Neutral citation No [2018] EWHC 4062 (Admlty)
Claim No. AD-2017-000060

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
ADMIRALTY COURT
Before Admiralty Registrar Jervis Kay QC

B E T W E E N:-

DAVID GREATBATCH

Claimant

- and –

SIRIUS MARINE SERVICE LIMITED

Defendant

Appearances

For the Claimant – Mr Charles Irvine instructed by LA Marine
For the Defendant – Mr Terence Saich, a director of the Defendant Company

Hearing dates: 26th –27th September 2018

APPROVED JUDGMENT
(Handed down on the 17th December 2018)

The Background

1. This is the trial of a claim related to osmosis treatment carried out by the Defendant to the Claimant's vessel, "RHAPSODY" ("the vessel"). The Claimant contends that the work was not properly performed and claims damages for the rectification of the work and the loss of use of the vessel over the relevant period.

2. During the course of the trial I was provided with witness statements from Mr Greatbatch, Mrs Sue Greatbatch, Mr Mike Godding and Mr Robert Freemantle for the Claimant and Mr Terence Saich, Ms Gillian Harman and Mr Neil Harman for the Defendant. Mr Tom

Barrow was jointly instructed to provide expert evidence and I was provided with his report and also the questions and answers provided by him. Mr Greatbatch, Mrs Sue Greatbatch, Mr Mike Godding, Mr Terence Saich, Ms Gillian Harman and Mr Neil Harman all gave oral evidence. Mr Barrow was not available to be called to give oral evidence and the parties agreed that the trial could proceed upon the basis of his written evidence alone.

3. Exhibited to the witness statement of Mr Freemantle was an email from Ms Kate Moss of International Paint Ltd regarding her observations as to samples of paint sent to her by Mr Freemantle. There was some dispute as to the provenance of the samples and the weight to be placed upon the email from Ms Moss. In that respect the Defendant relied upon correspondence between themselves and one Mr Dennis Tuijnman of Akzo Noble in the Netherlands which I understand to be a part of the group which includes International Paint. This correspondence was included in the evidence placed before me.

The history of the dispute

4. The matters relevant to this dispute took place over a period of four years and there are disputes as to the precise timing of events and what was said and done during that period. Having heard the witnesses I have sought to set out what I conclude to be the essential facts underlying the dispute.

5. In June 2010 the Claimant was considering purchasing the vessel and asked Mr Godding to provide a pre-purchase survey. The vessel is a Freeman 32 motor cruiser, built in 1972 of GRP. She is powered by twin Thorneycroft diesel engines. From the photograph of the vessel supplied to the court it can be seen that she is fully decked with accommodation forward and aft of a centre cockpit. She thus appears to be a vessel which is suitable for seagoing, coastal, estuarial or inland cruising, subject to being fitted with an appropriate anchor, navigation and lifesaving equipment.

6. On about the 1st June 2010 the Claimant contacted the Defendant by email and asked whether the Defendant would provide a rough price for carrying out "*full osmosis treatment*" to the vessel. The Defendant, probably acting by Ms Harman at that stage, responded that they could provide such a quotation after an inspection of the vessel. At that stage I do not think there is any doubt that the Defendant was a company which held

itself out as performing work to repair osmotic damage to a vessel and that the Claimant understood that to be the case. In fact by her email dated the 3rd June 2010 Ms Harman referred to osmosis treatment and stated that:"*We are skilled in this treatment . . . we will try and give you an indication of the cost involved in treatment; - To remove all previous coatings by sand blasting, grinding out blisters, filling with an epoxy filler and applying 3 to 4 coats of gelcoat. Storeage during the drying out period and finishing with 2 coats of Gelshield or similar . . . .£5,000 plus VAT*" (emphasis added).

7. Mr Godding prepared and provided to the Claimant a pre-purchase survey on the 15th June 2010. The relevant findings in that report state: "*On the exterior of the hull below the waterline I removed random areas of anti-fouling paint, I inspected the surface and metered for moisture absorption. It is apparent that an amateur osmosis treated* [sic] *has been attempted, a proper osmosis treatment entails planing the gelcoat off completely below the waterline, cleaning and drying the laminate and then recoating with a suitable solvent free epoxy paint system. In this case it seems that just the visible blisters were sanded off rather than removing all the gelcoat, which is almost bound to lead to a recurrence of the problems. There are now blisters in the paint and in the gelcoat under the paint, in many cases the filler is cracked or missing. High levels of moisture register on each of the fourteen areas checked. Moisture absorption will weaken the laminate and shorten the life of a fibreglass hull and so it is imperative that a full osmosis treatment is carried out, to maximise the lifespan of the vessel this should be done in the next two years. . . . the hull and superstructure remain sound. The only significant concern is the moisture absorption in the gelcoat below the waterline, a full osmosis treatment should be carried out in the next two years in order to maximise the vessels lifespan*" (emphasis added).

8. The Claimant purchased the vessel in July 2010. Thereafter the vessel was delivered to the Defendant and on the 4th November 2010 Ms Harman sent an email to the Claimant providing a quotation for the osmosis treatment in the sum of £4,465.77 plus VAT. There is a dispute as to whether the survey report was shown to the Defendant and as to what work the Defendant was engaged to perform. The vessel remained in the Defendant's yard over the winter of 2010-2011 during which the Defendant performed work on the vessel. As will appear below problems with the vessel's below water paintwork and/or osmosis treatment developed.

9. The vessel was redelivered to the Claimant and he was invoiced for the work in April 2011. The Claimant paid £5,973.59 for the work during the period which was £1,507.82 more than the original quotation. The additional sum is, in the Defendant's covering letter of 16th May 2011, stated to have arisen from additional work to the cutlass bearings which were found to be necessary. The Claimant thereafter had the use of the vessel during the summer seasons of 2011 and 2012. In October 2012 the Claimant had the vessel lifted from the water and noticed that the stern area and four other areas on the hull had turned green. He informed the Defendant on the 28th October 2012 and was informed by the Defendant that the colour differences were normal. The Claimant was reassured by this advice and took no further action at that time. In February 2013 the Claimant observed that osmosis blisters had reappeared on the vessel's transom below the waterline. He informed the Defendant which, after inspecting the vessel, offered to perform remedial work at no cost to the Claimant.

10. I understand that the Claimant had the use of the vessel during the summer season of 2013 and the vessel was returned to the Defendant in September 2013 for the remedial work to be carried out. The Claimant expected that the work would be completed in time for her to be used during the summer season of 2014 and, in January 2014, he applied for a renewal of his Avon Navigation Trust annual licence (for £237) and also paid for his annual membership of the Canal Rescue Service. However it transpired that the vessel was not lifted by the Defendant until December 2013 and, in February 2014, the Claimant was informed by the Defendant that the remedial treatment needed to be applied to the whole of the hull. The Claimant was given a completion date in May 2014. However by May 2014 the work had not been completed whereupon the Claimant requested that the work to the vessel should be completed in June 2014 but was told by the Defendant that it would not be possible to complete the work by then. A further request that the vessel be completed by July 2014 also received the response that it would not be possible. As a result the Claimant did not have the use of the vessel during the summer season of 2014.

11. In August 2014 the Claimant asked Mr Godding to inspect the vessel and provide him with his opinion on the progress of the remedial works. Mr Godding provided a second short survey report stating he had inspected the vessel on the 13th August 2014 and noted that: "*It was apparent that not all the original gelcoat had been removed, at least 70% of*

the surface still has either gelcoat or filler remaining on it." This gave rise to a question as to the work performed in 2010-2011. From the letter from Ms Harman dated 19th August 2014 it appears to be the case for the Defendant that it had not, in 2010, been instructed to perform a "full osmosis treatment" but only a "patch treatment" and that this was agreed following discussions between the parties and apparently at the suggestion of the Defendant. As part of that dispute the question arose as to whether the Claimant had given the Defendant the information that the vessel had previously been patch treated, "*the same way we were suggesting*", which had failed. A further part to that issue was whether Mr Godding's pre-purchase survey was shown to the Defendant before the quotation of the 4th November 2010 was provided by the Defendant.

