IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-7455
[2012] NZHC 3585

BETWEEN	HANOVER GROUP HOLDINGS LIMITED Plaintiff
AND	CHARTIS INSURANCE NEW ZEALAND LTD Defendant

Hearing: 15-19, 23 and 24 October 2012

Appearances: N S Gedye and J A MacGillivray for plaintiff
A C Challis and P McKinnon for defendant

Judgment: 21 December 2012

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 10.30 am on Friday 21 December 2012

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Introduction

[1] Over a substantial period ending in July 2008, certain companies associated with the plaintiff (Hanover) carried on business as finance companies, accepting deposits from members of the public and lending to commercial entities. There were three such companies; the first was Hanover Finance Ltd (previously known as Elders Finance) (HFL), the second was United Finance Ltd (UFL), and the third (from 2005 onward) was Hanover Capital Ltd (HCL).

[2] It is common ground that each of these three companies carried on business as second tier financiers, and that for the purpose of raising funds, they issued prospectuses pursuant to the provisions of the Securities Act 1978. Although there was some irregularity in the time period between certain prospectuses, each of the three companies issued a new prospectus on a more or less annual basis.

[3] For some years prior to 2007, Hanover maintained a D & O policy (the policy) with the defendant, then known as AIG. The Court was told at trial that the defendant has once again assumed that name for trading purposes. It is therefore convenient to use the AIG name throughout this judgment when referring to the defendant.

[4] The policy provided limited prospectus cover, which insured against liability arising from claims from investors made in reliance on the contents of prospectuses issued by the three finance companies.

[5] The policy was due for renewal with effect from 1 November 2007. Hanover had previously identified gaps in the cover and sought, through its brokers, to amend the policy upon renewal in order to provide more complete cover.

[6] Hanover's broker believed that he had negotiated complete cover with AIG's underwriter during the course of discussions prior to renewal, but when AIG issued its policy for the 12 month period commencing 1 November 2007, the relevant endorsement fell far short of complete prospectus cover. Remarkably, the

discrepancies were not picked up until after Hanover ceased to accept funds from the public in July 2008.

[7] More recently, the Financial Markets Authority (FMA) has taken an interest in Hanover. Its investigations are on-going. In about July 2008, Hanover gave notice to AIG of circumstances which may give rise to a claim. Ultimately, in reliance on the terms of the policy issued in December 2007, AIG indicated that cover was not available.

[8] In this proceeding Hanover's principal claim is that the policy ought to be rectified so as to accord with what it says was the oral agreement reached between its broker and AIG's underwriter. It advances separate arguments based on estoppel and an alleged breach of the Fair Trading Act 1986, each aimed at achieving the same objective as the principal cause of action. AIG's straight forward defence is that the policy as issued conforms with the oral agreement made between the broker and the underwriter, and that the claim must accordingly fail. It is common ground that consequential issues, including quantum, are to be left for another time.

Background

[9] Hanover had maintained a D & O policy with AIG since at least November 2004. For the year commencing 1 November 2004, cover was $10 million, and for the two succeeding years it was $20 million. Hanover retained Apex General Ltd (Apex) as its brokers.

[10] The broker having responsibility for the November 2007 policy renewal was Mr Grant Dawson, who had joined Apex early in 2007. Prior to that, he had worked at Marsh Ltd as a general insurance broker. For the purpose of making himself familiar with the Hanover file, he reviewed the history of the D & O liability policy as revealed by the broker's file. He became aware that, with effect from 1 November 2006, AIG had the primary D & O liability cover, and the excess layer was underwritten by QBE Insurance (International) Ltd (QBE).

[11] For that policy period, Hanover had $40 million cover, of which AIG held the first $20 million and QBE the balance of $20 million. Separate professional indemnity insurance was placed with QBE.

[12] The AIG policy wording for the insurance year commencing 1 November 2006 was issued on 1 December 2006. It contained the following endorsement to the policy wording:

> ENDORSEMENT ATTACHING TO AND FORMING PART OF POLICY NUMBER DO 6803 03
>
> ENDORSEMENT NUMBER 008
>
> THE EFFECTIVE DATE OF THE ENDORSEMENT IS 1 NOVEMBER 2006
>
> POLICYHOLDER: HANOVER GROUP HOLDINGS LIMITED
>
> The insurer shall not be liable to make any payment for **Loss** in connection with any **Claim** made against an **Insured Person** directly or indirectly arising out of, or in connection with:
>
> (a) any public or private issue of shares, preference shares (redeemable or otherwise), debentures of whatever kind, promissory notes or any other form of negotiable or non-negotiable security for the raising of capital by equity, debt or any other means;
>
> (b) the issue of any prospectus or similar document or the making of any written or oral representation, in connection with (a) above.
>
> Notwithstanding the above, this endorsement shall only apply to:
>
> i. Initial Public offerings;
>
> ii. Capital raisings outside of New Zealand;
>
> iii. The issuance of additional shares for listed companies;
>
> iv. Prospectus documents where the amount to be raised is over $400,000,000 and the sole or primary purpose is the acquisition of funds for the purpose of providing finance to third parties.
>
> However, this exclusion does not apply to:
>
> 1. Elders Finance Limited and its subsidiary companies in respect of Prospectus No.30 dated 30 November 2001.

2. Elders Finance Limited and its subsidiary companies in respect of Prospectus No.31 dated 9 December 2002.

3. Elders Finance Limited and its subsidiary companies in respect of Prospectus No.32 dated 27 August 2003.

4. Elders Finance Limited and its subsidiary companies in respect of Prospectus No.33 dated 13 December 2004.

In all other respects this policy remains unaltered.

[13] This is in exactly the same terms as the endorsement that was in effect for the previous policy period, commencing on 1 November 2005. It is to be noted that Elders Finance Ltd changed its name to Hanover Finance Ltd on 30 September 2005, but the name change had not been picked up as at 1 December 2006 in the policy endorsement.

[14] In about August 2007, Mr Dawson became responsible for the Hanover account. In the course of reviewing the file, he noted the provisions of endorsement 8 and accordingly became aware that prospectus cover was limited in certain material respects. During August and September 2007, Mr Dawson conferred with Hanover personnel in order to familiarise himself with Hanover's insurance requirements. On 27 September 2007 he sent the 2007 underwriting submission for Hanover, prepared by Apex, to Mr Barker, the AIG underwriter responsible for the Hanover account. With respect to the proposed policy renewal, the Apex submission noted that "the endorsement for prospectus cover provided for non-listed raisings under $400 million".

[15] On 23 October 2007, Messrs Barker, Dawson and Ross met at Hanover's offices. Mr Ross was chief financial officer of Hanover. He had by then become involved in the renewal process. The meeting was arranged in order that Mr Barker might obtain further information from Hanover so as to gain a better understanding of the group's business. For his part, Mr Ross wanted to understand exactly what cover was provided under the D & O insurance policy.

