

#78

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2008-404-006861

UNDER

S 290 of the Companies Act 1993

BETWEEN

MAGSONS HARDWARE LIMITED
Applicant

AND

DORIC INTERIORS & CONSTRUCTION
LIMITED
Respondent

Hearing: 24 July 2009

Appearances: D Smythe for Applicant
S Singh for Respondent

Judgment: 10 August 2009

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by me on 10 August 2009 at 3.30 pm,
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date.....

Solicitors/Counsel: Parshotam & Co, PO Box 27-079, Auckland
MacDonald Pilcher Partnership, PO Box 37851, Parnell, Auckland
Shean Singh, Barrister & Solicitor, PO Box 10018, Mt Eden, Auckland

[1] On 2 October 2008 Doric Interiors and Construction Limited issued three statutory demands pursuant to section 289(2)(d) of the Companies Act 1993. Those demands are as follows:

- a) A demand issued on Magsons Hardware Limited claiming \$379,501.60.
- b) A demand on Magsons Hardware Limited claiming \$386,091.52.
- c) A demand on Vijay Holdings Limited claiming \$451,858.67.

Magsons Hardware Limited and Vijay Holdings Limited have applied within the required period to set aside those statutory demands.

[2] The demand served on Magsons Hardware Limited for \$379,501.60 is the amount Doric Interiors claims to be due and owing by Magsons Hardware in respect of the construction of new dwelling at 36 and 36A Dudley Road, Auckland. The demand for \$386,091.52 represents the amount Doric Interiors claims to be owing by Magsons Hardware in respect of the construction of a dwelling at 44 and 44A Godden Crescent, Mission Bay. The demand for \$451,858.67 represents the amount claimed to be owing by Vijay Holdings to Doric Interiors in respect of the construction of five dwellings in Mangere.

[3] In seeking to set aside the statutory demands Magsons claims to have a genuine and substantial dispute as to the existence of the debts together with a counter claim for a liquidated amount of \$563,594.96.

[4] It is convenient to deal with the two claims by Doric Interiors against Magsons together as Magsons raises similar defences to both claims. Different issues need to be considered with regard to the claim against Vijay Holdings Limited.

Claim against Vijay Holdings Limited

[5] Vijay Holdings Limited acknowledges entering into a contract with Doric Construction. In terms of that contract Doric Construction was to build homes for Vijay Holdings for \$825 per square metre which was to include the cost of labour, material costs and GST. That contract is confirmed in a letter from Vijay Holdings signed on behalf by Mr Vinod Kumar, the Managing Director of Vijay Holdings to Doric Interiors and Construction. On the 22 August 2008, Doric Interiors and Construction issued a claim under s 20(2) Construction Contracts Act 2002 requiring Vijay to pay the amounts set forth in that claim. The claim seeks payment of \$23,795 which is referred to as the total current payment claim. There is also at the foot of the claim a panel marked "statement" which advises that a total amount due on contract to date is \$458,858.67. Vijay acknowledges owing \$33,587.64 in respect of this contract which is slightly more than the amount shown as currently payable in terms of the claim served on it. It acknowledges that it has not paid the \$33,587.64.

[6] The accountant for Vijay has provided detailed statements showing amounts claimed and credits provided in respect of this contract. Vijay provided materials which it claims have a value of \$594,856.86 in respect of this contract. As the contract price was inclusive of materials Vijay claims that the value of materials it supplied must be deducted.

[7] It is claimed by Doric Interiors and Construction that the amount it is claiming in the claim issued under s 20(2) Construction Contracts Act 2002 is not \$23,795.00 but the total amount due on the contract to date namely, \$451,858.67 as shown on the statement at the foot of the claim.

[8] The claim is dated 22 August 2008 and requires payment to be on 29 August 2008. It states to cover the period 1 April 2007 to 28 February 2008. In the column "current claim" the following calculation appears:

CURRENT CLAIM

Total Value current claim (excluding GST)	
Total Base Contract Complete to date	\$940,370.00
Total Variations Complete to Date	\$ _____
Gross Payment Claims to Date	\$940,370.00
Less Retentions	Nil retention contract
	\$ _____
Net Payment Claims To Date	\$940,370.00
Less Previous Net Claims	\$916,575.00
Net Payment Claim – Current	\$23,795.00
Add GST – current claim	Inclusive in price
	\$ _____
TOTAL CURRENT PAYMENT CLAIM	\$23,795.00

[9] Under the column “statement” the following appears:

