he ceased to do so. The effect of his evidence and that of Mr Davis, therefore, was that nothing whatever was done to the engine for a period of six months or more.

A further matter must, however, be adverted to with regard to the evidence of Mr Malone. The record of the proceedings showed that an earlier fixture had been made for the hearing of this action and in consequence of this an application was made to the Court in September 1983 for leave to adduce the evidence of Mr Malone in the form of an affidavit because of the fact that Mr Malone was resident in Brisbane and was unwilling to travel to New Zealand to give evidence. To this affidavit was attached what was described by the solicitor making the affidavit in support of the application as a copy of the "proposed affidavit of Mr Malone". Paragraphs 2 to 6 of the proposed affidavit read as follows:

"2. THAT in or about the months of March and April 1979 through my employers I was engaged by a Mr Arthur Davis to perform certain work on the engine of a boat he owned called "The Nam Sang".

3. THE boat was moored at Whangarei and when I first looked at the engine it was not in an operative condition and my job was to get it going. Mr Davis was doing other repair work on the boat and I understood he was trying to sell it.

4. AFTER I had done a little work on the engine I was approached one day at my employers' premises by a Mr Healy who said that he was interested in buying the Nam Sang from Mr Davis and that he had been referred to me about the engine. I told him it was a 4 cylinder Detroit diesel with a Horse Power rating of about 180.

5. AT a later stage I accompanied Mr Healy and Mr Davis to the Nam Sang. Mr Healy wanted to start the engine. I told him that he couldn't start the motor because it wasn't in working order.

6. I do not have any other knowledge of the transaction between Mr Davis and Mr Healy but I understand that Mr Healy bought the boat. I was not called upon to do any more work on the engine."

When confronted with this document which was of course, at variance with all the salient features of the evidence which he had given in chief, Mr Malone admitted that he discussed on the telephone with the solicitor the matters which were to be included in the affidavit but said that if the position had come about that he had actually had the affidavit presented to him for swearing, he would have changed almost everything said in it. He admitted that each one of the paragraphs which I have quoted above contained what he described as erroneous statements.

There were indeed numerous other contradictory and inconsistent statements to be found in the evidence given by and adduced on behalf of Mr Davis. My overall conclusion is that both his evidence and that of Mr Malone is unreliable. Both these witnesses made an unfavourable impression upon me as they gave their evidence and a reconsideration of the whole of the evidence since the hearing has only served to reinforce the view I had formed at the hearing that the evidence of Mr Healy and Mr Honore was to be preferred in all respects as to what was said to Mr Healy with regard to the condition of the yacht and its engine.

With regard to the winches, Mr Davis admitted in evidence that he knew all along that the big coffee grinder

winchers had no gearing. In my view, this being so, it could only be regarded as a fraudulent misrepresentation to describe them and continue to describe them as winches. As the expert witness, Mr Brooke, said, without any gearing, they could not properly be described as winches at all. I do not accept either that Mr Healy was told anything about a survey report having been prepared by Mr Pope or of this being available. I find that the existence of this document was deliberately concealed from Mr Healy who only obtained a copy of it by chance long afterwards. If Mr Davis was being truthful, I cannot understand why he should say that he told Mr Healy where he could get in touch with Mr Pope to find out about his survey when he himself had the report in his possession and could have made it available then and there.

I find as a fact that the engine was, to the knowledge of Mr Davis, inoperable and had been so for a very long time at the date of inspection by Mr Healy. It was certainly not, I find, in running order or in good condition.

I take account here of the evidence of Mr Malone as to what was said by Mr Stainton as to the state of the oil. What was said by Mr Malone, however, overlooks in my view the fact that while Mr Stainton said that he did not see water in the oil which was brought back to the shop, he did see rust on the crank shaft terminals and that that would indicate moisture or condensation in that particular area. Overall, Mr Stainton's positive evidence as to the state in which this engine was found is to be preferred, I think, to the arguments advanced by Mr Malone, particularly having



regard to my lack of confidence in him as a witness.

The overall result is, therefore, that I find that all the representations which have been pleaded in the statement of counterclaim were in fact made and they were false to the knowledge of Mr Davis.

I am satisfied also, and find that Mr Healy was influenced by the representations as to the soundness of the hull and the engine being in good running order and the fact of the vessel being equipped with these large coffee grinder winches and that these were major factors inducing him to enter into the purchase.

