

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D752/2010

### CATCHWORDS

Domestic Building - work and labour done – work not complete – price generally not due until work completed – substantial part performance - owners refusing to allow builder to complete work – contract still on foot – Domestic Building Contracts Act 1995 - s.53 – power to make order the Tribunal considers fair to resolve a domestic building dispute – fair to order completion of work and payment of price

<b>APPLICANT</b>	Eric Jones Stairbuilding Group Pty Ltd
<b>RESPONDENT</b>	Pravin & Divayli Bhatnagar trading as Deepa Construction
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R.Walker
<b>HEARING TYPE</b>	Small Claim Hearing
<b>DATE OF HEARING</b>	19 January 2011
<b>DATE OF ORDER</b>	28 January 2011
<b>CITATION</b>	Eric Jones Stairbuilding Group Pty Ltd v Pravin & Divayli Bhatnagar trading as Deepa Construction (Domestic Building) [2011] VCAT 100

### ORDER

1. Order the applicant to return to the site and carry out the following work:
  - a Trim the wedges from the treads and rises of the staircase so they do not protrude below the line of the bottom edge of the stringers;
  - b Provide the missing balusters to the upper flight of the staircase;
2. The said work is to be done in a proper and workmanlike manner by 15 February 2011.
3. The respondents must provide access to the applicant to enable the work to be carried out.
4. Order the respondents to pay to the applicant the sum of \$4,930.00.

5. There is a stay on the payment of the money referred to in paragraph 4 of this order until 28 February 2011.
6. Liberty to the respondents to apply in case the work is not done in accordance with this order, such liberty to be exercised by 15 March 2011.

## **SENIOR MEMBER R. WALKER**

### **APPEARANCES:**

For the Applicant	Mr D. Auld in person
For the Respondent	Mr P. Bhatnagar in person

### **REASONS**

#### **The dispute**

1. The applicant is a company specialising in the construction of staircases. The respondents are owner-builders who, at relevant times, were constructing or extending their house in Camberwell.
2. By a quotation dated 25 June 2008 the applicant agreed to construct a staircase in two flights from the basement to the first floor of the house for \$6,930.00 inclusive of GST.
3. The quotation was accepted by the respondents and the staircases were installed in September 2008.
4. The balance of the agreed price for the stairs, being \$4,930.00, was not paid. An invoice in the sum was sent on 11 November 2008.
5. A director of the applicant, a Mr Auld, made a number of attempts to contact Mr Bhatnagar to discuss the non-payment but he proved difficult to contact. Finally on 5 October 2009 Mr Auld met with Mr Bhatnagar at the house and asked him why the bill had not been paid. Mr Bhatnagar invited Mr Auld to look at the staircase and pointed out:
  - a that some of the wedges used to fix the rises and treads were protruding below the stringer;
  - b two or possibly three balusters were missing from the top of the upper staircase.
6. Mr Auld inspected the area of the missing balusters and formed the view that there was the evidence of glue there, suggesting that perhaps the balusters had been installed but had since been removed. Nonetheless, he informed Mr Bhatnagar that he would send someone immediately to

complete the staircase. Mr Bhatnagar refused to allow the applicant to do so.

7. The matter came before me for hearing as a small claim on 19 January 2011. I heard evidence from Mr Auld and Mr Bhatnagar. In the course of the hearing I informed the parties that I would go out to the premises forthwith and inspect the staircase and I did so in their presence.

### **Findings**

8. It is clear from my inspection that some of the wedges used to fix the risers and treads do protrude below the stringers and I am satisfied that no balusters have been provided to the top of the staircase as required. Mr Auld said on site that he was and has always been ready and willing to complete the staircase and Mr Bhatnagar then in my presence invited him to do so.

### **The law**

9. Generally, when an agreement is entered into between two parties for the doing and completion of work it is what is called an entire contract and the price is not due until such time as the work is completed. Where the contract is substantially performed it is usually possible to order payment with an allowance for the value of the work that is defective or incomplete.
10. I am satisfied in this case that the applicant is, and has been at least since 5 October 2009, ready and willing to complete the staircase. The contract is also still on foot. The respondents' refusal to allow the Applicant to come back and finish the work seems to me to be opportunistic behaviour designed to secure the benefit of the staircase, which they are now using, at no cost, beyond the small deposit that they have paid.
11. I am also satisfied that there has been substantial performance and the remaining work to be done is relatively minor.

### **Orders**

12. By s.53 of the *Domestic Building Contracts Act 1995* I have jurisdiction to make any order that I think is fair in order to resolve a domestic building dispute.
13. I make the following, albeit, unusual order:
  1. Order the applicant to return to the site and carry out the following work:
    - a Trim the wedges from the treads and rises of the staircase so they do not protrude below the line of the bottom edge of the stringers;
    - b Provide the missing balusters to the upper flight of the staircase;
  2. The said work is to be done in a proper and workmanlike manner by 15 February 2011.

3. The respondents must provide access to the applicant to enable the work to be carried out.
4. Order the respondents to pay to the applicant the sum of \$4,930.00.
5. There is a stay on the payment of the money referred to in paragraph 4 of this order until 28 February 2011.
6. Liberty to the respondents to apply in case the work is not done in accordance with this order, such liberty to be exercised by 15 March 2011.

**SENIOR MEMBER R. WALKER**