IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 44/2018
[2018] NZSC 72

BETWEEN	RICHINA PACIFIC LIMITED Applicant
AND	SAMSON CORPORATION LIMITED First Respondent
	AAI LIMITED (FORMERLY VERO INSURANCE LIMITED) Second Respondent

Court:	Elias CJ, Glazebrook and Ellen France JJ
Counsel:	D J Chisholm QC and D A C Bullock for Applicant G J Christie and J R J Knight for First Respondent S Stokes for Second Respondent
Judgment:	8 August 2018

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay costs of $2,500 to the first respondent.

REASONS

Introduction

[1] In 2010 Vero Insurance Ltd (now AAI Ltd) issued a $2 million performance bond as part of a $37 million contract between Mainzeal Property & Construction Ltd (Mainzeal) and Samson Corporation Ltd (Samson) relating to a construction project in Auckland.[1]

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[1] The project, the Geyser Building, involved five commercial buildings with a car stacker that would move vehicles around to their car spaces.

The contract used was the New Zealand Standards conditions of contract for building and civil engineering construction NZS 3910:2003 with some modification. The applicant, Richina Pacific Ltd (Richina), was the parent company of Mainzeal and it agreed to indemnify AAI for payments made under the bond. Mainzeal went into receivership on 6 February 2013 without completing its obligations under the contract. Part of the works, an automated car stacker, never met the contractual performance standard. The contract price included a provisional $5.1 million for the car stacker.

[2] That Mainzeal would not finish the works on time was apparent from March 2012. Late completion gave rise to liability for liquidated damages.[2] Mainzeal wanted to limit that liability and Samson's arrangements with prospective tenants meant it wanted possession. Access to one level of one of the buildings was provided to Samson in August 2012 and to three other buildings and the car stacker later that month. Ultimately, by 5 September 2012, Samson had taken possession of all five buildings. The issue of Mainzeal's liquidated damages was resolved in late September 2012.

[3] Meanwhile, Mainzeal had applied unsuccessfully to the contract engineer for a certificate of practical completion in late August 2012.[3] The car stacker failed performance testing. Mainzeal again sought a certificate in mid-September 2012. There was evidence that, at a site meeting at that time, all present accepted the car stacker could not be the subject of a certificate of practical completion. A certificate of practical completion was eventually issued on 25 September 2012. Its terms excluded the car stacker. The certificate added that the bond would not be released until the listed items (including the car stacker) were completed.

[4] On 17 June 2013 Samson made demand to AAI for payment of the bond in full.[4] Richina applied to the High Court for a declaration that it was not liable to pay

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2 Mainzeal had to pay liquidated damages of $6,450 plus GST per day from the due date of completion, 29 March 2012. By 1 July 2012, liquidated damages amounted to over $600,000.

3 The engineer was responsible for certifying practical completion.

4 The background is set out in detail in the judgment of the High Court: *Richina Pacific Ltd v AAI Ltd (formerly Vero Insurance Ltd)* [2017] NZHC 1686 (Hinton J) [HC judgment] at [10]–[67]; and see: *Richina Pacific Ltd v Samson Corp Ltd* [2018] NZCA 132 (Kós P, Miller and Gilbert JJ) [CA judgment] at [7]–[28].

the $2 million sought under the bond. Samson counterclaimed for payment.[5] Samson succeeded in the High Court and was awarded the full amount of the bond. The Court of Appeal dismissed an appeal by Richina and AAI from the High Court decision. Richina seeks leave to appeal to this Court against the decision of the Court of Appeal.[6]

The Court of Appeal judgment

[5] In the Court of Appeal AAI argued that, in essence, the bond was discharged at the point the contract engineer certified practical completion. AAI submitted that at that point the period of defects liability began and the certificate of practical completion could not and did not have partial effect. Alternatively, it submitted that the parties varied the contract by agreeing to treat the car stacker as a deferred work to which no requirement of practical completion applied.

[6] The Court found these arguments could not succeed because they were all based on the premise that the 25 September 2012 certificate of completion ended Mainzeal's obligation. The Court rejected that premise. The Court said that under cl 2(a) of the bond, "the bond was discharged only if at the date of practical completion Mainzeal had duly … fulfilled all obligations" under the contract.[7] Mainzeal had not completed the obligations and certainly had not by the date of the certificate. Although not necessary on the Court's approach, the Court then addressed the argument the car stacker was treated as deferred works and so a part of the contract works attracting no separate practical completion requirement. The Court saw it as likely that deferred works were, as the contract engineer said, "major incomplete or defective items" the parties agreed to defer to a later date.[8] But the Court did not accept that even if the car stacker's completion was deferred it was necessarily excluded from practical completion. Whether it was so excluded was a question of fact and the Court said that argument failed on the facts.[9]

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5 Samson incurred $3.23 million in costs in attempting to bring the car stacker to practical completion after Mainzeal's collapse.

