Federal Court Cour fédérale

Date: 20150316

Docket: T-1484-12

Citation: 2015 FC 324

Ottawa, Ontario, March 16, 2015

PRESENT: The Honourable Madam Justice Simpson

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

EHLER MARINE & INDUSTRIAL SERVICE CO.

Plaintiff/ Defendant by Counterclaim

and

THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP *M/V PACIFIC YELLOWFIN*, COLIN GRIFFINSON, MARELON GRIFFINSON AND GREAT BEAR COASTAL MARITIME CO. LTD.

Defendants

and

COLIN GRIFFINSON, MARELON GRIFFINSON AND GREAT BEAR COASTAL MARITIME CO. LTD.

Plaintiffs by Counterclaim

JUDGMENT AND REASONS

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I. INTRODUCTION

[1] The Plaintiff's action is for the unpaid portion of the amount it charged for the re-fastening, re-caulking and related work [the Repairs] it performed on a vessel called the Pacific Yellowfin [hereafter the "PYF" or the "Vessel"]. At issue is the nature of the contract between the Plaintiff and the owners of the PYF and specifically, whether the Plaintiff is bound by the estimate/quotation it provided for the Repairs.

[2] The Defendants' counterclaim arises from damage to the PYF which occurred after the completion of the Repairs while the Vessel was being launched.

II. THE PARTIES

[3] The Plaintiff, Ehler Marine Industrial Service Co. [Ehler Marine], is an American corporation which carries on business at the Lovric Sea-Craft ship yard [the Lovric Yard] at Anacortes in Washington State, USA. Mr. Ed Ehler Sr. [Mr. E.E.] is Ehler Marine's President and Director. He is also the manager of the Lovric Yard. He provided estimates and entered into contracts for the Repairs. He also performed some of the re-fastening.

[4] The Defendants, Mr. Colin Griffinson [Mr. C.G.] and his wife, Mrs. Marelon Griffinson, are Canadian residents and the owners of the PYF. Great Bear Coastal Maritime Co. Ltd. [Great Bear] is the British Colombia corporation through which Mr. C.G. operates a charter business using the PYF. Colin Griffinson Inc. was also named as a Defendant but no remedy is now

sought against it because the Plaintiff has learned that it was not actually involved in the dispute even though its letterhead and email address were used for much of the relevant correspondence. For this reason, an Order was made amending the style of cause to delete Colin Griffinson Inc..

III. THE PACIFIC YELLOWFIN

[5] The PYF is a wooden motor vessel that was built in 1944. It is 114 feet long and is propelled by two diesel engines. The PYF is certified by Transport Canada as a passenger vessel and is subject to safety inspections. In 2011, at its quadrennial inspection, Transport Canada required the Vessel to be re-fastened and re-caulked. This work is typically performed once – at the halfway point in a vessel's life.

IV. THE WITNESSES AND THE EVIDENCE

[6] Mr. E.E. and Mr. David Hartford testified for the Plaintiff. Mr. Hartford is a shipwright with many years of experience in caulking large wooden vessels. He was hired by Mr. E.E. to work on the PYF as chief caulker. He testified that the caulking proceeded smoothly.

[7] For the Defendants, the Court heard from Mr. C.G., Mr. David Sharp and Mr. John Dixon.

[8] Mr. C.G. serves, from time to time, as captain of the PYF. During the Repairs, he periodically attended at the Lovric Yard to check on the progress of the work. He was also present to paint the Vessel's bootstripe and he was onboard during the haul-out and the launch.

[9] Mr. David Sharp is a shipwright employed by Great Bear. He served as Mr. C.G.'s on-site supervisor during the Repairs. He was present at the Lovric Yard from Monday to Thursday each week and, when there were difficulties associated with the re-fastening, he undertook the corrective work.

[10] Mr. Dixon is a retired marine engineer. He was present during the haul-out and the launch and was aboard the PYF when Mr. C.G. took her back to Vancouver following the Repairs.

[11] In addition to the oral testimony, the evidence also included read-ins from Mr. C.G.'s Examination for Discovery and Exhibits. "Will say" statements from most of the shipwrights and general labourers who performed the Repairs were among the Plaintiff's Exhibits. In those statements, the workers provided their daily time sheets and swore to their accuracy.

V. MATTERS NOT IN ISSUE

[12] There is no dispute that:

- the re-fastening and re-caulking were well done. Mr. C.G. was pleased with the work and paid bonuses to all the shipwrights and general labourers;
- the hours of work recorded by the shipwrights and the general labourers were accurate;
- no unusual problems were encountered during the re-caulking; and
- there was no structural damage when the PYF was launched. The damage was cosmetic and involved paint and filler.

VI. THE FORMATION OF THE ORIGINAL CONTRACT

[13] Following Transport Canada's requirement that the PYF be re-fastened and re-caulked, Mr. C.G. sent a Request for Proposal dated October 24, 2011 [the RFP] to several shipyards including the Lovric Yard.

