# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd* [2018] QCA 174 |
| PARTIES: | **MINERALOGY PTY LTD**<br>ACN 010 582 680<br>(appellant)<br>**v**<br>**BGP GEOEXPLORER PTE LTD**<br>(respondent) |
| FILE NO/S: | Appeal No 11186 of 2017<br>SC No 3482 of 2016 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane – [2017] QSC 219 |
| DELIVERED ON: | 31 July 2018 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 15 March 2018 |
| JUDGES: | Fraser and Gotterson and McMurdo JJA |
| ORDERS: | **1. Appeal dismissed.**<br>**2. The parties are to file and serve written submissions as to the costs of the appeal (not to exceed two pages) within seven days of the date of delivery of these reasons for judgment.** |
| CATCHWORDS: | GUARANTEE AND INDEMNITY – DISCHARGE OF SURETY – ALTERATION OF OBLIGATION GENERALLY – where the respondent entered into a contract to provide services for reward to a third party – where the appellant entered into a guarantee with the respondent guaranteeing the third party's obligation under the contract – where the respondent made demand under the guarantee for debts owing under the contract – where, in the proceeding below, the appellant argued that variations made to the contract had the effect of discharging it from the guarantee – where the learned primary judge found that variations made to the contract did not have the effect of discharging the appellant from the guarantee – where the appellant argued the primary judge erred by failing to construe the guarantee *strictissimi juris* – whether the primary judge erred in finding that variations made to the contract did not have the effect of discharging the appellant from the guarantee |

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the respondent entered into a contract to provide services for reward to a third party – where the appellant entered into a guarantee with the respondent guaranteeing the third party's obligation under the contract – where the respondent made demand under the guarantee for debts owing under the contract – where, in the proceeding below, the appellant alleged that the third party was not liable under the contract because there was unsatisfactory performance of the respondent's obligations under the contract – where the contract between the respondent and the third party contained a provision enabling the third party to withhold payment due to the respondent for unsatisfactory performance of the contract – where the learned primary judge found that the third party, and therefore the appellant, was obliged to pay the amount due under the contract – whether the primary judge erred in finding that the respondent was not guilty of unsatisfactory performance and that its conduct did not amount to a breach or anticipatory breach of the principal contract

GUARANTEE AND INDEMNITY – THE CONTRACT OF GUARANTEE – MISREPRESENTATION OR NON-DISCLOSURE – where the respondent entered into a contract to provide services for reward to a third party – where the appellant entered into a guarantee with the respondent guaranteeing the third party's obligation under the contract – where the respondent made demand under the guarantee for debts owing under the contract – where the appellant alleged that the respondent misrepresented to the third party and the appellant that the respondent had the skill and competence to provide a report as to the prospective existence and volume of resources of oil and condensate – where, in the proceeding below, the appellant argued that it was entitled to relief under s 87 of the *Trade Practices Act* 1974 (Cth) declaring the contract to be void *ab initio* – where the learned primary judge found that the respondent did not engage in misleading and deceptive conduct – whether the primary judge erred in rejecting the claim of misleading or deceptive conduct

*Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424; [2004] HCA 28, cited
*Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549; [1987] HCA 15, considered
*Coghlan v S H Lock (Australia) Ltd* (1987) 8 NSWLR 88, applied
*Farrow Mortgage Services Pty Ltd (in liq) v Williams* [1994] ANZ ConvR 41, distinguished
*Lensworth Finance Ltd v Worner* [1979] Qd R 159, considered

*Moreton Bay Regional Council v Mekpine Pty Ltd* (2016) 256 CLR 437; [2016] HCA 7, cited
*National Westminster Bank plc v Riley* [1986] BCLC 268, cited
*Wardens and Commonalty of the Mystery of Mercers of the City of London v New Hampshire Insurance Co* [1992] 2 Lloyd's Rep 365, distinguished
*Watts v Shuttleworth* (1861) 158 ER 510; [1861] EngR 800, considered

COUNSEL: L T Livingston with J A Kennedy for the appellant
J Bell QC, with T Pincus, for the respondent

SOLICITORS: Alexander Law for the appellant
GRT Lawyers for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Gotterson JA. I agree with those reasons and with the orders proposed by his Honour. I also agree with McMurdo JA's additional reasons.

[2] **GOTTERSON JA:** In 2016, the appellant in this appeal, Mineralogy Pty Ltd ("Mineralogy"), as plaintiff, commenced a proceeding in the Supreme Court of Queensland against the respondent, BGP Geoexplorer Pte Ltd ("BGP"), as defendant. The principal substantive relief sought by Mineralogy ranged over a number of declarations and orders claimed in the alternative, any one of which, if granted, would have relieved it of any obligation to pay money to BGP under a guarantee ("the Guarantee").[1]

[3] The Guarantee is contained in a two page written document in the form of a letter from Mineralogy to BGP dated 28 July 2010.[2] It was executed for Mineralogy by Mr C F Palmer, a director, in favour of BGP. By the introductory paragraph to the letter, Mineralogy requested BGP to enter into a contract ("the Contract")[3] with its subsidiary, then named Chinampa Exploration Pty Ltd. That company was renamed Palmer Petroleum Pty Ltd. Its current name is Aspenglow Pty Ltd (in liq). It is convenient to refer to this subsidiary, as the learned primary judge did, as Palmer Petroleum.

[4] The introductory paragraph further provided that in the event that BGP entered into the Contract with Palmer Petroleum, Mineralogy would guarantee that the latter would duly perform it. BGP thereupon entered into the Contract with Palmer Petroleum. It is titled "CONTRACT NO.: CHINAMPA-BGP-Marine 3D-201007 PROVISION OF 3D MARINE SEISMIC INTEGRATED SERVICES".[4] Mr Palmer, as director, also executed the Contract on behalf of Palmer Petroleum at the same time that he executed the Guarantee.

[5] At that time, Palmer Petroleum was the holder of petroleum prospecting licences over designated below-sea areas within the Gulf of Papua in Papua New Guinea. The licences were granted as PPL 254, PPL 255 and PPL 256. Later, they were renumbered PPL 379, PPL 380 and PPL 381 respectively. Under the Contract, BGP agreed to conduct three dimensional seismic surveys of the licence areas, to process

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1 Further Amended Statement of Claim ("FASC") filed 14 October 2017: AB 1004-1020.
2 AB213-214.
3 Identified therein as "no. Chinampa-BGP-Marine 3D-201007".
4 AB215-455.

and compile the data derived from the surveys and to provide reports on their work areas.

[6] In the proceeding, BGP denied that Mineralogy was entitled to any of the relief claimed by it. As defendant, BGP counterclaimed on the Guarantee for work done by it under the Contract for which it had submitted invoices to Palmer Petroleum that remained unpaid.[5] It also claimed for contractual "deferred finance fee" interest and interest pursuant to s 58 of the *Civil Proceedings Act* 2011 (Qld).[6]

[7] After a trial over two days, judgment was delivered in the proceeding on 9 October 2017. Mineralogy's claim was dismissed. An order was made on the counterclaim that it pay BGP the sum of US$17,629,673.68 comprised of unpaid invoice amounts of US$14,992,148.22, "deferred finance fee" interest of US$553,102.51 and s 58 interest of US$2,084,422.95.[7]

[8] At a subsequent hearing on 18 October 2017, a further order was made that Mineralogy pay BGP's costs of the proceeding including the counterclaim.[8]

[9] On 25 October 2017, Mineralogy filed a notice of appeal against the judgment delivered on 9 October 2017.[9] BGP filed a notice of contention on 19 December 2017.

[10] The grounds of appeal raise issues of interpretation and application of the terms of the Guarantee and provisions of the Contract, and of the legal effect for the Guarantee of amendments made to the Contract. I shall set out the terms of the Guarantee and a summary of the relevant provisions of the Contract and amendments to them in order to give context to the consideration of the grounds of appeal.

**The Guarantee**

[11] The Guarantee contains the following terms:

> "1. We guarantee that [Palmer Petroleum] shall duly perform all its obligations contained in the Contract.
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> 2. If [Palmer Petroleum] shall in any respect fail to perform its obligations under the Contract or shall commit any breach thereof, we undertake on the simple demand by [BGP] 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 [BGP] against any loss, damages, claims, costs and expenses which may be incurred by [BGP] 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 are recoverable under the Contract.

