SUPREME COURT OF QUEENSLAND

CITATION:	*Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd* [2017] QSC 219
PARTIES:	**MINERALOGY PTY LTD ACN 010 582 680** (plaintiff) v **BGP GEOEXPLORER PTE LTD** (defendant)
FILE NO/S:	BS3482/16
DIVISION:	Trial Division
PROCEEDING:	Trial of claim and counterclaim
DELIVERED ON:	9 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	28 & 30 August 2017
JUDGE:	Jackson J
ORDER:	**The order of the court is that**: **1 The plaintiff's claim is dismissed.** **2 The plaintiff pay the defendant the sum of US$17,629,673.68.**
CATCHWORDS:	GUARANTEE AND INDEMNITY – DISCHARGE OF SURETY – ALTERATION OF OBLIGATION GENERALLY – where the defendant entered into a contract to provide services for reward to a third party – where the plaintiff entered into a guarantee with the defendant guaranteeing the third party's obligations under the contract – where the defendant made demand under the guarantee for debts owing under the contract – where the plaintiff alleges the defendant breached the contract with the third party – whether variations made to the contract or waiver by the third party of the defendant's breaches of the contract had the effect of discharging the plaintiff from the guarantee CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the defendant entered into a contract to provide services for reward to a third party – where the plaintiff entered into a guarantee with the defendant guaranteeing the third party's obligations under the contract – where the defendant made demand under the guarantee for debts owing under the contract — where the

plaintiff alleged that the third party was not liable under the contract because there was unsatisfactory performance of the defendant's obligations under the contract – where the contract between the defendant and the third party contained a provision enabling the third party to withhold payment due to the defendant for unsatisfactory performance of the contract – whether the third party and therefore the plaintiff was obliged to pay the amount due under the contract

GUARANTEE AND INDEMNITY – THE CONTRACT OF GUARANTEE – MISREPRESENTATION OR NON-DISCLOSURE – where the defendant entered into a contract to provide services for reward to a third party – where the plaintiff entered into a guarantee with the defendant guaranteeing the third party's obligations under the contract – where the defendant made demand under the guarantee for debts owing under the contract – where the third party has entered liquidation – where the plaintiff alleged that the defendant misrepresented to the third party and the plaintiff that the defendant had the skill and competence to provide a report as to the prospective existence and volume of resources of oil and condensate – whether the plaintiff is entitled to relief under section 87 of the *Trade Practices Act* 1974 (Cth) declaring the contract to be void ab initio

CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – INTEREST ON JUDGMENTS - RATE – where the defendant entered into a contract to provide services for reward to a third party – where the plaintiff entered into a guarantee with the defendant guaranteeing the third party's obligations under the contract – where the defendant has made demand under the guarantee for debts owing under the contract – where the defendant has counterclaimed against the plaintiff for the debts owing under the contract – where the debts owing under the contract are owed in United States Dollars – where the contract provides for specific "deferred finance fee" interest rates during the first and second years after an invoice is issued – whether the defendant is entitled to interest under section 58 of the *Civil Proceedings Act* 2011 (Qld) at the default judgment interest rate that is set by the court from time to time

Australian Consumer Law
Civil Proceedings Act 2011 (Qld), s 58
Corporations Act 2001 (Cth)
Trade Practices Act 1974 (Cth), s 52, s 87

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570, cited
Andar Transport Pty Ltd v Brambles Ltd (2004) 217 CLR 424, cited

Ankar Pty Ltd and anor v National Westminster Finance (Australia) Ltd (1987) 162 CLR 549, discussed
Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots [1991] 1 VR 637, distinguished
Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175, applied
Australia and New Zealand Banking Group Ltd v Manasseh [2016] WASCA 41, cited
Australian & New Zealand Banking Group Ltd v Cawood [1987] 1 Qd R 131, cited
Baltic Shipping Company v Dillon (1993) 176 CLR 344, considered
Bank of NSW Ltd v Swiss Bank Corporation (1995) 39 NSWLR 350, cited
Batchelor v Burke (1981) 148 CLR 448, cited
Bennett v Jones [1977] 2 NSWLR 355, cited
BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 4) (2009) 263 ALR 63, cited
Black v Ottoman Bank (1862) 15 Moo PCC 472, discussed
Blest v Brown (1862) 4 De GF & J 367, discussed
Bonython v The Commonwealth (1948) 75 CLR 589, cited
Bridgestone Australia Ltd v GAH Engineering Pty Ltd [1997] 2 Qd R 145, cited
Brighton v Australia and New Zealand Banking Group Ltd [2011] NSWCA 152, cited
Chan v Cresdon Pty Ltd (1989) 168 CLR 242, cited
Clarke v Birley (1889) 41 Ch D 422, distinguished
Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd (2000) 201 CLR 520, applied
Commonwealth Bank of Australia v Barker (2014) 253 CLR 169, cited
Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd [2012] NSWCA 184, considered
Credit Suisse v Borough Council of Allerdale [1995] 1 Lloyd's Rep 315, cited
CSR Ltd v Adecco (Australia) Pty Ltd [2017] NSWCA 121, applied
Dan v Barclays Australia Ltd (1983) 46 ALR 437, cited
Downey v Carlson Hotels Asia Pacific Pty Ltd [2005] QCA 199, cited
Electricity Generating Corporation v Woodside Energy Ltd (2014) 251 CLR 640, applied
Elkhoury v Farrow Mortgage Services Pty Ltd (in liq) (1993) 114 ALR 541, cited
European Asian Bank AG v Katsikalis [1988] 1 Qd R 45, cited
Farrow Mortgage Services Pty Ltd (in liq) v Williams [1994] ANZ ConvR 41, discussed
Fire & All Risks Insurance Co Ltd v Callinan (1978) 140 CLR 427, cited
Gore v Montague Mining Pty Ltd [2001] ANZ ConvR 8,

applied
Gould v Vaggelas (1985) 157 CLR 215, distinguished
Graeme Webb Investments Pty Ltd v St George Partnership Banking Ltd (2001) 38 ACSR 282, cited
Haines v Bendall (1991) 172 CLR 60, cited
Hancock v Williams (1942) 42 SR (NSW) 252, considered
Holme v Brunskill (1878) 3 QBD 495, discussed
I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109, cited
International Air Transport Association v Ansett Australia Holdings Ltd (2008) 234 CLR 151, cited
John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503, cited
Jones v Dunkel (1959) 101 CLR 298, applied
Kenny & Good Pty Ltd v MGICA (1992) Ltd (1999) 199 CLR 413, cited
MBP (SA) Pty Ltd v Gogic (1991) 171 CLR 657, cited
McMahon v National Foods Milk Ltd (2009) 25 VR 251, cited
Mt Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104, applied
National Westminster Bank plc v Riley [1986] BCLC 268, cited
Olsson v Dyson (1969) 120 CLR 365, cited
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451, cited
Palmer Petroleum Pty Ltd v BGP Exploration Pte Ltd [2016] QSC 33, cited
Perry v National Provincial Bank of England [1910] 1 Ch 464, cited
Polak v Everett (1876) 1 QBD 669, cited
Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900, discussed
Razdan v Westpac Banking Corporation [2014] NSWCA 126, cited
Ruby v Marsh (1975) 132 CLR 642, cited
Scarf v Jardine (1882) 7 App Cas 345, cited
Steele v Tardiani (1946) 72 CLR 386, considered
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165, cited
Trade Indemnity Co Ltd v Workington Harbour and Dock Board [1937] AC 1, cited
Valstar v Silversmith [2009] NSWCA 80, cited
Vlasons Shipping Inc v Neuchatel Swiss General Insurance Co Ltd (No 2) [1998] VSC 135, cited
Wardens & Commonality of the Mystery of Mercers of the City of London v New Hampshire Insurance Co Ltd [1992] 2 Lloyd's Rep 365, cited
Western Australia v Bond Corp Holdings Ltd (1990) 99 ALR 125, cited
Williams v Frayne (1937) 58 CLR 710, cited
Winstone Ltd v Bourne [1978] 1 NZLR 94, distinguished

Wood Hall Pty Ltd v Pipeline Authority (1979) 141 CLR 443, cited
Wren v Emmett Contractors Pty Ltd (1969) 43 ALJR 213, cited

COUNSEL: P Zappia QC and S Monks for the plaintiff
J Bell QC and T Pincus for the defendant

SOLICITORS: None for the plaintiff
GRT Lawyers for the defendant

Jackson J:

Introduction

[1] The plaintiff claims declaratory relief under the unwritten law that it is not obliged to pay any sum to the defendant under a written contract of guarantee on a number of different grounds. In effect, the same relief is sought in the alternative, pursuant to s 87 of the *Trade Practices Act* 1974 ("TPA") or s 237 of the *Australian Consumer Law* ("ACL"), based on misleading or deceptive conduct or unconscionable conduct.

[2] The counterclaim is for the following sums owing under the guarantee and interest:

Unpaid invoice amounts	US$14,992,148.22
Contractual "deferred finance fee" interest	US$553,102.51
S 58 *Civil Proceedings Act* 2011 interest	US$3,552,590.54
Total	US$19,097,841.27

[3] The plaintiff is the parent company of Aspenglow Pty Ltd (in liq). That company was formerly known as Palmer Petroleum Pty Ltd and before that, when the guarantee was given, as Chinampa Exploration Pty Ltd. It is convenient to refer to it as Palmer Petroleum.

[4] In 2010, Palmer Petroleum held petroleum prospecting licences under the laws of Papua New Guinea, located under the sea in the Gulf of Papua. The areas in question were initially known as PPL254, PPL255 and PPL256 but were renumbered later to PPL379, 380 and 381 respectively.

[5] At relevant times, the plaintiff held all the shares in Palmer Petroleum. Clive Frederick Palmer was one of two directors of the plaintiff and either the sole director or one of two directors of Palmer Petroleum.

[6] On 28 July 2010, the defendant and Palmer Petroleum entered into a contract for the defendant to supply services for reward to Palmer Petroleum. The contract was styled "Provision of 3D Marine Seismic Integrated Services". Under the contract, the defendant agreed to conduct three dimensional seismic surveys of the licence areas under the sea, to process and compile the data acquired from the surveys and to provide reports on the work areas.

[7] On 28 July 2010, at the same time when Palmer Petroleum executed the contract, the plaintiff and the defendant entered into the subject guarantee by the plaintiff of

Palmer Petroleum's obligations under the contract. In consideration of the defendant entering into the contract, the plaintiff agreed as follows:

> "1. We guarantee that [Palmer Petroleum] shall duly perform all its obligations contained in the Contract.
>
> 2. If [Palmer Petroleum] shall in any respect fail to perform its obligations under the Contract or shall commit any breach of thereof, we undertake on the simple demand by [the defendant] to perform or take whatever steps may be necessary to achieve performance of the said obligations under the Contract and shall indemnify and keep indemnified [the defendant] against any loss, damages, claims, costs and expenses which may be incurred by [the defendant] by reason of any such failure or breach or other part of [Palmer Petroleum] to the extent that such losses, damages, claims, costs and expenses (sic) are recoverable under the Contract. We also further reserve the ability to assert any claims or defen[c]es available to our affiliate company.
>
> 3. Our guarantee and undertakings hereunder shall be unconditional and irrevocable and without prejudice to the generality of the foregoing, we shall be released or discharged from our liability hereunder by any waiver by [the defendant] of or in respect of any of [Palmer Petroleum]'s obligations under the Contract if all obligations and payments have been made by [Palmer Petroleum] that are due to be made to [the defendant].
>
> 4. Our guarantee and undertakings hereunder shall be unconditional and irrevocable, and without prejudice to the generality to the foregoing we shall not be released or discharged from our liability hereunder by:
>
> (a) any alteration to, addition to or deletion from the Contract or the scope of the work to be performed under the Contract, or
>
> (b) any change in the shareholding relationship between ourselves and [Palmer Petroleum] and our guarantee and undertakings hereunder shall continue in force until all [Palmer Petroleum]'s obligations under the Contract and all our obligations hereunder have been duly performed.
>
> 5. This document shall be construed and take effect in accordance with the law of the State of Queensland."

[8] The contract was varied by written amendments on a number of occasions. They included amendments made by:

(a) Amendment Deed 1 dated 27 February 2011;[1]

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[1] As well, before Amendment Deed 1 was made, amendments were made by amendment letter 1 dated 9 September 2010, amendment letter 2 dated 22 September 2010, amendment letter 3 dated 26 October 2010, and amendment letter 4 dated 2 September 2010.

(b) Amendment Deed 2 dated 29 June 2011;
(c) Amendment Deed 3 dated 15 August 2011; and
(d) Amendment Deed 4 dated 5 September 2011.

[9] One effect of the amendment deeds was that the total amount payable by Palmer Petroleum to the defendant under the contract was capped at US$35 million. That was effected by cl 2 of Amendment Deed 3 as follows:

> "… the [defendant] unconditionally and irrevocably agrees and accepts the total amount, including but not limited to the Contract Price and the Rates and any chase boats, payable by or on behalf of [Palmer Petroleum] to the [defendant] pursuant to the Existing Agreement is limited to an amount not exceeding US$35 million (US$35,000,000) (the CAP)."

