IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-002230
[2017] NZHC 1686

BETWEEN	RICHINA PACIFIC LIMITED Plaintiff
AND	AAI LIMITED (FORMERLY VERO INSURANCE LIMITED) First Defendant
	SAMSON CORPORATION LIMITED Second Defendant

Hearing:	17-21, 26 and 27 October and 1 November 2016
Appearances:	D J Chisholm QC, C Hadlee and R Schultz for the Plaintiff S Stokes for the First Defendant G Christie and J R J Knight for the Second Defendant
Judgment:	20 July 2017

JUDGMENT OF HINTON J

This judgment was delivered by me on 20 July 2017 at 3.30 pm
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Counsel/Solicitors:
D J Chisholm QC, Auckland
Lee Salmon Long, Auckland
Dawson Harford & Partners, Auckland
Simpson Grierson, Auckland

Introduction

[1] This proceeding is about whether Samson can claim under a $2 million performance bond from Vero (now AAI). The answer turns primarily on whether practical completion was achieved under a construction contract between Samson and Mainzeal, causing the bond to be discharged.

[2] Mainzeal, which went into receivership and subsequently liquidation, defaulted on its obligations under the contract with Samson, particularly in relation to a car stacker.

[3] Demand was made by Samson under the Vero/AAI bond.

[4] The proceeding was brought by Richina, Mainzeal's parent company. Richina indemnified Vero for any payments required under the bond. Richina seeks declarations that the performance bond is null and void or otherwise unenforceable. Richina seeks an alternative declaration that AAI's liability under the bond is limited to the costs which would have been payable had Samson employed IPS, the subcontractor Mainzeal had engaged, to complete the car stacker.

[5] Richina also sought an interim injunction to restrain Vero/AAI from paying the bond to Samson.

[6] Samson denies Richina's claim and challenges Richina's right to interfere with its claim under the bond. Samson cross-claims against AAI for the full value of the bond (plus interest), being less than the losses it has allegedly suffered from Mainzeal's failure to meet its contractual obligations with respect to the car stacker.

[7] The parties agreed that the interim injunction would not be pursued and costs would be reserved, on the basis that Samson and Richina would pursue their claims in the present proceeding. Richina also paid $2 million into AAI's lawyer's trust account, to be held pending determination of this proceeding.

[8] Richina and AAI filed joint submissions in respect of this proceeding.

[9] The hearing proceeded on the basis that Samson is, in effect, the plaintiff.

Background

[10] In May 2010, Samson Corporation Limited ("Samson") entered into a contract ("the contract") with Mainzeal Property & Construction Ltd ("Mainzeal") under which Mainzeal was to construct new buildings and associated works at 90-106 Parnell Road, known as the Geyser project. The contract price was approximately $37 million.

[11] The Geyser project involved the construction of five commercial buildings situated around a shared ground floor courtyard, with shared basement parking, incorporating an automated robotic car parking facility ("car stacker").

[12] The car stacker was a complex installation comprising four virtual garages which rotate the cars; transfer shuttles which lift and move the cars; two large static lifts which carry the cars between floors; fixed rails along which shuttles carry the cars; 165 parking spaces over four levels in the basement and a computerised automation system. There are apparently only two car stackers in New Zealand.

[13] The contract includes General Conditions of Contract NZS3910; Special Conditions of Contract and the Car Stacker Specification.

[14] Samson appointed Resource Coordination Partnership ("RCP") as project manager, and Mr Jeremy Hay of RCP as the Engineer for the contract.

[15] The due date for practical completion of the contract works was 29 March 2012.

[16] By deed dated 27 May 2010, Mainzeal obtained from Vero Insurance Ltd ("Vero") a performance bond of $2 million (the bond), which was required under the contract. Vero is now AAI Ltd ("AAI"). The purpose of the bond was to provide security for Samson should Mainzeal fail to fulfil its obligations under the contract.

[17] By deed going back to 7 November 2006, Mainzeal had an indemnity and guarantee arrangement in place, whereby Vero provided bonds to secure Mainzeal's performance of its contracts and Mainzeal's parent company, Richina gave an unconditional guarantee and indemnity to Vero. Richina was therefore ultimately liable under the bond.

[18] The preamble to the bond records that the contract documents require the contractor to provide the principal with security in the form of an "on-demand bond". The relevant clauses of the bond provide:

> 1. THE Contractor [Mainzeal] and the Surety [Vero/AAI] are jointly and severally held and bound to the Principal [Samson] in the sum of NZ$2,000,000 (Two Million New Zealand Dollars) and bind themselves, their successors and assigns jointly and severally for the payment of that sum.
>
> **2. THE condition of this bond is that it shall be null and void if:**
>
> **(a) [Mainzeal] duly carries out and fulfils all the obligations imposed on [it] by the Contract Documents prior to commencement of the period of Defects Liability referred to in the Contract Documents; or**
>
> (b) On default by [Mainzeal], such default to be accompanied by a Certificate from the Engineer setting out the default and amount of damages, [Mainzeal] or [Vero/AAI] satisfy and discharge the damages sustained by [Samson] up to the amount of this bond.
>
> [Emphasis added]
>
> 3. EXCEPT as provided in clause 2 this bond shall be and remain in full force and effect.
>
> 4. [Vero/AAI] shall not be released from any liability under this bond:
>
> (a) By any alteration in the terms of the contract between [Samson] and [Mainzeal];
>
> (b) By any alteration in the extent or nature of the Contract Works to be completed, delivered and maintained;
>
> (c) By any allowance of time by [Samson] or by the Engineer appointed by [Samson] under the Contract Documents;

(d) By any forbearance or waiver by [Samson] or by the Engineer in respect of any of [Mainzeal's] obligations or in respect of any default on the part of [Mainzeal].

[19] The contractual works Mainzeal had to complete included the supply and installation of the car stacker according to the Car Stacker Specification which provided inter alia that:

(a) there would be 165 parking bays;

(b) the car stacker would be fully automated and operate unsupervised (except during periods of service and maintenance);

(c) the car stacker would fit to the building designed and if not, the costs to alter the building so that the car stacker would fit would be met by the contractor or subcontractor;

(d) there would be operational sensors and scanners to check that the cars and the virtual garage were clear of people and animals before the front doors would close and the car was transferred to a parking cell;

(e) it would process a vehicle every 36 seconds, equating to 92 inbound car movements and nine car outbound movements in one hour (for the morning traffic), or 18 inbound car movements and 110 exits (for the evening traffic); and

(f) the contractor should be able to guarantee the performance of the car stacker. This would be demonstrated in two tests, one in the morning and one in the evening.

[20] The period of defects liability, relevant to determining whether the bond has become null and void under clause 2(a) of the bond itself, is stated in the contract as commencing on the date of practical completion of the contract works or separable portion. The duration of the period of defects liability is 12 months.

[21] Practical completion is defined in clause 10.4.1 of the Standard Conditions and added to by clause 10.4.1 of part B of the Special Conditions as follows:

Standard Conditions

10.4.1 Practical Completion is that stage in the execution of the work under the contract when the Contract Works or any Separable Portion are complete except for minor omissions and minor defects:

(a) Which in the opinion of the Engineer the Contractor has reasonable grounds for not promptly correcting; and

(b) Which do not prevent the Contract Works or Separable Portion from being used for their intended purpose; and

(c) Rectification of which will not prejudice the convenient use of the Contract Works or any Separable Portion.

