VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO D420/2009

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Liability of guarantors under contract of guarantee. Whether surety is discharged from its obligations under a guarantee when there has been an alteration to the primary contract which the surety guaranteed. *Anker Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549; whether alternation or variation to primary contract caused by failure to re-issue architectural drawings or shop drawings; whether primary contract required shop drawings to be approved by architect or engineer.

APPLICANT	Monty Manufacturing Pty Ltd (ACN 050 464 536)
FIRST RESPONDENT	Joel David Platt
SECOND RESPONDENT	Abraham Platt (deceased)
THIRD RESPONDENT	Brian Sanderson
FOURTH RESPONDENT	Vito Sgro
FIFTH RESPONDENT	NMBW Pty Ltd ACN 079 825 488)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	7, 8 and 9 November 2012, 12 and 13 August 2013, 9 September 2013 and 21 November 2013. Last date submissions filed: 6 December 2013.
DATE OF ORDER	10 December 2013
CITATION	Monty Manufacturing Pty Ltd v Platt (Domestic Building) [2013] VCAT 2137

ORDER

1. The First, Third and Fourth Respondents must pay the Applicant $1,651,261 (excluding interest).
2. The Applicant's application against the Fifth Respondent is dismissed.
3. **The proceeding is listed for a directions hearing at 9.00 am 16 December 2013, at which time:**
   (a) **the summons issued by the Principal Registrar to Dr Lucy Platt for production of documents is returnable; and**

(b) **any application for costs or interest arising out of these orders will be heard and considered**.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr J Forrest of counsel
For the First Respondent	Mr M Robins of senior counsel [1]
For the Second Respondent	No appearance [2]
For the Third Respondent	No appearance
For the Fourth Respondent	No appearance
For the Fifth Respondent	Mr M Hooper of counsel

[1] Mr Robins SC appeared on behalf of the First and Second Respondents on 7, 8 and 9 November 2012 and behalf of the First Respondent only on 12 August 2013.
The First Respondent appeared in person on 13 August and 9 September 2013.
Mr Foster, solicitor, appeared on behalf of the First Respondent only on 21 November 2013.

[2] Mr Robins SC appeared on behalf of the Second Respondent on 7, 8 and 9 November 2012 only.

REASONS

INTRODUCTION

1. Monty Manufacturing Pty Ltd (**'Monty'**) is (or was) the developer and registered owner of a four level residential apartment block located in Fitzroy. In 2009, it issued proceedings against Architectural Building & Project Management Pty Ltd, the builder of that apartment block (**'the Builder'**). In that proceeding, Monty claimed loss and damage against the Builder pursuant to the building contract between those parties (**'the Contract'**) or alternatively, damages at common law relating to the works undertaken by the Builder. That related proceeding was stayed after the Builder was placed into administration and eventually de-registered.

2. The present proceeding was initially issued against the First, Second, Third and Fourth Respondents, who were former directors of the Builder and who guaranteed the performance and payment of all monies payable by the Builder (**'the Guarantors'**). That guarantee was given pursuant to a contract of guarantee executed by the parties on or around 29 July 2007 (**'the Guarantee'**). In its *Further Amended Points of Claim* dated 29 October 2012, Monty claims against the Guarantors both under the Guarantee and also under the *Fair Trading Act 1999*. The claim made under the *Fair Trading Act 1999* is based on an allegation that, by virtue of them executing the Guarantee, the Guarantors represented that they would:

   (a) be jointly and severally liable with the Builder to Monty for the performance of all the obligations of the Builder; and

   (b) jointly and severally guarantee to Monty that payment of all money payable by the Builder and the performance of the Builder's obligations.

   According to Monty, those representations were false and untrue and therefore constitute false and misleading conduct in contravention of s 9 of the *Fair Trading Act 1999* entitling it to relief under that Act.[3]

3. Since this proceeding was first issued in June 2009, the proceeding has been plagued with numerous adjournments and other interlocutory applications, which significantly delayed the final hearing of the dispute. Many of those interlocutory applications concerned applications for discovery, joinder, further particulars and amendments to pleadings. The complexity of the proceeding was reflected in these interlocutory applications, as the case was originally prosecuted and defended on the basis that Monty had to first prove primary liability of the Builder before secondary liability could be attributed to the Guarantors. In essence, that entailed either proving that a *Progress Certificate* certifying a payment to Monty of $1,606,490.94 had been properly issued by the administrating

[3] As the *Fair Trading Act 1999* existed at the time.

architect or alternatively, proving that the losses claimed by Monty arose as a consequence of the Builder breaching the Contract. In answer to that claim, the First and Second Respondents argued, by way of defence, that the Contract had been unlawfully terminated by Monty. They further argued that Monty had been in breach of the Contract because it had failed to provide adequate architectural and structural drawings, despite having made certain representations to the contrary, prior to executing the Guarantee. Consequently, the proceeding took on increasing complexity as the case focused on the adequacy of the design documents weighed against the actions of the Builder. Not surprisingly, the defence raised by the First and Second Respondents prompted Monty to join the administrating architect as the Fifth Respondent in the proceeding (**'the Architect'**).

4. The nature of the proceeding was fundamentally altered in October 2012, after the First and Second Respondents retained legal representation; having defended the action for a period of time as self-represented litigants. In particular, the First and Second Respondents sought leave to amend their defence to a solitary ground; namely, that their obligations under the Guarantee granted in favour of Monty had been discharged by reason of a change to the primary obligation of the Builder effected by the conduct of Monty.