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5 Second Further Amended Defence filed 7 April 2017 ("SFAD"): AB1031-1078.

6 The claim for s 58 interest was made by amendment with leave given on the last day of the trial: Reasons at [178].

7 AB1155: Reasons at [188]. The claimed unpaid invoice amounts and the "deferred finance fee" interest were not disputed as amounts that would be payable if Mineralogy's claim was dismissed: Reasons at [178].

8 AB1201.

9 AB1202-1205.

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 [BGP] 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 [BGP].

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."

**The Contract**

[12] The Contract comprises a contract form and exhibits. The contract form consists of several recitals, and contractual terms and conditions in 47 articles. There are four exhibits, respectively exhibit "I Scope of Works and Specifications", exhibit "II Schedule of Compensation", exhibit "III Contractor Equipment" and exhibit "IV Health, Safety and Environment".[10] Each exhibit contains annexes, some of which include schedules.

[13] Significantly, the word "Contract" is defined in Article 2(e) as meaning "recitals and the terms and conditions of the Contract form and the exhibits attached hereto, as amended from time to time". The contract form takes precedence over the exhibits in the event of any inconsistency between them.[11]

[14] The Contract was amended by letter on four separate occasions during 2010 and prior to the execution of a series of four Amendment Deeds, namely:

(i) Amendment Deed 1 dated 27 February 2011;[12]

(ii) Amendment Deed 2 dated 29 June 2011;[13]

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10 Article 1.1.
11 Article 1.2.
12 AB460-477.
13 AB478-503.

(iii) Amendment Deed 3 dated 15 August 2011;[14]

(iv) Amendment Deed 4 dated 5 September 2011.[15]

Amendment Deed 3 capped the total amount payable by Palmer Petroleum to BGP under the Contract at US$35 million.[16]

[15] In his reasons for judgment, the learned primary judge summarised relevant provisions in the Contract and Amendment Deeds. His Honour's summary, to which I have made certain additions in parenthesis, is as follows:

> "(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 [and any work orders issued to BGP];
> [(bb) by art 3, the Contract remained in force for 12 calendar months or against completion of the Work or until terminated earlier];
> (c) by art 4.1, that Palmer Petroleum would pay [BGP] the rates as defined in the contract in full and final payment for the satisfactory performance of the Work in accordance with the contract;
> [(cc) by art 5.8, payment due to BGP may be withheld by Palmer Petroleum on account of "unsatisfactory performance of this Contract" or a failure to rectify notified defective Work];
> (d) by art 5.9, that payment of 100 per cent of all undisputed invoice items should be made by Palmer Petroleum to [BGP] within 24 calendar months after receipt thereof, provided [BGP] 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 [BGP] of the disputed item within 30 days of the receipt of the particular invoice [whereupon the former would be entitled to withhold the actual amount in dispute without prejudice to any other rights or remedies];
> (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

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14 AB504-512.
15 AB513-528. This deed is materially the same as Amendment Deed 3.
16 Clause 2.

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 [BGP] 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 [BGP] 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 [BGP] 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;

[(ii) by art 12.3, that BGP should furnish the vessels and other equipment required for continuous performance of the Work];

[(iii) by art 12.5, that BGP should furnish and prepare a complete and accurate record of all Work performed as required by exhibit 1];

(j) by art 12.6, for the delivery of data by [BGP] to the plaintiff upon completion of identifiable portions of the Work;

(k) by art 12.7, that [BGP] 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;

[(kk) by art 12.17 that BGP agreed to perform the Work as required and at the times established under the Contract and/or otherwise communicated to it];

(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 [and by art 19.2, that the changes should be made by a ork order];

(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 [BGP] 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 [BGP] 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 [BGP] 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 working days;
   (ii) for BGP Prospector, the estimated start date was end June 2011 and the area and period were 2677 sq km in 42 working days;
   (iii) for Haiyangshiyou 719, the estimated start date was January 2011 and the estimated area and period were 915 sq km in 32 working days;

(r) by Amendment Deed 2, that:

(i) for BGP Prospector, the estimated start date was postponed to 30 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 [BGP] 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 [BGP] 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."

**Performance of, and invoicing for, the work**

[16] BGP began the survey work in January 2011 and finished it in March 2012. On the basis of that work, it undertook data processing, leads assessment and prospects

evaluation. It compiled reports with respect to different survey areas and provided them to Palmer Petroleum.

[17] One of the reports provided was a subject of the proceeding under appeal. It contained an evaluation of hydrocarbon resources within the area of PPL 380 ("the PPL 380 report"). Palmer Petroleum received that report in May 2012.

[18] As it carried out work under the contract, BGP invoiced Palmer Petroleum. The first invoice was dated 4 March 2011. The total amount invoiced was slightly under the capped amount of US$35 million. Palmer Petroleum paid US$18,222,148.21 against the invoices. A substantial invoiced amount remained unpaid, as did a deferred finance fee. BGP served a statutory demand on Palmer Petroleum in December 2015. It was wound up in insolvency on BGP's application in 2016.

**The judgment at first instance**

[19] The first declaration sought by Palmer Petroleum was that it was not bound by the Guarantee or that any liability on its part under the Guarantee had been discharged or released. Palmer Petroleum advanced a number of arguments in support of this declaration.

[20] The learned primary judge rejected an argument that the amendments effected by the Amendment Deeds were so fundamental as to substitute for the Contract a new contract to which the Guarantee had no application.[17]

[21] Turning to clause 4 of the Guarantee, his Honour found that amendments made by Amendment Deed 1, Amendment Deed 2 and Amendment Deed 3 were either alterations to, additions to or deletions from the Contract or the scope of works to be performed under it for the purposes of paragraph (a) of the clause.[18] He rejected an argument that the same paragraph, properly construed, did not countenance alterations, additions or deletions to the Contract or the scope of works that released, or had the effect of releasing rights that Palmer Petroleum had, or may have had, for breaches of contract by BPG.[19]

[22] Palmer Petroleum also argued that, independently of clause 4, and by operation of the law of guarantees, the Guarantee was discharged by reason of Palmer Petroleum's having "waived" or agreed to release BGP from alleged breaches of the Contract by it. The learned primary judge rejected this argument at a level of general principle, finding it unnecessary to determine whether or not BGP had breached the Contract in a way which would have entitled Palmer Petroleum to terminate it.[20] As a consequence, his Honour also found it unnecessary to determine a responsive argument for BGP that Mineralogy had consented to the amendments to vary the Contract and that the consent operated to preclude it from relying on prejudicial variations as having discharged the Guarantee.[21]

[23] The learned primary judge rejected an argument by Palmer Petroleum which sought to have article 5.8 of the Contract construed so as to have effect that once there had been unsatisfactory performance by BGP, Palmer Petroleum ceased to be liable thereafter to make any payment for work done. His Honour considered that this

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17 Reasons at [28]-[35].
18 Reasons at [37]-[39].
19 Reasons at [40]-[55].
20 Reasons at [56]-[74].
21 Reasons at [75]-[82].

provision did not operate as a bar to recovery of payment for undisputed invoiced items of work.[22] This argument was linked to an allegation that BGP's "failure" to report the prospective existence of recoverable volumes of condensate and oil in the PPL380 report constituted "unsatisfactory performance" within the meaning of the article. Acknowledging the possibility that he had erred in deciding the construction issue, his Honour considered this allegation. He concluded that Mineralogy had not proved unsatisfactory performance in the case of that report.[23]

[24] Further, the learned primary judge also rejected an argument that the same matters alleged to have constituted unsatisfactory performance under article 5.8 also made it unconscionable conduct on the part of BGP to demand payment of unpaid invoices.[24] That allegation had been made in support of the claim in the alternative for relief by way of an order pursuant to s 237 of the *Australian Consumer Law* relieving Palmer Petroleum of any obligation to pay any sum to BGP.

