SUPREME COURT OF QUEENSLAND

CITATION:	*Barclay v English & Ors* [2009] QSC 258
PARTIES:	**DONALD EDWARD BARCLAY** (plaintiff) v **BRADLEY PATRICK ENGLISH** (first defendant) and **STEPHEN BRIAN NICHOLS** (second defendant) and **ENGLISH YACHT DESIGNS PTY LTD** **ACN 017 610 618** (first named third defendant) and **NICHOLS MARINE DESIGNS PTY LTD** (second named third defendant) and **PHILLIP JAMES GRIFFIN** (fourth defendant) and **GRIFFIN MOTOR YACHTS PTY LIMITED** **ACN 079 127 245** (fifth defendant)
FILE NO/S:	8000 of 2005
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 August 2009
DELIVERED AT:	Brisbane
HEARING DATE:	17, 18, 21 August 2009
JUDGE:	A Lyons J
ORDER:	
CATCHWORDS:	CONTRACTS – BUILDING ENGINEERING AND RELATED CONTRACTS – PERFORMANCE OF WORK – REMEDIES FOR BREACH OF CONTRACT – DAMAGES – MEASURE OF DAMAGES – where design of vessel seriously flawed – cost of rectification compared with contract sum – whether obligations under terms of contract breached – whether costs of design and building were

excessive

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – WHERE ECONOMIC OR FINANCIAL LOSS – CARELESS ADVICE, STATEMENTS AND NON-DISCLOSURE – PARTICULAR PERSONS OR SITUATIONS – whether advice given was negligent – whether advice and/or information concerning design and construction were given negligently – whether defendants owed a duty to the plaintiffs to ensure the catamaran was built to survey standard – whether defendants owed a duty to the plaintiff to warn the catamaran had not been designed or built to survey standards – whether plaintiff relied upon the defendants to inform of the defects

TRADE AND COMMERCE – MISLEADING AND DECEPTIVE CONDUCT – TRADE PRACTICES ACT (CTH) AND RELATED LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – MISLEADING OR DECEPTIVE CONDUCT GENERALLY – GENERALLY – whether terms of contract deceptive – whether defendants engaged in conduct within meaning of the Trade Practices Act (Cth) – whether each of the predications made turned out to be false, wrong and/or inaccurate – whether the defendants had any reasonable grounds for making such claims

Trade Practices Act 1974 (Cth) ss 4B(b), 51A, 52, 74(1), 75B, 84(2)
Uniform Civil Procedure Rules 1999 (Qld) rr 189(2), 476(1)

ACCC v Black on White Pty Ltd (2001) 110 FCR 1
Bellgrove v Eldridge (1954) 90 CLR 613, followed
Crago v Multiquip Pty Ltd (1998) ATPR 41-620
Fubilan Catering Services Pty Ltd v Compass Group Aust Pty Ltd (2007) FCA 1205
L Shaddock & Associates Pty Ltd v Parramatta City Council (1981) 150 CLR 225
Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191
Prestia v Aknar (1998) ATPR 46
Quinlivan v ACCC (2004) FLR 1
San Sebastian Pty Ltd v Minister (1986) 162 CLR 341
Westpac Banking Corporation Ltd v Prelea and ors 1992 28 NSWLR 481

COUNSEL: L Bowden for the plaintiff
No appearance for the defendants

SOLICITORS: Creswick Saal Lawyers for the plaintiff
No appearance for the defendants

A LYONS J

Background

[1] The July/August 1999 issue of "Modern Boating" magazine carried an article favourably reviewing a 14 metre wave-piercing catamaran which had been designed by the first defendant Bradley English (English) and built by the fifth defendant Griffin Motor Yachts Pty Limited (Griffin Motor Yachts). The same issue of the magazine also carried an advertisement which stated that "From Brad English, the designer who gave us the Ocean Innovations 14-metre wave-piercing catamaran featured in this issue, comes a 15 metre fly-bridge version". The specifications in the advertisement referred to a speed of 28 knots, a length of 15.01 metres, a displacement of 10,000 kgs and a draft of .60 metres.

[2] The plaintiff Donald Barclay (Barclay) is a successful businessman and boating enthusiast who has owned at least six boats. After seeing the article he had several telephone conversations with English in late 1999 about the 15 metre version of the catamaran which had been advertised. The third defendants (English Yacht Designs Pty Ltd and Nichols Marine Designs Pty Ltd) operated in partnership in a boat designing business under the name "Ocean Innovations" (OI). Barclay subsequently inspected and sea trialled the 14 metre catamaran in Gosford in October 1999 in the presence of English and the fourth defendant Phillip Griffin (Griffin). Following the initial sea trial and further discussions between the parties, Barclay retained English and Griffin to prepare a concept plan of the 15 metre catamaran. This plan was to be used to prepare the pricing costs of the proposed vessel in order to determine whether Barclay would proceed further with the construction or acquisition of the catamaran.

[3] After more than a year of discussions and proposals, Barclay ultimately entered into separate contracts in late 2000 with OI and Griffin Motor Yachts. These contracts indicated that the required speed of the vessel was to be 28 knots with a displacement of 18 tonnes. A gross maximum contract price of $1,603,761 was agreed upon with an agreed delivery date of March 2002.

[4] Barclay ultimately paid more than $2.8 million for the boat prior to its delivery eight months behind schedule in November 2002. On the delivery voyage it was immediately apparent that there were major problems with the vessel. Naval architects agree that the vessel as delivered did not meet Barclay's specifications as set out in those contracts. In simple terms it is too heavy, too slow and is not appropriate as an ocean going vessel. Barclay was required to expend in excess of $647,000 ($761,217.31 inclusive of GST) to correct the defects and the boat was out of the water for over two years. The catamaran is currently valued at $820,000 or $910,000 including the betterments which have been made.

This action

[5] The plaintiff Barclay initiated proceedings against all the defendants on 22 September 2005 claiming damages for breach of contract, negligence and misleading and deceptive conduct. Defences were entered by all defendants. The first defendant English was declared bankrupt on 13 July 2009, the second defendant Nichols was declared bankrupt on 13 September 2007 and the fifth defendant was placed into external administration on 1 May 2006.

[6] Barclay is therefore proceeding only against the third and fourth defendants in this action. The plaintiff's claim against the third defendant, namely the first named third defendant, English Yacht Designs Pty Ltd and the second named third defendant, Nichols Marine Designs Pty Ltd is in contract, negligence and for misleading and deceptive conduct. The first named third defendant has a registered office and is currently registered with ASIC. The second named third defendant is currently the subject of a strike off action, however ASIC has indicated that they have granted a deferral of the strike off action until 19 September 2009. The plaintiff also proceeds against the fourth defendant, Phillip Griffin for negligence and for misleading and deceptive conduct. Griffin gave a notice that he was acting in person on 15 May 2006.

[7] A "Notice to Admit Facts" was served pursuant to *UCPR* r 189 on the third and fourth defendants on 30 July 2009. There was no response from the defendants within 14 days as required.

[8] When the trial commenced on 17 August 2009 there was no appearance by any defendants. Pursuant to *UCPR* r 476 counsel for the plaintiff called evidence to establish the plaintiff's entitlement to judgment against the third and fourth defendants.

[9] The trial was conducted over three days and oral evidence was given by the plaintiff Donald Barclay, naval architects Stuart Ballantyne, Andrew Dovell, Mark Hughes, and accredited ship builder Joseph Akacich. A forensic accountant, Elia Lytras, also gave evidence as to the funds actually paid by Barclay in relation to the vessel in the period from December 2000 to June 2009. Marine surveyor and naval architect Christopher Hutchings gave evidence of the current value of the vessel and the value at the time of delivery. A report was also tendered from Philip Hercus, another naval architect who is a wave-piercing catamaran specialist.