Special Conditions

Add to the end of 10.4.1:
"The Contract Works and each Separable Portion will be practically complete only when completed in accordance with this clause and the Building Contract and when they may be occupied by the Principal or any person authorised by the Principal, for their intended purpose without being unreasonably inconvenienced by the rectification of minor defects and only where the Contractor has:

(a) delivered to the Principal or the Engineer all of the following:
  (i) all documentation necessary to obtain all statutory and regulatory certificates and approvals which relate to the Contract Works;
  (ii) draft operations and maintenance manuals for services, plant and equipment;
  (iii) all keys, properly labelled.

(b) completed all of the following:
  (i) ensured that all wall, floor and ceiling finishes are free of significant defects;
  (ii) ensured that the connection, testing, balancing and certification of all services are fit for operation for their specified purposes; and
  (iii) the full cleaning of all finishes, fixtures, fittings, glass and removal of all labels and rubbish from the site."

[22] For there to be practical completion of the contract works, the construction parties proceeded on the basis that the car stacker had to meet the performance test in the Car Stacker Specification.[1] The performance test was treated as a shorthand way of ensuring that the Specification had been complied with, at least in material part.

[1] Mr Hemi, who was Mainzeal's Auckland Construction Manager queried this point but the overall evidence is very clearly to this effect. Even the overall thrust of Mr Hemi's oral evidence suggested the performance test was necessary for practical completion. Richina/AAI do not appear to argue otherwise. (Dr Wang, Chief Engineer and CEO of Shenzen Xuji Automation Technology Ltd, the car stacker manufacturer, gave evidence that in his view the car stacker was practically complete once it was in use and automatically parking cars, but he was not familiar with the term practical completion, or with the contract. He had never inspected the car stacker, but relied on videos. Dr Wang's evidence was consequently not relevant.)

The performance test follows commissioning,[2] which is a term given to ensuring all of the parts of the equipment are tested and operating properly.

[23] By agreement dated 15 September 2010 between Mainzeal and International Parking Systems ("IPS"), the supply and installation of the car stacker was subcontracted to IPS. Mainzeal was still liable to Samson for the installation and performance of the car stacker.

[24] Mainzeal became liable to Samson for liquidated damages, as it failed to achieve practical completion of the contract works by 29 March 2012. The rate for liquidated damages was $6,450 plus GST per calendar day.

[25] In late March 2012, knowing completion would be substantially late, representatives of Mainzeal, including the CEO, Mr Gomm, convened a meeting with representatives of Samson and RCP. As Mr Hemi (formerly of Mainzeal) confirmed, Mainzeal apologised to Samson and offered Samson access to and occupancy of some of the buildings ahead of full practical completion in return for a reduction of liquidated damages on a pro rata basis. This was not a matter of Samson's requiring occupancy of parts of the contract works prior to practical completion under clause 10.7.2 of the General Conditions, but rather, a similar arrangement at Mainzeal's instigation. Over the next few months, the parties proceeded on this basis.

[26] Following this meeting, Mainzeal provided future dates for completion of individual buildings.

[27] By 1 July 2012, the liquidated damages incurred by Mainzeal had reached over $600,000.

[28] Samson had to move into the Geyser building by 31 August 2012.

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[2] Mr Dillon of Task Consultancy Ltd, said in evidence at one point that the performance test could be a subset of commissioning, but the totality of the evidence, including of Mr Dillon himself is that commissioning necessarily precedes the performance test.

[29] At a site meeting on 24 July 2012, Samson and Mainzeal agreed to Level 1 of building E being handed over to Samson for a tenancy fit-out on 1 August 2012.

[30] As required under the contract, on 10 August 2012 IPS signed a guarantee with Samson and Mainzeal, whereby IPS guaranteed to repair any defects in the car stacker subcontract works for a period of two years.

[31] In July and August 2012, informal car stacker performance tests were conducted between Mainzeal and IPS, not being tests in accordance with the test protocol in the Car Stacker Specification.

[32] On 23 August 2012, Mainzeal applied for a certificate of practical completion, claiming that the contract works would be practically complete by 24 August 2012.

[33] In Mainzeal's 23 August application, it sought agreement that twelve listed items be "deferred works". Deferred works refers to items that are incomplete, to be distinguished from defective works, which are items that are complete but defective. While the Engineer can determine what are minor defects (that do not prevent a certificate of practical completion issuing), deferred works, which are not specifically provided for in the contract, have to be agreed between the Principal and Contractor and authorised by the Engineer before a certificate of practical completion will issue.

[34] The car stacker was not one of the items Mainzeal sought to have classified as a deferred work in its 23 August 2012 application. A performance test for the car stacker, in accordance with the Car Stacker Specification protocol, was scheduled for 24 August 2012.

[35] On 24 August 2012, Mainzeal and IPS conducted the performance test of the car stacker. A representative of RCP, Mr Fraser Robertson, was present at some stage. The car stacker broke down within 10 minutes and the test was aborted.

[36] That same day, Mr Robertson, acting on behalf of the Engineer, declined Mainzeal's application for a certificate of practical completion, and issued a notice listing the outstanding works to be carried out under the contract to enable practical completion to occur. It did not provide for any specific separate works to be carried out relating to the car stacker prior to practical completion. The full extent of the shortcomings of the car stacker was not particularly apparent at this stage, at least not to Samson or the Engineer. There were broadly-worded actions listed as still required to obtain a certificate of practical completion, including "summary and confirmation that all services are connected, tested, balanced and certified ready for use"; "summary of deferred works including completion dates"; and a "programme outlining the completion of all deferred works and defects, broken down on a floor-by-floor basis for each building, basement level, podium level, car stacker and lifts as a minimum".

[37] The 24 August 2012 notice also recorded that, providing the car stacker and passenger lift #1 were fully operational, and either a CCC or CPU had been issued by the Council to allow occupation and public access to two of the Geyser buildings, the rate of liquidated damages would be reduced by 40 per cent, down to $3,870 plus GST per calendar day.

[38] On 27 August 2012, IPS notified Mainzeal that there was a software issue with the car stacker and that roundtable meetings and further testing were being conducted. Mr Hemi acknowledged in evidence that the car stacker was not performing and it was not surprising that practical completion was not achieved at this point.

[39] By 31 August 2012, by agreement between Samson and Mainzeal, Samson had use of the car stacker and three of the five Geyser buildings. The car stacker had to be manually operated by IPS technicians and could not achieve the performance criteria described in the Specification. It was also not reliable, and was breaking down.

[40] On 18 September 2012, Mainzeal again applied for a certificate of practical completion on the basis that it claimed the contract works qualified as of 31 August

2012. The application sought agreement for the same items to be deferred as previously requested in the 24 August application. The list of deferred works again did not include the car stacker.

[41] On 19 September 2012, an onsite meeting was convened in respect of the car stacker. The minutes record a number of issues, including a major problem in lining up on the turntable and an urgent need to resolve interface problems.

[42] On 25 September 2012, a site meeting was held at 10.00 am. The minutes record urgent actions coming out of the separate car stacker meeting, and that it had been agreed that the car stacker performance test strategy was still on hold until the car stacker was performing more reliably. Mr Hay (the Engineer) and Mr Hemi both attended that meeting. Mr Hay's evidence, which I accept, is that everyone involved accepted the car stacker works were not completed and that there were continual problems with it. He said the car stacker had been flagged as being likely deferred works in August and throughout September, but the extent of deferred works was a matter of debate. He said as at 25 September, no one suggested the car stacker should be the subject of a practical completion certificate in light of the continual problems with it. Mr Hemi did not dispute that the car stacker had not met the performance test. While equivocal as to the performance test requirement, Mr Hemi said everyone knew performance of the car stacker still had to be demonstrated and Mainzeal's focus was on that. He said that there was no mention though by RCP at the site meetings on or before 25 September 2012 of the car stacker being a critical issue that would prevent the award of a certificate of practical completion.