12. On the 6th September 2014 there was a meeting at the Defendant's premises and it was agreed that the Defendant would complete the remedial work in February 2015. In expectation that the work would be completed timeously the Claimant again renewed his Avon Navigation Trust licence in January 2015 at a cost of £243. The Claimant had requested Mr Godding to continue to monitor the work and on the 17th February 2015 Mr Godding confirmed that the vessel's hull was dry. On the 20th February 2015 the Defendant sent the Claimant an email that the seal coat Gel Shield Plus was ready to be applied to the vessel. The Claimant visited the vessel and on the 22nd February 2015 informed the Defendant that Gel Shield 200 appeared to have been applied instead of the Gel Shield Plus. On the 27th February 2015 the Defendant responded confirming that the wrong Gel Shield had been used and that it would be removed and the correct Gel Shield Plus applied.

13. The work on the vessel was completed and she was launched on the 28th March 2015. The Claimant then commenced using the vessel. However in May 2015 damage occurred to the propellers and the vessel was lifted to perform repairs. At that time the Claimant noticed that paint was coming away from the hull. The Claimant informed the Defendant of this by email on the 5th June 2015. The Claimant did not receive an answer from the Defendant and sent a letter to the Defendant dated the 27th June 2015. In that letter the Claimant has stated that " . . .*it has been confirmed to me that the final layers of paint have not been applied correctly and therefore did not adhered (sic) to the initial coats . . . I am entitled to expect the work you carried out for me to be of satisfactory quality and fit for purpose. . . .this has not been the case because the final layers of paint that Sirius*

applied to the underside of my boat is falling off after only 8 weeks from completion." The Claimant also stated that Sirius are in breach of contract and he requested a repayment of he has paid to Sirius amounting to £5,973.59. He also stated in the letter: "*As you have not to date replied to my email regarding this issue I can only assume that you are not interested in correcting this problem.*" It is to be noted that photographs taken of the vessel at the time indicate that the paint in the areas around where the chocks were placed was ridged which might indicate a lack of adhesion.

14. The Claimant sent samples of the detached paint to International Paint Ltd, the manufacturer's paint system used, and to the Defendant who also sought an analysis from the manufacturers. On the 8th July 2015 the Claimant received a letter from the Defendant stating that they were awaiting their own analysis from International Yacht Paints but thereafter he received nothing further and sent a chasing letter on the 9th August 2015 which led to an email exchange on the 11th August 2015. In the message to the Claimant Mr Saich asked for a larger piece of the paint to send to International Paint. The Claimant responded stating: "*As you can see from the photos I forwarded, sheets of paint are now falling off the hull and it is obvious its not the chocking up of Rhapsody at Marine Performances Yard that has caused this problem as you suggested in your recent letter. Other marine engineers have commented on the state of my hull and two have suggested the cause of the paint failure is possible amine sweating??? Whatever the cause of the paint failure is, I can only hold Sirius responsible, after all they applied the paint and its now important I act to protect the hull as soon as possible.*" Mr Greatbatch stated that he would try to get a further sample. In his witness statement Mr Greatbatch has said that he did send a further sample of the paint to the Defendant and although he sent a chasing email on the 8th September 2015 he heard nothing further from the Defendant. In October 2015 Mr Greatbatch instructed Cardiff Marine to carry out the remedial work to the vessel. That commenced in October and the vessel was returned to him in December 2015. That work involved the entire removal of the existing gelcoat and paint to ensure the new coating bonded properly. The cost of that work was £5,920 plus VAT. Since that work there has been no recurrence of the osmosis problem or problems with the paint.

15. It appears from the evidence that neither the Claimant nor the Defendant managed to get the co-operation of the paint manufacturers however, after the vessel was delivered to Cardiff Marine samples were sent to International Paint by Mr Robin Freemantle of

Cardiff Marine. That approach elicited a response from Ms Kate Moss who reported that there was "amine blush" on the sample which was consistent with the paint not having adhered to the vessel properly when it was applied. In her email of the 13th October 2015 Ms Moss has stated: "*I carried out an amine blush test on the flake you sent through and the result was a positive identification of an amine blush. As you know, if the coating develops an amine blush on the surface during curing, which is not subsequently removed, this will inhibit the next coat from adhering to the surface.*"

16. On the 22nd December 2015 the solicitors for the Claimant sought £11,949.92 damages from the Defendant. On the 15th May 2017 the Claimant commenced this claim. The Claimant seeks to recover against the Defendant for breach of contract and/or negligence. The specific sums claimed are: (a) The cost of the repairs carried out by Cardiff Marine - £7,104; (b) Transportation costs to and from Cardiff Marine - £1,300; (c) Lifting fees - £248.92; (d) Relaunching fees of £195; (e) The surveyors fees of £660; (f) Loss of use of the vessel - £3,400; (g) Breakdown Rescue fee for 2014 of £140.25, and (h) 18 months of mooring fees of £1,980.

17. Contrary to usual practice the Defendant has drawn attention to the subsequent mediation which took place on the 22nd August 2017, the offer which it made to the Claimant at the mediation and the subsequent offer made on the 27th March 2018. Both parties appeared to be content that this information was placed before the Court. On the 3rd October 2017 the Claimant obtained a default judgment which was set aside on the 8th March 2018. On the 24th July 2018 the report of the joint expert, Mr Tom Barrow of Complete Coatings Consultancy, was published. On 1st August 2018 Mr Saich asked Mr Barrow to provide answers to further questions. The Claimant objected and on the 15th August 2018 the Defendant made an application to the Court seeking an order that the questions should be answered. There was a hearing on the 18th September 2018 (by telephone) to consider this aspect.

18. As a result of that hearing modified questions were put to Mr Barrow. The first of these was relevant to whether, since the vessel had been placed back in the water on the 8th July 2015 and remained in the water until lifted on the 8th October 2018, hydroscopic action would have had any effect on the unrepaired areas around where the vessel had been chocked. The second question was whether the fact that the vessel was returned to the

water at the end of March 2015 within 3 days of the Gelshield 200 coating being applied would have had any effect upon the bonding process of the applied coatings and, if it would have done, whether the Defendant should have warned the Claimant against re-launching the vessel at that time. By subsequent agreement a further ancillary question was put to Mr Barrow which was whether, if the return of the vessel into the water on the 8th July 2015 had the potential to effect the paint on the vessel's hull this would have had any impact upon the works carried out by Cardiff Marine**.**

The issues

19. Mr Charles Irvine, for the Claimant, has submitted that the court should resolve the following issues:
    a. Whether the Rectification Work carried out by the Defendant was carried out within a reasonable time;
    b. Did the peeling paint extend through the layers of paint back to the GRP matting;
    c. What was the cause of the paint failure;
    d. Whether it was reasonable and necessary for the works carried out by Cardiff Marine to be undertaken.