STATEMENT

	<u>Amount</u>	<u>GST</u>	
NET CLAIMS TO DATE	\$940,370.00	\$	\$940,370.00
LESS: OFFSETS AGAINST MATERIALS	\$176,595.93	\$ -	\$176,595.93
LESS: PAYMENTS RECEIVED	\$311,915.40	\$	<u>\$311,915.40</u>
NET AMOUNT DUE THIS PAYMENT			\$451,858.67
RETENTIONS HELD			
TOTAL AMOUNT DUE ON CONTRACT TO DATE	\$	\$	<u>\$ _____</u> \$451,858.67

[10] To comply with s 20 Construction Contracts Act 2002 a payment claim must be in writing, contain sufficient details to identify the construction contract to which the progress payment relates, identify the construction work and the relevant period to which the progress payment relates, indicate a claimed amount and the due date for payment and indicate the manner in which the payee calculated the claimed amount. Doric Interiors maintains that the claim is for \$451,858.67 whereas Vijay maintains that the claim is for \$23,795.00. It is significant that the \$23,795.00 is stated as being the total current payment claim. Consequently, there is some justification for Vijay’s conclusion that the amount being claimed is \$23,795.00.

[11] Pursuant to s 22 Construction Contracts Act 2002 Vijay becomes liable to pay the amount claimed if it does not within the time required by the Act provide a payment schedule. In the circumstances of this case the time for Vijay to provide a payment schedule is twenty working days after the payment claim is served (see s 22(b)(ii)). Vijay’s accountant is certain that Vijay does not owe Doric \$451,858.67. The accountant has produced a statement which establishes that the correct amount owing is \$33,597.64. Had the claim made it clear that the amount to be paid was

\$451,858.67 then it is most likely that Vijay would have supplied a payment schedule which would have complied with s 21 and established how Vijay calculated the balance payable. Consequently, if the claim is read as being for \$451,858.67 because of the way in which the form has been prepared Vijay in believing that the amount claimed is \$23,795.00 has not served a payment schedule and consequently will be prejudiced because it will be unable to dispute the amount claimed.

[12] Little prejudice can befall Doric if the claim is limited to the total current payment claim of \$23,795.00 as Doric can still issue a further claim for any balance it considers owing. No doubt such a claim will be met by a payment schedule in terms of s 21.

[13] Consequently, I am satisfied that the claim upon which the statutory demand is based is not for \$451,858.00 but is for \$23,795.00. Pursuant to s 290(5) and (6) a statutory demand is not to be set aside by reason only of a material misdescription of the debt unless the Court considers substantial injustice would be caused if it were not set aside see *United Homes (1988) Limited v Workman* [2001] 3 NZLR 447, at 454. I am satisfied that in the present case no substantial injustice would be caused if the amount claimed in the statutory demand is reduced to the sum of \$23,795.00. Accordingly therefore the statutory demand issued against Vijay will be set aside except as to payment of \$23,795.00. Pursuant to s 290(3) the time for compliance will be extended to ten working days from the date of delivery of this judgment.

Claims against Magsons Hardware Limited

[14] These claims arise out of building work at 36-36A Dudley Road and 44 and 44A Godden Crescent. According to Mr Vinod Kumar, the director of Magsons Hardware, Magsons is a retailer of hardware and building materials operating two "Mitre 10" megastores and one "Home and Trade" in Auckland. Magsons claims it is not a builder.

[15] Mr Kumar acknowledges that Magsons entered into a contract with Stratus Construction Limited with regard to the supply of material and hardware for the

construction of the dwelling at 36 and 36A Dudley Road, Mission Bay. That contract contains a schedule which provides an incentive in the following words:

If the Doric complete the project within seven months they will be entitled to a further payment of \$30,000 bonus.

It is submitted on behalf of Magsons that it did not enter into any construction contract with Doric.

[16] Doric acknowledges that there is no written agreement with Magsons relating to the construction of the Dudley Road dwellings. However, it has produced an agreement in writing with Magsons relating to the construction of the Godden Crescent dwellings. That contract is dated 28 May 2007. It is signed by Mr Rama Krishna on behalf of Magsons.

[17] Mr Kumar acknowledges that Mr Krishna at the appropriate time was employed by Magsons. Mr Kumar denies being involved in the negotiations that took place with regard to the Godden Crescent development. He has located a contract between Magsons and Guardian Development Limited. That is a building contract which records Guardian as developer having a management contract to construct houses at Godden Crescent for Godden Estate Limited which owns the land.

[18] Mr Kumar is concerned because he has been unable to locate any information in Magsons records concerning dealings with Doric and Guardian which led to the execution of Magsons contract with Guardian. He has been unable to locate copies of any emails, facsimiles or letters relating to this contract. He claims a recent search of the computers used by Mr Krishna and Mr Daya have revealed that all their emails and other files have been deleted.

