

Marine Surveyors Experience Stormy Waters

By Pauline Barratt

There have, this year, been two decisions of the High Court which have examined the nature and scope of duties owed by marine surveyors when undertaking pre-purchase inspections of boats. Some of the comments made in the judgments will be of interest not only to surveyors, but also to their professional indemnifiers and to hull insurers. They may also be some useful analogies to be drawn with the issues currently facing building certifiers.

Macdonald v Tod

Macdonald v Tod is a judgment of Justice Asher, on appeal from a decision of the District Court. The Tods had purchased a 1942 45-foot launch called *Talua* for \$92,000, on the assurance of a pre-purchase report from Mr Macdonald that the *Talua* was in safe and seaworthy condition for her age.

After the Tods had owned the *Talua* for a year, during which time she had performed satisfactorily, they decided to sell her. The intending purchaser arranged his own survey. The surveyor discovered extensive rot, concluded that the hull was not sound, and recommended a large amount of structural work.

The Tods were concerned, and arranged a further survey. This third survey largely agreed with the second, but found even more defects. The Tods sold *Talua* at a substantial discount, and sued Mr Macdonald. His defence that the rot had not been present at the time of his inspection was rejected, the court accepting evidence that it had taken many years to develop.

The primary issue then became whether Mr Macdonald should have discovered the rot, as his contract with the Tods included a disclaimer in respect of defects not discoverable without "additional opening up", something which he said he would not undertake. Such a disclaimer is common in contracts of this type. The rot would have been discovered if Mr Macdonald had lifted a carpet that was secured at the edges by hooks and strips of wood. He regarded this as being

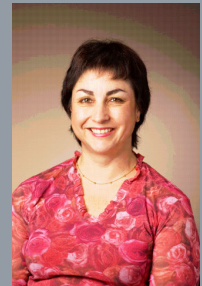
"additional opening up" and outside the scope of the contract. However, the District Court held that the decision not to lift the carpet was at least in part the result of undue reliance on the previous owner's assurances of meticulous maintenance, which the court considered made Mr Macdonald act in a way that was less than wholly independent.

The High Court considered the legal obligations faced by Mr Macdonald against a test of what would be expected from a competent marine surveyor. Justice Asher noted the difficulty in assessing this, given the absence of a professional body of surveyors, any system of peer evaluation, an accepted career path or a recognised qualification. However, he said that the failure to identify the presence of rot at the time of survey did not necessarily mean that the survey had been carried out negligently; and that the standard of reasonable care and skill allows for a margin of differing opinion and even a degree of error.

Against that background, the meaning of "additional opening up" was considered. The trial judge had concluded that proper practice included removing bunks, swabs and drawers, light floor coverings and any cabin floors that were held in place by their own weight or by screws. Essentially, everything inside a boat that could be inspected, should be. The High Court did not disagree with this, and said that none of those steps would constitute "additional opening up". The word "additional" should be taken as referring only to those areas which would be additional to those normally sighted on an inspection. It would exclude invasive examination, but not ordinary or usual opening up. The rot on *Talua* was discoverable on this assessment, and therefore the disclaimer did not exclude liability.

Meister v Carey

This decision involved the purchase by Mr Meister of the wooden 65 foot two-masted ketch *Enterprise III*, which had been built in Japan in 1975. A pre-purchase survey was carried out by Mr Carey, of Carey's Boatyard in Picton. Mr Meister's written instructions in respect of the survey were for inspection of the hull, framework and deck as priority items, with a particular requirement for any major issues to be identified.



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This was in a context where the vessel was 28 years old, and was known to have been somewhat neglected by the vendors, meaning that minor defects were to be expected.

The subsequent report concluded that the vessel was in good shape with only three areas of rot needing attention. Mr Meister relied on the report in proceeding with the purchase. The *Enterprise III* was sailed to Tauranga, and a boat builder was engaged to repair the defects identified by the survey. At that time the extent of rot was found to be worse than expected; and additional defects were found.