[14] The RFP said, *inter alia*, that Mr. C.G. wanted a "reasonably accurate estimate" for re-fastening and re-caulking 15 seams below the waterline per side.

[15] On receipt of the RFP, Mr. E.E. contacted Mr. C.G. and expressed interest in undertaking the Repairs. According to Mr. C.G., as their discussions continued, Mr. E.E. advised that he had performed similar work on a wooden tugboat known as the Ivanhoe, that he owned his own wooden vessel and that he had worked on the Alaskan fleet. For these reasons, Mr. E.E. assured Mr. C.G. that he was the "perfect man" for the job.

[16] Based on the RFP, Mr. E.E. provided an initial estimate dated October 28, 2011 [the First Estimate] in which he described 13 items of work. Six items were estimated with the stated proviso "T & M". The parties agree that this meant that the work on these items would be billed on the basis of the time actually spent to perform the work and the materials actually used.

[17] Items 6, 7, 8, 10 and 12 are in dispute and will be referred to collectively as the "Disputed Items". They all have estimated costs which are not described as "T & M" in the First Estimate. Specifics of those items (not the related materials) are as follows:

- Item 6 is the re-fastening using approximately 4,000 fasteners. $15,760.00
- Item 7 is the re-caulking. $33,600.00
- Item 8 is the priming, cementing and tarring of all seams. $12,200.00
- Item 10 is the spraying of one coat of anti-fouling paint. $820.00
- Item 12 is clearing the dock of debris in preparation for launching. $1,350.00

[18] Mr. E.E. provided a second estimate [the Final Estimate] with a fax dated January 26, 2012 in which he described the Final Estimate as a "quote". On his Examination for Discovery, Mr. E.E. acknowledged that, in general, a quote is a more certain or accurate figure than an estimate but he said that his estimate was not a fixed bid. Mr. E.E. also agreed on his Examination for Discovery that Mr. C.G. had asked him to "harden up" his numbers. He testified that he had done so, and that he told Mr. C.G. that he felt fairly confident about estimating the Repairs because of the work he had recently finished on the Ivanhoe.

[19] In the Final Estimate, which was also based on work on 15 seams, the dollar figures for the Disputed Items were as follows:

- Item 6 – re-fastening with 4,000 fasteners. $14,600.00
- Item 7 – re-caulking. $35,500.00
- Item 8 - priming, cementing and tarring. $12,200.00
- Item 10 – anti-fouling paint. $820.00
- Item 12 - clear the dock. $1,350.00

[20] The estimated amounts for the materials and consumables for the Disputed Items are described below.

First Estimate		Final Estimate	
Item 6 - Materials ½ x 8" lags and washers. Consumables – cutter bits, sealers, glue, fir.	$4,240.00 $380.00	To be supplied by Mr. C.G. instead of Mr. E.E.	$0.00 $540.00
Item 7 – Cotton, oakum/pound – 260 lbs	$2,574.00	260 lbs	$2,574.00
Item 8 – cement, tar sealer, primer, brushes	$380.00		$380.00
Item 10 – filters, thinners	$180.00		$180.00
Item 12 – no materials	$0.00		$0.00

[21] During the negotiations, Mr. E.E. inspected the PYF in the water at her boathouse in New Westminster, B.C., and Mr. C.G. visited the Lovric Yard to view the Plaintiff's facilities. During that visit, Mr. C.G. took Mr. E.E.'s advice on several topics. For example, Mr. C.G. decided to use three beads of oakum in the re-caulking instead of one bead of cotton and two of oakum, and he decided to use longer fasteners. In my view, this evidence shows that Mr. C.G. acknowledged Mr. E.E.'s expertise about the repair of wooden boats.

[22] Mr. E.E. says that he prepared the estimates based on the following inputs. He roughly calculated the total length of the seams using 100 feet as the length. Although the PYF is 114 feet long, he used 100 feet in all seams to account for their varying lengths. He used 15 as the number of seams and multiplied 100 x 15 to reach 1500 linear feet per side. He then doubled the number to 3000 feet to account for both sides of the Vessel. In addition to the 3000 feet, he used his experience with the Ivanhoe and other boats to estimate how much material and how many man hours and days the work would take. Based on these inputs, he calculated the dollar figures he provided in the estimates.

[23] On January 10, 2012, based on figures he was given by Mr. E.E. over the telephone, Mr. C.G. agreed to hire the Plaintiff to perform the Repairs. The parties agree that the dollar figures provided by phone are those which subsequently appeared on the Final Estimate. Accordingly, the Final Estimate is the basis of the contract for the Repairs reached on January 10, 2012 [the Original Contract].