The Contracts

[10] The plaintiff has kept detailed and contemporaneous notes of all his discussions with respect to the design, construction and purchase of the vessel. I accept that the plaintiff was a detailed record keeper and that the documents accurately set out the discussions and the agreements reached between the parties. Barclay also gave oral evidence of his dealings with the defendants in the period from late 1999. I accept Barclay's evidence and I consider that he had both an accurate and a detailed recollection of the events in question which was substantiated by the contemporaneous notes. Barclay's practice of writing extensive memos prior to his telephone discussions, written notes after the discussions and letters to the defendants confirming the outcome of the discussions, gives a very clear picture of the discussions in relation to the vessel, his requirements in relation to the vessel and the representations made to him by the defendants.

[11] Barclay satisfied himself about the background of the OI and was assured that they were "professional practising naval architects" who had previously supplied vessels to well known boating entities.

[12] An analysis of the documentation indicates that Barclay was particularly interested in the information set out in both the article and advertisement in relation to the performance of the 15 metre wave-piercing catamaran. Barclay also documented the defendant's responses to specific questions from him about the vessels ocean

performance and he was specifically told that "The boat revels in 1.5 to 2 metre seas. It is quite comfortable."[1] I also accept that there was specific discussion about the ocean handling characteristics of the vessel and that this was one of Barclay's specific requirements.

[13] There were further telephone discussions between Barclay and English on 17, 21 and 23 September 1999. On 27 September 1999 English sent a document entitled "15 metre Luxury Wave-piercing Catamaran General Arrangement" to Barclay

[14] When Barclay attended the sea trials in October 1999 he was told by both English and Griffin that the 15 metre version of the boat could achieve 28 knots and that it would perform well in heavy seas and open ocean conditions. Barclay also made it clear that he was only interested in the flybridge version of the boat.

[15] After the trial of the vessel in October 1999 there were further discussions between the parties. It is clear from the correspondence and Barclay's notes that Barclay gave the defendants very specific written details as to the fit out he required. I accept Barclay's evidence that his instructions to the third defendant were that the boat was to be built to "Survey Standard" but was intended for "Private Use" as the notes of discussion dated 19 October 1999 specifically refer to the need for there to be certification to the "appropriate SAA Standards". When Barclay suggested that they might put the construction of the boat out to tender English was emphatic that Griffin would do the best job for the best price.

[16] On 19 October 1999 Barclay had an extensive discussion with English about the boat. On that date Griffin also wrote to Barclay advising that the price would be approximately $1,500,000 inclusive of GST. By separate letter of the same date OI confirmed that quote and advised they would be responsible for the "construction supervision". The letter also stated that the quote included the preparation of the specification by OI. Barclay then wrote to OI on 22 November 1999 accepting OI's quote to pay $750 to get an advanced drawing. Some drawings were ultimately supplied in March 2000 and there subsequent modifications in August 2000.

[17] The negotiations and discussions continued and on 31 May 2000 OI sent a combined design and construction supervision quote. It is clear that at this point Barclay was concerned about the price. An examination of Barclay's letter of 12 June 2000 to Griffin reveals that Barclay is very concerned about the anticipated cost of the vessel compared to the boat he already had. He stated "Your costings including GST at $1,692,281 represents 3.6 times the cost of the Riviera 4000, and I am unable to 'digest' the difference on a comparative basis". [2]

[18] On 17 August 2000 Barclay once again attended at Gosford for further discussions in relation to the vessel, particularly the engine types. The four page agenda and two page addendum prepared by Barclay dated 13 August 2000 very precisely set out his requirements for the vessel. Further costings were then forwarded in September by both the third defendants. Final costings for the vessel were received from Griffin on 22 September 2000 and Barclay states that he "relied on such costings as being the basis of the price of the boat. Had the costs disclosed a much higher price, I would not have proceeded with the construction of the boat."[3]

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1 Exhibit 8 to affidavit of Donald Edward Barclay sworn 17 August 2009 at p 2.

2 Trial exhibit 13.

3 Affidavit of Donald Edward Barclay sworn 17 August 2009 at [49].

[19] Barclay's evidence was that by the time the contracts were signed after a year of discussions and negotiations he considered that the vessel was fully designed and fully specified. Barclay states he made no subsequent alterations to the design. On 3 October 2000 OI set out their conditions for the design of the vessel in a letter to Barclay who incorporated them into a contractual document dated 10 October 2000. This document was signed by Barclay on 10 October 2000 and by English as the authorised officer for OI on 13 October 2000. The terms of the agreement were set out in specific detail and included the following:

1. OI would provide professional services to provide such documents as required together with inspection, monitoring, supervision and administrative services;
2. OI would act as Barclay's "authorised officer" in the process to construct, outfit, trial and deliver a 15 m wave-piercing catamaran which would be built by Griffin Motor Yachts;
3. The dimensions and performance particulars included -
   "Design displacement - 18.00 tonnes lightship
   Design Speed - 28.00 knots";
4. The design particulars section of the agreement included a specific provision that OI would provide the service of "weight estimation including weighing of vessel at critical stages".

[20] A written contract was also entered into between Barclay and Griffin Motor Yachts on 28 November 2000 whereby the builder agreed to construct, outfit, trial and deliver the catamaran in accordance with the drawings and specifications that were set out in the plans which were to be provided by the designer OI. I note at this point that whilst some drawings were provided on 8 December 2000, detailed drawings and specifications were never in fact prepared or delivered. What appears to have occurred is that Griffin essentially prepared his own specification. In fact this was set out in a letter to Barclay dated 23 November 2000 prior to the signing of the actual contract on 28 November 2000. The document was titled "*GMY'S Specification in Relation to GMY'S Costings of 22 September 2000 to Construct Hull 007 15M WPC-Barclay Pursuant to Ocean Innovations Plan Plan99-188-02REVB"*. The contract allowed for Barclay to pay for the construction of the vessel at an hourly rate. The construction costs were subject to a gross maximum price of $1,603,761, exclusive of the drive system.

Construction

[21] Construction commenced in January 2001 with supervision provided by OI. English provided the monthly progress reports. In November 2001 a dispute arose over the cost of the construction. The parties then entered into another agreement whereby it was agreed that OI would certify progress payments up to the amount of $2,030,872 plus GST and Griffin and his company would accept this new figure as the total or maximum cost of the catamaran's construction.

[22] In May 2002 English reported the data from a "weigh in" of the vessel and gave an estimated weight of 20,422.59 kgs. In June 2002 when the catamaran was almost completed, Barclay went to Gosford for an inspection. At that visit Griffin advised Barclay that he had concerns that the vessel was overweight and out of trim. I note at this point it would appear that no extra items of plant or equipment had been added and construction had apparently proceeded in accordance with the plan. At no point prior to this had Barclay been advised the vessel was overweight. Griffin

also stated that he had concerns as to whether the catamaran could achieve the performance characteristics that were claimed by OI.

[23] After consulting Nichols, who was present at that inspection as English was away, Barclay received a fax on 22 June 2002 stating *inter alia*, that the vessel had been designed correctly, the calculations prepared by English made proper allowance for extra weight in the vessel, the structural, power and performance calculations allowed for the extra weight and that the calculations had been made using a displacement of 22 tonnes. The fax ended with a reassuring message from Nichols.

[24] It is clear from the evidence that Nichols gave very specific assurances that the boat would perform. Based on those assurances, Barclay continued making progress payments to Griffin who proceeded with the completion of the catamaran.

The modifications

[25] It is also clear from the evidence that a number of modifications were made to the vessel, which included the installation of "trim tabs", the installation of a water tank and the extension of the transom. It is unclear however how these modifications came about and in particular whether they were requested by OI. It would also seem that at one stage the propeller shaft was damaged when the vessel was dropped by the crane which was lowering it into the water. When sea trials were carried out in July 2002 there was no further indication that there was a difficulty with the boat being able to handle open seas or that it was overweight and could not achieve the top speed.

[26] The only difficulty raised was that there had been some cracking of the windows which had been caused by the use of the wrong adhesive. This caused Barclay to write a letter dated 18 September 2002 seeking clarification that the vessel had been designed and constructed in accordance with Standards Australia. Whilst Barclay received some assurances from English the answers were evasive.