20. *The case for the Claimant* is that the expert report of Mr Barrow and the other evidence support the following conclusions:
    a. The remedial works ought to take around 23 days plus drying time, not the 16 months which actually occurred;
    b. The paint peel extended over more than 2 layers;
    c. The cause of the paint failure was either amine blush, missing the overcoat window of the products or the paint was past its 'use by date'.
    d. In its Defence the Defendant admits, at paragraph 11, that " . . . *for one reason or another the antifoul and the final coat of epoxy failed to adhere to the previous coats of epoxy applied to the Vessel's hull and that it was the fault of the Defendant*". The Defendant also admits: " . . . *that the final coat of Gel Shield 200 and the antifouling paint failed to adhere to the previous coats of Gel Shield 200. The Defendant's negligence is admitted but limited to that extent*".
    e. In these circumstances the Defendant was admittedly in breach of contract and/or failed with respect to taking reasonable care in the work being performed and accordingly the Claimant should be entitled to recover its losses referred to above.

21. *The case for the Defendant*. Given the admissions made in its defence it is not easy to ascertain what the Defendant argues to establish that it has no or alternatively limited liability to the Claimant. From the correspondence between the parties, the skeleton argument provided by Mr Saich and from the issues raised at the trial a number of points have been raised upon which, so it appears, the Defendant relies as having an effect upon the outcome of these proceedings. These are:
    a. That in 2010 the Claimant did not provide a copy of the survey report to the Defendant when the Claimant asked the Defendant to provide the original quotation for the osmosis treatment. The issue appears to be whether Mr Godding's pre-purchase survey was shown to the Defendant before the quotation of the 4th November 2010 was provided by the Defendant**.**
    b. That in 2010 the Defendant was not contracted to provide a "full osmosis treatment" but some lesser level of work referred to as a "patch treatment". This contention appears to have first arisen in the letter from Ms Harman dated 19th August 2014.
    c. That the Claimant appointed Mr Godding as a surveyor and that he approved each stage of the work.
    d. That the Sirius terms and conditions no. 7.4 state that any remedial work put in hand by the customer without notifying Sirius will invalidate any guarantee in respect to those works.
    e. That the vessel was returned to the water at Upton, in July 2015, without any treatment to the areas where paint had been knocked off and that hydroscopic action could be responsible for stripping of the paint from the hull or the extent to which such paint was stripped from the hull.
    f. That on the 4th June 2015 Mr Godding advised that it would be necessary to remove the top layer of epoxy and antifoul and rebuild with fresh paint which could wait till the winter (of 2015-2016).
    g. That the Defendant offered to rectify the problem which is referred to in the Defendant's letter to LA Marine on the 4th August 2016, which offer was declined.
    h. That the Claimant had a duty to mitigate his losses in seeking to get the work done to rectify the problem at the lowest possible costs, having first sought and duly gained the approval of the Defendant.

i. That the email from Kate Moss of International Yacht Paints does not refer to Rhapsody or Mr Greatbatch and there is no provenance to prove that it refers to Rhapsody.
j. That the Defendant made an offer on 27th March 2018 of £1,500.
k. That the expert report was inconclusive.
l. That the questions referred to above were put.
m. That there are 4 possible reasons for the problem: (i) hydroscopic action; (b) Anime blush; (c) out of date material and (d) the wrong temperature and that, of these, it is reasonable to conclude that hydroscopic action was the real cause of the problem after the damage caused where the vessel was "chocked" and that, therefore the Defendant was not at fault and the case against it should be dismissed.

The witness evidence

22. Mr Greatbatch was the first to give evidence. He confirmed the contents of his witness statement. He explained that he had taken the photographs of the vessel's bottom in June, August and October 2015 which demonstrated the points where the paint had initially "shrivelled up" in way of the chocks and how large areas of paint had come off or flaked away from large portions of the hull. In cross examination he said he did not know about the paints and was not present when they were applied. He did not tell the Defendant how to carry out the work. He was not cross examined with respect to large parts of his evidence, particularly with regard to whether he had supplied Mr Godding's report to the Defendant or the whether the Defendant made an offer to carry out remedial work in 2015.

23. Mr Godding gave evidence as to his findings in 2010 and 2014. The reports are in evidence. He said it was unusual for it to take until January 2015 to dry the boat out. Usually such work would be performed over the lay-up period between October and Spring. The report of the survey in August 2014 indicates that the work done by the Defendant had failed, that it was apparent that not all the original gelcoat had been removed and at least 70% of the hull still had gelcoat or filler remaining on it. He noted that not all the gelcoat had been taken off in January 2015 and that it was removed at his recommendation. The usual process for dealing with osmosis is to remove all the gelcoat, clean a boat to remove any chemicals which can cause the problem, dry the hull out and

apply solvent free epoxy paints. The treatment, if properly applied, can last indefinitely and a recurrence of osmosis is not to be expected. In re-examination he was asked about the work commenced in December 2013 and said that he would expect the sequence to be that: the boat to be taken out of the water, the gel coat would be planed off, the hull would be shotblasted, the hulls should be washed to remove chemicals, that it should not take more than 6 months to dry the vessel out. That would be less if the vessel was moved indoors and heaters were used which should reduce the process to 4-5 months. Such a process would be usual. He said not taking the boat out of the water until December would delay the whole process. He said that the whole of the gelcoat should have been taken off but in January 2015 15-20% had still not been removed which surprised him as it should have been done months before.

24. Mrs Greatbatch was cross-examined as to whether Mr Godding's initial report was provided to the Defendant. She stated that it had been shown to Mrs Harman at the Defendant's yard and that it had been made clear that a full, not partial, osmosis treatment was required. She rejected the suggestion that it had been agreed that the treatment would be only partial. She explained about the paint which she saw had pealed off in August 2015 which she described as "bubbly".

25. Mr Freemantle did not give oral evidence but his witness statement was in evidence. He is the Director of Operations at Cardiff Marina and he inspected the hull when the vessel arrived at Cardiff in early October 2015 when, as he states large areas of the Gel Shield Plus had debonded. In multiple areas the vessel's paint had debonded from the first coat next to the GRP (ie. the glass reinforced plastic or fibreglass). He has stated that he sent a sample of the paint from the vessel to paint supplier, International Yacht Paints and received the exhibited email from Kate Moss dated 13th October 2015 which says that the sample had developed "amine blush" and therefore had not chemically or mechanically adhered to the previous layer. Mr Freemantle has stated that this was "*in line with my understanding of the issue regarding the paint.*" He has also stated: "*In order to rectify the defective paint, we needed to strip the Vessel's paint back to the GRP to ensure the new paint has a reliable bond throughout the hull. It would not have been possible to just replace the top coats of paint.*" He further states that the work was completed in December 2015 and the vessel was then returned to her owner.

26. Mr Neil Harman is a director of the Defendant. His evidence was provided in a statement dated the 14th June 2018. He refers to the first work as having been a "patch" treatment which had not provided a cure and that the rectification work would be carried out under warranty. After that the boat was returned to the Defendant in September 2013. His written evidence indicates that although no time frame was agreed with the Claimant he would have expected the work to have been done by the following spring. He has said that the transom was blasted to expose the blistering and "*noted that much of the hull had new blistering. We advised the client and proceeded to abrasively blast the whole hull with Aluminium Silicate*". He then says "*Having fully blasted the hull we left her to dry out in the yard before placing her into our paint shop . . . to dry out over the next few months*". He does recall there being some pressure to get the work done but this arose following a meeting at which Mr Godding was present. With respect to osmosis treatment he has said: "*The generally agreed route to osmosis treatment nowadays is fully dependent on the areas affected. If widespread and deep enough to reach the matting; A full strip of Gelcoat, rinsing, drying, application of biaxial matting and then rebuilding the protection layers to antifoul is recommended throughout the hull. If only small areas or not yet deep into the matting, then smaller patches can be treated as above. This is a recent change in industry thinking.*" (emphasis added). Mr Harman has referred to what happened after Mr Godding became involved which refers to the paint being applied after Mr Godding had accepted the moisture readings and stated that an employee applied the wrong paint which had to be rectified. The work then proceeded. After the vessel had been redelivered he refers to visiting the boat at Upton and agrees that paint was coming off although he states "*it appeared that this was due to chocking procedure and the way that it had been placed on the blocks*". He does not make any reference to meeting the Claimant or making any offer to provide rectifying work at that time but says that he took photos and a paint sample and returned to the office where he advised Terry Saich "*that it appeared to be a chocking incident but that would need to send the sample away to international and might need to carry out some patch repairs to the top most coats, where it had been damaged.*"