[10] The express terms of the contract included provisions as follows or to the following effect:

(a) by article 1.1, ex I is identified as a contract document and described as the "Scope of Works and Specifications". As well, "Work" is defined in art 2.1(bb) as including the work and other deliverables set out in ex I;
(b) by art 2.1(bb), that the work under the contract included the activities, work and other deliverables set out in ex I thereto;
(c) by art 4.1, that Palmer Petroleum would pay the defendant the rates as defined in the contract in full and final payment for the satisfactory performance of the work in accordance with the contract;
(d) by art 5.9, that payment of 100 per cent of all undisputed invoice items should be made by Palmer Petroleum to the defendant within 24 calendar months after receipt thereof, provided the defendant had advised Palmer Petroleum in writing that all work has been completed in accordance with the terms of the contract;
(e) by art 5.10, that if Palmer Petroleum had a bone fide dispute with any item on an unpaid invoice it should inform the defendant of the disputed item within 30 days of the receipt of the particular invoice;
(f) by art 5.12, that:
    (i) on or before 15 December 2011 Palmer Petroleum should pay a minimum of 50 per cent of all outstanding invoices which it had received prior to 1 December 2011;
    (ii) a deferred payment finance fee would be payable on the total of all unpaid undisputed invoice items rendered to Palmer Petroleum at least 30 days prior; and
    (iii) the deferred payment finance fee would be three percent per annum during the first 12 month period following the date of each undisputed and unpaid invoice and four per cent per annum during the second 12 month period following the date when each undisputed and unpaid invoice was payable;
(g) by art 10.1(a), that the defendant warranted that it had the experience and capability, including sufficient competent personnel and equipment, to perform the work efficiently, expeditiously and economically;
(h) by art 10.1(c), that the defendant warranted that it would perform the work and would do so with skill and diligence, in a professional and careful manner, adopting a standard for the work not less than the generally accepted international petroleum industry standard;

(i) by art 12.1, that the defendant should perform the work in strict adherence to the contract as specified in ex I and would comply with and adhere strictly to Palmer Petroleum's instructions and directions on any matter concerning the work;

(j) by art 12.6, for the delivery of data by the defendant to the plaintiff upon completion of identifiable portions of the work;

(k) by art 12.7, that the defendant warranted it was an expert in the field of marine geophysical data acquisition and that it had personnel who were specialists and who had state of the art proven technical and engineering knowledge of that type of work;

(l) by art 19.1, that the parties anticipated that as the work progressed, changes in the work may be required and those changes may affect the cost of or the time required for the work;

(m) by art 19.3, that Palmer Petroleum shall have the unfettered right to issue a work order for the suspension or termination of all or part of the work or changes to the work that do not have a significant impact on the anticipated costs of or anticipated timing of the work;

(n) by art 39.1, that time was of the essence of the contract and the defendant would complete the work and all portions or elements thereof within the time periods stipulated within the contract or within approved time periods;

(o) by ex I annex 1.1, that the defendant would be required to complete the following:

> "A. Design and obtain all necessary approvals to conduct Marine 3D Seismic Operations for the relevant government agencies of the Independent State of Papua New Guinea…
>
> B. Acquire 3D Seismic over leads and prospects identified over PPL254, 255 & 256. Ensuring the following minimum area is acquired in:
>
> (i) PPL254 – 650 sq km
> (ii) PPL255 – 1000 sq km
> (iii) PPL256 – 2500 sq km
> ...
>
> C. Delivering all raw data derived from acquisition work undertaken in paragraph (B) to [Palmer Petroleum] and delivering the data and a report to [Palmer Petroleum] which meets the requirements of regulation 95 of the *Oil and Gas Regulations* 2002;
>
> D. Completing a set of final stacked and migrated 3D seismic data derived from work undertaken in paragraph (C) and the data and a report to [Palmer Petroleum] which meets the requirements of Regulation 95 of the *Oil and Gas Regulations* 2002;
>
> E. Interpret and compile a comprehensive leads and prospects inventory over PPL254, 255 and 256 using the processed 3D seismic data merged with all existing G&G data. **The final deliverable will be the compilation of all data and a report which will be submitted to [Palmer Petroleum] in a format which meets the requirements of Regulation 95 of the *Oil and Gas Regulations* 2002**." (emphasis added)

(p) by ex I, annex 1.2, sch A, ex II and ex III, for extensive specifications of the exploration vessels and the data collection methodology to be used by the defendant in conducting the operations, including that:
  (i) for the three streamer vessel BGP Explorer, the estimated start date was middle November 2010 and the estimated area and period were 1000 sq km in 96 days;
  (ii) for the 12 streamer vessel BGP Prospector, the estimated start date was end January 2011 and the area and period were 3150 sq km in 113 days;

(q) by Amendment Deed 1, that the six streamer vessel Haiyangshiyou 719 was added to the vessels and the estimated start dates, areas and periods were amended as follows:
  (i) for BGP Explorer, the estimated start date was January 2011 and the estimated area and period were 652 sq km in 57 days;
  (ii) for BGP Prospector, the estimated start date was end June 2011 and the area and period were 2677 sq km in 42 days;
  (iii) for Haiyangshiyou 719, the estimated start date was January 2011 and the estimated area and period were 915 sq km in 32 days;

(r) by Amendment Deed 2, that:
  (i) for BGP Prospector, the estimated start date was postponed to end September 2011;
  (ii) for BGP Prospector, the estimated area was changed to 2900 sq km;

(s) by ex II, (as amended by Amendment Deed 1) a schedule of remuneration and expenses to be paid to the defendant under the contract, which among other things provided for:
  (i) mobilisation and demobilisations fees for the three survey vessels intended to be used, totalling US$6.1m;
  (ii) daily rates for data acquisition by the three survey vessels intended to be used, of US$780,000 per day for the first vessel, US$230,000 per day for the second vessel and US$160,000 per day for the third vessel, so that taking into account the estimated number of working days for each vessel the total estimated data acquisition fees were US$19,226,000;
  (iii) standby rates for the three survey vessels, of US$2,708 per hour for the first vessel, US$8,500 per hour for the second vessel and US$6,000 per hour for the third vessel;
  (iv) that the defendant would be reimbursed for all "chase boat" costs in relation to each of the three vessels, plus 5 per cent;
  (v) a lump sum project design fee of US$40,000;
  (vi) fees for data processing which, for basic processing and leaving aside options, totalled US$920 per full fold km^2, so that for the total estimated survey area of 4244 full fold km^2 specified in ex II (as amended by Amendment Deed 1) there would be basic processing costs of US$3,904,480;
  (vii) fees for data interpretation, which included reporting, comprising:
    A. seismic interpretation at US$260 per full fold km^2;
    B. leads and prospects evaluation including structure analysis reservoir prediction hydrocarbon detection and comprehensive evaluation at a combined rate of US$320 per full fold km^2,

  so that for the total estimated surveyed area of 4244 full fold km^2 specified in ex II (as amended by Amendment Deed 1) the total data interpretation fees would be US$2,461,520; and, for the estimated

survey area for PPL255/380 of 915 full fold km^2, the total data interpretation fees would be US$530,700; and

(t) by ex II, par 7.2, the leads and prospects evaluation was to include the items of structure analysis, reservoir prediction, hydrocarbon detection and a comprehensive evaluation.

[11] From time to time, the defendant carried out the work under the contract and rendered invoices for the same. The survey work commenced in January 2011 and finished in March 2012. Following the survey work, the defendant did data processing, leads assessment and prospects evaluation, and made reports relating to the different areas, including the report the subject of this proceeding.

[12] In or about May 2012, the defendant provided the report the subject of this proceeding to Palmer Petroleum containing or including an evaluation of hydrocarbon resources within the area of PPL380 ("PPL380 report"). It will be necessary to return to some of the details of this report later in in these reasons.

[13] Starting on 4 March 2011, the defendant issued invoices for the work that eventually totalled slightly under the amount of the cap of US$35 million. Palmer Petroleum paid the sum of US$18,222,148.21 to the defendant against the invoices. The balance amount unpaid for the work as invoiced and the deferred finance fee at the start of the proceeding was US$16,726,575.03.

[14] In December 2015, the defendant served a statutory demand under s 459E of the *Corporations Act* 2001 (Cth) on Palmer Petroleum.

[15] On 19 February 2016, Palmer Petroleum applied to set aside the statutory demand. The application was dismissed.[2]

[16] Subsequently, Palmer Petroleum was ordered to be wound up in insolvency on the defendant's application as creditor.

[17] On 5 April 2016, the plaintiff started this proceeding.

Variations of the principal contract

[18] Each of the amendment deeds varied the terms of the contract. At the times when the amendment deeds were made, no contract was made between the plaintiff and the defendant in relation to any of those variations. The plaintiff did not formally agree to any of them being made without prejudice to the plaintiff's liability under the guarantee.

[19] The plaintiff alleges in the statement of claim that some of the amendments discharged it from liability under the guarantee. In final submissions, the plaintiff narrowed the focus of this plea to a few of those amendments.

[20] As set out previously, cl 4 of the guarantee provides in effect that the plaintiff shall not be released or discharged from liability under the guarantee by any alteration to, addition to or deletion from the contract or the scope of the work to be performed under the contract.

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2 *Palmer Petroleum Pty Ltd v BGP Exploration Pte Ltd* [2016] QSC 33.

[21] Clause 4 operates against the background of a principle of law sometimes described as the rule in *Holme v Brunskill*,[3] after the name of the case in which it was formulated. The equitable principle was confirmed as part of the unwritten law of this country by *Ankar Pty Ltd and anor v National Westminster Finance (Australia) Ltd*,[4] as follows:

> "On appeal [in *Holme v Brunskill*], Cotton LJ expressed a similar view in different terms, saying …:
>
> 'The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court, will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged. This is in accordance with what is stated to be the law by Amphlett LJ, in the *Croydon Gas Co v Dickinson*.'
>
> Brett LJ related the principle to the terms of the suretyship contract, observing:
>
> 'The proposition of law as to suretyship to which I assent is this, if there is a material alteration of the relation in a contract, the observance of which is necessary, and if a man makes himself surety by an instrument reciting the principal relation or contract, in such specific terms as to make the observance of specific terms the condition of his liability, then any alteration which happens is material; but where the surety makes himself responsible in general terms for the observance of certain relations between parties in a certain contract between two parties, he is not released by an immaterial alteration in that relation or contract.'
>
> *Croydon Gas Co v Dickinson* was also a case in which the creditor had by arrangement with the debtor altered this relationship by extending the time within which the debtor was bound to make payments, the arrangement being made without the surety's assent.
>
> These statements of the principle, like that of Blackburn J in *Polak v Everett*, indicate that the principle is the by-product, not so much of the general law of contract, as of the special relationship between creditor and surety arising out of the suretyship contract upon which

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3 (1878) 3 QBD 495.

4 (1987) 162 CLR 549.

> equity fastened to protect the surety when the creditor's conduct affected the surety's liability: *Holme v Brunskill*. According to the English cases, the principle applies so as to discharge the surety when conduct on the part of the creditor has the effect of altering the surety's rights, unless the alteration is unsubstantial and not prejudicial to the surety. The rule does not permit the courts to inquire into the effect of the alteration. The consequence is that, to hold the surety to its bargain, the creditor must show that the nature of the alteration can be beneficial to the surety only or that by its nature it cannot in any circumstances increase the surety's risk, eg, a reduction in the debtor's debt or in the interest payable by the surety. The mere possibility of detriment is enough to bring about the discharge of the surety.
>
> The foundation of the rule is that the creditor, by varying the principal contract or extending time, has altered the surety's rights without consulting it though the surety has an interest in the principal contract, and that the creditor cannot be permitted to do: see *Rees v Berrington*.
>
> Thus the liability of the surety was seen to be *strictissimi juris* and the suretyship contract was construed strictly in his favour.'" (citations omitted)

Relevant variations

[22] The variations relied upon by the plaintiff in final submissions as variations that, apart from the operation of cl 4, would have had the effect of discharging the plaintiff's liability on the guarantee under the rule in *Holmes v Brunskill*, are as follows.

[23] By ex I, annex 1.2, sch A, par 1, the contract set out a preliminary acquisition and operation schedule including that the vessels, estimated start dates and estimated area and time to survey completion would be as follows:

> "1) Three-streamer BGP Explorer
> Estimated Start Date: Middle November 2010
> Estimated Completed Survey 1000 Square km in 96 days
> …
> 2) 12 Streamer BGP Prospector
> Estimated Start Date: End January 2011
> Estimated Completed Survey: 3150-4150 Square km in 113 days"

[24] By Amendment Deed 1, the six streamer vessel Haiyangshiyou 719 was added to the vessels and the estimated start dates, areas and periods became:

(a) for BGP Explorer, the estimated start date was January 2011 and the estimated area and period were 652 sq km in 57 days;
(b) for BGP Prospector, the estimated start date was end June 2011 and the area and period were 2677 sq km in 42 days;
(c) for Haiyangshiyou 719, the estimated start date was January 2011 and the estimated area and period were 915 sq km in 32 days.