[16] Mr Dawson took a sheet of paper to the meeting, on which to take notes. Before the meeting commenced he had written at the top of the sheet:

> Prospectus liability – coverage under D & O policy for capital raisings up to $400m.

[17] Mr Dawson made this note in order to ensure that the limitation on prospectus cover resulting from Endorsement 8 was discussed at the meeting. His evidence was to the effect that it was agreed at the meeting that the effect of Endorsement 8 was that under the existing policy, cover was available only for raisings under $400 million, or for prospectuses raising more than that figure which were specifically listed in the endorsement.

[18] Immediately after the meeting, Mr Dawson wrote to Mr Crawford, a broker representing the excess layer underwriters, advising that the endorsement did not provide cover for Hanover's annually issued prospectus. That was because, for raisings over $400 million, Endorsement 8 excluded cover, except in respect of prospectuses actually listed. By October 2007, funds raised by the Hanover companies were greatly in excess of $400 million, and approaching $1 billion.

[19] The next day, 24 October 2007, Mr Dawson sent an e-mail to Mr Ross in which he asked:

> In regards to the funds raised by Hanover Finance's annual prospectus – please confirm approximately the average capital raised in recent years. This will enable us to obtain pricing from AIG for coverage of the prospectuses to present to the Audit & Risk Committee.

[20] Mr Dawson said in evidence, and it is reasonably plain, that this e-mail request was made in the context of a concern that Endorsement 8 did not provide automatic cover for Hanover's annual prospectuses, and in particular the annual HFL prospectus.

[21] Later that same evening, Mr Ross responded to Mr Dawson's e-mail. He said:

> We are trying to understand why there is mention of Elders Finance 30 to 33. We need cover for current prospectuses. We also question what is the meaning of the $400m limit. Clearly we have way in excess of $400m in issue. Can you perhaps go back to the insurance in policy documents to get a better understanding or indeed AIG/QBE. We should discuss further Thursday morning.

[22] Two key telephone discussions took place between Mr Dawson and Mr Barker on 25 October 2007. The first was the subject of a file note by Mr Dawson, made immediately after the conversation had concluded. The file note reads:

> 25/10 – Vince @ AIG
>
> Discussed with Vince the requirement of Hanover to cover current prospectuses. He will look through his file regarding the endorsement. Agreed that terms this year reflect cover for current prospectus.

[23] Following that discussion, Mr Dawson obtained confirmation from Hanover as to the likely extent of total capital raisings in the near future. As a result, he sent to Mr Barker an e-mail, dated 25 October and timed at 11.09 am. The e-mail read:

> Morning Vince,
>
> As discussed, from their last prospectus Hanover Finance Ltd Raised approx $920M – they do not expect this figure to go over $1B in the near future.

[24] Then there was a further telephone discussion between Mr Barker and Mr Dawson. The latter again made a brief file note immediately after the discussion. It read:

> 25/10 – Discussed with Vince – it was always AIG's intention to cover prospectuses issued as this is the main risk for HFL.
>
> GWD

[25] Following the two telephone discussions, Mr Dawson sent an e-mail to Mr David Crawford, an Australian broker representing the excess layer insurers. This e-mail is timed at 11.42 am on 25 October 2007. It is common ground that the two discussions between Mr Dawson and Mr Barker preceded the 11.42 am e-mail.

[26] Mr Dawson's e-mail to Mr Crawford read:

> After further discussions with the insured & AIG, it will be agreed (AIG to confirm) that all prospectuses are to be covered under the D&O policy as this is where the majority of the risk is for the client.
>
> AIG have confirmed this was always the intention of the policy & the $400m figure was a historical figure from 5 or so years ago when annual capital raisings were a lot smaller.

> AIG will remove this endorsement from the policy accordingly and add one noting cover for the prospectuses.
>
> Hope this doesn't affect terms for the excess layer – please let me know if you have any queries.

[27] At 1.16 pm on 25 October, Mr Barker sent to Mr Dawson an e-mail in the following terms:

> We have been through the entirety of the file and note that in 2005 we included the last Elders Prospectus (No.33) for additional premium. Since then we have not been asked to include any further documents (that fall outside of the current write-back provisions) which warrants additional premium. There was an option put up in early '06 for stand along prospectus cover which went no further.
>
> As discussed the terms provided this year reflect the inclusion of the latest Hanover Finance Prospectus Document.

[28] Earlier in October, AIG had provided a document headed "Corporate Guard D&O Quotation Terms". This was a quote for cover under the D&O policy to commence on 1 November 2007. The quotation form provided for prospectus cover in the following terms:

> Prospectus cover provided for all non-listed raisings under $400m and specifically includes cover for Elders Finance Ltd prospectus No's 30-33.

[29] Mr Dawson made the following notation against that provision:

> To be removed – cover to include all prospectuses issued (non-listed).

[30] He said in evidence this amendment was made by him following his discussions with Mr Barker, and receipt of his confirmatory e-mail of 25 October.

[31] On Friday 26 October, Mr Dawson reported to Mr Ross by e-mail, as follows:

> Hi Michael,
>
> We have obtained an Employment Disputes Liability quote, which we will discuss Monday (summary: $1M cover, $10K excess, premium $5,300)
>
> We have been seeking an "indication of price" for the Network Security cover at this stage as this is seen as low risk. Hanover can then decide if the policy is worth pursuing. This is the only one I am waiting on (will have prices for you on Monday).

> Prospectus cover was also being looked into and this has been covered now with AIG confirming cover under the D&O policy.

[32] Also on 26 October Mr Dawson sent an insurance review, summarising the Hanover Group's insurance position, to Mr Ross. In an attached schedule, Mr Dawson indicated that Hanover carried prospectus liability insurance. A previous version of the schedule had indicated that such insurance was not in place.

[33] At the end of October, following his discussions with Mr Barker, Mr Dawson prepared a comprehensive insurance renewal report for a meeting with senior Hanover representatives scheduled for 30 October 2007. In that report, Mr Dawson said:

> Please note the Prospectus Liability endorsement providing cover only for non-listed raisings under $400M has been removed. This was an historical endorsement that had not been updated since 2004. All non-listed prospectuses are now covered.

[34] On 31 October 2007, Mr Barker wrote to Mr Dawson by e-mail as follows:

> Grant
>
> Thank you for your call.
>
> I have done some digging and I don't have any idea where these other terms may have come from which is a concern. My biggest concern is either that these terms have been desk quoted or the terms provided are inferior to the current programme.
>
> It must be stressed that this is no ordinary time for D&O for Finance Companies and we are not prepared to match inferior terms from an unknown source. We are providing very broad Prospectus Cover and full solvency cover under the D&O. Given it is the most volatile time in the FI sector for many years it should also be taken into account that AIG is the world' premier D&O insurer with an AREA+ rating which certainly should not be overlooked when offering this sort of capacity.
>
> In saying this we are very keen to retain our relationship with both Apex and Hanover and continue our support on this risk. We are prepared to amend our renewal premium to $70,000 Net.