VII. THE PARTIES' POSITIONS

[24] The Plaintiff says that the Final Estimate is just that – an estimate. In other words, it is his "best guess" about the price Mr. C.G. could expect to pay. However, he says that he never committed to charging those prices for the Repairs. He says it was always his understanding that he would charge for the time actually expended and materials actually used, and that the entire contract was based on time and materials even though "T & M" was not used to describe the estimates for the Disputed Items. The Plaintiff's Final Invoice of April 11, 2012 [the Final Invoice] reflected his understanding. All the charges were based on time and materials and the Plaintiff says that these are amounts due. The charges for labour for the Disputed Items are:

Item 6 re-fastening (27 seams)	Shipwrights	$2,665.00
	General Labour	$25,998.50
		$28,663.50
Item 7 re-caulking (29 seams)	Shipwrights	$66,560.00
	General Labour	$5,220.00
	Side Labour	$1,440.00
		$73,220.00
Item 8 cement, etc.		$10,962.00
Item 10 paint, etc.		$520.00
Item 12 clear the dock		$4,292.00

[25] On the other hand, Mr. C.G. says that as the negotiations developed, he made it clear that he wanted a revised quote with “hard” numbers. He says that Mr. E.E. impressed him with his experience and convinced him that he could provide such a number.

VIII. THE LAW

[26] The test for determining whether there has been *consensus ad idem* between contracting parties in the absence of a verbal or a written undertaking is an objective one. In *St. John Tug Boat Co. Ltd. v Irving Refining Ltd.*, [1964] SCR 614, the Supreme Court of Canada adopted the following statement from Lord Blackburn in *Smith v Hughes* (1871), LR 6 QB 597 at 607, as the proper test:

> If, whatever a man’s real intention may be he so conducts himself that a reasonable man would believe that he was consenting to the terms proposed by the other party and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.

[27] In *Greenhill Properties (1977) Ltd. v Sandcastle Recreation Centre Ltd.* (1998), 39 CLR (2d) 205 at paragraph 89 (BCSC), the Court referred to G.H.L. Fridman, *The Law of Contracts 3rd ed.* (Toronto: Carswell, 1994) where the author summarized the test at page 16 of that text:

> Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms.

[28] The Plaintiff and the Defendants in this case agree that the test for determining whether the Plaintiff is bound by its estimate is not what each party subjectively believed the terms of the contract to be, but rather "what a reasonable man in the situation of the parties would understand the contract to be" (*Aerovac Systems Ltd. v Darwin Construction (Western) Ltd.*, 2010 BCSC 654 at paragraph 25).

[29] The Defendants also referred the Court to several cases that address the circumstances in which an estimate or a quote can be held to have contractual effect. In *Golder Associates Ltd. v Mill Creek Developments Ltd.,* 2004 BCSC 665, Masuhara J. summarized the law on this topic and concluded the following at paragraphs 22 to 24:

> Mitigating in favour of an estimate having binding effect is the principle that although estimates are necessarily somewhat imprecise, persons in the business of providing work preceded by estimates should be able to do so with some accuracy: see *Kidd, supra* at 540.
>
> The plaintiff cited the recent Alberta case of *Husky Oil Operations Ltd. v Ledcor Industries Ltd.*, 2003 ABQB 751, [2003] A.J. No. 1111. In that case, the Court examined the principles underlying the question of whether an estimate is binding, and stated at [paragraph] 36: "It is clear the court has to look at the circumstances in which an estimate is provided, the positions of the two parties, the knowledge of the party providing the estimate and whether it was relied upon by the party requesting it."
>
> In sum, the Court must determine if the estimates were made in circumstances which imbue them with contractual effect and, if so, what margin of error may limit the extent to which the estimates are binding.

IX. CONCLUSIONS ABOUT THE ORIGINAL CONTRACT

[30] I am persuaded that an objective reasonable bystander would conclude that Mr. E.E. offered to perform the work and charge the prices for the Disputed Items that he set out in the Final Estimate. My first reason for this conclusion is the language of the Final Estimate itself. The fact that Mr. E.E. did not qualify the prices for the Disputed Items with the "T & M" label used elsewhere in the Final Estimate indicates that the figures for the Disputed Items were firm prices in the sense that they would change only if the nature and/or physical extent of the work materially changed. My conclusion is reinforced by the evidence that, by this point in the negotiations, the language in the RFP ("reasonably accurate estimate") had been overtaken. Mr. C.G. and Mr. E.E. were using the word "quote" to describe what they both understood to be the "hard" numbers in the Final Estimate and Mr. E.E. was expressing "confidence" in those numbers.

X. THE MISTAKE AND THE AMENDED CONTRACT

[31] On February 11, 2012, the PYF arrived at the Lovric Yard and the next day, she was hauled out on marine ways by Mr. E.E.. Mr. C.G. was present along with Mr. Sharp. It was then discovered that the RFP had incorrectly described the PYF as having 15 seams below the waterline [the Mistake]. As they stood near the PYF following the haul-out, Mr. C.G. and Mr. E.E. discussed the Mistake and agreed that significantly more than 15 seams per side required re-fastening and re-caulking. Mr. C.G. and Mr. E.E. agreed that the work would proceed notwithstanding the Mistake [the Amended Contract]. However, they each testified that they had a different understanding of the terms on which the further work would be performed.