27. In addition to his witness statement Mr Harman gave a significant amount of further evidence in chief. The further evidence was as follows: (a) After the vessel was delivered to the Defendant in September 2013 she remained in the water and was not lifted until December 2013 because that was the "*first available slot*"; (b) Initially she was stood on a

trolley and not jet washed; (c) He could not say when the hull was blasted but referred to January to February 2014; (d) Mr Saich put to Mr Harman that at that stage the intention was to rectify the partial osmosis treatment. Mr Harman agreed with this leading question but he said that the vessel had been patch treated and not received a full osmosis treatment; (e) He stated that he was not at the yard at the time of the original work and cannot say what was originally agreed; (f) There was still gelcoat from before 2010 and that Mr Godding caused 15-20% taken off; (g) The steps taken to dry the hull were that the vessel was tented and plastic sheeting being used to create a wind tunnel. The vessel remained outside over the summer. The moisture readings were checked. He said the vessel was placed inside but he could not remember when. He thought that they started using heaters. (h) He had no recollection about the meeting in September 2014 but understood that the plan was to deal with the gelcoat and put the vessel back in the water in March 2015. (i) He visited the vessel at Upton. He could not see under the boat but thought that there had been aggressive chocking which had caused the paint to "ruck up". He took paint samples but International Yacht Paints have said that they did not want to be involved.

28. In cross examination Mr Harman said there was no time frame for the work to be done over the 2013/2014 winter and he was not aware of any initial discussions. With respect to when the work should have been completed he stated that the vessel should have dried out by the Spring of 2014. He said that it had not dried out by January 2015 and that 15-20% of the gelcoat, which he described as a small area, was removed. He referred to the flooding in the yard which took place over the 2013-2014 winter. That dried in March 2014 and the vessel was left to dry out until September. He agreed that the Defendant could have used heaters and he was not sure and had no explanation as to why heaters were not used earlier than they were. He agreed that the drying out process could possibly have been completed earlier. A dryer was used from January to February 2015 when they were given the "go-ahead" to complete the work. With respect to the photographs of the vessel (taken at Upton) he explained that there was a movement of the "gelshield 200". Gelshield 200 is the tie coat put over the "gelshield plus", which provides the water barrier, and allows anti-fouling to be applied. He stated that he thought that the gelshield 200 and anti-foul had failed. He could not answer whether the gelshield plus had failed.

29. Mrs Gill Harman provided a witness statement and gave further oral evidence that the Claimant was given the choice between a full and partial osmosis treatment for the vessel. The difference in prices was £5,000-£10,000. The Claimant chose the cheaper partial treatment. This was cheaper and was what was set out in the 2010 estimate. She stated that at the time the estimate was given she had still not seen the boat. She said that she was told that a surveyor had indicated that the vessel suffered from osmosis but did not recall being shown the surveyor's report. She said that, when she did see the vessel, the osmosis appeared to be in the stern and it was not until they sand blasted the boat that they realised there was a problem. She stated that the Claimant was informed when the rest of the boat was blasted. She has stated that she did not know that the transom of the vessel had been treated on an earlier occasion and that the Claimant should have informed her. As to the later paint problem in 2015 she stated that Mr Harman had said that it looked as though it had been caused by the "chocking". Although paint samples were sent to International Yacht Paints the Defendant could not get an answer from them. As nothing was heard from the Claimant it was assumed that the problem with the paint had been dealt with at Upton. She denied that the yard had breached a duty of care and did not accept that the yard had been negligent. As to the winter of 2014 she said that the yard was flooded and contaminated on the 7th February 2014 and was out of action until April. She said that was a matter outside their control.

30. In cross-examination by Mr Irvine Mrs Harman was shown the estimate which was dated the 4th November 2010 she accepted that the vessel was in the yard by that date and that she had had an opportunity to inspect the vessel before the estimate was made. She said that in June 2015 samples of the paint flakes were brought back from the vessel and were sent to International Yacht Paints. There is apparently no correspondence and Kate Moss did not contact the yard. In about August or September 2015 Mrs Harman says she contacted the technical department at International Yacht Paints and was told that they were not offering an analysis service and that the samples had probably been thrown away. With respect to the Claimant's letter of the 27th June 2015 Mrs Harman said she could not recall whether she saw that letter but said that it would have been discussed (presumably with Mr Harman and/or with Mr Saich). Mr Irvine put to Mrs Harman that the statement in paragraph 13 of her statement, to the effect that she had told the Claimant that if the vessel was brought back to the yard "*we would once again look at it as we were a yard with integrity and would not shirk our responsibilities*" was completely wrong.

Mrs Harman did not answer directly but responded that she would "*have expected to receive a call*". She stated that she was on holiday in August 2015 and was not aware of later communications. In response to the question related to Mr Saich's letter dated the 8th July 2015, which did not offer a remedy but simply denied fault, Mrs Harman responded that she does "*not believe that we were negligent*" and that their work was overseen. She said that she did know whether she had told Mr Saich that she had told the Claimant to bring the boat back. In response to a question by the court with respect to the email sent by her to the Claimant dated 3rd June 2010 which referred to the removal of all the gelcoat and application of paint at a price of £5,000 in response to the Claimant's email of June 1st which stated that the vessel needed full osmosis treatment and whether that could be reconciled with her previous evidence Mrs Harman did not provide a coherent or comprehensible explanation.

31. Mr Saich provided a brief witness statement which contained little direct evidence but made assertions which suggested that the Claimant was under a contractual obligation to disclose Mr Godding's 2010 survey, that the 2014-2015 work to the vessel was overseen by Mr Godding who approved each step of the process, that because the vessel was returned to the water at Upton without treatment to the paintwork hydroscopic action could have been responsible for stripping the paint from the hull and that there is no provenance in the samples sent to Miss Kate Moss.

32. In cross examination Mr Saich accepted that he was not a member of the company in 2010, that he became a director in 2014 and that his knowledge was from the correspondence in the file. He accepted that there is nothing in the documents which required the Claimant to disclose a survey. With respect to any terms and conditions he stated that there were earlier terms which had not been disclosed or pleaded. He accepted that in September 2014 it had been agreed that the work would be completed in February 2015. He stated that the deadline was missed because of flooding and because the vessel had not dried out. He himself was not technical but his responsibility was for "customer interface". He referred to the fact that Mr Godding was checking the moisture levels before the paint was applied but accepted that "*Sirius Marine was responsible for ensuring that the work was done properly*". He stated that he was told by Mr Harman that an offer had been made to take the boat back but agreed that offer was not referred to in his own letter dated the 8th July 2015. Save that he said that was because they were still

waiting a response on the paint from International Yacht Paints he failed to provide a sensible answer to why his letter did not mention Mr Harman's apparent offer to take the boat back for further treatment.

The expert evidence

33. Mr Barrow, of Complete Coatings Consultancy, was appointed as a joint expert. A letter of instruction dated 27th June 2018 was signed by the Claimant's solicitor and Mr Saich on behalf of the Defendant. That letter set out a timeline which was apparently agreed between the parties although there were areas of disagreement which were recorded. The letter referred to and enclosed copies the photographs showing the peeling paint, samples of paint taken from the vessel, witness statements, Mr Godding's pre-purchase survey report, the pleadings and the witness statements. The issues which Mr Barrow was asked to consider were:
    a. The likely cause of the paint failure following the second osmosis treatment;
    b. Whether one, two or more than two layers came away from the hull;
    c. Whether it was reasonable for Cardiff Marine to carry out their repairs in the way in which they did;
    d. Whether the costs of Cardiff Marine were reasonable;
    e. What was the reasonable time for the performance of the works of the second osmosis treatment.