[35] It is common ground that cover became bound on 2 November 2007, AIG having agreed to a deferral for 24 hours in order that excess layer arrangements might be finalised.

[36] On or about 13 November, Mr Dawson sent a closing document in respect of the renewed D&O cover to AIG. The closing document was essentially a summary of the relevant cover for the various Hanover companies. Its precise purpose and legal effect is disputed, and is discussed below. For present purposes, the important point is that Mr Dawson included the narration:

> 2(g) Prospectus cover provided for non-listed raisings.

[37] The equivalent provision in the previous year's closing document contained a reference to the terms of the existing Endorsement 8. The new provision in the closing document was intended by Mr Dawson to reflect his understanding of the wider cover now in place.

[38] On 10 December 2007, Mr Dawson wrote to Mr Springhall, Mr Barker's assistant at AIG. His e-mail read:

> Morning George,
>
> Our Excess Layer Insurers in London will not issue certificates until they have viewed AIG's updated policy wording. As we have a request pending out of Australia, are you able to send this through this week?
>
> Following are the changes from last years schedule/wording as far as I can see:
>
> - Simon Holloway, Anthony Morgan, Stephen Auld & Colin McAlister noted as Insured Persons under this policy.
> - Endorsement 9 – Axis Property Group Holdings Ltd changed to Hanover Property Group Holdings Ltd
> - Endorsement 8 – Removal or editing of this endorsement to reflect coverage of all prospectuses issued by Hanover & its subsidiaries
> - The Excess Layer Insurer also has requested that "AIG" as mentioned in the Non-Accumulation clause be amended to read "the Insurers". This can be added by endorsement if preferable.

[39] On 14 December 2007, Mr Springhall responded by e-mail in the following terms:

> Hi Grant
>
> Please find attached the 2007 policy wording for Hanover.
>
> With regard to your final bullet point below, the Non-Accumulation clause, the excess layer Insurers can add this to the policy by endorsement (on receipt and approval by AIG), but we will not amend our Non-Accumulation clause.
>
> Please don't hesitate to contact Vince or myself should you wish to discuss anything.

[40] The policy terms for the year commencing 1 November 2007 were attached to Mr Springhall's e-mail. Endorsement 8 in the new policy varied from the previous Endorsement 8 only in that the Hanover Finance Investment Statement dated 29 December 2006 and the Hanover Finance Limited Prospectus No.35 dated 29 September 2006 were now included in the list of prospectuses covered under the endorsement.

[41] Neither Mr Barker nor Mr Springhall provided any explanation for the terms of the new Endorsement 8, nor was there any comment on Mr Dawson's statement in his 10 December e-mail to the effect that he understood that the endorsement would be amended to reflect coverage "of all prospectuses".

[42] Mr Dawson did not read the policy terms upon receipt, nor, it appears, at any material time thereafter. Neither did anyone else at Apex or Hanover.

[43] In or about July 2008, the Hanover Group ceased to accept deposits from members of the public, and gave AIG notice of circumstances which may give rise to a claim.

[44] Towards the end of 2008, the D&O policy was further renewed for the year commencing 1 November 2008. At that time, cover was explicitly extended to all of Hanover's prospectuses, by making express reference to them in the exception to Endorsement 8. But of course, that had no impact on the rights and liabilities of the parties in respect of the insurance year commencing 1 November 2007.

The competing contentions

[45] The case for Hanover is that on 25 October, Messrs Dawson and Barker reached agreement by telephone that AIG would provide D&O cover for the insurance year commencing on 1 November 2007 that would extend to all prospectuses, issued by members of the Hanover Group, including any new prospectus issued during the relevant year.

[46] Mr Gedye argues that the plaintiff's case is supported not only by Mr Dawson's evidence of what occurred, but also by the contemporary documents.

[47] Ms Challis, on the other hand, argues that the evidence does not establish any such agreement on the part of AIG. It is acknowledged that Mr Barker agreed that Prospectus 35 (in force at the time but shortly due to expire) would be expressly referred to in Endorsement 8, and therefore not subject to exclusion from cover. However, she says, there is insufficient evidence that Mr Barker agreed to provide cover that was effectively open ended, in that Hanover would be automatically covered in respect of any prospectus or investment statement that came into force during the insurance year, without further reference to AIG.

[48] The particular focus is on Prospectus 36, which was not in force as at 1 November 2007, but was issued on 7 December 2007. Prospectus 36 had been in force for some months when Hanover gave notice to AIG of circumstances likely to give rise to a claim under the policy. It is logical that many investor claims would be brought in reliance on Prospectus 36, for which no cover was available by virtue of Endorsement 8 of the policy issued on 14 December 2007.

[49] The case for the plaintiff is that the endorsement is wrong, because it does not reflect the agreement between Messrs Dawson and Barker reached on 25 October 2007 that all prospectuses, including Prospectus 36, would be covered under the policy. The plaintiff seeks rectification of Endorsement 8 accordingly, although it is agreed that, if relief is to be granted, then a suitable declaration will suffice.

Rectification: principles

[50] The elements of a claim for rectification were summarised by Tipping J in *Westland Savings Bank v Hancock*:[1]

> (a) … whether there is an antecedent agreement or not the parties formed and continued to hold a single corresponding intention on the point in question.
>
> (b) …such intention continued to exist in the minds of both or all parties right up to the moment of execution of the formal instrument of which rectification is sought.
>
> (c) …while there need be no formal communication of the common intention by each party to the other, or any outward expression of accord, it must be objectively apparent from the words or actions of each party that they each held and continued to hold an intention on the point in question, corresponding with the same intention held by each other party.
>
> (d) …the document sought to be rectified does not reflect that matching intention but would do so if rectified in the manner requested.

[51] The party seeking rectification bears the onus of proving that the parties shared a common intention,[2] so that the Court is in no doubt that the agreement was as claimed.[3] The Court will be astute to ensure that the defendant is not burdened with a contract to which it never assented.

[52] It is permissible to consider the conduct of the parties after the date of the contract for the purpose of ascertaining their intention at the time of execution because:[4]

> It seems both on principle and authority the fact that a party has acted as if the document stood in the form to which it is sought to be rectified is strong evidence of the existence of an intention on the part of that party to contract in these terms.