[32] Mr. E.E. testified that when it became obvious that there was significantly more work to be done, Mr. C.G. stated "That's why I'm called the King of Time and Materials" and then said "Proceed". In Mr. E.E.'s view, this statement signified Mr. C.G.'s offer that thereafter, all the work, including the Disputed Items, would be charged on a time and materials basis. Mr. E.E.'s view was that he accepted this offer.

[33] Mr. E.E.'s counsel says that the fact that Mr. E.E. submitted two progress invoices, which included charges for time spent re-fastening and re-caulking, and the fact that the Defendants made payments towards those bills without expressing concern, is evidence that they understood that the Amended Contract would be billed entirely on a time and materials basis.

[34] On the other hand, Mr. C.G. only recalls asking if Mr. E.E. would undertake the more extensive work, and when Mr. E.E. said "yes", Mr. C.G. then said "we will proceed based on our [Original] contract". He testified that he thought that the prices in the Original Contract would be pro-rated upward to reflect the percentage change in the work. However, the possibility of pro-rating and the basis for the calculation were not discussed.

[35] Although he was present at the haul-out, Mr. Sharp had no recollection of the conversation between Mr. E.E. and Mr. C.G. about the Amended Contract.

XI. CONCLUSIONS ABOUT THE AMENDED CONTRACT

[36] Given that Mr. E.E. repeated in two subsequent emails the unusual phrase he attributes to Mr. C.G., I accept that Mr. C.G. did say that he was the "King of Time and Materials" following

the discovery of the Mistake. However, in my view, an objective reasonable bystander would not have understood that all the negotiations for a "hard" price which preceded the Original Contract were nullified by that remark. This conclusion is supported by an email dated March 23, 2012 from Mr. C.G.'s accountant to Mr. E.E. following her receipt of the second progress invoice. She spoke of discrepancies in timesheets she had received and, in that context, said "Since we are fast approaching our estimates total, it is imperative that we clear up any issues sooner than later". It is clear from this statement that she viewed the estimates as firm prices.

[37] Accordingly, I find that the parties agreed to proceed "based on our contract" as Mr. C.G. testified. This meant that the prices for the Disputed Items in the Original Contract would be pro-rated to reflect the increased work.

XII. THE RE-FASTENING AND RE-CAULKING – ITEMS 6 & 7

[38] The re-fastening and re-caulking began on February 14, 2012 and the Repairs finished on or about April 4, 2012.

[39] Dealing with the re-fastening (Item 6), the First Estimate shows that the fasteners were "materials" which Mr. E.E. was going to supply. However, since Mr. C.G. agreed to supply them, their cost of $4,240.00 does not appear in the Final Estimate. The parties agree that the re-fastening was in fact accomplished with 2599 (rounded to 2600) fasteners of varying lengths.

[40] The Defendants' position is that they had a firm price and that, because 2600 fasteners were used instead of 4000, the physical extent of the work was materially less than that set out in

the Final Estimate. They submit that they are therefore entitled to a 35% reduction in the Final Estimate amount of $14,600.00. On their calculation, this would leave $9,460.00 owed.

[41] However, Mr. E.E. testified that, in his view, the nature of the re-fastening work also changed because the fastening crew experienced difficulty making the fasteners grip in certain areas of the Vessel where the wood had deteriorated.

[42] Mr. Sharp agreed that there was an initial problem because the workers were drilling holes that were too large. This prevented the fasteners from gripping the wood effectively. He corrected that problem and said that thereafter, there were only occasional situations in which a fastener did not grip. He said that this did not slow the fastening to a great degree. In view of this evidence and the fact that, at Mr. C.G.'s expense, Mr. Sharp performed the work necessary to provide a remedy when fastening problems arose, I have concluded that the nature of the work performed by Mr. E.E.'s workers did not change to a degree that warrants a departure from the Final Estimate. I therefore accept the Defendants' calculation of the amount owed.

[43] I now turn to the re-caulking (Item 7). The Defendants say that the calculation of the extra work caused by the Mistake should be based on linear footage. They calculate that the Mistake increased the seam length to be re-caulked to 4800 feet and therefore represented a 60% increase in the work over the 3000 feet Mr. E.E. used for the estimates. However, the Plaintiff does not agree that the Final Estimate should be pro-rated and says that the actual time taken for the work should be the basis for the price. The Plaintiff also says that, if linear feet are to be used, 4800 feet is not an accurate number. It says that 5400 linear feet, or an 80% increase, is

more accurate and notes that even this figure is somewhat low because it does not include the two seams above the waterline that Mr. C.G. added while the Repairs were underway [the Added Seams].

