LIABILITIES AND REMEDIES OF BOAT DEALERS, BROKERS AND REPAIRERS

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This paper is intended to give Boat Dealers, Repairers and Brokers a general idea of their legal duties and responsibilities and of their remedies in the event of non-payment. This paper is not intended to give legal advice on any particular issue and should not be used as such.

Introduction

As the title suggests, this paper is concerned with the liabilities of Boat Dealers, Brokers and Repairers and with the remedies available to these persons when the purchase price, commission or fee has not been paid. The paper is divided into 5 parts as follows:

Part I - Liabilities of Boat Dealers

The Boat Dealer or vendor has various duties and liabilities imposed by three sources. These sources are:

- the contract with the purchaser;
- the Sale of Goods Act; and,
- Law of tort.

The duties and obligations imposed on the dealer by contract (either verbal or written) are usually referred to as being "express warranties" whereas those imposed by the Sale of Goods Act are referred to as "implied warranties".

Contractual Duties/Express Warranties

The contract between the dealer/vendor and the purchaser is the primary source for determining the duties and liabilities of the parties. The contract should be in writing but need not be. The obvious advantage of a written contract is that it is evidence of the agreement and can significantly reduce the scope for misinterpretation. Most, but not all, disputes arise because parties have not been careful about ensuring that all of the terms of their agreement are contained in the written contract. Hence, it is **strongly** suggested that every term of the agreement be put in writing.

The written contract will normally (or should) contain terms dealing with the following issues:

- Title - The contract should provide that the vendor warrants it has good title and is able to transfer the vessel free and clear of any encumbrances. If there are any mortgages or other registered encumbrances there should be provision to discharge these at or before closing. A word of caution is in order with respect to title and unregistered liens.. A vessel can be subject to many unregistered liens , encumbrances or rights of action in rem. The contract should specifically contain a provision for the vendor to disclose these and should provide what happens in the event that the vessel is liened after title is transferred.

- Payment - The contract should obviously include a provision setting out the price, the value of any trade in and the deposit. The term dealing with the deposit should specify whether the deposit is forfeit in the event the purchaser defaults.

- Completion - The contract will specify the completion date and should also specify what will happen in the event either party does not complete. If the buyer does not complete, the contract should specify whether the deposit is forfeit as liquidated damages or whether the vendor can sue for damages in addition to the deposit. What the contract provides is a matter of choice. The current B.C. Yacht Brokers Association form provides for the deposit to be forfeit as liquidated damages. This provides certainty in that, regardless of the vendors real damages, the remedy is limited to retaining the deposit. If the contract did not provide for the deposit to be forfeit as liquidated damages the vendor would have to prove the actual amount of damages suffered, which may or may not be more than the deposit. If the seller does not complete, the contract should specify whether the purchaser's rights are limited to the return of the deposit. This is

the usual provision although the contract could equally allow the purchaser to sue for damages. If the contract does not provide for what will happen in the event of a breach by the vendor, the common law provides the purchaser with a right to either sue for damages or, if the vessel is unique, the purchaser could sue for specific performance of the contract.

- Quality or Condition - Most disputes relating to sales of vessels involve the quality or condition of the vessel sold. For this reason it is very important that the contract should define the warranties given by the vendor in this respect. The current B.C. Yacht Brokers form simply provides that there are no warranties. It is doubtful, however, whether this clause, by itself, offers much protection to the vendor. For new vessels the contract could provide that the only warranty in this respect is the manufacturers warranty and that the purchaser will have no recourse whatsoever against the vendor for defects in quality, materials or workmanship.

- Used Vessels - For used vessels the contract should provide that the vessel is sold "as is where is" and that there are no representations warranties or conditions whatsoever as to quality or fitness or seaworthiness. The contract should also state that the purchaser has inspected the vessel and satisfied himself as to the quality, fitness or seaworthiness of the vessel. (However, it should be noted that even an "as is, where is" sale may be subject to warranties implied by the Sale of Goods Act.)
- Exclusion/Exemption Clause - The contract could further contain an exemption clause, as discussed below.

Sale of Goods Act/Implied Warranties

It is well established that the Sale of Goods Act of British Columbia applies to a sale of a vessel. Accordingly, the implied warranties in that Act also apply to sales of vessels. These warranties are set out in section 18.

