**FILE NO. CI 18-01-12550**

**THE QUEEN'S BENCH**
**GENERAL DIVISION**
**WINNIPEG CENTRE**

**BETWEEN:**

**MICHAEL NORMANDEAU,**

**plaintiff,**

**- and -**

**ROND'S MARINE LTD.,**

**defendant,**

**- and -**

**ROBERTSON MOTORSPORTS & MARINE, FINELINE INDUSTRIES INC., FINELINE INDUSTRIES, LLC. and CENTURION BOATS,**

**third parties.**

**SITTING DATE:** **MAY 21, 2021** **JUDGE:** **KEYSER J.**

**COUNSEL:**

**MICHAEL G. FINLAYSON – for the plaintiff**
**DEREK M. OLSON – for the defendant**
**KIM E. STOLL – for Fineline Industries Inc., Fineline Industries, LLC. and Centurion Boats (on a watching brief)**

# ENDORSEMENT

[1] The defendant, Rond's Marine Ltd. ("Rond's") has filed a summary judgment motion asking that the claim against Rond's be dismissed as statute barred. Michael Normandeau ("Normandeau") purchased a boat from Rond's on June 30, 2015 for $123,856.00. That same day transmission issues arose and the boat was returned to Rond's for repairs. When those

were completed the boat was launched on July 10, 2015 and sank shortly thereafter. Normandeau filed a Statement of Claim for loss of the boat on January 31, 2018, more than two years after the loss. The position of Rond's is that the loss falls under s. 2(1)(g) of ***The Limitation of Actions Act***, C.C.S.M. c. L150, which limits "actions for trespass or injury to chattels, whether direct or indirect, within two years after the cause of action arose". Rond's position is that despite the Statement of Claim being framed in contract that what really occurred is an injury to chattels. The position of Normandeau is that the claim for loss is framed in contract, with a limitation period of six years pursuant to s. 2(1)(i) of ***The Limitation of Actions Act***.

[2] If Rond's position is correct, then the action is statute barred. If Normandeau's position is correct, it is not. *Queen's Bench Rule* 20.03(4) states that:

> 20.03(4) If the judge is satisfied that the only genuine issue is a question of law, he or she may determine the question and grant judgment accordingly.

I am satisfied that what is being asked is a question of law.

[3] Two expert reports were commissioned as to the cause of the sinking of the boat. One report by Alan Betton, Marine Consultant ("Betton"), is found at Tab B of his affidavit affirmed May 13, 2021. At paragraph 8 of his affidavit he states that:

> 8. ... the cause of the Loss was the ballast intake hose becoming separated from the port tank hose spigot, which allowed water to enter into the hull at a significant rate and led to the sinking.

Betton at page 3 of his report concluded that "... the intake plumbing to the port tank was separated at the joining bellows." Further he added that "[w]e must conclude that the clamp tension was inadequate to secure the bellows to the smooth stainless steel pipe as the pressure increased."

[4] A second expert report was commissioned by the third parties and authored by David Buchanan ("Buchanan"), an accredited marine surveyor for Buchanan Marine Appraisal Services Limited. No expert report was commissioned by Rond's. At page 2 of his report, Buchanan stated that:

> We agree that the vessel would sink rapidly with an open 3 ½" line being fed through a 6" to 8" opening in the bottom of the vessel. It is our opinion that sinking of the vessel would have taken place within minutes of the hose separating from the tank spigot. The sinking would have been sudden and unexpected, consistent with Mr. Normandeau's statement. It should be noted at this time that the cause of the sinking as put forth by Mr. Betton is supported by Crawford Adjusters. Based on our review of the facts and documentation of the loss as provided to our office, we take no issue with the surveyor's conclusions as to the direct cause of the sinking.

Buchanan, however, opined that the separation of the hoses occurred when Rond's repaired the transmission.

[5] After receiving Buchanan's report, Betton qualified his opinion as follows:

> As to why the intake hose became separated from the port tanks hose spigot, this was either caused by:
>
> (a) a defect in the Boat that existed some time before it came into the defendant's possession; or
>
> (b) a failure to tighten the intake hose that had been removed during the repairs to the Boat or some other act or default on the part of the defendant at or around the time that the defendant was performing repairs to the Boat.

[6] Rond's relies on the leading case in Manitoba of ***Speciallaser Tech Inc. v. Specialloy Industries Ltd. et al.***, 1998 CanLII 28191 (MBQB), [1998] M.J. No. 465 (QL), where Morse J. determined that the injury to chattels limitation period was operative where a heavy industrial laser had been dropped and was damaged as a result. He found that the claim which had been filed after the passage of two years was statue barred for several reasons:

1. That s. 2(1)(g) of ***The Limitations of Actions Act*** "... is a specific limitation provision which applies only to chattels", whereas s. 2(1)(i) "... is a general

provision" and that statutory interpretation leads to the conclusion "... that special provisions override general ones".

2. Morse J. concluded that the legal basis for that particular action was injury to chattels and commented that "... gild the farthing if you will, yet it is a farthing still" (H.M.S. Pinafore).