[53] Further on the topic of intention, Tipping J said:[5]

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[1] *Westland Savings Bank v Hancock* [1987] 2 NZLR 21 (HC) at 30.
[2] *Farmers Mutual Insurance Ltd v QBE Insurance International Ltd* [1993] 3 NZLR 305 (HC) at [314]; *John Birds and Simon Milnes McGillivray on Insurance Law* (11th ed, Sweet and Maxwell, UK, 2012)
[3] At 32.
[4] At 31.
[5] At 30.

> As is apparent I prefer a formulation which does not require an outward expression of accord, which pertains more to the establishment of a contract, but rather a formulation which requires the appearance from words or actions of the parties of the existence of a concurrent common intention. This is consistent with Australian courts. For example, in *Mander v Clements*, McKechnie J observed at [58]... there is no need for communication of the common intention but there must be convincing proof that the parties in fact held the common intention so that the document sought to be rectified does not reflect that matching intention but would do so if rectified in the manner requested.
>
> (Citation omitted)

[54] His overall analysis was approved by the Court of Appeal in *Pimlico Properties Ltd v Driftwood Developments Ltd*.[6]

Rectification: discussion

[55] Some important aspects of the relevant factual background are not disputed. For example, it is agreed that neither Mr Dawson nor Mr Barker was involved in previous renewals of Hanover's D&O policy. It is also agreed that prior to the 2007 renewal, each took some trouble to familiarise himself with the file, and with Hanover's cover requirements. Mr Barker had attended a meeting with Mr Dawson and Hanover on 23 October, in order to further familiarise himself with those needs. He accepted that he knew that any claims under the policy were likely to arise under and in reliance upon the various prospectuses issued by Hanover to investors from time to time. Accordingly, given the structure of Endorsement 8, it was important that the exceptions to the exclusion of cover were drafted in a manner that would ensure that each of Hanover's prospectuses and investment statements were the subject of appropriate cover.

[56] Mr Barker also knew that prospectuses were issued more or less annually, and that they expired after specified periods of time; and further, that for practical purposes they were rolled over in the sense that a significant portion of the funds managed by Hanover was reinvested by investors. The result was that while the level of funds held by Hanover remained relatively stable, from a legal point of view they were held in terms of a succession of annual prospectuses.

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[6] *Pimlico Properties Ltd v Driftwood Developments Ltd* [2009] NZCA 523 at [26]-[27].

[57] He knew also that the administration of Hanover's prospectus cover in the past had been somewhat haphazard. That was evident from the omission to include Prospectus 34 in Endorsement 8.

[58] For its part, AIG's chief concern was Hanover's solvency. Mr Barker accepted that the mere fact that Hanover accepted funds for investment under the umbrella of successive prospectuses made little difference to Hanover's risk profile for insurance purposes. AIG was more concerned about Hanover's overall financial strength.

[59] Another matter not in dispute is the authority of Mr Dawson and Mr Barker to bind their respective parties. Mr Dawson is acknowledged, on behalf of Apex, to have been in a position to negotiate and settle the terms of cover. Likewise Mr Barker, as the AIG underwriter having responsibility for Hanover, had authority to bind AIG.

[60] The plaintiff's claim rests upon Mr Dawson's version of the two telephone discussions he had with Mr Barker on 25 October, and the inferences which may properly be drawn from contemporary documents. The relevant events occurred about five years ago. For most people, the recollection of events so far in the past will have dimmed considerably. Much of the detail must inevitably be lost, unless there is some vital occurrence that causes a particular witness to remember with unusual clarity a particular event or statement. The existence of contemporary documents constitutes a valuable aid to the assessment of oral evidence about historic events.

[61] The comments of Phillips J in *The "Dora"* are apposite:[7]

> Mr Sumner I found to be a more satisfactory witness in that he was prepared to admit to uncertainty where the other witnesses advanced as recollection what was really retrospective reconstruction. In relation to this area of the case the witnesses were questioned about individual incidents in busy routines which were inherently unlikely to be kept in the memory years after the event. In such circumstances the inferences that flow naturally from the contemporary documents are of particular importance.

[7] *The "Dora"* [1989] 1 Lloyds Law Reports 69

[62] The key documents are those created on 25 October 2007. The first of them is Mr Dawson's file note following his first phone call to Mr Barker. It is to be remembered that Mr Ross had by then made it clear to Mr Dawson that Hanover required complete prospectus cover, Hanover management having become seriously concerned that cover in past years had been effected in a somewhat haphazard and incomplete fashion.

[63] Mr Barker does not dispute the accuracy of either of Mr Dawson's file notes of 25 October. He took no notes. He said his practice was to use his e-mail communications as his record of discussions and agreements. Mr Barker agrees in particular that the last sentence of the first file note accurately records the agreement reached in the first telephone call about the inclusion of the current prospectus in the forthcoming policy. The current prospectus was No.35, although both Mr Dawson and Mr Barker say that it was not referred to in the telephone call by its number.

[64] The file note refers to Hanover's requirement " … to cover current prospectuses". That expression is somewhat equivocal. It could simply denote any prospectus that was current as at the date of commencement of the new policy. On the other hand, it is capable of denoting a requirement that all policies be covered as soon as they take effect.

[65] Mr Dawson said in evidence that his file note was intended to convey the latter meaning. He said that he told Mr Barker during their first telephone discussion that Hanover required cover for the future in respect of any prospectus, as and when issued. Mr Barker disagreed. He thought that Mr Dawson had conveyed that indication to him only during their second telephone call of the morning.

[66] I consider it more likely than not that Mr Dawson did convey to Mr Barker Hanover's need for cover for each prospectus from the time of issue during that first telephone call. He had firm instructions from Hanover to do so. In particular, he knew that simply recording the existing Prospectus 35 in the forthcoming policy would not meet Hanover's requirements.

[67] Moreover, Mr Dawson's e-mail to Mr Barker, sent at 11.09 am on 25 October, is consistent with Mr Dawson's account. After the first telephone call to Mr Barker, he had obtained confirmation from Mr Ross that there would be no likely significant increase in total capital raisings in the near future. That is consistent with a request to AIG for cover for future prospectuses issued during the year commencing 1 November 2007. It is not consistent with Mr Barker's evidence that all that was discussed during the first telephone call was the need for the current prospectus (No.35) to be explicitly referred to in the forthcoming policy. There was no need for that information in that context because Mr Barker had already agreed on the telephone that the current prospectus (soon due to expire) would be included.

[68] There is no disagreement about what was discussed during the second telephone call of the morning. Mr Barker accepts that he discussed with Mr Dawson Hanover's need for cover on an on-going basis. He accepts also that he told Mr Dawson, as recorded in the latter's file note, that AIG intended to cover prospectuses issued by Hanover, as that was Hanover's main risk.