5. Subject to that defence, the First and Second Respondents have otherwise admitted the quantum of Monty's common law claim, which exceeds $1.6 million.[4] In relation to the Third or Fourth Respondents, neither have entered a defence, nor have they appeared at any of the hearings or taken any steps in the proceeding.

6. The defence raised by the First and Second Respondents relied upon the principle enunciated by the High Court in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* [5] that a surety is discharged from his or her guarantee by reason of any departure from or variation to the principal contract, to which he or she has not consented in advance, unless the creditor can affirmatively prove either:

   (a) the departure or variation was beneficial to the surety; or

   (b) the departure or variation could not in any circumstances increase the surety's risk.

7. Initially, the First and Second Respondents argued that the change in the primary obligation of the Builder comprised an instruction by the

[4] In paragraphs 5 and 14 of the First and Second Respondent's *Fifth Further Amended Points of Defence and Counterclaim* dated 19 November 2012 and paragraphs 5 and 14 of the First Respondent's *Sixth Further Amended Points of Defence* dated 22 November 2013, the First and Second Respondents admit the Guarantee and the quantum of the Applicant's claim as set out in Paragraph B of Applicant's *Amended Further and Better Particulars of Loss and Damages* dated 24 October 2012.

[5] (1987) 162 CLR 549.

Architect to rotate the building by 0 degrees 18 minutes in order to remedy discrepancies in the architectural drawings forming part of the Contract. However, on 9 November 2012, being the third day of hearing, Mr Robins, senior counsel for the First and Second Respondents at that time, conceded that the alteration to the primary obligation of the Builder was not the rotation of the building as had been first alleged but rather, a failure on the part of the Architect to properly address a discrepancy in the grid layout of architectural drawing AO2. Consequently, the hearing was adjourned to 27 February 2013 to allow the First and Second Respondents to further amend their defence.

8. Following further adjournment of that return date, the hearing eventually continued on 12 August 2013 for a further two days. On the first day of that hearing, Mr Robins advised the Tribunal that the Second Respondent had passed away since the matter had last been before the Tribunal. He said that he did not hold instructions to act on behalf of the Second Respondent's estate, nor was he aware of any representative having being appointed to administer the affairs of the Second Respondent's estate.

9. Consequently, upon the application of Monty and with the consent of the First and Fifth Respondents, orders were made that the proceeding, as against the Second Respondent be stayed. The proceeding then resumed in the absence of any representative of the Second Respondent's estate being present.

10. At the commencement of the hearing on 12 August 2013, Mr Robins further advised that his retainer to act on behalf of the First Respondent only extended to the first day of hearing. After that time, the First Respondent would represent himself. In addition, Mr Robins advised that the First and Second Respondent's defence had been further amended to include an additional factor which was said to constitute another departure from or alternation to the primary contract. That amended defence now pleaded that the departures from or alteration to the primary contract comprised:

    (a) the failure by Monty and the Builder to address a grid line discrepancy in the Contract drawings, identified in October and November 2007, in accordance with Clause B1.1 of the Contract; or

    (b) the abandonment by Monty and the Builder on 14 May 2008 of the requirement for the Builder to supply shop drawings for approval by the Architect before fabricating structural steel in accordance with Clause 2.4 of the *Structural Steel Specification*.

11. No defence has ever been filed by the Third and Fourth Respondents. Moreover, the Third and Fourth Respondents have not taken any steps in the proceeding or appeared at any of the numerous interlocutory hearings that have plagued this proceeding.

Background

12. The Contract between Monty and the Builder was in the form of an *ABIC SW-1 2002 Simple Works Contract* dated 29 June 2007. Under the Contract, the existing brick warehouse which occupied the site was to be demolished and a new four level apartment building constructed in its place. The Contract further provided that the Architect who prepared the architectural drawings was to also administer the Contract.

13. At the time the Contract was executed, the Guarantors were all directors of the Builder. It is common ground that, at least initially, the First and Second Respondents had little involvement with the construction of the development, as their role focused primarily on financing the project. The Fourth Respondent, Mr Sgro, was the person controlling and supervising the works on behalf of the Builder. However, his role ended in around late July 2008, after which time the First Respondent took over that responsibility.

14. The architectural drawings forming part of the Contract contemplated that the boundary walls on the east and west side of the site were to be retained, with construction otherwise built to each of the four boundaries. However, the site was of an irregular shape, in that the east and west boundaries did not run true north-south.

15. According to the First and Second Respondents' defences, architectural drawing AO2 Revision D, dated October 2006, for the ground floor provided a regular grid line across the drawing set at 90° down the length of the site. This was so even though the north boundary was not perfectly parallel with the south boundary.

16. This is disputed by Monty and the Architect. According to the Architect, the architectural drawing AO2 Rev C clearly showed the grid lines running parallel to the site boundaries, rather than true north-south. They contend that the land surveyor, engaged by the Builder, misinterpreted the drawing and erroneously assumed that the grid lines were depicted as running true north/south and true east/west.