Section 18(a) is known as the warranty of fitness. It provides:

Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply, whether he is the manufacturer or not, there is an implied condition that the goods are reasonably fit for such purpose...

Section 18(b) is what is known as the warranty of merchantable quality. It provides:

Where goods are bought by description from a seller or lessor who deals in goods of that description, whether he is the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality; but if the buyer or lessee has examined the goods there is no implied condition as regards defects which such examination ought to have revealed.

Section 18(b.1) contains yet a further warranty of durability. It provides:

There is an implied condition that the goods will be durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale or lease.

These implied warranties are vitally important to anyone involved in the sale of vessels. Their combined effect is that virtually any defect, even a minor defect, will amount to a breach. Also, there need not even be a defect before there can be a breach. If the vessel sold turns out to not be fit for the purchaser's particular purpose, and the purchaser advised the vendor of this purpose beforehand, the vendor could be liable.

In addition to the warranties implied under the Sale of Goods Act, there is an implied warranty in any contract for the sale of a vessel that the vessel will be in seaworthy condition. This condition, however, likely adds little to the conditions implied under the Act.

Tort Liability

In addition to liability at contract, a vendor also may be held liable in tort under the doctrine of Product Liability, Negligent Misrepresentation or Fraudulent misrepresentation.

Product Liability

Product liability is a branch of the law of negligence. It imposes a duty on manufacturers and suppliers of goods to provide goods without defects. The law of tort provides that the supplier of a defective product, whether the manufacturer or not, is liable for any personal injury of property damages resulting from the defect. This liability is not only to the purchaser of the vessel but extends to all users of the vessel and, in essence, anyone injured by the vessel. Thus, if a vessel is sold with a defect in the throttle such that the vessel becomes a runaway and rams another vessel. The occupants of that other vessel will have an action against not only the manufacturer but also the supplier.

The law of product liability also imposes on the vendor a duty to warn potential purchasers of any known defects. If the vendor does not warn of known defects, it is liable for any resulting damage.

Negligent and Fraudulent Misrepresentation

During the course of showing a vessel or during negotiations leading to a vessel purchase, representations are often made concerning the quality or characteristics of the vessel. Great care must be taken when making such statements as liability can attach to the maker of any such statement. Tort law provides that a boat dealer will be liable to a purchaser for representations of material facts that are wrong and are found to have been made carelessly or negligently. For example, if a boat dealer were to tell a potential purchaser of a ski boat that the boat would travel 45 mph whereas , in fact, the boat could only travel 35 mph, the dealer would be liable to the purchaser. Also, if the age or history of the vessel was misrepresented the dealer would be liable. It does not matter whether the Boat Dealer honestly believed the truth of what was told to the purchaser. If the fact was material and if the misrepresentation was relied on by the purchaser, the Dealer is liable.

A dealer is also responsible for fraudulent representations. If the dealer in the above examples knew the boat was capable of a speed of only 35 mph or knew and purposely misrepresented the age or history of the vessel he would be liable for fraudulent misrepresentation. This liability would attract punitive damages.

It is not all misrepresentations that will attract liability. It is only misrepresentations of material facts. The law recognizes that certain representations are not intended by the maker or the recipient to be relied upon. These representations are often said to be mere puffery and no liable attaches to them. An example of puffery might be: "This boat is a real gem". There is great difficulty, however, in distinguishing puffery from material representations.

Part II - Liabilities of Boat Brokers

The broker is traditionally hired by the vendor to facilitate and effect a sale of the vessel. As such, the broker is the agent of the vendor and owes duties to the vendor. These duties include:

- To act honestly and loyally in the best interest of his principal, the vendor;
- To disclose to the vendor all material facts;

- To avoid conflicts of interest; and
- To use his best efforts to obtain the best price possible.

Essentially, the brokers duty is to act in the best interest of his principal to secure the best possible price for the vessel. The broker does not guarantee that the vessel will sell for a particular price, or for any price. He merely undertakes to use best efforts to obtain the best possible price. If the broker fails to use best efforts or fails to exercise the standard of care of a reasonable broker he will be liable to the owner in negligence.