[44] I am unable to accept the Defendants' submission that linear footage is the proper basis for pro-rating the Final Estimate to reflect the extra work. Although Mr. E.E. prepared the estimates using a rough calculation of 3000 linear feet as one of his inputs, there is no evidence that the parties ever discussed this or any other footage amount before the Original or Amended Contracts were made. Indeed, the first reference to Mr. E.E.'s calculation of 3000 feet appears in his fax of April 27, 2012 which followed the Final Invoice of April 11, 2012 by more than two weeks. As well, the first notice Mr. E.E. received of the Defendants' calculation of 4800 feet appears with Mr. C.G.'s email of April 24, 2012 – also well after the date of the Final Invoice.

[45] In my view, an objective reasonable bystander would conclude that the Original Contract was based on the 15 seams described in the Defendants' RFP and the Amended Contract (which was expressed by Mr. C.G. to be "based" on the Original Contract) was in turn based on the increased number of seams revealed after the haul-out when the Mistake became apparent. The increase from 15 to 27 seams represents an increase of 80% and the increase from 15 to 29 seams to reflect the Added Seams involves an increase of 93.33%.

[46] Since the parties did not contract based on linear footage, the pro-rated calculations for Item 7 should be based on the number of seams, and the revised price for the re-caulking of 29 seams (including the Added Seams) should therefore be determined by the following calculation:

- The Final Estimate provided a price of $35,500.00 for 15 seams or $2,366.67 per seam;
- The price per seam of $2,366.67 x 29 seams results in a total owed of $68,633.43.

XIII. THE CEMENTING AND PAINTING – ITEMS 8 & 10

[47] For the reasons given above in the discussion of the re-caulking, I would pro-rate these numbers upward based on the increase in the number of seams from 15 to 29. This means that the calculation for Item 8 (cementing) is:

- The Final Estimate provided a price of $12,200.00 for 15 seams or $813.33 per seam;
- The price per seam of $813.33 x 29 seams results in a total owed of $23,586.67.

[48] For Item 10 (painting), the following calculation is based on an increase from 15 to 27 seams. The Added Seams are not included because Mr. C.G. painted the bootstripe:

- The Final Estimate provided a price of $820.00 for 15 seams or $54.66 per seam;
- The price per seam of $54.66 x 27 results in a total owed of $1,475.82.

XIV. THE DOCK CLEAR UP – ITEM 12

[49] For this item, the Final Estimate amount was $1,350.00 and the Final Invoice charged $4,292.00 reflecting the time actually taken to complete the work. Mr. E.E. said that the extent of the work changed because 29 seams instead of 15 seams per side were reefed. This meant that there was an increase in the quantity of debris on the ground that had to be swept up. However, Mr. E.E. acknowledged that the reefing work did not increase in direct proportion to the increased number of seams because some of the seams were empty.

[50] The more significant change from the amount in the Final Estimate to the charge in the Final Invoice is said to be due to a change in the physical nature of the work. Mr. E.E. testified that, when the PYF arrived at the Lovric Yard, Messrs. C.G. and Sharp asked him to hire a truck to pump out the bilges before the reefing was done. Mr. C.G. testified that he was willing to pay the $4,000.00 charge for the truck. However, Mr. E.E. testified that he decided not to hire a pumper truck, and instead installed a boom to capture the oil and water that spilled from the bilges. The clean up of those spills was the principal reason for the increase of $2,942.00 in the price of Item 12.

[51] In my view, neither party anticipated that oily bilges would be an issue once the PYF arrived in Anacortes. Although Mr. C.G. offered to hire the pumper truck, Mr. E.E. was not contractually obliged to do so. Accordingly, the work needed to boom and clean up the bilge oil is a change in the physical nature of the work and a change in the price is therefore justified. Since there was no quote for this work as it related to the oil, I have concluded that the Plaintiff should be compensated on a *quantum meruit* basis. Because there is no dispute that the hours posted by Mr. E.E.'s employees were accurate and because Mr. C.G. was willing to pay $4,000.00 to deal only with the bilge oil, I find it reasonable to order the Defendants to pay the amount the Plaintiff charged for this item. Accordingly, the sum of $4,292.00 is owed.

XV. AMOUNTS OWED FOR DISPUTED ITEMS

[52] The amounts owed under this heading are:

- Item 6 – Re-fastening (27 Seams): $9,460.00 owed.
- Item 7 – Re-caulking (29 Seams): $68,633.43 owed.

- Item 8 – Cementing etc. (29 Seams): $23,586.67 owed.
- Item 10 – Painting (27 Seams): $1,475.82 owed.
- Item 12 – Dock Clear-up: $4,292.00 owed.

XVI. AMOUNTS OWED FOR DISPUTED MATERIALS

[53] The amounts owed under this heading are:

- Item 6 — The Final Estimate showed a charge of $540.00 for consumables. That figure should be reduced by 35% to account for the reduced number of lags actually installed – i.e. 35% of $540.00 = $189.00, and $540.00 - $189.00 = $351.00.