17. This issue underlies the first ground upon which the First and Second Respondents contend that there was a departure from the primary Contract, invoking the *Anker* principle.[6]

18. Under the Contract and the specifications forming part of the Contract, the Builder was required to prepare shop drawings in respect of the structural steel, which was, to a large extent, to be fabricated off-site. The minutes of site meetings set out a chronology of issues concerning the production of those structural steel shop drawings:

    (a) On 1 November 2007, the minutes stated that the Architect had noted the requirement for structural steel shop drawings and

[6] See paragraphs 26 to 33 below.

requested that they be produced as soon as possible as detailed checking was required.[7]

(b) On 13 November 2007, the minutes noted that the Builder was to advise on the expected date for receipt of structural steel shop drawings.[8]

(c) On 20 November 2007, the minutes noted that the Builder had advised that the structural steel shop drawings were being prepared and that the expected date for completion was to be advised.[9]

(d) On 26 February 2008, the minutes noted that the structural steel shop drawings were required as soon as possible for checking and coordination by the Architect and the engineer.[10]

(e) On 5 March 2008, the minutes stated that the Builder had advised that the structural steel shop drawings were expected at any time.[11]

(f) On 11 March 2008, the minutes stated that the Builder was expecting the structural steel shop drawings *at any time now*. The minutes further stated that the Architect had advised that approximately two weeks would be required for *checking, revision and approval process.*[12]

(g) On 8 April 2008, the minutes stated that the Architect and the engineer submitted revisions to the first round of shop drawings and were awaiting revised structural steel shop drawings for checking by the Architect and engineer.[13]

(h) On 23 April 2008, the minutes stated that the revised structural steel shop drawings had been received and that the Architect was to check and issue corrections to the Builder.[14]

(i) On 7 May 2008, the minutes stated that the revised issue shop drawings had been returned from the engineer and that the Architect had issued marked-up shop drawing revisions. The minutes further stated that the Builder's subcontractor *would site-measure all steel lengths and confirm details on site*.[15]

(j) On 14 May 2008, the minutes stated:

> *14.01 Steel Shop Drawings/Fabrication*

[7] *Minutes: Site meeting no 3* dated 1 November 2007.
[8] *Minutes: Site meeting no 4* dated 13 November 2007.
[9] *Minutes: Site meeting no 5* dated 20 November 2007.
[10] *Minutes: Site meeting no 14* dated 26 February 2008.
[11] *Minutes: Site meeting no 15* dated 5 March 2008.
[12] *Minutes: Site meeting no 16* dated 11 March 2008.
[13] *Minutes: Site meeting no 17* dated 8 April 2008.
[14] *Minutes: Site meeting no 18* dated 23 April 2008.
[15] *Minutes: Site meeting no 19* dated 7 May 2008.

> Note that due to steel shop drawings being unacceptable and unable to be satisfactorily revised within the available timeframe, the steel fabricator is now fabricating all steel work to measured site dimensions and in accordance with Connell Wagner's [the engineer] and NMBW's [the Architect] comments on the latest round of shop drawings received. Fabricator/ABMW [the Builder] to ensure that all details are in accordance with structural and architectural requirements as documented.[16] [square brackets added]

19. Following the site meeting on 14 May 2008, the Builder, through its subcontractor, fabricated and installed the structural steel over the ensuing six weeks. It is common ground that significant construction problems plagued the building site and that many of those problems concerned the fabrication and installation of the structural steel.

20. Given the problems on site, the First Respondent assumed the day to day control of the project on behalf of the Builder from 1 July 2008. However, the building works continued to experience delays and on 13 December 2008, Monty served a show cause notice on the Builder. On 21 January 2009, Monty served the Builder with a notice terminating the Contract, which then led to proceedings being issued by and against the Builder.

The *Anker* Principle

21. The Guarantee is a short form document and provides:

> **GUARANTEE**
>
> 1. The 'Guarantors', 'Owner', 'Contractor' and 'contract' are set out in the schedule.
> 2. In consideration of the Owner at the request of the Guarantors entering into the contract the Guarantors:
>
> 2.1 agree to be jointly and severally liable with the Contractor to the Owner for the performance of all the obligations of the Contractor.
>
> 2.2 jointly and severally guarantee to the Owner the payment of all money payable by the Contractor and the performance of the Contractor's obligations.
>
> 3. If all or any part of the contract is unenforceable by the Owner against the Contractor the Guarantors will jointly and severally indemnify the Owner against all loss including all money that would have been payable by or recoverable from the Contractor if the contract had been enforceable against the Contractor.

22. Mr Robins submitted that Clause 2 of the Guarantee created the obligation of guarantee and Clause 3 created an indemnity obligation on the part of the Guarantors. The primary obligation secured was identified as being the

[16] *Minutes: Site meeting no 20* dated 14 May 2008.

Contract. In *Anker Pty Ltd v National Westminster Finance (Australia) Ltd* the High Court stated:

> Then it has been said that any departure by the creditor from the suretyship contract "which is not obviously and without inquiry quite unsubstantial, will discharge the surety from liability, whether it injures him or not, for it constitutes an alteration in the surety's obligations" (Halsbury's Laws of England, 4th ed., vol. 20 par.259). The final clause in the passage quoted from Halsbury indicates that this proposition is founded not so much on cases dealing with a breach of a term in the suretyship contract, as on cases in which conduct on the part of the creditor materially altered the surety's obligations. Such an alteration takes place when the creditor agrees to a variation of the principal contract or to an extension of time within which the debtor may comply with that contract. The creditor's agreement with the debtor thereby alters the nature of the surety's obligations without the surety's consent.[17]

23. Further, the High Court held that where there has been a departure from or variation to the terms of the primary obligation, then:

> The rule does not permit the courts to enquire as to the effect of the operation. The consequence is that, to hold the surety to his bargain, the creditor must show that the nature of the alteration can be beneficial to the surety only or that by its nature it cannot in any circumstances increase the surety's risk e.g., a reduction in the debtor's debt or in the interest payable by the surety. The mere possibility of detriment is enough to bring about the discharge of the surety.[18]