The cost overruns

[27] Barclay continued to make progress payments as requested by Griffin. Despite the agreement that OI would certify payments only up to $2,030,872 plus GST it became clear to Barclay in late 2002 that this figure had been exceeded. On 11 October 2002 Barclay raised the issue of the cost overruns in a letter to Griffin Motor Yachts where he stated:[4]

> "I confirm my extreme concern at the serious financial implication to Griffin Motor Yachts Pty Ltd, Ocean Innovations, Brad English and myself in the total amount of $2,619,698.55 that it appears you have billed and presented to Brad English for authorisation and approval for payment to be made to you and to sub contractors and material suppliers that you have engaged in the construction of the above vessel."

[28] In correspondence between the parties in October 2002 just prior to delivery Griffin blamed OI for not preparing a proper specification. He states in a fax dated 15 October 2002:[5]

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4 Exhibit 73 to affidavit of Donald Edward Barclay sworn 17 August 2009.

5 Exhibit 75 to affidavit of Donald Edward Barclay sworn 17 August 2009.

> "I have looked at the Contract and have used this as the basis of my opinion to advise if I am in agreement with the overruns and what agreement can be reached to effect final payment to initiate delivery and hand over as mentioned in Ocean Innovations letter of 11 October 2002.
>
> This is plainly difficult as the most vital component of the Contract is the Contract's Specification for the vessel and this has not been supplied to either of us.
>
> In the Contract's Recitals Clause 2 it mentions the builder's obligations which are to construct, outfit, trial and deliver the Vessel to the Sovereign Islands, the builder is to use its best endeavours to ensure that the maximum price estimate will not be exceeded and the builder will construct and outfit the Vessel in accordance with the drawings and specifications. Without the Contract's specifications GMY was unable to apply the correct budgets to the work that it undertook at the start of this Contract."

[29] In a fax to Griffin on 15 October 2002 Barclay stated:[6]

> "3. You asserted for the first time last Saturday in our telephone conversation and now in your fax that you should not have commenced this project until you had received the 'Contract's Specification' from Ocean Innovations.
>
> I find that comment extraordinary. Neither of you have raised this issue with me before you did last Saturday and I was led to believe that you were constructing the vessel in accordance with Brad's drawings and specifications.
>
> That you would proceed to commence the project without all necessary drawings and specifications is beyond belief: that you would continue with the project on this basis and not raise that as an issue until last Saturday defies comprehension.
>
> 4. As at 14 November 2001, at the budget review, no mention of this was raised as an issue by you or Brad yet you both provided me with your recommendations (which I now query) in seeking to obtain my agreement to set a revised final price including variations at $2,030,872.00."

[30] On 15 October 2002 in a letter to English and OI Barclay demanded delivery of the vessel by 31 October 2002. There was further correspondence between OI and Barclay in relation to compliance with the appropriate Australian Standard. In a letter dated 13 November 2002[7] OI confirmed that the vessel "has been designed and built with the intention to perform coastal passages along the New South Wales and Queensland coastline, 50 nautical miles from the nearest harbour or safe anchorage".

Delivery

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6 Exhibit 77 to affidavit of Donald Edward Barclay sworn 17 August 2009.

7 Exhibit 85 to affidavit of Donald Edward Barclay sworn 17 August 2009.

[31] Barclay was present during the delivery voyage in November 2002. I accept his evidence as to what was experienced during that voyage.[8] It would seem clear that even a medium size wave caused the whole vessel to shudder and that the "vessel had a most uncomfortable ride".[9] The vessel also had a characteristic known as "porpoising" whereby the vessel had a continuous rising and falling motion when moving forward. The vessel also "slammed and shuddered every time it went through any wave higher than 500 mm".[10]

[32] When the vessel arrived at the Gold Coast Barclay refused to take delivery, indicating it was "totally unacceptable". Barclay told Griffin that he refused to accept it and that Griffin "should make arrangements to sell or dispose of it to somebody else and to refund the total monies that I had paid". Griffin did not respond to this formal notice of refusal. The vessel remained in Barclay's possession.

The evidence of the naval architects and the shipbuilder

[33] As previously indicated four naval architects gave oral evidence at the trial. All the experts had prepared detailed reports[11] and were questioned extensively in relation to those reports. That evidence in summary form is set out below.

Stuart Ballantyne

[34] Mr Ballantyne is a naval architect who also has extensive academic qualifications in catamaran design. Mr Ballantyne tested the vessel on 26 November 2002 which was shortly after its arrival on the Gold Coast. Barclay, Griffin and English were all on board at the time of the trial. In his view, the vessel was a well finished vessel but was "severely lacking in terms of the hull geometry and the weight distribution, the power, and really it was not fit for purpose in the end".[12] Based on the extensive performance trials which he conducted on that date he considered the vessel was only fit for smooth water sailing and that to run the vessel in exposed waters would result in structural failure. He also stated that at 18.8 knots there was heavy impacting and slamming of waves on the central hull and forward tunnel area, with shuddering every four to six seconds. He considered that the slamming did not disappear even with a reduction in speed. He stated that the maximum speed was 22 knots which was some six knots short of the specification speed.

[35] Mr Ballantyne's view was that there had been a breakdown in the monitoring process of the project, particularly in relation to weight control. He considered that with a large boat such as this, a weight monitoring process had to be put in place throughout the entire construction period. He considered that a boat such as this should have been weighed at least three times. Furthermore, he stated that the report of the first series of trials failed to mention the problem with slamming.

Andrew Dovell

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8 Affidavit of Donald Edward Barclay sworn 17 August 2009.
9 Affidavit of Donald Edward Barclay sworn 17 August 2009 at [102].
10 Affidavit of Donald Edward Barclay sworn 17 August 2009 at [102].
11 Trial exhibits 4, 5, 7, 8, 9.
12 Transcript day 1 at p 34, ll 13-15.

[36] Andrew Dovell is also a naval architect and he first inspected the vessel in December 2003, a year after delivery but before any rectification works commenced. He was called in by Barclay to advise in relation to rectification works. In his view there were three major design problems, namely that the underbridge clearance was quite low, the increased weight sank the vessel down quickly and that the centre bow was quite full, given its proximity to the water.

[37] Dovell's evidence was that at any speed greater than 10 knots the vessel "was slamming its underside into the seaway in an uncomfortable way, and because of the lack of clearance between the two hulls, it would hit in front, and then as it reacted to that, it would hit at the stern".[13] He considered that it was a "very unusual slam slam in the worst of the slams".[14] He stated that the vessel was unable to achieve its design speed of 28 knots. He did not consider the vessel was suitable for ocean conditions and advised that the vessel only be used in "protected waters" until rectification work was carried out.

[38] Dovell's conclusions were that relative to the vessel as designed, the delivered vessel was 25 per cent heavier, was sitting bodily lower in the water by approximately 175 mm, was trimmed 1.6 degrees bow up and the underbridge clearance was 44 per cent less. There were also a number of other defects, particularly in relation to the safety and manoeuvrability of the vessel.

[39] Dovell stated that from his examination of the material he was briefed with it was clear that OI were contracted to provide both design and construction supervision. In his view, OI should have maintained and updated the weight estimate through construction and up until the launch date to ensure that the vessel was built in accordance with the estimate. He considered that any weight overrun was caused by "a combination of inaccurate weight estimating during the design process and or poor control of weight during construction".[15]

[40] Dovell's opinion was that it would be impossible to put a price on a vessel without a proper set of plans or specifications and that the practice usually adopted was for a naval architect to prepare a full set of plans which would then be given to the builder to quote. Dovell prepared plans for extensive rectification works to be carried out and those works were undertaken by Joe Akacich from Blackline Shipping.