[43] Later in the day on 25 September 2012, the Engineer issued a certificate, as follows:

> Re: SAMSON CORPORATION
> GEYSER
> CERTIFICATE OF PRACTICAL COMPLETION
>
> Further to your application for Practical Completion dated 18th September 2012 and in accordance with condition 10.4.4 of NZS3910, we certify herewith that **with the exception of the car stacker machine the Contract Works at 100 Parnell Rd reached a stage of Practical Completion as at 14th September 2012.**
>
> **Practical Completion for above works is granted with the exception of** the following items;

> 1. Deferred works as outlined in your letter dated 18th September 2012 to be completed in accordance with close-out programme issued under NTC-615.
> 2. Completion of all defects as issued under Contract Instructions.
> 3. Provision of Twelfth Schedule – Form of Guarantee (Weather tightness).
> 4. Provision of final O&M Manuals and As-built drawings.
> 5. Provision of Meter readings as at 14th September 2012.
> **6. Car Stacker Performance to be demonstrated in accordance with our letter dated 1st July 2010 and Contract Instruction 59 issued 22nd September 2010.**
>
> Completion dates for these items shall be no later than Wednesday 31st October 2012.
>
> We advise that the Engineer reserves his position as it relates to the application of Liquidated Damages. Further direction will be provided within 5 working days.
>
> **As it relates to the Performance Bond, we advise that this will not be released until the items noted above are completed.**
>
> [Emphasis added]

[44] Mr Hemi said in evidence that although he was a little surprised when they received the certificate, carving the car stacker out of the certificate was not objected to, either when it was issued or later. He said he was not too concerned about it at the time as his expectation was that the performance test would be done soon and would be successful. Mr Hemi said there was no dispute that the 25 September certificate carved out the car stacker and that the certificate stated the bond would be held onto. Mr Hay said there was no objection by anyone to the 25 September certificate and if Mr Hemi was even a little surprised, he gave no indication of that at the time.

[45] Mr Hay says of the 25 September certificate that the level of non-completion of the works generally was well beyond "normal practice" and the alternative would have been to decline practical completion altogether, which would not have suited Mainzeal.

[46] The issue of liquidated damages was resolved on 25 or 26 September 2012 by agreement that they would be reduced by a further 20 per cent of the original sum from 31 August 2012, and would stop at 5 September 2012.

[47] On 27 September 2012, Mainzeal applied for an extension of the bond, which was granted by Vero/AAI.

[48] Mainzeal (and IPS) continued to work on site.

[49] The parties to the contract attended eight "close-out meetings" between 2 October 2012 and 11 December 2012.[3] The minutes all include separate items of "Defect and Deferred Works Closeout" and "Car Stacker".

[50] The minutes were copied to all parties. In each minute it was recorded:

> Practical Completion for all works except Car Stacker machine confirmed as 14th September 2012. Performance Test for car stacker required to receive full PC.

[51] Clause 12.3.1 of the Special Conditions provided that 20 per cent of the total retentions were to be released to Mainzeal following practical completion and lodgment of the Code Compliance Certificate application to the local authority.

[52] On or around 23 October 2012, 20 per cent of the contract retentions were paid to Mainzeal.

[53] On 21 December 2012, Mainzeal emailed RCP advising that IPS had undertaken a car stacker functionality test in which IPS had demonstrated to Mainzeal that the car stacker could operate on a fully-automated unsupervised basis. Mainzeal said it believed the car stacker was able to achieve practical completion and could be used by Samson for its intended purpose. Mainzeal said IPS was making plans to complete the performance testing requirement of the Car Stacker Specification.

[54] Mainzeal had written to IPS that same day, recording that as at the end of November, IPS had still not achieved practical completion or demonstrated a fully-automated, workable car stacker.

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[3] The minutes were dated 2, 16, 23 and 30 October 2012, 13, 20 and 27 November 2012, and 11 December 2012.

[55] Mainzeal wrote to Vero a number of times, requesting and obtaining further extensions of the bond with corresponding invoices from Vero.

[56] Mainzeal went into receivership on 6 February 2013 and ceased work on site.

[57] IPS continued to attend to the car stacker, but issues with the car stacker persisted. The car stacker had still not passed performance tests. Written incident reports from December 2012 onwards show that issues arose frequently with the car stacker, including safety issues.

[58] Mainzeal had kept retentions from IPS on the basis that the car stacker had not been completed. As a result, IPS said it was owed more than $700,000 by Mainzeal for subcontract retentions and variations. IPS advised Samson that it could not afford to continue work on the car stacker without payment.

[59] Samson was fearful that IPS would walk off the job, leaving even more problems behind. IPS was already operating under another corporate identity. Samson agreed to pay IPS to continue operating the car stacker. On 22 May 2013, IPS sent Samson an invoice for the work it had done from 7 February 2013 to 30 June 2013.

[60] In June 2013, Samson hired Mr Dillon, a specialist mechanical engineer of Task Consultancy Ltd, to conduct a survey on the condition of the car stacker. Samson then engaged Mr Dillon to design and oversee the work that it said needed to be carried out for the car stacker to reach the stage of practical completion.

[61] On 17 June 2013, Mr Hay wrote to AAI making demand for $2 million, the full sum of the bond. He enclosed an Engineer's certificate certifying that amount.

[62] On 19 July 2013, AAI replied. It advised that:

(a) the bond was not on demand;

(b) its liability was limited to obligations falling outside of the practical completion certificate, in this case the car stacker;

(c) it accepted Mainzeal had outstanding obligations under the contract when the defects period commenced, but it was not satisfied Samson was entitled to make a demand in the sum that it did; and

(d) it proposed a meeting to try to reach an agreement regarding Mainzeal's residual obligations and the costs associated with those obligations.

[63] Samson and AAI attempted to reach an agreement, but this was unsuccessful. Amongst other things, Richina intervened.

[64] In 2014, Samson issued invitations to four companies, including IPS, to tender for the car stacker corrective works. IPS tendered, but the tender was non-complying. On 5 September 2014, Samson accepted a tender from McRaes Global Engineering Ltd for the supply and delivery of works to complete commissioning and achieve practical completion of the car stacker.

[65] Samson has subsequently reissued its demand on AAI under the bond for costs it has incurred which it says were the result of Mainzeal's failure to provide a car stacker that had reached practical completion. Revised certificates from the Engineer, required under the bond, have also been provided.

[66] The updated costs were evidenced by Mr Creemers, General Manager for Samson, as follows:

(a) costs associated with the car stacker so that it can be commissioned and reach the stage of being practically complete ($1,755,430);

(b) the cost of employing technicians to remain on site to operate the car stacker manually ($404,117);

(c) the cost involved in investigating and determining the works needed to achieve practical completion of the car stacker ($491,838);

(d) project management costs ($147,707); and

(e) losses in car parking revenue as a result of some of the car parking spaces being unavailable ($431,460).

[67] The claimed costs total over $3.23 million, well exceeding the $2 million bond. Samson's claim is necessarily limited to the $2 million bond. (Samson claims interest in addition.)