24. In the context of building contracts, the learned authors of *Modern Contract of Guarantee* state:

> In relation to a building contract, a change in the work or design from the original specifications, a variation in the terms of a trust of retention monies, the postponement of the date upon which the contractor was to take possession of the site in order to commence the building work, or payments made to the building contractor before the contractual date for payment stipulated in the principal contract all constitutes variations that will discharge guarantors of the builder's obligations.[19] [footnotes omitted]

25. However, where the primary contract contemplates variations, such as changes to the scope of the work to be performed or the time to complete the works, such changes will not necessarily bring about a discharge of a Guarantor's obligations.[20] As is the case with many building contracts, the obligations of the primary parties may change rather than being of a fixed obligation.[21] In the present case, the Contract, like so many other building

[17] (1987) 162 CLR 549.
[18] (1987) 162 CLR 549 at 559-560.
[19] *Modern Contract of Guarantee* Dr James O'Donovan & Dr John Phillips (Thomson Lawbook Company) Looseleaf service at paragraph 7.200.
[20] *Johnson Bros (Dyers) Ltd v Davison* (1935) 79 SJ 306.
[21] *Wren v Emmett Contractors Pty Ltd* (1969) 43 ALJR 213 at 220.

contracts, was not one of a fixed obligation. It permitted variations to the scope of the work undertaken under it, subject to its terms. Nevertheless, both parties submitted that the circumstances relied upon by the First and Second Respondents did not constitute a variation to the Contract. In that respect, the First Respondent contended that what occurred was a departure from the administrative process contemplated under the Contract, which had the effect of materially changing the Guarantors' risk under the Guarantee.

First ground: Failure to address grid line discrepancy

26. The issue concerning the grid line discrepancy was initially raised by the land surveyor engaged by the Builder in correspondence dated 24 October 2007 and in site meetings which then followed. In his witness statement dated 17 October 2012, Mr Arrowsmith, the land surveyor, explained the issue as follows:

> 5. In applying the grid set out from the architect's drawings a problem arose in that the grid set out based on the architectural drawings (grid set out 1) was not square to the northern boundary running along Kerr Street and was not within the boundaries contained in the re-establishment plan in that:
>
> (a) there was a gap in between the north-eastern boundary and the proposed location of the building; and
>
> (b) the building significantly protruded into the property on the western title boundary. Effectively the building was not square to the Kerr street site and was askew to the south west.
>
> 6. After having completed grid set out 1, I attended a conference with the architect, Mr Nigel Bertram, and asked him how he wished to address the disconformities between the architectural drawings and the re-establishment plan I had prepared in 2004, and the misalignments identified in paragraph 5 above.
>
> 7. Unless the building was rotated to the east, part of the western wall would have to be sliced off (not the whole wall). The instruction of the architect was that the building should be built square to the northern Kerr Street boundary. In order to achieve this I had to "rotate" the grid layout minus 0 degrees 18 minutes from that as shown on the architect's drawings, with a consequence that the building layout rotated some 188 mm to the east around the north-west corner. That grid layout would be squared to the Kerr Street boundary, whereas on the architectural drawings it was askew and not adjacent with that boundary.

27. Mr Robins submitted that the failure by the Architect or Monty to take any steps in accordance with Clause B1.1 of the Contract and issue a written instruction to resolve the discrepancy constitutes an alteration to the primary Contract, sufficient to discharge the Guarantors' obligations under the Guarantee. Mr Robins referred to the evidence of Mr

Arrowsmith and also Mr Casamento, the structural engineer engaged by the First and Second Respondents, to demonstrate how this changed the risk of construction.

28. Mr Casamento prepared a report dated 21 October 2009. In that report, he opined that that the building itself had to be rotated to accommodate the irregular shape of the building site. In fact, it was on the basis of that opinion that the First and Second Respondents initially based their defence of an alteration to the primary Contract. However, at the conclusion of Mr Casamento's evidence, he conceded that the rotation of the building had not, in fact, occurred. At that point, the First and Second Respondents remodelled their defence to allege that the alteration was a discrepancy in the architectural drawings which was not resolved in accordance with Clause B1.1 of the Contract. The allegation concerning the discrepancy in the architectural drawings is, to a large extent, based on Mr Arrowsmith's interpretation of the architectural drawing AO1 and Mr Casamento's evidence, as detailed in his witness statement dated 17 October 2012, which appears to adopt Mr Arrowsmith's interpretation of the architectural drawings. In particular, Mr Casamento states:

> 5. In my opinion, the content of the Surveyor's Letter dated 24 October 2007 in the Witness Statement of Harry Arrowsmith indicate and inform that:
>
> - the grid contained on Architectural drawings A00, A01 Rev C and Rev D, A02 Rev C1 and Rev D A03 Rev C and Rev D (the ground floor architectural drawings) have been rotated minus 0 degrees 18 minutes.
>
> - the building is being built in accordance with Grid lines different to that on the ground floor architectural drawings.

29. Mr Casamento stated further that:

> 12. It was essential that the Architect produced new drawings showing the rotation of the Grid lines and consequential re-alignment of the East and West walls at the rear of the building. This information is crucial to the Builder and various Contractors manufacturing structural components. The Builder and the Contractors working of old Grid lines would cause structural components to be placed in incorrect locations, different alignments and constructed with incorrect lengths.