[25] By Amendment Deed 2, the estimated start date for BGP Prospector was postponed again to end September 2011 and (by way of error correction) the survey area for

BGP Prospector was increased from 2677 sq km to 2900 sq km. As well, the due date for payment of some invoices was extended.

[26] The plaintiff submits that these variations extended the estimated completion date of the survey work from about 24 May 2011 to 30 November 2011. Correspondingly, invoices for parts of the work were rendered to Palmer Petroleum on later dates than originally envisaged, as the work progressed, and were payable by Palmer Petroleum at later dates, extending the time over which the plaintiff would be potentially liable on the guarantee.

[27] The plaintiff also submits that the addition of Haiyangshiyou 719 to the vessels to perform the work increased the price of the work under the contract by:

(a) an added mobilization fee for Haiyangshiyou 719 of US$1,000,000 and an added de-mobilization fee of US$400,000; and
(b) adding to the cost of the survey work, depending on how much of the work originally to be performed by BGP Explorer and BGP Prospector was transferred to Haiyangshiyou 719, because Haiyangshiyou 719 was more expensive than the BGP Explorer although less expensive than the BGP Prospector.[5]

New principal contract

[28] The plaintiff submits that the changes made to the contract by the amendment deeds were so fundamental that they amounted to replacing the contract with a "new contract" between the defendant and Palmer Petroleum. The new contract relied on is the first form of "novation" described by Lord Selborne in *Scarf v Jardine*,[6] being a new contract between the same parties to the original contract.[7] The plaintiff points to the following features of the contract as amended by the amendment deeds:

(a) the survey work was to be performed by three ships instead of two;
(b) the individual vessels were to cover different areas by transfer of some of the areas from the original two vessels to the third vessel;
(c) the estimated time periods for the commencement and completion of the survey and subsequent work were changed; and
(d) the price of the work to be carried out was affected by some of the work being done by the third vessel at a different rate from the other two vessels with a price cap of US$35 million.

[29] The plaintiff submits that these amendments went to the root of the contract.

[30] As an additional ground for the declaratory relief it seeks, the plaintiff submits that the consequence of replacing the contract with the "new contract" is that the

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5 It was not clear from the invoices in evidence how much of the area of the work was done by Haiyangshiyou 719, although I note that invoice numbers 20110205 and 20110203 relate to the work it performed in January and February 2011 and include the mobilisation and demobilisation fees.

6 (1882) 7 App Cas 345, 351.

7 *Olsson v Dyson* (1969) 120 CLR 365, 389.

guarantee does not apply to it. In substance, the argument is that, as a matter of construction, the guarantee does not apply to the new contract.[8]

[31] Whether a new contract comes into existence, or amendments operate as a variation of a subsisting contract, is determined by ascertaining the intention of the parties to the contract, according to the language they have used and the agreement they have made.[9] In my view, as a matter of first impression, the argument for a new contract is unsustainable on the facts of this case, having regard to the terms of the amendment deeds themselves, because the language chosen by the parties and the subject matter of the amendments do not disclose any intention to rescind and replace the contract.

[32] This "new contract" argument was not pleaded in the statement of claim as a ground for relief from liability under the guarantee and was not foreshadowed during the trial at any time prior to the plaintiff providing its written final submissions.

[33] Although the characterisation of the effect of amendments made in writing to a contract in writing is largely a matter of law, as applied to the facts of the particular case, the plaintiff should have pleaded that the effect of the amendments on which it relies was that the contract was rescinded and replaced by a new contract, as a matter that if not stated specifically may take another party by surprise.[10]

[34] The extraordinary series of procedural twists and turns made by the plaintiff in this case by way of successive applications for adjournments (to gather evidence which as matters transpired was not obtained), for late amendments to the statement of claim and late abandonment of allegations of serious misconduct against the defendant, all without proper explanation, must lead a court at some point to say "enough".[11] In my view, that point has been passed. Presumably because the basis of this ground of relief from liability was not raised by the statement of claim, the court does not have the benefit of any submissions upon it from the defendant.

[35] In the circumstances, I do not consider that it would be appropriate to consider this argument further or to provide more detailed reasons for rejecting it.

Construction of clause 4

[36] Case law recognises that when a contract of guarantee is made, the parties are free to agree that a variation subsequently made between the parties to the principal contract will not discharge the guarantor under the contract of guarantee.[12] The

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8 *Australia and New Zealand Banking Group Ltd v Manasseh* [2016] WASCA 41, [14]-[27]; *Dan v Barclays Australia Ltd* (1983) 46 ALR 437, 442, 448; *Trade Indemnity Co Ltd v Workington Harbour and Dock Board* [1937] AC 1, 21.

9 *Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520, 533-534 [22]-[24].

10 *Uniform Civil Procedure Rules* 1999 (Qld), r 149(c).

11 *Uniform Civil Procedure Rules* 1999 (Qld), r 5(4), 371(2) and 367(1). *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 213 [97] and 214-215 [102].

12 *Perry v National Provincial Bank of England* [1910] 1 Ch 464, 471; *Hancock v Williams* (1942) 42 SR (NSW) 252, 256; *Wood Hall Pty Ltd v Pipeline Authority* (1979) 141 CLR 443, 455; *Graeme Webb Investments Pty Ltd v St George Partnership Banking Ltd* (2001) 38 ACSR 282, 301 [78]-[79] and 306 [99]; and *Valstar v Silversmith* [2009] NSWCA 80, [43]-[45].

point was made by Sir Frederick Jordan with his usual clarity in *Hancock v Williams*[13] as follows:

> "The rights of the obligee and the liabilities of the guarantor are, however, not destroyed or reduced by anything which, according to the terms or the suretyship agreement, leaves the obligation still one which the guarantor has agreed to guarantee. Hence, if that agreement provides that the obligee may release co-guarantors, or may release securities taken for the guaranteed obligation, **or may vary the terms of that obligation**, the exercise by him of these rights does not affect the liability of the guarantor…" (emphasis added)

[37] The first question as to the operation of cl 4 of the guarantee is whether on the ordinary meaning of the text the variations identified by the plaintiff were alterations to, additions to or deletions from the contract or the scope of the work to be performed under the contract.

[38] In my view, the variations to the contract made by Amendment Deed 1 and Amendment Deed 2 (other than the extension of the due date for the payment of some invoices) were either alterations to, additions to or deletions from the contract or the scope of the work to be performed under the contract. As to the extension of the due date for the payment of some invoices, in my view, that was an alteration to, addition to or deletion from the contract.

[39] By Amendment Deed 3, the contract was varied by agreeing to limit the amount payable under the contract to US$35 million, reducing the time for payment of invoices issued after the date of signing that agreement and increasing the amount of interest payable by Palmer Petroleum on unpaid amounts. In my view, the variations to the contract made by Amendment Deed 3 were alterations to, additions to or deletions from the contract.

[40] The second question as to the operation of cl 4 is that the plaintiff submits it did not authorise alterations, additions or deletions to the contract or the scope of works which released or had the effect of releasing Palmer Petroleum's rights for breaches of the contract by the defendant.

[41] This argument proceeds from the starting point that, in accordance with the ordinary meaning of the text, cl 4 would include each of the identified amendments as an alteration to, addition to or deletion from the contract or the scope of the work to be performed under the contract.

[42] The argument turns on the hinge that cl 4 should be read down to exclude any amendment that releases or has the effect of releasing the defendant from liability for breach of contract. No case in support of that argument was identified by the plaintiff. However, the plaintiff relied on the general propositions accepted in *Ankar* that the liability of a guarantor is *strictissimi juris* and a contract of guarantee is construed strictly in the guarantor's favour.

[43] In my view, this argument as to the operation of cl 4, on its proper construction, must be rejected. There are a number of considerations.

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13 (1942) 42 SR (NSW) 252, 256,

[44] First, *Ankar* was decided in 1987, and was about the construction of the commercial contract of guarantee in that case. One question was whether the creditor's promise to give notice to the guarantor of breach of the principal contract by the other party was a condition of the contract of guarantee, so that breach of the term entitled the guarantor to elect to terminate the guarantee for breach of contract. The "special character" of the contract of guarantee reinforced the conclusion that would otherwise have been reached by the court that it was.[14]

[45] Second, following *Ankar*, in 1989[15] and 2004,[16] the High Court again accepted that guarantees and indemnities are to be read contra proferentem where there is ambiguity.

[46] Third, since 2004, the High Court has carefully considered the correct approach to the construction of commercial contracts, in general, on numerous occasions.[17] A recent statement in 2015 in *Mt Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* illustrates:

> "In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract…
> Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption 'that the parties … intended to produce a commercial result'. Put another way, a commercial contract should be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'."[18] (footnotes omitted)

[47] A year before, in 2014, a plurality said in *Electricity Generating Corporation v Woodside Energy Ltd*:

> "…The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'. As Arden LJ observed in *The Golden Key Ltd (in rec)*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption 'that the

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14 (1987) 162 CLR 549, 557-558 and 562.
15 *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242, 256.
16 *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424, [23].
17 *Mt Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; *Electricity Generating Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, 160 [8] and 174 [53]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179 [40]; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 461-462 [22].
18 (2015) 256 CLR 104, 116-117 [57] and [51].

> parties … intended to produce a commercial result'. A commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience.'" [19] (footnotes omitted)

[48] Fourth, no case in the High Court has specifically considered these modern restatements of principle in relation to the construction of a commercial contract of guarantee. However, there has been relevant discussion at the level of intermediate Courts of Appeal. It is sufficient for present purposes to refer to *CSR Ltd v Adecco (Australia) Pty Ltd*, where McColl JA said:

> "I addressed the relevance of a contextual approach to the construction of guarantees and the application of the *strictissimi juris* principle of construction in *Zhang v BM Sydney Building Materials Pty Ltd*, as follows:
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> 'As Campbell JA pointed out in *Rava v Logan Wines Pty Ltd*, the *strictissimi juris* principle of construction 'is an aspect of the *contra proferentem* rule.' It 'needs to be used bearing in mind the fundamental purpose of construction of a document, namely, to ascertain the intention of the parties arising from the document as a whole and reading the document with such background information as was known by all the parties to it' and 'along with other aids that the law recognises for the construction of a document'.
>
> Further, '*it is not a legitimate use of the contra proferentem rule to say that two meanings of a particular contractual provision are possible and hence the meaning unfavourable to the proferens should be chosen if one of those meanings is an unrealistic or unlikely construction of the contract … [r]ather, the contra proferentem rule is to be used only where the document is otherwise ambiguous, and it is a principle of last resort'*. Thus, the *strictissimi juris* principle of construction 'does not involve preparing a list of all the possible meanings of a clause that the language can bear without breaking, and choosing the meaning that is most favourable to the guarantor or indemnifier. Rather, the choice is limited to choosing amongst meanings that are fairly open by reason of the application of other rules of construction.'" [20] (footnotes omitted)

[49] Fifth, consideration of the same questions under English law is instructive. A number of cases in the Court of Appeal suggest that the same principles of construction that apply to other commercial contracts apply to commercial contracts of guarantee.[21] But the decision of the Supreme Court of the United Kingdom in *Rainy Sky SA v Kookmin Bank*[22] is more important. That case concerned the construction of refund guarantees, but no mention was made of the contract as one

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19 (2014) 251 CLR 640, 656-657 [35].

20 [2017] NSWCA 121, [163].

21 *Static Control Components (Europe) Ltd v Egan* [2004] 2 Lloyd's Rep 429, [13] and [22]-[38]; *Cattles Plc v Welcome Financial Services Ltd* [2010] 2 Lloyd's Rep 514; *National Merchant Buying Society Ltd v Bellamy* [2013] 2 All ER (Comm) 647, [75]; and *Harvey v Dunbar Assets Plc* [2013] BPIR 722, [28].

22 [2011] 1 WLR 2900, [14]. *Rainy Sky* was recently affirmed in *Wood v Capita Insurance Services Ltd* [2017] 2 WLR 1095, 1099–1101 [10]-[17].

of guarantee in discussing the principles of construction that apply to a commercial contract.

[50] In my view, there is no general principle in the construction of a commercial contract of guarantee that the court should read down words of generality, so as to exclude things that fall within the ordinary meaning of the wide words deployed by the parties from the operation of the text of a provision like cl 4.

[51] In particular, there is no justification for limiting the meaning of the text of cl 4 that would permit any "alteration to, addition to or deletion from the contract or the scope of the work to be performed under the contract" to alterations that do not have the effect of a release from liability for breach of contract.[23]

[52] In reaching that view, I have not overlooked the last sentence of cl 2 of the guarantee that provides:

> "[The plaintiff] also further reserve[s] the ability to assert any claims or defenses (sic) available to [Palmer Petroleum]."

[53] If the amendment deeds had the effect the effect of releasing the defendant from any claim or defence that Palmer Petroleum otherwise would have had, that claim or defence ceased to be available to Palmer Petroleum. There is no inconsistency between cl 4 and the last sentence of cl 2.

[54] In my view, cl 2 of the guarantee, as context, does not require or lead to a different conclusion as to the operation of cl 4.

[55] It follows that I reject the construction of cl 4 of the guarantee contended for by the plaintiff.

