

1) Definitions

'Agreement' means this document.

'Customer' means the person firm, body corporate, association or company who, or on whose behalf, requests the Repairer to perform the works.

'Repairer' means *Barry Clark (Trading as Barry Clark Marine)* and any of its employees agents or subcontractors.

'Vessel' means the boat or watercraft described on any quotation invoice job sheet or other document issued by the Repairer to the Customer and it includes the hull, motors, controls, equipment, accessories, dinghies, tenders and their motors.

'Works' means all works carried out by the Repairer at the request of the Customer, its employees or agents, including without limitation:

- All repairs, maintenance, improvements or shipwright work;
- The supply of all machinery, parts, materials, equipment, accessories, Labour, or specialised tools, and/or the removal from the Vessel of any machinery, parts, materials, equipment or accessories
- Any operation movement or storage of the Vessel.

2) Scope of Works and Authorisation

The Customer warrants that it is the owner of the Vessel or the Vessel owner's agent and that it has the authority to request that the Repairer perform the Works. The Customer authorises the Repairer to move and store the Vessel by whatever means and in whatever circumstances the Repairer considers necessary and appropriate for the performance of the Works. The Customer acknowledges that quotes for Works are valid for the period stated in the quote.

3) Payment

The Customer agrees to pay the Repairer immediately upon receipt of an invoice. Payment shall be made by electronic or manual bank deposit, or cash. Payment by any other means, if accepted by the Repairer, will attract a 5% handling fee. If the Customer owes any amount on any invoice after the expiration of seven days from the date of invoice, the Repairer will be entitled to claim interest at the rate of one percent per week. The Customer agrees that the Repairer may claim payment for progress of works, and that no payment or part payment will be withheld pending completion or progress of work by any third party.

The Customer agrees that until all outstanding invoices together with any interest charges or other costs payable have been paid in full the title of any goods supplied by the Repairer does not pass to the Customer. If any goods are incorporated in or used with any other product so as to lose separate identity, then ownership of that proportion of the new product/s equal in value to the sum owing to the Repairer shall vest in the Repairer absolutely until the Repairer receives payment in full.

The Customer hereby gives the Repairer the right to gain access and/or entry to the Vessel by any reasonable means to recover any goods not paid for within ten days of the date of invoice. In the case of payment not being made by the due date for services or when goods supplied cannot be recovered, the Customer hereby gives the Repairer the right to seize any other property of the Customer. The Customer agrees to hold the Repairer indemnified against any claim against the Repairer that might arise from the Repairer exercising this right to recover goods or seize property. The Customer shall be liable for all costs arising out of the Repairer exercising the right to recover goods supplied or seize property under the terms of this agreement.

The Customer agrees that by accepting completion of the Works it has inspected the Works and satisfied itself that all Works have been performed and completed with due care and skill and to a proper and satisfactory standard.

4) Lien

The Repairer is entitled to a repairer's lien over the Vessel and/or a general lien over any other property of the Customer that comes into the possession of the repairer for any reason until all amounts owing by the Customer to the Repairer are paid in full.

5) Liability limitation and Indemnity

To the extent the Consumer Guarantees Act 91 of 1993 or any similar national legislation apply to this Agreement, then certain conditions and warranties will be implied into this agreement to the benefit of the Customer, and those conditions and warranties cannot be excluded, restricted or modified by any provision of this Agreement.

However where the Customer carries on a business as defined in the Consumer Guarantees Act 91 of 1993, it agrees it is acquiring the services of the Repairer for the purposes of that business and nothing in that Act shall apply.

Except as provided for in this Agreement the Repairer will not in any circumstances be liable for any loss, damage or injury of any kind arising out of or in any way connected with the performance of the works or any act of the Repairer howsoever caused, including by way of negligence breach of contract breach of duty of bailment or willful act of the Repairer, its employees, agents or subcontractors.

The Customer will indemnify the Repairer against all claims and demands whatsoever by whomsoever made in respect of any loss, damage or injury of any kind arising out of or in any way connected with the performance of the works or any act of the Repairer howsoever caused, including by way of negligence, breach of contract, breach of duty of bailment or willful act of the Repairer, its employees, agents or subcontractors.

6) Sub-contracting and Indemnity

The Repairer is entitled to subcontract on any terms the whole or part of the Works.

7) Liability of employees, agents and subcontractors

It is expressly agreed that every exemption from liability, defense, immunity and right under this Agreement will extend to and protect every employee agent and subcontractor defined as the Repairer in this Agreement and in this regard the Repairer who is a party to this Agreement will be deemed to be acting as agent or trustee on behalf of all Repairers.

8) Force Majeure

If the Repairer by reason of any matter beyond its control including without limitation any act of God; strike, lock-out or labour disturbance; war or warlike condition; act of terrorism; civil riot; sabotage; explosion; lightning; fire; earthquake; landslide or

tidal wave; storm, flood, or other extraordinary weather conditions; quarantine; requirements of government authorities; unavailability or delay in supplies (including electricity oil or gas), equipment or transport; refusal of or delay in obtaining governmental or quasi-governmental approvals, consents, permits, licences; or otherwise is unable to perform any part of its obligations under this Agreement to the extent and for the period that it is not reasonably able to perform, the Repairer will not be liable to the Customer.