30. Mr Arrowsmith's assessment of the issue is at odds with Mr Bertram of the Architect. In his witness statement, dated 7 February 2013, he responds as follows:

> 5. As I stated in my supplementary witness statement, the first grid layout in September 2007 by the builder's surveyor, Henry Arrowsmith, was in error, in that the surveyor incorrectly thought that the gridlines were to run true north/south and true east/west. This was contrary to architectural drawing A02 Rev C (drawing) and what it depicted.

6. There was no inconsistency between the depicted orientation of gridline 4 and gridline G in the drawing. The degrees noted on the drawing were clearly referable to the title boundary as noted by the words "TITLE BOUNDARY". These are the same as those marked on the title boundary as shown in the re-establishment survey prepared by the surveyor and dated 5 August 2004. The drawing had been prepared using Computer Assisted Design software and the builder was sent, by e-mail, the drawing in an electronic format (ie a "dwg" file).

7. There was no omission in the drawing of any clear indication or notation in relation to the grid layout.

8. The second grid layout in October 2007 by the surveyor corrected the error in the first grid layout.

9. The second grid layout did not involve a "rotation" of the proposed building to an orientation or position different to that shown on the drawing. The second grid layout depicted the grid lines in the exact same position as they had been shown on the drawing. The building was built in the same position as it was shown in the drawing.

10. Accordingly, there was no need for NMBW, as the project architect, to issue a written direction or instruction to the builder as there was no discrepancy or omission in the drawing which required clarification.

11. The minutes of site meetings 1 to 4 provide an accurate record of the events and steps taken to resolve the error in the first grid layout and NMBW's desire to ensure that the actual set-out of the proposed building was correct and in accordance with the drawing.

12. The minutes also reflect the discussions and mutual understanding between the surveyor, builder and NMBW about the resolution of the layout of the grid on site.

13. Once the grid layout had been corrected, and I confirmed that the drawing had been properly read and understood by the surveyor and builder, the second grid layout was established on site in November 2007.

14. From then on all future building works were carried out in accordance with that grid layout and the drawing. Accordingly, the issue of the site boundaries and their relation to the grid layout had no impact on the carrying out of the primary building work, such as structural steel work. For example, the shop drawings for the steel work was set out purely in relation to the grid, as established, and did not need to refer to site boundaries or orientation of the grid on site. See attachment 1-Shop drawing ISO-01 dated 10 March 2008.

15. As I stated in paragraph 32 of my first witness statement, the new builder, Galvin Constructions, had no difficulties or problems in

using the same architectural drawings and shop drawings in successfully completing the project.

31. No further evidence was adduced by the First Respondent to respond to the matters raised by Mr Bertram. In Mr Bertram's supplementary witness statement dated 5 November 2012, he states that the issue concerning the gridlines was ultimately of no consequence because Mr Arrowsmith produced a revised grid layout drawing in November 2007, well before the structural steel shop drawings had been prepared.

32. In my view, the evidence of Mr Bertram is to be accepted on this issue. It appears from the architectural drawing A02 that Mr Arrowsmith incorrectly assumed that the gridlines ran true north-south, when in fact they are not depicted as such on the architectural drawing. This finding is reinforced by the evidence of Mr Permewan, the architectural consultant engaged by Monty, who stated in his report dated 2 November 2012 that:

> 32) An examination of the drawing indicates the following:
>
> (a) The set out on the Kerr Street frontage is parallel to the boundary as the lines of the boundary and grid do not diverge or converge. We note that the drawings do not specifically state the grid are parallel to the Kerr Street boundary or at 90° to that boundary but this might be reasonably assumed from the drawing unless otherwise noted. Simply put, lines appearing to be at right angles (90°) are assumed to be at right angles unless otherwise noted. If this was not the case typical rooms in houses, apartments and commercial buildings would have corners marked as 90°. If there is any confusion the architect can be asked during tender or construction. This requirement is normally mandatory under the specification.
>
> (b) The set out on the western boundary has a grid numbered 4 which is not running true north-south. This is indicated by the drawing showing the grid and the boundary (10.82 m at 0° 0') not being parallel but the gridlines moving away from the boundary as the grid line goes south.
>
> (c) The surveyor's initial set out (setout 1 drawing 092004) is based on a main grid access which is running true north-south (0° or 180°) as marked on gridlines 2 of setout 1. This set out is incorrect because the grids on the architectural drawing are shown as being slightly less than true north-south because they are at right angles to the northern boundary (Kerr Street) which is slightly less than east-west. The grid is based on the northern boundary rotated 0° 18' to the east of true north-south line. The surveyor is therefore incorrect in stating that the grid axis was north-south. The drawing A 02 clearly shows the gridlines moving away from that section of the west

boundary running north-south in the north-east corner of the site.

33. Consequently, I do not find that there was an alteration to the primary contract by reason of any failure on the part of Monty or the Builder to address the gridline discrepancy. In my view, any error in the gridlines was to be found in the first version of the set out plan prepared by Mr Arrowsmith, on behalf of the Builder and not because of any error in the architectural drawings. That being the case, the Builder carried the burden of that error, which was a risk within the scope of the Guarantee. Therefore, the *Anker* principle is not enlivened by reason of this ground.