Waiver by Palmer Petroleum of breaches of the contract by the defendant

[56] In addition to the argument about the proper construction of cl 4, the plaintiff alleges that the guarantee was discharged, as a matter of law, by Palmer Petroleum "waiving" or agreeing to release the defendant from alleged breaches of the contract by the defendant.

[57] At the outset, it is important to distinguish the alleged waiver raised in this case from the effect of "waiver" by a creditor of a breach of the principal contract by the other party, by making a binding agreement to give the other party more time to perform the principal contract.[24] That form of agreement operates to vary the principal contract to the presumptive prejudice of the guarantor. On payment of the guaranteed debt, the guarantor would be subrogated to the rights of the creditor. As against the other party to the principal contract, in that way, the guarantor may be prejudiced by a "waiver" by the creditor.

[58] The "waiver" in this case is not concerned with breaches of contract by Palmer Petroleum. It is concerned with alleged breaches or anticipatory breaches of

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23 For similar reasons, there is no reason or justification for limiting the operation of cl 4 to alterations that are not made when Palmer Petroleum elected to affirm the contract for anticipatory breach of contract.

24 *Clarke v Birley* (1889) 41 Ch D 422, 434-435; *Hancock v Williams* (1942) 42 SR (NSW) 252, 255.

contract by the defendant. But the fact in this case is that Palmer Petroleum sought performance of the contract by the defendant by carrying out the work under the contract as was agreed and as varied by the amendment deeds.

[59] The plaintiff concedes that no case has decided that a "waiver" like the one in the present case is a ground for discharge of the guarantor's liability. In *Farrow Mortgage Services Pty Ltd (in liq) v Williams*,[25] Giles J found it was unnecessary to decide whether "alteration of a guarantor's rights without his consent resulting from breach by the creditor of his agreement with the debtor has the same consequence in law as such an alteration by variation of the same agreement". O'Donovan and Phillips, in the *Modern Law of Guarantee*, suggest there is merit in the approach.[26]

[60] However, in my view, there is no general principle of law that the liability of a guarantor is discharged by a breach of the principal contract by the creditor, when the principal contract is not terminated for breach of contract by the other party. Andrews and Millett, *The Law of Guarantees*, opine that the better view is that in the event of an election to affirm the principal contract by the other party, the guarantor ought to remain liable.[27] I accept that view for the following reasons.

[61] First, the facts of the present case illustrate some of the difficulties that would attend such a principle. Simplifying, the plaintiff alleges that because the defendant failed to perform or intimated that it would not perform the contract to supply services for reward in accordance with its terms as to time, the defendant was in breach of contract and Palmer Petroleum was entitled to terminate the contract for breach (or anticipatory breach) either before or at an early point in the time for the performance of the work by one or more of the vessels.

[62] On the plaintiff's argument, Palmer Petroleum had rights that it was capable of exercising for any breach of contract (or anticipatory breach), but chose not to exercise those rights. Of course, that Palmer Petroleum might have been entitled to terminate the contract does not mean that it was in Palmer Petroleum's best interests to do so, or in the interests of the plaintiff as its wholly owning shareholder that it do so.

[63] As previously discussed, the defendant and Palmer Petroleum agreed to vary the terms of the contract to provide for a different manner and timing of performance of the work in place of that previously agreed. That course was open to them as a matter of law and under cl 4 of the guarantee, on its proper construction.

[64] The defendant performed the contract as varied, as it was obliged to do, by doing the work over a period in excess of a year and for which it ultimately invoiced amounts totalling a little under US$35 million.

[65] Second, it is necessary to put to one side those cases where a creditor and guarantor expressly contract that the guarantor's liability is conditioned on the performance of the principal contract by the creditor either in particular respects or in whole. For example, in *Blest v Brown,*[28] the guarantee was given of payment of the price of flour to be supplied by the creditor under the principal contract with the other party,

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25 [1994] ANZ ConvR 41.
26 At [7.300].
27 Andrews and Millett, *The Law of Guarantees*, 7 ed, 391-392 [9-017].
28 (1862) 4 De GF & J 367; 45 ER 1225.

but the guarantee provided expressly that the flour was to be of a particular quality. If the guarantee in the present case had provided that the plaintiff's liability under the guarantee is conditional on the defendant performing the contract in whole without any breach, similar considerations might apply, but it doesn't provide that.

[66] Third, a general reference in a contract of guarantee to the principal contract does not have the effect of making the parties to the contract of guarantee promise each other to perform the terms of the principal contract.[29]

[67] Fourth, where liability under a guarantee has arisen before the principal contract is terminated by the other party to that contract for the creditor's breach of contract, the guarantor's liability under the guarantee is not discharged by a later termination.[30] A free-standing principle that the guarantor is discharged if the breach is in some way potentially prejudicial to the guarantor would not operate coherently with this principle.

[68] Fifth, however, the future liability of a guarantor (as opposed to a liability that has arisen before the principal contract is terminated) will be discharged, generally speaking, if the principal contract is terminated for the creditor's breach of contract.[31]

[69] Sixth, where a creditor breaches the principal contract and the other party suffers loss or damage that is recoverable for breach of contract, a guarantor of the other party's liability under the principal contract may be entitled to set up the loss or damage in diminution of the creditor's claim under the guarantee, as if by way of set-off, provided that the other party is joined to the proceeding.[32]

[70] Seventh, a difference between the last two points lies in whether the other party to the principal contract terminates the contract for breach by the creditor. Where the other party terminates the principal contract before liability under the guarantee has arisen, the guarantor's future possible liability under the guarantee is discharged but where the other party does not terminate the principal contract and insists on continued performance, the guarantor's future liability under the guarantee may be reduced by the loss or damage which the other party suffered by reason of the breach of the principal contract. A free-standing principle that, in any event, the guarantor is discharged, if the breach is in some way potentially prejudicial to the guarantor, would not operate coherently with that difference.

[71] Eighth, a cognate principle to that advanced by the plaintiff may have underlain *Black v Ottoman Bank*.[33] However, the principle as stated in that case is engaged by:

> "[s]ome positive act done by [the creditor] to the prejudice of the surety, or such degree of negligence as… 'to imply connivance and amount to fraud'"

[72] O'Donovan and Phillips say of the principle in *Black*: "it is difficult to find any clear examples in either England or Australia of the discharge of a guarantor on this

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29 *Wardens & Commonality of the Mystery of Mercers of the City of London v New Hampshire Insurance Co Ltd* [1992] 2 Lloyd's Rep 365, 378.

30 *Elkhoury v Farrow Mortgage Services Pty Ltd (in liq)* (1993) 114 ALR 541.

31 *National Westminster Bank plc v Riley* [1986] BCLC 268, 275.

32 *Elkhoury v Farrow Mortgage Services Pty Ltd (in liq)* (1993) 114 ALR 541.

33 (1862) 15 Moo PCC 472, 483; 15 ER 573, 577.

basis",[34] and there has been some judicial suspicion directed towards the extent of the principle.[35] For my purposes, it is enough to say that many breaches of a principal contract by a creditor will not fall within any requirement of a positive act by the creditor and many such breaches will not imply connivance or amount to fraud. Accordingly, the principle in *Black*, if accepted, does not operate in a way that would be coherent with the general principle for which the plaintiff contends.

[73] These reasons combine, in my view, so that the principle contended for by the plaintiff either should not be accepted at all, or should not be accepted as having any possible operation in the present case.

[74] In those circumstances, it is unnecessary to consider further whether as alleged in the statement of claim, or advanced by the plaintiff's final submissions, there was a substantial breach of contract or an anticipatory breach of contract that entitled Palmer Petroleum to terminate the contract as at either 27 February 2011[36] or 5 June 2011.[37]

Consent to the variations of the contract

[75] The defendant raises an alternative ground of defence based on the alleged prejudicial variations of the contract. It alleges that the plaintiff consented to the variations and that the plaintiff's consent operates to preclude the plaintiff from relying upon the prejudicial variations as a discharge of the guarantee.

[76] Consent of this kind differs from a provision such as cl 4 of the guarantee, because it is a consent to the variations in question when they are made,[38] or after they were made.[39] Such a consent can operate in law to prevent the guarantor from relying on a prejudicial variation.[40]

[77] It is strictly unnecessary to decide the question of consent in this case, because of the conclusions I have reached upon the plaintiff's argument about the operation of cl 4 of the guarantee and as to the discharge of the guarantee by the defendant's alleged breaches of contract. Nevertheless, I will state my provisional conclusions upon this point in summary form, without finally deciding the question.

[78] First, the case law is unclear whether the consent that is required must be sufficient to amount to a variation of the contract of guarantee. If not, the legal characterisation of consent in this context, be it an election or estoppel or other species of waiver, may be a source of some complexity, given recent analysis by the

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34 O'Donovan and Phillips, *The Modern Contract of Guarantee*, [8.1100].

35 *Brighton v Australia and New Zealand Banking Group Ltd* [2011] NSWCA 152, [113]; compare *Bank of India v Trans Continental Commodity Merchants Ltd* [1983] 2 Lloyd's Rep 298, 302; compare also *Graeme Webb Investments Pty Ltd v St George Partnership Banking Ltd* (2001) 38 ACSR 282, 302 [85]-[86].

36 When Amendment Deed 1 was dated.

37 When it is alleged in par 88 of the statement of claim that the parties agreed Amendment Deed 2, although it was dated 29 June 2011.

38 Compare *Wren v Emmett Contractors Pty Ltd* (1969) 43 ALJR 213, 220 (per Menzies J in dissent) and *Polak v Everett* (1876) 1 QBD 669, 673. See also *Credit Suisse v Borough Council of Allerdale* [1995] 1 Lloyd's Rep 315, 363 and *Winstone Ltd v Bourne* [1978] 1 NZLR 94, 96.

39 *Credit Suisse v Borough Council of Allerdale* [1995] 1 Lloyd's Rep 315, 364.

40 *Williams v Frayne* (1937) 58 CLR 710, 729; *Bridgestone Australia Ltd v GAH Engineering Pty Ltd* [1997] 2 Qd R 145, 156-157; *McMahon v National Foods Milk Ltd* (2009) 25 VR 251, 284 [83].

High Court of the operation of the doctrine of waiver in a contractual context.[41] It is unnecessary to pursue any question of that kind in this case.

[79] Second, the case law recognises that in this context mere knowledge on the part of the guarantor does not amount to consent.[42] It might be argued that although that distinction in law is justifiable in many cases, it fails to take into account some pervading features of modern commercial arrangements in this country.

[80] Business may be carried on by a proprietary limited company that has insignificant net assets and only one shareholder and one director. Often a party contracting with such a company will insist that the company's liability under the principal contract be guaranteed by the shareholder and director. Corporate groups are structured so that a wholly owned subsidiary proprietary limited company that has insignificant net assets will conduct an operating business. The management of the subsidiary and the holding company comprises the same or substantially the same directors. Often a party contracting with such a company will insist that the subsidiary's liability under the principal contract is guaranteed by the holding company. In both classes of case, a variation of the principal contract may be made through the actions of the same individuals who are the guarantor or directors of the guarantor. In such cases, a principle that consent to a variation may not be inferred from knowledge alone may be thought to be a triumph of form over substance. It is unnecessary to consider these questions further, as a matter of principle.

[81] In the present case, the plaintiff alleges that it did not consent to the amendment deeds. The defendant denies that allegation on the grounds that Mr Palmer signed the amendment deeds on Palmer Petroleum's behalf, Mr Palmer knew of the fact and substance of each amendment at and from the date of each amendment deed, Palmer Petroleum was a wholly owned subsidiary of the plaintiff, Mr Palmer was one of two directors of the plaintiff and the plaintiff did not suggest any concern in relation to any of the amendments. The plaintiff admits those facts but denies that its consent is to be inferred from them.

[82] In my view, on the basis of those facts and in the circumstances of this case, it might be inferred that the plaintiff consented to the amendments contained in the amendments deeds. It is unnecessary to go further so as to decide the question.

Article 5.8

[83] Article 5 of the contract provided as follows:

> "5.1 Unless otherwise provided for herein, at the beginning of each calendar month, [the defendant] shall invoice [Palmer Petroleum] for any Approved invoice charges made by [the defendant] for expenditures made on [Palmer Petroleum]'s behalf and, based upon the prices or rates set out in a Work Order, for Work performed during the previous month with Each invoice shall be accompanied by all relevant documents to support the invoiced amounts. Daily and/or other reports signed by Company Offshore Representatives and [the defendant]'s Offshore Representative shall be

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41 *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 585-603.

42 *Winstone Ltd v Bourne* [1978] 1 NZLR 94, 96; cf *Clark Equipment Credit of Australia Ltd v Kiyose Holdings Pty Ltd* (1989) 21 NSWLR 160, 176.

conclusive evidence of all matters stated in such report and shall form the basis for invoicing.

5.2 All invoices shall be rendered to [Palmer Petroleum] in United States Dollars and Company shall make payment in United States Dollar.

5.3 All invoices shall be itemized in accordance with this Contract and shall be verified and signed by the [the defendant] Representative and [Palmer Petroleum] Representative prior to submission to [Palmer Petroleum] for payment.

5.4 Any Approved invoice charges claimed by [the defendant] for items reimbursable under this Contract based on actual cost shall be fully supported by sufficient original documentation, including copies of invoices or other documentation as applicable, to permit verification thereof by [Palmer Petroleum].

