

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA399/2015
[2015] NZCA 559**

BETWEEN	AAI LIMITED Appellant
AND	92 LICHFIELD STREET LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) Respondent

Hearing: 30 September 2015

Court: Winkelmann, Dobson and Gilbert JJ

Counsel: S W B Foote and J C Dymock for Appellant
S D Munro and V M Heward for Respondent

Judgment: 19 November 2015 at 11.30 am

JUDGMENT OF THE COURT

- A The appellant's application to adduce further evidence is dismissed.**
- B The respondent's application to adduce further evidence is dismissed.**
- C The appeal is allowed.**
- D The statutory demand served by the respondent on the appellant is set aside.**
- E The appellant is entitled to costs in the High Court, to be fixed in that Court.**
- F The appellant is entitled to costs in this Court for a standard appeal on a band A basis with usual disbursements.**
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REASONS OF THE COURT

(Given by Winkelmann J)

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[1] The respondent (Lichfield), a company in receivership and liquidation, owns a Christchurch property that was damaged in the Canterbury earthquakes. The appellant, AAI Limited, was the insurer of that property for material damage. Lichfield asserted that it had reached a contractual settlement with AAI in respect of its material damage claim and issued a statutory demand for what it claimed was the agreed settlement sum. AAI then applied under s 290 of the Companies Act 1993 to set aside the demand, an application dismissed by Associate Judge Osborne on the grounds there was no substantial dispute as to whether or not the debt specified in the statutory demand was owed or due.¹ AAI now appeals that judgment.

Background

The policy

[2] Lichfield's receivers arranged for the material damage insurance policy with AAI, and when doing so listed Lichfield's three mortgagees in the policy schedule as interested parties. The companies listed as first mortgagee were Equitable Property

¹ AAI Ltd v 92 Lichfield Street (in rec and in liq) [2015] NZHC 1421.

Finance Ltd and Equitable Property Holdings Ltd. Equitable Property Holdings Ltd was also the creditor that had appointed the receivers under the terms of a general security agreement. The other mortgagees listed were Dominion Finance Group Ltd (second mortgagee), and Hanover Finance Ltd (third mortgagee).

[3] Lichfield is a member of the David Henderson group of companies. At some point prior to the alleged settlement, FTG Securities Ltd and SPF No. 10 Ltd (also companies within that group) took assignments of the second and third mortgagees' interests in the property respectively.

[4] Under the policy the insured is entitled to the indemnity value of the building at the date of damage. If the insured chooses to reinstate the building "with reasonable dispatch" and spends money to do so, then it is entitled to the reasonable costs of reinstatement beyond indemnity value up to the sum insured (\$13,000,050).

[5] Negotiations to settle Lichfield's material damages claim under the policy were lengthy. AAI is a subsidiary of Vero Insurance Ltd. Vero and AAI's loss adjuster, TPA-Godfreys, handled those negotiations for AAI.

The offer

[6] On 21 June 2013 TPA-Godfreys wrote to the receivers with an offer of settlement. TPA-Godfreys said that AAI's valuer's estimate of the pre-event (pre-earthquake) market value of the building was \$4,627,000 excluding GST. On that basis, AAI contended that sum was the policy entitlement on an indemnity basis, plus claim costs incurred to date. The offer continued:

We note you are uncertain at this stage as to whether you will effect reinstatement with a view to maximising return for your principals. Nevertheless, and in order to reach a pragmatic, negotiated, commercial settlement, we are prepared to revise our offer to **NZ\$6,500,000 excl. GST**, plus Claim costs incurred by you to date (to be confirmed), together with the outstanding cost associated with the protection measures (**NZ\$203,309 excl. GST**), net of the deductible, under Section 1 – Material Damage of the policy.

It will be understood that this revised offer, which reflects the described uncertainty in relation to the remediation measures, will remain open for 14 days from the date of this letter. Upon expiry of that period, the offer is withdrawn and our position will revert to a settlement representing the

described measure of “indemnity value” being **NZ\$4,627,000 excl. GST** plus Claim costs incurred to date, together with the outstanding cost associated with the protection measures, gross of the Deductible and payment made by Vero to date.