The relationship between the broker and vendor is usually set out in a contract called the listing agreement. The B.C. Yacht Brokers Association has prepared a standard listing agreement. The listing agreement will normally provide for the following:

- That the broker has the exclusive right to sell the vessel during the currency of the contract;
- The commission to which the broker is entitled upon sale (10% or $1,000 in the standard contract);
- The circumstances under which the commission is paid. (The standard contract provides the commission is to be paid upon closing of a contract entered into during the currency of the listing agreement or upon a subsequent sale of the vessel to a person introduced by the broker.);
- That the owner agrees to indemnify the broker in the event the information given to the broker by the owner concerning the vessel proves to be inaccurate; and
- An exemption clause exempting the broker from loss or damage to the vessel. (It is noteworthy that the standard listing agreement does not contain an exclusion clause exempting the broker from liability to the vendor/owner other than for damage to the vessel. There is no reason why the listing agreement could not have included such an exemption clause.)

Duties to Purchaser

As the broker is the agent of the vendor he does not owe any duties to the purchaser except the duty not to misrepresent the facts. The broker can be liable to the purchaser in the same way that a dealer can for misrepresentation of a material fact. As noted above, the listing agreement contains an indemnity from the owner in the event the information given by the owner to the broker proves to be inaccurate. This indemnity is given to provide the broker with some recourse against the owner in the event the broker is held liable to the purchaser for misrepresentation of a material fact. Brokers would, however, be well advised not to rely on the indemnity provision as these provisions are only as good as the solvency of the owner.

The standard listing agreement provides additional protection to the broker in that its exemption clause refers to and gives some protection to the broker as well as the vendor. It specifically provides that neither the vendor nor the broker make any representations,

warranties, etc. other than as indicated. Although this offers some protection, the best protection is to verify all of the facts given to the vendor.

Part III - Liabilities of Boat Repairers

As many boat dealers are also engaged in the business of repairing vessels it is instructive to look at the duties and liabilities of boat repairers. Not surprisingly, a boat repairer is under an obligation to use reasonable care in the repair of a boat and, if reasonable care is not used, will be held liable to the boat owner for any damage. Also, if defective parts are installed during the repair of a boat, the repairer is liable for any resulting damages. This is because such a contract is a sale of goods and, as such, is covered by the Sale of Goods Act and the implied warranties as outlined above.

It is very common in repair estimates or invoices for there to be an exemption clause exempting the liability of the repairer. The comments made below regarding exemption clauses are equally applicable to repairers. The clause must be clearly worded and the boat owner must have had sufficient notice of the clause. A clause on an invoice will not usually protect the repairer as the owner will not have had notice of the clause until after the contract is completed. Therefore customers should be made to sign an estimate or work order which sets out the clause in a conspicuous place and that has a space for the customer to acknowledge having read the clause.

Part IV - Exclusion Clauses

Because of the many areas of liability vendors, dealers and repairers are exposed to, it is extremely common for them to include a clause in the contract excluding themselves from all liability. Subject to some very important limitations, such a clause is valid at law and can serve to minimize and , in some cases completely eliminate, their liability.

The first limitation on an exclusion clause is that it will be interpreted very strictly by the courts against the maker. Thus, the clause must be clearly written and be precise. A typical clause (or combination of clauses) should deal with the following subjects:

- It should provide that there are no representations, warranties or conditions, express or implied, other than those set out in the written contract;
- It should provide that, for new vessels, the vendors sole remedy in the event of a breach of the manufacturers warranty is an action against the manufacturer and not the vendor, and, that for used vessels, the boat is sold "as is where is";

- It should provide that the written contract comprises the entire agreement between the parties;
- It should provide that, in the event of a breach of an express warranty, the buyers remedy is limited to repair or replacement of the defective part and that the vendor is not liable for any consequential damages;
- It should expressly provide that the vendor is not liable in negligence or for any negligent representations;
- Finally, it should expressly state that the implied warranties under the Sale of Goods Act do not apply to the contract.

An exemption clause could contain other terms and conditions in addition to these but these are the basic terms that all clauses should contain.