Joseph Akacich

[41] Akacich is a registered builder who has expertise in steel fabrication, aluminium fabrication, fibreglass construction and timber construction and he carries on the business of shipbuilding and repairing under the name of Blackline Shipping. He stated that he and Edward Hughes did rectification work for Barclay. Akacich put together a team who were specially selected to look at the repair of the vessel. In particular he chose Philip Hercus, who is an expert in wave-piercing catamarans and in relation to glass and reinforced plastic and fibreglass structures, he also chose Andrew Dovell because of his specific experience. Akacich considered that the vessel was clearly grossly overweight and it was difficult to maintain any sort of comfort onboard and the vessel was not achieving its speed criteria. Akacich stated

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13 Transcript day 1 at p 67, ll 18-20.

14 Transcript day 1 at p 67, l 22.

15 Trial exhibit 5 - expert report of Andrew Dovell at [6.5].

that when he met Barclay, Barclay had shown to him the documentation he had provided to the defendants which had outlined what he required and Akacich stated, "It was clear – crystal clear to me that what was produced for Barclay was not what he had requested".[16]

[42] Akacich also considered that it was clear that Barclay wanted the vessel to be capable of going into open waters along the Queensland coast, not more than 50 nautical miles from safe haven and that, whilst the vessel was not "going to be in survey it was to be built to survey". Akacich's evidence was that the ship had no fixed in-place fire system and no remote fire and bilge system. There was no life-raft fitted. There was also poor visibility from the helm station to enable continuous navigational watch. He also stated that the ship had a material on the flybridge which acted to protect the operator from the elements but that this material did allow a wiper to be fitted to enable a continuous navigational watch while it was raining or there was salt spray on the screen.

[43] He also considered that the ship's VHF radio was in a position which makes it difficult for the operator to operate and the operator would need to be on all fours to achieve operation. Guard rails around the ship were also virtually non-existent, and the ones that did exist did not comply with the UFL code. Furthermore structural fire detection has not been signed by an accredited surveyor and the vessel did not have a set of electrical drawings as to Minimum Standard AS3000. He also stated that the ship had a fuel bunker position only on the port side, which made it very difficult for the operator to bunker fuel and that it had poor access to both engine rooms as well as a poorly designed exhaust system.

[44] Akacich gave evidence that his main aim was to get the "weight off" and that he carried out rectification works at considerable expense in accordance with a design from the team of specialists he had put together.

Edward Hughes

[45] Edward Hughes is also a naval architect and he was previously employed by Blackline Shipping, which did the rectification works. His view is that of the expenditure of $1,043,340.78, which was spent between 11 December 2003 and 9 May 2008, a total of $647,905.78 can be considered rectification and that the rest is betterment. Hughes had access to all the financial records and invoices of Blackline and Barclay and has done a very extensive report as to the cost of the repairs. This includes an extensive spreadsheet which details every payment made and verified.

[46] Hughes gave evidence that to enable the rectification works to occur, the ship had to be stripped out entirely. One of the major rectification issues was the centre bow modification and hull widening which was achieved by fixing foam along the inside of both hulls. The transom was also extended. Bow rails were installed as was a fire system and a fuel bunkering system. A life-raft was purchased and a good exhaust system was fitted. He stated:

> "We needed to remove all of the - all of the liners, all painted panels, then remove all of the ineffectual structure that was in behind it, all the while reinforcing and supporting the flybridge while we took the

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[16] Transcript day 2 at p 20, ll 46-48.

> structure out from underneath it. And then the process of rebuilding that what should have been done in the first place."[17]

[47] Hughes gave evidence that he thought the vessel was out of the water for some two and a-half years. Hughes also stated that there was an initial amount of work done and then when they put the vessel in the water, they realised there were further problems. In particular, they only appreciated the problem of the lack of secondary bonding between the bulkhead and the cabin above when they were installing air-conditioning after the sea trial had stopped.

Philip Hercus

[48] Philip Hercus is a naval architect who prepared a report dated 3 May 2005. However, since the preparation of that report he has suffered a stroke and was unable to give evidence at the hearing. His report, however, has been relied on by the plaintiff. Hercus examined the vessel on four occasions in 2003 and 2004. The report indicates that the designer refers to the vessel as a "15 metre wave-piercer motor yacht". Hercus stated that the term "wave-piercer" is relatively new and was coined in about 1983 by himself and his former partner, Robert Clifford, when they were together in International Catamarans Pty Ltd.

[49] Hercus's conclusion was that the vessel was heavier than the designer anticipated when he accepted the design agreement and there is no evidence that the specification of the vessel was changed by anyone other than the designer or builder in a way to increase weight significantly after the design agreement was finalised.

[50] He considers that the designer was responsible for the construction supervision and the contract administration and that the designer had the responsibility and the authority to ensure that the builder built the vessel to the designer's design and weight specifications. He also considers that the vessel has a serious slamming problem and he does not believe that the vessel could operate safely for any length of time without seriously damaging its structure. Whilst the design agreement is silent on the seagoing requirements for the vessel, Hercus states that the fact that the designer sold it as a wave-piercer meant that it was intended to operate in waves and this it cannot do without severe slamming. Hercus concluded that the vessel is not fit for its intended purpose. He also considers that the draft of the vessel has increased as a result of the weight increase and this has decreased tunnel clearance from the water surface and he considers that the vessel's tunnel clearance aft has been reduced by the stern's trim.

[51] In Hercus's view the slamming problem "arises from a combination of the low V in the bottom of the bridging structure forward, inadequate tunnel height due to weight increased and, at the aft end further reduction of the tunnel height due to the stern trim". He also considered that the vessel is slow and that it was intended to achieve a speed of 28 knots, which it cannot do, and that the loss of speed can be explained by increase in weight. Overall, Hercus believes that the vessel is well built, fitted and finished, and that the layout and appearance of the vessel are what the owner wanted to buy, however in his view "the vessel is not fit for the purpose for which it was intended".

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[17] Transcript day 2 at p 4, ll 8-13.

The evidence of the forensic accountant

[52] Elia Lytras is a forensic accountant and he gave evidence in relation to a four volume report he prepared in relation to this case. It was his task to go through the statement of claim, seek out all the financial figures in it and verify each of them. That included the claim against defendants which is not currently being proceeded with. Lytras indicated that his approach "was to identify underlying invoices, evidencing of amounts paid through bank statements, in certain instances it was to source amounts from contracts of agreements, and/or between correspondence between the parties dependent on the nature of the pleadings, and one instance there was to consider amounts in another expert report, a maritime expert's report."[18]

[53] Lytras gave evidence that he had verified that an amount in excess of $2.8 million was in fact paid by Barclay. Lytras verified that in relation to para 36(a) of the statement of claim, the amount of $2,876,419.84 was paid and that this was inclusive of GST. In relation to para 36(c) of the statement of claim, Lytras indicated that the figure of $761,217.31 was verified inclusive of GST. Lytras stated that given the verification exercise he had undertaken the calculations in the prayer for relief should therefore be varied.

The valuations

[54] Christopher Hutchings, a naval architect and marine surveyor, gave evidence as to the valuation of the vessel.

[55] Hutchings' report[19] gave three valuations as follows:

1. Valuation 1 - vessel as built at time of delivery 2002: $700,000;
2. Valuation 2 - vessel as currently built and rectified excluding betterment works: $820,000;
3. Valuation 3 - vessel as currently built and rectified including betterment works: $910,000.

Specific Factual Findings

[56] On the basis of the evidence set out above I am satisfied of the following factual matters:

1. Detailed plans were not prepared by the third defendant as required by the contract dated 10 October 2000;
2. Construction specifications and calculations as to the design weight of the catamaran were not provided to the builder as required by the contract;
3. The third defendant was contracted to inspect, monitor and supervise the construction of the vessel and was specifically responsible for the weighing of the vessel at critical stages;
4. Modifications were made by the fifth defendant including the main bulkhead in the main stateroom was not secondary bonded as required by the plan. In addition, trim tabs, and a transom extension were also made.
5. The vessel was not constructed to accord with the USL Code as required by the contract;
6. The plaintiff spent $2,876,419.84 as a result of proceeding with the construction of the vessel;

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18 Transcript day 2 at p 49, ll 51-56

19 Trial exhibit 10 – Report of Christopher Hutchings.

7. The value of the vessel on delivery was $700,000;
8. The plaintiff has spent $647,905.78 exclusive of GST or a total of $761,217.31 on the reasonable repairs;
9. The current value of the vessel exclusive of betterment is $820,000.