...

Conclusion

If our revised settlement is acceptable, then please advise Adrian Bowness, of TPA-Godfreys ..., and he will arrange for issue of a form of discharge in the appropriate sum to you.

[7] The time for which the offer remained open was extended twice: on 4 July 2013 and 23 October 2013. On each occasion the receivers requested the extension to allow them time to discuss the offer with other interests.

The agreement

[8] On 1 November 2013, one of the receivers, Mr David Ruscoe, telephoned TPA-Godfreys to advise that Lichfield was prepared to accept the offer of \$NZ6,500,000 (net) in settlement of the material damage claim. He sent an email confirming the conversation, and asking what further information was needed from the receivers.

[9] On 7 November 2013, AAI provided a draft discharge form to Lichfield which provided for execution by Lichfield and its interested parties, the three mortgagees.

[10] On 14 November 2013, the receivers’ solicitors wrote to AAI’s loss adjusters regarding the draft discharge. In respect of the “parties” they said:

We are of the opinion that it is sufficient for the receivers to be party to the document as the authorised agents of [Lichfield] and as such [the mortgagees] do not need to be included as a party to the document. As such we request they are deleted.

[11] On the same day, TPA Godfreys received a letter from the solicitor for FTG challenging the amount of the offer and advising that FTG would not consider itself bound by any agreement reached between AAI and the receivers to which FTG did not consent.

[12] AAI remained insistent that it required the discharge to be signed by all interested parties. Over the course of the next year or so AAI and the receivers worked together to attempt to ensure that the interested parties were bound in some way by the agreement. However on 19 February 2015, the receiver’s solicitors wrote to the solicitors for AAI stating that there was a binding settlement between Lichfield and AAI that “was not subject to any term or condition that the mortgagees agree to the settlement of the claim/policy for \$6.5 million ...” and accordingly, “[a]s the mortgagees’ consent was not a term or condition of the parties’ agreement reached on 1 November 2013, [AAI] was obligated to pay the settlement sum to the first mortgagee within a reasonable period following 1 November 2013...”.

The statutory demand

[13] Service of the statutory demand followed on 5 March 2015. In response AAI’s solicitors denied that a debt was owed by AAI to Lichfield because the settlement was “in principle” only. They asked for an undertaking that Lichfield would withdraw its statutory demand. Lichfield refused to do so, obliging AAI to make an application for an order under s 290 of the Companies Act to set aside the statutory demand.

Associate Judge Osborne’s judgment

[14] Before the Associate Judge AAI argued that no contract to settle the insurance claim had come into existence because the receivers did not accept all of the aspects of AAI’s offer: in their acceptance they referred only to the \$6,500,000 in settlement of the material damage claim, and not the other components of AAI’s offer (claim costs and costs associated with protection measures). The Associate Judge rejected this argument, and AAI does not now challenge that finding.²

[15] AAI’s alternative argument was that the execution of an appropriate form of discharge, one signed by all mortgagees listed as interested parties in the policy, was a condition precedent to any obligation AAI had under the agreement to make

² AAI Ltd v 92 Lichfield Street (in rec and in liq), above n 1, at [26]–[27].

payment. The Associate Judge was satisfied that the implication of such a term did not fit with the full record of contemporary correspondence.³

[16] He also rejected a related ground of challenge to the statutory demand, that its issue was an abuse of process.

[17] The Associate Judge declined the application to set aside the statutory demand.

Relevant principles

[18] Applications to set aside statutory demands are governed by s 290 of the Companies Act, which provides in material part:

290 Court may set aside statutory demand

...

- (4) The court may grant an application to set aside a statutory demand if it is satisfied that—
 - (a) there is a substantial dispute whether or not the debt is owing or is due; or
 - (b) the company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount; or
 - (c) the demand ought to be set aside on other grounds.