The Court held that, having discovered rot in the hull, Mr Carey did not take sufficient care to determine its extent. The vessel was of triple skin mahogany construction and expert evidence was that, not only are some mahoganies susceptible to rot, but that it is known that extensive rot is often found in the inaccessible middle planking. Mr Carey should have taken core samples to find out whether the middle planking was affected – as it proved to be. It was also clear that Mr Carey had missed rot that was externally visible; and that had he investigated the source of an obvious leak into a cupboard he would have found extensive rot in the underside of the decks and gunwales above the engine room. Similar findings were made with respect to other areas of damage.

As a consequence of all this Mr Meister was not alerted to the true extent of damage and an estimate given to him by Mr Carey as to the likely cost to repair the rot, was too low. However, as Mr Meister had purchased the vessel in the knowledge that some expenditure would have to be incurred his claim (brought in the High Court) was for the difference between the estimate and the actual cost of repairs.

The question of damages proved to be a problem for Mr Meister. He sued for \$49,358.11 but added claims for general and exemplary damages.

However, Mr Meister had carried out extensive refurbishment of the vessel at the same time as the repairs were being done, and separating the repair from the refurbishment costs proved difficult. The Court therefore discounted a number of the costs claimed, and disallowed others altogether. Mr Meister's claim for the assumed cost of his own labour was dismissed, as was a loss of profits claim based on the missing of a charter season – the vessel was not at any time during that season in survey and able to be used for charter work.

The general damages claim for stress and inconvenience was dismissed because it was not proved that the stress was caused by the defendant's fault as opposed to the need to undertake the additional refurbishment; and the claim for exemplary damages also failed.

The result was a judgment for \$31,783. This was of course well within the jurisdiction of the District Court, and while the question of costs was reserved for submissions from the parties the judgment suggests a view by the Judge that costs should only be awarded at the District Court scale. The eventual outcome is likely to be only a Pyrrhic victory for Mr Meister.

Conclusion

There are a number of lessons that can be taken from these two decisions. From an intending purchaser's point of view the primary lesson is to ensure that the extent of the survey that is expected to be undertaken is clearly defined. At the very least the purchaser should have a firm understanding of what the surveyor proposes to do. The level of fee charged may be a useful indicator – there was evidence in *Meister v Carey* that the agreed fee was \$450, but that a comprehensive survey would have cost around \$2000.

Surveyors, also, need to define the limits of their intended inspection. However, they need to take particular care to qualify any aspects of their report that may not be complete as a result of a limited inspection and to make recommendations as to further work, if that may identify faults. For example, in *Macdonald v Tod*, Mr Macdonald could have specified that he had not lifted the carpet and that he had no knowledge of anything underneath. Mr Carey, in *Meister v Carey*, would have been well advised to report that he had found rot and that core samples needed to be taken to determine its extent. Unqualified assurances as to the condition of any vessel will form a good starting point for any purchaser who suffers loss as a result of an inadequate inspection or report.

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- **Macdonald v Tod**
 - High Court, Auckland, 10 February 2006
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- **Meister v Carey**
 - High Court, Blenheim, 3 July 2006

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A Ship is a Ship is a Ship

By Richard Hart

What is a ship? In the absence of a single definition in either New Zealand or international maritime law, much will depend on the particular circumstances of each case, and on any applicable statutory context. Two recent cases have grappled with the issue, and reached quite different conclusions.

One of most common legislative definitions of “ship” is “every description of vessel used in navigation”: see, for example, the Ship Registration Act 1992 and the Maritime Transport Act 1994 (“MTA”). There are thus two limbs to this definition. First, the ship must be a vessel, which suggests at least a container of some sort: *Fletcher Steel v The Un-named Double-Ended Gravel Dredge* (HC 1988). Second, the vessel must be “used in navigation”, which term, although not defined, is considered to involve some concept of purposeful movement: *Thompson v Police* (HC 1992). The Courts have tended to focus, not on any actual use in navigation, but on the vessel’s capability and intended purpose.

In *Lloyd v Registrar of Ships* (1989), the High Court held that the key question (in the particular statutory context) was “is this description of vessel used in navigation?” So, for example, an unlaunched but otherwise fully completed motor boat would come within the definition, but a hull without engines or any means of steering or propulsion would not. However, in *Independent Boat Builders v The Unnamed Ship* (1996), the Court adopted a stricter test, holding that a ship under construction is not subject to *in rem* admiralty jurisdiction until it is actually launched and in the water.