[19] Consequently, it is submitted on behalf of Magsons that it has no contract with Doric, its contracts with regard to the construction of the dwellings at Dudley Road being with Stratus Construction Limited and its contract with regard to the development at Godden Crescent being with Guardian Developments Limited. Mr Kumar claims that the first he became aware of the contract between Magsons and

Doric was when that contract was produced as an exhibit to Mr Prasad's affidavit filed in these proceedings and sworn on 26 March 2009.

[20] It was submitted on behalf of Doric that the contracts between Doric and Magsons were negotiated by Mr Krishna who at that time was the group trade manager of Magsons and had been held out by Magsons as having authority to enter into binding contracts on behalf of Magsons. There is no doubt that Mr Krishna did occupy a responsible position with Magsons and apparently entered into contracts on its behalf. In particular Magsons acknowledges being bound by a contract it had entered into with Stratus Construction Limited on 21 December 2007 executed by Mr Krishna on behalf of Magsons.

[21] Mr Prasad who gave evidence on behalf of Doric stated as follows at paragraph 9 of his affidavit:

All construction contracts before signing had final approval from Vinod Kumar (who is a director of Magsons and Vijay) and myself for Doric (at the relevant time I was the director of Doric) leaving the paperwork to be completed by Mr Krishna for Magsons and Vijay and Mr Portsmouth for Doric.

Thus Doric does is not relying upon Mr Krishna's apparent authority to bind Magsons but relies on specific confirmation of the construction contracts by Mr Kumar, the director of Magsons. That evidence is not accepted by Mr Kumar.

[22] There is a dispute between Magsons on the one part and Doric on the other as to whether there is a construction contract in existence between them. If there is no construction contract then clearly the Construction Contracts Act 2002 can have no application.

[23] In support of Doric's contention that such construction contract exists counsel for Doric referred to emails and correspondence between Doric and Magsons which he suggested supported Doric's contention. However, it is significant that the emails and correspondence include comments such as:

Mr Kumar trying to get to the bottom of all issues

[24] It must also be borne in mind that Magsons acknowledges separate contracts with Stratus Development Limited and Guardian Developments Limited. Magsons acknowledges making progress payments under both contracts. Magsons maintains Stratus and Guardian had separate contracts with Doric for the building of the dwellings at Dudley Road and Godden Crescent. The reference to an incentive payment to Doric in Magsons contract with Stratus tends to support this contention.

[25] On receipt of the payment claims Magsons instructed its counsel who supplied a payment schedule in response to the claims. In that payment schedule counsel for Magsons pointed out:

Doric is not entitled to serve payment claims

There is no settled form of contract between Magsons and Doric, however, Doric knew that Magsons was only entitled to issue payment claims in accordance with its contract with the developer and agreed that it would render payment claims on the same terms. Accordingly Doric has issued payment claims which have been dealt with in accordance with the progress payment schedule and Magsons contract...

[26] The above evidence establishes there is a genuine and substantial dispute as to the existence of the contract between Magsons and Doric. In particular, there is a disputed question of fact, namely whether such contract was authorised by Mr Kumar. It is significant that so far as the claim issued under the Construction Contracts Act 2002 with regard to Dudley Road is concerned that claim contains the following notation:

Note: Doric Interiors & Construction Limited does not hold a contract for works on this job site.

That statement tends to support Magsons claim.

[27] Counsel for Doric accepted that Doric had to be a party to a construction contract with Magsons to be entitled to make a claim against Magsons under the Construction Contracts Act. In the circumstances I conclude that as there is a genuine and substantial dispute as to the existence of the contract between Magsons and Doric, the applications relating to the statutory demands issued by Doric against Magsons must succeed and the statutory demands must be set aside.

[28] Because of my conclusion that there is an arguable case as to the existence of any construction contract between Doric and Magsons I need not resolve further issues raised at the hearing as to the validity of Doric's claim, whether Magsons had issued a payment schedule in accordance with s 21 Construction Contracts Act and whether Magsons has a set off which it can bring up in these proceedings by reason of s 79 Construction Contracts Act 2002.

Costs

[29] As Magsons has been successful in its application to set aside the statutory demands it is entitled to costs on those applications on a 2B basis with disbursements as fixed by the registrar.

[30] On the other hand, Vijay has not been successful in having the statutory demand served against it set aside. However, it has been successful in a substantial reduction in the amount claimed in the statutory demand. In those circumstances, there will be no order as to costs in relation to that statutory demand.

Associate Judge Robinson