[19] There was no dispute on appeal as to the relevance of the following principles identified by the Associate Judge in relation to the application of s 290(4):

[17] For the purposes of this hearing I adopt as a general approach to the exercise of this jurisdiction these five principles –

As to s 290(4)(a)

- (a) The applicant must show that there is arguably a genuine and substantial dispute as to the existence of the debt.
- (b) The mere assertion that the dispute exists is not sufficient. Material short of proof is required to support the claim that the debt is disputed.

³ At [35].

- (c) If such material is available, the dispute should normally be resolved other than by means of proceedings in the Court's Companies Act jurisdiction.

As to s 290(4)(b)

- (d) Alternatively, an applicant must establish that any counterclaim, cross demand or set-off is reasonably arguable in all the circumstances.

As to both ss 290(4)(a) and (b)

- (e) It is not usually possible to resolve disputed questions of fact on affidavit evidence alone, particularly when issues of credibility arise.

[18] The discretion under s 290(4)(c) – whereby the Court finds that the demand ought to be set aside on other grounds – is a residual discretion which enables the Court to do justice between the parties. As Tipping J indicated in *Commissioner of Inland Revenue v Chester Trustee Services Ltd*, the exercise of the discretion comes down to the Court's judgment as to whether the creditor's prima face entitlement to liquidate the company is outweighed by some factor making it plainly unjust for liquidation to occur.

[Footnotes omitted]

[20] During the course of the hearing an issue arose as to the meaning of the expression "substantial dispute" in s 290(4)(a). Mr Munro for Lichfield argued that to meet this threshold, AAI would have to show a stronger case to justify the setting aside of a statutory demand than would be required were it resisting an application for summary judgment. He cited *Re Welsh Brick Industries Ltd* as authority for this proposition.⁴

[21] We are not persuaded that is the threshold an applicant must meet under s 290(4). Such a threshold would be inconsistent with a statutory scheme which provides for a process summary in nature, with potentially draconian consequences for the unsuccessful applicant and tighter time frames than those applying in the summary judgment jurisdiction. In *Industrial Group Ltd v Bakker* this Court said:⁵

... the statutory scheme ... for applications to set aside statutory demands [is] a summary proceeding ... The section calls for a prompt judgement as to whether or not there is a substantial dispute ... The test may be compared with the principles in cognate fields such as applications to remove caveats, [and] leave to appeal an arbitrator's award ... The tight time constraints

⁴ *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197 (CA).

⁵ *Industrial Group Ltd v Bakker* [2011] NZCA 142, (2011) PRNZ 413 at [24]–[25].

distinguish the s 290 discretion from that to be exercised on say, a summary judgment application, where the presence of complex legal issues is not necessarily a bar to a remedy. As with leave to appeal an arbitrator's award, the hearing should, in the normal course, be short and to the point. And the judgment likewise.

[22] It is important to keep in mind the words of the statute. What the applicant must show is that the dispute it raises has substance; the applicant must explain to the court what the dispute is; and the dispute so shown must be a real and not a fanciful or insubstantial dispute.⁶ The Court must bear in mind that it is operating in the summary jurisdiction, with the accompanying disadvantages that brings for any applicant. The Court must also keep in mind the requirement that what is intended to be a summary hearing should not be converted into a full-blown trial.

AAI's arguments on appeal

[23] Before us AAI argues that either:

- (a) There was a binding agreement, and the requirement for discharge is to be interpreted as requiring a full discharge of all potential claims under the policy. Because the mortgagees are interested parties under the policy, this includes any potential claims they have; or
- (b) There is no binding agreement because the parties have failed to reach a concluded bargain as to the consideration to be provided by Lichfield. This is either because the terms of the required discharge were too uncertain to constitute a binding agreement, or the vagueness of expression of the discharge as consideration indicates that the parties intended not to be bound until the terms of the discharge were agreed.