[69] Again, however, the terms of Mr Barker's file note are equivocal, in that the expression "It was always AIG's intention to cover prospectuses issued …" is capable of two interpretations. It is capable of being seen as referring to AIG's willingness to provide cover in principle for all prospectuses issued from time to time. On the other hand, Mr Gedye says it should be read, in effect, as noting AIG's intention to cover prospectuses as and when issued during the currency of the policy.

[70] The two file notes, while undoubtedly helpful, cannot of themselves provide the answer to the dispute, and Mr Gedye does not argue that they do. He places rather more emphasis upon Mr Dawson's e-mail to Mr Crawford, sent shortly after the second of the two telephone discussions between Mr Dawson and Mr Barker. By then, on Mr Dawson's account, AIG had already agreed through Mr Barker to provide cover as from 1 November 2007 for all prospectuses issued, or to be issued, during the policy period. Mr Gedye says that the e-mail to Mr Crawford is valuable because it constitutes in effect, a contemporaneous note made by Mr Dawson immediately the following the second of these two telephone discussions.

[71] Ms Challis argues that the Court ought not to place too much emphasis on the e-mail to Mr Crawford because it was never seen by Mr Barker. Primary reliance ought to be placed upon communications between Hanover and AIG, she says.

[72] I accept that such communication between the parties will be of key importance, but Mr Dawson's e-mail to Mr Crawford is a contemporaneous note which is capable of supporting evidence of his understanding of the agreement reached with Mr Barker. As Mr Gedye points out, Mr Dawson had absolutely no reason to misrepresent to Mr Crawford his understanding of the agreement with Mr Barker. Mr Crawford represented the excess layer insurers. Hanover was accordingly obliged to observe the ordinary duties of good faith owed by an insured to an insurer.

[73] Two matters of special significance arise out of the e-mail. The first is that Mr Dawson simply advises that:

> …all prospectuses are to be covered under the D&O policy…

[74] This language is somewhat imprecise. It does not indicate whether or not, on Mr Dawson's understanding, any new prospectus issued during the policy year would attract automatic cover immediately upon issue. The e-mail is however consistent with Mr Barker's evidence to the effect that, while AIG was willing in principle to provide cover during the policy year for each new prospectus when issued, a separate application would need to be made to AIG in each and every instance. This is the key difference between them. Mr Dawson thought there was agreement that AIG would automatically hold Hanover covered immediately upon the issue of a new prospectus and without formal notice or request to AIG. Mr Barker considered that the agreement was restricted to AIG's willingness in principle to cover all prospectuses, leaving individual requests to be made on a case by case basis.

[75] The second point is that the e-mail indicates that agreement with AIG has not yet been achieved:

> … it will be agreed (AIG to confirm) …

[76] Accordingly, the e-mail to Mr Crawford, while undoubtedly helpful in a general sense, does not of itself record a concluded agreement between Hanover and AIG.

[77] Mr Dawson regarded the e-mail from Mr Barker at 1.16 pm on 25 October outlined at [27] above, as providing confirmation of the agreement as he understood it, namely that AIG would in the forthcoming policy provide cover for all prospectuses whether issued or to be issued during the policy year.

[78] Again however, the language in the e-mail is somewhat equivocal. The expression " …the latest Hanover Finance Prospectus Document" is equally capable of representing a reference to the latest prospectus issued as at the time of the e-mail (that is, Prospectus 35), or alternatively to the latest prospectus in existence at any given time. The expression "as discussed", with which the second paragraph commences, clearly indicates that Mr Barker thought that he was confirming what had been discussed earlier with Mr Dawson.

[79] In my opinion, the expression "as discussed" in Mr Barker's e-mail, is a reference back to Prospectus 35 which, as is common ground, was to be expressly included in the exceptions to Endorsement 8. Indeed, that is what Mr Dawson conceded during the course of cross-examination:[8]

> MS CHALLIS . If Mr Barker had agreed to the things you say he did, why did this e-mail not say Mr Barker or AIG has agreed to write all prospectuses? …Ah, I believe I was waiting for the e-mail or confirmation in writing from Vince to confirm our conversation. I think he was going to go away and do that.
>
> So he wanted to, did he confirm what you had discussed in writing to make sure that there was no slippage in what had been agreed? ...Yes.
>
> If we turn then to that e-mail which, presumably, on your evidence, is his confirmation e-mail, that's document 607. Mr Barker's e-mail to you of 1.16 pm. So as I mentioned, is this the confirmation or agreement you were waiting for? … Yeah, that was the confirmation that I was expecting to confirm our conversation.
>
> And which you had referred to in your e-mail to Mr Crawford, a confirmation? … ...Yes.

[8] Notes of Evidence pp 54 l.32- to 56 l 21,.

> That e-mail, in the last paragraph, says that the terms provided this year reflect the inclusion of the latest Hanover Finance prospectus document? ...Yes.
>
> And we've already established that's Hanover Finance No.35? ...Yes.
>
> Mr Barker's e-mail doesn't say, does it, that AIG would cover all historic prospectuses? ..No
>
> It doesn't say that it would cover all future prospectuses? ...No.
>
> It doesn't say that all prospectuses issued and to be issued during the policy period were covered? … No it doesn't.
>
> It doesn't say that all prospectuses issued for over $400 million were covered, does it? … No it doesn't.
>
> Did you reply to this e-mail? …No I didn't.
>
> What you've said to me, it didn't reflect what you say was agreed in your second telephone conversation with Mr Barker? ...Yes.
>
> Why didn't you respond to Mr Barker to say that that was not what he had agreed? … This was the e-mail I was expecting to confirm our conversation, that prospectuses were covered under the policy. I –
>
> It doesn't say that though, Mr Dawson? … No. I don't think I've picked – at the time, didn't pick up the word "latest" there. If I had I would have replied to Vince to re-confirm our conversation.
>
> But you didn't? ...No.
>
> Reading that now, that is not the confirmation that you were seeking from AIG, and which you referred to in your e-mail to Mr Crawford, is it? … It is the confirmation I was expecting from Vince, but he does not confirm the prospectus as we agreed in this e-mail.
>
> No, all it does is confirm that AIG was prepared to include the latest Hanover Finance prospectus? … Yes, that's what it says.

[80] It is clear from this evidence that Mr Dawson now accepts that Mr Barker's e-mail did not provide the level of assurance he was expecting, and that he had simply failed to pick up the significance of the word "latest". Had he done so at the time, then he would have reverted to Mr Barker in order to pin down the detail of their agreement.