5.5 Man hour costs invoiced to [Palmer Petroleum] shall be supported by original timesheets in the format designed by [the defendant] and confirmed by Company hereto if applicable.

5.6 [The defendant] shall submit to Company original invoice with supporting documents for the scope and type of the Services carried out during the Service period, i.e. Acceptance Protocols of the rendered services signed by the Parties as above.

5.7 Company shall be entitled to withhold payment if any of [the defendant]'s invoices do not include appropriate supporting documentation or do not conform in any other way with the requirements of this Article 5.

5.8 Invoices shall be addressed to:

_____

_____

_____

_____

Payment due to [the defendant] may be withheld by [Palmer Petroleum] on account of:

(a) Unsatisfactory performance of this Contract;

(b) [The defendant]'s failure to remedy defective portions of the Work where [Palmer Petroleum] has given [the defendant] notice of any such defective Work; or

5.9 Despite any other clause to the contrary, Payment of 100% of all undisputed invoice items shall be made by [Palmer Petroleum] to [the defendant] within twenty four (24) calendar months after receipt thereof by [Palmer Petroleum]'s Finance Department and either (i) [the defendant] has

advised [Palmer Petroleum] in writing all Work has been completed in accordance with the terms of this Contract, or (ii) termination of the Contract in accordance with Article 3 herein. If the date for payment falls on a Saturday, Sunday or an official public holiday in the Work Country, the next working day shall be deemed to be the due date for payment. Payments made by [Palmer Petroleum] shall not preclude the right of [Palmer Petroleum] to thereafter dispute any of the items invoiced.

5.10 Subject to Article 8, if [Palmer Petroleum] has a bona fide dispute with any item on an unpaid invoice, [Palmer Petroleum] shall inform [the defendant] of the disputed items within thirty (30) days of the receipt by [Palmer Petroleum] of the particular invoice and [Palmer Petroleum] shall be entitled to withhold the actual amount in dispute from its payment. In respect of disputed items, payments may be withheld by [Palmer Petroleum] until settlement of the dispute. The Parties shall confer in good faith to resolve any such dispute within a reasonable time. Any payments withheld by Company pursuant to the terms of this Contract shall be without prejudice to any other rights or remedies available to Company. When the cause or causes for withholding payment have been remedied or removed by [the defendant] and satisfactory evidence of such remedy or removal has been presented to [Palmer Petroleum], the payments withheld shall be made forthwith by [Palmer Petroleum]. If [the defendant] fails to take appropriate remedial action or refuses to remedy or remove any cause for withholding such payments after delivery of notice to [the defendant] by [Palmer Petroleum], [Palmer Petroleum] shall be entitled to cause the same to be remedied or removed on its own and may deduct the cost including the expenses thereby incurred by [Palmer Petroleum] from any amounts due or owing or which may become due or owing to [the defendant] under this Contract provided always that this provision shall not affect any other remedy to which [Palmer Petroleum] may be entitled to for the recovery of such sums.

5.11 The bank account of [the defendant] to which Company shall make payments under the Contract shall be as follows:

Beneficiary Name	BGP Inc.
Beneficiary Address	P.O.Box 37519, Dubai, U.A.E.
Account No.	01-02-2612380-01 (USD)
Beneficiary Bank	Standard Chartered Bank, Dubai Main Branch
Swift code	SCBLAEADXXX
Bank Address	P.O.Box 999, Dubai, U.A.E.
Intermediary Bank	Standard Chartered Bank, New York
Swift code	SCBLUS33XXX

Any change to the above details shall be the subject of a formal amendment to the Contract.

> 5.12 A deferred payment finance fee of:
>
> (a) 3% per annum during the first twelve (12) month period following the date of each undisputed & unpaid invoice; and
>
> (b) 4% per annum during the second twelve (12) month period following the date of each undisputed & unpaid invoice.
>
> will be charged on the total of all unpaid undisputed invoice items rendered to [Palmer Petroleum] at least thirty (30) days prior (the "finance fee").
>
> On or before December 15, 2011, [Palmer Petroleum] shall pay a minimum of 50% of all outstanding invoices which [Palmer Petroleum] has received prior to December 1, 2011."

[84] Article 5.1 thus contained provisions for the defendant to invoice Palmer Petroleum for work done under the contract at the beginning of each calendar month. Article 5.8 provided that Palmer Petroleum was entitled to withhold payment due to the defendant on account of unsatisfactory performance of the contract.

[85] The plaintiff alleges in the statement of claim that the defendant's performance of the contract was unsatisfactory within the meaning of art 5.8 because the PPL380 report failed to report on the existence of oil and condensate "resources" when it ought to have recorded the existence or prospective existence of very substantial volumes of oil and condensate, and that it follows that both Palmer Petroleum and the plaintiff were relieved from any obligation to pay the defendant's unpaid invoices under the contract.

[86] This plea raises two questions of construction of art 5.8. First, whether the defendant's failure to report the existence or prospective existence of recoverable volumes of oil and condensate in the PPL380 report constituted "unsatisfactory performance" within the meaning of art 5.8? Second, if art 5.8 was engaged, does it operate to suspend the right to payment on the invoices for which the defendant claims payment, either at all or indefinitely or permanently, when performance of the work under the contract is finished?

Consequence of unsatisfactory performance

[87] The parties devoted considerable energy as to whether the defendant's failure to report the prospective existence of recoverable volumes of condensate and oil in the PPL380 report constituted "unsatisfactory performance".

[88] However, it is convenient in the first place to consider what would be the consequence of the unsatisfactory performance alleged. The plaintiff alleges that pursuant to cl 5.8 of the contract, no sum was payable by Palmer Petroleum to the defendant under the contract. Next, the plaintiff alleges that it is not obliged to pay those sums under the guarantee.

[89] The defendant denies that construction of art 5.8 and submits that art 5.8 of the contract operates more narrowly; in effect, that it is confined to a right to withhold payment of invoices for work that is unsatisfactory. The defendant alleges in the defence that none of the outstanding invoices is for the work of preparing or

providing the PPL380 report. That fact is not disputed. Accordingly, the defendant alleges in the defence and submits that art 5.8 does not operate to defeat the defendant's right to payment of the outstanding invoices

[90] The plaintiff alleges in reply that the cap of US$35 million provided for in cl 2 of Amendment Deed 3, as set out previously, was not divisible among the various stages of the work. In final submissions, the plaintiff contended that the cap operated to require performance of all items of work for the "fixed" contract sum of US$35 million, and that the sum was indivisible, as in the case of an entire contract.

[91] At the outset, it may be accepted that the introduction of the cap of US$35 million did not relieve the defendant of its obligations to perform the work as provided in the contract, including the obligation to provide a report relating to PPL380. It is expressly provided in cl 4a of Amendment Deed 3 that cl 2 is not intended to limit or restrict the work or limit or remove any of the obligations of the defendant under the contract. The express example is provided that if the cap is exceeded the defendant will complete the work to the same quality and standard as if the cap had not been exceeded. It is also expressly provided in cl 4b of Amendment Deed 3 that

> "…clause 2… [d]oes not… restrict the rights of [Palmer Petroleum] to dispute any invoices pursuant to the Existing Agreement."

[92] However, it does not follow that the amounts of invoices that became payable under art 5.9 and the other provisions of the contract as to payment were thereby rendered indivisible, in the sense that those amounts became entire amounts that were not payable unless all work under the contract was performed satisfactorily.

[93] In *Steele v Tardiani*,[43] Dixon J cited the general proposition that:

> "Where the consideration for the payment of money is entire and indivisible, as where the benefit expected by the defendant under the agreement is to result from the enjoyment of every part of the consideration jointly, so that the money payable is neither apportioned by the contract, nor capable of being apportioned by a jury, no action is maintainable, if any part of the consideration has failed; for, being entire, by failing partially, it fails altogether."

[94] In *Baltic Shipping Company v Dillon*,[44] Mason CJ said:

> "An entire contract or, perhaps more accurately, an entire obligation is one in which the consideration for the payment of money or for the rendering of some other counter-performance is entire and indivisible…
>
> The concept of an entire contract is material when a court is called upon to decide whether complete performance by one party is a condition precedent to the other's liability to pay the stipulated price ..."

[95] In *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd*,[45] MacFarlan JA said:

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43 (1946) 72 CLR 386, 401.
44 (1993) 176 CLR 344, 350.
45 [2012] NSWCA 184, [94].

> "In the case of contracts which at least on their face appear to be entire contracts, particularly lump sum building contracts, courts have been reluctant to construe complete performance of the works as an essential pre-condition for payment. Rather, in circumstances where there has been substantial performance, they have treated a failure to complete as a breach of a non-essential term of the contract not disentitling the builder to contractual payment for the work done but, rather, giving the proprietor a right of setoff or claim for damages for the cost of completing the work or rectifying any defects."

[96] In the present case, the contract does not appear to be an entire contract on its face. The cap of US$35 million had the effect of limiting the amount of the remuneration and expenses payable to the defendant under the contract. But nothing supports the conclusion that the introduction of the cap of US$35 million had the additional consequence that all sums otherwise payable for invoices for work in accordance with art 5 and the other provisions of the contract as to payment were no longer payable unless all the work under the contract was performed and performed satisfactorily.

[97] The operation of art 5.8 is to be determined by construing the text of that provision in its context. There are a number of relevant features of art 5. First, art 5.1 envisages a monthly payment claim process by invoice from the defendant to Palmer Petroleum. An invoice is to be supported by the relevant documents, and under art 5.3, verified by the defendant's representative and Palmer Petroleum's representative.

[98] Second, under art 5.7, if an invoice does not include the appropriate supporting documents, or is submitted in a non-conforming way, Palmer Petroleum may withhold payment.

[99] Third, as set out above, art 5.8 provides that:

> "Payment due to [the defendant] may be withheld by [Palmer Petroleum] on account of:
> (a) [u]nsatisfactory performance of the Contract;
> (b) [the defendant]'s failure to remedy defective portions of the Work where [Palmer Petroleum] has given [the defendant] notice of any such defective Work; or (sic)"

[100] Fourth, art 5.9 provides for payment of all undisputed invoice items within a 24 hour period "[d]espite any other clause to the contrary". However, there are other express terms of the contract as amended by the deeds of amendment that delayed the date when payment was due. Article 5.9 is also conditioned upon either the defendant advising Palmer Petroleum that all work for the invoice has been completed in accordance with the terms of the contract or that the contract has been terminated in accordance with art 3.

[101] Fifth, art 5.10 provides that Palmer Petroleum is entitled to withhold payment in respect of disputed items if it has a bona fide dispute with any item on an unpaid invoice and has informed the defendant within 30 days of receipt of the particular invoice.

[102] Sixth, art 5.10 provides that if the defendant fails to take appropriate remedial action or refuses to remedy or remove any cause for withholding such payments Palmer Petroleum is entitled to cause the same to be remedied from any amounts due or owing.

[103] The defendant submits that Palmer Petroleum has not withheld any payment under art 5.8. The plaintiff submits that Palmer Petroleum did so by the letter from Palmer Petroleum to the defendant dated 18 June 2013. The letter stated that Palmer Petroleum had serious questions over the interpretation the data and the professionalism and techniques of the defendant in carrying out the work of the reports under the contract and continued:

> "As a consequence, Palmer Petroleum disputes your companies' (sic) entitlements to any further payments at this time."

[104] The defendant submits that this dispute was not bona fide. It is unnecessary to decide that question, although there is some factual support for the defendant's position. In any event, the letter was not notice given in accordance with art 5.10. It was not given in respect of a disputed item on an unpaid invoice.

[105] Further, although the letter referred to disputing payment "at this time", Palmer Petroleum did not, despite demand, identify the alleged defect or defects alleged to constitute the unsatisfactory performance subsequently, or require the defendant to remedy the alleged defect or defects, or have the defect or defects remedied from any amounts owing on the invoices that were payable otherwise (in accordance with art 5.10). The letter was not notice of defective work that the defendant failed to remedy under art 5.8(b), because it did not identify what was defective.

[106] Nevertheless, the plaintiff submits, in effect, that on the proper construction of art 5.8(a) Palmer Petroleum was entitled to withhold further payment of the outstanding invoices that were otherwise due and owing, indefinitely or permanently, by the fact of unsatisfactory performance, although the defect was not identified, by giving the notice contained in the letter.

[107] In my view, art 5.8 did not operate that way, properly construed. As at 18 June 2013, the work under the contract had been finished. Payment of the outstanding invoices became due when they were rendered and became payable under art 5.9 and the other provisions of the contract as to payment. Let it be assumed that there was a defect or defects in the PPL380 report, amounting to a breach of contract by the defendant as to the quality of the work for the report. For such a breach, Palmer Petroleum would have retained a right to recover damages for breach of contract for any loss or damage it may have suffered. Article 5.9 provides that payment does not preclude the right of Palmer Petroleum to dispute any of the items invoiced after payment. That provision confirms that payment does not prevent a claim for damages for breach of contract. Alternatively, such a claim may have been raised as a defence by way of equitable set-off to a claim for payment of the outstanding invoices.