- Item 7 — The Final Estimate showed 260 lbs of Oakum for 15 seams at $9.90 per lb. The quantity for 1 seam would be 260 lbs ÷ 15 = 17.3 lbs. For 29 seams, the quantity would be 17.3 lbs x 29 = 501.7 lbs. The amount owed is 501.7 lbs x $9.90 = $4,966.83.

- Item 8 — Portland cement, tar, sealer primer, brushes. For 15 seams the price on the Final Estimate was $380.00. For 1 seam, the price would be $380.00 ÷ 15 = $25.33. The amount owed is $25.33 x 29 seams = $734.57.

- Item 10 — Filters, thinners were estimated to be $180.00 based on 15 seams. The price per seam would be $180.00 ÷ 15 = $12.00. The amount owed for 29 seams would be $12.00 x 29 seams = $348.00.

XVII. OVERALL SUMMARY

[54] Counsel for the Defendants prepared a summary of the amounts owed, which he attached to his final written submissions. Counsel for the Plaintiff accepted the summary with the correction for item 11 noted below. Using the Defendants' figures for the items which are not in dispute with the corrections noted below, and using my calculations for work and materials for the Disputed Items (Items 6, 7, 8, 10 & 12), the revised figures are as follows:

Item	**Amounts**	**Item total**
Item 1	$22,890.00	$22,890.00
Item 2	$467.50	$467.50
Item 3	$1,105.00 + $130.50 + $517.12 +$136.48	$1,889.10
Item 4	$455.00 + $3,161.00	$3,616.00
Item 5	$8,368.75 + $6,206.00	$14,574.75
Item 6	$9,460.00 + $351.00	$9,811.00
Item 7	$68,633.43 + $4,966.83	$73,600.26
Item 8	$23,586.67 + $734.57	$24,321.24
Item 9	$3,712.00 + $297.05 + $88.73	$4,097.78
Item 10	$1,475.82 + 348.00	$1,823.82
Item 11	$406.00	$406.00
Item 12	$4,292.00	$4,292.00
Item 13	$2,380.00	$2,380.00
Item 14	$747.50 + $72.33	$819.83
Item 15	$65.00	$65.00
Item 16	$520.00	$520.00
Additional lags	$722.10	$722.10
Total owed		$166,296.38
Payments made		$117,970.60
Balance owed		$48,325.78

Corrections:

Item 3	$130.50 was missed and is now included.
Item 9	$297.05 and $88.73 were missed and are now included.
Item 11	$406.00 was left out in error and is now included.
Item 14	$747.50 was incorrectly stated as $520.00. $747.50 is now included.
Item 16	No figure was included. It is $520.00 and is now included.

XVIII. THE LAUNCH AND THE DAMAGE

[55] The Repairs were completed, the site was cleared and the PYF was launched on April 5, 2012 [the Launch]. However, the Launch did not proceed smoothly. Although the ways extended 250 feet into the water, the PYF did not float free on the first attempt. Mr. E.E. therefore hauled her back up the ways so that her bow was on shore and her stern remained in the water [the Mid-Launch Position]. At that time, one of her engines was started so that it could be operated in reverse and two skiffs were brought in to pull her backwards off the ways. As a result of these efforts, the PYF floated free of the ways on the second attempt.

[56] During the Launch, Messrs. C.G., Hartford and Sharp were aboard and on deck. They testified that they heard loud popping and cracking sounds, and that the PYF's paint cracked and split. However, their evidence about when the damage occurred is inconsistent. Mr. Hartford wasn't sure but thought it happened at the end of the second launch attempt as the PYF came off the ways. Mr. C.G. thought it happened at the bottom of the ways when the first launch attempt failed, and Mr. Sharp thought it occurred when the boat was in the Mid-Launch Position.

[57] Regarding the extent of the damage, Mr. Hartford saw cracks in the paint in the seams at the joints of the vertical planks on the port side of the main deck house from the aft end of the house to the front. Mr. C.G. said that he heard a "cracking and snapping of timbers" and "incredible noise". He did not give his location on the PYF and did not describe the location of any damage. However, he did say in an answer that was read in from his Examination for Discovery that he saw open seams, cracks in the walls and paint lying on the floor. Mr. Sharp

was standing on the starboard deck and he testified that he saw paint cracking on that side of the main deck house where the plywood sheathing came together. However, he did not describe the extent of that cracking. He also heard cracking noises under the deck. He initially said he saw cracks in the paint in the seams between the planks on the starboard side of the hull at midships above the waterline. Then he changed his evidence and said that he "noticed some significant cracking in virtually every plank seam on the topside of the hull".

[58] The Defendants (Plaintiffs by Counterclaim) say that, as Dockmaster, Mr. E.E. is responsible for the damage because it was an implied term of the Original and Amended Contracts that the Launch would be safe.