3. He found that s. 2(1)(g) is applicable not only to claims in tort but to claims in contract as well if at its base the claim remains an injury to chattels.

This position was followed in ***Pembina Consumers Co-op (2000) Ltd. v. Ainsworth Inc. et al***, 2013 MBQB 81 (CanLII), a decision of Master Cooper.

[7] Normandeau relies on a number of cases from the jurisdictions of British Columbia ("B.C.") and Alberta. In ***Edmonton (City) v. Lovat Tunnel Equipment Inc.***, 1993 ABCA 178 (CanLII), [1993] A.J. No. 443, the Court referred to and adopted the approach in a similar case from B.C. as follows:

> 5 I accept the reasoning of McLachin, J.A., as she then was, about an almost identical term in the British Columbia statue. I refer to *B.C. (Workers Compensation Board) v. Genstar Corp.*, [1988] 4 W.W.R. 184 at 189;
>
> > I am persuaded that "injury to property" refers to the situation where property is damaged by an extrinsic act, and not to the situation where a claim is made for damage occasioned by defects in the property itself.
>
> 6 Internal failure, not external assault, is the claim here also.

Thus Normandeau submits that this approach distinguishes the ***Speciallaser*** fact situation from the one at bar. However, Rond's submits that the legislation differs in B.C. and Alberta from other provinces. At paragraph 9 of ***Lovat*** the Court goes on to say:

> 9 ... McLachlin J.A. grounded her view on, as she said at p. 190, "policy considerations". The B.C. and Alberta statutes are unique in Canada in offering only two years to sue for injury to property. She explained that a two-year limit "...may not be appropriate for a claim based on defects ... which may not manifest themselves clearly for some time...".

[8] The claim at bar is framed in contract not in tort. Normandeau sued Rond's pursuant to ***The Sale of Goods Act***, C.C.S.M. c. S10, for not supplying a boat which was reasonably fit for the purpose for which it was intended and which was not of merchantable quality. As Morse J. said in ***Speciallaser***, "[t]hat does not matter if the claim is at its core a case of injury to chattels." Is this, in fact, a case of *injury* to chattels? Does it trigger the limiting section merely because it involves a chattel?

[9] I appreciate that the Alberta and B.C. legislation are different from the legislation in Manitoba and, as well, that there were policy considerations at work in the cases cited by Normandeau. But the definition of injury to chattels is important to the conclusion as to whether or not the case, at its core, is a case of injury to chattels, regardless of whether the claim is framed in tort or contract. As was said at paragraph 5 in ***Lovat***:

> 5 ... "injury to property" refers to the situation where property is damaged by an extrinsic act, and not to the situation where a claim is made for damage occasioned by defects in the property itself.

Clearly, at ***Speciallaser*** there was an external act that caused the injury. The laser was dropped which caused the damage.

[10] Here, both experts agree that the damage came from the separation of the intake plumbing which caused the intake of water. The only real disagreement is who was likely to be at fault between Rond's and the third parties. It is important to consider the comments of the Alberta Court of Appeal in ***Lovat*** with an analogy that is helpful. At paragraph 8, the Court said:

> 8 The sense of the word "injury" employed by McLachlin, J.A. is commonplace. Most Canadians faced with a flat tire on account of a failed valve would not, I think, complain that the valve "injured" itself, or the tire, or the car, even though it became necessary to stop it. Her use is one the words can reasonably bear, even if a different connotation were appropriate in another context.

[11] Similarly, in this case, the plumbing did not injure itself. Even in ***Speciallaser***, Morse J. referred in paragraph 12 to the New Brunswick case of ***Longdo v. McCarthy and Gordie's Auto Sales Ltd.***, (1977), 18 N.B.R. (2d) 661 (N.B. C.A.):

> 12 ... There the plaintiff delivered his car to the defendant used car dealer to sell on commission. While the car was still in the custody of the defendant, it was involved in an accident for which the plaintiff was found liable for damages. The plaintiff brought action against the defendant for breach of a contract of bailment. The action was brought over two years after the accident. The issue was whether the action was barred under s. 5(1) of the New Brunswick *Limitation of Actions Act* which provided a two year limitation for actions "arising out of the operation, care or control of a motor vehicle". The Court of Appeal held that the legal basis of the action was breach of a contract of bailment and not one arising out of the operation, care or control of a motor vehicle and that the action was not barred by s. 5(1).
>
> I agree with counsel for the applicant that the court in *Longdo* did not have to choose between two different limitation periods as in the present case. Rather, it determined the legal basis for the claim and, having done so, applied the appropriate limitation period. This is what I think must be done in the present case.

[12] In the case at bar I find that this involves a breach of contract at its core rather than an injury to chattels, even though it involves a chattel. As a result, the six year general limitation rule applies and the action is not statute barred. As a result, the motion for summary judgment is denied.

B Keyser J.

**Copies of this Endorsement have been sent to counsel noted above on the 8th day of June, 2021.**