The notice to admit facts

[57] A notice to admit facts was served on 30 July 2009. A notice disputing those facts was not served within the 14 days specified in *UCPR* 189. Accordingly, pursuant to r 189(2) the facts contained in the Notice to Admit are taken to be admitted:[20]

> "1. That the catamaran the subject of these proceedings (the catamaran) when delivered to the plaintiff in late 2002 had a displacement of 22.525 tonnes lightship.
>
> 2. That the catamaran was, as delivered, approximately 25 per cent overweight.
>
> 3. That the catamaran was out of trim at the time of delivery being 1.6º bow up relative to the waterline.
>
> 4. That as a result of the catamaran being overweight and out of trim, it drew far more water than the design draft of .6m and had an underbridge clearance at the stern of the catamaran of 350mm rather than 800mm as designed.
>
> 5. As a further consequence of its being overweight and out of trim, the catamaran suffered from slamming, that is to say, there was insufficient clearance underneath the catamaran in the area between the two hulls such that waves regularly slammed underneath the catamaran causing it to shudder and thereby create fatigue cracks.
>
> 6. As a further consequence of its being overweight and out of trim, the catamaran was totally incapable of handling a head sea of 1.2m at 10 knots other than aft of the beam and as delivered was only capable of being used in a river or in smooth conditions.
>
> 7. Further as a consequence, the catamaran was incapable of reaching its design top speed of 28 to 30 knots and could only achieve a top speed of approximately 22 knots.
>
> 8. The catamaran had numerous design defects and omissions in the flybridge, fire system, foredeck railings, fire main and bilge system, electrical drawings, fuel bumpering system and life raft and exhaust.
>
> 9. The plans as drawn by the first, second and/or third defendants paid no attention to the final weight and trim of the catamaran.
>
> 10. The first, second and/or third defendants prepared no proper calculations as to the design weight of the catamaran.
>
> 11. The first, second and/or third defendants drew no specifications at all as to the proper construction of the vessel.

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[20] Submissions of the plaintiff dated 19 August 2009 at [116].

12. The first, second and/or third defendants made no effort whatsoever to ensure that the catamaran achieved its design weight of 18 tonnes lightship.

13. The first, second and/or third defendants during the construction process did not track, monitor or control the weight of the catamaran and such weight and monitoring as was conducted was totally inadequate.

14. The plans and design of the catamaran were negligently drawn by the first, second and/or third defendants and even if adhered to by the builder would not have produced a vessel with the performance characteristics which the catamaran was intended to achieve namely a wave piercing catamaran with flybridge capable of handling heavy seas with a top speed of 28 to 30 knots.

15. The plans and the design of the catamaran were defective in that the centre bow of the catamaran as drawn was too full forward and did not have a sufficient "V" given its purpose and proximity to the water."

The claims

[58] Barclay's claim against the remaining defendants is as follows:

1. the claim against the third defendants in contract;
2. the claim against the third defendants in negligence;
3. the claim against the third defendants for misleading and deceptive conduct;
4. the claim against the fourth defendant for negligence;
5. the claim against the fourth defendant for misleading and deceptive conduct.

Was there a breach of contract by the third defendants?

[59] The claim is against Ocean Innovations, which is the partnership between English Yacht Designs and Nichols Marine Designs. This partnership was admitted by both English Yacht Designs and Nichols Marine Design in their respective defences.

[60] So far as the relevant express terms are concerned, the third defendant agreed:

1. "to provide: design, plans and specifications including such detailed drawings as may be required to enable the vessel to be constructed in accordance with the design". The contract then set out the dimensions and performance particulars which included the following: draft - 0.65 metres, design displacement - 18.00 tonnes lightship and design speed - 28 knots;
2. to provide "best professional services" during construction of the vessel in the inspection and supervision of the work to be carried on by the builder;
3. to provide administration services to facilitate the checking, verifying and authorisation process in accordance with the contract, of progress claims, as and when received from the builder.

[61] Barclay also claims that the third defendant breached the warranties of reasonable care in carrying out their duties to act as reasonably competent ship designers, supervisors and construction costs assessors. It is argued that it was an implied term of the contract that, pursuant to s 74(1) of the *Trade Practices Act*, the services

rendered by the third defendant would be rendered with due care and skill. Section 74(1) provides:

> "In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any material supplied in connection with those services will be reasonably fit for the purpose of which they are supplied."

[62] Section 4B(b) defines "consumer" for the purposes of the section. That section provides that a person shall be taken to have acquired particular services as a consumer if and only if:

> "(ii) where that price exceeded the prescribed amount – the services were of a kind ordinarily acquired for personal domestic or household use or consumption."

[63] The prescribed amount is $40,000. Whether or not goods are of a kind ordinarily acquired for personal, domestic or household use is a question of fact. In this case the contract provided for remuneration of $53,450 for the detailed drawings and specifications which is therefore well in excess of the prescribed amount. There were then additional hourly fees for supervision and administration. This luxury boat was clearly designed for personal use. "The Act makes clear that the consumer protection provisions are for the benefit of those who purchase goods or services having a comparatively small value of less than $40,000, or if that value be exceeded, that the goods or services are of a personal, domestic, or household nature or for use and consumption in such a household."[21] I consider that the design of luxury boats of this size is generally done for private use and that according to the definition Barclay is a consumer.

[64] This conclusion is also assisted by s 4B(iii) which is to the effect that there is a presumption that the relevant person is a consumer in relation to the relevant goods or services unless the contrary is established. In *Crago v Multiquip Pty Ltd*[22]it was held that goods may be of a kind ordinarily acquired for personal domestic or household use even if the goods of that same kind are in many cases acquired for business use.

[65] The express obligation in the contract was to provide "best professional services" and is clearly a high standard of care. It is obviously a higher standard of care than mere "reasonable care" or "due care and skill". But this higher standard of care was limited by the contract to the period "during construction of the vessel in the inspection and supervision of the work to be carried out by the builder". Accordingly where the higher standard leaves off, the lower standard applies. Clearly an implied duty of reasonable care also exists quite apart from the provisions of the *Trade Practices Act*. As Cheshire & Fifoot's *Law of Contract*[23] provides:

> "Thus a duty of reasonable care is implied in all contracts for the provision of professional services. The implied term of reasonable care in a contract of professional services arises by operation of law. It is one of those terms that the law attaches as an incident of contracts of this class. The duty has been imposed inter alia on

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21 Westpac Banking Corporation Ltd v Prelea & Ors 28 NSWLR 481.

22 (1998) ATPR 41-620.

23 GC Cheshire & CHS Fifoot *Law of Contract* (2001 9th Aust ed.), at pp 464-465.

> solicitors, medical practitioners, estate agents, landlords, insurance brokers, accountants, and professional consultants and managers."

[66] Obviously this contract involved the provision of professional services as boat designers. I consider on the basis of the findings I have set out above and the factual admissions pursuant to the operation of Rule 189(2) *UCPR* that each of the above terms both express and implied, were in fact breached. I am satisfied that whilst the third defendant drew plans they were not detailed plans. It is also clear that the detailed specifications to enable the vessel to be constructed according to the design were never prepared by the third defendant. The evidence now from a number of the experts was that the vessel was badly designed. The centre bow was too full forward and not sharp enough. The vessel was also designed such that the tunnel clearance above the water was below the optimum level of 900mm.

[67] The third defendant also breached the "best professional services" term and the implied terms as to due care. I am satisfied that the third defendant did not provide "best professional services" during construction of the vessel in the inspection and supervision of the work to be carried on by the builder. In so far as the inspection and supervision is concerned, there is good evidence of breach as the vessel suffered from various performance deficiencies. They are all admitted and as a matter of evidence it must be concluded that there was no proper care taken in the inspection and supervision of the work. Blackline Shipping ultimately performed the rectification work at significant cost. I am satisfied that there was no proper supervision particularly as to weight control and weight distribution.

