Federal Court  Cour fédérale

Date: 20141105

Docket: T-1625-12

Citation: 2014 FC 1047

Ottawa, Ontario, November 5, 2014

PRESENT: The Honourable Madam Justice Strickland

ADMIRALTY ACTION *IN REM* AGAINST THE SAILING VESSEL "AESTIVAL" AND *IN PERSONAM*

BETWEEN:

0871768 B.C. LTD.

Plaintiff

and

THE OWNERS AND ALL OTHERS INTERESTED IN THE SAILING VESSEL "AESTIVAL", THE VESSEL "AESTIVAL", ISLAND-SEA MARINE LTD., KENNETH W. HIGGS, EXECUTIVE YACHT SERVICES LTD. AND MICHAEL GUY COLBECK, DOING BUSINESS AS EXECUTIVE YACHT SERVICES AND/OR EXECUTIVE YACHT SERVICES LTD.

Defendants

JUDGMENT AND REASONS

[1] The Plaintiff, 0871768 B.C. Ltd., as owner of the vessel "*Ain't Life Grand*", brought a motion for summary judgment pursuant to Rule 213(1) of the *Federal Courts Rules*, SOR/98-106 (Rules) seeking an order against each of the Defendants for: repair and survey fees in the amount of $42,765.74, plus pre-judgment interest on those amounts; damages for the loss of use of the "*Ain't Life Grand*"; and, costs. Subsequently, the Plaintiff amended its Notice of Motion so as to have the matter proceed as a summary trial pursuant to Rule 216.

Background and Allegations

[2] The Plaintiff is the corporate owner of the "*Ain't Life Grand*", a 49 foot sail boat of fibreglass construction which, at all relevant times, was registered in the Port of Iqaluit, Nunavut, Official No. 818884 (Vessel). Matt Nielsen (Nielsen) and Christopher Thody (Thody) are directors of the corporate Plaintiff and claim damages for loss of use of the Vessel.

[3] The Defendant Island-Sea Marine Ltd. (Island-Sea) is the owner of the steel hull sailing vessel "*Aestival*", Official No. 800992. Kenneth W. Higgs (Higgs) is the president of Island-Sea.

[4] The Defendant Michael Guy Colbeck (Colbeck) operates a business providing vessel repair and maintenance services, doing business as Executive Yacht Services (Executive Yacht). He was hired by Island-Sea and/or Higgs to work on and provide services to the "*Aestival*".

[5] On or about July 26, 2012 the Vessel was sitting on blocks at the Lynnwood Marina (Marina) in North Vancouver, British Columbia. As a result of a previous accident, it had

recently been repaired, repainted and polished by Fraser Fibreglass Ltd. (Fraser Fibreglass). The Vessel was situated next to the "*Aestival*", which was also on blocks.

[6] The Plaintiff alleges that on July 26, 2012 Philip O'Donoghue (O'Donoghue), one of the owners and a director of Fraser Fibreglass, was notified by his foreman that there was grinding work being undertaken on the "*Aestival*". O'Donoghue immediately went to the Vessel and observed Colbeck standing on the forward port bow of the "*Aestival*" overseeing grinding work being done by Higgs. The Plaintiff alleges that O'Donoghue observed a cloud of dust and debris emanating from the grinding and that, in the absence of a plastic enclosure, tarp, or other precautionary measure being used by those on board the "*Aestival*", dust and debris settled on the Vessel.

[7] The Plaintiff also alleges that on July 27, 2012 O'Donoghue observed Executive Yacht employees sanding the top sides of the hull of the "*Aestival*". There was still no protective enclosure or tarp to prevent the spread of airborne dust and debris which again settled on the Vessel.

[8] The Plaintiff alleges that that the grinding and sanding debris that emanated from the work being performed on the "*Aestival*", including metal particles, paint and rust, were deposited on the Vessel, including its upper works, fibreglass decks, hull, stainless steel fittings and sails, causing damage.

[9] On August 31, 2012, the Plaintiff filed a Statement of Claim *in rem* against the sailing vessel "*Aestival*" and *in personam* against the other Defendants. The "*Aestival*" was arrested in September 2012.

[10] A motion on behalf of Island-Sea, Higgs and the "*Aestival*" for an order under Rule 488 setting aside the arrest was heard by Prothonotary Lafrenière. By Order dated November 13, 2013, the Prothonotary found that as the Plaintiff had a valid *in rem* claim against the "*Aestival*", it was entitled to arrest it pursuant to s. 43(8) of the *Federal Courts Act*, RSC 1985, c F-7. The Prothonotary also fixed the amount of bail at $58,000.

Procedural History

[11] The procedural history relevant to this motion for summary trial is set out below.

[12] On August 8, 2013 the Plaintiff filed a Notice of Motion seeking an order pursuant to Rule 213(1) for summary judgment. In support of that motion, the following affidavits were filed:

- Affidavit of Matt Nielsen sworn August 7, 2013 (Neilsen Affidavit #1);
- Affidavit of Christopher Thody sworn August 7, 2013 (Thody Affidavit #1);
- Affidavit of Philip O'Donoghue sworn August 7, 2013 (O'Donoghue Affidavit);
- Affidavit of F.I. Hopkinson sworn August 6, 2013 (Hopkinson Affidavit #1); and
- Affidavit No. 1 of Kenneth Higgs sworn April 22, 2013 and previously filed on August 2, 2013 in support of the motion to set aside the arrest of the "*Aestival*" (Higgs Affidavit #1).

[13] On January 9, 2014 the Chief Justice issued a direction setting May 7, 2014 as the date for the hearing of the summary judgment motion and also setting dates by which certain procedural matters were to be effected, including that responding motion records were to be served and filed no later than March 25, 2014.

[14] On March 20, 2014 the transcript of the cross examination of Philip Oldham (Oldham) on his affidavit was filed.

[15] On March 25, 2014 the Defendant Colbeck filed a Motion Record in reply to the summary judgment application. This included the following evidence:

- Affidavit of Michael Colbeck sworn January 29, 2014 (Colbeck Affidavit #1);
- Affidavit No. 2 of Michael Colbeck sworn February 15, 2014 (Colbeck Affidavit #2);
- Affidavit of Philip Oldham sworn January 30, 2014;
- Affidavit of Philip Maier sworn August 16, 2013;
- Affidavit of Arvin Pacris sworn August 16, 2013;
- Affidavit of Shawn Albert sworn October 30, 2013;
- Transcript of cross examination of Philip O'Donoghue on his Affidavit; and
- Affidavit of Kenneth Higgs No. 3, sworn March 25, 2014 in response to a written examination (Higgs Affidavit #3).

[16] On March 25, 2014 the Plaintiff sought to file a Supplemental Motion Record but was advised by the Registry that leave would be required as the document was not addressed in the Chief Justice's direction. On March 27, 2014 the Plaintiff requested leave and on April 10, 2014 Prothonotary Lafrenière directed that the Supplemental Motion Record be filed. It contained:

- Affidavit No. 2 of F.I Hopkinson sworn February 24, 2014 (Hopkinson Affidavit #2);
- Affidavit No. 2 of Matt Neilsen sworn March 8, 2014 (Neilsen Affidavit #2);
- Affidavit No.2 of Christopher Thody sworn March 21, 2014 (Thody Affidavit #2);
- A disk of digital copies of the photographs in Exhibit "A" and Exhibit "B" of the O'Donoghue Affidavit; and
- A copy of an enlarged photograph from Exhibit "A" of the O'Donoghue Affidavit.

[17] The Defendants "*Aestival*", Island-Sea and Higgs (collectively, the Aestival Defendants) did not file a Motion Record in response to the summary judgment application on or before the March 25, 2014 filing requirement.

[18] On March 25, 2014 the Aestival Defendants submitted to the Registry a Motion Record including a Notice of Motion seeking to bring a non-suit and/or no evidence motion in regard to the summary judgment application. In the alternative, seeking direction as to how to proceed further with a non-suit and/or no evidence motion in a summary judgment application.

[19] On April 9, 2014 I issued a Direction stating that the concept of non-suit was not compatible with a motion for summary judgment and that the non-suit motion would not be heard on May 7, 2014. I also indicated that if the Aestival Defendants successfully opposed the motion for summary judgment on the basis that there was a genuine issue for trial, then at trial or summary trial, at the close of the Plaintiff's case, a non-suit motion may be pursued. The non-suit motion was not filed.

[20] On April 22, 2014, a case management conference was held to address the Plaintiff's request to file an Amended Notice of Motion which would amend its motion for summary judgment to one for a summary trial with judgment, and the Aestival Defendants' failure to file a Motion Record in reply to the motion for summary judgment. As a result, on the same date Prothonotary Lafrenière directed that the Plaintiff was granted leave to file the Amended Notice of Motion and dispensed with the requirement for the Plaintiff to serve and file an Amended Motion Record.

[21] This matter was heard in Vancouver on May 7, 2014. As of the commencement of the hearing, the Aestival Defendants had not filed a Motion Record in response to the motion for summary judgment or the amended motion for summary trial.

[22] At the hearing, upon the conclusion of the Plaintiff's submissions, counsel for the Aestival Defendants indicated his intent to verbally seek leave to bring a non-suit motion and to file written submissions and a book of authorities in that regard. Further, should the non-suit motion not succeed, to then file the Aestival Defendants' Submissions on Summary Judgment, their Brief of Authorities on Summary Judgment, and, a Motion Record containing a Notice of Motion by which they sought:

> 1. An order allowing the vessel defendants leave to file the affidavit of Ken Higgs sworn on the 22nd day of April in these proceedings;
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> 2. In the alternative, an order setting the further filing of affidavit material in response to the Plaintiff's amended notice of motion dated April 22, 2014 and in compliance with the Rule 214 of the Federal Court Rules;
>
> 3. The costs of this motion; and

4. Such further and other relief as this Honourable Court deems just.

[23] I ruled that I would hear counsel for the Aestival Defendants and issue one ruling dealing with all of the issues as identified below.

Issues

1. Is a non-suit motion permissible?
2. Could non-suit succeed?
3. If not, are the Aestival Defendants permitted to file evidence and written submissions in reply to the motion for summary judgment, as amended to summary trial?
4. Should this matter proceed by way of summary trial?
5. If so, does the Plaintiff's negligence claim succeed on the merits and, if so, what damages are appropriate?
6. Costs

ISSUE 1: Is a non-suit motion permissible?

[24] In my view, the Aestival Defendants' motion for non-suit is not permissible.

[25] Pursuant to Rule 359, except with leave of the Court, motions must be commenced by notice of motion in the prescribed form. Further, Rule 362(1) requires service and filing of notices of motion and any required affidavits at least three days before the day set out in the notice for the hearing of the motion. The Court may hear a motion on less than three days' notice if the motion is made on notice and all parties consent, or if the moving party satisfies the Court of the urgency of the motion (Rule 362(2)).

[26] In this instance the Court had directed that a non-suit motion would not be heard on May 7, 2014. The Aestival Defendants take the position that they are, as of right, entitled to bring a non-suit motion. Further, that when the summary judgment motion was amended to a summary trial motion on April 22, 2014, this permitted them to resubmit the non-suit motion and that, therefore, they required a clear ruling given my Direction of April 9, 2014.