As regards this question of representations, it was Mr Midlane's submission that even if what Mr Healy and Mr Honore had said was correct, what was described by them as being said did not amount to a representation but simply constituted exaggerated or laudatory statements. He relied upon the statement in Halsbury, 4th Edn. Vol. 31, para. 1017, that:

"Mere praise by a man of his own goods, invention, projects, undertakings, or other marketable commodities or rights, if confined to indiscriminate puffing and pushing, and not related to particulars, is not representation."

He further submitted that what was said by Mr Davis amounted simply to a statement of his opinion and a mere expression of an opinion could not amount to a representation.

I do not find myself able to accept either of these submissions. The statements as I have found them to have been made relating to the soundness of the hull and freedom from rot and worm and as to the engine being in running order were obviously related to very vital matters as regards the condition of any vessel intended to be used at sea and the matters referred to were not matters of exaggeration or praise but matters of positive and particular fact.

As regards the matter of opinion, Mr Midlane referred to the Oxford Dictionary definition of this as "seeming to one's own mind to be true". As I have already indicated I could not in any event accept this as here being the position. As regards Mr Davis, I have already adverted to the question of the possession of the 1973 report by Mr Davis and the intimate knowledge which he must have obtained of the condition of the hull by sanding it down and using filler and repainting in the way he described. As a carpenter, and someone with his experience of boat building, he could not in my view properly claim to be speaking as someone who could not be expected to appreciate the situation fully.

As regards the condition of the engine, it is also quite incredible in my view that he should have in the way he describes, started the engine regularly, every fortnight or so for the 12 months or more that he was living on the boat and then simply have elected to leave it untouched for a period of six months. The latter action satisfies me on the balance of probabilities, that he was perfectly well aware

that the engine was damaged beyond economic repair and could not be started. Likewise with regard to the winches, the submission again was that Mr Davis was simply expressing an opinion by describing them as winches and that it should have been apparent to a purchaser that they had never been in running condition. I am satisfied, however, that Mr Davis did know the purposes and functions of winches and that a winch barrel or drum did not constitute a winch. It was further said that the remarks were made when Mr Davis did not know that Mr Healy was definitely going to be the purchaser, that there was no enquiry made as to his expertise of such matters, and in any case the contract was qualified by the use of the words "as is where is". It was further submitted that even if there were the representations of fact pleaded, these were not material and were not shown to have induced Mr Healy to enter into the contract. Reliance was placed upon the statements in Halsbury, 4th Edn. Vol. 31, para. 1066 dealing with the well-known requirements as to inducement and materiality in relation to matters of representation. As to these aspects, it is true that Mr Healy frankly admitted that he was very interested in the boat and eager to purchase it. At the same time, it is my conclusion that he relied strongly upon assurances as to the state of the hull and the engine which were obviously material matters and he made it clear and I accept that he would not have proceeded with the purchase had he known the engine was of lower horse power and inoperable and that the hull was extensively affected by worm and rot.

The question then is whether the fact that the contract was drawn up without reference to the matters of the condition of the hull and the condition of the engine as distinct from its type and that there was included the reference to the vessel having been inspected by the purchaser and to it being purchased "as is where is" are sufficient to prevent Mr Healy from recovering any damages. My conclusion is that the representations which I have found were here made were made in such a way and in such circumstances as to become conditions of the contract between the parties or, alternatively, warranties upon which Mr Healy is entitled to rely and for the breach of which he can claim damages notwithstanding the matters to which I have just adverted. As to this aspect, it is necessary to have regard to the totality of the evidence in the case. There are a number of factors I find to be present here which lead me to the conclusion that the statements made as to the condition of the hull and of the engine were intended by the parties to form actual conditions of the contract as distinct from mere representations. Factors which are of importance in this regard are adverted to and listed in Halsbury, 4th Edn. Vol. 9, in the title "Contract" at para. 347. The first of these is the question of the shortness of the time lapsing between the making of the statement and the formation of the contract. That time was clearly here very brief. The evidence shows that Mr Healy's offer was made and a contract drawn up immediately after he returned from Whangarei from seeing the vessel and receiving Mr Davis's assurances regarding it together with a re-iterated assurance obtained

by telephone through Mr Davis's agent. The contract then signed between Mr Davis and Mr Healy was, it is true, not the contract upon which the purchase proceeded as that contract was subject to Mr Davis's solicitor's approval and this was not given. The contract on which the sale actually proceeded, however, was simply a modification of this with some altered terms designed to meet stipulations made on behalf of the vendors, there being other parties than Mr Davis apparently then involved and to incorporate the stipulation regarding possession to meet Mr Healy's special requirements.

As regards the second point referred to in this passage, I have already found that Mr Healy made it very clear that he would not have contracted without the assurances being given.