[68] Given the significant overpayments and defects I am satisfied that the third defendant failed to provide administration services to facilitate the checking, verifying and authorisation process in accordance with the contract, of progress claims, as and when received from the builder. I am satisfied the third defendant contracted to provide administration services to facilitate the checking, verifying and authorisation process for the progress claims. Clearly the initial price was quickly exceeded. When the revised price was set at $2,030,822 that figure was also exceeded without explanation or even notice to Barclay. In fact Barclay paid an amount in excess of $524,949.34 before he discovered the overpayment.

[69] I am also satisfied that there were warranties that the catamaran was to have the speed of 28 knots, draft of 0.65 metres, and design displacement of 18 tonnes lightship and that the warranties were breached.

[70] **Quantum**

[71] In terms of damages for breach of contract, had the contract been performed properly, the vessel would have been a properly designed vessel, which would have been sufficiently out of the water, have a top speed of 28 knots and been able to handle the open waters.

[72] Damages for breach of contract are assessed in that sum required to put the plaintiff back "in the position in which he would been had the contract been performed".[24] I

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[24] *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1.

consider that in this case the cost of repair is the proper measure of damages. Jackson & Powell on *Professional Liability*[25] states:

> "The cost of repair will usually be the prime head of recoverable damages when a building suffers from defects which are a consequence upon negligence by an architect or engineer in the examination of the site, design or supervision."

[73] In *Bellgrove v Eldridge*[26] the High Court held that the measure of damages where a building professional engaged under a contract to undertake work has left the work incomplete or containing defects is the reasonable cost of completing the work or rectifying the defects. The Court held that this included a situation where "the necessary remedial work may call for the removal or demolition of a more or less substantial part of the building". The Court held however that "The qualification, however, to which this rule is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt".[27]

[74] Accordingly, I consider that the sum of $1,329,897.30 is the figure for which judgment should be given for damages fro breach of contract by the third defendants. This is calculated on the basis of the adjusted figure for the cost of repairs based on Hughes report, but with a deduction of $13,743 which was inadvertently claimed twice. This adjusted figure is $697,579. This amount is then added to the costs for the vessel paid by Barclay as at the date of delivery. I accept that the costs paid by Barclay to the date of delivery, less cost for airfares, accommodation and trips to Gosford was $2,866,277.57. From this figure is deducted the cost which was in fact ultimately contracted for of $2,233,959.20.

[75] There should therefore be judgment against the third defendant in the sum of $1,329,897.30.

Were the third defendants negligent?

[76] The third defendants all traded in partnership in the business of boat designers under the name of Ocean Innovations. English was clearly a servant or agent of the third defendant and in giving advice or information he was acting in the course of that employment.

[77] In the decision of *L Shaddock & Associates Pty Ltd v Parramatta City Council*[28] Mason J held:

> "Whenever a person gives information or advice to another upon a serious matter in circumstances where the speaker realises, or ought to realise, that he is being trusted to give the best of his information or advice as a basis for action on the part of the other party and it is reasonable in the circumstances for the other party to act on that information or advice, the speaker comes under a duty to exercise reasonable care in the provision of the information or advice he chose to give."

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25 Rupert M Jackson, *Jackson and Powell on Professional Liability* (2007 6th ed.) at ch 9 at [294].
26 (1954) 90 CLR 613.
27 (1954) 90 CLR 613 at 618.
28 (1981) 150 CLR 225 at 250.

[78] The entirety of the relationship between the parties needs to be looked at. Much of the advice was given at the outset but it was maintained and repeated right up until the critical time when Barclay committed to the enterprise in late 2000. I consider that the relationship of reliance was built up over a long period of time. During that relevant period there may have been as many as 30 or 40 contacts in person, by facsimile, by post or by telephone. On my analysis of Barclay's notes and the relevant correspondence I consider that English told Barclay that:

1. the 15 m version of the wave-piercing catamaran would do 28 knots;
2. the vessel would be capable of handling heavy seas, e.g. 4.5m;
3. it would revel in 1.5 m – 2 m seas;
4. the catamaran should cost about $1.5m.

[79] I also consider that English was a professional man and indeed on 21 September 1999 during one of his first conversations with Barclay he stated that OI were "Practicing Naval Architects located in Gosford".[29] The footer to English's emails was "Ocean Innovations Naval Architects and Yacht Designers". Barclay also asked to see a copy of OI's professional indemnity insurance which was provided on 13 October 2000 and it stated that the activities covered were "Naval Architects and Yacht Designers". Whilst there is no universally accepted definition as to whether a person is a professional Santow J in *Prestia v Aknar*[30] summarised the relevant principles in relation to what constituted "professional activity" and stated that the term:

> "would embrace intellectual activity, or manual activity controlled by the intellectual skill of the operator, whereby services are offered to the public, usually though not inevitably for reward and requiring professional standards of competence, training and ethics, typically reinforced by some form of official accreditation accompanied by evidence of qualification."

[80] It is clear that OI were yacht designers and they were clearly advising about a possible investment in a boat by Barclay of $1.5m - a very substantial amount of money.

[81] I consider that a duty of care in tort arose because of the existence of a number of salient features including the vulnerability of Barclay, the position of control over the risk of injury by the defendants as well as Barclay's reliance on the defendants and their assumption of responsibility. Furthermore it is quite clear that the third defendants knew the risk of the loss. In *San Sebastian Pty Ltd v Minister*[31] it was held by the majority:

> "When the economic loss results from negligent misstatement, the element of reliance plays a prominent part in the ascertainment of a relationship of proximity between the plaintiff and the defendant and therefore in the ascertainment of a duty of care … In cases of negligent misstatement, reliance plays an important role, particularly so when the defendant directs his statement to a class of persons with the intention of inducing members of the class to act or refrain from acting, in reliance on the statement, in circumstances where he should realise that they may thereby suffer economic loss if the

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29 Exhibit 7 to affidavit of Donald Edward Barclay sworn 17 August 2009 at p 2.
30 (1996) ATPR 46-157.
31 (1986) 162 CLR 341 at 355-357.

> statement is not true … The existence of an antecedent request for information or advice certainly assists in demonstrating reliance, which is a cornerstone for negligent misstatement."

Breach of Duty

[82] The real question is whether there in fact a breach of that duty? It would seem that the 15m version was really a scaled down version of a much larger model and it would seem that the 15m version was a concept. There had been no flybridge version previously. Barclay submits that there is no evidence that at or about the time that the relevant representations were made, any relevant calculations had been made or performed and that no plans of the vessel had in fact been drawn by that stage. Barclay states there were no specifications.

[83] The essence of counsel for Barclay's submission is that the third defendant breached the duty owed to Barclay in that English represented that Barclay could get a 15 metre catamaran that would achieve 28 knots, could handle heavy seas and go out in the ocean for a cost of 1.5 million dollars when there was essentially no basis for this representation because detailed plans and specifications had not been done.

[84] It would seem clear that the relevant duty was a duty to exercise reasonable care in the provision of the information or advice OI provided through English and Nichols. Was there an exercise of reasonable care in the provisions of the information to Barclay about the vessel?

[85] It is clear that a 14 metre catamaran had been successfully produced. It would also seem from the magazine article that it was successfully performing. The article was to that effect that the 14 m vessel had performed well when the author was on board with the two owners of the vessel who were clearly very proud of it. The author concluded that it may well be "the Powerboat of the next millennium". Furthermore the magazine carried an advertisement with an illustration and specifications that referred to the length of 15 m as well as the speed of 28 knots and a displacement of 10,000 kgs. There was an illustration of the 15 m flybridge version. It is also clear that on 27 September 1999 a drawing "number 99-188-02" was in fact forwarded from OI to Barclay which was a "modified General Arrangement for the 15 metre Wave Piercing Catamaran". Barclay also knew that a 15 m vessel had never been built by OI. Barclay also stated that on his first trip on the 14 m vessel in October 1999 he "formed a favourable impression of the vessel and its performance. It seemed to be sea worthy. At the speed we were travelling it seemed in all respects satisfactory"[32]

[86] He also signed both the contract with OI and the contract with Griffin Motor Yachts knowing that the specification was to be added later.