[68] Richina and AAI contend that the bond is not payable.

Issues

[69] The issues that need to be determined are as follows:

(a) Did the operation of clause 2(a) of the bond render the bond null and void?

(b) If not, is AAI, and therefore Richina, nonetheless discharged from liability under the bond on the basis of prejudicial conduct by Samson and the Engineer?

(c) Is the bond an "on-demand" bond or a "conditional" bond?

(d) If the bond is conditional, what is the quantum of loss Samson can claim under the bond?

(e) Does Richina have standing to bring this proceeding?

Did the operation of clause 2(a) render the bond null and void?

[70] Clause 2(a) of the bond provides it is null and void when Mainzeal has carried out and fulfilled all the obligations imposed upon it by the contract documents prior to the period of defects liability commencing. Otherwise the bond is in full force and effect: clause 3.

[71] There is no question but that, as a matter of fact, there were outstanding obligations by Mainzeal under the contract well past 25 September 2012. In particular, the car stacker works were not complete. The car stacker had not met the Specification requirements and not met the performance test.

[72] As an immediate impression, it might seem that the bond was therefore still operative.

[73] However, the provisions of the contract documents, and in particular the effect of the words "prior to the period of defects liability commencing", make this more complicated.

[74] Clause 6.6.1 of the General Conditions provides that "[t]he Engineer shall issue … the certificate of Practical Completion … as required by the Contract Documents." The process for obtaining a certificate of practical completion is covered by clauses 10.4.2-10.4.4 of the General Conditions as follows:

> **10.4.2** When the Contract Works or any Separable Portion are believed to qualify for the issue of a certificate of Practical Completion the Contractor shall notify the Engineer accordingly.
>
> **10.4.3** Within five Working Days of receipt of such notice or as soon as practicable thereafter the Engineer shall inspect the Contract Works or Separable Portion and shall thereupon either:
>
> (a) Issue a certificate of Practical Completion stating the date and time at which the Contract Works or Separable Portion were so completed; or
>
> (b) Give the Contractor written notice of the work to be altered or completed in order to qualify for a certificate of Practical Completion.
>
> **10.4.4** On satisfactory completion of any work required under 10.4.3 the Engineer shall issue a certificate of Practical Completion stating the date and time at which the Contract Works or Separable Portion were so completed.

[75] Richina/AAI say that under clause 10.4.3 the Engineer could either issue a certificate, or give notice of work to be altered. While any certificate issued could in theory be for a separable portion, there was no provision in the contract for separable portions. They say that the 25 September certificate was a certificate of practical

completion of the whole of the contract works, the effect of which was to trigger the defects period for the whole of the works. They say the works to complete the car stacker were agreed between Samson and Mainzeal to be deferred works. Under the contract, deferred works are works to be completed during the defects period. Therefore, Mainzeal had fulfilled all the obligations that were required of it prior to the defects period commencing. (This argument can be expressed in a number of different ways, as Richina/AAI did, but all to similar effect.) On that basis, Richina/AAI say that the bond was discharged.

[76] Quite clearly, on the face of the 25 September certificate, the Engineer was not issuing a certificate that the works as a whole were practically complete. He expressly excluded the car stacker. (In fact he excluded a number of other items as well, including completion of all defects, but no one has made anything of these exclusions, except for item 6, which refers again to the car stacker.)

[77] As noted, a certificate of practical completion could be issued for a separable portion, and not the balance of the contract works, in which case the defects liability period would not be triggered at least for the balance, and similarly clause 2(a) of the bond would not be triggered. A separable portion had to be either specified in the contract or agreed between the parties.

[78] Samson says the certificate was for a separable portion, being all the works bar the car stacker, leaving the car stacker as an obligation that had not been fulfilled. Samson says in the alternative that the certificate was a partial certificate. I see little difference between these two points.

[79] There was no separable portion actually specified in the contract. Samson argues that separable portions had been informally agreed (which the contract provides for), between Samson and Mainzeal on or by 25 September 2012. However, there is insufficient evidence of an agreement as to separable portions (or equivalent) by 25 September 2012. While I am sure Mr Hay genuinely believed that Mainzeal and Samson had effectively agreed the car stacker would be carved out, there is insufficient evidence to that effect.

[80] The Engineer was therefore not authorised under clause 10.4.3 to issue the certificate in the form he did.

[81] However, I consider that immediately after 25 September 2012, Mainzeal and Samson agreed to treat the 25 September certificate at face value as a valid partial certificate, equivalent to a certificate of a separable portion. As Tipping J said in *Rattrays Wholesale Ltd v Meredyth-Young & A'Court Ltd*,[4] the existence of agreement can be inferred from conduct. The law will determine whether agreement has been reached on the basis of what a reasonable person, in the shoes of the parties, would consider to be the position. An agreement can be found to exist by this process of inference.

[82] The agreement to vary the contract is evidenced by the parties' conduct and documents created very shortly after the issue of the 25 September certificate, and ongoing. Mainzeal and Samson both clearly understood that the 25 September certificate was carving the car stacker out from practical completion. No objection whatsoever was ever taken by either of them to the certificate as worded, or to its clear effect. I have no doubt that if Mainzeal did not accept the 25 September certificate and/or if it considered the car stacker had been agreed as a deferred work, (which is Richina's case) it would have voiced its objection very loudly.

[83] Further, there were a number of close-out meetings, starting on 2 October 2012, attended by all involved in the construction, including Mainzeal and Samson representatives. As I recorded earlier, the minutes all state: "Practical Completion for all works except Car Stacker machine confirmed as 14th September 2012. Performance Test for car stacker required to achieve full PC." This language is similar to the language of the 25 September certificate. The minutes were sent to all parties.

[84] Also, in the email dated 21 December 2012 from Mainzeal to RCP, Mainzeal said it believed the car stacker was ready to achieve practical completion and could be used by Samson for its intended purpose, mirroring the language in clause 10.4.1(b), which provides that one of the indicia for works being practically

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4 *Rattrays Wholesale Ltd v Meredyth-Young & A'Court Ltd* [1997] 2 NZLR 363 (HC) at 373.

complete is when minor defects do not prevent their use for the intended purpose. The email from Mainzeal to RCP went on to say that IPS was making plans to complete the performance testing requirement of the Car Stacker Specification. That same day Mainzeal wrote to IPS saying that, as at the end of November, IPS still had not achieved "PC" or demonstrated a fully automated workable car stacker. While the latter communication is in the context of the subcontract between Mainzeal and IPS, it is clearly again relevant to Mainzeal's understanding of the position with the car stacker under the head contract. (There were also emails from IPS to Mainzeal on 16 and 29 January 2013, which stressed the importance to IPS of achieving practical completion of the car stacker quickly, and release of the IPS retentions, illustrating acceptance by IPS that the car stacker was not complete as a matter of fact.)

[85] In addition, Mainzeal sought further extensions from Vero/AAI for the bond until 31 December 2012, and then until 28 February 2013, which is consistent with Mainzeal's accepting that practical completion of the whole contract had not been achieved, as that would have discharged the bond.

[86] It follows that I do not accept Richina/AAI's argument that the car stacker was agreed to be a deferred work (or a defect, as was occasionally suggested). Richina/AAI say this was the "understanding" from August 2012 when occupancy was given. An understanding would not be enough in any event, but it is clear that occupancy was in exchange for a reduction in liquidated damages, not in exchange for agreement as to deferred works. The car stacker was contemplated as being deferred, even during September 2012, as Mr Creemers and Mr Hay acknowledged. But it was not agreed to be deferred. There is no good evidence, even from Mr Hemi, to that effect.