Second ground: Failure to approve shop drawings

34. The relevant parts of the Contract are:

> A7.1 The architect may issue an instruction at any time during the performance of this contract provided that the instruction is given in writing.
>
> B2.1 Unless otherwise shown in schedule 3, the order of precedence of the contract documents is as follows:
> - any special conditions shown in schedule 2
> - the conditions set out in this contract, the Introduction and schedule 1
> - the specifications for the works in the order shown in schedule 3
> - the drawings for the works shown in schedule 3
> - any other document in the order shown in schedule 3
>
> J1.1 The architect may give to the contractor a written instruction for a variation at any time before the date of practical completion

35. Clause 1.9 of the General Specification states:

> **Shop Drawings**
>
> General: if required, submit dimensional drawings showing details of the fabrication and installation of services and equipment, including relationship to building structure and other services, cable type and size and marking details.
>
> Diagrammatic layouts: Coordinate work shown diagrammatically in contract documents, and submit dimensioned set-out drawings.
>
> Submission medium: Hard Copy

36. Clause 2.4 of the Structural Steel Specification states:

> **Shop drawings**
>
> General: Submit shop drawings showing the following information:
> - Relevant details of each assembly, component and connection.
> - Information relative to fabrication, surface treatment, transport and erection.
>
> Particular: Include the following information:

- Identification.
- Steel type and grade.
- Dimensions of items.
- Required camber, where applicable.
- Fabrication methods including, where applicable, hot or cold forming and post weld heat treatment.
- Location, type and size of welds or bolts.
- Weld categories and bolting categories.
- Orientation of members.
- Surface preparation methods and coating system.
- Procedures necessary to shop and site assembly, and erection.
- Temporary works such as lifting lugs, support points, temporary cleats embracing which are required to transport and erection of the structural steel work.
- Required fixings for adjoining building elements.

Before submitting these documents to the Superintendent, ensure that the work covered by these documents complies with the requirements of the Specification and Drawings including all details of connections, welds and paint finishes.

Do not manufacture, stockpile, supply or assemble steelwork affected by these documents until the documents are received back from the Principal, endorsed as examined by the Principal and Structural Engineer.

Endorsement of these documents by the Managing Contractor, Architect and Structural Engineer will indicate if the Contractor's interpretation of the contract requirements is generally satisfactory. Such examinations do not relieve the Contractor of his contractual obligations nor of his responsibility of ensuring that the works are complete, accurate and correct.

Fabrication: Do not commence fabrication until permission to use the relevant shop drawings has been obtained.
Submit the name of the proposed Shop Drawing Company to the Managing Contractor for approval prior to work commencing.
Submit to the Managing Contractor, for examination, comprehensive shop and construction drawings with notes and/or specification, called "the documents", which are necessary for the proper carrying out of the works. Ensure the documents are in accordance with AS1100. Prepare and submit the documents in a logical order to allow a full examination to be carried out.

The drawings shall show the relevant details of each assembly, component and connection, together with information relative to fabrication, surface treatment and erection. (emphasis added)

37. In his written submissions, Mr Robins states that the *Structural Steel Specification* unequivocally provided that no structural steel was to be fabricated, manufactured, stockpiled, supplied or assembled for the project until shop drawings were first received back from the *Principal*, endorsed as examined by the *Principal* and *Structural Engineer*.

38. The underlying premise upon which the First and Second Respondents' defences rest is that the contract documents expressly (or implicitly) required shop drawings to be approved or revised before steel fabrication could commence. That premise is repeated in the First Respondent's *Closing Submissions in Reply*.

39. It is common ground that the structural steel shop drawings were never approved by either the structural engineer or the Architect. Indeed, of the 120 revised shop drawings submitted, 41 were stamped by the structural engineer as having been rejected. As I have indicated, what underlies the First and Second Respondents' reliance upon the *Anker* principle is that something which was required to be done under the primary Contract was not done and that this omission had the effect of increasing their risk under the Guarantee.

40. Therefore, the threshold question is whether the Contract, including the *Structural Steel Specification*, required something to be done that was not done. There are two aspects to this threshold question:

    (a) Did the Contract documents require Monty, the Architect or the engineer to approve the shop drawings submitted by the Builder?

    (b) Alternatively, was Monty or the Architect required to instruct the Builder to provide further revised shop drawings, incorporating the mark-ups made by the Architect and addressing any deficiencies in the shop drawings reviewed by the Architect and engineer?

41. The only direct evidence as to what occurred regarding the shop drawings is the evidence of Mr Bertram. In his Second Supplementary Witness Statement dated 7 February 2013, he states:

> 20. After 11 March 2008, the builder provided NMBW with preliminary shop drawings for the steelwork.
>
> 21. By 26 March 2008, NMBW and CW submitted revisions of the first round of shop drawings. Thereafter, NMBW and CW awaited a revised issue of the shop drawings from the builder.
>
> 22 On 17 April 2008, the builder provided NMBW with revised shop drawings for approval.
>
> 23 On 28 April 2008, NMBW submitted revisions and comments to the second round drawings.
>
> 24 At site meeting 20 on 14 May 2008, I discussed with Vito Sgro on behalf of the builder of the problems with the revised second round shop drawings. I said that, given the delays with producing the shop drawings and a limited time available to progress the manufacture and supply of the steelwork, the most expedient way forward was for the builder to instruct the steel fabricator to use the marked-up second round drawings to fabricate the steelwork. Mr Sgro said that he agreed. This meant that the steel fabricator would use the shop drawings with NMBW's and CW's hand written

> comments or "mark-ups" and confirm those comments by checking the mentioned measurements on site. This was a quicker alternative to arranging for the builder's draftsperson to re-do the shop drawings incorporating NMBW's and CW's comments.

42. Mr Forrest, counsel for Monty, submitted that the Contract does not impose any obligation on the Architect or the engineer to approve or to require revision of the shop drawings provided by the Builder. Mr Forrest contended that there is no clause in the Contract documents which prescribes the form in which the shop drawings must take or precludes or prevents the shop drawings from containing amendments, mark-ups and notations made on them by the Architect or the engineer for the purposes of fabrication and installation of the structural steel. He further argued that there is no evidence indicating that there was any variation either to the terms of the Contract or the process under which the Contract was to be administered. Consequently, he submitted that there was no departure from the primary Contract giving rise to the *Anker* principle.