[27] I do not agree that the Aestival Defendants are entitled, as of right and without notice, to bring a motion for non-suit at the close of the Plaintiff's summary trial submissions. The Rules pertaining to service and filing of motions are ignored at the peril of the moving party.

[28] As to my prior Direction of April 9, 2014, it was issued when the matter was still a summary judgment motion and it clearly stated that the concept of non-suit was not compatible with a motion for summary judgment and that the non-suit motion would not be heard on May 7, 2014. The remainder of the Direction was an effort to explain the Court's refusal based on general concepts.

[29] In hindsight, the Direction should perhaps have been limited to a refusal to hear the subject motion. However, to the extent that the Aestival Defendants found it to be unclear in the context of the subsequent amendment of the Plaintiff's motion to one of summary trial, they were free to seek clarification from the Court at any time prior to the deadline for filing the Notice of Motion. They did not do so nor did they attempt to file, on the basis of the change in status of that matter, the non-suit motion in advance of the May 7, 2014 hearing date.

[30] There is also a question of whether the motion can be entertained in the absence of a non-suit provision within the Rules. The Aestival Defendants acknowledge that there is no specific non-suit rule, but argue that the Court retains an inherent power to control its own process and may dismiss a case in the clearest of cases independent of the summary judgment rules (*Melina & Keith II (The) v Gerald's Machine Shop Ltd*, 1999 CanLII 8518 (FCA)). They submit that the non-suit application is akin to a no evidence motion as that term is defined in British Columbia's *Supreme Court Civil Rules*, BC Reg 168/2009 (*BC Civil Rules*). The Aestival Defendants also acknowledge that there is little jurisprudence on this issue but refer to a decision of the Tax Court of Canada, *410812 Ontario Limited v The Queen*, 2002 CanLII 11 (TCC) (*410812 Ontario*), which describes non-suit procedure guidelines in the context of income tax appeals. It was also submitted that non-suit is in keeping with the spirit and intent of the Rules on summary judgment.

[31] In response to this question, I note that in *Canadian Union of Postal Workers v Canada Post Corporation*, 2011 FC 25 this Court considered, in the context of a contempt proceeding, the availability of non-suit which is not specifically contemplated in the Rules. Having considered what limited case law there is on the point, Justice Bédard concluded that there was nothing to preclude a party from making such a motion.

[32] Justice Bédard then went on to consider the test applicable in a non-suit motion:

> [14] The concept of "nonsuit" is well known in civil law and it is useful to be guided by the parameters that have been developed. The applicable tests for this type of motion have been well defined by Sopinka, Lederman & Bryant in *The Law of Evidence in Canada*, 3rd edition. The authors defined the concept of a motion of nonsuit as follows:

> The word "non-suit" is still used, but in relation to a motion by a defendant for a final judgment on the ground that a plaintiff has made out no case against him or her.

[15] The authors described the role of a judge who is faced with a motion for nonsuit as follows, at page 183:

> The trial judge, in performing this function, does not decide whether he or she believes the evidence. Rather, the judge decides whether there is any evidence, if left uncontradicted, to satisfy a reasonable person. The judge must conclude whether a reasonable trier of fact could find in the plaintiff's favour if he or she believed the evidence given in the trial up to that point. The judge does inference that the plaintiff seeks in his or her favour could be drawn from the evidence adduced, if the trier of fact chose to accept it.

[16] The test to be applied to a motion for nonsuit and the burden imposed on the party that is the subject of the motion were also addressed as follows by the Court of Appeal for Ontario in *Calvin Forest Products Ltd v Tembec*, 208 OAC 336, 147 ACWS (3d) 401 at paragraph 14:

> [14] In determining a motion for non-suit, the trial judge must take into consideration the most favourable facts from the evidence led at trial, as well as all supporting inferences. *In attempting to set aside the granting of the non-suit, a plaintiff simply has to show that there is evidence which, if believed, would form the basis for a prima facie case. A prima facie case is no more than a case for the defendant to answer* (see *Hall et al. v. Pemberton* (1974), 5 O.R. (2d) 438 (C.A.) and *Ontario v. Ontario Public Service Employees Union* (1990), 37 O.A.C. 218 at 226 (Div. Ct.)).

[17] In *Prudential Securities Credit Corp v Cobrand Foods Ltd*, 2007 ONCA 425, 158 ACWS (3d) 792, at paragraph 35, the Court of Appeal for Ontario specified the principles that must guide a judge who is faced with a motion for nonsuit in his or her assessment of the evidence:

> On a non-suit motion, the trial judge undertakes a limited inquiry. Two relevant principles that guide

> this inquiry are these. *First, if a plaintiff puts forward some evidence on all elements of its claim, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a prima facie case, the judge must assume the evidence to be true and must assign "the most favourable meaning" to evidence capable of giving rise to competing inferences***.** This court discussed this latter principle in *Hall et al. v. Pemberton* (1974), 5 O.R. (2d) 438 at 438-9, quoting *Parfitt v. Lawless* (1872), 41 L.J.P. & M. 68 at 71-72.
>
> [Emphasis added]

[33] Justice Bédard concluded that to rule on the motion for non-suit she must determine whether the applicant had submitted a *prima facie* case in support of each constituent element of contempt. She found it had met that burden.

[34] Based on this it would appear that, in the normal course, and despite the view by some jurists that it serves no useful purpose (*FL Receivables Trust 2002-A v Cobrand Foods Ltd*, 2007 ONCA 425 at paras 13-14, Laskin JA; John Sopinka et al, *The Trial of an Action*, 2d ed (Toronto: Butterworths Canada, 1999) at 151-152), a non-suit motion can be entertained by the Court in the absence of a specific Rule permitting it. In this case, however, the motion was not served and filed at least three days before the day set out in the notice for the hearing of the motion as required by Rule 362(1). Further, the motion is brought in the context of a motion for summary trial and no authority has been cited in support of the proposition that non-suit can, or cannot, be brought in that context. This Court has held that the British Columbia jurisprudence concerning summary trials is instructive (*Louis Vuitton Malletier S.A. v Singga Enterprises (Canada) Inc*, 2011 FC 776 [*Louis Vuitton*]; *Teva Canada Limited v Wyeth and Pfizer Canada Inc*, 2011 FC 1169 at paras 28-29 [*Teva Canada*]). However, I would note that the *BC Civil*

Rules, relied upon by the Aestival Defendants in support of their position, address summary trial applications under Rule 9-7. Part 12 of the *BC Civil Rules* deals with trials and Rule 12-5(1), which concerns rules and evidence at trial, states that Rule 12-5 does not apply to summary trials under Rule 9-7, except as provided in that Rule. Neither a no evidence application (Rule 12-5(4)) nor an insufficient evidence application (Rule 12-5(6)) are so specified. Thus, at summary trial under the *BC Civil Rules*, a no evidence or insufficient evidence application would not be permitted.

[35] In these circumstances, I decline to grant leave to permit the non-suit motion to be heard on short notice. Based on the foregoing, although non-suit motions may be entertained by the Federal Court in the context of a trial, I have some doubt as to whether they are appropriate in the context of a summary trial. However, and in any event, I need not decide that point as for the reasons set out below, the non-suit motion would not succeed in this case.

ISSUE 2: Could non-suit succeed?

[36] Even if the Aestival Defendants had brought their motion for non-suit in a timely manner and it was appropriate in the context of a summary trial, it would not succeed in these circumstances. That is because some evidence has been presented by the Plaintiff which, if believed, would form the basis of a *prima facie* case.

[37] As put otherwise in *Brooks-Martin v Martin*, 2010 BCSC 1708:

> [5] The legal test that must be met by a defendant who makes a motion for non-suit has been stated many different ways by many different courts. Based on the authorities, I would state the rule in

> this way: In order to succeed on a motion for non-suit, a defendant must persuade the court that there is no evidence which is capable of proving one of the essential elements of the cause of action alleged against the defendant. The court must not weigh the evidence or attempt to make finding of fact or to assess credibility. If an inference which is essential to the plaintiff's case would be "mere speculation," the defendant's "no evidence" motion should be granted. See *Fenton v. Baldo* 2001 BCCA 95 at paragraphs 25-26; *Seiler v. Mutual Fire Insurance Co.* 2003 BCCA 696 at paragraph 12; *Craigdarloch Holdings Ltd.* at paragraphs 14 and 30; and *Tran v. Kim Le Holdings Ltd.* 2010 BCCA 156 at paragraph 2.

[38] The only basis for the non-suit motion asserted by the Aestival Defendants is the allegation that there is no causal link between the grinding and sanding done on the "*Aestival*" and the alleged damage to the Vessel. The Aestival Defendants submit that this would require proof that the grinding material was linked to the "*Aestival*" and their activities. They say that there is simply no factual or expert evidence of such a link.

[39] As will be discussed in greater detail below in the context of the Plaintiff's claim, there is factual evidence of such a link. For the purposes of the proposed non-suit motion it is necessary to refer only to the following to conclude that there is some evidence of causation:

i) The O'Donoghue Affidavit states that on July 26, 2012, as O'Donoghue approached the Vessel and the "*Aestival*", he observed Colbeck and Higgs on the "*Aestival*" (para 11). Colbeck was standing on the forward port bow of the "*Aestival*" overseeing grinding work (para 13). O'Donoghue observed a cloud of dust in the air between the two boats and dust and debris settling on the Vessel (para 14). During a resultant conversation concerning the grinding he could see the debris from the grinding continuing to be deposited on the Vessel (para 18). He went to get his camera and on his return there was still work being done on the "*Aestival*" and he could see grinding dust and debris still emanating from the "*Aestival*" and landing on the Vessel (para 22). He then climbed on to the Vessel and immediately observed that the deck was covered in sanding and grinding debris (para 24). He took photographs which are attached as exhibits to his affidavit. The following day he witnessed a number of Executive Yacht employees on board the "*Aestival*"

sanding the topsides of the hull, he observed dust and debris emanating from the "*Aestival*" which settled on the Vessel (paras 29 and 30). On July 28, 2012 he conducted an inspection of the hull and deck of the Vessel and discovered damage to its gelcoat on the deck from grinding debris. The deck was covered with debris containing steel particles and black antifouling paint which had stained the deck's gelcoat finish. He elaborated on other damage that he observed and again took photographs which are attached as exhibits to his affidavit (paras 33-35).

ii) Higgs Affidavit #1 confirms that on July 26, 2012 Higgs was on board the "*Aestival*" (para 4) and used a hand held grinder for 11 minutes to assist in the proper fitting of the hull and so the teak gunwale would fit properly where it joins the upper hull of that vessel which is of steel construction (para 6). The affidavit further confirms that Colbeck failed to erect the required tarping of the work area (para 10). Higgs stated his belief that the alleged damage to the Vessel did not give rise to any surface deficiencies but that the alleged damage was from the actions of Colbeck (para 14).

iii) The report of marine surveyor Oldham, made on behalf of Colbeck, states that steel particles from grinding will embed into fibreglass gelcoat, oxidise and result in an unsightly condition.

[40] Accordingly, the Plaintiff has put forward some evidence and made out a *prima facie* case with respect to causation, the only element of negligence that the Aestival Defendants challenged in their non-suit submissions.

[41] It was also suggested by the Aestival Defendants that the causal link could not be established without expert evidence. The Plaintiff submits that expert evidence of causation is not required. In this regard the Plaintiff relies on *R v Burns*, [1994] 1 SCR 656 at 666 which held that the general rule is that expert evidence is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of the judge and jury, as well as *R v Mohan* [1994] 2 SCR 9 (*Mohan*).