[25] As an alternative to the primary declaration, Mineralogy also sought an order pursuant to s 87 of the *Trade Practices Act* 1974 (Cth) (TPA) avoiding the Guarantee *ab initio*. The order was underpinned by a pleading that BGP had engaged in misleading or deceptive conduct in contravention of s 52 TPA. It was alleged, first, that BGP had misrepresented its skill and competence to provide a report as to the prospective existence and volume of resources of oil and condensate and, secondly, that such was to be inferred principally from an absence of opinions with respect to those topics in the PPL 380 report. The learned primary judge held that it was not open to draw such an inference and concluded that BGP had not engaged in misleading or deceptive conduct as alleged.[25]

[26] Having rejected Mineralogy's arguments in support of its claim for relief, the learned primary judge turned to consider BGP's counterclaim. He gave judgment on it as I have already detailed.[26]

**The grounds of appeal**

[27] The notice of appeal filed by Mineralogy advanced 11 grounds of appeal. Two of them, (j) and (k), were abandoned.[27] The grounds on which Mineralogy made submissions are the following:[28]

> "(a) The learned trial judge having found (at [8]) that the principal contract had been amended (the amendments) erred in failing to find that the Appellant was discharged from any liability under the guarantee by reason of the amendments.
>
> (b) The learned trial judge erred in failing to apply the principle of construction that clause 4 of the guarantee should be construed strictissimi juris in the Appellant's favour.
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> (c) The learned trial judge erred in finding that upon its proper construction clause 4 of the guarantee applied to the amendments

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22 Reasons at [83]-[110].
23 Reasons at [111]-[130].
24 Reasons at [176], [177].
25 Reasons at [145]-[175].
26 Reasons at [178]-[188].
27 Appeal Transcript ("AT") 1-45 ll36-39.
28 AB1203-1204.

such that the Appellant was not discharged from any liability under the guarantee.

(d) The learned trial judge, without deciding, erred in finding that it might be inferred that the Appellant consented to the amendments.

(e) The learned trial judge erred in failing to make findings that the Respondent engaged in conduct which amounted to breaches or anticipatory breaches of the principal contract.

(f) The learned trial judge erred in deciding that there was no principle to the effect that a breach or anticipatory breach of the principal contract by the creditor discharges the surety unless the breach is unsubstantial and not prejudicial to the surety.

(g) The learned trial judge erred in failing to find that:

(i) there had been breaches and/or anticipatory breaches of the principal contract by the Respondent that were not unsubstantial and were prejudicial to the Applicant; and

(ii) by reason thereof the Appellant was discharged from any liability as guarantor.

(h) The learned trial judge erred in finding [at 164] 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) The learned trial judge erred in finding that the defendant was not guilty of unsatisfactory performance of the contract and [at 129] that the plaintiff had not 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."

[28] In its written outline of argument, Mineralogy addressed grounds (a) – (d) together under the heading "The primary judge erred in construing cl 4 of the Guarantee". Grounds (e) – (f) were addressed similarly under the heading "The primary judge erred in finding that breach or anticipatory breach of the Contract would not discharge the Guarantee". Grounds (h) and (i) were addressed individually under respective headings of "The primary judge erred in rejecting the claim of misleading or deceptive conduct" and "The primary judge erred in rejecting the claim of unsatisfactory performance within the meaning of art 5.8 of the Contract".

[29] At the hearing of the appeal, counsel for Mineralogy made submissions on five topics. Three of the topics mirrored the outline of argument in that, in presentation, Grounds (a) – (d) were addressed together, as were Grounds (e) – (g); and Ground (i) was addressed separately. The other two topics were a survey of provisions in the Guarantee, the Contract and the Amendment Deeds; and matters raised by the notice of contention. No oral submissions were made in respect of Ground (h). It is convenient to consider the grounds of appeal as they are grouped in the submissions.

**Grounds (a) – (d)**

[30] The learned primary judge attributed to the words "alterations", "additions" and "deletions" to or from the Contract as used in cl 4(a) of the Guarantee, their ordinary meaning.[29] As noted, he concluded that the variations made by Amendment Deed 1, Amendment Deed 2 and Amendment Deed 3 were within the ordinary meaning of those words.[30]

[31] From that point, his Honour next considered whether, as Mineralogy had argued, cl 4(a) ought to be interpreted in a way that, to use his words, "read down" the clause so as to exclude any variation by way of alteration, addition or deletion that releases, or has the effect of releasing, BGP from liability for breach of contract.[31]

[32] The learned primary judge noted that no authority directly on point was cited for the argument and that Mineralogy relied on "general propositions accepted in *Ankar* [*Pty Ltd v National Westminster Finance (Australia) Ltd*[32]] that the liability of a guarantor is *strictissimi juris* and a contract of guarantee is construed strictly". In his discussion of the argument, his Honour had regard to a number of considerations, namely:

> "[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.[33]
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> [45] Second, following *Ankar*, in 1989[34] and 2004[35] the High Court again accepted that guarantees and indemnities are to be read *contra proferentem* where there is ambiguity.
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> [46] Third, since 2004, the High Court has carefully considered the correct approach to the construction of commercial contracts, in general, on numerous occasions.[36] A recent statement in 2015 in *Mt Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* illustrates:
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> > "In determining the meaning of the terms of a commercial contract, it is necessary to ask what a

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29 Reasons at [37].
30 Reasons at [38], [39].
31 Reasons at [40]-[42].
32 (1987) 162 CLR 549; [1987] HCA 15.
33 (1987) 163 CLR 549, 557-558 and 562.
34 *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242, 256.
35 *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424, [23].
36 *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].

> 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'."[37] (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 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.'"[38] (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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37 (2015) 256 CLR 104, 116-117 [57] and [51].
38 (2014) 251 CLR 640, 656-657 [35].

> '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.'"[39] (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.[40] But the decision of the Supreme Court of the United Kingdom in *Rainy Sky SA v Kookmin Bank*[41] is more important. That case concerned the construction of refund guarantees, but no mention was made of the contract as one of guarantee in discussing the principles of construction that apply to a commercial contract."

[33] Next, his Honour reasoned to a conclusion that Mineralogy's argument should be rejected in the following way:

> "[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

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39 [2017] NSWCA 121, [163].

40 *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].

41 [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].

performed under the contract" to alterations that do not have the effect of a release from liability for breach of contract.[42]

[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 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."

[34] **Mineralogy's submissions:** Mineralogy submitted that the approach adopted by the learned primary judge of analysing the ordinary meaning of clause 4(a) and then inquiring whether that meaning should be read down risked error. As the High Court had affirmed in *Ankar*, the correct approach is to ascertain the true legal meaning of clause 4(a) in accordance with settled principles of construction that apply to a guarantee. That approach, Mineralogy submitted, would have required construction of the provision *strictissimi juris*.[43]

[35] Referring to paragraphs 44 and 45 in the Reasons, Mineralogy contended that the learned primary judge had wrongly conflated the equitable doctrine of construction *strictissimi juris* with the legal rule of construction *contra proferentem*. One aspect of construing guarantees *strictissimi juris* is that, in common with the *contra proferentem* rule, any ambiguity is to be resolved in favour of the guarantor. However, that is not the entire ambit of the doctrine.[44]

[36] By way of illustration of differences between the doctrine and the rule, Mineralogy proposed that the principle that a variation, neither beneficial nor risk-neutral to the guarantor, made to the principal's contract without the guarantor's consent discharges the guarantee, is a manifestation of the *strictissimi juris* doctrine. So also is holding the guarantor strictly only to that which is agreed. These dimensions to the doctrine show it to be much more broad in scope than the *contra proferentem* rule.[45] Moreover, unlike the *contra proferentem* rule, the doctrine is not dependent for its operation upon a discerned ambiguity in the text of the guarantee under consideration.[46]

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42 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.