The third aspect referred to is also, I find, in favour of the treating of the assurances as a term of the contract, that is that they related to facts which were or should have been within the knowledge of the vendor Mr Davis and of which Mr Healy was ignorant.

I have already found that there was no suggestion made here to Mr Healy that he should obtain an independent survey or opinion and I am unable to conclude that Mr Davis was innocent of fault in giving these assurances to Mr Healy and it is certainly not in my view unreasonable that he should in all the circumstances here be bound by those assurances.

The only point therefore of those mentioned in this passage operating in favour of the contrary view is the absence of reference to the hull and condition of the engine in the written contract. That fact, however, will not avail a vendor if all the circumstances present indicate that the parties intended that the representation should be contractual. They can, of course, alternatively, be regarded as constituting an independent collateral contract but this will not usually be held to be the position if the collateral matters contradict the written terms. There is in fact here, however, in my view, no actual contradiction. The use of the description "as is where is" was very understandable in the circumstances here where the vessel being sold displayed obvious signs of the deck being in a very poor condition and there were obvious signs of damage and generally the vessel was in no condition to put to sea because the mast was not in it and all the rigging had to be supplied by the purchaser and winches re-installed and the like.

The case, therefore, in my view, does indeed fall into the same category as that which was considered in Coffey v. Dickson (1960) NZLR 1135 where the purchaser of a milk bar did not look closely at the plant but was assured that it was in good working order. There, as here, nothing was mentioned in the agreement regarding the state of the plant.

There are other decided cases upon which Mr Healy is here in my view entitled to rely. Thus in Couchman v. Hill (1947) 1 All E.R. 103 the purchaser of a heifer at auction.

received a verbal assurance that it was unserved. The conditions of sale contained one reading -

"The lots are sold with all faults, imperfections, and errors of description, the auctioneers not being responsible for the correct lot, and giving no warranty whatever."

The heifer so purchased suffered a miscarriage and died and the purchaser was held entitled to recover it being held that the conversation between the parties before the sale amounted to a warranty by the defendant which overrode a condition in the printed terms. This decision of the Court of Appeal in England was approved in a later decision of that Court, Harling v. Eddy (1951) 2 All E.R. 212 where, again at a sale at auction, the conditions included one providing that -

"No animal, article, or thing is sold with a 'warranty' unless specially mentioned at the time of offering, and no warranty so given shall have any legal force or effect unless the terms thereof appear on the purchaser's account."

The plaintiff, however, was held to be entitled to rely upon the assurance of the defendant who offered a heifer for sale that, despite its unpromising appearance there was nothing wrong with it and that he would absolutely guarantee it and would be willing to take it back if it proved not to be as he had stated.

Mr Midlane relied upon the decision in Heilbut

Symons & Co. v. Buckleton [1913] AC 30 which was applied in Donovan v. Northlea Farms Limited [1976] 1 NZLR 180. These are cases where questions of this kind have been dealt with on the basis of the alternative referred to in Coffey v. Dickson (supra), i.e. that of collateral contract, the basis of such collateral contract being that the consideration for which it is made is the making of some other contract. Mahon, J. in that case referred to the statement of Lord Moulton in the Heilbut Symons case that such collateral contracts the sole effect of which is to vary or add to the terms of the principal contract are viewed with suspicion by the law and must be proved strictly not only as to their terms but as to the existence of animus contrahendi. I prefer to base my decision in any case, however, here upon the basis that the representations were such on the evidence as a whole as to be incorporated as terms of the contract for the sale and purchase of the yacht or were, alternatively, warranties in respect of which Mr Healy is entitled to claim damages for breach thereof notwithstanding the wording of the contract.

As was pointed out in J. Evans & Son v. Andrea Merzario [1976] 2 All ER 930 at p.933 by Lord Denning MR:

"The cases are numerous in which oral promises have been held binding in spite of written exempting conditions; such as Couchman v. Hill [1947] All ER 103, Harling v. Eddy [1951] 2 All ER 212, City of Westminster Properties (1934) Ltd. v. Mudd [1958] 2 All ER 733. The most recent is Mendelssohn v. Normand Ltd, where I said: 'The printed condition is rejected because it is repugnant to the express oral promise or representation'."



For the reasons I have mentioned, I do not think that the provision in the contract is in reality actually inconsistent with the assurances that were here given but if it is to be so regarded then I would rely and act upon the cases there cited.