The second limitation on an exemption clause is that it must form part of the contract between the parties. One might think that this is a simple matter of including the clause as part of the written document. However, there have been **many** cases where a clause in a written contract has not been enforced because the purchaser was not aware of the clause or did not read the clause in advance. Courts often go to great lengths to avoid enforcing an exemption clause and the favourite way of doing so is by saying the clause was not properly brought to the attention of the purchaser. Therefore, the contract should be designed such that the exemption clause is in a conspicuous place. The purchaser should be asked to sign or initial the clause signifying that he has read it. The Dealer should also take care to point out the exemption clause to the purchaser.

Assuming the clause is properly worded and has been properly brought to the attention of the purchaser it will still not protect the vendor in every situation. Specifically, if the sale is to an individual consumer (not a corporation or a purchaser who intends to resell the goods), the Sale of Goods Act provides that the implied warranties of fitness, merchantability and durability cannot be contracted out of. Thus, there is no way that the implied warranties under the Sale of Goods Act can be avoided in such sales. This is obviously a very important limitation on exemption clauses.

Collecting Your Money

A problem every vendor or repairer is inevitably faced with is how to collect the unpaid balance of the purchase price or repair invoice when possession of the vessel has been given up. The best way to get out of this problem is to avoid it entirely. Always make sure you are paid in full before giving up possession of the vessel. Once possession is turned over to the owner, there are very few remedies available.

Liens

A repairer of a vessel who remains in possession of the vessel has a possessory lien on the vessel. This lien gives the repairer a high priority in the event of the bankruptcy or insolvency of the owner. For example, a repairer's possessory lien will rank ahead of a mortgage. However, at common law, in order to retain the lien the repairer had to retain possession of the vessel. To rectify this situation the Repairers Lien Act of British Columbia was enacted.

The Repairers Lien Act provides a mechanism by which a repairer can give up possession of the vessel yet retain his lien through registration. Before possession is surrendered the repairer must have the owner sign an acknowledgement of indebtedness. Thereafter, a financing statement must be registered within 21 days after possession is surrendered. Once registered, the repairer can have the vessel seized and sold to satisfy the outstanding amount of the lien.

In addition to the Repairers Lien Act there is also the Warehouse Lien Act which may give wet or dry marina operators a lien over boats stored with them. The Act gives every "Warehouseman" a lien on goods deposited with him for storage. "Warehouseman" is defined as a person lawfully engaged in the business of storing goods as a bailee for hire. The definition of "goods" is very wide and is arguably wide enough to include boats. This Act also provides for a method by which the goods may be sold to satisfy outstanding charges.

A note of caution is, however, in order with respect to both of these Acts. There is an issue as to whether the provinces can legislate with respect to vessels since Navigation and Shipping is a matter over which the Federal Government has exclusive legislative authority under the constitution. Accordingly, these Acts might be invalid and any priority they give might be of no force or effect.

Personal Property Security Act

The Personal Property Security Act of British Columbia provides a remedy for unpaid vendors under conditional sales contracts by way of a security interest in the vessel sold. The transaction must meet the requirements of the Act and a financing statement must be registered within 15 days of the purchaser being given possession of the vessel. The Act provides that the perfected security interest of an unpaid vendor ranks above almost all other security interests.

Two caveats are in order with respect to the Personal Property Security Act. The first is that this is a very technical area of law and if a vendor is inclined to use conditional sales contracts and to rely on the priority provided by the Act they would be well advised to seek detailed legal

advice. The second caveat is that, as with the Repairers Lien Act, there is an issue as to the constitutional validity of the Personal Property Security Act insofar as boats are concerned.

Rights of Action In Rem

Unpaid vendors and unpaid repairers who have no lien or security interest have very few remedies. Essentially, their only remedy is a right of action In Rem against the vessel. An action In Rem is an action that names the vessel itself as a defendant. The advantage of an action In Rem is that the vessel can be arrested and a vessel under arrest cannot be moved or disposed of. Arrest therefore gives the unpaid creditor some security, either in the vessel itself or in the bail that is posted to secure the release of the vessel from arrest.

There are, however, serious limitations to rights of action In Rem and arrest as remedies to an unpaid creditor. The most serious limitation is that arrest gives absolutely no priority to the creditor. Accordingly, if the debtor does not post security to release the vessel from arrest but instead becomes bankrupt or insolvent, the unpaid vendor and unpaid repairer become general creditors. As general creditors, they are unlikely to recover any debts owed to them.