43 Appellant's Outline of Submissions ("AOS") paragraph 9.

44 AOS at [10].

45 AOS at [12].

46 AOS at [13].

[37] In a similar strand of argument, Mineralogy challenged the statement by Campbell JA in *Rava*[47] that the *strictissimi juris* principle of construction is "an aspect of the *contra proferentem* rule" as taxonomically incorrect[48] and inconsistent with the view of the plurality in *Ankar*.[49]

[38] Also challenged was the relevance of his Honour's observation at paragraph 48 of the Reasons that no High Court decision had specifically considered the approach to the construction of commercial contracts articulated by that Court in *Mt Bruce Mining* and *Electricity Generating Corporation*[50] as it might apply to the construction of a commercial contract of guarantee. The observation overlooked that in 2016 in *Moreton Bay Regional Council v Mekpine Pty Ltd*,[51] French CJ, Kiefel, Bell and Nettle JJ had confirmed that a guarantee is ordinarily construed *strictissimi juris*. The guarantee in that case related to a shopping centre lease. Moreover, it was submitted, the relevant principles of construction as articulated by Mason J in 1982 in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*,[52] and prior to the decision in *Ankar* in which his Honour participated, had not materially changed.[53]

[39] Turning to what was submitted to be the proper approach to the construction of clause 4(a), counsel for Mineralogy identified as the starting point the principle of discharge by variation to which I have referred. Citing from the speech of Lord Jauncey in *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd*,[54] counsel maintained that whilst the principle may be excluded by agreement, the words of exclusion, to be effective, must be "clear and unambiguous".[55]

[40] It was urged for Mineralogy that the reservation in clause 2 of the Guarantee ought to be construed and applied to the full extent of its meaning as the Court determined it to be. That was the relevant enquiry. It was incorrect for his Honour to have, in the first place, construed the reservation with an objective of reconciling it to clause 4(a).[56] Rather than accommodating the two provisions, the construction of clause 4(a) adopted by his Honour left Mineralogy "in no different position than if [the reservation in] clause 2 did not exist".[57]

[41] Next, it was submitted that both the Guarantee and the Contract were entered into contemporaneously, the former ought to be read in light of the latter. Citing the "time of the essence" provision in art 39.1, it was argued that the expression "scope of the work to be performed" in clause 4(a) should not be construed as applying to a failure to comply with essential time stipulations in a way that would subject the guarantor to an increased period of exposure to liability.[58]

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47 Adopted by McColl JA in her discussion at [173] in *CSR Ltd v Adecco*, which was extracted by his Honour at [48] of the Reasons.

48 AOS at [14].

49 At 561.

50 Extracts from which are set out in Reasons at [46], [47].

51 (2016) 256 CLR 437; [2016] HCA 7 at [55], citing *Ankar* at 561 and *Chan* at 256.

52 (1982) 149 CLR 337 at 352.

53 AOS at [15]. It was also noted that in both *Ankar* at 560 and in *Andar Transport Pty Ltd v Brambles Ltd* at [20], the High Court had declined to adopt a different rule for commercial guarantees.

54 [1996] AC 199 at 208c.

55 AOS at [17].

56 Reasons at [52], [53].

57 AOS at [20].

58 AOS at par 21(a).

[42] Further, characterising art 19.1 as an exception to art 39.1, counsel for Mineralogy noted that the former is expressly predicated upon the parties' anticipation that changes in the Work may be required "as the Work progresses". Art 19.1, therefore, applied to changes taking place only after Work had begun, and not beforehand. Specifically, this article did not authorise changes to correct defects or defaults on the part of BGP that had already occurred.

[43] Counsel for Mineralogy contended that changes addressed under art 19.1 might be to the cost or timing of work, in which case the relevant variation would be to the Contract (the first limb of clause 4(a)); or to the scope of work to be performed (the second limb).[59] Clause 4(a), therefore, is to be construed as applying only to alterations, additions or deletions authorised under art 19.1.[60]

[44] It was also submitted for Mineralogy that variations effected by the Amendment Deeds as to start dates, areas and work periods for the vessels, released BGP from liability for its failure to comply with essential time conditions of the Contract prior to the commencement of works under the Contract. Those variations were not effected by alteration, amendment or deletion within the scope of clause 4(a) as Mineralogy submitted it is to be construed. Consistently with principle, they discharged the Guarantee.[61]

[45] I mention that, by way of Reply, it was submitted for Mineralogy that the Guarantee applied to obligations "contained in" or "under" the Contract as identified in the Guarantee document as it existed at the time of execution of the Guarantee.[62] It did not apply to the Amendment Deeds because the variations to obligations effected by them were not contained in, or under, the Contract. They were not within the scope of art 19.1.[63]

[46] **BGP's submissions:** BGP submitted that the learned primary judge did not misapprehend the doctrine of *strictissimi juris* as one that is of last resort and limited to cases of ambiguity. His Honour's observations at paragraph [21] and [42] of the Reasons showed that. He was correct to acknowledge that resolution of ambiguity in favour of a guarantor is within the ambit of the doctrine.[64]

[47] Further, his Honour was correct in saying, at paragraph [50] of the Reasons, that 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 meaning of wide words deployed by the parties. Clause 4(a) is an instance in point. The words used in clause 4(a) are wide. They cover any variation by way of amendment, addition or deletion to or from the Contract or the scope of works to be performed under it. They are necessarily intended to have a broad ambit given that parties will not know what variations may be required until time passes.[65]

[48] As to Mineralogy's various arguments for "reading down" the wide words of the clause, BGP submitted, first, that there is no inconsistency between clause 2 and

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59 AT1-22 ll11-15.
60 AOS at par 21(b).
61 AOS at [23].
62 Clauses 1 and 2.
63 Reply at [14], [15]. This submission was made without advertence to the definition of "Contract" in the Contract.
64 Respondent's Outline of Submissions ("ROS") at [6], [7].
65 ROS at [8].

clause 4(a). The effect of these two provisions is that defences available to Palmer Petroleum are also available to be asserted by Mineralogy, but a defence based on alleged actual or potential breach will not be available to Mineralogy if it has been addressed by a variation to the contract.[66]

[49] Secondly, neither art 39.1 nor art 19.1 assist Mineralogy's case. Under the former, Work was to be completed "within the time periods stipulated in the Contract or within Approved time periods". Given the definitions of "Approved" and "Approval" in art 2.1, times, as varied by the Amendment Deeds, were Approved time periods.[67] The Work Order mechanism under art 19.1 is irrelevant to the construction of clause 4(a). Were the latter to apply only to variations by Work Order under the former, then it would be superfluous because variation by Work Order is a process for which the Contact, the subject of the Guarantee, has always provided.[68]

[50] Thirdly, the words "to be performed" in clause 4(a) are not ambulatory in operation so as to refer only to Work remaining to be done under the Contract at any given time. They do not support an interpretation that limits the provision to variations yet to fall due for performance under the Contract.[69]

[51] **Discussion:** It is clear, as Mineralogy has submitted, that the *strictissimi juris* doctrine and the *contra proferentem* rule coexist with respect to the construction of guarantees. As was recently observed by the Full Court of the Federal Court in *Todd v Alterra at Lloyd's Ltd*,[70] the strict construction of guarantees does not depend upon the *contra proferentem* rule.

[52] There is, however, substantial overlap in the application of the doctrine and the rule where there is ambiguity. That this is so is evident from the following observation in the joint judgment of Mason ACJ, Wilson, Brennan and Dawson JJ in *Ankar*:

> "At law, as in equity, the traditional view is that the liability of the surety is *strictissimi juris* and that ambiguous contractual provisions should be construed in favour of the surety."[71]

This observation was cited with apparent approval by Mason ACJ, Brennan and Deane and McHugh JJ in *Chan*.[72] Further endorsement for it was given in 2004 in *Andar*[73] and, as noted, in 2016, in *Moreton Bay Regional Council*.[74]

[53] The learned primary judge noted Mineralogy's reliance on the observation in *Ankar* at paragraph 42 of his Reasons. I do not understand his Honour to have misunderstood or misapplied it. He did not, for example, propose that the doctrine applied only in cases of ambiguity or that it had been displaced by the *contra proferentem* rule. Significantly, he did not search for ambiguity in the text of the Guarantee on the footing that the doctrine could apply only if ambiguity was detected.

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66 ROS at [11].
67 ROS at par 12(a).
68 ROS at par 12(b).
69 ROS at [13].
70 (2016) 239 FCR 12; [2016] FCAFC 15 per Allsop CJ and Gleeson J at [34].
71 At 561.
72 At 256.
73 Per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ at [17].
74 At footnote 25.

[54] In the course of oral argument, counsel for Mineralogy identified paragraph 50 in the Reasons as "most clearly" revealing error in two respects. One error was a suggestion in it that there is a different principle of construction for a commercial contract of guarantee, namely, that it is to be interpreted like any other commercial agreement.[75] The other was to assert that there is no general principle that courts should read down words of generality in a commercial contract of guarantee.[76]

[55] As to the first alleged error, I do not understand his Honour to have proposed, expressly or impliedly, that a different principle of construction applies in the case of a commercial contract of guarantee with effect that such a guarantee is not to be interpreted strictly. He did not speak of different rules applying to different categories of guarantee.

