

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. **BP1634/2015**

CATCHWORDS

Domestic building contract for landscaping works; claim for rectification of alleged defects and completion of contract works; whether defects or cost of rectifying alleged defects had been proved; termination of contract; effect of repudiation of contract by owners; counterclaim for balance of works completed and variations; variations not in writing; whether variations enforceable by reason of section 38(6) *Domestic Building Contracts Act 1995*.

FIRST APPLICANT	Mr Kamalesh Kapadia
SECOND APPLICANT	Ms Rajvee Kapadia
FIRST RESPONDENT	Mr Adrian Porto t/as AP Concreting and Landscaping (ABN 84 539 905 373)
SECOND RESPONDENT	Mr Frank Porto (Removed by order dated 26 October 2016)
WHERE HELD	Melbourne
BEFORE	R Buchanan, Member
HEARING TYPE	Hearing
DATE OF HEARING	8 September 2016
DATE OF ORDER AND REASONS	26 October 2016
CITATION	Kapadia v Porto (Building and Property) [2016] VCAT 1810

ORDER

- 1 Frank Porto is removed as a respondent to this proceeding.
- 2 The applicants' claim is dismissed.
- 3 On the counterclaim, the Kapadias must pay \$2,632.10 to the respondent Adrian Porto.

R Buchanan
Member

APPEARANCES:

For Applicants

Mr Kamalesh Kapadia and Mr Raynal Kapadia

For Respondents

Mr A Porto and Mr F Porto, in person

REASONS

1 This case concerned a dispute over landscaping works.

Contract

2 In 2015 Kamallesh and Rajvee Kapadia (“the Kapadias”) contracted with the first respondent, Adrian Porto (“Mr Porto”), for Mr Porto to carry out landscape building works on the Kapadias’ home in Endeavour Hills. The Kapadias’ home is built on a corner block, well above the level of the street, with a steeply sloping front garden. The works involved constructing steps from the front portico down to the street and building two retaining walls to form terracing in the garden. The Kapadias provided no plans or specifications for the works.

3 The basis of the contract was a written quotation dated 14 September 2015, which provided for the following:

a removing existing steps and building new concrete steps from the front portico to the footpath \$3,850, including GST

b a 14 m sleeper wall \$4,545, including GST

c a similar 17 m sleeper wall \$5,549.50, including GST

d a similar 25 m sleeper wall \$6,600, including GST

Total \$20,544.50, including GST.

4 The parties subsequently agreed to a substantial number of written variations, additions to and subtractions from the contract works. The parties tendered a great deal of material, which included numerous amended quotations, emails and receipts. Their submissions and evidence about the scope of the contract works and contract prices was rarely in accord. For reasons which I will set out below, where conflict occurred between the Kapadias’ and Mr Porto’s evidence about the scope and price of the contract works, I have accepted Mr Porto’s submissions and evidence. On that basis, the price of the works after those variations was as follows:

a Steps and associated works \$6,380, including GST

b Upper sleeper wall \$4,301, including GST

c Lower sleeper wall \$6,688 including GST

This made the full contract price \$17,369.

5 The evidence made it clear that the project quickly became highly fluid, with multiple changes to the project works.

6 By late November 2015 Mr Porto had built the steps (with the help of his father, the second respondent) and the upper retaining wall. He was well on the way to finishing the bottom wall, when a dispute developed. Mr Porto stopped work and has not returned.

- 7 On 14 December 2015 the Kapadias issued the present proceeding.
- 8 On 5 February 2016 the Kapadias received a quotation from another builder to demolish and replace the steps, which was subsequently done.
- 9 On 16 February 2016 Mr Porto filed a counterclaim.
- 10 By their amended points of claim, the Kapadias alleged that the works carried out by Mr Porto were defective and incomplete. They claimed the cost of rectification and completion, alternatively the refund of all monies paid to Mr Porto, punitive damages and costs. The Kapadias named as respondents both Mr Porto and his father, Frank Porto.
- 11 By his amended points of counterclaim, Mr Porto claimed the balance of the contract price, \$2,869, plus extras of \$3,200.