I accordingly turn to the question of assessment of damages. With regard to the claim for damages in respect of the misstatements as to the condition of the hull, I am satisfied that the costs solely attributable to the repairs effected by Smith's Boatyard Ltd. which were necessary to eliminate the rotted and worm-eaten areas were fairly estimated by the boatbuilder, Mr Smith. He, by an analysis of all the accounts rendered to Mr Healy, and from his full general knowledge of the work done, arrived at a figure of \$7,575 to cover both labour and materials. This did not include a certain amount of timber supplied by Mr Healy himself in respect of which no separate claim was made. Mr Smith was cross-examined at length but nothing emerged which leads me to doubt the reliability of the assessment arrived at by Mr Smith. The expert evidence of Mr Pope, in which he questioned the figure put forward by Mr Smith, was led on behalf of Mr Davis. Apart, however, from referring to the difficulties of assessment without more detailed accounts, Mr Pope offered no real criticism of the overall figure arrived at by Mr Smith. I accept the figure of \$7,575 as a proper assessment of the damages under this heading.

It is next necessary to refer to the considerable volume of evidence relating to the question of the damages attributable to the necessity to replace the engine completely.

The first item under this heading presents little difficulty - that is the cost to Mr Healy of the second-hand engine obtained by him as a replacement. The invoice produced shows the "wholesale" price as \$5,000 and reference is made there to a motorcar taken in part payment with the note "should realise \$2,500" and to a cash payment of \$3,010, the \$10 being simply to pay for the registration of the change of ownership of the car. Mr Healy said the price was \$5,500 and that the \$5,000 figure was, he assumed, put in by the vendor who was an importer "to save himself a little bit of tax". I find this somewhat unsatisfactory evidence and conclude that the proper course is for me to accept simply the price the invoice records. This I understood Mr Bright to accept.

There is then the further claim for the difference in value between an 871 185 H.P. Detroit G.M. Diesel and the 453 model with which Mr Healy had to be content because the larger engine would not in any event fit into the very limited space available in the engine compartment of the yacht. A claim of \$3,000 is advanced for this. Mr Brooke's opinion was that the difference in value between the 671 model and the 453, taking both to be engines in good condition and working order would be in the order of \$4,000 to \$5,000. There was no evidence, however, with regard to the difference if the 453

engine was turbo-charged as was the one obtained and installed by Mr Healy. The turbo-charging resulted in some substantial proportion of the power rating difference between the two engines being eliminated. I think it must also be taken into account that there was no evidence as to how many hours running the engine obtained by Mr Healy had had. He knew something of the history of the Nam Sang and must surely have appreciated that its engine was very likely to have run a very large number of hours. Altogether, my conclusion is this item is properly and fairly assessed at the figure of \$1,000 only.

The next item - that relating to the costs of removing the old engine and re-installing the replacement engine -- is the most difficult to assess. There was conflicting evidence as to this. Mr Stainton's evidence showed that, in reality, there was also included in the claim of \$11,859 as originally advanced in Mr Healy's statement of claim, costs related to the stripping down and testing of parts of the engine removed from the yacht in order to ascertain whether it was economically repairable. The estimates of cost obtained were in the vicinity of \$3,000 for parts and \$5,000 for labour. The cost thus incurred is clearly in my view a proper item of claim. Mr Healy had certainly to ascertain whether the engine was repairable. Even with repairs thus carried out, however, the reliability of the engine would, according to Mr Stainton, be suspect and this alternative was quite rightly rejected in my view.

During his evidence, however, Mr Stainton acknowledged that an amount of \$1,282.65 in respect of particular parts items included in the account for \$11,859.11 should be deducted from the amount claimed against Mr Davis. It was said, however, that there was a further account of \$4,314.48 rendered to and paid by Mr Healy which was not included because of the charging system adopted when the account for \$11,859.11 was given to him and that by eliminating this further account from consideration, a fair apportionment was arrived at between the charges properly attributable to the removing, testing and replacement of the old engine and the installation of the replacement engine and the substantial items of other work carried out for Mr Healy at the same time.