[87] Richina/AAI point to payment of 20 per cent retentions and the end of liquidated damages as evidence that the 25 September certificate was a certificate for the whole works. But these were no more than matters the parties negotiated in reliance on the 25 September certificate. They cannot lead to a rewriting of the 25 September certificate. In my view, they reinforce Mainzeal and Samson's acceptance of the certificate.

[88] The evidence that has led me to conclude that Mainzeal and Samson agreed to vary the contract makes it clear that Mainzeal and Samson did not agree to treat the car stacker as deferred works.

[89] I find that the car stacker was excluded from practical completion and that the contract was varied to permit the partial certificate, which Mainzeal and Samson treated as equivalent to an agreement as to separable portions.

[90] In terms of clause 4 of the bond, Vero/AAI was expressly not released from any liability under the bond by any alteration in the terms of the contract between Samson and Mainzeal.

[91] Mr Chisholm QC, counsel for Richina/AAI, submits that if their primary argument fails, the 25 September certificate should nonetheless be deemed to be a full certificate, and the exclusion of the car stacker ignored, on the basis that the parties could not rely on a non-permitted reservation in the certificate. He relies on what he refers to as a principle arising from *Metier3 Pty Ltd v Enwerd Pty Ltd (No 3)*,[5] that a party who does not challenge an excess of jurisdiction cannot rely on a non-permitted reservation.

[92] In my view, *Metier3* supports Samson's position. In that case, the engineer issued a partial certificate which the contracting parties treated as a certificate in respect of the whole of the works. The principal then tried to argue, for purposes of its dispute with the architect, that the certificate was not a certificate for the whole of the works. Vickery J, a specialist Judge sitting in the Supreme Court of Victoria (Technology, Engineering and Construction List), found that the certificate took effect in accordance with the way the parties treated it, not in accordance with its terms. The fact that there may well have been grounds to set aside the certificate as between the principal and builder was held not relevant. Neither contracting party acted upon those grounds; the certificate remained valid between them and was accepted by them as regulating their rights under the contract.[6]

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5 *Metier3 Pty Ltd v Enwerd Pty Ltd (No 3)* [2015] VSC 587.

6 At [111].

[93] In *Metier3*, the wording of the certificate and the parties' treatment of it were different, but the parties' treatment prevailed. That would be even more so on the facts of this case, where the parties treated the certificate precisely as it was worded. *Metier3* supports my finding that the 25 September certificate should be treated as a valid partial certificate.

[94] If, contrary to my finding, there either was no agreement to accept the 25 September certificate as valid on its face, or such an agreement is insufficient, then I agree with Mr Christie, counsel for Samson, the alternative scenario is that the 25 September certificate would be invalid and of no effect, it not being authorised by clause 10.4.3. An invalid certificate, as Mr Christie points out, would only expand the outstanding obligations of Mainzeal under the contract documents and the obligations of AAI under the bond (subject of course to the cap).

[95] Mr Chisholm also advances an argument that, quite apart from all of the above, the actions required of Mainzeal under the Engineer's notice of 24 August 2012 had all been met and the Engineer was therefore obliged to grant a certificate of practical completion under clause 10.4.4, despite the car stacker not meeting the Specification on 25 September 2012. Mr Chisholm does not provide any authority for such a narrow interpretation of the clauses relating to practical completion. This point does not seem to be touched upon in Richina's written opening submissions, but considerable significance was placed on it in closing. Mr Christie does not address the point in his written closing submissions, but I agree with the oral submissions he makes, to which I now refer in part.

[96] First, the 24 August 2012 notice from the Engineer was very wide and unspecific. The ticking of a box in terms of outstanding works could not lead to any guaranteed outcome. I do not accept that a notice such as this one can be approached as technically as Richina/AAI do with their detailed ex post facto analysis. Samson and Mainzeal clearly did not consider that to be the case. The subsequent issue of a certificate is still a matter of whether the Engineer considers there is satisfactory completion of any work required. As at 25 September 2012, the Engineer clearly was not satisfied that all items had been met. In particular, not all works that Mainzeal sought to be approved as deferred works, which included the car stacker

(although not specified in Mainzeal's application), had been agreed as deferred works. I have found that the car stacker was never agreed as a deferred work. No final certificate could be issued without that.

[97] Significantly, Mainzeal itself clearly did not consider that it was in a position to compel the issue of a certificate under clause 10.4.4 based on alleged compliance with the Engineer's 24 August 2012 certificate. To the contrary, it made a fresh application, on different terms to its previous application, on 18 September 2012. I have already found that Mainzeal and Samson both then accepted the 25 September certificate as regulating their rights under the contract. Where the parties to the contract have agreed to vary it in the way they have, it is not open to third parties to argue otherwise.

[98] Furthermore, I do not consider the contract provisions relating to practical completion should be read as narrowly as Mr Chisholm submits. Both clause 10.4.1 of the General Conditions and the addendum provided for in the Special Conditions in particular make it clear that the requirements for practical completion are cumulative and broad. That supports my position that the 24 August notice should not be read down, nor the Engineer's discretion limited. There is also arguably nothing to prevent the Engineer from issuing a second written notice under clause 10.4.3(b), where circumstances change or his knowledge of them changes.

[99] No certificate of practical completion of the whole of the contract work was therefore compellable by Mainzeal, nor has Mainzeal or its receiver or liquidator ever suggested otherwise.

Is AAI, and therefore Richina, discharged from liability under the bond on the basis of prejudicial conduct by Samson and the Engineer?

[100] Richina/AAI submit that if the issue of the 25 September certificate did not discharge the bond, it was discharged by virtue of Samson's prejudicial conduct under the contract documents. They argue that while clause 4 of the bond protects Samson from the bond being discharged in certain circumstances, it does not mean the bond is not discharged in the event of prejudicial conduct by Samson or the Engineer. They rely on the general principle that guarantors and sureties will be

discharged from liability if there has been any prejudicial deviation from the contract obligations being guaranteed. While it is not clear, I proceed on the basis that principle does apply here.

[101] The alleged prejudicial conduct is that Samson and the Engineer have not acted in accordance with the contract, or any variation of it, but rather have acted outside the terms of the contract.

[102] First, Richina/AAI say that when Samson began to occupy and use the car stacker from 31 August 2012 (which they say was contrary to clauses 5.6.1 and 10.7), it was understood this was on the basis that the car stacker would be treated as a deferred work after practical completion. Mr Chisholm submits that Richina/AAI were prejudiced by Samson's failure to honour this understanding and by the Engineer's conduct in issuing the certificate of practical completion, purporting to exclude the car stacker. Mr Chisholm says Richina/AAI's liability thereby continued for a longer period than contemplated and there is less incentive for both Samson, because it is in occupation, and Mainzeal, because liquidated damages no longer apply, to complete the works. The net effect is that Richina/AAI's liability would persist and it may become liable for wear and tear issues. Mr Chisholm also says that the bond should have been reduced to reflect the fact that some of the works were practically complete.

[103] I have already found there was no agreement that use of the car stacker was on the basis it would be treated as a deferred work. At Mainzeal's instigation, Samson and Mainzeal agreed that Samson would have occupancy and use before practical completion because Mainzeal was in significant breach of the contract date for practical completion. This was to be in exchange for accommodation over liquidated damages. This arrangement was not in breach of the contract and the bond expressly gives Mainzeal and Samson the ability to alter the contract, with the bond remaining on foot. The alternative to issuing the partial certificate was to issue no certificate (in which case no retentions would be paid and residual liquidated damages would continue), which was worse for Mainzeal and therefore for Richina/AAI.