9) Time bar

The Repairer will not in any circumstances be liable for any claim for loss, damage or injury (including any economic or consequential loss) arising out of or in any way connected with the performance of the Works, whether involving negligence of the Repairer or otherwise, unless such claim is made in writing within six (6) months of the earliest of the following occurring:

- The Works being completed; or
- The Vessel leaving the care, custody or control of the repairer.

10) Mediation and Arbitration

Any dispute arising out of or relating to this contract may be referred to mediation, a non-binding dispute resolution process in which an independent mediator facilitates negotiation between the parties. Mediation may be initiated by either party writing to the other party and identifying the dispute which is being suggested for mediation. The other party will either agree to proceed with mediation or agree to attend a preliminary meeting with the mediator to discuss whether mediation would be helpful in the circumstances. The parties will agree on a suitable person to act as mediator or will ask the Arbitrators' and Mediators' Institute of New Zealand Inc. to appoint a mediator. The mediation will be in accordance with the Mediation Protocol of the Arbitrators' and Mediators' Institute of New Zealand Inc.

The mediation shall be terminated by –

- (a) The signing of a settlement agreement by the parties; or
- (b) Notice to the parties by the mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified; or
- (c) Notice by one or more of the parties to the mediator to the effect that further efforts at mediation are no longer justified; or
- (d) The expiry of sixty (60) working days from the mediator's appointment, unless the parties expressly consent to an extension of this period.

If no mediation is agreed to or if the mediation should be terminated as provided in (b), (c) or (d), any dispute or difference arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in New Zealand in accordance with New Zealand law and the current Arbitration Protocol of the Arbitrators' and Mediators' Institute of New Zealand Inc. The arbitration shall be by one arbitrator to be agreed upon by the parties and if they should fail to agree within twenty-one (21) days, then to be appointed by the President of the Arbitrators' and Mediators' Institute of New Zealand

11) Warranty

(a) The term of the Repairers warranty is six months.

(b) The Repairer is not responsible or liable under any manufacturer's warranty however, the Repairer will pass on for the benefit of the Customer any warranty provided by the manufacturer of any goods supplied to the Customer in respect of the Works.

(c) The Repairer will not be responsible and the warranty does not apply for failure or defect in respect of the Works resulting from or arising in connection with:

- (i) Customer or operator abuse or neglect;
- (ii) Lack of maintenance;
- (iii) Improper use or operation;
- (iv) Alterations, modifications or repairs conducted by the Customer or any third party;
- (v) Failure to use and operate in accordance with any installation, maintenance or instructions provided by the Repairer in respect of the Works;
- (vi) Normal wear and tear; or
- (vii) The Customer being in breach of these terms and conditions.

(viii) Any works for which the Repairer considers that insufficient notice has been given or time been allowed for the works to be carried out to a proper and satisfactory standard. Such works shall be classed as Urgent work. The Repairer shall notify the Customer if it considers that work is urgent, or alternatively ask the Customer to confirm that work should be considered urgent.

(ix) Fault or problem diagnosis.

(x) Works that any third party not engaged by the repairer has contributed to.

(d) In order to make a claim under this warranty, a Customer must:

- (i) Give the Repairer written details of any defect immediately upon becoming aware of the defect and within a maximum of 7 days of identifying the defect;
- (ii) Deliver the vessel to a place nominated by the Repairer or meet any cost incurred by the Repairer associated with accommodation and travel to a different place if the Repairer agrees to travel to a different place.
- (iii) Allow the Repairer or it's employees or agents to inspect the Customer's Property; and
- (iv) Provide immediately or as soon as possible any information requested by the Repairer.

12) Quotations for Services

All prices given exclude GST unless stated otherwise. Where a price given by the Repairer for the Works, is specified to be an estimate. The Customer shall pay the Repairer the amount claimed by the Repairer on completion or progress of the Works, which amount may vary from the estimated amount and which amount shall be based upon the actual work done and materials supplied by or on behalf of the Repairer. When the Customer has requested the Repairer to prepare a quotation or estimate for the provision of the Works then in the event that the Customer does not accept the quotation or estimate the Customer shall be responsible for all labour and associated costs and charges incurred by the Repairer in preparing the estimate. The Customer's Property will not be reassembled following rejection of a repair estimate unless the Customer requests the Repairer to do so and agrees, at the time of the request, to pay the Repairer's charges for such work. Quotations and Estimates are valid for 30 days.

13) Uninhibited Access

The Customer shall immediately ensure that uninhibited access is provided to all areas of the Vessel where work is to be carried out by the Repairer. The Repairer will be entitled to charge for any time lost or cost incurred if this requirement is not met.