34. Mr Barrow provided a report apparently dated 24th July 2018. In it he has stated that a typical scheme recommended by international paints would be for the application of three layers of Gelshield Plus with one layer of Gelshield 200, which is an antifouling tie coat to which two coats of anti foul should be added. That is 6 layers of paint in all. Mr Barrow had commissioned an analysis of the flakes of paint, by Materials Technology. The results showed that there were three layers of paint made up of one layer of Gelshield Plus, one layer of Gelshield 200 and one layer of anti-foul. The thickness of the layers varied but, in general, were less than the thickness recommended by International Yacht Paints. Mr Barrow stated " . . . *the failure is likely to be between two layers of gelsheild* [sic] *plus, the most common cause of the failure is amine blush. Amines are a curing mechanism of an epoxy coating and with solvent free systems such as gelsheild plus this curing mechanism can be quite sensitive. If cold temperatures or moisture in the form of*

dew, high humidity's etc are present during the application the amine does [not] completely bind with the epoxy resins and raised to the surface creating a sticky layer. If subsequent coatings are applied onto amine blush they will not adhere and detach. Unfortunately due to the age of the paint flakes provided this could not be tested for but is a high probable cause for the detachment and CCC have seen this failure many times."

35. Mr Barrow also stated that alternative reasons for the failure were: (a) missing the "overcoat window of the products" which is allowing a coat to be left too long before the next coat is applied so that the first hardens and will not bind with the second, or (b) a failure of the paint itself or where it is past its use-by date. With respect to these possibilities Mr Barrow stated "*CCC cannot establish 100% which of the above failures is to blame but by experience it is most likely by having amine blush present throughout the application.*" With respect to the work done by Cardiff Marine Mr Barrow accepted that it would be proper to "start afresh". He has also stated that the industry standard approach to quoting for osmosis rectification, including the removal of suspect materials and applying a full gelshield system is normally between £160-£200 per foot ex VAT. He has stated: "*The quote from Cardiff Marine services seems completely suitable and fair for the work undertaken."* With respect to the question as to the reasonable time to undertake the work he has stated that it is not possible to comment upon the length of drying time needed but that, once dried, the work should take about 23 days after the vessel has dried out.

36. Following the application to the Court two further questions were put to Mr Barrow. The first related to whether hydroscopic action might have affected the unrepaired areas of the vessel between being returned to the water on the 8th July 2015 and when she was lifted out on the 8th October 2015. In his response Mr Barrow has stated that he cannot provide an answer because he does not know what thickness of paint remained on the vessel when she was returned to the water on the 8th July 2015. However he has expressed the opinion that "*by leaving the patches unrepaired it is likely that the adjacent coatings to the unrepaired area may peel at a faster rate and expose more underlying coatings.*" The parties agreed that a further question should be put to Mr Barrow which asked whether, if returning the vessel to the water unrepaired on the 8th July 2015 had the potential to effect the paint on the hull, he considered this would have had an impact on the works carried out by Cardiff Marine. His answer was to the effect that although returning the yacht to

the water without performing the remedial repair may have created some extra peeling nonetheless it was proper and reasonable for Cardiff Marine to have carried out the work which they did.

Consideration

37. The starting place for analysing the issues should be the statements of case. It is not necessary to set them out at length however I consider that the following aspects should be referred to:

    a. In paragraph 36 of the Particulars of Claim the Claimant has pleaded that: (a) the Defendant would carry out the osmosis treatment and/or the rectification work with reasonable skill and care; (b) That the Defendant would carry out the Rectification work within a reasonable time and (c) the Defendant would carry out the Osmosis Treatment and Rectification Works in accordance with the standard of a purported specialist osmosis treatment centre. The Defendant has admitted the contents of paragraph 36 but contended that the terms of the osmosis treatment are irrelevant. The Defendant has not pleaded to paragraph 36 insofar as it refers to the Rectification work however if, as is admitted, the Defendant had a duty to perform the osmosis treatment with reasonable skill in my view it cannot sensibly be argued that the Defendant would provide the Rectification work upon some lesser basis of care.

    b. In paragraph 37 of the Particulars of Claim it is contended that there were express terms of the contract that the Defendant would perform the Rectification work by May 2014 and that it would be carried out in accordance with the meeting of the 6th September 2014. These allegations were admitted by the Defendant in paragraph 14 of the Defence.

    c. In paragraph 38 of the Particulars of Claim the Claimant has pleaded 14 particulars of negligence or breach of contract against the Defendant. In paragraph 15 of the Defence the Defendant has pleaded: "*Paragraph 38(a) to (n) are denied, save in so far that the Defendant admits that the final coat of Gel Shield 200 and the antifouling paint failed to adhere to the previous coats of Gel Shield Plus. The Defendant's negligence is admitted but limited to this extent.*"

38. It is the Defendant's case that what happened with respect to the initial work carried out by the Defendant in 2010-2011 is irrelevant. I do not agree. What was agreed between the parties and the work initially carried out is at the heart of this dispute.

39. It has become clear from the physical evidence of original hull gelcoat still being on the vessel in January 2015, from the contents of Mrs Harman's letter dated the 19th August 2014 and from Mr Neil Harman's oral evidence that the work actually performed by the Defendant over the winter of 2010-2011 was not a "full osmosis treatment" but rather what has been described as a "partial treatment". It is not clear precisely what work was, in fact carried out at that time.

40. The question is what work was commissioned in 2010. For the Defendant Mrs Harman has stated that the Claimant only requested a partial treatment whilst the Claimant is adamant that he showed Mr Godding's survey report to Mrs Harman and that a full osmosis treatment was requested and agreed.

41. *Whether Mrs Harman's evidence that the Claimant was offered two types of remedial work and chose the partial treatment can be accepted.* The initial email from Mr Greatbatch dated the 1st June 2010 clearly states that the vessel "*needs a full osmosis treatment below the waterline*" and asks for a rough price guide. Mrs Harman's email of the 3rd June 2010 responds that "*To remove all previous coatings by sand blasting, grinding out blisters . . .*" (emphasis added). Thereafter on the 3rd November 2010 Mr Greatbatch sent Mrs Harman a reminder asking for the cost of the necessary osmosis treatment. On the 4th November 2010 Mrs Harman sent an email with the estimate which specifically states that it is provided "*now that we have the vessel . . in our yard*". There is nothing in that document to suggest that the Defendant considered that there were two ways of dealing with the problem of osmosis and were giving the Claimant an option of which system to use.

42. In her letter of the 19th August 2014 Mrs Harman raised, for the first time and when it had become apparent that the Claimant might be considering legal action, that there were telephone discussions between herself and the Claimant about "*the available options to treat the osmosis on your boat*" and that there was a discussion about removing all the gelcoat or using the substantial patch treatment. No such case was put to Mr Greatbatch when he gave oral evidence. Mr Greatbatch's evidence was to the effect that he wanted a

full osmosis treatment and that was what he asked the Defendant to perform. That evidence was not challenged at the hearing and was corroborated by the evidence of Mrs Greatbatch. At the relevant time the Claimant had been provided with the Mr Godding's report which makes it clear that a full treatment was necessary. In the light of that report is it is highly improbable that Mr Greatbatch would have been satisfied with a lesser service without at least discussing with Mr Godding whether it would be satisfactory. From the way in which the report itself is couched I have no doubt that if Mr Godding had been asked whether a partial treatment been proposed he would have advised against it in the strongest terms. Further on this aspect it is very strange that, if the Defendant really considered that a less than full procedure was proper, no mention of this is referred to in the email of the 3rd June 2010 or in the later estimate of the 4th November.