[59] Mr. E.E. and Mr. Hartford both speculated about the cause of the damage after the Launch but there was no agreement among those present about what went wrong. Mr. C.G. testified that the PYF had weathered very heavy seas and had previously been hauled on marine ways without damage. Mr. Hartford and Mr. Sharp both testified that they had never seen such damage during a launch.

XIX. THE COUNTERCLAIM

[60] The Counterclaim is for damage caused during the Launch. However, the evidence adduced in support of the Counterclaim is incomplete. A bundle of documents was presented to Mr. C.G. to be marked as an Exhibit during his testimony. However, Counsel for the Plaintiff objected to the documents being marked because of late disclosure. Since the documents were not listed in the Affidavit of Documents, were not produced during Examination for Discovery,

were made the subject of an Undertaking, and were not provided to Counsel for the Plaintiff until the last business day before trial, the objection was allowed and the documents are not in evidence. However, notwithstanding this ruling, there is some evidence about the Counterclaim.

[61] The Counterclaim consists of the following three amounts:

a. $17,379.00 [the Painting Claim] – This sum is described in Mr. C.G.'s email of April 24, 2012 [the Email];

b. $840.00 – This sum is described in an invoice from Western Marine Surveyors dated July 31, 2012 [The Surveyor's Invoice]; and

c. $3,400.00 – This sum is described in an invoice from Allied Shipbuilders dated June 29, 2012 [The Allied Invoice].

The Email and the Allied and Surveyor's Invoices were all Exhibits at trial. I will deal with them in turn.

A. *The Painting Claim*

[62] The Email describes this claim as follows:

> […] as you are aware, the Pacific Yellowfin sustained considerable damage while sitting on the ways. This is due to incorrect set-up at the outset.
>
> […]
>
> I have just spent a considerable amount of time and money making good all of these repairs.
>
> The exterior repair and painting costs to the hull based on your lower rate of $58.00 per hour total $18,055.00. To be fair, I will reduce this price by $4,986.00 (Labour $4,466, Materials $520.00) because I do put a coat of paint on the boat every year. The

> exterior repair work now sums $13,069.00 (Labour $12,064.00, Materials of bondo, sandpaper, and other sundries are $1,005.00)
>
> The interior costs to repair and repaint the main cabin and hallways, also at $58.00 per hour total $4,310.00 (Labour $4,060.00, Materials of paints, bondo, sandpapers, and other sundries are $250.00)
>
> The total to date is $17,379.00.

[63] Mr. C.G. did not testify about these aspects of the Email. This means that there is no explanation for his statement that the "PYF sustained considerable damage while sitting on the ways". There was no evidence at trial that any such damage had occurred. Accordingly, to the extent that the repair of such damage is included in the Painting Claim, it is unsubstantiated and makes the amount claimed for exterior painting unreliable.

[64] The amount claimed for exterior painting is also unreliable because there is no clear evidence about the extent of the damage to the hull above the waterline. As noted earlier, Mr. Sharp's evidence was inconsistent. There were photos of damage to the hull above the waterline but Mr. C.G. referred to them only to give evidence about the presence of rust bleeding through the paint. He did not use them to describe the extent of the damage. Further, there is no evidence of the time needed to make repairs to this area of the hull or of the amounts paid to those who made the repairs.

[65] Regarding the claim for interior repairs, there was no evidence at trial about damage to the interior of the PYF.

[66] Regarding the main deck house, there are photos in evidence which show the damage and as stated above, Messrs. Hartford and Sharp testified that that damage occurred during the Launch. However, there is no evidence to describe the time taken to repair this damage or to show what the workers were actually paid to effect the repairs.

B. *The Surveyor's Invoice*

[67] The Surveyor's Invoice shows that a surveyor visited the PYF's boathouse in Richmond to inspect damage caused by the Launch. However, his report is not in evidence and he did not testify. Further, there was no clear evidence about why this inspection was necessary. Mr. C.G. simply testified that the surveyor was called in so that he could "make note" of the paint damage and "log it into his book".

[68] The Surveyor's Invoice shows that the surveyor also attended at a dry dock on June 12, 2012 to "inspect the underwater portion of the hull and document the condition of the hull". However, there was no evidence about why this inspection was needed. No one testified that there was any concern about damage to the hull below the waterline.

[69] In my view, Mr. E.E. is responsible in contract for the cost of repairing the paint damage that occurred during the Launch, and I find that the Launch caused damage to the paint on both sides of the main deck house and some damage (the extent is unknown) to the paint on the hull above the waterline.

[70] However, I have no means of assigning a dollar value to work needed to repair this damage.

C. *The Allied Invoice*

[71] It is noteworthy that this invoice shows that the PYF was put in dry dock for one day for a hull survey on June 12, 2012. However, since there is no evidence to show why the hull needed to be inspected, I cannot conclude that the dry dock expense is justified.

[72] For all these reasons, the Counterclaim will be dismissed.