[42] In *Mohan*, the Supreme Court of Canada stated as follows:

> (b) Necessity in Assisting the Trier of Fact
>
> [21] In *R. v. Abbey, supra*, Dickson J., as he then was, stated, at p. 42:
>
> > With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (*Turner* (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.)
>
> [22] This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey, supra*. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672, at p. 684, this Court, quoting from *Beven on Negligence* (4th ed. 1928), at p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge". More recently, in *R. v. Lavallee, supra*, the above passages from *Kelliher* and *Abbey* were applied to admit expert evidence as to the state of mind of a "battered" woman. The judgment stressed that this was an area that is not understood by the average person.

[43] I agree with the Plaintiff that in this case where there is eye witness testimony that grinding and sanding occurred on the "*Aestival*" and that dust and debris from those actions was seen to be settling on the Vessel, and given the evidence of the Aestival Defendants' own surveyor that steel particles from grinding will embed and cause the unsightly marking of fibreglass gelcoat, expert evidence is not required to establish causation on a *prima facie* basis for the purpose of the proposed non-suit motion.

[44] Based on the foregoing, the motion for non-suit, even if leave had been granted permitting it to proceed, would not have succeeded.

ISSUE 3: Are the Aestival Defendants permitted to file evidence and written submissions in reply to the motion for summary judgment, as amended to summary trial?

[45] Non-suit rules may require that when a defendant makes a non-suit motion after the plaintiff has entered its evidence, that the defendant must elect whether to call evidence. If the defendant elects to call evidence, the non-suit motion is typically not decided until the close of the defendant's case. If the defendant elects not to call evidence, the non-suit motion can be decided immediately and the defendant forfeits the right to call evidence.

[46] This was the procedure considered by the Tax Court in *410812 Ontario*, above, at para 34. There, the Court indicated that where a party moves for non-suit, counsel for that party should be put to an election of whether to call evidence before the Court rules on the motion. If the election is made to call evidence, the judge should reserve on the motion until all of the evidence is in. If the election is to call no evidence, the Court should immediately rule on the

non-suit. If the judge dismisses the motion on the basis that there is some evidence supporting the appellant's (plaintiff in this matter) case, two results should flow: (i) counsel who brought the motion for non-suit should be held to his or her election and should not, after losing the motion, be entitled to withdraw the election and call evidence; and, (ii) counsel should then be entitled to argue that, notwithstanding the judge's ruling that there is some evidence supporting the appellant's case (or the case of whoever has the onus), the evidence is insufficient to satisfy the onus. This is the distinction between no evidence, which is a question of law, and insufficient evidence, which is a question of fact.

[47] In this case, despite the existing summary judgment motion, as amended to summary trial, the Aestival Defendants did not respond by putting forward evidence by way of a responding Motion Record, as required by Rule 213(4). They submitted before me and in their written submissions pertaining to non-suit that they believed, if they were unsuccessful on the non-suit motion, that they then would be at liberty to file additional affidavit material in response to the amended summary trial motion to establish that there is a genuine issue for trial. In that regard, they would have it that the summary trial motion would be adjourned, given the late amendment of the Plaintiff's Notice of Motion, to accommodate this.

[48] At the hearing I declined to grant an adjournment. It had taken considerable time and effort to set the summary trial date. The Registry's summary of recorded entries indicates that the Aestival Defendants had not been responsive to efforts to set a date and, ultimately, a Direction was issued by the Court advising that if a date was not agreed, one would be set.

Further, in my view, it would have been unfair to the other parties who had prepared for and attended at the summary trial motion to adjourn in these circumstances.

[49] The Aestival Defendants also had ample opportunity to file a response to the summary judgment motion and made a strategic decision not to do so. In that regard, the Direction of the Chief Justice set out the dates by which the Defendants were to file motion records in response to the summary judgment motion. The Aestival Defendants declined to do so and, instead, made a decision to attempt to file a motion for non-suit in the summary judgment motion, which was declined by the Court. The subsequent Direction issued by Prothonotary Lafrenière granted leave to the Plaintiff to serve and file the Amended Notice of Motion by which the motion for summary judgment was amended to summary trial and dispensed with the requirement of the Plaintiff to serve and file an Amended Motion Record. The only change to the Notice of Motion was to the following sentence: "An Order pursuant to Rule 213 (1) for a summary trial with judgment in favour of the Plaintiff against each and all of the Defendants […]".

[50] The Aestival Defendants argue that because of this amendment, they were again free to file a responding Motion Record. Whether or not, in the prevailing circumstances, this was so, the Aestival Defendants would have had to file their responding motion record by April 28, 2014 in accordance with Rule 213(4). This is because the Direction permitting the Plaintiffs to file and serve an amended Notice of Motion was issued on April 22, 2014 and the Amended Notice of Motion was filed on the same date. The hearing of this matter had previously been scheduled for May 7, 2014 and this was not altered by the amendment or the Direction. Rule 213(4) requires a party served with a motion for summary judgment or trial to serve and file a

responding motion record not later than 10 days before the hearing date which would have been April 28, 2014. Therefore, I do not see how this argument assists the Aestival Defendants as they still had not filed a Motion Record in response to the amended summary trial Notice of Motion as of the date of the hearing.

[51] Given the foregoing, I am of the view that the Aestival Defendants clearly made a decision to call no evidence by declining to file a Motion Record responding to the motion for summary judgment, or a Motion Record responding to the motion as amended to summary trial. They are now bound by that decision with respect to the filing of evidence regardless of any implicit election in connection with the non-suit motion.

[52] Accordingly, the Motion Record of the Aestival Defendants, entitled "Motion Record Rule 214(2) Of the Vessel Defendants", containing a Notice of Motion dated May 7, 2014 seeking an order granting leave to file Higgs Affidavit #1, submitted during this proceeding shall not be filed and the request is denied. I would note that, in any event, the subject affidavit is already before the Court as part of the Plaintiff's Motion Record. Similarly, the Aestival Defendants' alternate request, as contained in that Notice of Motion, for an order permitting further filing of affidavit material in response to the Plaintiff's Amended Notice of Motion, is also denied.

ISSUE 4: Should this matter proceed by way of summary trial?

Summary Judgment and Summary Trial	**Jugement et procès sommaires**
Motion and Service	**Requête et signification**
Motion by a party	**Requête d'une partie**
213. (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.	213. (1) Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l'égard de toutes ou d'une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l'instruction soient fixés.
[…]	[…]
Obligations of moving party	**Obligations du requérant**
(3) A motion for summary judgment or summary trial in an action may be brought by serving and filing a notice of motion and motion record at least 20 days before the day set out in the notice for the hearing of the motion.	(3) La requête en jugement sommaire ou en procès sommaire dans une action est présentée par signification et dépôt d'un avis de requête et d'un dossier de requête au moins vingt jours avant la date de l'audition de la requête indiquée dans l'avis.
Obligations of responding party	**Obligations de l'autre partie**
(4) A party served with a motion for summary judgment or summary trial shall serve and file a respondent's motion record not later than 10 days before the day set out in the notice of motion for the hearing of the motion.	(4) La partie qui reçoit signification de la requête signifie et dépose un dossier de réponse au moins dix jours avant la date de l'audition de la requête indiquée dans l'avis de requête.

Summary Judgment

Facts and evidence required

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

[…]

Summary Judgment

Motion record for summary trial

216. (1) The motion record for a summary trial shall contain all of the evidence on which a party seeks to rely, including

(a) affidavits;

(b) admissions under rule 256;

(c) affidavits or statements of an expert witness prepared in accordance with subsection 258(5); and

(d) any part of the evidence that would be admissible under rules 288 and 289.

Further affidavits or statements

(2) No further affidavits or statements may be served,

Jugement sommaire

Faits et éléments de preuve nécessaires

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

[…]

Procès sommaire

Dossier de requête en procès sommaire

216. (1) Le dossier de requête en procès sommaire contient la totalité des éléments de preuve sur lesquels une partie compte se fonder, notamment :

a) les affidavits;

b) les aveux visés à la règle 256;

c) les affidavits et les déclarations des témoins experts établis conformément au paragraphe 258(5);

d) les éléments de preuve admissibles en vertu des règles 288 et 289.

Affidavits ou déclarations supplémentaires

(2) Des affidavits ou déclarations supplémentaires

except (a) in the case of the moving party, if their content is limited to evidence that would be admissible at trial as rebuttal evidence and they are served and filed at least 5 days before the day set out in the notice of motion for the hearing of the summary trial; or (b) with leave of the Court.	ne peuvent être signifiés que si, selon le cas : a) s'agissant du requérant, ces affidavits ou déclarations seraient admissibles en contre-preuve à l'instruction et leurs signification et dépôt sont faits au moins cinq jours avant la date de l'audition de la requête indiquée dans l'avis de requête; b) la Cour l'autorise.
[…]	[…]
Adverse inference (4) The Court may draw an adverse inference if a party fails to cross-examine on an affidavit or to file responding or rebuttal evidence.	**Conclusions défavorables** (4) La Cour peut tirer des conclusions défavorables du fait qu'une partie ne procède pas au contre-interrogatoire du déclarant d'un affidavit ou ne dépose pas de preuve contradictoire.

[53] For the reasons set out above, the Aestival Defendants' materials entitled "The Vessel Defendants Submission on Summary Judgment" and "The Vessel Defendants Brief of Authorities on Summary Judgment", both dated May 7, 2014 and tendered on the Court at the hearing on that date, shall not be filed by the Registry.

[54] It is of note, however, that these documents address summary judgment and submit that the Plaintiff cannot succeed as it cannot establish that the Aestival Defendants have no genuine issue for trial.

[55] While it is correct that, in a summary judgment matter, the Court is to determine if there is a genuine issue for trial, in a summary trial the Court actually tries the issues raised by the pleadings and weighs the evidence contained in the affidavits to determine certain issues or the full matter and judgment can be given (*Society of Composers, Authors and Music Publishers of Canada v Maple Leaf Sports & Entertainment*, 2010 FC 731 at paras 13-17, 40-47 [*Society of Composers*]; *Inspiration Management*, (1989), 36 BCLR (2d) 202 at para 40; *Teva Canada*, above, at para 32(a)).

[56] In this case, the amendment of the Notice of Motion from one of summary judgment to summary trial changed the purpose of the motion from a determination of whether there was a genuine issue for trial, to a determination of the outcome of the claim. The Aestival Defendants' submissions are, therefore, and in any event, not relevant to the question of whether this matter should proceed by way of summary trial which, in my view, it should.