43. The contents of the letter dated the 19th August 2014 are curious in respect of other matters. It suggests that the estimate was based upon the Claimant's information not on a "*full inspection*" and that the Claimant was at fault for not informing the Defendant that the vessel had previously been "*patch repaired*" and that had this been known "*our advice to you may have been different*". However Mr and Mrs Greatbatch both gave evidence that the Defendant was shown a copy of Mr Godding's survey report which made it clear that there had been a previous patch repair done to the vessel which was inadequate. Mr Greatbatch was not cross examined on his evidence and I can see no sensible reason to disregard it. It is, in my view, highly probable that Mr Greatbatch showed Mrs Harman the report as it would be a sensible thing to do. The highest that Mrs Harman could put the matter was that she did not recall being shown it and did not have a copy of the report.

44. Further the letter of the 19th August 2014 states that "*our estimate was based upon your information not a full inspection*". However, as the estimate itself shows, the vessel was in the hands of the yard at the time when it was made and, as the email of the 3rd June indicates, the clarification of the early preliminary estimate (of about £5,000) was to be made when the Defendant had been able to inspect the vessel itself. It follows that the estimate of the 4th November 2010 should have been made upon the basis of such an inspection. Even if Mrs Harman was correct in saying that she was not shown the report it is extraordinary that a company which holds itself out as making osmosis repairs did not recognise what Mr Godding had seen, namely that such past repairs had been carried out.

At the time of making such inspection it should have become obvious to a competent repairer that a partial treatment had been attempted in the past and that a full treatment was by then necessary whether or not it had been previously agreed with the Claimant.

45. Further I find that the contention made in the letter of the 19th August 2014 that the Defendant did not take on the work associated with a full treatment because it would have cost in the region of £10,000 is unacceptable. The present facts demonstrate that the eventual repairers, Cardiff Marine, performed the relevant work of a full stripping down and repainting the hull for £5,920, ex VAT which is more but not dissimilar to the figures put forward by the Defendant in June 2010 and November 2010. Moreover, on this topic Mr Barrow has given evidence that the industry standard approach to quoting for osmosis rectification, including the removal of suspect materials and applying a full gelshield system is normally between £160-£200 per foot ex VAT. On a 32 foot vessel that means that the costs of full osmosis treatment should have been between £5,120 and £6,400. It follows that Mrs Harman's assertion that the cost of a full treatment as being £10,000 is not only an exaggeration it is also misleading.

46. The letter written by Mr Terry Saich dated 8th July 2015 is also of some relevance. In that Mr Saich stated "*Back in 2010 you were quoted two figures; one circa £5,000 to do a 'patch treatment' and £10,000 for a 'back to bare hull treatment'. You elected to go for the £5,000 option despite knowing that 'Rhapsody' had been spot treated previously*". It is to be noted that Mr Saich, as he admitted, had no first hand knowledge of what had occurred in 2010 and had obtained his knowledge from other documents. It is striking that there is no written evidence to support the quotation of the two figures which he asserts. The only documentary estimates provided are in the email of 3rd June 2010 and the estimate of 4th November 2010. If there had been quotations based upon the two different premises put forward by Mr Saich it is beyond the bounds of probability that there would not have been some documentary evidence of it.

47. Lacking any documentary evidence to support the assertion made and for the reasons already given I cannot accept the statement made by Mr Saich as being true. What is more concerning is that the fact that the assertion was made without any apparent basis which demonstrates a disingenuous approach by those acting for the Defendant. In these circumstances it is necessary to scrutinise all of the Defendant's evidence with care.

48. Bearing those matters in mind and being mindful of the demeanour of the witnesses when giving oral evidence I prefer the evidence of Mr and Mrs Greatbatch and consider that they are telling the truth on these aspects. I am unable to accept that Mrs Harman is telling the truth about what was agreed between the parties in 2010. I therefore reject Mrs Harman's version of events, to the effect that in 2010 there was either a discussion, or an agreement, that the Defendant would perform something less than a full osmosis treatment. I find that Mr Greatbatch requested that a "full osmosis" treatment be carried out and that is what the Defendant contracted to perform.

49. It is not clear why the Defendant decided not to remove the whole of the original gelcoat which is, according to Mr Godding, better practice in the case of osmosis to a vessel and was necessary for this particular vessel, but is it clear that the Defendant did not perform the work it had been contracted to do. Since the Defendant itself failed to recognise that the more extensive work was necessary, as prescribed by Mr Godding, I think it follows that this probably came about from a lack of competence on the part of the Defendant which amounted to negligence.

50. It is common ground that the work performed by the Defendant over the winter of 2010-2011 was not effective because, by February 2013 it had become apparent that the earlier treatment had failed. The Defendant recognised that the earlier work had failed and it was agreed that the vessel would be returned to the Defendant in September 2013 for remedial work to be performed. The Defendant offered to do that at no cost to the Claimant.

51. For the reasons set out above it is clear that the failure of the earlier work was caused as a result of the breach of contract and/or the negligence by the Defendant. Although the Defendant undertook to perform the remedial work it follows that the Defendant is, nonetheless liable for the losses arising from the first breach including the loss of use.

52. Having failed to comply with its initial obligations it was, in my judgment, incumbent upon the Defendant to take proper steps to remedy the situation which it had caused. That is what the Defendant agreed to do. It is clear that, in September 2013, the Claimant requested that the vessel would be ready by the summer season of 2014 and no indication was made by the Defendant that this would not be achieved. In the Defence it is admitted

that it was an express term of the agreement to carry out rectification that the Defendant would perform the rectification work and that the vessel would be available to the Claimant during 2014 "season". Even if it was not an express term of the agreement by which the Defendant undertook the remedial work I consider that, in the circumstances of this case, there must be an implied term to the effect that the work is to be completed in a reasonable time.

53. For the reasons set out below I consider that the Defendant failed to carry out the remedial work within a reasonable time. It was explained by Mr Godding, and in any event is obvious, that drying out the hull, until the moisture readings indicate that the hull can be painted with appropriate materials, is essential to the success of any osmosis treatment. Mr Godding also stated that the removal of old gelcoat is necessary to allow this to occur. I accept that evidence. This operation may also be accelerated by placing the vessel inside and/or by the use of heaters. Mr Godding stated that he would expect that the full osmosis treatment, including the drying out aspect, should normally be capable of being completed within 6 months. Mr Barrow stated that once vessel is dried out the work of repainting can be completed over a short period of time. In my judgment it follows that if proper steps were taken to dry out the hull promptly in 2013 then the work ought to have been completed by the spring of 2014. That view is supported by the actual time taken by Cardiff Marine to carry out the necessary work in the winter of 2015.

54. However that did not occur and, in fact, the vessel was still unrepaired by the autumn of 2014 at which time Mr Greatbatch, understandably, instructed Mr Godding to assist him. The Defendant failed at the time, and has continued to fail, to provide any sensible or acceptable explanation as to why the repairs were not completed by the beginning of the 2014 season. It has been stated that this was because the vessel had not properly dried out but there is no acceptable explanation as to why that was so. It is apparent that the vessel was left in the water for a considerable period at the end of 2013 when one might reasonably expect that a competent boat yard would have removed her from the water so that she could start to dry out. It is to be noted that some work had commenced by February 2014 because it was at that stage that the Defendant recognised that it would be necessary to strip off the hull completely. What happened with respect to the vessel between February 2014 and Mr Godding's re-involvement later that year is obscure. It appears that this work was not done or if it was it was not done adequately because Mr

Godding has given evidence that there were significant remains of the old gelcoat still on the hull in January 2015. That is of additional significance because, as he told the court, it is necessary to remove the earlier gelcoat so that the drying process can take place.

