

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 86/2021  
[2021] NZSC 135**

BETWEEN  
AND

IKON BUILDING CO-OPERATION  
LIMITED  
Applicant

POURUSHASP ROHINTON DUMASIA  
First Respondent

DAVID HILLIAM  
Second Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: M J W Lenihan and D A Cowan for Applicant  
D W Gove for Respondents

Judgment: 13 October 2021

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**JUDGMENT OF THE COURT**

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- A The application for leave to appeal is dismissed.**
- B The applicant must pay the respondents one set of costs of \$2,500.**
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**REASONS**

[1] The respondents, Pourushasp Dumasia and David Hilliam, guaranteed advances made by New Zealand Mortgages and Securities Ltd (NZMS) to SKKY Holdings 2015 Ltd (SKKY). These advances were made pursuant to a funding agreement in relation to a residential property development involving SKKY. Messrs Dumasia and Hilliam were directors of SKKY. The principal contractor involved in the development abandoned the contract in what appears to have been April 2017. This resulted in a discussion between Messrs Dumasia and Hilliam and a

director of NZMS on 1 May 2017 and subsequent correspondence. While there is dispute as to what, if anything, was agreed, NZMS did not treat SKKY as being in default and it agreed to certain remedial work being carried out.

[2] On 13 June 2017, NZMS assigned the loan to Bolter Management Group Ltd (Bolter), which was acting as trustee for the applicant, Ikon Building Co-operation Ltd (Ikon). On 14 June 2017, NZMS notified Mr Dumasia of the assignment. It explained the transfer on the basis that SKKY was in default and that this had the potential to affect its own banking arrangements.

[3] On 19 June 2017, Bolter served notices of default on SKKY and Messrs Dumasia and Hilliam. Bolter later sold the property under its power of sale. Ikon, having taken an assignment of the rights of Bolter, obtained summary judgment against Messrs Dumasia and Hilliam for the deficiency between the amount outstanding on the advance and what was realised on sale.<sup>1</sup> Messrs Dumasia and Hilliam were successful in their appeal to the Court of Appeal in respect of this judgment,<sup>2</sup> and Ikon now seeks leave to appeal to this Court.

[4] In allowing the appeal, the Court of Appeal concluded that in light of what had happened in May 2017 between NZMS on the one hand and SKKY and Messrs Dumasia and Hilliam on the other, it was reasonably arguable that:

- (a) the default notice served on 19 June 2017 was premature;<sup>3</sup>
- (b) the default notice was a repudiatory breach of the funding agreement as indicating that funding required under the funding agreement would not be provided;<sup>4</sup>
- (c) the default notice resulted in the funding and progress of the development stopping;<sup>5</sup> and

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<sup>1</sup> *Ikon Building Co-operation Ltd v Dumasia* [2020] NZHC 223 (Lang J).

<sup>2</sup> *Dumasia v Ikon Building Co-operation Ltd* [2021] NZCA 292 (Cooper, Mallon and Wylie JJ).

<sup>3</sup> At [48].

<sup>4</sup> At [48]–[49].

<sup>5</sup> We see this as the corollary of the Court of Appeal expressing the view at [52] that it was inappropriate to reject the argument in summary judgment proceedings.

(d) a no set-off clause in the funding agreement was ineffective to shield Ikon from the consequences of a breach by Bolter.<sup>6</sup>

[5] The complaint about the prematurity of the notice of default was not at the forefront of the case that Messrs Dumasia and Hilliam presented to the High Court in opposition to the application for summary judgment. And according to the submissions on behalf of Ikon in support of its application for leave, the repudiatory breach argument on which Messrs Dumasia and Hilliam succeeded was raised in the Court of Appeal only in reply. The argument now advanced by Ikon in support of the application for leave to appeal is that, assuming the notice of default was a repudiatory breach, SKKY and Messrs Dumasia and Hilliam subsequently affirmed the contract after the notice was issued. The alleged affirmation consisted of attempts by SKKY to come to terms with Bolter over continuation (or restoration) of funding.

[6] The arguments in support of the application for leave to appeal do not engage with the substance of the Court of Appeal's reasoning. Although it used the language of repudiation, the Court did not proceed on the basis that Bolter had repudiated, and SKKY had cancelled, the funding agreement (or that it was reasonably arguable that this was so). Rather, the primary point was that it was arguable that the effect of the notice of default was an assertion by Bolter that the funding obligations of NZMS would not be honoured. The arguable entitlement of SKKY to damages against NZMS for that refusal and to set off such damages against its liability to Bolter/Ikon is not obviously affected by unsuccessful attempts by SKKY in the June/July 2017 period to come to an arrangement with Bolter.

[7] It is not suggested that the case involves any question of general or public importance.<sup>7</sup> As will be apparent, we see no appearance of a miscarriage of justice.<sup>8</sup> The application is accordingly dismissed. Ikon is to pay Messrs Dumasia and Hilliam one set of costs of \$2,500.

Solicitors:  
Doug Cowan Barristers & Solicitors, Auckland for Applicant  
Foy & Halse, Auckland for Respondents

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<sup>6</sup> At [55].

<sup>7</sup> Senior Courts Act 2016, s 74(2)(a).

<sup>8</sup> Section 74(2)(b).