[57] Justice Hughes canvassed the relevant Federal Court jurisprudence on summary trial in *Teva Canada*, above, at paras 28-37, appeal allowed on other grounds, 2012 FCA 141. He stated at paragraph 32:

> - Summary trial need not be reserved only in cases where there will be a determination of every issue. The Court in its discretion can look at the issue or issues in question and determine if it is appropriate to deal with the those (sic) issues by summary trial (Rule 213(1));
>
> - The party seeking a summary trial should put in all its evidence relevant to the issues, as should the responding party; a responding party cannot assert that there may be better evidence later (Rule 214);
>
> - Where the evidence is uncontested, or uncontroversial, or where there are no serious issues as to credibility, the Court

> should be more inclined to allow a summary trial. This does not mean that if the evidence is contested or controversial, or credibility is at issue, then there shall be no summary trial. It means that the Court must decide if there is "no genuine issue" (Rule 215); and
>
> - The Court should not avoid summary trial simply because there is a serious legal issue (Rule 215(5)). [Rule 215(3)]

[58] Further, summary trial is warranted where: the issues are well defined and their resolution will allow the action, or whatever remains of it, to proceed more quickly or be resolved between the parties; the facts necessary to resolve the issues are clearly set out in the evidence; the evidence is not controversial and there are no issues as to credibility; and, the questions of law, though novel, can be dealt with as easily as they would be after a full trial (*Teva Canada*, above, at para 34).

[59] On a motion for summary trial, the burden is on the moving party to demonstrate that summary trial is appropriate (*Teva Canada*, above, at para 35, citing *Trevor Nicholas Construction Co v Canada*, 2011 FC 70 at paras 43-46). Once the matter is before the Court for determination on summary trial, the usual civil burden of proof applies. The party making an assertion must prove it through relevant evidence and the application of appropriate law (*Teva Canada*, above, at para 36).

[60] When determining whether summary trial is appropriate, the Federal Court has also considered whether the cost of a trial would be high, the amount involved, the complexity of the matter, whether the summary trial would take considerable time, whether credibility was a crucial factor and if cross examination had taken place, and whether a summary trial would result

in detrimental "litigation by slices" (*Society of Composers*, above, at paras 41-42; *Wenzel Downhole Tools Ltd v National-Oilwell Canada Ltd*, 2010 FC 966 at paras 36-38; also see *Louis Vuitton*, above, at para 96).

[61] It is of note that the Supreme Court of Canada has recently held, in the context of proportionality and access to justice, that summary judgment rules must be interpreted broadly (*Hryniak v Mauldin*, 2014 SCC 7 at para 5).

[62] Applying these general principles to this matter, I find as follows:

- the issues in this matter are well defined, being whether the Defendants' negligence caused the alleged damage to the Vessel and the quantum of any damages;
- the facts necessary to resolve these issues are found in the affidavit evidence filed. As the essential relevant facts have been established by affidavit evidence, proceeding to trial may add detail but not significant additional evidence (*Pawar v Canada*, [1999] 1 FC 158 at para 16 (TD); affirmed (1999), 247 N.R. 271; leave to appeal refused [1999] SCCA No. 526);
- there is no serious credibility issue;
- this matter started life as a motion for summary judgment. In that context the Defendants were required to put their best foot forward (Rule 214). In the case of the Aestival Defendants, they failed to do so. The same basic concept applies in the context of summary trial where the Court may draw an adverse inference from a failure to cross examine an affiant or to file responding or rebuttal evidence (Rule 216(4)). The concept of putting one's best foot forward has also been applied to summary trial and the failure to do so has been held not to frustrate the ability of the Court to proceed by way of summary trial (*Everest Canadian Properties Ltd v Mallman*, 2008 BCCA 275 at para 34; also see *Louis Vuitton*, above, at paras 94-99). Here the Aestival Defendants had ample opportunity to obtain and file expert evidence as to causation but elected not to do so;
- the application of the facts to the test for negligence is a matter of mixed fact and law which can be determined by summary trial;
- pursuant to Rule 216(6), if the Court is satisfied that there is sufficient evidence for adjudication then, regardless of the amounts involved, the complexities of the issues and the existence of conflicting evidence, the Court may grant judgment either generally or

on an issue, unless the Court is of the opinion that it would be unjust to do so. In my view, this matter is not complex and there is little significant conflicting evidence; and

- the value of this claim is $42,765.74, for repairs and survey fees, plus loss of the use of the Vessel. There has been a prior motion seeking to set aside the arrest, various directions and a full day of Court time reserved to hear the matter. Rule 3 requires the Rules to be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on the merits. In my view, the principle of proportionality applies and weighs heavily in favour of disposition by summary trial in the circumstances of this case.

[63] I am satisfied that the facts can be determined and the law applied such that I will be able to reach a fair and just determination on the merits by way of summary trial.

ISSUE 5: Does the Plaintiff's negligence claim succeed on the merits and, if so, what damages are appropriate?

[64] The Plaintiff submits that on or about July 26 and 27, 2012 the Defendants were performing maintenance and repair work, specifically grinding and sanding on the "*Aestival*". That work was performed in a careless and negligent manner as no steps were taken to contain the grinding and sanding debris which settled on and caused damage to the Vessel, causing loss to the Plaintiff.

[65] The Plaintiff identifies the four elements of its claim for negligence which must be established as a duty of care, breach of the standard of care, causation, and compensable damages (*Ediger v Johnston*, 2013 SCC 18 at para 24).

i) Duty of Care

Plaintiff's Position

[66] The Plaintiff submits that the Defendants owed it a duty of care, citing and applying the two part *Anns v Merton London Borough Council*, [1978] A.C. 728 (H.L.) test as refined in *Cooper v Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (*Anns/Cooper test*) and as summarized in *The Los Angeles Salad Company Inc v Canadian Food Inspection Agency*, 2013 BCCA 34 at para 4 [*The Los Angeles Salad Company*].

[67] The Plaintiff submits that it was reasonably foreseeable that the Defendants' careless grinding and sanding work may cause harm to the Vessel. The work was being performed by Colbeck and Higgs on board the "*Aestival*", located next to and in close physical proximity to the Vessel. The evidence establishes that Higgs was experienced with Vessel repair and Colbeck was familiar with the Marina's rules for tarping or covering all work areas. It was foreseeable that without such containment the debris might escape and settle on the Vessel and it is known that such debris can be harmful. There was sufficient proximity between the parties and a close and direct relationship. This gives rise to a *prima facie* duty of care.

[68] Once a *prima facie* duty of care is established, the evidentiary onus shifts to the defendants to show countervailing policy considerations that suggest no duty should be imposed (*Childs v Desormeaux*, 2006 SCC 18 [*Childs*]). The Plaintiff submits that in this case the policy considerations are in its favour as sound policy requires that those who cause harm through their carelessness should be held liable for the resulting damage.

Defendant Colbeck's Position

[69] Colbeck in his submissions takes issue with the Plaintiff's position that steel grinding was not allowed at the Marina, as this is not supported by the cited evidence, but concedes that parties grinding and sanding vessels at the Marina, which were in close proximity to other vessels, had a duty to contain that residue. Colbeck also concedes that the "*Aestival*" was in close proximity to the Vessel.

[70] Colbeck submits that late in the afternoon of July 26, 2012, he thought he was finished sanding and removed the protective tarps from the "*Aestival*". It was not foreseeable that further sanding would be done or that Higgs, contrary to Colbeck's advice and in his absence, would conduct steel grinding without first installing tarping or directing Colbeck to do so, nor that Higgs would refuse to stop grinding when so directed by Colbeck.

Analysis

[71] The Supreme Court of Canada in *Childs*, above, at paras 11-13 addressed the general test for a duty of care, stating:

> [11] In *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), Lord Wilberforce proposed a two-part test for determining whether a duty of care arises. The first stage focuses on the relationship between the plaintiff and the defendant, and asks whether it is close or "proximate" enough to give rise to a duty of care (p. 742). The second stage asks whether there are countervailing policy considerations that negative the duty of care. The two-stage approach of *Anns* was adopted by this Court in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, at pp. 10-11, and recast as follows:

> (1) is there "a sufficiently close relationship between the parties" or "proximity" to justify imposition of a duty and, if so,
>
> (2) are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise?

> [12] In *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69, the Court affirmed the *Anns* test and spoke, *per* Iacobucci J., of three requirements: reasonable foreseeability; sufficient proximity; and the absence of overriding policy considerations which negate a *prima facie* duty established by foreseeability and proximity: para. 52. Some cases speak of foreseeability being an element of proximity where "proximity" is used in the sense of establishing a relationship sufficient to give rise to a duty of care: see, e.g., *Kamloops*. *Odhavji*, by contrast, sees foreseeability and proximity as separate elements at the first stage; "proximity" is here used in the narrower sense of features of the relationship other than foreseeability. There is no suggestion that *Odhavji* was intended to change the *Anns* test; rather, it merely clarified that proximity will not always be satisfied by reasonable foreseeability. What is clear is that at stage one, foreseeability and factors going to the relationship between the parties must be considered with a view to determining whether a *prima facie* duty of care arises. At stage two, the issue is whether this duty is negated by other, broader policy considerations.
>
> [13] The plaintiff bears the ultimate legal burden of establishing a valid cause of action, and hence a duty of care: *Odhavji*. However, once the plaintiff establishes a *prima facie* duty of care, the evidentiary burden of showing countervailing policy considerations shifts to the defendant, following the general rule that the party asserting a point should be required to establish it.

[72] This was restated by the British Columbia Court of Appeal in *The Los Angeles Salad Company*, above:

> [12] The *Anns/Cooper* proximity analysis begins by considering whether the case falls within a category of relationship in which the alleged duty of care has been recognized. If the duty has been recognized, it can usually be inferred that there is sufficient proximity between the parties to raise a *prima facie* duty of care

> and there is no need to consider proximity further; however, if the case does not clearly fall within a previously recognized relationship, whether proximity has been established must be carefully considered: *Cooper* at para. 36; *Childs v. Desormeaux*, 2006 SCC 18 at para. 15, [2006] 1 S.C.R. 643.

[73] The Court there also addressed proximity:

> [38] The precise meaning of proximity has been evolving since it emerged into the spotlight from the shadow of reasonable foreseeability in *Cooper*. In Hill, after observing (at para. 23) that the relationship between the alleged wrongdoer and the victim must be sufficiently close and direct to make it appropriate to impose a duty of care on the wrongdoer, the Court explained proximity in this way:
>
> > [24] Generally speaking, the proximity analysis involves examining the relationship at issue, considering factors such as expectations, representations, reliance and property or other interests involved: *Cooper*, at para. 34. Different relationships raise different considerations. "The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic": *Cooper*, at para. 35. No single rule, factor or definitive list of factors can be applied in every case. "Proximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (*Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1151, cited in *Cooper*, at para. 35).

[74] Further, the Court confirmed at paragraph 41 that the proximity stage of the *Anns/Cooper* test involved consideration of foreseeability, proximity and policy issues as they arise from the relationship between the parties.

[75] In the matter before me, the evidence supports the existence of a duty of care.

[76] It is not disputed that the "*Aestival*" was on blocks next to and in close physical proximity to the Vessel. Colbeck Affidavit #1 estimates the distance as 22 feet at mid ship and 30 feet at the bows.

[77] The O'Donoghue Affidavit states that on the afternoon of July 26, 2012 he observed Colbeck and Higgs on the "*Aestival*". Colbeck was overseeing grinding work on the "*Aestival*'s port bulwarks. Having noticed a cloud of dust in the air between the two vessels, debris settling on the Vessel, and that there was no tarp or other protective measure in place, he asked Colbeck to stop the grinding and advised him that Fraser Fibreglass had just completed $60,000 worth of painting and polishing of the Vessel. His evidence is that Colbeck did not respond and that Higgs continued grinding. O'Donoghue deposes that he then offered a roll of plastic sheeting to protect the Vessel from further contamination but that Colbeck still made no response. Higgs then said that he would spray the Vessel down with water. O'Donoghue states that he replied that this would worsen the condition of the Vessel and that they had to cover up the "*Aestival*". During this conversation, Higgs continued grinding. O'Donoghue deposes that the following day he observed Executive Yacht employees on board the "*Aestival*" sanding the top sides of the hull, again with no tarp or other means of containment, and that he observed dust and debris emanating from the "*Aestival*" and settling on the Vessel.