[104] Further prejudicial conduct is claimed as being the payment by Samson of 20 per cent of the total retention sum to Mainzeal, following issue of the 25 September certificate, when that payment was only supposed to occur, under clause 12.3.1 of the contract, following practical completion and lodgment of the code compliance certificate application to the local authority.

[105] The bond expressly provides that it remains on foot in the event of a waiver by Samson, which is a conclusive answer in itself to this point. There is also no evidence that payment of the 20 per cent retention sum discouraged Mainzeal from completing its work. The evidence shows that both Mainzeal and IPS continued to work towards achieving practical completion of the car stacker after the 20 per cent retention was paid to Mainzeal. Further, of the $100,000 released, being 20 per cent of the total retention sum, the car stacker would only have accounted for around $13,000-$14,000. The balance had been given practical completion and so the retention sum was arguably due. I agree with Samson that in the context of $400,000 still being held as retentions, and the $37 million contract price, the sum attributable to the car stacker in the retentions released is de minimis and was not prejudicial, nor was it capable of being so.

[106] The last claimed prejudicial conduct by Samson is that Samson failed, or refused, to enforce the IPS guarantee.

[107] There was no requirement to enforce the IPS guarantee ahead of Samson's making a claim against Mainzeal or under the bond. Further, IPS refused to honour the guarantee because Mainzeal had not paid IPS all of the money IPS claimed was due under the subcontract. Samson submits that it was forced to co-operate with IPS and pay IPS additional funds, rather than try to enforce the IPS guarantee. There is clear evidence to that effect and no evidence to the contrary.

[108] I find therefore that there was no prejudicial conduct leading to AAI (and therefore Richina) being discharged from the bond.

Is the bond an "on-demand" bond or a "conditional" bond?

[109] Samson says the bond is "on demand". Richina/AAI submit that the bond is conditional.

[110] The significance is that a conditional bond requires certain specified conditions to be met and proven before a demand for payment under the bond can be made. An on-demand bond only requires that the bare demand be made, regardless of whether the contractor is in default.[7] An on-demand bond must be paid in response to a demand unless the request is known to be fraudulent.[8] Lord Denning in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* noted that on-demand performance bonds are "virtually promissory notes payable on demand".[9]

[111] If the bond is conditional, Samson would still be required to prove that Mainzeal breached its obligations under the contract and the quantum of loss,[10] noting there is a $2 million cap.

[112] As Mr Christie said, this point may not be so germane now, as Samson is proving its case in any event.

[113] The preamble to the bond states that the bond "is in the form of an on-demand bond". Significantly, this is different to the standard form of contractor's bond, which does not use the term "on-demand".

[114] However, there seems to be little else to support that label.

[115] To support their argument that the bond is conditional, Richina/AAI point to the following:

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7 *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1996] AC 199 (HL).

8 *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 (CA) at 171.

9 At 170.

10 *UGL (NZ) Ltd v Trade Indemnity + Surety Ltd* [2013] NZHC 2623 at [13].

(a) There is no express reference to the bond being on demand in the bond or the contract documents, other than in the preamble to the bond. Labels cannot be determinative in themselves[11] and the description in the preamble should not be given much weight.

(b) Clause 2 makes the bond conditional, insofar as it provides that the bond is null and void if stipulated conditions are met.

(c) There is overseas case law to the effect that a bond will be presumed to be conditional unless there are clear words to the contrary.[12]

(d) The bond does not use the language of an on-demand bond, for example, as in *Amalgamated Builders Ltd v Kitchener Construction Shed 20/24 Ltd*, where the bond provided that the issuer was "to pay immediately on demand".[13] Mr Chisholm also contrasts AAI's bond with the guarantee Richina gave to AAI, which is unconditional and on demand, and uses language to that effect.

(e) AAI is described as a surety, and the terms in clause 4 of the bond, which stipulate that AAI is not released from its promise under the bond by variation or forbearance, are all consistent with the bond being a guarantee, as they are traits of a guarantee.[14]

(f) The bond has not arisen in a context where an on-demand bond usually does, such as the parties in the contract underlying the bond being in different jurisdictions, or the bond being issued by a bank.[15]

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11 *Gold Coast Ltd v Caja De Ahorros Del Mediterraneo* [2001] EWCA Civ 1806; *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch) at [20].

12 *IIG Capital LLC v Van Der Merwe* [2008] EWCA Civ 542 at [9]; *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd*, above n 11, at [33].

13 *Amalgamated Builders Ltd v Kitchener Construction Shed 20/24 Ltd* HC Auckland M621-SW01, 16 May 2001.

14 *Trade Indemnity Co Ltd v Workington Harbour and Dock Board* [1937] AC 1 (HL) at 17; *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd*, above n 7, at 205.

15 *Quay Park Arena Management Ltd v Great Lakes Reinsurance (UK) PLC* [2014] NZHC 2204 at [79]-[84].

[116] Significantly, Mr Chisholm refers to two cases where bonds using language to similar effect to the present were held to be conditional bonds.[16] I agree the language is similar.

[117] Samson's submissions on this point are brief. They rely on the preamble stating that the bond is on demand and say that clause 2 does not make the operation of the bond conditional, but rather sets out conditions as to when the bond will be discharged.

[118] These are both valid points, but they are outweighed by the other factors relied on by Richina/AAI. I am particularly influenced by the findings in *UGL (NZ) Ltd* and *Trafalgar House* where similar bonds to the present were held to be conditional. I agree with the conclusions reached in those cases.

[119] In substance, for the reasons advanced by Richina/AAI, I conclude that the bond here is conditional.

[120] As a consequence of the bond's being conditional, Samson must prove that Mainzeal has failed to meet its obligations under the contract documents prior to 25 September 2012, and the quantum of the loss it has suffered.

What is the quantum of loss Samson can claim under the bond?

[121] Samson is entitled to claim under the bond for the costs incurred to correct Mainzeal's failure to provide a car stacker that had reached practical completion.

[122] Samson's costs are not estimated. They are costs actually incurred. There is detailed evidence to that effect. Revised certificates have been provided from the Engineer. The total costs are now over $3.23 million. These are set out at [66] above. On the face of it, the costs include $2,799,092 to bring the car stacker to a stage of practical completion, and lost car parking revenue of $431,460. As I understand it, even at the date of the hearing, the performance test had not been met and costs were still being incurred.

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[16] *UGL (NZ) Ltd v Trade Indemnity + Surety Ltd*, above n 10; *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd*, above n 7.

[123] Richina/AAI do not dispute these costs were incurred.

[124] Their main argument as to quantum relies on the point addressed earlier, that the Engineer was obliged to issue a full certificate on 25 September 2012 and therefore Samson's claimable loss is limited to any matters that still needed to be addressed under the clause 10.4.3(b) notice issued on 24 August 2012. Richina/AAI say these matters were of a minor nature, if any, including for example the cost to rectify non-provision of an executed guarantee. I have already rejected the argument that the Engineer had an obligation to issue a full certificate of practical completion on (or before) 25 September 2012. The argument as to quantum therefore also fails.