[56] With respect to the second alleged error, Mineralogy's criticism depends upon a proposition that there is a general principle of construction that words of generality in a commercial contract of guarantee are to be read down. No support for such a principle was cited. It is, in my view, inconsistent with what was said by the Privy Council in *Coghlan v S H Lock (Australia) Ltd*.[77] That case concerned a company directors' guarantee of corporate trading debts. Their Lordships referred to the principles of strict construction and of *contra proferentem* and then said:[78]

> "But these principles do not, of course, mean that where parties to such a document have deliberately chosen to adopt wording of the widest possible import that wording is to be ignored. Nor do they oust the principle that where wording is susceptible of more than one meaning regard maybe had to the circumstances surrounding the execution of the document as an aid to construction."

[57] In summary, I am not persuaded that his Honour proceeded upon a misapprehension that the Guarantee was not to be interpreted strictly. However, consistently with *Coghlan*, to interpret the Guarantee strictly does not necessitate a reading down of the widely-worded constituent elements of clause 4(a).

[58] I now turn to Mineralogy's reliance upon contextual and textual considerations. At a broad level, Mineralogy submitted that clause 1 of the Guarantee limited its application to performance of all of Palmer Petroleum's obligations contained in the Contract as it existed at 28 July 2010, to the exclusion, in particular, of obligations arising from the Amendment Deeds.

[59] That submission is unsustainable. The contractual document, as described in the introductory paragraph in the Guarantee and referred to in its terms, at the time when both the Guarantee and Contract were executed, included, in art 2(e), the definition of "Contract" which I have set out above. That definition extends to amendments made from time to time. There is no reason to exclude that definition from the Contract to which the Guarantee is referenced. No contextual or textual factor was identified which might suggest that parties intended that the Guarantee extend only to the contractual obligations of Palmer Petroleum as they existed at 28 July 2010.

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75 AT1-10 ll25-29.
76 AT1-11 ll13-18.
77 (1987) 8 NSWLR 88.
78 At 92f-g.

[60] Next, there is Mineralogy's contention that the learned primary judge read down the reservation in clause 2 in order to give clause 4(a) a broad construction.[79] The reading down, as explained in oral submissions, was from a meaning which relies on the use of present tense in the reservation. According to this meaning, any claim or defence available to Palmer Petroleum is available to Mineralogy as soon as it arises and remains reserved to Mineralogy even if Palmer Petroleum engages in conduct that has the effect that the claim or defence is no longer available to it.[80]

[61] To my mind, such a meaning conceives of a claim or defence that Palmer Petroleum may have as dualized, such that it is exercisable by both Mineralogy and Palmer Petroleum either together or independently of each other.[81] As counsel for Mineralogy put it in oral argument, in the case of a breach by BGP, there would be two causes of action against, one for Palmer Petroleum and one for Mineralogy, each of which might be pursued independently of the other.[82]

[62] This conception of a claim or defence available to Palmer Petroleum as one that is dualized, is difficult to reconcile with conventional legal concepts. How it is that, without assignment, the claim or defence would be invested in Mineralogy the moment it arises as a claim or defence available to Palmer Petroleum, is quite unexplained. In these circumstances, I cannot accept that the meaning of the reservation for which Mineralogy contends, is open.

[63] By contrast, the meaning given by the learned primary judge that the reservation encompasses claims or defences of Palmer Petroleum as they may exist from time to time, accords with its natural and ordinary meaning. That meaning is not the product of a reading down of a viable broader meaning of the kind for which Mineralogy contends.

[64] Mineralogy has also submitted that a strict construction of clause 4(a) confines it to changes effected under the regime for which art 19.1 provides. Clause 4(a) itself is not, of course, expressly referenced, much less limited, to alterations, additions or deletions effected that way.

[65] This submission is not without difficulty. There is no textual nexus with art 19.1 in clause 4(a). By contrast, the clause has a coherence with the reference to amendments made from time to time to the terms and conditions of the Contract Form or the Exhibits as contemplated by the definition of "Contract".

[66] I have particular difficulty with the proposition that a strict construction of the first limb of clause 4(a), wide as it is in its reference to "**any** alteration to, addition to, or deletion from the Contract", necessitates its being construed as applying only to alterations, additions or deletions to the Contract effected by means of art 19.1. That article is focused upon changes in the Work. It is not directed towards the subject of alteration, additions or deletions to or from the Contract. Having regard to that, I consider that the proposition seeks to give an unrealistically narrow meaning to the first limb of clause 4(a).

[67] It remains to note that such a narrow interpretation of clause 4(a) would not necessarily avail Mineralogy in arguing that the Amendment Deeds effected

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79 AT1-17 ll36-40.
80 AT1-23 ll20-37.
81 As counsel for Mineralogy submitted at AT1-24 l24 – AT1-25 l8.
82 AT1-26 ll34-42.

variations to the Contract beyond the scope of art 19.1. That is because each of Amendment Deeds 1, 2 and 3 respectively expressly state that by executing the Deed, the parties have satisfied the requirements of art 19.[83]

[68] A related argument for Mineralogy was that "[c]lause 4(a) looks prospectively to future performance, by referring to alterations to the Contract or to the scope of the work "to be performed under the Contract", and not backwards to alterations to cure a failure to perform work that was required to have already been performed". By this argument, Mineralogy would have the words "to be performed under the contract" apply not only to the words "the scope of the work", but also to the first limb of cl 4(a). The argument is contrary to the unambiguous terms of cl 4(a) and cannot be accepted.

[69] For these reasons, I conclude that these grounds of appeal have not been established. I would add that, in my view, the construction of clause 4(a) adopted by the learned primary judge is correct. That construction precludes argument that alterations, additions and deletions to or from the Contract or the scope of work to be performed under it which, expressly or impliedly, released enforceable rights that Palmer Petroleum may have against BGP, are beyond the field of operation of clause 4(a).

**Grounds (e) – (g)**

[70] At first instance, Mineralogy advanced an argument that, independently of clause 4(a), the Guarantee was discharged, as a matter of law, by the conduct of Palmer Petroleum in "waiving", or agreeing to release BGP from alleged breaches of contract by it. The learned primary judge distinguished the instance addressed by that argument from the circumstance where a creditor waives a breach of the principal contract by the other party to it.[84]

[71] His Honour noted that no authority was cited to him in support of the argument. At paragraph 60 of the Reasons, he rejected it in these terms:

> "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.[85] I accept that view for the following reasons."

[72] The reasons given by his Honour are:

> "[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

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83 Amendment Deed 1 clause 4: AB 462, Amendment Deed 2 clause 3: AB 480, Amendment Deed 3 clause 7: AB 515.

84 At [57]. His Honour noted that in the latter instance, the rights to which the guarantor would be subrogated upon honouring the guarantee, would be thereby affected to the presumptive prejudice of the guarantee.

85 Andrews and Millett, *The Law of Guarantees*, 7 ed, 391-392 [9-017].

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 plaintiffs 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*,[86] 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, 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.[87]

[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

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86 (1862) 4 De FG & J 367; (1862) 45 ER 1225.

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

liability under the guarantee is not discharged by a later termination.[88] 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.[89]

[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.[90]

[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*.[91] 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 basis",[92] and there has been some judicial suspicion directed towards the extent of the principle.[93] For my purposes, it is enough to say

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

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

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

91 (1862) 15 Moo PCC 472, 483; 15 ER 573, 577.

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

93 *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

> 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."