[24] AAI argues that these are objectively reasonable outcomes on the evidence before the Court. In contrast, Lichfield's scenario supposes a commercially absurd interpretation that results in AAI settling a claim for several million dollars without achieving finality in respect of potential claims under the same policy for the same

⁶ *Re A Company* [1991] BCLC 737 (Ch) at 740 per Harman J.

building. Without obtaining the discharges it seeks, the second and third mortgagees can dispute the indemnity sum agreed upon. Alternatively, if they are able to obtain control of the site, they can pursue AAI for the gap between the indemnity and reinstatement values.

[25] There was some discussion during the hearing as to whether in the event of settling with Lichfield only, AAI had any remaining exposure to the mortgagees. In written submissions Lichfield had asserted that the operation of s 30A of the Receiverships Act 1993 was sufficient to protect AAI from the claims of subsequent mortgagees under the policy. Section 30A(1) relevantly provides:

30A Extinguishment of subordinate security interests

- (1) If property has been disposed of by a receiver, all security interests in the property and its proceeds that are subordinate to the security interest of the person in whose interests the receiver was appointed are extinguished on the disposition of the property.

...

[26] The argument was not pressed by counsel for Lichfield at the hearing. He was right not to do so. Section 30A does not operate to extinguish the underlying indebtedness of a creditor, and it cannot operate to extinguish contractual entitlements under an insurance policy. It is in substance a machinery provision that allows a receiver to convey title to a property which would otherwise be subject to several security interests, free of those interests.⁷

[27] Ultimately Lichfield accepted that it was an arguable proposition that the policy constitutes a promise by the insurer to each party mentioned in the endorsement. It was also accepted to be an arguable proposition of law that a full and final settlement between an insurer and an insured will not bind other interested parties of whom the insurer has notice.⁸

[28] For the purposes of this hearing Lichfield therefore accepts that there is some risk to AAI of further claims under the policy unless it receives the discharge in the

⁷ *Agnew v Pardington* [2006] 2 NZLR 520 (CA).

⁸ *Zybert v CML Fire and General Insurance Co Ltd* (1981) 1 ANZ Insurance Cases (NSWSC) ¶60–414; *Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (NZ) Ltd* [1995] 3 NZLR 1 (PC).

form it insists upon. It also does not dispute that it makes no commercial sense for an insurer to settle a claim with the insured only to face further claims from the insured's mortgagees. But it says that this does not preclude a party from doing just that. Lichfield says that to the extent that AAI remains vulnerable to a claim from interested parties, that was a risk it accepted when it failed to expressly state it wanted the interested parties to sign a discharge. Although its failure to do so may mean that from its perspective it has entered into a bad bargain, the interpretation of that bargain AAI argues for is inconsistent with contemporaneous evidence.

Analysis

First ground of challenge: express term

[29] Although the Associate Judge dealt with this argument as one for an implied term, before us counsel clarified AAI's argument as follows. It is claimed by AAI that there was an express term of the agreement that Lichfield and the other interested parties would discharge all claims they had under the policy in return for payment of the settlement amount. AAI is therefore not obliged to make payment of the settlement sum when it has not been provided with a discharge signed by all interested parties.

[30] The issue arising under this head is one of contractual construction. In the absence of a formal written contract the task is to construe the language of the offer accepted by Lichfield's receivers. From the language of the offer it is clear AAI made an offer of settlement under the policy, but which claims was this offer intended to settle? AAI also asked for a discharge of claims, but a discharge by whom?

[31] There is no issue as to the appropriate approach to the construction of contracts. The proper approach is an objective one. As Lord Hoffman said in *Investors Compensation Scheme Ltd v West Brunswick Building Society*, the aim is:⁹

... the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would

⁹ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28, [1998] 1 WLR 896 at 912.

reasonably have been available to the parties in the situation in which they were at the time of the contract.