[78] Higgs Affidavit #1 confirms that Higgs is the president of the Defendant Island-Sea which has owned the "*Aestival*" since 1971. He stated that the "*Aestival*" was brought to the

Marina so that Colbeck, doing business as Executive Yacht Services, could refinish its exterior hull. Higgs states that he has over 50 years of extensive experience with large steel renovations and complete repowerings of large ocean tugs and ocean going barges in numerous ship yards. He further states that he has over 45 years experience as a coastal Master, operating various vessels at sea and attending them while under repair. Higgs deposes that he believed that Colbeck was familiar with the Marina rules for tarping work areas as he had done work there for over 10 years and rented a space there, and that he believed Colbeck knew of his duty to isolate such work.

[79] In Colbeck Affidavit #1, Colbeck deposes that he has been in business at the Marina since 1991 and has a shop there. He states that on July 18, 2012 he and his crew hung plastic protective tarps over the sides of the "*Aestival*" and, during the entire time that he and his crew were working on that vessel, they used plastic tarps to contain dust and debris and vacuum sanders when sanding the bottom of the hull. The plastic tarps were rolled up late in the afternoon of July 26, 2012 as they felt they had completed the preparation of the hull for priming and wanted to inspect and clean it.

[80] Based on the evidence, it is clear that a duty of care was owed by each of the Defendants to the Plaintiff. The "*Aestival*" was the neighbour of the Vessel in physical proximity. Colbeck was an experienced vessel repairer, retained by Higgs, and was familiar with the Marina. Higgs was also an experienced boat owner and operator who deposed that he believed that Colbeck was familiar with the Marina's Yard Rules concerning tarping. Both Colbeck and Higgs knew, or should have known, of the need to tarp the "*Aestival*" when conducting work such as sanding or

grinding that could cause airborne debris. In fact, Colbeck states in his affidavit evidence that the "*Aestival*" was tarped until he and his workers thought the sanding was complete. Clearly then he was aware of the need to effect protective tarping and it was also foreseeable to him that a failure to do so during grinding or sanding on the "*Aestival*" could cause damage to the Vessel. In fact, O'Donoghue's evidence was that Higgs and Colbeck were told by him that debris was settling on the Vessel. Higgs, in effect, acknowledged this by stating that he would hose off the Vessel, which he subsequently did.

[81] Colbeck submits that he could not have foreseen that Higgs would undertake grinding after the tarping had been removed. However, he also deposes that on the morning of July 27, 2012, an employee of his, Shawn Albert, was "doing some spot sanding of the filler and old paint on the top sides of the "*Aestival*"". He does not depose that tarping was effected during that time and, according to the O'Donoghue Affidavit, there was no plastic sheeting, enclosures, tarps or other means of containment in place. It was, therefore, foreseeable to Colbeck that debris from sanding conducted by his employee could result in debris settling on the Vessel and potentially causing damage.

[82] The relationship and proximity between the parties was such that it was reasonably foreseeable to the Defendants that a failure to contain debris from their work could cause damage to the Vessel. This gives rise to a *prima facie* duty of care.

[83] No countervailing policy considerations that negative the duty of care arise in this case.

ii) What is the applicable standard of care and was it breached by the Defendants?

Plaintiff's Position

[84] The Plaintiff submits that the Defendants were required to perform the work on the "*Aestival*" to the standard of care expected of an ordinary, reasonable and prudent person in the same circumstances (*Ryan v Victoria (City)*, [1999] 1 SCR 201 at paras 21-28 [*Ryan*]). Given the proximity of the vessels and the real risk of harm from grinding and sanding debris, the Defendants should have taken appropriate measures to contain any harmful material. They should have been aware of the Marina's posted Yard Rules which state that "Sanding Residue and Paint Spray Must be Contained" and that there was to be "No Sandblasting". This was the appropriate standard of care.

[85] Further, Higgs and Colbeck should have been alive to the risk given their extensive experience in operating, maintaining and repairing vessels; the clear community standard as posted; and, the warning and notice provided by O'Donoghue. In response to O'Donoghue's warning, Higgs stated that he would spray the Vessel with water. O'Donoghue informed him that this would increase the damage. Despite the warning and notice, the Defendants continued their work without taking steps to contain the debris, and further work was done the following day also without containment.

[86] A reasonable person, with the extensive experience of the Defendants in operating, maintaining and repairing vessels, combined with the various warnings, would have taken

measures to prevent debris from escaping and settling on the Vessel. The Defendants breached the standard of care by failing to do so.

Defendant Colbeck's Position

[87] Colbeck submits that prior to and on the morning of July 26, 2012 the standard of care was met as a protective tarp was erected around the "*Aestival*" and that there is no evidence to the contrary. He was not planning on doing any sanding or grinding that afternoon. He also suggested to Higgs that he get a new piece of steel cut for the cap rail and on three occasions shouted at him to stop grinding and also pulled out the grinder extension cord, which also met the standard of care.

[88] He denies that he was present during the alleged offer of a roll of plastic by O'Donoghue or the conversation about hosing off the Vessel. In any event, he could not have tarped the "*Aestival*" at that time without risk of injury. An ordinary, prudent person would not attempt to physically restrain another person while they operated a dangerous power tool.

[89] The measure of what is reasonable as per *Ryan*, above, at para 28 includes the likelihood of a known or foreseeable harm and the gravity of that harm. Colbeck's evidence that the dust was not bad enough for him to need to wear protective eye wear and the absence of dust evident in the photographs, suggests that the foreseeability of harm was not great. Further, on July 27, 2012, Shawn Albert was primarily using a hand sander, the vessels were 20 feet apart and the putty and paint dust could have been cleaned up by hosing it off. Accordingly, the foreseeability

and gravity of harm was not great. In these circumstances, the standard of care was not breached by not tarping.

Analysis

[90] As stated by the Supreme Court of Canada in *Ryan*, above, a discussion of duty of care centres around its existence, while the standard of care clarifies the content of that duty:

> [28] Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[91] In Hopkinson Affidavit #1, F.I. Hopkinson describes himself as a marine surveyor, the owner and director of F.I. Hopkinson Marine Surveyors Ltd, and a master mariner. His affidavit attaches as Exhibit "B" a Certificate Concerning Code of Conduct for Expert Witnesses, prepared pursuant to Rule 52.2. Exhibit "C" is a copy of a survey report dated September 15, 2012 that he prepared pertaining to the Vessel at the request of Navis Marine Insurance Brokers. Exhibit "D" is comprised of colour photographs, including one of the Marina's posted Yard Rules. These list, amongst other rules, that "Sanding Residue and Paint Spray Must be Contained" and that there is to be "No Sandblasting".

[92] While it is true that the Yard Rules do not refer to grinding, it can reasonably be inferred that if sanding residue and paint spray were required to be contained by way of this community

standard, then the containment of steel grinding debris would similarly be required by the same standard of care.

[93] Colbeck's evidence as described above was that he has been in business at the Marina since 1991 and was experienced in vessel repair. Thus, he was, or should have been, familiar with the Yard Rules. Higgs' evidence was that he is an experienced vessel operator and has attended vessels while under repair. Both Higgs and Colbeck were put on notice of the risk by O'Donoghue, yet on July 26, 2012 Higgs continued to grind on the "*Aestival*" without setting up any form of containment. In doing so, Higgs breached the standard of care.

[94] O'Donoghue's affidavit evidence was that when he arrived at the "*Aestival*" and the Vessel on July 26, 2012 Colbeck and Higgs were both on board the "*Aestival*". Colbeck was standing on the forward port bow overseeing grinding work being done by Higgs. O'Donoghue knew Higgs, asked him to stop the grinding and advised him that contamination was settling on the Vessel which had just been painted and polished. There was no response and Higgs continued grinding. O'Donoghue states that he then offered a roll of plastic sheeting to protect the Vessel but that Colbeck again did not respond. Higgs then said he would spray down the Vessel whereupon O'Donoghue advised that this would worsen its condition and that they had to cover up the "*Aestival*". Higgs continued grinding and Colbeck did not speak. O'Donoghue then left and got his camera. Upon his return the grinding was still ongoing and he overheard Colbeck say, "The asshole has a camera". The grinding work continued and O'Donoghue took photos.

[95] When cross examined on his affidavit by counsel for Colbeck, O'Donoghue was asked if it was possible that only Higgs was present when the conversation about the hosing down of the Vessel took place. O'Donoghue responded that it was not possible because he had been talking to Colbeck. He did not know Higgs and did not know he was the owner of the "*Aestival*". When counsel suggested that Colbeck was not there as he had been called away to a meeting, O'Donoghue responded that that was incorrect.

[96] When asked if it was possible that Colbeck had not heard O'Donoghue, he replied that when he asked Colbeck to put something over the "*Aestival*" to protect it, Higgs stopped grinding and said he would spray down the Vessel. Colbeck at no time responded to O'Donoghue. When asked if it was possible that when he returned with his camera, what Colbeck actually said was "Stop, the asshole has a camera", O'Donoghue stated that he did not think that was what was said.

[97] Conversely, Colbeck in Affidavit #1 deposes that at approximately 3:30 p.m. on July 26, 2012 he called Higgs to the bow of the "*Aestival*" to show him that a piece of steel that Higgs had given to Colbeck would not fit properly. Colbeck suggested that he make a template and give it to Higgs to get a new piece of steel cut that would fit. Higgs resisted this and said he could make it fit. During this discussion, Colbeck was called away to see one of the Marina managers. When he returned, Higgs had taken up a steel grinder and was grinding a steel portion of the cap rail support. Colbeck immediately yelled at him to stop but Higgs kept grinding. Colbeck yelled a second time and unplugged the grinder from the extension cord. Higgs yelled back that he had spoken to the owner of the boat beside him (the Vessel) and advised him that he

would hose the Vessel down after he finished grinding. He then plugged the grinder back in while Colbeck was still holding it. Higgs then took the grinder from Colbeck's hands and resumed grinding with Colbeck watching, frustrated and feeling at a loss of what to do. Shortly thereafter he saw O'Donoghue on the deck of the Vessel taking pictures and yelled at Higgs, "Stop grinding, the asshole has a camera". Higgs continued to grind and there was nothing Colbeck could do but watch.

[98] Colbeck states that if O'Donoghue said anything to him he did not hear it over the noise of the grinder and did not recall him offering plastic. Even if it had been offered, he could not have done anything with it while the grinding was ongoing, for fear of injury. In addition, he was not present when the conversation about hosing down the Vessel occurred.

[99] The affidavit of Arvin Pacris states that on July 26, 2012 he was an employee of Fraser Fibreglass and, while working in the Marina on another vessel, he heard Colbeck screaming "stop…stop". Pacris stood on the top of the boat he was working on and observed a man on the "*Aestival*", who he believed to be its owner, operating a grinder and Colbeck standing on the ground looking up at him.