XX. THE CREDIT CARD FEES

[73] The Original and Amended Contracts include no agreement that:

i. Mr. C.G. would pay a deposit or make progress payments;

ii. Mr. E.E. would accept payment from Mr. C.G. by credit card.

[74] However, after the Repairs were underway, Mr. E.E. asked for a $25,000.00 deposit and progress payments, and Mr. C.G. agreed to his request.

[75] The disagreement between the parties is about whether Mr. C.G. also agreed to pay Mr. E.E. 2.2% as a credit card fee for payments he made using a credit card.

[76] Mr. E.E. testified that Mr. C.G. asked to use a credit card to pay the deposit and progress payments because he wanted to collect airline points. Mr. E.E. said that he could do so if he paid a credit card fee of 2.2%. Mr. E.E. says that evidence of Mr. C.G.'s agreement to pay this fee is found in his first progress invoice of February 27, 2012. It refers to the fee when it says "If paying by Credit Card…please add 2.2% card fee with payment". However, this statement does not appear on either the second progress invoice or on the Final Invoice. Mr. E.E. also says that the Defendants' failure to dispute the reference to the fee is further evidence of their agreement. Mr. E.E. sent a separate invoice for credit card fees dated May 1, 2012 in the amount of $1,534.86.

[77] Mr. C.G. testified that a 2.2% credit card fee was never discussed, and that it would make no financial sense to use a credit card to collect airline points if he was required to pay a fee.

[78] In my view, the evidence described above would not persuade an objective reasonable bystander that Mr. C.G. agreed to pay 2.2% on payments he made using his credit card. In other words, the Plaintiff has not met its burden to establish such an agreement. Accordingly, the invoiced amount is not owed.

XXI. THE EXCHANGE RATE

[79] The parties have agreed that, at the relevant date, U.S. and Canadian currency traded at par.

XXII. INTEREST

[80] Counsel for the Defendants says that interest should be set at 3% because it is the prime rate and because prime was endorsed by the British Columbia Court of Appeal in its decision in *Omega Salmon Group Ltd. v Punico Gemini (The)*, 2007 BCCA 33. It was an admiralty case in which the trial judge rejected prime as the appropriate rate and instead awarded a rate of interest that was personal to the plaintiff in that it was based on the plaintiff's actual cost of borrowing.

[81] The Court of Appeal was troubled by the uncertainty that would be created if interest awards depended on the outcome of inquiries into plaintiffs' personal circumstances. The Court therefore ordered that interest should be set at the prime rate.

[82] The Plaintiff, on the other hand, asks me to follow Mr. Justice Harrington's decision in *Kuchne & Nagel Ltd.v Agrimax Ltd.*, 2010 FC 1303, in which he awarded interest at 5%. In this regard, he spoke of section 3 of the *Interest Act*, RSC, 1985, c I-15 [*Interest Act*] which remains unchanged today. He said the following in para. 24 his judgment:

> […] Although interest is often awarded at a commercial rate, given the current bank prime lending rate I consider it more appropriate, and just, to award pre-judgment and post-judgment interest at the legal rate of 5 percent, as specified in the *Interest Act*.

[83] The question is whether I should follow the British Columbia Court of Appeal and award prime or follow Mr. Justice Harrington and award 5% under the *Interest Act* given that prime remains low (it is now 2.85%). In my view, since prime is still low and since the principle of comity applies, interest will be set at 5%.

XXIII. COSTS

[84] The Plaintiff failed to prove an agreement that the Disputed Items were to be billed on a time and materials basis. This was the theory of its case.

[85] However, the Defendants have failed to prove their Counterclaim.

[86] In these circumstances if the parties cannot agree to settle costs – perhaps on the basis that each bear their own – I will hear submissions by teleconference at a mutually convenient time.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. in the main action the Defendants are jointly and severally liable to pay the Plaintiff the sum of $48,325.78 plus interest at 5%; and
2. the Counterclaim is hereby dismissed.

"Sandra J. Simpson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1484-12
STYLE OF CAUSE:	EHLER MARINE & INDUSTRIAL SERVICE CO. v THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP *M/V PACIFIC YELLOWFIN*, COLIN GRIFFINSON, MARELON GRIFFINSON AND GREAT BEAR COASTAL MARITIME CO. LTD.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 19, 21, 22, 23 AND 26, 2015
JUDGMENT AND REASONS:	SIMPSON J.
DATED:	MARCH 16, 2015

APPEARANCES:

J. Michael Hutchinson	FOR THE PLAINTIFF
W. Gary Wharton	FOR THE DEFENDANTS AND FOR THE PLAINTIFFS BY COUNTERCLAIM

SOLICITORS OF RECORD:

Smith Hutchinson Law Corporation Barrister and Solicitor Victoria, British Columbia	FOR THE PLAINTIFF
Bernard LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE DEFENDANTS AND FOR THE PLAINTIFFS BY COUNTERCLAIM