[32] There is no conceptual limit to what can be regarded as background, but it has to be background that a reasonable person would regard as relevant.¹⁰ On that test evidence of background circumstance is not relevant if it does no more than tend to prove what one party subjectively intended or understood the words to mean, or what a party's negotiating stance may have been at a particular time.¹¹

[33] The interpretation exercise in this case is not straight forward given the sketchiness of the written record of the agreement. The letter of offer contains a full discussion of how AAI's offer has been arrived at but does not deal in any detail with the consideration it proposes flows the other way. In that regard, the letter goes no further than describing the offer presented as an attempt to reach a "pragmatic, negotiated, commercial settlement", and referring to the provision of a form of discharge.

[34] Nevertheless we are satisfied that AAI has shown that there is a substantial dispute whether the debt Lichfield claims is owed. This is on the grounds that what AAI and Lichfield intended to settle was all possible claims under the policy, so that it follows the discharge referred to was a discharge releasing AAI from all claims under the insurance policy. Such a discharge was never provided to AAI and AAI is therefore not obliged to make payment. In reaching this view we have taken into account a number of matters.

(i) Events preceding acceptance of the offer

[35] The first is that at the time the policy was taken out, Lichfield was being managed for the benefit of its creditors. It was an insolvent company. We do not have any evidence as to the terms of the financing agreements between Lichfield and the mortgagees, but it is at least clear that the building was security provided to each of the mortgagees. It is usual in mortgage documents to require the debtor to maintain insurance, and to ensure that the mortgagee's interest is noted. In certain

¹⁰ *Bank of Credit Commerce International SA v Ali* [2001] UKHL 8, [2001] 2 WLR 735 at [37] per Lord Hoffman.

¹¹ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19].

circumstances, such as receivership and liquidation, payments received under an insurance policy go to meet the claims of creditors. In this case, the receivers negotiated for the insurance policy and as part of the negotiation required that the mortgagees be listed as interested parties. It was therefore in all parties' contemplation that the interested parties may have an interest in any payment out under the policy.

[36] We also see as relevant that AAI's offer was approximately \$1.9 million more than AAI contended was the appropriate indemnity value for the property. As AAI submits, it was offering a payment above the indemnity value in return for the certainty to be achieved by obtaining a discharge of claims.

[37] Lichfield says that AAI's stipulation for the particular form of discharge did not emerge until after the receivers accepted the offer. It emphasises that the offer was only addressed to the receivers and made no reference to the interested parties. That evidence does provide some support for Lichfield's position. But there is also evidence that before accepting the offer, the receivers dealt with the interested parties in relation to the offer to secure their agreement to the proposed settlement.

[38] On 4 July 2013, Lichfield's receivers and AAI's representatives met to discuss the offer. Minutes of that meeting subsequently circulated to the attendees recorded the receivers' initial assessment of the settlement offer as "reasonable ... although he caveated this as being provisional subject to a further valuation of the property ... and [the receivers] satisfying all interested parties". The minutes further record that the receivers requested an extension of time beyond the 14 days imposed by AAI to enable them to liaise with "interested parties". AAI obliged, and the time to respond to the offer was extended.

[39] In his affidavit in opposition to AAI's application to set aside the statutory demand, one of the receivers, Mr Ruscoe, explained the steps taken following the extension of time. He said he discussed the offer of settlement with the appointing creditor, Equitable Property Holdings Ltd, but claims not to have liaised with FTG, SPF No. 10 or David Henderson. Mr Ruscoe says the purpose of obtaining the further valuation referred to in the minutes was to satisfy himself that the offer of

settlement from AAI was a reasonable one and the best price achievable for the insurance policy, “taking into account my duties as receiver and the interests of the secured parties in the Property”. But this explanation does not seem to square with the record in the minutes of the meeting that the receivers needed the time to liaise with the interested parties.

[40] It is also significant that on 23 October 2013 the solicitors acting for the receivers again requested a further extension of the time for which the offer was open, on this occasion “to allow the receiver more time to consider the offer in depth with mortgagee interest”.