[100] Higgs Affidavit #1 states that while Colbeck was called away via cell phone to meet with the general manager of the Marina, Higgs used a hand-held grinder for 11 minutes. In Higgs Affidavit #3, made in response to a written examination issued by counsel for Colbeck, Higgs was asked whether Colbeck was present when he spoke to the person who he thought was the owner of the "*Ain't Life Grand*" about hosing it off, and he responded: "Initially Mr. Colbeck

was not present and then subsequently he became present sometime afterward but before I did the hosing". He also acknowledged that he had hosed down the Vessel. Higgs was not cross examined on his affidavits.

[101] In the result, while I have some reservations as to Colbeck's evidence as to when he was on the "*Aestival*" during the subject incident and as to his actions to stop the grinding, the undisputed evidence remains that it was Higgs alone who undertook the grinding and continued that action when the lack of containment had been brought to his attention, and it was Higgs who subsequently hosed down the Vessel when he had been warned against both actions by O'Donoghue. In these circumstances, Colbeck did not breach the standard of care on July 26, 2012 by not erecting tarping while Higgs continued to grind.

[102] However, sanding was undertaken by an employee of Colbeck on the following day, again without containment.

[103] In that regard, Shawn Albert attached as Exhibit "A" to his affidavit the time ledger used to record time by Executive Yacht employees. This records that he worked on the "*Aestival*" for 6.5 hours on July 27, 2012. The entry reads "July 27 – Shawn – Putty, sand, spot prime bare metal – 6 ½". He states that his habit when filling out time ledgers was to list the work in the order that he had done it. He did not recall grinding any bare metal that day and, if he had, he would have used the word "grind" as he did for his entries on July 18 and 30. It was possible that he used an air powered orbital sander for some very short periods to sand small spots but larger spots were done by hand with a long board. He deposes that he did not sand or grind any

bare metal. Further, that in his experience, when sanding putty the dust from the putty is easily washed away with a hose and cold water. And, that because "spot prime bare metal" was entered last, this was likely done late in the day. It involved spraying small amounts of paint on small areas for only 2-3 seconds. He states that to the best of his knowledge and belief, he was the only person working on the "*Aestival*" that day.

[104] What is apparent from this evidence, in the context of the standard of care, is that although Colbeck's evidence was that the plastic tarps were rolled up late in the afternoon on July 26, 2012 because it was believed that the preparation of the hull for priming was complete, in fact, an employee of Colbeck was subsequently tasked to do further sanding and spot spray painting of the hull on July 27, 2012 without reinstating the tarping or taking other measures to isolate that work. This was contrary to the Yard Rules and was a breach of the standard of care.

[105] In my view, the fact that Colbeck did not wear eye protection while Higgs was grinding is not indicative of the applicable standard of care, nor is it reflective of the likelihood of harm to the surrounding vessels by deposited debris. Colbeck and Higgs were warned by O'Donoghue of the fact that debris was settling on the Vessel, thus there is no question that the likelihood of harm to the Vessel was foreseeable.

[106] I agree with the Plaintiff that, given the close physical proximity of other vessels in the Marina, including the Vessel, and the risk of damage to them from grinding and sanding debris, the Defendants were required to perform their grinding and sanding work to the standard of care expected of an ordinary, reasonable and prudent person in these circumstances. This would have

entailed the taking of appropriate measures, before commencing any grinding and sanding, to contain the debris and ensure that it did not escape and land on nearby vessels, including the subject Vessel. Colbeck's evidence that the "*Aestival*" had been tarped until the late afternoon of the 26th when he thought the sanding was completed supports that he was aware that for grinding and sanding work, vessels should be tarped.

[107] Accordingly, the Defendant Higgs breached the standard of care on July 26, 2012 and the Defendant Colbeck breached the standard of care on July 27, 2012.

iii) Causation

Plaintiff's Position

[108] The Plaintiff submits that the test for determining causation is the "but for" test (*Resurfice Corp v Hanke*, 2007 SCC 7 at paras 20-23 [*Resurfice*]) and that, but for the Defendants' negligent grinding and sanding on the "*Aestival*" without taking measures to prevent the escape of the resulting debris into the air, the Vessel would not have been damaged and the Plaintiff would not have incurred costs for repairs and cleaning. The damage was directly caused by a cloud of steel and other debris which settled on and stained the hull and topsides of the Vessel. The evidence of Hopkinson was that steel debris in particular can penetrate the gelcoat and cause brown stains which are difficult or perhaps impossible to remove. Therefore, the Defendants are solely responsible for the damage to the Vessel, which was exacerbated by the hosing down, and the loss of the use of the Vessel during the repair period.

Defendant Colbeck's Position

[109] Colbeck submits that the Vessel was on blocks in the Marina for one month before the alleged incidents and that there were numerous sources of potential contamination such as the metal shop situated near the Vessel; a woodworking and fibreglass shop, also within the Marina; work being done on other boats; and, passing coal trains.

[110] Colbeck submits that the Plaintiff has not established on a balance of probabilities that the contamination damage from the alleged grinding would not have occurred but for the actions of Higgs or Colbeck. No sample of the contaminants was taken and although O'Donoghue described a cloud of debris his photographs did not show this. There is also evidence of poor relations between Colbeck and O'Donoghue. Colbeck submits that O'Donoghue may have exaggerated the extent to which the dust and debris traveled from the "*Aestival*" and settled on the Vessel. Further, such an exaggeration would have served to justify Fraser Fibreglass' large invoices for the clean up. Given this, and in the absence of corroborating evidence, O'Donoghue's testimony should be rejected or afforded little weight. Further, if the hosing of the Vessel exacerbated any damage, which is not admitted, then that damage was the fault of Higgs alone.

[111] As to the damage alleged to have occurred on July 27, 2012 as a result of Colbeck's employees' actions, Colbeck submits that this is divisible from the damage caused by the metallic dust on or before July 26, 2012 (*Moore v Kyba*, 2012 BCCA 361 at paras 32-37). This is because the work was performed on different days and by different people; the alleged damage

was caused by different substances; the alleged damage arose from different projects; and, the method of cleaning metal contamination is very different from that of cleaning putty/paint contamination. Each tortfeasor must only be responsible for the injury he caused. At most, Colbeck should only be responsible for the putty and paint dust. However, since the putty and paint dust did not exacerbate the pre-existing damage from the metallic dust and did not require any additional cleaning, it did not cause any damage.

[112] Colbeck submits that pursuant to s. 4(2) of the British Columbia *Negligence Act*, RSBC 1996, c 333, joint and several liability is only imposed if the damage is indivisible. Thus, there should be no joint and several liability in this case. Alternatively, the crumbling skull rule (*Athey v Leonati*, [1996] 3 S.C.R. 458, 140 DLR (4th) 235 [*Athey v Leonati*]) applies. The Vessel was injured by the metallic contamination (its pre-existing condition) on July 26, 2012. This required extensive cleaning. The paint and putty dust the next day required only an hour of hosing to clean, the only damage for which Colbeck would be liable. But, as no additional work was required to clean the paint and putty debris, it did not exacerbate the pre-existing damages from contamination and therefore no liability should result therefrom. Given the application of the crumbling skull rule there is no joint and several liability.

Analysis

[113] The basic test for determining causation remains the "but for" test. The plaintiff bears the burden of showing that "but for" the negligent acts or omissions of each defendant, the injury would not have occurred. Where it was the negligence of more than one defendant that caused

the same loss, damages may be apportioned as permitted by statute (*Clements v Clements*, 2012 SCC 32 at paras 8, 12).

[114] The Plaintiff must establish on a balance of probabilities that the Defendants' actions were the cause of the damage sustained. That is, but for the grinding and/or sanding work on the "*Aestival*", the damage would not have occurred.

[115] First, as to the submission that the contamination could have been from an alternate source, the evidence in this regard is speculative.

[116] The affidavit of Philip Maier, a manager of the Marina, states that the Vessel was returned to the common area of the Marina from the Fraser Fibreglass shop on June 20, 2012. Further, that the Marina is in an industrial area almost directly under the Second Narrows Bridge and beside a railway. Maier deposed that "[i]f vessels are left uncovered for a period of two to three weeks they tend to get dirty".

[117] While this may be so, it would appear to refer to a general exposure of all vessels to atmospheric dirt and dust. It would not account for metallic particulate or the other debris as described in O'Donoghue's evidence.

[118] Colbeck Affidavit #1 states that the area where the Vessel was stored from June 20 to August 7, 2012 "is a dirty location where there is the possibility of contamination from a number of sources". He deposes that it is located almost underneath the Second Narrows Bridge and

next to a railway where coal trains regularly pass. During the summer, the Marina is active with numerous vessels being sanded and painted. There is a steel fabrication shop close to where the Vessel was stored that welds and grinds steel every day. During the summer of 2012, that shop often left its doors open, as did other shops, such as fibreglass repair and woodworking shops. On some occasions the steel shop also did grinding in the yard in front of its doors near the Vessel. During the time that the Vessel was in the Marina, there were many other boats nearby where grinding and sanding work was being performed.

[119] Colbeck Affidavit #2 was made in response to a written examination. In response to question 3(a), Colbeck stated that while there were numerous boats in the area being worked on, not all of them would have been subject to sanding or grinding. As the work on other vessels was prior to the July 26, 2012 incident, he had no notes or photos and could not provide precise details as to date, time and location of each vessel. Further, the majority of the vessels were tarped, but not all of them were fully tarped. He stated that in his experience from working at the Marina, in the early morning and evenings, when Marina staff are absent, people tend to break the tarping requirements more frequently. He gave no specific examples of this that would have been relevant to the June 20 to July 26, 2012 period in issue.

[120] In my view, this evidence is non-specific. In addition, it would seem reasonable that if the steel fabrication shop was leaving its doors open, grinding and permitting steel particles to escape, there would have been many complaints by the owners of fibreglass vessels in the Marina. Nor did the Marina manager, Maier, in his affidavit suggest this as a source of contamination.

[121] In contrast, O'Donoghue Affidavit #1 states that on July 26, 2012 he and his staff had recently completed repair work on the Vessel, part of which was repainting and polishing. "Accordingly, on July 26, 2012, while the Vessel still remained out of the water at the Marina on blocks, it was clean, polished and in pristine condition ready to be relaunched for use".

[122] Further, O'Donoghue deposed that on July 26, 2012 he observed Higgs doing grinding work on the "*Aestival*" port bulwarks and observed a cloud of dust in the air between the two boats and dust and debris settling on the Vessel. Higgs admits in his first affidavit that he undertook grinding on that date. This suggests that the source of the debris was not simply an accumulation over time prior to July 26, 2012. Further, O'Donoghue states that on July 28, 2012 he conducted an inspection of the Vessel. He discovered damage to the gelcoat on the deck from grinding debris. The deck was also covered with debris containing steel particles and black antifouling paint which had stained the deck's gelcoat finish. The sails, canvas and stainless hardware were also damaged as was the hull where steel debris had settled on the rub rail. Attached to his affidavit are many photos taken during the inspection. When cross examined on his affidavit, he stated that he could see a cloud of airborne dust going on to the Vessel, and it was very easy to see. He was taken through copies of the photographs he had taken and asked to point out the airborne debris cloud but stated that, due to the quality of the copies of the photos, it was difficult to do so. However, in one photo he was able to point to dots in front of the lens that he stated were caused by dust. An enlarged copy of that photo and a disc of photos was provided in the Supplemental Motion Record of the Plaintiff.

