

#104

IN THE COURT OF APPEAL OF NEW ZEALAND

CA547/2009  
[2010] NZCA 224

BETWEEN DORIC INTERIORS & CONSTRUCTION  
LIMITED (IN LIQUIDATION)  
Appellant

AND MAGSONS HARDWARE LIMITED  
First Respondent

AND VIJAY HOLDINGS LIMITED  
Second Respondent

Hearing: 17 May 2010

Court: O'Regan, Priestley and Ronald Young JJ

Counsel: D Singh for Appellant  
D E Smyth for Respondents

Judgment: 1 June 2010 at 2.30 pm

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**JUDGMENT OF THE COURT**

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- A The appeal is dismissed.**
- B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.**
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**REASONS OF THE COURT**

(Given by O'Regan J)

## Introduction

[1] This case concerns statutory demands that Doric Interiors and Construction Ltd (Doric) issued against Magsons Hardware Ltd (Magsons) and Vijay Holdings Ltd (Vijay) for amounts that Doric said were owed to it under construction contracts. Magsons and Vijay are sister companies. Doric has, since the judgment under appeal was delivered, gone into liquidation.

[2] The first demand against Magsons for \$379,501.60 related to dwellings at 36 and 36A Dudley Road, Auckland. Doric says Magsons contracted to build those houses for Stratus Construction Ltd (Stratus) and then subcontracted the building work to Doric. It said it had made a valid payment claim for that sum and Magsons had not issued a payment schedule disputing that claim.

[3] The second demand against Magsons for \$386,091.52 related to dwellings at 44 and 44A Godden Crescent, Mission Bay, Auckland. Doric said there was a similar arrangement in relation to these houses, which Magsons had contracted to build for Guardian Developments Ltd (Guardian).

[4] In addition Doric issued a statutory demand against Vijay for \$451,858.67 for dwellings Doric contracted to build at Peninsula Palms, Mangere, Auckland for Vijay.

[5] Both Magsons and Vijay applied to the High Court to have the statutory demand set aside. Associate Judge Robinson held that the demands against Magsons were to be set aside as there was a genuine and substantial dispute as to the existence of the contract.<sup>1</sup>

[6] Vijay did not dispute the existence of a contract with Doric but claimed that the amount of the demand was wrong. Associate Judge Robinson found that the correct amount of the statutory demand was for \$23,795 and not \$451,858.<sup>2</sup>

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<sup>1</sup> *Vijay Holdings Ltd v Doric Interiors and Construction Ltd* HC Auckland CIV-2008-404-6859, 10 August 2009 at [27].

<sup>2</sup> At [13].

Although the amount had been misstated, the Judge was not prepared to set aside the statutory demand as no substantial injustice would be caused if it were not set aside.

[7] Doric now appeals against the finding that it did not have construction contracts with Magsons for the building of the Godden Crescent and Dudley Road dwellings. It also appeals against the finding that the payment schedule Doric issued to Vijay was for \$23,795 only, arguing that it was instead for an amount of \$451,858.67 and hence the statutory demand correctly stated the amount due.

### **Issues**

[8] The issues in relation to each of the Magsons demands is: was there a substantial dispute as to whether there was a construction contract between Doric and Magsons? If there was a construction contract as defined in the Construction Contracts Act 2002 between Magsons and Doric, the provisions of that Act relating to payment claims and payment schedules, to which we refer below, will apply to the dealings between Doric and Magsons. If we find that there was a substantial dispute as to whether there was such a contract, Doric accepts that the statutory demand was correctly set aside. However, if Doric succeeds on that point, a number of other arguments raised by Magsons to resist liability (and to justify the setting aside of the demands) would need to be dealt with. It was agreed that if it was necessary for those issues to be addressed, the case would need to be remitted to the High Court for that purpose. So the only issue we must address is that relating to the existence of a construction contract.

[9] The sole issue in relation to the Vijay demand is whether there was a substantial dispute as to the amount of Doric's payment claim: that is, as to whether the claim was for \$451,858.67 or \$23,795.00.

## **Construction Contracts Act 2002**

[10] There was no dispute that, if the contracts between Magsons and Doric were as Doric characterises them, they were construction contracts as defined in the Construction Contracts Act. Doric's case is, in a nutshell, that it issued payment claims in terms of s 20 and Magsons failed to submit payment schedules in terms of s 21. So Magsons is now liable under s 22 of the Construction Contracts Act for the amount claimed in the payment claim and must pay Doric. Magsons may then dispute liability and seek reimbursement of any over-payment. With Doric now in liquidation, that is an unattractive option for Magsons.