[41] Mr Ruscoe says that he asked for this extension to allow him time to discuss the offer with the receivers’ appointing creditor. But again, on first impression, the explanation seems at odds with the contemporaneous record; the reference is to mortgagee interest, not to a particular creditor. It is also hard to see why the receivers needed more time to discuss the offer with the appointing creditor when they had, on their own account, already sought an extension of time for that purpose.

[42] There were other events which support the view that AAI and Lichfield were proceeding on the basis that the mortgagee interested parties had a say in the settlement. Mr Ruscoe says that at some time in August 2013 he met with Mr Henderson at Mr Henderson’s request. Mr Henderson told Mr Ruscoe that he wanted to purchase Equitable Property Holdings Ltd’s interests in the property so that he could take over the insurance claim/policy and rebuild the property. On 10 September 2013 a meeting was convened between TPA-Godfreys for AAI, Mr Ruscoe, other staff from the receivers’ office, and Mr Henderson. Mr Henderson advised the meeting that he was liaising with engineers to assist in drawing up a scheme to re-establish the property and that he had identified options as follows:

1. Acquire possession of the site and building (through matching any offer of settlement and considered by [the receivers] to be acceptable to them), and succeed to the policy/claim with a view to negotiating an improved cash settlement with the insurers or effecting repairs in settlement.
2. Supervising and approve any settlement between the insurers and [the receivers].

The meeting concluded with Mr Ruscoe stating an intention to liaise with Mr Henderson and “confirm the position to be adopted by them to [AAI’s representative].”

[43] Lichfield points to the fact that the minutes of the same meeting record that TPA-Godfreys “advised that the Offer of Settlement remains open to allow... [the Receivers] full opportunity to review their position (as the policy holder) ...”. Lichfield says this statement tends to contradict the notion that the offer of settlement remained open to allow the interested parties the full opportunity to review their position. We agree this statement is something to be added into the mix, but on the evidence to date, we see it as more equivocal as to meaning than Lichfield would have it. Less equivocal is the role Mr Henderson claimed for himself in approving any settlement. The receivers' promise recorded in the minutes, to come back to AAI with a joint position between the receivers and the interested parties, tends to support the view that the receivers and AAI were proceeding on the basis that the interested parties had a say in the settlement.

[44] After this meeting Mr Henderson again sought to meet with AAI’s representatives. AAI declined, instead sending a letter to the receivers explaining that they had refused to meet as their offer had been fully explained in the memorandum of 21 June and advising that if a third party successfully succeeds to the insurance policy (presumably a reference to Mr Henderson’s interests), AAI reserved its position to avoid the policy or to restrict it to one of indemnity only. The letter concludes “You may provide David Henderson and any other interested party with a copy of this memorandum if you wish”.

[45] Lichfield says these statements are simply inconsistent with AAI’s position that the interested parties were required to sign a discharge: if AAI required the interested parties to agree to discharge all claims under the policy, why would it leave it to Lichfield whether it passed on this information? Ultimately Lichfield’s view of the significance of this evidence may be accepted. But on the evidence before us, AAI’s invitation to the receivers to share the memorandum “if you wish” is arguably consistent with a common understanding between AAI and Lichfield that

the interested parties had to be brought along with the settlement, and it was for the receivers to achieve this.

[46] On one view of this narrative of events, the receivers negotiated insurance which conferred rights upon the interested parties, involved the interested parties (through Mr Henderson) in discussion regarding the settlement, and on two occasions sought time to discuss the offer settlement with the interested parties.

(ii) Subsequent conduct

[47] The offer was ultimately accepted by the receivers as set out above. There is also evidence of subsequent conduct on the part of the receivers relevant to whether the receivers' and AAI's shared intention was that AAI was to receive a discharge from Lichfield and the interested party mortgagees. Evidence of subsequent conduct may be admissible to assist in the construction of contracts. In *Gibbons Holdings Ltd v Wholesale Distributors Ltd* Tipping J described the threshold for admissibility as follows:¹²

If the Court can be confident from their subsequent conduct what both parties intended their words to mean, and the words are capable of bearing that meaning, it would be inappropriate to presume that they meant something else.