[87] Whilst Counsel for Barclay submits that there was no proper information or detail upon which to base the relevant advice when it was given or at any time up until when the contracts were signed I am not able to conclude that this was in fact the case. An examination of Barclay's file indicates that he was given a copy of all the relevant plans and specifications which existed and was given further plans throughout the design phase. Catamaran designer Hercus's conclusion was that the vessel was heavier than the designer anticipated when he accepted the design

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[32] Affidavit of Donald Edward Barclay sworn 17 August 2009

agreement. In addition Dovell's conclusion was that relative to the vessel as designed, the delivered vessel was 25 per cent heavier, was sitting bodily lower in the water by approximately 175mm, was trimmed 1.6 degrees bow up and the underbridge clearance was 44 per cent less. In my view this information indicates that there was a specific design which may have been able to deliver what had been predicted but that the construction some how failed to achieve what was designed.

[88] Furthermore Dovell's opinion was that the weight overrun was due to "a combination of inaccurate weight estimating during the design process and or poor control of weight during construction".[33] Whilst Dovell stated that it would be impossible to put a price on a vessel without a proper set of plans or specifications and that the practice usually adopted was for a naval architect to prepare a full set of plans which would then be given to the builder to quote, he did not say that one could not make predictions such as were given by English, as to the performance of the vessel on the information to hand prior to the provision of the detailed plans and specifications.

[89] Ballantyne's view as to what went wrong was that there had been a breakdown in the monitoring process of the project, particularly in relation to weight control. If that was indeed the case the representations that were made may well have been reasonable in the circumstances.

[90] I am unable to conclude that the drawings and specifications which were prepared and provided were an "insufficient" basis for the representations that were made. I am not aware of how much detail was required before a yacht designer can make predictions as to performance and speed. I am unable to conclude that it was unreasonable for OI through English to make the predictions that he made at the time given his state of knowledge and information at the time.

[91] Accordingly on the information before me I am unable to be satisfied that the third defendant breached the relevant duty of care. In my opinion the causes of action based on the negligence of the third defendant are not made out and must be dismissed. Having reached this conclusion I do not need to consider the issue of whether the plaintiff could recover in both contract and in tort.

Is the fourth defendant liable in tort?

[92] It is also argued that Griffin owed a duty of care when giving advice or information as to the characteristics of the vessel. Clearly as a professional boat builder this was the case and Griffin owed a duty of care to Barclay in relation to the provision of information to him. It is clear that Griffin was present when the 14 metre wave-piercing catamaran was initially trialled at Gosford. In fact Griffin Motor Yachts had built the 14 metre version. I accept Barclay's evidence that English and Griffin advised him that the catamaran would have the same performance characteristics as the 14 metre version, would achieve a top speed of 28 knots and would perform well in heavy seas. Barclay's evidence in fact is that he was relying on the third defendants and Griffin to give accurate advice or information as to the performance characteristics of the catamaran in order to determine whether he would proceed further and acquire such a vessel.

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[33] Trial exhibit 5 - expert report of Andrew Dovell at [6.5].

[93] A concept plan was provided to Griffin by the third defendant for the purpose of providing advice to Barclay as to the likely cost of constructing the catamaran. Clearly Griffin was under a duty to take reasonable care in the provision of such costings and advice. In reliance upon that advice, Barclay determined that it was viable to proceed with the construction of the catamaran and, in regard to its costs.

[94] I am not however satisfied that the advice and information given was given negligently. I am not satisfied that it was in fact unreasonable to proceed on the basis of an amended version of the successful 14 metre version of the vessel which Griffin had in fact built. An examination of the extensive material which has been provided in this case reveals that Barclay was initially given a 6 page preliminary costing document in June 2000 which had been prepare by Griffin and which gave specific detail as to how the $1.6 million figure had been calculated. In addition when Barclay had pressed for a fixed price contract in June 2000 Griffin had replied:

> "At this stage GMY is unable to provide you with a fixed price contract price until a complete set of design drawings and specifications have been provided by Ocean Innovations. However, I have assembled a budget of costs attached, which I believe would be a close indication of what the vessel will cost….These costs have been arrived at by using Ocean Innovations Drawing No 99-188-02 and the experience and data of GMY when "Wildcat", the prototype wave-piercer, was constructed."

[95] Griffin then went to considerable trouble to provide a 13 page basis for his costings that were provided in the letter dated 22 September 2000. Furthermore, Barclay knew that when he signed the contract with Griffin Motor Yachts that the detailed specification had not been provided and that it would be attached as a schedule when it was later provided. In fact after he had signed the contract with the third defendant on 10 October 2000 he had a telephone conversation with Griffin on 3 November 2000 and he wrote on the same day to Griffin stating:

> "It is agreed that the "Specification" referred to in the above CAD (Contract Agreement Document) is not of such critical importance in the nature of our CAD that it should unnecessarily delay the formalisation and completion of the contract agreement between us."

[96] I am not able to conclude that the costings that were provided were provided negligently by Griffin.

[97] Accordingly on the information before me I am unable to be satisfied that the fourth defendant breached the relevant duty of care. In my opinion the cause of action based on the negligence of the fourth defendant is not made out and must be dismissed.

Were the third defendants guilty of misleading and deceptive conduct?

[98] It is clear that the first third defendant and the second third defendant were both corporations engaging in trade or commerce. This has been admitted on the pleadings.

[99] Section 52 of the *Trade Practices Act* 1974 provides:

> "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

[100] In this case when the relevant representations were made in September and/or October, 1999, they related to the future likely performance of the vessel once it was constructed. In short they were representations with respect to a future matter.

[101] Accordingly s.51A of the *Trade Practices Act* 1974 is brought into play and it provides:

> "51A Interpretation
>
> 1. For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.
> 2. For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not have had reasonable grounds for making the representation.
> 3. Subsection (1) shall be deemed not to limit by implication the meaning of a reference in this Division to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead."

[102] Clearly then to the extent that English was the servant or agent of the Ocean Innovations partnership, his conduct is deemed to have been the conduct of each of the body corporates which carried on the business as partners: see s.84(2) of the Act.

[103] I am satisfied that the representations that were made by English were representations "with respect to" a future matter. The defendant made predictions that the vessel would be capable of handling heavy seas, would revel in 1.5-2 metre seas, would achieve 28 knots and would cost approximately $1.5 million ($1.8 with GST). I am also satisfied that those predictions did not prove to be accurate.

[104] The onus of proof that there were reasonable grounds for the making of the statement as to the relevant future matters therefore falls upon the defendants. No evidence has been adduced, therefore the representation is taken to be misleading within the meaning of s 51A(1).

[105] I am satisfied that the plea has been properly raised. As French J (as he then was) stated in *Fubilan Catering Services Pty Ltd v Compass Group Aust Pty Ltd:*[34]

> "541 The cause of action for misleading and deceptive conduct in contravention of s52 of the TPA is created by s 82 which provides (1) subject to subsection (1AAA) a person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, Part IVA, Part IVB or V and section 51AC may recover the amount of loss or damage by action against that

[34] (2007) FCA 1205 at 541.