43. I note that Mr Bertram speaks of an approval process in his witness statement referred to above, which is also recorded in the *Minutes: Site meeting no 16* dated 11 March 2008.[22] However, I do not consider those comments to be determinative. Ultimately, it is for the Tribunal to decide whether the terms of the Contract imposed an obligation on the Architect, the engineer or Monty to approve the shop drawings before fabrication of the steelwork could commence. Mr Bertram's comments do not assist me in undertaking this task. Similarly, I do not consider that those comments, in themselves, evidence any agreement to vary the Contract such that the Architect or the engineer was to give approval for the shop drawings submitted by the Builder.

44. The words in Clause 2.4 of the *Structural Steel Specification* focus primarily on what the Builder has to do or not do. Insofar as Monty, the Architect and the engineer were concerned, Clause 2.4 contemplated that they would:

(a) receive the shop drawings; and

(b) endorse the shop drawings as examined by Monty and the structural engineer.

45. That is all that Clause 2.4 required of Monty and the structural engineer. The question arises what does *endorse* mean in the context of Clause 2.4. According to the Shorter Oxford English Dictionary the word *endorsement* is defined as:

> 1. The action of endorsing; *concr.* a signature, memorandum, or remark endorsed on the document. 2. *fig.* Confirmation, ratification, approving testimony.[23]

[22] See paragraph 18(f) above.
[23] The Shorter Oxford English Dictionary Third Edition (Oxford University Press) 1973.

46. Therefore, the word *endorsed* can mean either some form of writing or mark constituting a signature, memorandum or remark or alternatively, some form of confirmation or approval, whether or not that confirmation or approval is in writing.

47. The words in Clause 2.4 are stated as: *endorsed as examined*. In my view, that expression, read in context, lends itself to the first of the definitions described above; namely, that the shop drawings are to be marked as having been examined. I do not construe those words as meaning that the shop drawings are required to be approved by Monty, the Architect or the engineer. Such an interpretation would be inconsistent with other parts of Clause 2.4. In particular, Clause 2.4 states that endorsement will indicate if the Builder's interpretation of the contract requirements is generally satisfactory. However, it goes on to state that such examinations do not relieve the Builder of its contractual obligations nor of its responsibility of ensuring that the works are complete, accurate and correct.

48. In my view, it would be inconsistent with other parts of Clause 2.4 to construe that clause as requiring the shop drawings to be approved by Monty, the Architect or the engineer. That function is simply not conveyed to those parties through the words in Clause 2.4. All that is required by the structural engineer is to endorse that the shop drawings have been examined. Clearly, that occurred given that the engineer has stamped a considerable number of drawings as being rejected and the Architect has marked-up a number of the shop drawings. After that has occurred, it is a matter for the Builder to decide what to do. It can revise the drawings and re-submit them if it considers that they do not comply with Clause 2.4 (and thereby avoid being in breach of the Contract) or alternatively, seek *permission* to proceed with the drawings after they had been *endorsed as examined*. From that point, the only obligation on Monty, the Architect or the structural engineer under Clause 2.4 was either to give permission to use the drawings or to refuse such permission. That obligation being implicit, given that without such permission the steel fabrication was not to proceed.

49. The Contract and the *Structural Steel Specification* did not expressly prohibit inadequate shop drawings being used, nor did they impose any obligation on the Architect or structural engineer to check the shop drawings for errors. The Architect's and engineer's *endorsement* was merely an indication by them that the Builder's interpretation of the Contract requirements was generally satisfactory. In my view, that endorsement was effected by the combination of the engineer's stamps and Architect's notations and mark-ups.

50. It is common ground that the Builder, structural steel fabricator, Architect and Monty entered into an agreement to allow the Builder to proceed with fabrication of the structural steel based on the shop drawings submitted and engrossed by the engineer and the Architect. It has not been suggested that the Builder was given a mandatory instruction to proceed on that

basis, absent its agreement to adopt that course. That being the case, I find that the Builder either sought permission or consented to that course being adopted by it. The Contract and in particular, Clause 2.4 of the *Structural Steel Specification*, did not prohibit that course from being adopted, which is not surprising given that the risk of construction remained with the Builder.

51. The fact that 41 drawings were stamped by the engineer as rejected is beside the point. The terms of the Contract do not require Monty or the engineer to approve the shop drawings, despite there being some indication in one of the minutes of site meetings that the parties may have been under a misapprehension that this was the case.[24] Therefore, it was a matter entirely for the Builder to proceed with shop drawings that were marked-up, rather than submitting revised shop drawings for further examination. In other words, it was within the discretion given to the Builder under the terms of the Contract, such that it had the choice – either to proceed with the marked-up drawings or re-submit revised shop drawings and again seek permission to proceed.

52. Given that the course adopted by the Builder is contemplated by the terms of the Contract, it is also within the scope of the risk that the Guarantee provided. As I have already found, this is not a situation where the evidence demonstrates that Monty or the Architect issued a mandatory instruction to the Builder not to revise the shop drawings or not produce shop drawings in the first place.

