

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D77/2010

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – defective glass balustrade – terms of settlement - interpretation

APPLICANT MK Building Group Pty Ltd (ACN 098 226 003)
RESPONDENT Eagle Cove Pty Ltd (ACN 006 381 979)
WHERE HELD Melbourne, 20 January 2012 and on site, 27 March 2012
BEFORE Senior Member R. Walker
HEARING TYPE Hearing
DATE OF HEARING 20 January 2012 and 27 March 2012
DATE OF ORDER 18 April 2012
CITATION MK Building Group Pty Ltd v Eagle Cove Pty Ltd
(Domestic Building) [2012] VCAT 482

ORDERS

- 1 The time within which the applicant must comply with the Tribunal's order of 20 January 2012 is extended to 4:00 p.m. on Monday 14 May 2012.
- 2 Liberty to the applicant to apply to have the proceeding reinstated and seek a monetary order if the respondent should fail to comply with the order.
- 3 If application is made for a monetary order, any documents in support of the application including any quotation or expert assessment should be filed and served no later than 3 working days before the time fixed for the hearing.
- 4 Order the respondent to pay the applicant's costs of the hearing on 20 March 2012, fixed at \$550

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant Mr J. Bowes-Taylor, solicitor
For the Respondent Ms S. Kirkham

REASONS

Background

- 1 In this proceeding the applicant sought damages for allegedly defective workmanship in the construction by the respondent of a glass balustrade in a house in McCrae.
- 2 Following a mediation between the parties terms of settlement (“the Terms”) were entered into dated 24 June 2010.
- 3 By paragraph 1 of the Terms, the respondent agreed to carry out certain work that was described in a schedule.
- 4 The work was to be carried out in two stages. The Stage 1 works is described as follows:
 - “Remove all glass in the channel
 - All grout to be removed and cleaned;
 - Any broken glass panels to be replaced by the respondent at its cost;
 - Reinspection of glass with any panels that need replacement due to chips and scratches to be replaced by the respondent for which the applicant will pay the respondent \$225 exclusive of GST per metre²;
 - The glass to be used is 12mm clear toughened FPAE”.
- 5 The Stage 2 works was the re-installing of all the glass and the channel, supplying all necessary grout.
- 6 In paragraph 2 of the Terms, the applicant was to pay the respondent the sum of \$3,000 including GST for the carrying out of this work.

The enforcement order

- 7 The work was not done and the applicant applied for an order to give effect to the Terms.
- 8 At the reinstatement hearing on 20 January 2012 I made an order that the respondent carry out the required work on or before 10 February 2012. The applicant’s solicitor, Mr Bowes-Taylor appeared at the reinstatement hearing and the respondent was represented by its manager, Ms Kirkham.

The dispute

- 9 Notwithstanding the making of the order the work was still not done and the matter came before me again on 20 March 2012. On this occasion Ms Kirkham said that it was never contemplated at the time the Terms were entered into that the panes of the glass in the balustrade that were not defective would be replaced. She said that the words “all glass” were intended to refer only to the defective sheets.

- 10 Mr Bowes-Taylor said that it was clear that all of the glass was defective and that “all glass” was intended to mean “all of the glass”.
- 11 I informed the parties that I would visit the site and see for myself whether there was any basis for interpreting the Terms of settlement by limiting the meaning of the term “all glass” as asserted by Ms Kirkham.

Site visit

- 12 The visit took place on site on 27 March 2012 in the presence of a director of the applicant, Ms Kirkham and another representative of the respondent. It is quite clear from that inspection that all of the glass is defective as Mr Bowes-Taylor stated at the hearing and I see no reason why the words in the Terms should be given any other interpretation than their ordinary meaning.

Order to be made

- 13 I will extend the time within which the respondent is to comply with the order of 20 January 2012 to Monday 14 May 2012.
- 14 In view of the failure of the respondent to comply with the Terms and the earlier order I will add a provision giving leave to the applicant to apply to have the proceeding reinstated to seek a monetary order in place of the doing of the work if this order should not be complied with. Any such application would need to be supported by some evidence as to the reasonable cost of having the work done by another tradesman.
- 15 I will order the respondent to pay the applicant’s costs of the hearing on 20 March 2012, fixed at \$550.

SENIOR MEMBER R. WALKER