[81] There are, in my view, further problems for Hanover. They are encapsulated in a later passage from the evidence recording Mr Dawson's cross-examination by Ms Challis:[9]

> MS CHALLIS: So I think I just said, and you agreed, that this just referred to including the latest Hanover Finance prospectus, and the policy which was actually later issued, included the latest Hanover Finance prospectus didn't it? … Yeah, yes it did.
>
> There is then – what did you expect would happen as a result of what you thought Mr Barker had agreed after your second conversation in relation to the wording? …I can't remember the exact words, but I recall some discussion around the endorsement being removed and then also some discussion around that $400 million limit being historical and possibly looking to amend that limit to – that number to reflect cover for future prospectuses and the past prospectuses as well. Although it was – I mean, that's my recollection, I don't recall the exact words, but that was what I think happened.
>
> Was that your assumption of what you thought might happen to the wording, or are you saying you actually discussed with Mr Barker what would happen? … Yeah, I believe I discussed with Vince as to what would happen. I wouldn't make those assumptions by myself.
>
> And then again, on receipt of Mr Barker's e-mail on the 25th, there was no mention of removing the endorsement at all or removing the $400 million limit, is there? ...No.
>
> Do you appreciate the way the D&O policy works in relation to this endorsement in particular? ...Yes.
>
> So there is this endorsement removes, without all the – the primary point is it removes cover for prospectuses? ...Yes.
>
> And then it effectively gives some cover back? ...Yes.
>
> And there were other aspects of the endorsement, we could go to it in fact, so we're clear. File A has the wording in it, as issued, p 22. So, the part of that that says, "Notwithstanding the above, this endorsement shall only apply to", that means the exclusion will apply to, "initial public offerings, capital raising outside of New Zealand, shares for listed companies?" ...Yes.
>
> So they were independent of the $400 million limit? …yeah.
>
> So at the end of the day this wasn't just addressing the $400 million limit, it addressed other issues as well? ...Yes.
>
> And you hadn't asked AIG to remove the other aspects of the exclusion, had you/ ...No.

[9] Notes of evidence P.56 l 25 to 58 l.16.

> So do you accept that it would be unlikely that AIG would offer to remove the endorsement in its entirety? … I'm not sure. I really left it up to Vince, it was AIG wording, he was as far as I was aware after that conversation, he was going to look into how he could get the cover for the prospectuses under that endorsement.
>
> So you didn't – so, on your evidence you didn't know then what would ultimately happen in respect of this endorsement? ...No.
>
> Until the wording was issued? ...Yes.

[82] Endorsement 8 is a complex provision, drafted in a somewhat convoluted and awkward fashion.

[83] Mr Dawson left it to Mr Barker to draft the detail of the changes Hanover was seeking. Given the comprehensive character of the amendments needed to carry into effect what Hanover wanted, it is difficult to see how Mr Dawson could have accepted the two lines of advice at the end of Mr Barker's e-mail as sufficient confirmation of his request for complete prospectus cover.

[84] Hanover bears the onus of establishing the terms of the oral contract relied upon. In large measure it relies on Mr Dawson's file notes, his e-mail to Mr Crawford, and Mr Barker's confirmatory e-mail. In my view, those documents are inconclusive, and fall far short of supporting Hanover's claim that AIG agreed through Mr Barker that Hanover would enjoy automatic cover for all prospectuses, including those to be issued during the insurance year. In particular, Mr Barker's e-mail does not address Hanover's request for wider prospectus cover at all, save for the confirmation which I conclude refers back to Prospectus 35. It appears that Mr Dawson misconstrued that e-mail and so did not go back to Mr Barker for further advice and the confirmation he sought.

[85] The oral evidence of Mr Dawson and Mr Barker provides little further assistance to Hanover. Mr Dawson says that he told Mr Barker that Hanover required complete coverage for all prospectuses, including those yet to be issued.

[86] Mr Barker accepts that there was a general discussion about the desirability of such cover, but says that he was not explicitly asked to make such provision for the forthcoming insurance year. He says that it is curious that he was not asked to do

so. In his mind, it was for Hanover to advance a specific proposal for cover in respect of future prospectuses, which would be dealt with by AIG on a case by case basis. Having said that, given that AIG had been prepared to extend cover to all of Hanover's prospectuses to date, Mr Barker would expect there to be little difficulty in reaching agreement. He accepts however that he did not make AIG's stance clear to Mr Dawson, seemingly because his discussions with Mr Dawson did not reach that level of detail.

[87] There is some support from Mr Dawson himself for Mr Barker's contention that discussions about future cover were of a general character only. Mr Dawson explained in evidence that he left the detail to Mr Barker because it was for AIG to draft the new policy terms, which would be checked on Hanover's behalf in due course. In the event, Mr Dawson reviewed neither the 25 October e-mail from Mr Barker, nor the policy itself when issued on 14 December.

[88] In short, Mr Barker's position is that he knew in general terms that Hanover was seeking coverage for all prospectuses, including future prospectuses, that Hanover's business was of a continuing character, and that the issue of successive prospectuses did not materially increase the insurance risk. He accepted that, in principle, there ought to be no difficulty in effecting suitable cover, save for a residual concern that AIG would not leave itself open to unascertainable future risk. However, Mr Barker said, AIG had not specifically been asked by Mr Dawson to rejig the policy terms in order to cover automatically any prospectus issued during the relevant insurance year.

[89] Hanover relies on three post-contract documents to support its argument that there existed a sufficient common intention for rectification purposes. The first are the Apex closings. Although there was only one D&O policy, the two closings were issued to reflect a split premium. A closing document is often issued by a broker to an insurer by way of confirmation of the terms of the cover already negotiated. In this case, the closing documents were long and detailed. As earlier noted, Mr Dawson included in his closing documents the narration:[10]

[10] At [36].

2(g) Prospectus cover provided for non-listed raisings.

[90] Ms Challis argues that this document, sent to AIG a fortnight after cover was bound, is of no contractual effect. In part, she relies on the evidence of Ms Schwartz, a very experienced underwriter who gave independent expert evidence for AIG, for that submission. Ms Schwartz confirmed that closing documents, although common, must be distinguished from a placing slip, which is an outline of the terms agreed in the contract, and in almost all cases is signed and dated prior to expiry of the policy. A placing slip can constitute, or at least evidence, a binding contract between the parties.

[91] But the principal importance of a closing document is the detail it contains about such matters as premium calculation, brokerage and tax. It confirms the accounting aspects of an insurance transaction by setting out the detail of the premium and brokerage fees.

[92] Mr Barker did not read Mr Dawson's closing documents. Ms Schwartz' evidence was that she would not necessarily expect him to do that because a broker's closing document could properly be seen as a generic document, important only for the financial information it contained. Mr Barker says that he did not regard the closing as of any significance. Had Mr Dawson intended the closing documents to have contractual effect, then he would expect to receive them prior to cover being bound.

[93] A second post-contract document referred to in submissions was a certificate of insurance issued prior to release of the policy, at Mr Dawson's request, because it was necessary to obtain evidence of the existence of cover. But the certificate simply refers to the policy to be issued and contains nothing of substance that might bear on the question of the contractual intention of the parties.