[48] AAI's first significant act post contract was to send a discharge form which required the consent of the interested parties. Mr Ruscoe says that was the first time there was any indication that the receivers would be required to obtain a discharge from the interested parties. He said they would not have accepted the offer on terms that required such a discharge because they knew that they would be unable to get the consent of the second and third mortgagees. In their solicitor's letter of 14 November 2013 the receivers immediately challenged the requirement for such a discharge.

[49] The letter that Mr Ruscoe refers to may properly be construed as a challenge to AAI's requirement that the interested parties agree to discharge all claims against

¹² *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277 at [63], see also [7].

AAI. But it can equally be read as focusing upon necessary mechanics of how a full discharge for AAI under the policy is to be achieved. The solicitors for the receivers wrote:

We are of the opinion that it is sufficient for the receivers to be party to the document as the authorised agents of 92 Lichfield Limited (in Receivership and in Liquidation) and as such Equitable Property Finance Limited, Equitable Property Holdings Limited, Dominion Finance Group Limited or Hanover Finance Limited do not need to be included as a party to the document. As such we request they are deleted.

[50] For its part AAI remained insistent that it required the formal discharge. On 13 December 2013 AAI's solicitor suggested that they hold the settlement sum in their trust account whilst the receivers sought a declaration from the Court that they were entitled to settle with AAI on the terms and at the sum agreed. The receivers did not protest this position, but rather commenced preparation of the application for directions.

[51] It was only on 19 February 2015, some 14 months after this correspondence, that the receivers asserted for the first time that the mortgagees' consent was not a term or condition of the parties' agreement.

[52] Drawing these threads of evidence together we consider that AAI has put forward an argument, supported by evidence contained in contemporaneous documents, that the offer was for payment in return for a full discharge of all potential claims under the policy, and that was the offer accepted by Lichfield. While Mr Ruscoe refutes that account in his affidavit, there is sufficient evidence in the contemporaneous documents to satisfy us that AAI should be entitled to discovery and ultimately, to the opportunity to test Mr Ruscoe's evidence on cross-examination.

[53] As noted earlier, the Associate Judge dealt with this ground for the application as an argument for the implication of a term.¹³ This may have been how the point was argued before the Associate Judge. However in this Court the argument put was that the "settlement" reached was a settlement of all claims under the policy, including interested parties. On the basis of the argument we have heard,

¹³ *AAI Ltd v 92 Lichfield Street (in rec and in liq)*, above n 1, at [34].

we are satisfied the Judge erred in finding that AAI had not raised a substantial dispute, that the appeal should be allowed, and the statutory demand set aside.

Second ground of challenge: no concluded agreement

[54] Although not strictly necessary we also address, if only briefly, the alternative ground of challenge put forward by AAI: that there is no binding agreement because the terms of the required discharge were too vague, indicating the parties did not intend to be bound at that point. There are some indications the receivers' approach was to treat the offer as still open to negotiation on significant terms after November 2013. For example, the receivers asked that the indemnity contained in the settlement documentation make clear that the receivers accepted no personal liability in respect of that indemnity. Moreover, in an email dated 4 February 2014, the receivers asked AAI to update their "offers". The email read in part: "can you please put something into writing for us as the offers in the memo's attached are now quite out of date and both say they have a limited time frame on offer?"

[55] This correspondence occurred in the context of the receivers preparing evidence for the application for directions. The evidence therefore provides some support for the alternative ground of challenge and is, we consider, also sufficient to show a substantial dispute.