55. Further, in her letter dated the 19th August 2014, Mrs Harman has also acknowledged that the full gelcoat had not been removed by that time. She has stated: "*I have actually just seen a copy of the report by Mike Godding. Should you now wish to instruct us to carry out further gelcoat removal in order to speed up the drying time then we are happy to do this. . . . The costs of this is . . . so could range from £468 to £780 . . . [the vessel] is now under the covered blasting canopy at the rear of the yard awaiting your further instructions.*" From that it is clear that although the Defendant had, in February 2014, recognised the need to fully remove the vessel's gelcoat that still had not been done by August 2014. In the circumstances any endeavours to dry the boat out over the summer of 2014 would probably be ineffective. In this respect it is to be noted that once Mr Godding had required that the whole of the gelcoat be removed in January 2015 the drying out process proceeded at a reasonable speed allowing the vessel to dry out sufficiently for the Defendant to apply the paint in March 2015.

56. In my judgment, by reason of the agreement to perform the repair work to the vessel, there was a duty upon the Defendant to use its best endeavours to perform the repair work efficiently within a reasonable time frame. From the evidence put before the court I consider that the exercise of such duties required the Defendant, during and after September 2013, to remove the vessel from the water, to remove the gelcoat and to take such steps as were reasonably necessary, including placing the vessel inside and using heaters, to ensure that the vessel was dried out and the repainting work completed before the beginning of the 2014 "season". In my view the evidence available demonstrates a woeful failure on the part of the Defendant to comply with its obligations to the Claimant. As a result of the Defendant's failure the Claimant lost the use of the vessel during the 2014 season. Further the Claimant had expended sums to allow the vessel to be used during that summer and these were wasted.

57. In addition to drying the vessel out it was the duty of the Defendant to paint the vessel carefully so as to complete the original contract to carry out the osmosis treatment in a careful and effective manner. The Defendant has sought to argue that it did the work in

accordance with the directions of and overseen by Mr Godding. However Mr Godding gave evidence that he did not oversee the painting work and that the work was the sole responsibility of the Defendant. In oral evidence Mr Saich accepted that it was indeed the responsibility of the Defendant to perform the work properly. Insofar as the Defendant has sought to argue that its responsibility for the work has been extinguished or reduced by reason of the appointment of Mr Godding to assist Mr Greatbatch this cannot be accepted.

58. The evidence demonstrates that, in May 2015 when the vessel was lifted because of possible propeller damage, it was found that layers of paint were coming away from the vessel. That was about two months after the vessel was returned to the Claimant by the Defendant following the completion of the Defendant's rectification work. It was also noted that the paint work had suffered particular damage in way of where the vessel's chocks were placed when the vessel was lifted. After the vessel was returned to the water the paintwork continued to come away so that by the time that the vessel was delivered to Cardiff Marina the loss of paintwork was very extensive.

59. The issue is why the paintwork applied by the Defendant in 2015 failed in the manner described. After the vessel was delivered to Cardiff Marina Mr Robert Freemantle sent a sample of the paint which had come away from the vessel's hull to the supplier of the paint, International Yacht Paints for their comments. He received a response from Ms Kate Moss by an email dated the 13th October 2015. That indicated that amine blush was present in the paint system applied which act to prevent the adherence of the coats of paint.

60. Mr Saich has argued that there is no proof that the sample tested came from the vessel so that no reliance can be placed upon the information provided by Ms Moss. He sought to rely upon his correspondence with Mr Dennis Tuijnman of Akzonobel, an associate company to International Paint. That exchange took place by email between the 19th March 2018 and 26th March 2018. In it Mr Tuijnman asked Mr Saich how he could assist to which Mr Saich responded: "*Preferably a rebuttal of Kate Moss's email. If this is not possible the provenance of the paint sample and its relationship to "Rhapsody" together with Kate Moss's technical qualifications to make her assessment. Or admission that there is no provenance history in place for the paint sample. If possible expert opinion on the effect of Gel Shield 200 by returning "Rhapsody" to the water without the damaged*

top layer of gel shield being repaired." In answer Mr Tuijnman stated "*The discussion of Kate Moss' email is not relevant. Kate Moss was technically skilled to conclude the cause of defects related to the application and/or the paint. At the time the paint sample was investigated by Kate there was no reference to the mentioned "Rhapsody" or the vessels history. Again, Kate gave her professional feedback on the finding on the flake/sample*".

61. In his submissions Mr Saich argued that as Mr Tuijnman has stated that Ms Moss' email is not relevant the evidence in her email dated the 13th October 2015 should be disregarded. Mr Irvine submitted that the provenance of the sample sent to Ms Moss was satisfactorily proved by Mr Freeman's evidence, that Mr Tuijnman did not say that Ms Moss' email is not relevant and that Mr Tuijnman's email does not discredit the information provided by Ms Moss. I consider that Mr Irvine's submission is correct. Mr Tuijman did not state that Ms Moss' email was irrelevant but that discussion of her email was not relevant. That was clearly a response to Mr Saich's email which asked him to "rebut" her email or comment adversely upon Ms Moss' technical qualifications. In fact Mr Tuijnman states that Ms Moss did have the technical skill to reach the conclusion which she did.

62. The effect of Mr Freemantle's evidence is that he sent a sample which was taken from the vessel to Ms Moss and Ms Moss indicated that the sample tested was the one sent to her and indicated the presence of amine blush. That was the evidence placed before the court. Mr Freeman's evidence was not challenged. In these circumstances I conclude that there is evidence that amine residues had been allowed to accumulate on the vessel whilst the painting operation was taking place in 2015.

63. Mr Saich, both in his skeleton and in his oral submissions, has also sought to argue that the evidence points to 4 possible causes of the paint failure. These are: (i) Amine blush; (ii) the use of out of date material; (iii) the application of the paint at the wrong temperature and (iv) hydroscopic action. His argument is that sanding discs were issued out of the stores and were used to remove the amine blush; (ii) out of date paint is unlikely to be the cause because they had been purchased just prior to its use and (iii) a chart was kept indicating that the application process was undertaken at the correct temperatures. He has argued that the paint became disturbed by chocking when the vessel was lifted to look at the propellers and not that disturbance was not properly repaired

before the vessel was returned to the water so that hydroscopic action was probably the main or only cause of the failure of the paint work.

64. Mr Barrow's report refers to the possible alternatives causes of out of date paint and application at incorrect temperatures. However even if either of the two alternatives Mr Barrow mentions were causative they would indicate an operational failure by the Defendant in the supply of the paint or its application. In fact Mr Barrow opines that of the three alternatives the most probable cause of the paint failure was the presence of the amine blush which was found to be present. Mr Barrow made no mention of hydroscopic action in his original report. Although he has subsequently accepted that hydroscopic action might increase the loss of paint from the vessel once it had started to fail it is not suggested and there is no evidence which supports the proposition that hydroscopic action could be a cause of the initial paint failure. Mr Saich sought to argue that the hydroscopic action worked on the areas which had been damaged when the vessel was lifted to inspect the propeller damage. However boats are chocked every time they are lifted without the type of damage which occurred in the present case.