> other person or against any person involved in the contravention. ……So where misleading or deceptive conduct is alleged it must be shown that the applicant suffered loss or damage as a result of that conduct.
>
> …
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> 543 The test of causation therefore is a practical or commonsense one. It does not require that the contravening conduct be the only cause of the applicant's loss. Nor is it necessary, where the misleading or deceptive conduct involves a misrepresentation that the applicant who suffered loss or damage relied upon that misrepresentation. It may be that the misleading or deceptive conduct will set in train a chain of events where one person is led into error on the basis of that conduct and induces some other person loss.
>
> …
>
> 547….In my opinion a pleading of misleading or deceptive conduct which relies upon s51A should make clear that it involves the allegation that the representor did not have reasonable grounds for making the statement alleged. Section 51A will then operate, to require the conduct of the representor, if established, to be treated as misleading or deceptive for that is its substantive operation. Its adjectival operation puts the evidential burden upon the representor and supports it with a powerful deeming provision.
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> …
>
> 548 ….The causal connection between the respondent's conduct in such a case and the loss or damage claimed is not the breaking of the promise or the failure of the prediction. The causal connection which must be shown to exist is a causal connection between the los or damage claimed and the making of the promise or prediction."

[106] I am satisfied that Barclay has suffered loss and damage because in reliance on those statements, he entered into the relevant contract and made the payments which are set out in my findings above.

Quantum

[107] I am satisfied that the loss should be calculated on a "no transaction" basis which means that if the relevant statements had not been made, the whole transaction would have been avoided. I consider that the entire expenditure is $3,686,200.20. I also consider that the current value of the boat which is $910,000 should be subtracted as this is the appropriate figure. This results in a figure of $2,776,200.20

[108] Accordingly there should be judgment against the third defendants in the amount of $2,776,200.20.

Was the fourth defendant guilty of misleading and deceptive conduct?

[109] The case against Griffin in this regard is based on accessorial liability. The pleadings clearly raise s 75B of the *Trade Practices Act* 1974 which provides:

> "**75B Interpretation**
>
> (1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB, V or

VC, or of section 75AU, 75AYA or 95AZN, shall be read as a reference to a person who:

(a) has aided, abetted, counselled or procured the contravention;

(b) has induced, whether by threats or promises or otherwise, the contravention;

(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

(2) In this Part, unless the contrary intention appears:

(a) a reference to the Court in relation to a matter is a reference to any court having jurisdiction in the matter;

(b) a reference to the Federal Court is a reference to the Federal Court of Australia; and

(c) a reference to a judgment is a reference to a judgment, decree or order, whether final or interlocutory."

[110] Section 75B is procedural and it extends the application of s 82 and indicates "the various ways in which a person can be involved in a contravention by another person sufficiently to extend to making damages or compensatory orders against that person." [35]

[111] There may be an accessorial liability even though the person or entity which is technically the principal offender is not actually before the court or was never joined or has, as in this case, been deregistered.[36] Furthermore, although s 51A reverses the onus of proof in cases against the principal offender (the corporation), the same does not apply in relation to accessorial liability under s.75B. This was recently discussed by the Full Court of the Federal Court in *Quinlivan v ACCC*[37] as follows:

> "Accordingly, where s.75B or s.80 accessorial liability is in issue in relation to a representation with respect to a future matter, the existence or otherwise of reasonable grounds will be relevant. If reasonable grounds exist, there will have been no contravention and that no question of accessorial liability will arise. However, as against the accessorial respondent, the onus will be on the applicant to show that the respondent had actual knowledge that:
>
> - the representation was made; and
> - it was misleading; or
> - the corporation had no reasonable grounds for making it.
>
> see *ACCC v Michigan Group Ltd* (2002) FCA 1439 at 303".

[112] Counsel for Barclay submits that the court should find that:

1. Griffin himself made the representations at the first sea trial in October, 1999 as alleged in paragraph 10 of the statement of claim and as sworn to by Barclay;

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35 *Miller's Annotated Trade Practices Act* (2009 30th Ed) [1.75B.5]

36 *ACCC v Black on White Pty Ltd* (2001) 110 FCR 1.

37 (2004) 160 FCR 1.

2. Griffin himself wrote the letter of the 22nd September, 2000 which gave the "final costings" in the sum of $1,603,761 plus GST.

[113] I consider that on the facts before me Griffin had actual knowledge that the representations were made. However the question is, did Griffin know that the representations were misleading? Alternatively did he know that OI (the corporation) had no reasonable grounds for the making of those representations?

[114] In determining whether Griffin knew that the statements were misleading, misleading conduct for the purposes of s 52 is regarded as conduct which induces or is capable of inducing error (*Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*[38]). *Miller's Annotated Trade Practices Act* states that a person will only be regarded as involved in a contravention sufficiently to invoke the section if

> "the person intentionally participated in the contravention. Intentional participation requires actual, rather than constructive, knowledge, of the essential matters that make up the contravention and a level of involvement, although where there is a combination of suspicious circumstances and failure to inquire that may lead to the conclusion that the person had sufficient knowledge to be implicated in the contravention sufficiently to attract s 75B."[39]

[115] Counsel submits that it may be inferred that Griffin knew that Barclay would be induced into error, e.g. by assuming that the 15m flybridge version had actually been drawn up or had been placed in production. I do not consider there is evidence to support this inference as Barclay knew the precise state of the drawings and specifications as Griffin provided all the plans and specifications he had to Barclay. Barclay clearly knew that there had been no 15 m vessel built.

[116] In my view Griffin knew:

1. that the 14 m vessel was itself a scaled down version of a much larger wave piercing catamaran;
2. that the 14 m vessel had some trouble reaching a speed of 22 knots;
3. that there were no detailed plans for a 15m flybridge version;
4. that he had never built a 15m flybridge version of the catamaran;
5. that there were no detailed specifications for a 15m flybridge version.

[117] However it is clear that Barclay himself was not concerned about the speed the 14 m vessel achieved during the sea trial as he himself said it "depends upon the engines they put in."[40] It is also clear that Griffin had built the 14 m catamaran and that he had a concept plan from OI and some general specifications from which he was working. He also formulated his own specifications when the more detailed ones were not forthcoming from OI. It is also clear that Barclay himself had provided very specific details as to what he required in the fitout.

[118] It is clear that a number of problems arose during construction including the need for the adjustment of the water line, the problem with the exhaust outlets, the dropping of the vessel and the cracking of the windows caused by the failure to properly attach the bulkhead to the deck above. However, in his evidence Barclay stated "I knew that they had done some modifications, and I – yes, I was aware that

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38 (1982) 149 CLR 191.

39 *Miller's Annotated Trade Practices Act* (2009 30th Ed) at [1.75B.5]

40 Transcript day 2 at p 8, l 42.

they had extended the transom." He further stated when asked when he knew about the extension to the transom "I am not too sure, but I was aware that they had to extend it in order to accommodate the rearrangement of the engines together with the electric generator that they had installed. So it would have been about that time when English would have advised Griffin that that was necessary".[41] I do not consider therefore that the modifications necessarily raise a suspicion about Griffin's behaviour which is sufficient for the purposes of the s 75B. It must also be remembered that OI were the designers and were providing the construction supervision and design. It cannot be inferred that Griffin would have affected these modifications without the approval of OI which was in fact the "authorised person" for Barclay. Indeed when Barclay attended the sea trials in June 2002 Griffin put directly to Barclay his concerns that the vessel was overweight, out of trim and that the vessel might not achieve its top speed. OI however through Nichols specifically reassured Barclay about these concerns.

[119] I do not consider that there is sufficient evidence to establish that Griffin knew that there were no reasonable grounds for the making of the relevant statement or that he knew that the statements themselves were misleading.

[120] In my view the cause of action based on the misleading and deceptive conduct of the fourth defendant is not made out and must be dismissed.

[121] These are a numbers of orders which I consider could be appropriate and would be generally in the following terms:

1. Judgment against the third defendant for breach of contract in the sum of $1,329,897.30;
2. Judgment against the third defendant for misleading and deceptive conduct in the amount of $2,776,200.20;
3. The cause of action based on the negligence of the third defendant is not made out and must be dismissed;
4. The cause of action based on the negligence of the fourth defendant is not made out and must be dismissed;
5. The cause of action based on the misleading and deceptive conduct of the fourth defendant is not made out and must be dismissed.

However, I invite submissions from counsel as to the proper form of the order and whether they are seeking an order that judgement be entered in accordance with paragraph (1) or (2).

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[41] Transcript day 2 at p 14, l 46.