[73] **Mineralogy's submissions:** Mineralogy submitted that the learned primary judge erred in rejecting the general principle for which it had argued. In a challenge to his Honour's stated reasons for rejecting it, reference was made to paragraph 65 and 66 thereof. It was wrong for his Honour to have concluded that the Guarantee was not of a kind exemplified by *Blest*. Clause 2 of the Guarantee, it was argued, has the consequence that a breach of the Contract by BGP is a breach of the Guarantee.[94] Under the Contract, time was of the essence. Hence, a failure to adhere to time conditions by BGP was a breach of a condition of the Contract and, by virtue of clause 2, a breach of a condition of the Guarantee, thereby discharging Mineralogy from it. No waiver thereafter by Palmer Petroleum could have restored Mineralogy to liability under the Guarantee.[95]

[74] As an alternative argument, Mineralogy submitted that "there is no principled reason why a sufficiently serious breach by [a party in the role of BGP under the Contract] (whether or not waived by [a party in the role of Palmer Petroleum]) ought to be treated differently to other circumstances in which the guarantee is discharged by the conduct of the principal and creditor under their contract which prejudicially affects the guarantor".[96]

[75] In developing the argument, counsel for Mineralogy referred to instances where it is well-established that a guarantee is discharged when, without its consent, the guaranteed obligation is altered from its state when the guarantee was given: where the parties to a principal contract vary it; where the creditor discharges or impairs a security or releases a co-surety; or where the creditor waives rights against the other party to the principal contract.[97] It was submitted that an underlying principle inheres in these instances which applies with equal force to an instance where a breach or anticipatory breach of the contract by the creditor, whether or not waived by the other party, alters the obligation guaranteed. In oral submissions, counsel refined this instance to a "serious" breach or anticipatory breach where seriousness is assessed by reference to the practical impact on the guarantor.[98]

[76] This latter instance, it was further submitted, would include a case where the creditor's breach or anticipatory breach results in an alteration to the guarantor's obligation via an extension of the period of time for which the guarantor is liable or,

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*Graeme Webb Investments Pty Ltd v St George Partnership Banking Ltd* (2001) 38 ACSR 282, 302 [85]-[86].

94 AOS at [26].

95 AOS at [27].

96 Citing *O'Donovan & Phillip's The Modern Law of Guarantee* (3rd edit 2016) at 7-042.

97 AOS at [29].

98 AT1-33 ll10-29.

in the case of a waiver by the other party, the removal from the guarantor of the ability to claim on the creditor's breach or anticipatory breach in reduction of its liability.[99] It was contended[100] that the application of the principle to such circumstances is supported by observations made in *Farrow Mortgage Services Pty Ltd (in liq) v Williams*[101] and *Wardens & Commonalty of the Mystery of Mercers of the City of London v New Hampshire Insurance Co*[102] and the conclusions reached in *Lensworth Finance Ltd v Worner*[103] and *Watts v Shuttleworth*.[104]

[77] As well, Mineralogy submitted that the distinction drawn by his Honour with the case of a defaulting debtor did not acknowledge the prejudice to a guarantor where either party to the principal contract is in serious breach; and secondly, that the factor that it may not be in the best interests of the principal or guarantor to accept a repudiation and terminate the principal contract does not prevail against discharge in the well-established instances where a guarantee is discharged by operation of law. The incoherence with other principles discerned by his Honour was also challenged.[105]

[78] **BGP's submissions:** BGP relied on the analysis undertaken by the learned primary judge with respect to both arguments. Further, it submitted that either argument, if accepted, could have availed Mineralogy only if BGP had committed a breach or anticipatory breach of the Contract. That had not occurred. Specifically, there was no condition in the Contract incorporated into the Guarantee, breach of which would have justified termination by Mineralogy or which could have discharged the Guarantee. Nor had there been a "sufficiently serious" breach of the Contract by BGP as would have discharged the Guarantee.[106]

[79] **Discussion:** In oral submissions, counsel for Mineralogy explained that the first argument depends upon acceptance of its construction of the reservation in clause 2 of the Guarantee. As counsel put it, the condition that required BGP not to breach the essential time stipulations in the Contract itself became embodied in the Guarantee by virtue of the reservation.[107]

[80] The question posed by this argument is whether the reservation operates so as to incorporate the terms and conditions of the Contract into the Guarantee. To my antecedent discussion of the meaning of it, I would add that the reservation does not use words which, expressly or impliedly, incorporate provisions of the Contract into the Guarantee. In its own terms, the reservation relates to claims or defences available to Palmer Petroleum and reserves them to Mineralogy. These are not words of incorporation by reference of terms and conditions in the Contract.

[81] Further, the reservation is not at all analogous with the contractual provisions in *Blest*. There, a guarantee was given to the supplier of flour to a baker who had contracted with the Government to deliver to barracks bread made from wheat of defined specifications. The guarantee expressly referred to that contract, to a

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99 AOS at [30].
100 AOS at [31].
101 [1994] ANZ ConvR 41.
102 (1993) [1992] 2 Lloyd's Rep 365.
103 [1979] Qd R 159 at 163, 166.
104 (1861) 158 ER 510 at 510-511.
105 AOS at [32].
106 ROS at [24]-[26].
107 AT1-30 ll42-45.

request by the baker that the supplier supply him flour that would enable him to carry out the contract and to the suppliers' agreement to do so. Lord Westbury LC construed the guarantee as being an engagement to be answerable for flour supplied in conformity with the contract specifications.[108] These features of that guarantee which I have noted plainly justified the construction adopted. They have no counterparts in the Guarantee.

[82] For these reasons, I do not accept Mineralogy's first argument.

[83] With regard to the alternative argument, I accept that there is apparent support in *obiter* remarks of Giles J in *Farrow* for it. His Honour found that there was no relevant breach by the financier under a loan agreement with the debtor. Notwithstanding, in questioning a submission for the financier that the guarantor was discharged only upon a repudiatory breach or breach of a condition of the loan agreement which the debtor accepted as terminating it, his Honour said:[109]

> "Yet the guarantor's rights may be just as much, or as little, altered by unilateral breach of the agreement between the creditor and the debtor as by consensual variation of that agreement, and it is not easy to see why breach should not be conduct on the part of the creditor materially altering the guarantor's obligations within the principle stated in *Ankar*, a principle flowing from "the special relationship between creditor and surety arising out of the suretyship contract upon which equity fastened to protect the surety when the creditor's conduct affected the surety's liability".[110]"

[84] In evaluating the potential application of the extension of the principle to a breach by BGP in the present case, I note that the terms of the guarantee in *Farrow*, as summarised in the judgment, do not appear to have contained a provision in any way analogous to clause 4(a) of the Guarantee. Thus, his Honour's remarks do not review how the principle so extended might operate where there is such a provision in a guarantee.

[85] Further, I am unable to regard the other three authorities referred to by Mineralogy as offering unequivocal support for its argument. *Mercers* concerned a surety bond given against the risk that a builder might fail to complete a contract with Mercers on which the latter had made a forward payment. The judge at first instance determined that the terms of the building contract were incorporated into the bond and that the surety was discharged by a variation to the contract which postponed by 10 weeks, the date by which possession of the site was to be given to the builder. On appeal, it was held that the terms of the contract as to the date for possession of the site were not embodied into the bond; that in relation to the payment, there was no repudiatory breach of the building contract nor unsubstantial departure from any term of it that was embodied in the bond; and that, therefore, the liability of the guarantor was not discharged.

[86] One of the members of the Court of Appeal, Scott LJ, observed:[111]

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108 At 1229.
109 At 8-9.
110 At 559.
111 At 12.

> "The substantiality of the breach of contract ought, I think, to be assessed by reference to the impact of the breach on the risk undertaken by the surety. I would think it possible that even a repudiatory breach of contract would not necessarily discharge a surety. Discharge should, in my opinion, depend on the importance of the breach in relation to the risk undertaken. Similarly, a non-repudiatory breach might, in particular circumstances, significantly alter the risk and so enable the surety to claim to be discharged."

It is on these observations that Mineralogy relies.

[87] As I read them in context, I understand the observations to be directed at whether a breach of a term which is embodied in a guarantee must be repudiatory before the guarantor might be discharged. I say this for several reasons. First, a little later, Scott LJ made the point that not only was the breach in question non-repudiatory and intrinsically unsubstantial, but also it was not part of the obligations guaranteed. Secondly, the observations were made immediately after his Lordship had quoted the following statement from the judgment of May LJ in *National Westminster Bank plc v Riley*:[112]

> "I do not think that a non-repudiatory breach of the principal contract will, with nothing more, discharge a surety who has guaranteed that contract. A repudiatory breach, if accepted, will certainly do so, but a non-repudiatory breach, if accepted, will not unless it can be shown in fact to amount to a departure from a term of the principal contract which has been "embodied" in the contract of guarantee."

It is noteworthy that Scott LJ did not express any disagreement with that statement. Significantly, it is a statement that contradicts, rather than supports, Mineralogy's argument.