65. In my judgment the presence of the amine blush found by Ms Moss indicates that the paint system on the vessel was bound to fail and the "rucking" to the paint in way of the chocks is a clear indication that the failure had begun to occur when the vessel was lifted and chocked. The expert evidence indicates that there was amine blush present in the paint applied by the Defendant and that was the probable cause of the failure of the paint system. Mr Barrow has accepted that hydroscopic action could accelerate the rate at which the paint came away from the hull however his answers to the supplementary questions clearly demonstrate that once it is established that the paint system applied by the Defendant had failed the proper and reasonable course of action was to remove the whole system and re-apply paint to the whole vessel as was, in fact, performed by Cardiff Marine. That remedy would have been necessary whether or not there had been hydroscopic action and the argument raised by the Defendant that the repair carried out by Cardiff Marina could have been avoided by repairing the paint damaged in way of the chocking would not have remedied the underlying problem and would, in any event, have been an inadequate remedy. For these reasons I reject Mr Saich's argument that hydroscopic action was what necessitated the repair carried out by Cardiff Marine.

66. The Defendant also sought to argue that an offer was made to the Claimant in June 2015 to rectify the problem. The Defence states "*In June 2015 the Defendant offered to carry out the work to rectify the problem. The Claimant rejected this offer*". However no particulars were provided as to when such an offer was made or by whom. Mr Saich submitted that this took place when Mr Neil Harman visited the vessel at Upton in the summer of 2015 and that he was given this information by Mr Harman. However Mr Harman gave no such evidence in his witness statement or in his oral evidence. In her witness statement Mrs Harman has stated that she informed Mr Greatbatch that if he brought the boat back to them they would look at it again. However Mr Greatbatch's evidence was that he received little or no communication from the Defendant after the vessel left Upton and in cross examination Mrs Harman was very vague as to when or how such an offer was made. There is no documentary evidence supporting such an offer and the contents of Mr Saich's letter to Mr Greatbatch of 8th July 2015 are not consistent with such an offer having been made. Bearing in mind my earlier observations as to the credibility of the Defendant's witnesses I find that no such offer was, in fact, made by the Defendant or anyone acting on its behalf.

67. It is to be noted that the point appears to have been raised by Mr Saich as part of his submission that "*Mr Greatbatch had a duty to mitigate his losses in seeking to get the work done to rectify the problem <u>at the lowest possible cost</u>, having first sought and gained approval from Sirius Marine Services*" (emphasis added). In fact, as a matter of law, Mr Saich's assertion is incorrect. The duty to mitigate losses is a duty to act reasonably in all the circumstances. In the circumstances of this case I am quite satisfied that Mr Greatbatch acted reasonably in deciding to have the final repair work carried out by Cardiff Marine.

68. Having considered the evidence and the submissions referred to above I have come to the conclusion that the presence of amine blush in the paint system was the probable cause of the failure of the paint system applied by the Defendant. Further it is quite clear that such residues must not be allowed to occur or, if they do, they must be removed before the next level of paint is applied. In my judgment it follows that the presence of amine blush clearly indicates that there was a lack of care by the Defendant in the manner in which the paint was applied. That is not the only example of the Defendant' lack of care as there

had been an earlier example of misapplication of the paint in February 2015. The Defendant has accepted that was an error in its work.

69. In these circumstances I conclude that the Defendant acted in breach of contract and acted negligently in (i) the manner in which it performed the agreement entered into in 2010; (ii) failing to carry out the remedial work in 2013-2014 within a reasonable time; and (iii) failing to apply the paint system in 2015 properly and carefully and that the Claimant is entitled to damages insofar as he has been to loss and expense arising therefrom.

Damages

70. For breach of contract the Claimant is entitled be placed in the same position, so far as to an award of money can do it, in the same position as if the contract had been properly performed. In respect of negligence the Claimant is entitled to be placed, so far as an award money can do it, in the same position as if the negligent act had not occurred. In each case damages are only recoverable if the loss is a direct consequence of the breach of contract or act of negligence.

71. In these circumstances I consider that the Claimant is entitled to the following damages:
    a. The cost of repairs carried out by Cardiff Marine in the sum of £7,104, the costs of transporting the vessel to and from Cardiff Marine in the sum of £1,300, the lifting costs in the sum of £248.92 and the relaunching fees of £195. These were all directly caused by the Defendant's breach of contract and negligent acts. Total £8,847.92
    b. *The surveyor's fees of £660*. Because of the Defendant's failure to perform the work properly during the period 2013-2014 it was reasonable for the Claimant to employ Mr Godding to assist him.
    c. *Breakdown Rescue fee* for 2014 of £140.25. The Claimant has stated that he expended this sum in the reasonable expectation that the vessel would be returned to him in time for the 2014 season. The benefit of that payment was lost by reason of the Defendant's failure to perform the work timeously.
    d. *Loss of use of the vessel* – In the present case the Claimant has put forward a figure of £3,400 based upon 8% of the value of the vessel for a period of 16 months. The Defendant has pleaded that the loss should be calculated at the rate of 2% per annum on the basis of a value to be decided by the court. In fact no

evidence as to the relevant value of the vessel was provided by either side**.** I consider that the following matters should be taken into account:

i. As a result of the Defendant's failure the Claimant lost the use of the vessel during the 2014 season. Following the decision of Lord Wright in *Liesbosch Dredger (Owners of) v Owners of SS Edison, The Liesbosch HL* [1933] AC 449, [1933] All ER Rep 144, [1933] 149 LT 49, Bailii, [1933] UKHL 2 it is possible to recover damages for loss of use of a non profit earning vessel in a claim in tort.

ii. In my view there is no reason why such loss of use cannot be recoverable in a claim made in contract especially where it was within the contemplation of the parties that the vessel was a pleasure vessel used for summer cruising etc. If that approach is incorrect I find that the loss of use arises from the negligence of the Defendant in the manner in which the operations were performed between the 2013-2015.

iii. In some cases it may be possible for a Claimant to put forward a figure based upon the hire of an alternative vessel but where that is not the case the court may assess such damage upon the basis that the Claimant has been deprived of the use of a valued chattel for a period of time. That is best calculated upon the basis of a percentage (based upon reasonable interest rates) of the actual value of the vessel at the material time.

iv. With respect to the appropriate rate I consider that a rate based solely upon the bank rate plus some small allowance, usually 1-2% in The Admiralty Court, would not be sufficient to recompense a party who has been kept out of the use of his pleasure vessel in the circumstances of this case which includes the conduct of the Defendant in failing to complete the work in the Spring of 2014, failing to provide any acceptable reason or excuse and failing to carry out the work required in a proper manner. In such circumstances I consider that a fair rate would be to take 8%, which is the judgment rate, and apply it to the value of the vessel over an appropriate period.

v. In this case I consider that the proper period is 12 months. This is upon the basis that where an owner has lost a "season" he has lost the effective use and enjoyment of his vessel for the whole year.

vi. No evidence as to the value of the vessel at the material time has been provided. Therefore either party may provide evidence as to the value of the vessel at the relevant time. In this case it is probable that the best evidence of the value of the vessel to the present Claimant would be the price he paid for her purchase in 2010.

vii. The loss of use will be calculated on the basis set out above but, if either party wishes to provide further evidence or make further submissions as to the calculation of the damages for loss of use then they may do so at the hearing when this judgment is handed down providing that short written reasons are served and filed not less than 5 days before the hearing.

e. *Mooring fees.* The claim for lost mooring fees of £1,980 is put on the basis of the loss of 18 months. However annual mooring fees are usually paid for a 12 month period which include the winter lay-up period and the spring to autumn season when most vessels are in use. For the reasons given above I consider that the Claimant was deprived on the use of his vessel over the 2014 season. In my judgment it is therefore appropriate to allow loss of mooring fees for the year 2014. That is £1,320.

Conclusion

72. For the reasons set out above I conclude that the Defendant is to pay damages of £10,968.17 plus an appropriate amount for loss of use to be calculated as set out above.

Dated this 17th day of December 2018