BEWARE OF DRY ROT

BY PETER DAWSON

The Tod family and a Mr Meister had at least one thing in common. They were both passionate about old wooden vessels. Meister's dream was realised when he came across a 65ft wooden two-masted ketch, built in 1975, with a triple-skin, mahogany-planked hull and teak frames. She was, perhaps unfortunately, named the Enterprise. The Tod's dream took form in the Talua, a 45ft wooden displacement launch built in 1942 by Colin Wild.

Both the Tods and Meister did what any prudent purchaser of an old vessel of would do - they identified and appointed surveyors to conduct pre-purchase surveys of the vessels. But neither surveyor did their job properly, and the New Zealand courts found that both were negligent, with the result that the Tod family's and Meister's dreams were somewhat tarnished, and they suffered a loss.

The evidence showed that had the surveyors exercised a normal degree of professionalism and good surveying practice, they would have discovered that both vessels had extensive dry rot, which in the case of the Enterprise reduced her value, rendered her unseaworthy, and in the case of the Talua, reduced her value substantially.

The first case was an appeal from the District Court to the High Court in Auckland in the case of MacDonald v Tod. This was a judgment of Asher J handed down on February 10. The second is a High Court case heard in Blenheim, and reported as Meister v Carey, a judgment of Wild J handed down on July 3.

These two judgments caught my attention because it is quite unusual to have two such similar cases being reported within a few months of each other, and the area of pre-purchase surveys has cropped up time and again in my professional practice.

Meister intended to buy the Enterprise and live aboard her. He appointed Carey, the proprietor of the boatyard in Greymouth, to survey the vessel. Carey concluded after a two-day inspection that there were several minor defects, and found that, "In general the vessel is in good shape, with only three areas of rot that need attention... When these areas have been attended to I would have no hesitation in recommending the vessel for insurance purposes..." Carey said.

Meister took delivery of the vessel, and set sail from Greymouth for Tauranga. On arriving in Tauranga, a subsequent inspection revealed extensive dry rot and other defects. Meister sued Carey both for breach of contract and in tort (breach of a duty of care). The High Court found that Carey owed Meister a duty to observe the standards of a prudent surveyor in the circumstances, and that he failed to exercise reasonable care and skill in conducting the survey.

In the other case, Mr and Mrs Tod sued MacDonald in the District Court for an amount of money they claimed to have lost on the resale of their launch, the Talua. That loss arose from the discovery of dry rot in the boat following her purchase the previous year.

MacDonald had been retained to conduct a pre-purchase survey, and produced a written survey report in which he concluded that the Talua was in seaworthy condition as inspected, and would provide "many more years of comfortable cruising".

Some 12 months after the Tods purchased the Talua they decided to sell her for reasons unconnected to the condition of the boat. The prospective purchaser arranged to have the vessel inspected by another surveyor and she was pulled out of the water for that purpose. The surveyor found substantial dry rot and recommended extensive structural work before the boat was used further. In the District Court it was found that the Tod family had established causes of action for breach of contract (an implied term that the defendant would carry out the survey with all reasonable care and skill) and negligence.

A number of issues were raised on appeal, in particular the question was asked whether a reasonable and competent marine surveyor should lift a carpet that was secured at the edges by hooks and strips of wood to look for rot, and whether that work came within the term "additional opening up".

The High Court affirmed the decision of the District Court, and noted that MacDonald had failed to exercise a standard of reasonable care, despite a disclaimer stating that MacDonald disclaimed all liability without "additional opening up". The removal of the carpet was not found to be an additional opening up.

These cases serve to emphasise the extent to which a surveyor is obliged to examine a vessel before pronouncing it safe and seaworthy. With the obvious benefit of hindsight, the surveyors would have been assisted by having comprehensive terms and conditions and terms under which they contracted with the owners of the vessels, and so doing excluded liability. The terms upon which they were engaged were vague and lacked definition, and vessel purchasers and surveyors would be well advised to drill down the nature and extent of the survey in detail and record this in writing.

What constitutes a reasonable degree of care and skill on the part of the surveyor will depend on the vessel's unique configuration and the facts of the survey. However, it is safe to say that a mere visual inspection, or tapping with a surveyor's hammer without some degree of 'opening up", would not constitute a sufficiently thorough survey.

The obvious consequence of imposing a higher standard of care in surveys of this nature is that (assuming you can find a surveyor willing to do the job) the costs of surveys will be increased to cover the additional time spent and additional risk, should they get it wrong.

Peter Dawson is a partner in Oceanlaw New Zealand, and specialises in shipping law. He has a broadly based international practice and holds a master's degree in shipping law.