### **The Magsons demands: background facts**

[11] Doric is a building company. Magsons is a hardware retailer, trading under the name "Mitre 10 Mega" at two Auckland locations and as a "Mitre 10 Home and Trade" at another. Mr Kumar, a director of Magsons, denied in the High Court that Magsons also operated as a builder. He said it was only a supplier of hardware and building materials. (Mr Kumar is also the sole director of Vijay. He accepted that Vijay does carry on business as a builder.)

[12] The Dudley Road properties were being developed by Stratus and the Godden Crescent properties by Guardian. Mr Ghee is the sole director of both companies. Magsons entered into building contracts with Stratus and Guardian. It disputes the bona fides of these contracts which were signed by an ex-employee, Mr Krishna, who Mr Kumar says was not authorised to do so. Magsons says the true position is that it was to supply material and hardware for both developments. More importantly, it claims that it never entered into any contract with Doric to build the houses. On Magsons' case, Doric had contracted directly with Stratus and Guardian to build the properties, with Magsons supplying the materials, and acting as a clearing house for payments to Doric by Stratus and Guardian. Magsons says the actual arrangement was that Doric would undertake building work at the relevant site, sourcing the necessary building materials from Magsons. Quantech Surveyors would then value the work, approve any variations and issue a payment claim, which Doric would submit to Guardian or Stratus for payment. Magsons would then

receive this payment from Guardian or Stratus. Magsons would deduct the cost of any materials it had supplied to Doric, then pay Doric the balance.

[13] Doric claims that it had a contract with Magsons to carry out the building work for both projects. Magsons had contracted with Stratus and Guardian to build the houses and had subcontracted the building work to Doric. Thus Doric argues there was a construction contract between Magsons and Doric to which the Construction Contracts Act applied.

**Godden Crescent project: was there a construction contract?**

[14] The evidence before the Associate Judge included a copy of a construction contract between Magsons as builder and Guardian as developer dated 18 May 2007. This provided for Magsons to erect two houses at 44A and 44B Godden Crescent and set out the terms, including the process for progress payments to be made. It was signed on behalf of Magsons by Mr Krishna.

[15] Also in evidence before the Associate Judge was a contract between Magsons as builder and Doric as sub-contractor, under which Magsons engaged Doric to undertake the obligations it had taken on under its contract with Guardian. The contract was in similar form to the Magsons/Guardian contract, and was also signed on Magsons' behalf by Mr Krishna. It was signed on Doric's behalf by Mr Portsmouth, who was an undischarged bankrupt at the time. Mr Kumar says that this contract first came to his attention when it was placed in evidence before the High Court: there was nothing in the records of Magsons indicating that the contract had been entered into and no record of any negotiations or correspondence relating to it. He said that the data on the computer which had been used by Mr Krishna when he was employed at Magsons had been deleted.

[16] As it had in the High Court, Doric argued that it was entitled to rely on the apparent authority of Mr Krishna to enter into the contract between Magsons and Doric on Magsons' behalf. Associate Judge Robinson noted that Magsons accepted it had a binding agreement with Guardian and proceeded on the basis that the Magsons/Guardian contract was binding. But he found that there was a genuine

substantial dispute as to the existence of a contract between Magsons and Doric in relation to Godden Crescent.

[17] The Associate Judge gave particular weight to the fact that the principal of Doric, a Mr Prasad, said in his affidavit that all the construction contracts between Doric and Magsons/Vijay had final approval from Mr Kumar as director of Magsons and Vijay and himself as director of Doric. Mr Prasad said that he and Mr Kumar had left the paperwork to be completed by Mr Krishna for Magsons and Vijay and Mr Portsmouth for Doric. The Associate Judge said that this statement indicated that Doric was not relying upon Mr Krishna's apparent authority to bind Magsons, but rather was relying on the specific confirmation of the construction contracts by Mr Kumar. As Mr Kumar strongly disputed that he had ever given approval to these contracts or ever known of their existence, there was a substantial dispute as to whether the contract between Doric and Magsons was as contended.

[18] Counsel for Doric, Mr Singh, pointed out that there was a degree of inconsistency in accepting that Mr Krishna could bind Magsons in its contract with Guardian, but not in its contract with Doric. He pointed to correspondence between Doric and Magsons at the time at which the payment claim now in dispute was made, which appears to proceed on the assumption that the Magsons/Doric contract is in place and is as contended for by Doric. He also relied on the fact that a number of payment claims had already been met by Magsons under the contract, and that these payments had been made in accordance with the written contract produced in evidence.

[19] We consider that the Associate Judge was correct to conclude that there was a genuine substantial dispute as to the existence of the contract between Magsons and Doric. Mr Prasad's own evidence was that the contract required Mr Kumar's approval prior to its conclusion with Magsons, and there is clear dispute about whether this approval was ever given. In the absence of such approval, it is not clear that Mr Krishna had the relevant authority to bind Magsons. That dispute is not able to be resolved in the context of statutory demand proceedings. The Judge was therefore right to set aside the statutory demand.