[88] In *Lensworth* the guarantor was discharged from any obligation in a guarantee given to a financer-creditor who, having advanced $33,750 from an agreed loan amount of $121,000, sought to impose additional conditions on the debtor for advance of the balance in light of its interest payment defaults on the initial advance. In a short passage, Andrews J expressed his reason for the discharge of the guarantor. His Honour said:[113]

> "In my view, the plaintiff here failed to lend the sum of $121,000.00 relying upon conditions which could not be tacked onto the guarantee and the defendant was thereby discharged from any obligation there under."

[89] This reason was not elaborated with any discussion of principle. It is preceded by quotations from judgments in *Eshelby v Federated European Bank Ltd*[114] and *Burton v Gray*,[115] both of which were directed at breaches by a creditor of the terms on which the guarantor agreed to be bound as surety.

[90] In *Watts*, the proprietor under a building contract for completion of certain fittings in a warehouse was obliged to insure the fittings from fire risk. A surety agreed

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112 [1986] BCLC 268 at 275.
113 At 166.
114 [1932] 1 KB 254 per Swift J at 266-267, citing per Lord Westbury LC in *Blest* at 376.
115 (1873) 8 Ch App 932 per Mellish LJ at 937.

with the proprietor to guarantee due performance of the work by the builder. Certain of the fittings were destroyed by fire in the builder's workshop. The proprietor had failed to insure. The builder became insolvent. The proprietor sued on the guarantee.

[91] According to the short reasons of the Exchequer Chamber given by Williams J, all the judges were unanimous that the surety was discharged by reason of his having been made responsible for an uninsured principal. The issue for decision was whether the discharge was total, as it was held to be; or only to the extent that the surety could show loss by reason of the failure to insure. There was no elaboration of why it was that the court held the unanimous view that the surety was discharged. It may well have been because it regarded the obligation to insure as one that was embodied in the guarantee.

[92] As with *Farrow*, none of the guarantees in these three cases appears to have included a provision analogous to clause 4(a). Hence, none of the authorities referred to by Mineralogy provides cogent support for its argument.

[93] As I have noted, clause 4(a), properly construed, avoids *inter alia* discharge of the Guarantee by any alteration, addition or deletion to or from the Contract or the scope of work to be performed under it, which expressly or impliedly releases enforceable rights that Palmer Petroleum may have had against BGP for breach of the Contract. Thus, by their express agreement, the parties have thereby excluded any scope for operation of the principle, extended as Mineralogy contends, to breaches by BGP that have been waived by Palmer Petroleum by any of these means.

[94] For these reasons, I also reject Mineralogy's alternative argument. Since neither argument has succeeded, these grounds of appeal also have not been established in my view. It follows that it is unnecessary to consider the contention raised by BGP in its notice that the breaches or anticipatory breaches by it pleaded by Mineralogy as having been waived by Palmer Petroleum under the Amendment Deeds[116] thereby discharging the Guarantee,[117] were not breaches or anticipatory breaches of the Contract.

**Ground (i)**

[95] Art 5 of the Contract is headed "Invoicing and Payment". Art 5.1 required BGP to invoice Palmer Petroleum for Approved invoice charges at the beginning of each calendar month. Art 5.8 provides:

> "Invoices shall be addressed to:
>
> [left blank]
>
> Payment due to BGP may be withheld by [Palmer Petroleum] on account of:
>
> (a) Unsatisfactory performance of this Contract;[118]
>
> (b) BGP's failure to remedy defective portions of the Work where [Palmer Petroleum] has given [BGP] notice of any such defective Work."

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116 FASC at [89], [90] and [91]: AB 1017-1019.

117 Ibid paragraph 94: AB1019.

118 The expression "unsatisfactory performance" is not defined in the Contract.

[96] Payment of undisputed invoice items and notification of dispute concerning an unpaid invoice are the subject of the immediately following provisions, arts 5.9 and 5.10 as follows:

> "5.9 Despite any other clause to the contrary, Payment of 100% of all undisputed invoice items shall be made by [Palmer Petroleum] to [BGP] within twenty four (24) calendar months after receipt thereof by [Palmer Petroleum]'s Finance Department and either (i) [BGP] 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 [BGP] 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 [BGP] 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 [BGP] fails to take appropriate remedial action or refuses to remedy or remove any cause for withholding such payments after delivery of notice to [BGP] 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 [BGP] 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."

Art 12 imposes a deferred payment finance fee in respect of invoices that are undisputed and unpaid.

[97] As I have noted, Mineralogy submitted that BGP's "failure" to report the prospective existence of recoverable volumes of condensate and oil in the PPL 380 report constituted "unsatisfactory performance" within the meaning of art 5.8.

Mineralogy further submitted that, properly construed, art 5.8 operated to release Palmer Petroleum from liability thereafter to pay any unpaid invoice.

[98] It was common ground that none of the unpaid invoices related to the PPL 380 report. BGP submitted that art 5.8 did not operate to defeat its right to payment of those invoices.

[99] The learned primary judge considered the construction issue first. Speaking of the construction advanced by Mineralogy, his Honour said:

> "[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."

[100] As I have also noted, the learned primary judge did consider whether there was unsatisfactory performance as alleged. His Honour rejected submissions by Mineralogy that, on the pleadings, BGP had admitted an unqualified obligation to provide a report on the potential existence of recoverable volumes of hydrocarbons including gas, oil and condensate;[119] and that certain contractual provisions obliged BGP to provide such a report.[120]

[101] The learned primary judge adverted to other contractual provisions that relate to standards for the preparation of that report, namely, "generally accepted international petroleum industry standards"[121] and "generally accepted geophysical industry standards".[122] His Honour reviewed the evidence given by each side's expert witness and concluded that that body of evidence did not justify a conclusion that conformity with such standards had required BGP to report as to the potential existence of recoverable volumes of condensate and oil in the PPL 380 report.[123]

[102] **Mineralogy's submissions:** Mineralogy submitted that upon its plain terms, art 5.8 does not confine the right to withhold payment to an invoice for particular work amounting to unsatisfactory performance. It bestows a remedy applicable to all unpaid invoices which is in addition to other remedies under the Contract such as art 12.7 or at law.[124]

[103] As to unsatisfactory performance, Mineralogy submitted that BGP had admitted on the pleadings an obligation to report on the potential existence of areas of hydrocarbons including gas, oil and condensate.[125] The report was required to opine on the potential existence or non-existence of all three types of hydrocarbon.[126] It failed to do so. The pleaded qualifications to the admission[127] did not alter the substance of it; moreover, the evidence supported a finding that it was within the competence of a service provider such as BGP to express an opinion on such matters with the consequence that the qualifications to the admission did not arise.[128]

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119 Reasons at [117].
120 Reasons at [122].
121 art 10.1(c).
122 ex 1, annex 1.2, sch A, par 12.3.7.
123 Reasons at [123]-[130].
124 AOS at [38].
125 SFAD at par 4(e): AB1035.
126 AOS at [39].
127 SFAD at par 4(a)(c): AB1034-1035.
128 AOS at [40].

[104] **BGP's submissions:** BGP adopted the reasoning of the learned primary judge on the construction issue as correct.[129] His Honour was also correct, it was submitted, in concluding that BGP was not obliged to report as to the potential existence of recoverable volumes of oil and condensate.[130] Its qualified admission did not state or imply that in order to meet its obligation, there would need to be specific reference to oil and condensate.[131]

[105] BGP further submitted that Mineralogy's own expert had testified that it is unexceptional in ordinary professional practice that where a report concludes that potential hydrocarbon reservoirs are most likely to be gas, for it to analyse the potential reservoirs on that basis only. The absence of an express reference to hydrocarbons other than gas does not necessarily convey an opinion that there are no other hydrocarbons present. The PPL 380 report ought not be read as conveying such an opinion.[132] There was, therefore, neither breach, nor unsatisfactory performance, in this regard on the part of BGP.[133]

[106] **Discussion:** The construction of art 5.8 for which Mineralogy contends is, in my view, irreconcilable with art 5.9. That provision requires payment of 100 per cent of undisputed invoices within 24 calendar months of receipt by Palmer Petroleum's Finance Department and either BGP having advised Palmer Petroleum in writing of completion of all Work in accordance with the terms of the Contract, or termination of the Contract in accordance with art 3. That requirement is at odds with a construction of art 5.8 that would permit Palmer Petroleum to withhold payment of undisputed invoices indefinitely and notwithstanding written advice of completion given by BGP. Even if Mineralogy's construction of art 5.8 were open, the concession given to Palmer Petroleum by it would yield to the force of the mandatory language[134] in which the obligation to pay all undisputed invoices is expressed in art 5.9 which prevails "despite any other clause to the contrary".