The issue of non-conventional craft can pose further difficulties. In *The Un-named Double-Ended Gravel Dredge* (which must surely qualify as one of the best case names in New Zealand legal history), the Court held that a floating gravel dredge and screening plant were not “ships” for the purposes of admiralty jurisdiction, because they were not used as containers, had no means of propulsion and could not be towed as a barge.

Two recent decisions have considered whether particular types of non-conventional craft fall within the definition of “ship”. In *R v Goodwin* (2006), the English Court of Appeal had to determine whether a jet ski was a “ship” for the purpose of imposing criminal liability for a collision. The relevant statute defined “ship” as including “every description of vessel used in navigation”.

The Court of Appeal held that the nature of the jet ski’s construction did not preclude it from being a “vessel” within the meaning of the definition. However, the Court held that the “used in navigation” requirement confined the definition to vessels which are used to make ordered progression over the water from one place to another. While it is not a necessary requirement that the vessel should be used in transporting people or property to an intended destination, craft that are simply used for having fun on the water without the object of going anywhere are not “used in navigation”, and are thus excluded from the definition of “ship”.

There can be no criticism of the Court’s finding that “navigation” must mean the planned or ordered movement from one place to another on water. However, in deciding that the operation of a jet ski did not qualify as “navigation” in this sense seems incorrect – even though a person rides a jet ski for the purpose of enjoying (as the Court put it) “the thrills of water skiing without the ties of a boat and tow rope”, it is difficult to escape the conclusion that this nevertheless amounts to planned movement on water. A jet ski is as capable of being purposefully moved from one place to another as any other vessel that qualifies for the label “ship”. There is a sense in reading the judgment that the Court reached its finding on the basis that jet skis have no other real purpose than “the exhilaration of high speed movement over the surface of water”. Mucking about, in other words.

In *Birkenfeld v Yachting NZ Inc* (2006), the New Zealand Court of Appeal had to consider, amongst other issues, whether a rigid inflatable boat (“RIB”) was a “ship” for the purposes of the limitation of liability regime contained in section 85 of the MTA. This section is intended to implement New Zealand’s obligations under the London Convention on Limitation of Liability for Maritime Claims 1976 (“the Limitation Convention”).



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Ms Birkenfeld had been severely injured in a collision between her windsurfing board and an RIB owed by Yachting New Zealand (“YNZ”). In the face of Ms Birkenfeld’s claim against YNZ and others for damages in the amount of \$15million, YNZ sought to limit its liability under section 85.

Section 84 of the MTA defines “ship” for these purposes as meaning “every description of vessel (including barges, lighters, and like vessels) used or intended to be used in navigation, however propelled...”. The High Court had held that the RIB fitted within the ambit of the term “ship”, and that it was therefore open to YNZ to rely on section 85.

In the Court of Appeal, Ms Birkenfeld argued that the rationale of the Limitation Convention is to facilitate commercial shipping, and that “ship” has to be interpreted in that light. She contended that the cases relied upon by YNZ to show that a ship could include, for example, a barge or a kayak, related to legislation which defined “ship” for purposes other than limitation of liability.

The Court disagreed. It considered that the MTA had to be read in light of the international law of the sea, and that consideration of the Limitation Convention did not warrant any different view or limit the matter in the way in which Ms Birkenfeld suggested.

Ms Birkenfeld also sought to rely on *Goodwin*, and in particular the English Court of Appeal’s view that craft such as jet skis were simply used for having fun without the object of going anywhere, and were thus not “ships”. However, the New Zealand Court of Appeal held that *Goodwin* turned on “the particular issues involved with jet skis”, and that there was nothing to suggest that the RIB was not used in navigation in the sense of planned movement. Accordingly, the High Court’s finding that the RIB was a ship was upheld, allowing YNZ to rely on section 85.

While the outcome may seem harsh for Ms Birkenfeld, it seems appropriate that the New Zealand Court of Appeal restricted its English counterpart’s finding in *Goodwin* to its own facts.

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