[94] The final post-contract document is Mr Dawson's 10 December 2007 e-mail to AIG, reproduced earlier in this judgment.[11] In that letter, Mr Dawson set out four separate changes that would need to be made to the policy for the previous year, in

[11] At [38].

order to accommodate what had been agreed. One of the topics was Endorsement 8, for which Mr Dawson noted the need for "Removal or editing of this endorsement to reflect coverage of all prospectuses issued by Hanover & its subsidiaries."

[95] Mr Barker accepted that Mr Dawson's e-mail was a sort of checklist or reminder about changes that Mr Dawson wanted to have made. In the event, one of the topics in Mr Dawson's e-mail (not Endorsement 8), received an explicit (negative) response from Mr Springhall, but the remaining topics were not the subject of a reply at all. Rather, AIG simply issued the policy which, although dated 11 December 2007, was issued on 14 December 2007.

[96] I do not consider the 10 December e-mail to advance Hanover's case in any respect. While the reference to Endorsement 8 is consistent with what Mr Dawson says he understood had been agreed in late October, it provides no assistance as to what Mr Barker thought. Indeed, the issue of the policy containing a largely unamended Endorsement 8 immediately following Mr Dawson's e-mail is quite inconsistent with Hanover's claim that Mr Barker and Mr Dawson were ad idem.

[97] I do not consider the post-contract documents to assist Hanover's rectification argument.

[98] I have concluded that Hanover has not discharged its burden of proof in respect of the claim for rectification. It is impossible to spell out the terms of an agreement for amended insurance cover as at 2 November 2007, when cover became bound. At that date, the arrangements were too vague to justify the grant of the relief sought.

[99] Mr Gedye argues that the refusal of a remedy would produce a commercially absurd outcome. He says that, because Prospectus 35 was replaced by Prospectus 36 from 7 December 2007, Hanover was left without any meaningful cover for 11 months of the policy term.

[100] In my view, it is not quite right to suggest that cover under Prospectus 35 effectively lapsed by efluxion of time after one month. Claims under the policy

referable to Prospectus 35 could well be made during the currency of the policy period, even though no further investments were accepted under the terms of that prospectus. Claims made by investors who invested prior to 7 December 2007 would logically rely on Prospectus 35, or on even earlier prospectuses, depending on the date of investment.

[101] Moreover, there is evidence that in earlier years AIG had been prepared to extend cover to nominated prospectuses without further premium. There is nothing to suggest that AIG would not have provided cover for Prospectus 36 upon request, possibly without any further premium.

[102] Mr Barker accepted that the issue of a new prospectus would not materially change Hanover's risk profile. AIG was keen to retain Hanover's business, as is evident from its decision to reduce the quoted premium when Hanover provided evidence of competitive rates obtainable elsewhere.

[103] Finally, I touch briefly upon an argument advanced by Ms Challis to the effect that it was too late for Hanover to run its rectification argument. She refers to a line of authority that where a policy of insurance is issued and there is no demur or objection to its terms for some time, silence may be taken to constitute acceptance of cover on those terms.[12]

[104] As to that, I accept Mr Gedye's argument that the authorities relied upon by AIG are cases in which a policy was issued in response to an application or proposal for insurance. In those circumstances, the policy sent to the prospective insured represented the terms upon which the insurer was prepared to offer cover. In such cases, if the insured receives and retains the policy without raising any issue with its terms and pays the premium, this can be treated as contractual acceptance of the insurance offered by the tendering of the policy.

[105] But where, as here, the drafting and provision of the policy is preceded by the negotiation of its terms, then the policy must reflect those terms. Ordinary

[12] *Providence Savings Life Assurance Society v Mowat* (1902) SCR 147 at 155 and 165, and *Rust v Abbey Life Assurance Co Ltd* [1978] 2 Lloyds' Rep 386 at 393-394.

rectification rules apply. There was evidence that the issue of policy documents can be delayed by insurers for weeks or months, and that claims can be made and even paid before policy documents are issued. Against that background, questions of delay will fall to be considered under ordinary rectification principles rather than in accordance with special rules laid down to govern insurance contracts.[13]

Estoppel/Fair Trading Act claims

[106] Mr Gedye submits that were the Court to conclude (as it has), that there was no agreement between the parties to do anything more than add Prospectus 35, and that AIG's actual intention was to maintain the $400 million limit for prospectuses other than Prospectus 35, then Mr Barker has misled Mr Dawson as to AIG's position. Hanover's argument is that Mr Barker's conduct was misleading and deceptive in terms of the Fair Trading Act, and also gives rise to an estoppel.

[107] It is not in dispute that a misrepresentation as to the terms of insurance cover on offer can entitle an insured to relief against an insurer, both under the Fair Trading Act and by the application of estoppel principles.[14]

[108] The test under s 9 of the Fair Trading Act rests on the question whether:[15]

> … a reasonable person in the claimant's situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived.

[109] In order to establish an estoppel, Hanover must show that:[16]

(a) AIG created or encouraged a belief or expectation through some action, representation, or omission to act;

(b) Hanover reasonably held the belief or expectation and reasonably relied upon it;

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[13] See for example the judgments in *Provident Savings* at 156 and 162.
[14] See for example *Clifton-Mogg v National Bank of New Zealand Ltd* (2001) 10 TCLR 213 (HC).
[15] *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20 [2010] 2 NZLR 492 at [28].
[16] See *Goldstar Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 (CA).

(c) Hanover has suffered detriment as a consequence of AIG resiling from the expectation it created;

(d) It would be unconscionable for AIG to depart from the belief or expectation so engendered.

[110] Representations relied upon as giving rise to an estoppel by representation must be objectively clear and unambiguous.[17] Silence may of itself give rise to an estoppel, but only where the circumstances create a reasonable expectation that if some relevant fact exists, it would be disclosed. Generally there will need to be an element of unconscionability about the failure to speak out.[18]

[111] Mr Gedye submits that under the Fair Trading Act, a failure to speak is to be assessed as any other circumstance to determine whether there has been misleading conduct or not. As with estoppel, the touchstone will be whether there was a reasonable expectation that the defendant would disclose something or speak up to correct the misapprehension.[19] Mr Gedye refers also to the mutual duty of good faith and fair dealing that exists between insurer and insured. He cites by way of example of the application of that principle the decision of the New South Wales Court of Appeal in *Nigel Watts Fashion Agencies Pty Ltd v GIO General Ltd*.[20] There, the Court held that an insurer, by its conduct, had represented that it would indemnify an employer with respect to a claim where the insurer had taken over the conduct of proceedings against the insured. The Court held that the insurer was not entitled, following an adverse outcome, to refuse indemnity.