[107] I consider, however, that it is neither necessary nor appropriate to resolve the ambit of the application of art 5.8 in that way. The preferred construction of it is one that aligns with arts 5.9 and 5.10 and does not encounter conflict with either of them. I arrive at such a construction in the following way.

[108] The term "unsatisfactory performance of the Contract" is undefined. Had some broad or ambulatory operation been intended for it, then item (b) in art 5.8 would have been unnecessary. That factor and the sequence in which the two items are placed in art 5.8 suggest that they are intended to apply to invoiced items of work which Palmer Petroleum *bona fide* disputes as unsatisfactory. Item (a) permits Palmer Petroleum immediately to withhold payment once it has received the invoice for such work; art 5.10 continues the permission to withhold once Palmer Petroleum has given BGP notice of the dispute under that provision; and item (b) continues the permission further in the event of a failure by BGP to remedy the unsatisfactory defective work.

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129 ROS at [29].
130 ROS at [30].
131 ROS at [31].
132 Affidavit D Gillies sworn 29 May 2017 paragraph VI: AB863.
133 ROS at [32], [33].
134 The word "shall" denotes a mandatory requirement of the Contract: art 1.9.

[109] Accordingly, I consider that the learned primary judge was correct in his construction of art 5.8. On that construction, Palmer Petroleum could not have relied upon that provision to withhold payment of any undisputed invoice even if it had disputed an invoice for work that included preparation of the PPL 380 report. Further, had there been an invoice for such work, Palmer Petroleum did not act under art 5.10 to dispute it. Hence it would not have been an invoice for which Palmer Petroleum could have withheld payment under art 5.8 properly construed, or art 5.10.

[110] Had Mineralogy succeeded on the construction issue, it ought nevertheless fail on the issue of breach of contract. I respectfully agree with the reasons of McMurdo JA to that effect.

**Ground (h)**

[111] At paragraph 164 of the Reasons, the learned primary judge accepted a submission for BGP, which this ground of appeal challenges, that, on the evidence, it did not engage in misleading or deceptive conduct in representing its professional skill and competence to Mineralogy in ways that the latter had alleged it had. As noted, certain contractual warranties given by BGP as to its experience and capability (art 10.1(a)) and its expertise in the field of marine geophysical data (art 12.7) were pleaded, proof of breach of which, it was further pleaded, was the preparation of the allegedly defective PPL 380 report.

[112] His Honour then considered whether, if misleading and deceptive conduct had been proved by Mineralogy, it would have had any entitlement to relief under s 87(1) TPA. As to that, he concluded:

> "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."[135]

[113] Significantly, there is no challenge to the finding expressed in this paragraph or to its consequence for relief. In the absence of such a challenge, the challenge to the finding of an absence of misleading or deceptive conduct can have no practical consequence for this appeal. I therefore do not propose to consider it in any detail. It is, I think, sufficient to note, as his Honour did,[136] that the affidavit and report of Dr Gillies, the expert called by Mineralogy, contained opinions with which the expert called by BGP, Mr Peacock, agreed, that the PPL 380 report is of an acceptable professional quality, and that the qualifications and *curricula vitae* of BGP's personnel as a whole were appropriate for the work and indicated that they had the skill and competence required to perform the work under the Contract. Those opinions substantially undermine the contention inherent in this ground of appeal that misleading or deceptive conduct was, in fact, proved.

**Disposition**

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135 Reasons at [175].

136 Reasons at [125].

[114] None of the grounds of appeal has succeeded. This appeal must, therefore, be dismissed. Given that the parties requested an opportunity to make submissions on costs once reasons were delivered, that ought to be granted to them.

**Orders**

[115] I would propose the following orders:

1. Appeal dismissed.

2. The parties are to file and serve written submissions as to the costs of the appeal (not to exceed two pages) within seven days of the date of delivery of these reasons for judgment.

[116] **McMURDO JA:** I agree with the reasons which Gotterson JA has given for the dismissal of this appeal. I wish to add something in relation to ground (i), on the appellant's argument that the judge ought to have found that there was "unsatisfactory performance of the contract". I am not persuaded that his Honour was incorrect in finding against the alleged breach of the Contract in the preparation of the PPL 380 report.

[117] Mineralogy argues that, by its pleading, BGP effectively admitted that its report had not satisfied the requirements of the Contract. However a fuller examination of BGP's pleading reveals otherwise. And there was evidence, discussed in the judgment,[137] which supported the judge's finding that there had been no breach, and therefore no "unsatisfactory performance of the contract" by BGP.

[118] The alleged breach, as pleaded in paragraph 29 of the Statement of Claim, was a failure by BGP to record "the existence or prospective existence of very substantial volumes of oil and condensate." By its pleading, BGP denied that it was obliged to report on the existence (as opposed to the prospective or potential existence) of any hydrocarbon.[138] The case for BGP in that respect is now unchallenged.

[119] BGP denied that it had to record the potential existence of "very substantial volumes of oil and condensate". It explained its denial by reference to facts which can be summarised as follows: according to common professional knowledge in the geoscience industry and the field of hydrocarbon exploration (as known to Palmer Petroleum and BGP at the time of entry into the Contract), the focus of a report such as that required in the circumstances of this case would be on "identifying the geological characteristics and structure of the area and its potential to include hydrocarbon reservoirs"; the circumstances of this case included the fact that the report had to be based primarily on seismic surveys without any drilling data; and it was "impossible to be definitive in such a report as to whether any identified potential hydrocarbon reservoirs contain oil, or gas, or condensate, or a combination of any one or more of those things, or as to the volume of any such resources".[139]

[120] At the trial, as the primary judge noted,[140] the case for Mineralogy went beyond its pleading. It argued that BGP was obliged to provide a report on the potential existence of *recoverable volumes* of hydrocarbons. The admission made by BGP[141] was that

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137 Reasons at [111] – [130].
138 SFAD at par 37(a).
139 SFAD at pars 4(a), 16(b)1 and 16(b)2.
140 Reasons at [117].
141 SFAD at par 4(e).

subject to other matters pleaded by it, it was obliged to report "on the potential existence in the areas in question of hydrocarbons including gas, oil and condensate". The primary judge was correct in holding that this was not an admission of an obligation to report on the potential existence of recoverable volumes of hydrocarbons.[142]

[121] The primary judge then considered Mineralogy's submission against relevant terms of the Contract and the evidence which each side called from an expert in the field. The Contract required BGP to "[i]nterpret and compile a comprehensive leads and prospects inventory over [PPL 380] using the processed 3D seismic data merged with all existing G&G data".[143] It provided that "[a]ll reports … shall be compiled and prepared in accordance with … the generally accepted standards of the geophysical industry".[144] As the primary judge noted, no term of the Contract expressly referred to providing a report on the potential existence of recoverable volumes of condensate or oil.[145]

[122] The judge then discussed the expert evidence on the question of what was to be expected in such a report, in accordance with industry standards. His Honour noted that neither expert gave evidence that any generally accepted industry standard required BGP to report on the potential existence of recoverable volumes of condensate and oil.[146] On his Honour's view of the evidence, Mineralogy did not prove that there was any industry standard by which BGP was to be expected to report on the potential existence of recoverable volumes of this material. And given that the terms of the Contract contained no express requirement for that content, the primary judge concluded that BGP was not obliged to report as had been submitted for Mineralogy.[147]

[123] For the most part, Mineralogy's argument is built upon a misinterpretation of BGP's pleading. Once its submission about the pleading is rejected, what remains is a challenge to the findings of the primary judge about the expert evidence. But that challenge goes no further than a submission that "[t]he evidence supported a finding that it was within the competence of a service-provider like [BGP] to opine on [the matters which should have been included in the report]".[148] The submission does not reveal an error by the primary judge in making the relevant findings. Nor, more generally, does the submission suggest any error affecting the primary judge's interpretation of the relevant provisions of the Contract. Consequently, there is no demonstrated basis for disturbing the primary judge's rejection of the claim of unsatisfactory performance.

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142 Reasons at [117].
143 Reasons at [118].
144 Reasons at [119].
145 Reasons at [122].
146 Reasons at [126].
147 Reasons at [129] – [130].
148 AOS at [40].