[108] These general conclusions are specifically supported by art 12.7 of the contract, which provides in part:

> "If [the defendant] fails to meet these professional standards, [the defendant] shall be liable to repeat any specific work which failed to meet such professional standards. Such correction work shall be at no additional expense to [Palmer Petroleum], and the additional work shall be such as to conform the affected Work to the above mentioned professional standards. In the event [the defendant] is unable or unwilling to correct the Work, [Palmer Petroleum] may cause the Work to be performed by other contractors at [the defendant]'s sole expense which costs shall in no event exceed the correction work that [the defendant] would have incurred had [the defendant] performed the Work."

[109] In fact, Palmer Petroleum did not call upon the defendant to repeat or further perform the work of the PPL380 report. Had it done so, on the plaintiff's case, the defendant would have been obliged to repeat and correct the work. Had it been unable or unwilling to do so, Palmer Petroleum would have been entitled to get another contractor to do a report to the standard the plaintiff alleges was required, such as the Isis report. In that event, the cost of the further report would have been to the defendant's expense.

[110] But it is another thing entirely, in my view, to construe art 5.8 as a bar to any further right to payment that is due on the outstanding invoices, where none of the items on those invoices is disputed, because of a defect or defects in in the interpretation of or the extent of the reporting on the data in the PPL380 report. In my view, the context of art 5.8 in the contract, and the purpose of that provision, are such that it should not be construed as extending to the facts of the present case, even assuming the existence of the breach of contract alleged by the plaintiff.

Unsatisfactory performance

[111] Against the possibility that I am wrong in the last conclusion, I proceed to consider the plaintiff's allegation that the defendant was guilty of unsatisfactory performance of the contract.

[112] A second reason for doing so is that although the plaintiff does not allege in the existing statement of claim that Palmer Petroleum suffered any loss or damage as a result of the alleged unsatisfactory performance as a breach of contract, on 1 August 2017, I reserved an application by the plaintiff to amend the statement of claim to claim that Palmer Petroleum suffered loss or damage by reason of the defendant's unsatisfactory performance of the contract.

[113] It is uncontroversial that the PPL380 report did not opine as to the potential existence of recoverable volumes of condensate or oil.

[114] The plaintiff's final submissions impliedly accept that unless the alleged failure to opine as to that matter was a breach of contract it was not unsatisfactory performance for the purposes of art 5.8(a).

[115] The plaintiff contends in its final submissions that the defendant concedes in its defence that it was obliged to provide a report on the potential existence in PPL380 of recoverable volumes of hydrocarbons including gas, oil and condensate. The defendant in its final submissions disputes that is the effect of the defence.

[116] Paragraph 4(e) of the defence admits that the defendant was obliged to report on the potential existence in the areas of hydrocarbons including gas, oil and condensate subject to the matters pleaded in paras 4(a), 4(b) and 4(c) being:

> "(a) … [that] reporting in relation to hydrocarbons [that is] based primarily on seismic data acquired from a survey area, particularly when there is no drilling data available from the area:
>
> (i) involves drawing conclusions in light of:
>
> (A) many variables and parameters that cannot be precisely assessed;
>
> (B) a range of possible theoretical and methodological bases; and
>
> (ii) involves drawing conclusions on which reasonable minds may differ without thereby being incorrect or inconsistent with ordinary professional practice; and
>
> (iii) is a matter of evaluative and uncertain opinion as to the potential rather than actual existence and volume of hydrocarbon resources in the area;
>
> …
>
> (b) … that:
>
> (i) the reporting required under the [contract] on the survey areas was reporting in relation to hydrocarbons based primarily on seismic data acquired from the survey areas;
>
> (ii) there was no drilling data available to [the defendant] from any part of any of the survey areas;
>
> (iii) Palmer Petroleum and [the defendant] knew at the time of entry into the [contract]:
>
> (A) the matters at (a) above, as common professional knowledge in the geoscience industry and field of hydrocarbon exploration;
>
> (B) the matters at (b)(i) and (b)(ii) above;
>
> (iv) the meaning of the [contract], as to [the defendant's] obligations should be understood in the light of (a) and (b)(1) to (iii) above;
>
> (c) … that clause 12.3.7 of Annex 1.2 Schedule A to the [contract] provided that all reports shall represent the best efforts and opinion of the defendant and be prepared in accordance with the generally accepted standards of the geoscience industry…"

[117] In my view, those paragraphs do not mean that the defendant has admitted an unqualified obligation to provide a report on the potential existence of recoverable volumes of hydrocarbons including gas, oil and condensate. First, there is no express admission of an obligation to report as to potential "recoverable" volumes. That is not surprising, because "recoverable" is not a word used in the relevant paragraph of the statement of claim.[46] Second, the admission made is qualified by the matters alleged, including that the extent of the required reporting is to be in accordance with the generally accepted industry standards alleged. There is no unqualified admission that any potential existence of recoverable volumes of condensate or oil must be reported upon.

[118] Alternatively, the plaintiff submits that the defendant was obliged to provide a report on the potential existence of recoverable volumes of hydrocarbons including gas, oil and condensate by:

(a) ex I, annex 1.1, item E, of the contract, which (as previously referred to) provided for the defendant to "[i]nterpret and compile a comprehensive leads and prospects inventory over [PL 380] using the processed 3D seismic data merged with all existing G&G data"; and

(b) ex II, clause 7.2 of the contract which referred to leads and prospects evaluation as including:
"- Structure Analysis
- Reservoir Prediction
- Hydrocarbon detection
- Comprehensive evaluation"

[119] The defendant's final submissions rely on ex I, annex 1.2, sch A, par 12.3.7 of the contract that provides:

> "All reports and information shall represent the best efforts and opinion of [the defendant] and shall be compiled and prepared in accordance with this Agreement and the generally accepted standards of the geophysical industry"

[120] As well, I have previously referred to art 10.1(c) of the contract, by which the defendant warranted that it would perform the work and would do so with skill and diligence, in a professional and careful manner, adopting a standard for the work not less than the generally accepted international petroleum industry standard.

[121] It is uncontroversial that "hydrocarbon", a word that on its ordinary meaning refers to a chemical compound of hydrogen and carbon, has a meaning in this context that extends to gas, condensate or petroleum (oil). It is unnecessary to refer to the relevant chemistry further.

[122] However, neither the provisions of the contractual text relied upon by the parties, nor art 10.1(c), expressly refers to providing a report on the potential existence of recoverable volumes of condensate or oil.

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46 Paragraph 29.

[123] Because the contract picks up, by art 10.1(c) the "generally accepted international petroleum industry standard", and by ex I, annex 1.2, sch A, par 12.3.7 "generally accepted geophysical industry standards", in relation to the preparation of the relevant report, the extent of the contractual obligation to report as to the potential existence of recoverable volumes of oil and gas is a matter on which the expert reports touched.

[124] It will be recalled also that ex I, annex 1.1 par E of the contract required that the report be submitted to Palmer Petroleum in a format which meets the requirements of reg 95 of the *Oil and Gas Regulations* 2002. The regulation required the report to be submitted within 4 months after completion of a seismic survey in a form acceptable to the director of the relevant PNG government department.

[125] The expert called to give evidence by the plaintiff was Dr Gillies. He was one of those who prepared the Isis report in 2012. The expert called by the defendant was Mr Peacock. In his affidavit and report, Dr Gillies:

(a) recognised that a four month period was too short to expect a full assessment of the resources to have been finalised. However, he did not express any experience of what the requirements of the director of the relevant PNG governmental department were;
(b) opined that only one petroleum system had been proven to be hydrocarbon bearing in the offshore area adjacent to the PPL380 licence area. It contained gas and gas-condensate discoveries in carbonate reefs of the Miocene age;
(c) agreed with Mr Peacock that it is "entirely normal" for different assessors to come up with different interpretations from the same data set which includes both seismic and other geological data, especially in frontier exploration areas;
(d) agreed with Mr Peacock that all potential volumes in PPL380 should be classified as prospective resources, meaning they may not exist;
(e) opined that the PPL380 report is of an acceptable professional quality and agreed with Mr Peacock that it was reasonable and consistent with industry practice;
(f) opined that it was unexceptional in ordinary professional practice that if a report concluded that the potential hydrocarbon reservoirs are most likely to be gas, for it to analyse the potential reservoirs on that basis only;
(g) opined that the absence of express reference to other hydrocarbons does not necessarily convey an opinion that there are no other hydrocarbons;
(h) agreed with Mr Peacock that the PPL380 report should not be read as conveying that there were no other hydrocarbons;
(i) opined that the qualifications and curriculum vitae of the defendant's personnel as a whole were appropriate for the work and indicate that they had the skill and competence required to perform the work under the contract;
(j) noted that s 3.4.2 of the Working Proposal (as defined later in these reasons) described a formula that only estimates gas in place;
(k) opined that whether or not a broader range of potential outcomes to a gas-condensate play should be considered in a frontier area is a matter of interpretation, and differences of opinion such as that are common in in frontier exploration work; and

(l) opined that the omission of estimates of recoverable hydrocarbons was an issue that could easily be addressed with minimal extra work.

[126] Thus, although Dr Gillies expressed the opinion that it would have been prudent for the purposes of a report like the PPL380 report for the reporter to consider the possibility of other plays, including gas-condensate or oil, he did not give evidence that generally accepted [petroleum or geophysical] industry standards required that the defendant report as to the potential existence of recoverable volumes of condensate and oil in the PPL380 report. Nor did Mr Peacock, in his report.

[127] During the plaintiff's cross examination of Mr Peacock, the following exchange occurred:

> "Yes, so the importance of what comes out of the ground relates to the value of – potentially, of a prospecting petroleum licence, doesn't it?---I think it's more of a – it's more of a technical issue: what will be produced at the surface as opposed to what's left – what's left in the ground.
>
> But the industry reports on recoverable volumes as you - - -?---The industry typically reports on recoverable volumes; that's correct.
>
> Because that's what the holders of licences want to know, isn't it?---Yes, I mean, the ultimate aim of hydrocarbon - - -
>
> Yes?--- - - - exploration is to produce and sell and to make money, yes."[47]

[128] Later during the cross examination, the following exchange occurred:

> "And another reason why you use the expression "broadly" is because it doesn't mention any volumes in relation to condensate? Well, it's not only that it – if they had explained why they had not include condensate volumes, I – that – that – that would've been okay, so I think it's – it's okay for them to say, "We don't think there's any conde – there's no condensate here, so we will not report it." I think that – that would've been – that would've been better, but there's no mention either of condensate or of why condensate was not mentioned."[48]

[129] In my view, it does not follow from these passages that the plaintiff has proved that the defendant was obliged by the contract to provide a report as to the potential existence of recoverable volumes of condensate and oil in the PPL380 report.

[130] In my view, on the whole of the expert evidence, it should be concluded that the defendant was not obliged to do so.

Work program as a method of performance

[131] It may be unnecessary to consider it, but the defendant relies on a further ground as negating any finding that the defendant was obliged by the contract to provide a report as to the potential existence of recoverable volumes of condensate and oil in the PPL380 report.

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47 T69.5-.15.

48 T77.25.

[132] On 28 June 2011, Kong Fandong of the defendant sent an email to Chris Hart of Palmer Petroleum. The email stated that it attached a document described as the "Interpretation Plan". A document styled "Block PPL255 Working Proposal of Interpretation Project" dated June 2011 was attached.[49]

[133] Section 3.4.1 of the document stated that according to analysis of drilled wells in the Gulf of Papua the main discoveries were natural gas and condensate; therefore, structural natural gas reservoirs are the main ones in the research area; and, the potential resource will be estimated according to natural gas reservoir during resource assessment.

[134] On 1 July 2011, Kong Fandong sent another email to Chris Hart. The email sought a response to the work plan. It stated that Attachment 1 was a document named "Working Proposal".

[135] On 4 July 2011, Chis Hart responded with comments and looking forward to completion of the plan. His email emphasised the need for a highly experienced contractional structural geologist to help build the models and the importance of this aspect of the project under the contract.

[136] On 9 July 2011, Kong Fandong sent an email to Ben Turner in relation to Chris Hart's suggestions. He attached a revision of the "Interpretation Plan." It attached a document styled "Block PPL255 Working Proposal of Interpretation Project" dated July 2011 ("Working Proposal"). It was an update of the document attached to the 28 June email. Section 3.4.1 was unchanged.

[137] On 20 July 2011, Raymond Tam sent an email to Kong Fandong responding on behalf of Palmer Petroleum. He said that the interpretation plan was basically accepted.

[138] At no stage did Palmer Petroleum resile from its statement as to the acceptability of the plan, or complain about the estimation of hydrocarbons being carried out according to or by reference to natural gas reservoirs in the PPL380 report, until this proceeding was started.

[139] The defendant submits that the plaintiff's acceptance of the Working Proposal extended to s 3.4.1. It further submits that the PPL380 report complies with the Working Proposal and therefore complies with the contract.

[140] The plaintiff submits that the Working Proposal did not amend the contract. I agree. Accordingly, the plaintiff submits that the PPL380 report did not comply with the contract, notwithstanding Palmer Petroleum's basic acceptance of the Working Proposal.