[125] Secondly, Richina/AAI submit that Samson has not proven that its loss was caused by the failure to achieve practical completion of the car stacker itself. It says that the sums claimed will, or may, include the following:

(a) losses caused by wear and tear, fatigue, maintenance of stacker or latent defects arising from Samson's occupation of the premises;

(b) losses caused by deficiencies in the concrete levels surrounding the car stacker. The car stacker was to fit to the building designed, not to be altered to fit to a defective building. Some works were carried out on the car stacker because of incorrect concrete levels of the building itself;

(c) losses caused by failure of the car stacker to meet "best practice", rather than practical completion;

(d) losses caused by Samson's decision not to make demand under the IPS guarantee, which would have required IPS to remedy any defects in the installation of the car stacker or resulting from failure to install it in accordance with the contract documents.

[126] I agree with Mr Christie that there is no reliable evidence of the claim being inflated by wear and tear, fatigue, maintenance or latent defects. Mr Chisholm did

not point to any material supporting evidence. He questioned Mr Creemers with regard to maintenance costs of $60,000 per annum. But Mr Creemers said that this sum, or the bulk of it, had been deducted from the amount claimed. Mr Hemi suggested that misalignments in the shuttle rails and guides were beginning to cause wear and tear by December 2013. This evidence was vague and unquantified. On the other hand there was evidence, with which I am satisfied, that any relevant wear and tear, fatigue or similar, was minor in the context of the major works required to bring the car stacker to practical completion and more importantly, was the result of the car stacker being badly installed in the first place. Such costs would fall under the bond. I therefore reject the argument that the quantum would be relevantly affected on this basis.

[127] In respect of (b) above, I accept Samson's position that there is no evidence that the building was not built as designed. Rather, it seems that the concrete floors were constructed outside the strict tolerances stipulated by the car stacker manufacturer and the rails had been installed out of tolerance as well. Mr Dillon confirmed that no remediation of the concrete was carried out. Replacement rails were installed that were straight rather than bent, and these were packed out with epoxy resin to accommodate the unlevel floor. The costs that were incurred to remedy the car stacker were largely for matters unrelated to the concrete level/rails misalignment in any event. Those costs were in the order of $400,000, which would still leave a total claim well in excess of $2 million.

[128] I therefore do not consider that this point leads to any reduction in the claim of $2 million.

[129] Regarding the point at (c) above, Mr Chisholm refers to evidence of Mr Creemers and Mr Dillon, which he says indicates that the standard of best practice was used to measure what remedial works would be required for the car stacker, not the standard that would be required under the original contract for the car stacker to reach the stage of practical completion. It seems clear that the work which was carried out was on the basis of what was required to achieve practical completion, and that is what matters. There was no evidence to the effect that Mr Dillon's report being on the basis of best practice made any difference to the

costs incurred. It was unclear what difference there was between "best practice" and achieving practical completion. Mr Creemers appeared to say that practical completion and best practice were the same. Mr Dillon said they were different concepts. He said best practice was undefined and had a range of different parameters. The point was left on a very vague basis. Overall I am satisfied on the evidence as a whole, including the evidence of Mr Dillon and the Engineer's certificate, that the work that was carried out was reasonably necessary to achieve practical completion in terms of the contract.

[130] As to (d), I have already held that Samson was not required to first make a call on the IPS guarantee. Samson was not obliged to employ IPS to carry out the remedial works on the car stacker. There is no evidence that IPS was prepared to voluntarily return to carry out the necessary works to complete, as was earlier alleged by Richina. Furthermore, I consider Samson did what it could to mitigate its loss. Samson invited IPS (amongst others) to tender to complete the car stacker, but IPS' tender did not conform. Samson is entitled to claim the actual costs of employing a new contractor to complete the work on the car stacker.

[131] Overall, Samson has provided sufficient evidence to satisfy me that the costs listed at [66] flowed from Mainzeal's default under the contract, and Richina/AAI have not provided any tangible evidence to the contrary, certainly not that would bring the costs below the bond limit of $2 million. (Arguably the revised Engineer's certificate as to default and as to the costs being reasonably incurred, is sufficient on its own in terms of quantum. That seems to be the position under clause 2(b) of the bond.)

[132] Therefore, I find that Samson has properly claimed the $2 million value of the bond and that AAI is in breach by failing to pay that sum.

Does Richina have standing to bring this proceeding?

[133] As stated earlier, it was Richina who filed this proceeding, seeking a declaration that the bond was null and void.

[134] Samson raised a number of arguments as to Richina's standing.

[135] Given AAI has joined forces with Richina and they have made joint submissions, the issues as to standing may have relevance only to costs, and then to a limited extent. I nonetheless address the points raised by each party.

[136] Samson claims first that Richina did not have standing to bring this proceeding, or have any right to seek relief or interfere with Samson's claim against AAI under the bond, because Richina is not a party to the contract or the bond.

[137] Second, Samson submits that Richina's only claim to standing or rights in relation to the bond would arise from the deed dated 7 November 2006 between Richina and AAI, by which Richina indemnified AAI against all losses relating to Mainzeal's performance under the contract, and against any payments required under the bond that AAI could not recover from Mainzeal. Samson submits that clause 3.2 and clause 4.1 of the deed between Richina and AAI preclude Richina from making any claim in relation to the bond.

[138] Clause 3.2 of the Richina/AAI deed provides that each contractor and guarantor must pay money owing under the deed in immediately available funds without any deduction and that they irrevocably and unconditionally waive any right of set-off or counter-claim in relation to any money owing by them under the deed and any right to rely on any defence available to a contractor as against a beneficiary of any bond. Clause 4.1 provides that no contractor or guarantor may interfere in any claim under a bond, which the surety may decide to pay, refuse or otherwise deal with in its discretion.

[139] Third, if Richina did have standing, Samson submits that the contract between Samson and Mainzeal is also a barrier to Richina's making a claim. It says that Mainzeal, as a party to the contract, could have taken advantage of the dispute mechanism provisions if it had any issues. The contract stipulates certain procedures to follow if disputes arise. Mainzeal did not utilise those procedures, and in relation to some it is argued they would now be barred because of time limits. In particular, Samson points to clause 13.1.1 of the General Conditions which provides:

> 13.1.1 No decision, valuation, or certificate of the Engineer shall be questioned or challenged more than three Months after it has been given or more than one Month after the date on which any relevant Adjudicator's Determination is given to the parties, whichever is the later, unless notice has been given to the Engineer within that time …

[140] Samson says that Mainzeal itself could not contest the exclusion of the car stacker from the certificate of practical completion issued by the Engineer after three months from when the certificate was issued. Therefore, Richina would also be precluded from making such a claim or raising defences in respect of the certificate of practical completion because of clause 13.1.1. (I note that this same argument would presumably be available against AAI, but that did not seem to be argued by Samson.)

[141] Beginning with Samson's second argument, as Richina has identified, Richina and AAI are in effect conducting the claim and the opposition against the cross-claim together, through their joint submissions. Given that approach, AAI is clearly not seeking to enforce clauses 3.2 and 4.1 of the 7 November 2006 deed. Samson, not being a party to that deed, cannot assert that it has standing to rely on those provisions and enforce them contrary to AAI's waiver. Therefore, I do not consider the terms of the 7 November 2006 deed between Richina and AAI preclude Richina from bringing any claim.