This further work included modifying and upgrading the fuel system, including all the fuel lines, and the installation of filters, installing switching devices and a two pack system for the batteries and also providing for a water cooled exhaust system. Mr Stainton admitted that without full time sheets available to him, he could not say whether this method of apportionment made any or a proper allowance for the labour involved in the additional items which the list of costs for parts included in the account for \$11,859.11 showed had been installed and which were admittedly not claimable against Mr Davis. In addition to this, account must be taken of the fact that both Mr Malone and Mr Pope were of the opinion that the labour charges for removing and re-installing of the two engines were excessive because the hours were very excessive. I do not, for reasons already indicated and because of the

special relationship which clearly existed between Mr Malone and Mr Davis, attach much importance to Mr Malone's evidence about this aspect. As regards that of Mr Pope, I think that he attached far too little importance to the special difficulties which were no doubt presented through the engine in the yacht having been so grossly neglected as I am satisfied on all the evidence that it was. The removal of badly corroded bolts for example could well, as the evidence showed, have added very considerably to the time involved. So also could the factors referred to by Mr Stainton and accepted by Mr Pope as to the fact of the work being carried out by a large engineering shop with many union practices and restrictions adding to the costs. Account also must be taken of the fact that there is no evidence to indicate that Mr Healy had any real choice as regards who did the work, having regard to where the yacht was lying when he purchased it. I conclude also that Mr Pope failed to take account of the fact that modifications of the engine compartment had to be effected to cope with the additional space required by the turbo equipment and the need to make changes as regards the engine bed.

Making the best and fairest estimate that I can in the light of all the evidence presented, I conclude that overall costs of \$7,000 attributable to matters within the ambit of the claim would be reasonable and this is the figure I adopt under this heading. From this figure, however, a deduction of \$1,000 agreed to by Mr Bright has to be made in respect of the allowance for the parts value of the old engine.

The final item is that relating to the winches. Here, I accept the figures of \$8,500 and \$1,910 previously mentioned as representing costs necessarily incurred after taking all steps which reasonably could be expected to minimise the loss. \$20 should be deducted as salvage value of the pedestal making the figure under this head \$10,390. I am not able to find any evidence which would justify my concluding that in the end Mr Healy finished up, as Mr Midlane contended with a better winch system than he would have had if the Nam Sang winches had been as represented.

I accordingly conclude that Mr Healy is entitled to judgment against Mr Davis on the counterclaim for the sum of \$29,965.98 computed as follows:

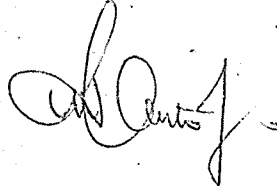
Hull repairs	\$7,575.98
Reduced value of model of engine as delivered	1,000.00
Removal, stripping and testing of old engine and installing second-hand engine less allowance of \$1000	6,000.00
Cost of second-hand engine	5,000.00
Cost of purchasing, adapting and installing "coffee grinder" winches	10,390.00
	<u>\$29,965.98</u>

The plaintiff Mr Davis is of course entitled to judgment on the counterclaim because Mr Healy elected to keep the vessel. He is to have judgment on his claim for the sum of \$18,450.00. I do not think, however, that this is a case where the Court should properly exercise its discretion under the Judicature Act 1908 and award him interest after June 1980.

I accept Mr Bright's submission that by this date, Mr Davis should have been well aware that the amount of Mr Healy's counterclaim was likely to exceed the amount owing under the instrument by way of security. If he were allowed interest after that date, then I think Mr Healy should be also. I think the position is met fairly in all the circumstances by disallowing the claim for interest under the Act as regards both parties.

As regards costs, the general rule is that when there is a claim which succeeds and also a counterclaim, each party should be awarded costs as though they were independent actions. (See Rule 566 of the Code of Civil Procedure). This is subject, however, to the overall discretion of the Court. In the present case, the plaintiff, Mr Davis, is entitled to judgment on his claim for the sum of \$18,450 but because the amount and indeed his right of recovery under the claim in the action were undisputed at the hearing and indeed on the pleadings, the only costs I award to the plaintiff on the claim are those on the issue and service of the writ based on the amount of \$18,450 plus the issue fee on the writ. He is not entitled in terms of the judgment, I direct, to witnesses' expenses for the trial as all witnesses were called in relation to the counterclaim. The defendant, Mr Healy, is, in terms of the judgment, to have costs according to scale on the amount of \$29,965 together with disbursements and witnesses' expenses as settled by the Registrar and I certify for 4 extra days at \$300 per day and for \$75 in respect of discovery and inspection of documents. In terms of Rule 301 of the Code, when the overall

amount has been ascertained which each party is entitled in terms of this judgment to recover against the other, the amount to which the plaintiff is entitled is to be set off against the amount which the defendant is entitled to recover and judgment entered in favour of the defendant against the plaintiff for the balance.

A handwritten signature in cursive script, appearing to read 'W. C. G. J.', is written in the right-hand margin of the page.

SOLICITORS:

Peter E. Newfield, Auckland, for Plaintiff.  
Johnston Prichard Fee & Partners, Auckland, for Defendant.