[141] In my view, the relevance of the Working Proposal becomes clearer, once it is recognised that otherwise neither an express contractual requirement nor generally

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[49] The plaintiff objected in final submissions that this document was not proved to be the one attached to the email. However, the plaintiff did not object to the tender of the document itself. In my view, the document should be received as the attachment to the email under s 129A of the *Evidence Act* 1977 (Qld) by production of the document in evidence, on the ground that the provenance of the attachment is not seriously in dispute.

accepted petroleum or geophysical industry standards necessarily required a report on the potential existence of recoverable volumes of condensate or oil.

[142] First, as previously stated, there were contractual provisions requiring that the defendant comply with a number of requirements and standards in providing the report. Second, by art 12.1, the contract provided that the defendant should perform the work in strict adherence to the contract as specified in ex I and would comply with and adhere strictly to Palmer Petroleum's instructions and directions on any matter concerning the work. Third, there was more than a single possible method of performance of the work required for the report, as the expert's reports accepted.

[143] These provisions may have left it to the defendant to decide the method of performance of the work for the report for PPL380 unless Palmer Petroleum gave a direction under art 12.1. However, it was both prudent and professional for the defendant to inform Palmer Petroleum of its proposal by the Working Proposal. Palmer Petroleum made some amendments to the draft of the document that were accepted by the defendant. They are not material to the issue raised in this case. However, it did not propose that the approach foreshadowed by s 3.4.1 should be changed.

[144] In my view, Palmer Petroleum's basic acceptance of the Working Proposal made it all the more difficult for the plaintiff to prove that the contract, whether by ex I, annex 1.1, item E, or ex II, clause 7.2 or ex I, annex 1.2, sch A, par 12.3.7 required the defendant to report as to the potential existence of recoverable volumes of condensate and oil in the PPL380 report.

Misleading or deceptive conduct case

[145] Simplified, the plaintiff's misleading or deceptive conduct case is that at the time of entering into the contract the defendant misrepresented its skill and competence to provide a report as to the prospective existence and volume of resources of oil and condensate.

[146] The plaintiff alleges in the statement of claim that by the terms of the contract the defendant represented to Palmer Petroleum and the plaintiff in Australia that the defendant had the professional skill and competence to provide a "true and accurate report", inter alia, on volumes or prospective volumes of oil and condensate in the areas of the petroleum prospecting licences ("representation").

[147] The plaintiff alleges that the representation was misleading and deceptive and constituted conduct that contravened s 52 of the TPA because the defendant did not have the skill and competence to give a true and accurate report identifying the existence or prospective existence and volume and resources of oil and condensate.

[148] Simplified again, the defendant admits in the defence that at the time of entering into the contract it represented to Palmer Petroleum and the plaintiff that it had the professional skill and competence to provide a "true and accurate" report to the extent that:

(a) the defendant was obliged pursuant to the contract to report on the potential existence of hydrocarbons in the area of PPL380 containing a true and accurate report of its opinion;

(b) ex I, annex 1.2, sch A, par 12.3.7 of the contract provided that the report would represent the best efforts and opinions of the defendant and be prepared in accordance with generally accepted standards of the geoscience industry;
(c) hydrocarbons include gas, condensate and oil; and
(d) reporting on hydrocarbons based on seismic data where there is no drilling data is a matter of opinion on which reasonable minds can differ.

[149] However, the defendant denies that it was obliged pursuant to the contract to report on the actual existence of gas, condensate or oil, as opposed to the potential existence of the same.

Dispute as to the representation

[150] The relevant provisions of arts 10.1(c) and 12.7 support that the defendant represented that it had professional skill and competence. However, a representation that the defendant had the professional skill and competence to provide a true and accurate report on volumes or prospective volumes of oil and condensate in the areas of the petroleum prospecting licences was not expressly made either by art 10.1(c) or art 12.7.

[151] It is uncontroversial that there was no express representation that a "true and accurate" report would be provided. From that starting point, there is an underlying dispute as to the alleged representation as a matter of implication. Because the alleged representation is as to the quality of a report to be provided, by definition it was a "representation" as to a future matter. However, the plaintiff did not rely upon s 51A of the TPA in the statement of claim as is required if that section is to be relied upon.[50] It did not expressly allege or otherwise frame its case on the basis that at the time of the contract the defendant did not have reasonable grounds for making the representation. Further, it did not rely on s 51A(2) of the TPA as casting the onus of proof on the defendant.[51]

[152] At the time of the contract PPL380 was a frontier petroleum licence exploration area. No wells had been drilled in the area. No gas, condensate or oil had been found physically. The report proposed under the contract as to potential hydrocarbons was to be based on seismic information to be gathered for the report. In any general sense, an implied representation that the report to be provided would be "true and accurate" seems counterintuitive, given the context in which the report was to be provided.

[153] When a statement or report is made as to facts, as opposed to opinions, to say that a report is "true" does ordinarily mean that the report is consistent with fact or reality.[52] In the same context, to say that a report is "accurate" would convey the ordinary meaning that it is made with care.[53] But the substance of the complaint made by the plaintiff as to the PPL380 report is not that the defendant misrepresented any of the facts in the report. It is that the defendant failed to express opinions as to other possible plays in the PPL380 area, under which condensate or oil might be discovered in recoverable volumes.

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50 *Western Australia v Bond Corp Holdings Ltd* (1990) 99 ALR 125.
51 Compare *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 and *Razdan v Westpac Banking Corporation* [2014] NSWCA 126.
52 Shorter Oxford English Dictionary, 6 ed, vol 2, p 3360, definition "true".
53 Shorter Oxford English Dictionary, 6 ed, vol 1, p 16, definition "accurate".

[154] In its final submissions, the plaintiff contends the alleged implied representation that the defendant would provide a true and accurate report means an "honest and reasonable opinion" and the allegation that the defendant would provide that report as to volumes or prospective volumes of oil or condensate means "prospective volumes of hydrocarbons". No explanation was given for the suggested changes in meaning from the words of the representation and they should not be accepted. First, "hydrocarbons" include gas but the pleaded case contained no alleged incompetence to provide a report as to the volumes or prospective volumes of gas. Second, the plaintiff abandoned any suggestion that the defendant misrepresented anything in a dishonest way at the trial, so no question that anything other than an "honest" opinion was given arises. Third, the plaintiff should not be permitted to mask any failure to prove the pleaded case by shifting ground as though its case was always set at the different hurdle of an implied representation that the defendant would provide a report containing a reasonable opinion as to prospective volumes of condensate or oil.

Competence to provide a true and accurate report

[155] The plaintiff alleges in the statement of claim that the defendant's absence of skill and competence at the time of the representation should be inferred from the following facts:

(a) in accordance with ordinary professional practice a report such as the PPL380 report would make reference to the existence or prospective existence and volume of any oil and condensate;
(b) the PPL380 report made no such reference;
(c) the defendant had access to and investigated data from 58 wells in adjacent areas;
(d) a competent person in the position of the defendant would have identified that there was evidence in the onshore wells to the east of the permit area of an oil prone Tertiary Petroleum System indicating that an assessment of the existence of oil could and should be made;
(e) the PPL380 report identified the great possibility of a gas bearing oil reservoir within the area but failed to make any assessment with respect to oil reserves;
(f) Isis Petroleum Consultants Pty Ltd, in a report dated September 2012 ("Isis report"), estimated that the mean oil case for PPL380 indicated the existence of 3.9 million barrels of oil in place and 1.4 million barrels of recoverable oil, using the same data utilised by the defendant;
(g) The Isis report also "recorded" a mean case of 421 million barrels of condensate in place and 169 million barrels of recoverable condensate;
(h) oil is a substantially more valuable resource than gas; and
(i) condensate is a substantially more valuable resource than gas.

[156] In contrast to the pleaded case, in final submissions the plaintiff contends that the fact that the defendant did not have the skill and competence to prepare a true and accurate report as to prospective volumes of oil and condensate should be inferred from its failure to meet its "basic contractual requirements to opine on oil and condensate when it clearly promised to do so and by its failure to provide any adequate explanation for its failure to do so."

[157] The plaintiff submits that it was not beyond the capability of an expert to provide a report that addressed the potential recoverable volumes of oil and condensate, because the Isis report did so and the experts called at the trial both opined as to the

competence of the Isis report. But this way of putting the plaintiff's case inverts the relevant question. The question is not whether Isis were competent. It is not whether the Isis report was competently prepared in general or in a particular respect. The question is not whether the defendant as a company with the professional skill and competence to prepare a report as to the prospective volumes of condensate or oil made an error in the PPL380 report in not fully reporting on that subject matter. The question is whether at the time when the contract was entered into the defendant misrepresented its skill and competence as alleged in the statement of claim.

[158] The plaintiff also relies on the contrast between the extent of the reporting in the PPL380 report on gas, on the one hand, and the comparative lack of reporting on condensate or oil, on the other. As to the reporting on gas, there is extensive reference in Table 8.3 of the PPL380 report to the location of gas leads and estimated volumes in place. There is no reporting on recoverable volumes of gas.[54] So the suggested comparison does not hold up on that point.

[159] The defendant's case answered the plaintiff's pleaded case. However, it is unnecessary to consider every point, because the plaintiff's final submissions were confined to the defendant's failure to opine on condensate and oil in the PPL380 report and failure to provide an explanation for doing so.

[160] The defendant's case answers those points in two ways. First, the defendant submits that the evidence of both expert witnesses supports the conclusion that the PPL380 report was reasonable and made in accordance with industry practice. Second, the defendant submits that the focus of the PPL380 report on gas leads and prospects was the result of dealings between the defendant and Palmer Petroleum in July 2011 where, by the Working Proposal, the defendant informed Palmer Petroleum that it intended to estimate potential resources by reference to gas and Palmer Petroleum agreed to or did not raise any objection to that proposal. I have dealt with that subject matter previously, and concluded that Palmer Petroleum did basically accept the Working Proposal, including s 3.4.1.

[161] However, in my view, the answer to the plaintiff's misleading or deceptive conduct case appears sufficiently from the expert evidence. Given that:

(a) Dr Gilles agreed with Mr Peacock that it is "entirely normal" for different assessors to come up with different interpretations from the same data set which includes both seismic and other geological data, especially in frontier exploration areas; and

(b) Dr Gillies opined that the PPL380 report is of an acceptable professional quality and agreed with Mr Peacock that it was reasonable and consistent with industry practice,

it cannot be concluded that the failure of the defendant to opine on potential recoverable volumes of oil and condensate evidences that the defendant misrepresented its skill and competence at the time of entering into the contract.

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54 There is no allegation in the statement of claim that the failure to report recoverable volumes of gas was a fact from which the absence of the defendant's skill and competence at the time of the representation should be inferred.

PPL380 report otherwise

[162] The PPL380 report:

(a) at par 3.4 under the heading “Reservoir Model”, stated:

> “Previous study shows under a sea floor temperature of 4 °C and a geothermal gradient of 30-33 °C/km, the oil-generating window in Gulf of Papua is 3000-4500m, and the gas generating window in Gulf of Papua is 4500-6000m ...
>
> Evaluation according to this hydrocarbon-generating window shows the lower part of Miocene in the foreland basin of [PPL380] 3D study area has entered oil-generating window, Mesozoic and underlying upper Paleozoic are in the gas-generating window...
>
> In previous study on late Jurassic source rock, two main oil and gas generation and expulsion stages have been identified, first Cretaceous, second from Mesozoic to now that is of great importance. Early Miocene mudstone (perhaps including Oligocene deposit), Mesozoic deep water mudstone and Permian coal measure strata are effective source rocks in the study area.
>
> From early 1913 to 1967, 18 out of 36 wells drilled on land in Gulf of Papua have discovered oil and gas shows, among them 14 have found gas shows. Wells drilled after 1967 are also generally gas wells, proving the source rocks in Gulf of Papua have entered into gas generation stage, therefore our exploration will focus on the search for gas reservoirs too.”

(b) at par 7.3, under the heading "AVO hydrocarbon detection result", stated:

A. "Hydrocarbon detection is performed for oil and gas bearing properties of the main exploration series of strata-Miocene ... ";
B. “In type III AVO ... it is most possible to exist gas reservoir or gas bearing oil reservoir”;

(c) subsequently referred to different Miocene areas in which "it is speculated that gas bearing possibility is high", "it is speculated that gas bearing possibility is lower", there is "high gas-bearing possibility", "it is predicted that gas bearing property is poor" and there was indicated "high possibility of gas bearing”;

(d) at par 8.1, under the heading “Oil/gas type analysis”:
(i) under the subheading "Drilling evidence", referred again to previous wells drilled between 1913 and 1967 and those drilled after 1967, and concluded that:
> “The drilling conditions show that for the petroleum exploration in Papua basin, gas reservoirs account for a large percentage, especially the exploration in Gulf of Papua basically discovered natural gas”

(ii) then referred to "Evidence on the seismic stack data volume";
(iii) under the subheading "Evidence on the seismic gather", said that a type III AVO anomaly in the survey area "shows probable gas reservoir, at least gas-bearing oil reservoir in the area"; and concluded:

> "The evidence of the above three aspects shows that the reservoir in the Survey is probably natural gas; thus the resource estimation will be conducted mainly based on natural gas reserves."