[142] As to Samson's third argument, that Mainzeal did not take advantage of dispute mechanisms and any dispute therefore is effectively barred, I again agree with Richina that AAI's liability is effectively limited by virtue of clause 2(a) of the bond, to the extent of the contractor's obligations under the contract documents. As Richina submits, AAI, and therefore Richina, is not bound by ultra vires acts of the Engineer because they are outside the terms of the contract. Also, as Richina points out, it would seem that theoretically the Mainzeal liquidators could still bring a claim under clause 13.1.1 of the contract because there has been no adjudicator's determination on the issue under the contract, so there is no absolute bar to challenging the 25 September certificate.

[143] Samson's first argument must still be determined: whether Richina has standing in the first place, and by what means? Richina is not a party to the contract or the bond, being the two agreements relevant to this proceeding.

[144] Richina submits that it has standing under s 3 of the Declaratory Judgments Act 1908, which provides that any person who claims to have acquired any right under a statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or to be in any other manner interested in the construction or validity thereof, may apply to this Court by originating summons for a declaratory order determining any question as to the construction or validity of such document, or of any part thereof.

[145] The Supreme Court in *Mandic v The Cornwall Park Trust Board (Inc)* interpreted s 3 broadly, and held that it "enables anyone whose conduct or rights depend on the effect or meaning of an instrument, including an agreement, to obtain an authoritative ruling".[17] Richina submits that it has standing to seek declaratory relief on the basis of its financial interest as the effective reinsurer of the bond, which it claims constitutes conduct or a right, to use the language from *Mandic*.

[146] Richina also submits, on the basis of *Yeoman v Public Trust Limited*,[18] that there is no requirement of contractual privity in order to engage s 3. The Court in *Yeoman* cited with approval *Zamir & Woolf*, an English text on declarations which stated that if the:[19]

> … acts of the defendant affect or may affect the claimant in his private rights, it is not necessary that their relationship should fall within the framework of a specific legal category such as contract or trust.

[147] I note that *Yeoman* was a case where the plaintiff claimed beneficial ownership of assets and the question was whether that was sufficient to grant standing. *Yeoman* may not in itself dispose of the issue as to whether Richina has rights that stand outside of the relevant contracts.

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17 *Mandic v The Cornwall Park Trust Board (Inc)* [2011] NZSC 135, [2012] 2 NZLR 194 at [9]. See also *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2015] NZHC 2393 at [19]-[38].

18 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC).

19 Lord Woolf and J Woolf, *The Declaratory Judgment* (4th ed, Sweet & Maxwell, London, 2011) at [5.26].

[148] In 1997, the Court of Appeal in *All-Weather Investments Ltd v Sealord Charters Ltd*[20] adopted the approach taken in the English case of *Meadows Indemnity Co Ltd v Insurance Corp of Ireland Plc*.[21] The approach in *Meadows* was that a non-party to a disputed contract does not have standing to seek a declaratory judgment that there is no binding contract. That case bore a striking resemblance to the current proceedings, as the reinsurer (Meadows) of a financial guarantee of insurance sought a declaration that the original guarantor was not bound to indemnify the principal. In other words, the party in the position of Richina sought a declaration that the party in AAI's position was not bound to indemnify the party in the position of Samson. The Court in that case held that its jurisdiction to grant a declaration was limited to declaring contested legal rights, current or in the future, of the parties represented in litigation before it. Therefore, Meadows did not have standing.

[149] However, the Court in *Meadows* also stated that it reached the conclusion that Meadows did not have standing to obtain a declaration with reluctance, on the basis it was contrary to the general approach of the Courts to resolve matters in one set of proceedings. The Court said that "[o]ne can … see the good sense of a person being able to establish by means of declaration the legal rights of a third person if those rights will in due course directly affect him as an insurer or re-insurer."[22] Despite that, the Court felt obliged to follow the earlier case of *Gouriet v Union of Post Office Workers*,[23] which held that the jurisdiction of the court to grant a declaration is limited to declaring contested legal rights, subsisting or in future, of the parties represented in the litigation before it and not those of anyone else. On that basis, while Meadows had a direct interest in the claim by the principal against the insurer, there was no contested issue between it and the principal, and so it could not claim a declaration against the principal.

[150] There does not seem to have been judicial comment as to the effect of *Mandic* on cases like *All-Weather*. However, since *Mandic*, the Court does not

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20 *All-Weather Investments Ltd v Sealord Charters Ltd* (1997) 10 PRNZ 320 (CA).
21 *Meadows Indemnity Co Ltd v Insurance Corp of Ireland Plc* [1989] 2 Lloyds Rep 298 (CA).
22 At 305.
23 *Gouriet v Union of Post Office Workers* [1977] QB 729 (CA).

require an existing dispute, nor is it necessary that there be a lis.[24] It would seem likely that *All-Weather* is no longer applicable. Anyone whose conduct or rights depend on the interpretation or effect of an instrument can obtain a declaratory judgment.[25] This statement from *Mandic* can be interpreted widely, and I consider it could permit Richina to have standing. This is particularly so if one considers the point raised in *Meadows* that if a party has a direct interest in the claim by the principal against the insurer, whereby their rights will be affected soon enough, then it would make sense that they have standing to seek a declaration in respect of the claim. The Court in *Meadows* considered itself constrained by prior case law which held that declarations were limited to enforceable rights. Given the Court's statement in *Mandic* regarding the scope of the jurisdiction, I consider that such constraints no longer apply in New Zealand.

[151] Richina has a direct interest in the agreement between AAI and Samson. Given the broad scope of the jurisdiction under the Declaratory Judgments Act that the courts have indicated, I find that Richina has standing under s 3 of the Declaratory Judgments Act.

[152] It was not raised in argument, but I note that it is considered inappropriate to issue a declaration under s 3 of the Declaratory Judgments Act when there is an issue of mixed fact and law,[26] or disputes of fact,[27] both of which apply here. The procedure is designed to provide a speedy and inexpensive method of obtaining a judicial interpretation.[28] I make no finding on this point. Samson may consider it relevant in respect of costs.

Interest and Costs

[153] Samson seeks interest, either from the date of its first demand or, at the latest, from when Samson started to incur the costs that arose in respect of the car stacker.

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24 *Mandic v The Cornwall Park Trust Board (Inc)*, above n 17, at [9].
25 At [9]. See also *Right to Life*, above n 17, at [20]-[21].
26 *Turner v Pickering* [1976] 1 NZLR 129 (SC) at 133.
27 *Wu v Body Corporate 366611* [2011] 2 NZLR 837 (HC) at [130]-[133]; *Mandic*, above n 17, at [5]. See also Declaratory Judgments Act 1908, s 3.
28 *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 (CA) at 85 per McCarthy P.

[154] Richina/AAI say it is unclear on what basis Samson seeks interest on the bond sum, given the contract appears only to provide for interest payable to a contractor for late payment and for interest on awards in arbitration. The bond does not provide for interest.

[155] Samson is presumably claiming interest under s 87 of the Judicature Act 1908, but it is not clear on what date the cause of action arose. I do not have submissions from either Samson or Richina on this point.

[156] Samson also seeks costs on both Richina's injunction application and the substantive proceedings, but asks that costs be reserved.

[157] Richina wishes to be heard separately from AAI in respect of costs.

Result

[158] Richina's application for declarations is dismissed.

[159] Vero/AAI is in breach of its obligation to Samson to pay $2 million under the bond.

[160] Samson's cross-claim is allowed. Judgment is entered against AAI in the sum of $2 million.

[161] The questions of interest and costs are both reserved. Samson is to file and serve submissions on these points by 9 August 2017. Richina and AAI are to file and serve submissions by 23 August 2017.

Hinton J