Applications to adduce further evidence

[56] Both parties sought leave to adduce further evidence on appeal. AAI sought leave to adduce evidence of two receivers' reports prepared after November 2013 in which the receivers referred to the settlement as being "in principle". For its part Lichfield sought leave to file evidence of another settlement which it claims was in very similar terms to the present; the essential nature of the claims being settled and the parties were the same (AAI was the insurer, Mr Ruscoe was a receiver and the mortgagees included Equitable Property Holdings Ltd and SPF No. 10 Ltd), yet AAI did not require discharge from the interested parties.

[57] We decline both applications for leave to file further evidence. As to AAI's application, the receivers' reports cannot be characterised as fresh as they are public

documents which should have been available to AAI at the time. In addition, they are not particularly cogent as the reports add little to material already before the Court.

[58] As to the receivers' application, we do not regard the evidence of another settlement, even between the same parties, as cogent. Admitting that evidence opens up a collateral inquiry as to the circumstances of the other settlement. Such evidence is not appropriate on the hearing of a summary application.

Costs

[59] In its notice of appeal AAI challenged the Associate Judge's finding that the use of the statutory demand procedure was not an abuse of procedure. Although this ground of appeal was not initially covered in its written submission, the misuse by Lichfield of the statutory demand procedure emerged as an issue at the hearing of the appeal, in connection with costs.

[60] AAI seeks an award of indemnity costs, or an uplift in costs ordered on the grounds of abuse of process. The submission is advanced that by invoking the statutory demand procedure, Lichfield used a procedure that in the circumstances should never have been utilised. Further, although Lichfield agreed not to advertise the liquidation application it filed following the dismissal of AAI's application to set aside the statutory demand, it would not agree to a stay of the liquidation proceedings until AAI had paid the disputed amount into Court.

[61] We agree that the statutory demand procedure should not have been used in this case, and that its use was an abuse of procedure. The statutory demand jurisdiction is not one to be invoked as a means to obtain payment where a genuine dispute exists. We adopt the following comments of the Judge in *Rembrandt Custodians Limited v Pro-Drill (Auckland) Limited*:¹⁴

[38] One of the most significant potential consequences is the establishment of jurisdiction to immediately place the company in liquidation. If a company wishes to avoid those consequences it must either

¹⁴ *Rembrandt Custodians Limited v Pro-Drill (Auck) Limited*, HC Auckland, M337-IM03, 13 June 2003.

persuade the issuer of the statutory demand to withdraw it or, alternatively, apply to the Court for an order setting the demand aside. The timeframe for the filing of such an application is very tight. There is no room for error, because the Court has no power to extend the time within which an application to set aside a statutory demand may be filed. In those circumstances, it is obviously incumbent on the issuer of a statutory demand to ensure that the demand is being issued on a proper basis. In particular, it must take care to ensure that the debt which is claimed in the statutory demand is not the subject of a genuine dispute ...

[62] Lichfield knew that AAI's position was that the settlement sum was not payable until Lichfield was able to procure that the interested parties were somehow bound by the settlement agreement. It is a fair characterisation of events to say that for 14 months Lichfield acquiesced to this view of the parties' respective obligations, until only very shortly before the issue of the statutory demand. Lichfield knew that there was a substantial dispute as to whether the debt was payable, but nevertheless issued a statutory demand to force payment of the settlement sum.

[63] Notwithstanding this finding, we do not consider that increased or indemnity costs should be awarded in this Court, as before us, Lichfield was defending a judgment in which it had been the successful party. Issues concerning abuse of process can however be considered within the context of the fixing of costs in the High Court.

[64] The appeal having been allowed, AAI is entitled to costs in the High Court which are to be fixed in that Court.

[65] In this Court AAI is entitled to payment of costs on a standard appeal on a band A basis, together with disbursements.

Result

[66] The appellant's and the respondent's applications to adduce further evidence are dismissed.

[67] The appeal is allowed and the statutory demand served by the respondent on the appellant is set aside.

[68] The appellant is entitled to costs in the High Court, to be fixed in that Court. The appellant is also entitled to costs in this Court for a standard appeal on a band A basis with usual disbursements.

Solicitors:

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Anderson Lloyd, Christchurch for Respondent