[20] As we have found a real dispute over the existence of a contract it is not necessary for us to consider whether Magsons issued payment schedules in time disputing Doric's payment claims or whether these claims were made in good faith. Doric will need to pursue these matters in conventional proceedings.

**Dudley Crescent project: was there a construction contract?**

[21] The position in relation to Dudley Crescent is less favourable again from Doric's point of view. A contract between Stratus and Magsons was produced in evidence, and this was similar in form to that between Guardian and Magsons. But there was no written agreement between Magsons and Doric. Doric said that there was an oral contract, and there is no dispute that an oral contract can be a construction contract in terms of the Construction Contracts Act.<sup>3</sup>

[22] Mr Prasad's evidence was that the terms of the construction contracts for Godden Crescent and Dudley Crescent except for price were identical. But he does not depose as to when the oral contract was entered into, how the terms were agreed, how the price was recorded and the like. As with the Godden Crescent contract, Mr Prasad accepted that Mr Kumar's approval had been required for Magsons to enter into the contract in relation to Dudley Crescent, and Mr Kumar again denied such approval being given. Thus, the position is similar to that relating to Godden Crescent, with even more grounds for dispute about the existence or otherwise of the Magsons/Doric contract. Again, we agree with the approach taken by Associate Judge Robinson in this regard.

**The Vijay demand: background facts**

[23] The dwellings to be constructed in Peninsula Palms, Mangere raise different issues. Vijay had a contract with the developer, Shah Homes Ltd (Shah), to build the dwellings. The construction price was \$825 per square metre. Vijay sub-contracted to Doric on the same terms as Vijay had with Shah. Doric did not complete the work as it became apparent that the price agreed was too low. Nevertheless, it claimed

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<sup>3</sup> See s 9.

that money was owing to it and issued a payment schedule to Vijay. This schedule showed two different amounts owing. There was the “total current payment claim” of \$23,795 which was under the heading “current claim” and then, under the heading “statement” there was the “total amount due on contract to date” of \$451,858.67. There is a dispute as to which of those figures is the correct amount for the statutory demand.

[24] Doric claims that the amount was the \$451,858.67. Vijay says this is wrong as a matter of construction of the payment claim. Associate Judge Robinson agreed. Vijay also says its actual liability to Doric under the contract was \$33,597.64, not the sum Doric claims was owed. Doric’s case rests on its having made the payment claim and, it says, Vijay failing to submit a payment schedule challenging that claim. Vijay disputes that contention too.

[25] It should be noted that Magsons claims that Doric owes it \$560,062.36 as at 22 August 2008 for building materials supplied to Doric for which it has not made payment. It has set off the amount it accepts it owes to Doric against that amount. It has since assigned \$23,795 of that debt to Vijay to satisfy Doric’s liability under the statutory demand. In recent High Court proceedings, Doric sought to put Vijay into liquidation as a result of a failure by Vijay to pay it the \$23,795 that was the subject of the statutory demand. Doric was unsuccessful. Lang J held that Vijay could claim a set-off by way of the assignment of the debt to satisfy its liability under the statutory demand.<sup>4</sup>

#### **What was the amount payable under the Vijay payment claim?**

[26] Associate Judge Robinson considered the payment claim was confusing. We agree. On its face it clearly states that the “Total Current Payment Claim” is \$23,795.00. The reference to \$451,858.67 appears in a section headed “Statement”

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<sup>4</sup> *Doric Interiors and Construction Ltd v Vijay Holdings Ltd* HC Auckland CIV-2009-404-5850, 20 October 2009.



and purports to be calculated by deducting offsets and previous payments received from “Net Claims to Date”. So it purports to be an aggregate of all previous and current payment claims, with deductions for payments and offsets.

[27] If all previous claims were the subject of payment claims, it is hard to see why the earlier claims are then claimed again in the present payment claim, thereby triggering again the possibility that Vijay could dispute the claim in a payment schedule. If Doric was owed \$451,858.67 at the time it issued the statutory demand, one would have expected all unmet payment claims to be in evidence. They were not. Mr Smythe suggested that was because all previous claims actually made by Doric had been paid and the figures in the “Statement” section of the present payment claim were wrong. That is a matter which will need to be addressed later.

[28] We conclude that the Judge was correct to find that the claim upon which the statutory demand was based was for \$23,795.00, not \$451,858.67. He was also correct to set aside Doric’s statutory demand except as to payment of \$23,795.00. This aspect of the appeal also fails.

### **Result**

[29] The appeal is dismissed. All aspects of Associate Judge Robinson’s decision are upheld.

### **Costs**

[30] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:  
Shean Singh, Auckland for Appellant  
Parshotam & Co, Auckland for Respondents