6 AAI abides the decision of the Court on the leave application.

7 CA judgment, above n 4, at [30]. Clause 2(a) provided the bond became "null and void" if Mainzeal "duly carries out and fulfils all the obligations imposed on [it] by the Contract Documents prior to commencement of period of Defects Liability referred to in the Contract Documents".

8 At [32].

9 By contrast, the High Court found the parties' arrangement was a variation of the contract: above n 4 at [81]–[82].

[7] The Court of Appeal also found the evidence supported the view the parties treated the car stacker as a separable portion with the result it was carved out of the practical completion certificate.

[8] The Court of Appeal next dealt with Richina's argument that the bond was discharged when Samson was allowed into possession because that was "beyond the scope of the indulgence clause and adverse to AAI".[10] This aspect of the case was directed, first, to the decision to allow Samson into possession and, second, to the voluntary decision to release retentions.

[9] The Court found possession occurred under the contract which expressly contemplated that possibility. The contract anticipated the parties treating the stacker and the remainder of the works as separable and allowing Samson into possession of the latter works. The indulgence clause therefore continued to apply.[11] Miller J, delivering the judgment of the Court, put it in this way:[12]

> The contract expressly envisaged that with Mainzeal's consent possession of a separable portion might precede practical completion. … the stacker was a separable portion and Mainzeal unquestionably agreed to Samson using it. It is debatable whether Samson actually took possession of the stacker; IPS [International Parking Systems, who was contracted by Mainzeal to supply and install the stacker] technicians remained on site to work on it and operate it. But if Samson did take possession, it did so pursuant to the construction contract and not by way of variation.

If there was a variation, in any event, the Court was satisfied that it came within the indulgence clause. No prejudice to AAI arose.

[10] Finally, the Court considered the bond was not discharged by Samson's payment of retentions to Mainzeal because this payment was required under the contract when practical completion was certified.

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10 CA decision, above n 4, at [38].

11 The indulgence clause provided the surety was not released from liability under the bond by, amongst other things, an alteration in the terms of the contract.

12 At [40].

The proposed appeal

[11] The proposed grounds of appeal would challenge the findings of the Court of Appeal summarised above. Richina argues that reconsideration of these findings would raise a number of matters of general commercial importance concerning construction law practice, the effect and satisfaction of performance bonds, and the construction of the NZS 3910:2003 standard contract.

[12] The approach to the interpretation of performance bonds and the standard form contract may give rise to a more general question of commercial importance. We are satisfied, however, that none arises here. Rather, the proposed questions turn on the particular facts.

[13] In this respect, the striking feature is that the only obligations in issue were Mainzeal's obligations relating to the construction of the car stacker. Against that background, as Samson submits, the real dispute was whether or not the parties agreed to defer the requirement to complete the car stacker and whether that excused the car stacker from the obligation to attain practical completion. That is a factual assessment. It is relevant also that, as is acknowledged by Richina, cl 2(a) of the standard form of bond has changed in the NZS 3910:2013 version of the standard agreement.

[14] The other issues Richina wishes to advance similarly turn on their facts. Further, the question of whether the parties agreed the car stacker was a deferred work is the subject of concurrent factual findings.[13] Similarly, the question of the effect of Samson's entry into possession of the works raises questions about how the Court of Appeal has applied the contract to these facts. No different issues arise in relation to the payment of retentions which are, as Samson submits, in any event not significant.[14] Accordingly, we are satisfied no question of general commercial importance arises.[15] Nor does anything raised by Richina as to the way in which the factual findings were arrived at give rise to an appearance of a miscarriage of justice.[16]

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13 HC judgment, above n 4, at [86]; and CA judgment, above n 4, at [32]–[33].

14 Hinton J considered that the amount of retentions relating to the car stacker to be "de minimis": HC judgment, above n 4, at [105]; and see: CA judgment, above n 4, at [45].

15 Supreme Court Act 2003, s 13(2); Senior Courts Act 2016, s 74(2).

16 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

[15] The application for leave to appeal is accordingly dismissed. Richina is to pay Samson costs of $2,500.

Solicitors:
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Simpson Grierson, Auckland for First Respondent