[123] While the photos do not conclusively illustrate a dust and debris cloud, there is no doubt that on July 26, 2012 Higgs undertook steel grinding next to the Vessel, which he admits, and which activity is captured by the photographs. O'Donoghue was an eye witness to this and to the settling of the debris on the Vessel which he described as clean prior to July 26, 2012. His photographs do show accumulated dust and debris at various locations on the Vessel as well as metallic staining.

[124] Hopkinson, in his September 15, 2012 survey report prepared on behalf of the Plaintiff's insurers, described the damage to the Vessel: "[t]he decks, upper works, canvas work and the sails which were stored on the fore deck of Ain't Life Grand became contaminated with debris which stained the gelcoated finish of the decks". Hopkinson reviewed three of Fraser Fibreglass' invoices for the repairs. The first (no. 8706) in the amount of $15,075.87 was approved in full as fair and reasonable; the second (no. 8724) was discounted by $388 being the cost to reattach the sails, and was otherwise approved as fair and reasonable in the amount of $13,579.68; the third (no. 8718) was for Marina storage charges and was discounted for charges incurred for storage prior to July 26 and then approved in the amount of $3247.33. North Sails Vancouver invoice no. 25636 for sail cleaning was approved in full in the amount of $975.39. Exhibit "D" of Hopkinson Affidavit #1 contains colour photographs of the Vessel. Exhibit "E" is his invoice for his survey work "…for damage caused to the deck, topsides, upper works, canvas work and sails by grindings containing steel particles from the ketch Aestival" [emphasis added]. Exhibit "F" includes a copy of correspondence dated July 31, 2012 to Higgs in which Hopkinson states:

> We are marine surveyors, requested by hull and machinery underwriters of the above vessel to investigate the cause, nature and extent of damage sustained as a result of recent work carried

> out on your boat which resulted in *metal particles* and other debris contacting that vessel.
>
> As you may know, debris, particularly steel particles can stain gelcoat, in some cases becoming absorbed by the gelcoat resulting in ugly brown stains which are difficult and in some cases impossible to remove.
>
> We have recommended that remedial action be carried out as soon as possible in order to minimise the damage. That work commenced this afternoon when a steam cleaner was used to rid the deck and upper works of the contaminate. That work, we expect will continue tomorrow. We shall have to see how successful that method of cleaning will be, but it is entirely possible that other means of cleaning, such as cut polishing and hand scrubbing will have to be employed.
>
> […]
>
> [Emphasis added]

[125] While Hopkinson relies on O'Donoghue as to the source of the contamination, he conducted his own survey and took no issue with the contamination of the Vessel, including by metallic debris, and he approved the clean up required for that type of contamination.

[126] In his affidavit, Oldham describes himself as a marine surveyor. Exhibit "B" is a Certificate of Code of Conduct for Expert Witnesses made pursuant to Rule 52.2 in which he confirms that he was retained as an expert on behalf of Colbeck. Exhibit "C" of his affidavit is a copy of his report dated January 27, 2014 concerning the Vessel. One of the questions Oldham was asked to respond to was whether the work performed by Fraser Fibreglass was necessary to clean up any damage or mess caused by the alleged contamination from the "*Aestival*" on July 26 and 27, 2012. In response he states, in part, that "steel partials (sic) from grinding will embed

into fibreglass gelcoat and oxidize therein. This results in an unsightly condition of the fibreglass but does not compromise the structural integrity of the structure".

[127] While Oldham takes issue with the cleaning method employed with respect to the grinding dust, he does not suggest that there was no metallic debris nor resultant damage.

[128] In my view, on a balance of probabilities, the source of the metallic particles that contaminated the Vessel was the grinding conducted by Higgs on July 26, 2012 and this caused damage to the Vessel. But for Higgs' actions the damage would not have occurred.

[129] As to the events of July 27th, when cross examined on his affidavit, O'Donoghue stated that there was a person grinding or sanding the transom of the "*Aestival*" on that date but he could not say if they were grinding metal, bondo, paint or epoxy. All he could see was dust. The affidavit of Shawn Albert confirms that he was puttying, sanding and spot priming on that date, but denies that he was grinding any metal. In my view, it has not been established on a balance of probabilities that the sanding on July 27, 2012 included sanding of metal. However, the settling of the other particles on the Vessel on that date was due to the sanding by Shawn Albert.

[130] As to the relations between O'Donoghue and Colbeck, the evidence is clear that they were not overly fond of each other.

[131] On cross examination, when asked about his relationship with Colbeck, O'Donoghue stated that Colbeck had never liked him. He had nothing against Colbeck, who is a competitor,

but that Colbeck never looked at or spoke to him. When asked if he would agree that Colbeck had previously complained to the Marina management about O'Donoghue's staff not properly tarping boats, he stated that he had heard that. He confirmed that he had also made complaints about Colbeck, and that there had been an incident when Colbeck had unplugged a sander being operated by one of O'Donoghue's employees, which O'Donoghue deemed to have been a dangerous action. He stated that he had never complained to WorkSafeBC or the Workmen's Compensation Board about Colbeck.

[132] For his part, Colbeck began his Affidavit #1 by stating that O'Donoghue had always appeared to dislike him, which he presumed was because he had set up a competing business in an advantageous position in the Marina. He had on occasion complained to management about O'Donoghue or Fraser Fibreglass not following the Yard Rules as to protective tarps. Over the last two to three years, following such complaints, there was retaliation by Fraser Fibreglass. For example, on more than one occasion after a complaint, inspectors from Workers Compensation arrived in his shop responding to a complaint about alleged improper work habits.

[133] In my view, while Colbeck and O'Donoghue were not on friendly terms, Colbeck speculated as to retaliatory measures taken by O'Donoghue, which O'Donoghue denied. There is also no evidence to support Colbeck's submission that, as a result of the friction between the two, O'Donoghue may have exaggerated the extent to which the dust and debris traveled from the "*Aestival*" and settled on the Vessel. Nor is there evidence to support the further submission that such an exaggeration would have served to justify Fraser Fibreglass' large invoices for the

clean up. In my view, these allegations are simply an effort to discredit damaging eye witness evidence and are not supported by the evidence.

[134] I would also note that O'Donoghue was not conducting the repair of the Vessel without oversight. His invoices were reviewed by Hopkinson who, as noted above, is a marine surveyor who also attended on the Vessel after the events of July 26 and 27, and who adjusted and approved the invoices as fair and reasonable on behalf of the Plaintiff's insurer. There is no suggestion that Hopkinson found the source of contamination to be suspect or its effect exaggerated.

[135] In my view, the Plaintiff has established on a balance of probabilities that the contamination damage to the Vessel from the grinding on July 26, 2012, undertaken and continued without taking measures to prevent the escape of the resulting debris into the air, would not have happened but for the acts or omissions of Higgs. It does not, however, establish that it was foreseeable to Colbeck that Higgs would undertake grinding on that date and that Colbeck, therefore, should, or could have effected protective tarping before Higgs commenced or during that activity. However, the contamination on July 27, 2012 would not have occurred but for the acts and omissions of Colbeck or his employees both in effecting the sanding and in failing to erect protective tarping.

[136] That said, defendants are only liable for those injuries that are caused by their negligent acts (*Athey v Leonati*, above). In this matter, Higgs is responsible for the damage caused by his negligence on the 26th, and Colbeck is responsible for any damage caused by his employee's

negligence on the 27th. However, the damages caused by these two incidents are divisible or separate and, as further addressed below, the contamination that occurred on July 27, 2012 did not result in the Plaintiff incurring any further damage or additional cost of repair.

[137] In *Sunrise Co v "Lake Winnipeg" (The)*, [1991] 1 SCR 3 [*The Lake Winnipeg]*, the plaintiff ship collided with the defendant ship and ran aground. The collision was found to be due to the negligence of the defendant, and the damage caused by this collision required the ship to be in dry dock for repairs for 27 days. While the plaintiff ship was on its way to anchorage, it ran aground a second time in an unrelated incident. The second incident would have required 14 days in dry dock, but the repairs were all effected during the initial 27 day period.

[138] Writing for the majority of the Supreme Court of Canada, Justice L'Heureux-Dubé allowed the plaintiff to claim lost earnings for the full 27 days from the defendant, even though it could have been said, based on personal injury jurisprudence where the second incident is non-tortious, that 13 of those days would have occurred anyway and were not the responsibility of the defendant. Justice L'Heureux-Dubé cited and relied on the proposition in The Haversham Grange, [1905] P 307 at 398:

> (b) If it is necessary to effect collision repairs in respect of two collisions, damages for detention are payable by the wrongdoer in the first collision, so far as not increased by the second.

[139] She cautioned against the comparison of loss of profit cases in the shipping area with personal injury cases but gave a non-shipping example of the principle, specifying its relevance to property damage cases:

> It seems to me that a more meaningful use of the principles in the shipping cases occurs in Performance Cars Ltd. v. Abraham, [1962] 1 Q.B. 33, in that, as in the shipping cases, the issue revolved around property damage. In this case, a car was involved in two collisions. The damage done was slight although the first collision necessitated the respraying of the whole of the lower part of the car. As the plaintiff was unable to recover the amount needed for respraying from the first tortfeasor, he reasoned that, as the damage caused by the second tortfeasor would have independently required respraying, he would look to the second tortfeasor for recovery of this cost. Lord Evershed M.R. in coming to a conclusion, relied partly on the reasoning in The Carslogie and The Haversham Grange. At page 40 he concluded:
>
> > In my judgment in the present case the defendant should be taken to have injured a motor-car that was already in certain respects (that is, in respect of the need for respraying) injured; with the result that to the extent of that need or injury the damage claimed did not flow from the defendant's wrongdoing.
> >
> > [Emphasis added]

[140] L'Heureux-Dubé J found at paragraph 30 of *The Lake Winnipeg*, above, that in that case, it was not sufficient merely to determine that the damage caused by the second incident was a cause of the detention. Although the second incident caused time in dry dock, there was no causal link between the second incident and the loss of profit suffered by the owners of the plaintiff ship, since the repairs due to the second incident were completed within the 27 days detention in dry dock required by the first incident. Therefore, the defendant ship, which was solely responsible for the first incident, was wholly responsible for the loss of profit incurred for the full 27 day detention in dry dock.

[141] Although the second incident in *The Lake Winnipeg* was a non-tortious one, L'Heureux-Dubé J held in *obiter* that it was irrelevant to the liability of the first defendant whether or not the second incident was tortious.

[142] In this case, the two torts occurred on different days, by the conduct of different persons, and, as discussed further below, caused different damage or loss to the Plaintiff Vessel. Accordingly, as the damages are overlapping but separate, this is not a circumstance where apportionment based on degree of fault as described in s. 17(1) of the *Marine Liability Act*, SC 2001, c 6 (MLA), nor joint and several liability as set out in s. 17(2) of the MLA, has application. The same conclusion is reached if the relevant provisions of the British Columbia *Negligence Act*, RSBC 1996, c 333 (ss. 1(3), 4) were applicable.

[143] In the result, the Aestival Defendants are wholly responsible for the damage caused by the settlement of steel particles and other debris on the Vessel on July 26, 2012. Colbeck is responsible for any damage or loss suffered by the Plaintiff as a result of the sanding that occurred on board the "*Aestival*" on July 27, 2012.