[112] An insurer does not have a duty outside the contract to ensure that an insured realises and understands the terms and conditions already settled between them. The insurer is entitled to stay silent and leave the insured to its own devices in knowing

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[17] *Davis v CGU Insurance Ltd* (2009) 15 ANZ Insurance Cases 61-812, at 77, 571.
[18] *W & R Jack Ltd v Fifield* [1996] 2 NZLR 105 (HC), *The Lutetian* [1982] 2 Lloyds' Rep 281, and *Kimberley NZI Finance Ltd v Torero Pty Ltd* (1989) 80 ATPR (Digest) 46-054.
[19] See *Tuiara v Frost and Sutcliffe* [2003] 2 NZLR 833 (HC).
[20] *Nigel Watts Fashion Agencies Pty Ltd v GIO General Ltd* (1995) 8 ANZ Insurance Cases 61-235 at 75,638.

and understanding the contract.[21] In other words, it is not for an insurer to ensure that the insured understands the language used in the contract.

[113] The position may however be different where the issue is not as to the proper construction of the language used in the policy of insurance, but rather the scope of the policy itself. That distinction appears to explain the different conclusions reached in *Speno Rail Maintenance Australia Pty Ltd v Hammersley Iron Pty Ltd*.[22] In that case, the relevant insurance policy was extremely complex. Malcolm CJ held that although the insured or the insured's professional insurance broker might have discovered the omission of the specific indemnity which had been sought by the insured if the policy was perused with care, because the cover was so complex, the insurer had a duty to speak.[23] On the other hand, Wheeler J held that, despite the complexity of the cover, the insurer was under no such duty and the provision of the policy terms was the clearest way in which the insurer's position could be notified. That was particularly so where the insured was experienced in commercial and insurance matters.

[114] In reliance on estoppel principles, and s 9 of the Fair Trading Act, Mr Gedye focuses on two events. It is argued that:

(a) Mr Barker's words and conduct on 25 October 2007 were misleading, in that he induced Mr Dawson reasonably to believe that he had obtained full prospectus cover from AIG for Hanover;

(b) Mr Dawson's expectation was made clear in his e-mail of 10 December 2007. Mr Springhall's response of 14 December 2007 was misleading (by not responding to Mr Dawson's reminder that Endorsement 8 would need to be amended) and led to Mr Dawson concluding that AIG accepted the position set out in his e-mail.

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[21] *Lovett v Crown Worldwide (NZ) Ltd* HC Auckland CIV-2002-404-1877, 29 October 2004; *Gate v Sun Alliance Insurance Ltd* [1995] Lloyds' Reinsurance Law Reports 385 at 425.
[22] *Speno Rail Maintenance Australia Pty Ltd v Hammersley Iron Pty Ltd* (2001) 11 ANZ Insurance Cases 61-485 at [178].
[23] At [46].

[115] In my opinion there are fundamental problems with this argument. There is no evidence that AIG was aware that Hanover or Apex were labouring under a misapprehension about the cover being offered by AIG. Mr Barker did not wilfully shut his eyes to the obvious fact of a mistake by Hanover or Apex, nor is there anything to suggest that he determined not to make reasonable inquiries that might reveal the existence of a mistake.

[116] Whatever passed orally between Mr Dawson and Mr Barker on 25 October, Mr Barker's e-mail sent at 1.16 pm on that day simply confirmed that cover would be available for Prospectus 35, then the "latest" prospectus. It was completely silent about other amendments to prospectus cover in the policy. In evidence, Mr Barker said that was because, although there had been a general discussion about the desirability of wider cover, no specific proposal or requirement to that end had been conveyed to him by Mr Dawson.

[117] Had Mr Dawson considered that the 25 October e-mail was insufficient for Hanover's purposes, he had only to take the matter up with Mr Barker. This was still a week before the existing policy expired. Mr Dawson says that he did not read the e-mail in its entirety. But because he did nothing to put AIG on notice that Mr Barker's e-mail did not meet Hanover's requirements, Mr Barker remained in ignorance of any mismatch between those requirements on the one hand, and AIG's understanding on the other.

[118] In those circumstances, it is not possible to spell out an obligation on Mr Barker's part to explain the precise implications of his e-mail, or the limitations on the cover offered in that communication. In other words, what Hanover wanted and what AIG was prepared to offer, were two different things. Neither was aware of their different understandings

[119] For his part, Mr Barker was not aware of the precise date upon which the current 2006 Prospectus No.35 would expire. At the time of renewal AIG was already covering a considerable risk in respect of those prospectuses already listed in Endorsement 8, along with Prospectus 35, which was to be covered as from 1 November 2007.

[120] AIG's response to Mr Dawson's e-mail of 10 December 2007 was to issue the policy on 14 December. The terms of Endorsement 8 in the new policy varied somewhat from the preceding policy. A new investment statement and Prospectus 35 were specifically included, but Endorsement 8 was not amended in a manner which would have been necessary had Mr Dawson's requirements been implemented. That much would have been obvious at a glance if the new policy, and Endorsement 8 in particular, had been reviewed on receipt by Mr Dawson or anyone else at Apex or Hanover. In that respect, this case is quite different from *Speno* where the relevant insurance terms were extremely complex.

[121] Had the policy terms been reviewed, then Apex or Hanover would have realised at once that Endorsement 8 did not meet Hanover's cover requirements. It would then have been open for Hanover, through Apex, to negotiate amendments to the policy.

[122] Mr Gedye submits that Mr Barker needed to inform Mr Dawson of AIG's "about face on full prospectus cover". In my view, AIG's position was sufficiently conveyed in Mr Barker's e-mail of 25 October 2007. To the extent that this represented an "about face" by AIG, it was for Mr Dawson to take the issue up afresh with Mr Barker. Of course, Mr Barker did not regard his e-mail as an about face, but rather as simply recording what AIG had agreed to do during his telephone discussions with Mr Dawson.

[123] To succeed in these causes of action, Hanover needed to establish that Mr Barker had led Mr Dawson to believe that there would be full prospectus cover, and that AIG had subsequently resiled from that promise without giving notice to Hanover of its intention to do so. In my view, Hanover has not established that the terms of any promise or representation by Mr Barker were as Hanover now asserts. Although there was a discussion of the desirability of full prospectus cover, Mr Dawson acknowledged that he left the detail to Mr Barker. From AIG's point of view, the detail was provided first in Mr Barker's e-mail of 25 October, and then in the policy issued on 14 December 2007.

[124] Mr Dawson had an opportunity at each point to raise his on-going concerns with Mr Barker, but he did not do so. In those circumstances, I do not see how AIG can be rendered legally responsible for what occurred.

Result

[125] For the foregoing reasons, I am satisfied that Hanover has not made out its case for relief. The proceeding is accordingly dismissed.

[126] The defendant is entitled to costs. Counsel may file memoranda if they are unable to agree.

C J Allan J