53. In his *Reply Closing Submissions*, the First Respondent submits that it would have only taken one week to produce revised shop drawings. I do not consider this factor to be material. The Builder was not prevented from revising the shop drawings, if that is what it wanted to do. It agreed to use the marked-up version of the shop drawings, presumably because it believed that there would be no problem fabricating the steelwork based on those drawings. As I have already found, provided those shop drawings had been endorsed as examined and permission was given to use them, that course of conduct was entirely permissible under the terms of the Contract. Consequently, I do not consider that the *Anker* principle applies to the facts as presented.

54. Therefore, I find that the grounds raised by the First and Second Respondents in their defences fail to exculpate them from liability under the Guarantee.[25] That being the case, it is unnecessary for me to consider Monty's alternative claim based on a breach of the *Fair Trading Act 1999*.[26]

---

[24] See paragraph 18(f) above.

[25] *Fifth Amended Points of Defence and Points of Counterclaim of the First and Second Respondents* dated 19 November 2012 and *Sixth Amended Points of Defence of the First Respondents* dated 22 November 2013.

[26] On 21 November 2013, leave was given to the First Respondent to file and serve *Sixth Amended Points of Defence*. Paragraphs 15 and 25.2 of the First Respondent's *Sixth Amended Points of*

55. As indicated above, both the First and Second Respondents admit the quantum claimed by Monty under paragraph B of Monty's *Amended Further and Better Particulars of Loss and Damage* dated 24 October 2012.[27] This amount represents Monty's claim for damages at common law. The First and Second Respondents deny Monty's alternative claim for payment under the Contract. The only difference between the two heads of damage claimed is that the claim under the Contract seeks payment of a *Termination Payment Certificate* issued by the Architect on 3 March 2009 in the amount of $1,605,490.94, whereas the common law damages claim seeks compensation for the cost overrun in completing the works. Evidence was given by Mr Montaldo as to how that cost overrun was incurred. By contrast, there is limited evidence as to how the *Termination Payment Certificate* was calculated or derived.

56. Having regard the admissions made by the First and Second Respondents and the evidence of Mr Montaldo, contrasted against the limited evidence as to how the *Termination Payment Certificate* was calculated or derived, I find that Monty's loss and damage is $1,651,261 (excluding interest and costs), being the amount detailed in paragraph B of Monty's *Amended Further and Better Particulars of Loss and Damage* dated 24 October 2012. That amount is made up as follows:

    (a) $50,980.15 (inclusive of GST), being the cost of rectifying defects in the nature of safety works;[28]

    (b) $383,792.48 (inclusive of GST), being the cost to rectify defects;[29]

    (c) $946,049.67 (inclusive of GST), being the cost of completing the works in excess of the sum remaining in the Contract;

    (d) $57,438.70 (inclusive of GST), being the cost of consultancy fees paid by Monty as a result of defective works and termination of the Contract;[30]

    (e) $213,000, being damages as a result of the building works being delayed, calculated from 30 January 2009 (the date for practical

---

Defence denies the Applicant's claim based on a breach of the *Fair Trading Act 1999*, on the ground that the *representations* did not cause loss or damage to Monty. This was expanded upon during closing submissions on 21 November 2013 where the First Respondent argued that if the *Anker* principle applied and the Guarantee became unenforceable, it was because of the conduct of Monty, through the actions of the Architect and its dealings with the Builder, and not because of any conduct of the First Respondent. Therefore, the First Respondent contended that if its defence based on the *Anker* principle succeeded, Monty's alternative claim based on the *Fair Trading Act 1999* also failed.

[27] Paragraph 14 of the *Sixth Amended Points of Defence of the First Respondent* dated 22 November 2013 and paragraph 14 of the *Fifth Amended Points of Defence of the First and Second Respondents* dated 19 November 2012.

[28] Paragraphs 129-141 of the Amended Witness Statement of: Montaldo dated 9 November 2010.

[29] Paragraphs 142-150 of the Amended Witness Statement of: Montaldo dated 9 November 2010.

[30] Paragraphs 142-150 of the Amended Witness Statement of: Montaldo dated 9 November 2010.

completion) to 1 April 2010 (the date of practical completion) at a rate of $500 per calendar day.[31]

57. I note that the Third and Fourth Respondents have taken no active part in the proceeding, including failing to file any defence to the claim made against them, despite being ordered to do so.

58. Consequently, I find that the Guarantee operates to impose liability against the First, Third and Fourth Respondents in the amount set out above, with costs and interest to be determined.[32]

59. Further, having regard to my findings concerning the conduct of the Architect, and in particular, that there was no material departure from its administrative functions under or in relation to the Contract, I find that the claim made against it is unproven, such that Monty's application against it will be dismissed.

60. Finally, I note that the proceeding was returned to the Tribunal on 21 November 2013 upon an application by Monty seeking discovery of the will of the late Second Respondent. That application was adjourned to 16 December 2013 after Monty was given information that the will was likely to be in the possession of a third party. Nevertheless, counsel for Monty and the First Respondent indicated to the Tribunal that the continuance of the proceeding against the estate of the Second Respondent should not preclude or delay the Tribunal in handing down its determination of Monty's claim as against the First, Third, Fourth and Fifth Respondents, even if that course resulted in the estate of the Second Respondent raising different or new points in its defence of any claim that might be made against it. Consequently, my findings as set out in these Reasons are limited to the claims made against the First, Third, Fourth and Fifth Respondents and I make no finding as to whether any claim against the estate of the Second Respondent is proven.

SENIOR MEMBER E. RIEGLER

[31] Paragraph B(v) of Monty's *Amended Further and Better Particulars of Loss and Damage* dated 24 October 2012.
[32] See paragraph 60 below.