[144] In that regard, based on the evidence I find that any damage caused by Colbeck's employee's sanding activities on July 27, 2012 did not cause loss to the Plaintiff beyond that already caused by Higgs' actions on July 26, 2012. O'Donoghue's evidence was that he could not say that any metallic grinding occurred on July 27 and Albert's evidence was that he did not sand or grind any bare metal on that date. Thus, the evidence does not establish, on the balance of probabilities, that the action of Colbeck's employee on July 27, 2012 caused damage to the

Vessel as a result of metal particle contamination. Further, there is no evidence that the mingling of the contamination from both days caused specific damage.

[145] Oldham Affidavit #1 states that the sand particles that settled on the Vessel as a result of the July 27, 2012 incident would have required one hour of hosing down to remedy. Oldham was not cross examined on his evidence. Further, review of the invoices leads me to the conclusion that there was not a hosing down or cleaning of the deck for the putty/paint particles separate from that which was required, in any case, in response to the July 26, 2012 damage incurred from the deposit of the steel particles. In the result, Colbeck is not liable for damages.

iv) Damages

Plaintiff's Position

[146] The Plaintiff submits that the cost for repairs, cleaning and storage during the repair work in the amount of $37,886.32 as well as survey costs of $4,879.42 are compensable ($42,765.74). The Plaintiff further submits that loss of use during the repair period by the directors of the Plaintiff, who had planned holidays on the Vessel, are also compensable (*Perera v De Groot*, 2006 BCSC 1281 [*Perera*]; *Strachen v Constant Craving (The)*, 2003 FCT 86 [*Strachen*]).

Defendant Colbeck's Position

[147] Colbeck makes lengthy and detailed submissions challenging the method and cost of the repairs.

[148] In essence, he submits that the damage was overestimated by the Plaintiff, that repairs could have been effected less expensively and that the Plaintiff failed to mitigate its damages. In this regard, Colbeck relies on the survey report completed by Oldham. Oldham's opinion was that if the decks of the Vessel had been cleaned using a light pressure wash and oxalic acid followed by cut polishing and scrubbing then it could have been completed in 50 hours. Colbeck submits that had competitive quotes been obtained, it is likely that one of the bidders would have known about the use of oxalic acid and made a more competitive bid based on this.

[149] Colbeck also submits that the rust staining around the stainless steel was not attributable to the grinding and sanding contaminants, that certain rust staining on the deck was the result of a corroded anchor chain, and that other areas would have been protected by the sails and would not have required cleaning. Further that Fraser Fibreglass invoice no. 8729, in the amount of $3,846.64, and an invoice of Malkin Cleaners in the amount of $1,161.41 for cleaning towels and bedding were not approved by Hopkinson and should not be indemnified.

[150] Colbeck submits that the Vessel had been listed for sale and that this influenced the cleaning costs.

[151] He further submits that Hopkinson's services were not restricted to providing an expert report and therefore the cost of his report should be discounted.

[152] As to loss of use, Colbeck submits that it is questionable whether the Vessel would have been available during the summer of 2012 even if the contamination had not occurred.

Relaunching was delayed from June 26 to July 27, so it may well also have been delayed until September of 2012. Therefore, the Plaintiff has not established on a balance of probabilities that the contamination caused the loss of use. In any event, the July 27, 2012 contamination did not result in any loss of use as it was only putty/paint dust that could be hosed off in one hour.

[153] Further, Colbeck submits that the directors of the corporate plaintiffs are not named plaintiffs, the loss is not quantified, and there is no evidence that a replacement vessel was leased. The Vessel was sold for $340,000 on June 14, 2013 based on which a loss of use claim could be calculated as $1,341.60 (*Teschner v Teschner*, [1995] OJ No 1569).

Analysis

[154] Hopkinson's survey report dated September 15, 2012 states that Hopkinson commenced his survey on July 31, 2012 at the request of Navis Marine Insurance Brokers. Hopkinson describes Fraser Fibreglass as having cleaned the decks and upper works in a variety of ways, including with a steam cleaner, with muriatic acid, and hand cleaning the decks and non skid areas with cut polishing compound and other cleaners. He considered three invoices from Fraser Fibreglass, adjusted two of them, and allowed the amount of $32,878.27, which included $975.39 for sail cleaning. His July 31, 2012 correspondence to Higgs included his recommendation that remedial action be carried out as soon as possible in order to minimize the damage, and advised that although steam cleaning had started that afternoon, other means of cleaning may prove to be necessary. In my view, given this evidence, there is no merit in Colbeck's submission that the Plaintiff failed to mitigate the damages.

[155] Hopkinson Affidavit #2 was made in response to a written examination. He was asked why the deck of the Vessel could not be pressure washed, and he answered that pressure washing may have made the staining worse. He was also asked if he recommended the use of oxalic acid to clean the steel particles. He answered that he did not, and that he normally only recommended oxalic acid for bleaching teak. He was asked if Fraser Fibreglass had a reputation for being one of the more expensive repairers and he agreed that it had. He also agreed that the Vessel owners had higher than normal expectations regarding the degree to which the Vessel would be cleaned.

[156] Oldham, in preparing his report, was asked to provide an opinion on whether the work performed by Fraser Fibreglass was necessary to clean up any damage or mess caused by the alleged contamination from the "*Aestival*", and whether the repair charges were reasonable. He stated that in his opinion, if the Vessel's decks had been cleaned of grinding dust by use of a light pressure washer, most of the grinding debris would have been removed. The application of oxalic acid would dissolve any metal particles and etch any stained fibreglass. Cut polishing and scrubbing would have completed the process. His opinion was that an excessive period of time was spent cleaning the decks of grinding dust and, if undertaking in a timely fashion, this work could have been done in 50 hours. Oldham noted that Fraser Fibreglass had cleaned the decks using a steam cleaning machine application of muriatic acid and hand polishing.

[157] When cross examined on his affidavit by counsel for Colbeck, O'Donoghue was asked why he did not use oxalic acid. His response was that he usually used a product called On & Off as well as muriatic acid and found them to be extremely good, even better, at removing steel and

cuprous oxide debris. He stated that On & Off contains an acid which is very good for removing contamination on boats, and is a good cleaner. On & Off was referenced in his invoice.

[158] In my view, the Defendants have not established that the method used and time expended by O'Donoghue was inappropriately excessive. Oldham was not on site immediately after the damage occurred. Nor does he state that the use of On & Off as well as muriatic acid was inappropriate. I am also swayed by the fact that Hopkinson, in reporting to the insurers throughout the clean up period, does not take issue with the method employed or the time taken to effect the deck cleaning. He also explained why he would not recommend pressure washing as Oldham had done.

[159] As to the lack of competing quotes, on cross examination, Oldham confirmed that he first attended on the Vessel on September 28, 2012. He was referred to his report where he stated that it is normal practice when a repair is likely to be as costly as the subject incident to obtain additional estimates. He confirmed that there was no actual requirement for additional quotes, and that the decision lies with the owner or the underwriter who can elect to proceed on the basis of one quote. Hopkinson Affidavit #2 was made in response to a written examination wherein he was asked if he normally gets more than one quote before approving a particular repair. He replied that he tries to get more than one quote on jobs but that sometimes this is not possible. In this case, he did not get other quotes as the scope of the work was unknown at the outset.

[160] In my view, the fact that no additional quotes were obtained, particularly as an immediate response to the contamination was deemed necessary, does not serve to discredit the claimed repair costs. Nor does the fact that the Plaintiff maintained the Vessel to a high standard.

[161] Oldham was also of the view that the cost to clean the stained fibreglass around the deck hardware would be excluded as this is typical Vessel damage. In this regard, he referred to the photo at page 33 of the O'Donoghue Affidavit as demonstrating this type of damage. Hopkinson's evidence was that he had not seen or approved the Fraser Fibreglass invoice no. 8729 which included this work. Neilsen Affidavit #2 states that the Vessel was maintained to a high standard at all times and that to the best of his knowledge there had been no prior bleeding at the base of the stanchions. Photos taken sometime between the spring and fall of 2011 were attached as exhibits to show the general condition of the Vessel at that time.

[162] I am not satisfied that this damage was the result of the July 26, 2012 contamination. Although the invoice covers other work as well, in the absence of approval by Hopkinson, I would disallow this claim in the amount of $3,846.64.

[163] Similarly, I would disallow the Malkin Cleaners invoice in the amount of $1,161.41 for the cleaning of towels and bedding. Correspondence of Hopkinson to Navis Marine Insurance Brokers dated August 7, 2012 states that Hopkinson had received a call from Neilsen after the interior inspection of the Vessel for contamination and that he advised Neilsen that he did not feel the interior of the Vessel was affected by the subject incident. Hopkinson stated in the letter that although some of the horizontal surfaces in the interior were found to have a very small

accumulation of dust, this was considered to be an inevitable settling of dust from the atmosphere in the boat during the repair period. A magnet was used in the inspection of the dust and no steel particles were found.

[164] As to the $4,879.42 cost of Hopkinson's services, in my view the services provided were within the parameters of those that would be expected of a marine surveyor in such circumstances and need not be discounted.

[165] Finally, as to loss of use, this claim cannot succeed. The Plaintiff directors, Neilsen and Thody, are not named plaintiffs in this action, unlike in *Perera* and *Strachen*, both above. The Plaintiff, as the Vessel owner, is a corporate entity that does not vacation. *Nordholm I/S v Canada* (1996), 105 FTR 161, submitted by the Plaintiff at the hearing, does not dissuade me of this view.

[166] In summary, I allow damages as follows:

i. $37,757.69, being $32,878.27 for the invoices as approved and adjusted by Hopkinson and $4,879.42 for the survey conducted by Hopkinson; and

ii. Pre-judgment and post-judgment interest at the rate of five percent (5%) as determined in the *Interest Act*, R.S.C. 1985, c. I-15.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The Defendant Vessel "*Aestival*", its Defendant owner Island-Sea Marine Ltd, and the Defendant Kenneth W. Higgs are liable for damages to the Plaintiff, in the amount of $37,757.69 plus pre-judgment and post-judgment interest at the rate of five percent (5%) as determined by the *Interest Act*, R.S.C., 1985, c. I-15; and

2. The Plaintiff shall have its costs which shall be paid by the Defendant Vessel "*Aestival*", its Defendant owner Island-Sea Marine Ltd and the Defendant Kenneth W. Higgs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1625-12
STYLE OF CAUSE:	0871768 B.C. LTD. v THE OWNERS AND ALL OTHERS INTERESTED IN THE SAILING VESSEL "AESTIVAL", THE VESSEL "AESTIVAL", ISLAND-SEA MARINE LTD., KENNETH W. HIGGS, EXECUTIVE YACHT SERVICES LTD. AND MICHAEL GUY COLBECK, DOING BUSINESS AS EXECUTIVE YACHT SERVICES AND/OR EXECUTIVE YACHT SERVICES LTD.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 7, 2014
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	NOVEMBER 5, 2014

APPEARANCES:

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Brad Caldwell	FOR THE DEFENDANT, MICHAEL GUY COLBECK, DOING BUSINESS AS EXECUTIVE YACHT SERVICES AND/OR EXECUTIVE YACHT SERVICES LTD.

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