(e) at 8.2.4, under the heading "Hydrocarbon migration passage", referred to a geological fault in the Survey as "causing deep oil/gas to migrate to the shallow structure together with the deep fault";

(f) at 8.3, noted that there was no drilling data in the exploration area itself, with the result that the reserve (meaning, in context, "resource volume") calculated in the report is speculative; and

(g) at table 8.3, calculated gas in place as a mean of 1,379.3 hundred million cubic metres.

[163] The defendant submits those references show that the PPL380 report did not indicate there was no potential existence of condensate or oil and did make reference to the potential existence of oil in gas bearing oil reservoirs. I accept that submission. The defendant further submits that the report impliedly referred to the potential existence of condensate. I accept that submission as well.

Conclusion on misleading or deceptive conduct

[164] The defendant submits that in the light of the facts and evidence set out above, the correct conclusion is that the defendant did not engage in misleading or deceptive conduct in representing its professional skill and competence to the plaintiff in the respects that the plaintiff contended for in the statement of claim or in final submissions. I accept that submission.

Proof that loss or damage has been suffered by the contravening conduct

[165] Had the plaintiff been able to prove misleading or deceptive conduct, the question would have arisen whether it would be entitled to relief. Under s 87(1) of the TPA, where a party to the proceeding has suffered or is likely to suffer loss or damage by contravening conduct the court may make an order as it thinks appropriate if the court considers that the order will compensate for the loss or damage or will prevent or reduce it. Under s 87(2), the orders that may be made for those purposes include an order declaring the relevant contract to have been void ab initio. The plaintiff's claim is for such an order.

[166] The plaintiff submits that had the alleged misleading or deceptive representation as to the plaintiff's competence not been made, the plaintiff would not have entered into the guarantee. The case theory thus presented is that the plaintiff's liability under the guarantee is loss or damage for the purpose of s 87(1). There is no evidence that suggests that Palmer Petroleum did not get value for money for the services performed under the contract. Of course, had it not entered into the contract, it would not have obtained the defendant's services. And the unpaid invoices under the contract do not relate to the costs of or value of a report of the character that the plaintiff says it was entitled to obtain, such as the Isis report.

[167] The plaintiff's case is squarely presented as what is sometimes termed a "no transaction" case in relation to its liability to the defendant under the guarantee.

Such a case involves the causal step that but for the defendant's alleged misleading or deceptive conduct the plaintiff would not have entered into the guarantee.

[168] The plaintiff relies on *Gould v Vaggelas*[55] and *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots*[56] as showing that a representation does not have to be the sole inducement for the plaintiff to have entered in to a contract under which it suffers loss or damage. *Gould* and *Ansett* were claims for damages for the torts of deceit and inducing breach of contract respectively. The same or a similar causal question is raised in a claim for damages under s 82 of the TPA for contravention of s 52; see *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*.[57]

[169] But the causal question in the present case is not answered fully by asking whether the alleged representation played some part in the decision to enter into a contract that was loss making. It extends to the additional question of whether, had the representation not been made, the plaintiff would not have entered into the guarantee and thereby avoided any liability under it. This is a "but for" question of causation. It is akin to the question of causation considered in *Kenny & Good Pty Ltd v MGICA (1992) Ltd*.[58]

[170] In the present case, whether or not the plaintiff would have given the guarantee but for the alleged misleading representation is a decision that would have been made by the plaintiff's director Mr Palmer. He was not opened as a witness who would give evidence in the case. I raised with the plaintiff's counsel whether in such circumstances the plaintiff would be able to prove causation, referring to the decision of *Gore v Montague Mining Pty Ltd.*[59] In that case, the Full Court of the Federal Court of Australia considered causation for a claim for damages under s 82 of the TPA for contravention of s 52. The plaintiff was required to show it had suffered a loss of a valuable commercial opportunity. That involved a question of what the plaintiff would have done if the defendant had not given misleading or deceptive advice as a solicitor. The court said:

> "It seems to be established that the standard of proof of such a hypothetical question is ordinarily the general civil standard of proof ie on the balance of probabilities. As Mason CJ and Dawson, Toohey and Gaudron JJ observed in *Sellars* at 353:
>
> > 'When the issue of causation turns on what the plaintiff would have done, there is no particular reason for departing from proof on the balance of probabilities notwithstanding that the question is hypothetical.'
>
> In our view, under Australian law, the test for causation in a case such as the present case is a subjective one, that is, what would the respondent have done if proper advice had been given? (See for example McHugh J at 246 and Kirby J at 272 in *Chappel v Hart*.) But

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55 (1985) 157 CLR 215, 236 and 250-251.

56 [1991] 1 VR 637, 694.

57 (2002) 210 CLR 109, 128 [57].

58 (1999) 199 CLR 413, 426 [19], 428 [30], 433 [72], 447 [86], 457 [119] and 461 [130]. Compare also *Wealthsure Pty Ltd v Selig* (2014) 221 FCR 1, [221]-[232]. The decision of the Full Court of the Federal Court of Australia was reversed but not on this question in *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661.

59 [2001] ANZ ConvR 8.

> we think that the authorities show that it is quite proper, when applying this test, to have regard to objective pieces of evidence. Otherwise, on occasion, justice would not be done. A person who suffered loss might be dead or have lost his or her memory, but there might be an abundance of other evidence of what that person would have done if properly warned or advised."

[171] This reasoning shows that it is permissible in some cases for a court to infer that a plaintiff would have acted so that but for the defendant's misleading or deceptive conduct it would have avoided the alleged loss or damage. But it is still a subjective question of what the relevant decision maker would have done.

[172] Absent a factor like those mentioned in *Gore*, where the hypothetical decision-maker is available to give evidence but does not do so, it is proper for the court to infer that the person's evidence would not have helped the plaintiff's case.[60] In the absence of other evidence to find that the person would have decided to act so as to avoid the suggested loss the party bearing that onus of proof may fail to discharge it.

[173] I acknowledge that in relation to negligence,[61] because of the likelihood that a person called to give such evidence will do so in a self-serving way, the *Civil Liability Act* 2003 (Qld) prohibits such evidence from being given, unless it is against interest.[62] However, that Act does not apply to a claim under s 87 of the TPA. And for the reasons previously discussed, in my view, it does not follow as an obvious inference from the objective circumstances that the plaintiff would not have given the guarantee if the alleged misleading representation had not been made.

[174] Summarising, in the present case, the defendant carried out all of the work under the contract by carrying out an under the sea seismic three-dimensional survey, processing and compiling the data from the survey, and providing not one but three reports in relation to different areas of the survey work. In the PPL380 report for the area the subject of this case, the defendant reported on the prospective volumes of gas but not on those for oil or condensate. But there is no allegation that Palmer Petroleum did not receive value for money for the work carried out by the defendant or proof that suggests that it did not.

[175] In my view, in the absence of persuasive evidence that (subjectively) the plaintiff would not have entered in to the guarantee had it known of the alleged misleading or deceptive representation as to the defendant's competence, the plaintiff does not satisfy the onus of proof that it has suffered loss or damage by the alleged contravening conduct so as to entitle it to relief under s 87 of the TPA by an order declaring the guarantee void ab initio.

Unconscionable conduct

[176] The plaintiff alleges in the statement of claim that the same matters that constitute unsatisfactory performance under art 5.8 also made it unconscionable conduct for the defendant to demand payment under the contract from Palmer Petroleum and

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60 *Jones v Dunkel* (1959) 101 CLR 298, 308, 312 and 320-321.

61 And in this State a breach of contract that amounts to a "breach of duty" under the *Civil Liability Act* 2003 (Qld): see the definition of "duty" in Schedule 2.

62 *Civil Liability Act* 2003 (Qld), s 11(3).

that the plaintiff is entitled to an order under s 237 of the *Australian Consumer Law* relieving it from any liability under the guarantee.

[177] In my view, this allegation must be rejected. In the context of this commercial transaction, it was not unconscionable for the defendant to:
(a) agree to make the amendment deeds;
(b) provide the PPL380 report;
(c) demand payment for the outstanding invoices from Palmer Petroleum; or
(d) demand payment from the plaintiff under the guarantee.

Counterclaim and interest

[178] The unpaid invoice amounts of US$14,992,148.22 and the contractual deferred finance fee amount of US$553,102.51 are not disputed as amounts that would be payable if the plaintiff's claim is dismissed.

[179] However, by an amendment made by leave given on the last day of the trial, the defendant added a claim for interest pursuant to s 58 of the *Civil Proceedings Act* 2011 (Qld), calculated from the date of each unpaid invoice until 28 August 2017. The calculation period varied according to the date of the invoice but in general terms was made in accordance with the court's default judgment interest rate calculator utilising the interest rate set by the court from time to time for the relevant periods for prejudgment interest under s 58.

[180] The plaintiff disputes that interest should be calculated in accordance with those rates. It submits that no interest should be allowed at a rate in excess of the agreed rate of 4 percent per annum calculated on a simple basis as a matter of discretion, if any interest under s 58 should be awarded.

[181] Neither of the parties made any detailed submissions as to the principles on which interest is allowable or calculated under s 58. Unassisted by the parties, in my view, there are five points of relevance.

[182] First, prejudgment interest under s 58, whether awarded in actions for debt or damages, is awarded in the nature of damages.[63]

[183] Second, statutory interest is the "price" to be paid by a defendant for keeping a plaintiff out of money to which the plaintiff is entitled, so as to provide compensation to the plaintiff for the loss of use of the judgment money;[64] however, the award is discretionary.[65]

[184] Third, since the late 1970's, common law courts have consistently accepted that they have power to give judgment in a foreign currency, such as United States dollars, and that has been the accepted position in this court since at least 1987.[66]

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63 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Haines v Bendall* (1991) 172 CLR 60, 66; *Bonython v The Commonwealth* (1948) 75 CLR 589, 606.

64 *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657, 663; *Batchelor v Burke* (1981) 148 CLR 448, 455; *Ruby v Marsh* (1975) 132 CLR 642, 644.

65 *Fire & All Risks Insurance Co Ltd v Callinan* (1978) 140 CLR 427, 432; *Bennett v Jones* [1977] 2 NSWLR 355, 375.

66 *Australian & New Zealand Banking Group Ltd v Cawood* [1987] 1 Qd R 131, 134; *European Asian Bank AG v Katsikalis* [1988] 1 Qd R 45, 47.

As previously noted, the counterclaim of the defendants is for a judgment expressed in United States dollars.

[185] Fourth, where judgment is given in a foreign currency in respect of an amount that was to be paid to the judgment creditor in a foreign place, it is the rate of investment on that currency in that place which reflects the purpose of an award of interest under s 58, namely to compensate the judgment creditor for being kept out of their money. Accordingly, it is not appropriate in such a case to award prejudgment interest by reference to usual rates for judgments given in Australian dollars for claims that arise within the jurisdiction.[67] It follows, in my view, that the court should not award interest at the rates claimed by the defendant, by reference to the rates applicable to default judgments in this State in Australian dollars for claims that arise within the jurisdiction.

[186] Fifth, instead, in my view, the rate of interest that should be awarded by the court under s 58 in the present case, should be arrived at by reference to average of the rates of interest described as the "deferred payment finance fee" under art 5.12 of the contract as applicable for the years 2012 and 2013, and calculated as simple interest from the end of the second twelve month period following the date of each undisputed and unpaid invoice under art 5.12 at the average rate of 3.5 per cent per annum. The calculation of that amount appears in the table below, to 9 October 2017.

Date	Invoice	Invoice Amount	Interest
04.03.13	20110205	US$419,587.67	US$67,593.85
04.03.13	20110206	US$1,207,996.67	US$194,603.29
07.04.13	20110203	US$1,085,631.02	US$171,351.25
07.04.13	20110204	US$693,747.39	US$109,498.05
07.04.13	20110302	US$732,160.49	US$115,561.01
03.05.13	20110401	US$1,178,568.63	US$183,081.75
31.05.13	20110503	US$1,080,903.84	US$165,008.10
29.11.13	20111103	US$539,976.06	US$73,007.71
29.11.13	20111104	US$73,850.00	US$9,984.92
19.03.14	20120303	US$1,088,900.97	US$135,739.71
19.03.14	20120304	US$1,750,000.00	US$218,150.69
19.03.14	20120305	US$6,092,527.28	US$759,479.41
19.03.14	20121001	-US$951,701.80	-US$118,636.79
Total			**US$2,084,422.95**

Conclusions

[187] The plaintiffs claim must be dismissed.

[188] The defendant's counterclaim should be allowed in the sum of:

Unpaid invoice amounts	US$14,992,148.22

[67] *Bank of NSW Ltd v Swiss Bank Corporation* (1995) 39 NSWLR 350, 361; *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 4)* (2009) 263 ALR 63, 65 [8]; *Vlasons Shipping Inc v Neuchatel Swiss General Insurance Co Ltd (No 2)* [1998] VSC 135, [15].

Contractual “deferred finance fee” interest	US$553,102.51
Section 58 *Civil Proceedings Act* 2011 interest	US$2,084,422.95
Total	US$17,629,673.68

[189] I will hear the parties on costs.