Witnesses

- 12 Evidence was given by the Kapadias' son, Raynal Kapadia and by Mr Kapadia senior. Mr Porto gave evidence on his own behalf and evidence was also given by his father, Frank Porto.
- 13 Most of the evidence given on behalf of the Kapadias was given by Raynal Kapadia. Mr Kapadia senior gave limited evidence, but clearly adopted and affirmed to me the evidence given by Raynal Kapadia.
- 14 I found Raynal Kapadia to be an unsatisfactory witness. His evidence contained numerous, evident inaccuracies and he appeared to be more focused on advancing the Kapadias' case than in giving factual evidence.
- 15 An example of my concerns was Raynal Kapadia's evidence about the length of the steps. The contract originally specified for the steps to run all the way from the front portico to the footpath. Raynal Kapadia's evidence was that when Mr Porto began to build the steps, Mr Porto announced that he would only build them halfway to the footpath.
- 16 Raynal Kapadia said that the Kapadias had protested that the contract called for a full flight of steps. Mr Porto's response had been that, in the course of the parties' varying the contract works, he had submitted a quotation which, while not specifically saying so, was to be understood as only providing for the steps to go halfway to the footpath, not all the way. He therefore refused to do more than build steps half of the way down to footpath. This claim was repeated by Raynal Kapadia on a number of occasions and was clearly affirmed by Mr Kapadia senior. In addition, the claim was made in the submissions and materials filed by the Kapadias.
- 17 I found it difficult to accept that evidence, for a number of reasons:
 - It is improbable that a landscape builder would unilaterally refuse to construct half of a contracted flight of steps.
 - Mr Porto gave evidence that he built the steps halfway, on the instruction of Mr Kapadia senior, who told him that the family wanted to construct a parking space halfway up the slope.

- Raynal Kapadia gave evidence that the family had been contemplating building a parking space halfway up the flight of steps because they were worried about hoon drivers in the neighbourhood.
- Photographs tendered by the Kapadias clearly showed that after Mr Porto had constructed the steps, the Kapadias had carried out excavations below the steps, such as would be required to cut a parking platform into the slope.

18 In view of my concerns about the evidence given on behalf of the Kapadias, where a conflict occurred between that evidence and the evidence of Mr Porto, I have preferred the evidence of Mr Porto.

Defects

19 The Kapadias alleged that the works built by Mr Porto contained a number of defects:

a **Defects in the steps:**

- uneven treads
- potentially undermined
- defective finish
- formwork timbers left in situ
- variation in treads and risers
- unfinished construction
- reinforcing mesh not adequately incorporated into the concrete.

b **Defects in the retaining walls:**

- no engineering documentation
- plastic sheeting, aggie pipe and scoria not placed on fill side of walls
- sleepers not aligned
- variation in sleeper bank heights and in structural steel
- walls bowed
- posts not buried sufficiently deeply
- bottom wall not built on the line of the footpath.

20 Mr Porto gave evidence in relation to the alleged defects. That evidence can be conveniently characterised as either denying that an alleged defect was in fact a defect or saying that allegedly defective work had been built as directed by Mr Kapadia senior.

21 By a contract dated 5 February 2016 the Kapadias engaged ZD Tiling to demolish and replace the steps constructed by Mr Porto.

- 22 In their Amended Points of Claim the Kapadias stated that:
- ... the Kapadias did consult with a concreter in relation to remedying the condition of the steps. The concreter recommended that the steps constructed by the respondents should be removed as they are of poor quality and it would look awful if a new set of steps were constructed as a continuation of the respondent's steps. It was advised that it would look better, be cheaper, easier and quicker to construct a new set of stairs entirely.
- 23 The Kapadias tendered a report by an expert, Anton Molnar, based on his inspection of the works on 2 February 2016. The report listed most of the defects set out above and contained photographic evidence of the alleged defects but did not give any cost for rectification.
- 24 The Kapadias did not call Mr Molnar to give evidence and did not provide any evidence of the cost of rectifying the alleged defects.
- 25 On the basis of the evidence presented by the Kapadias I am of the view that the alleged defects were not sufficiently serious to warrant the demolition of the steps. In addition, I note the evidence of Mr Porto about the alleged defects. I also note the assertion in the Kapadias' Amended Points of Claim, that the concreter whom they consulted advised them that Mr Porto's steps "would look awful if a new set of steps were constructed as a continuation of the respondent's steps". This suggests that the Kapadias' decision to demolish Mr Porto's steps was not necessarily made because of the seriousness of the alleged defects.
- 26 (I also note that the Kapadias seek the full cost of constructing the new steps, although they are approximately twice the length and twice the width of the steps constructed by Mr Porto. The Kapadias have also claimed the cost of works associated with the replacement steps, which works were over and above the works which were the subject of their contract with Mr Porto.)
- 27 In view of Mr Porto's evidence disputing the alleged defects and the absence of any evidence on behalf of the Kapadias about the cost of rectification, there is no evidence upon which a finding about the extent of the Kapadias' loss, if any, can be based. Accordingly, the Kapadias' claim in relation to defects is dismissed.

Termination

- 28 Mr Kapadia senior gave evidence that he had instructed Mr Porto to build the bottom retaining wall 2 to 3 cm from the footpath. Mr Porto had done so, but on the corner, had installed the posts some 20 cm back from the footpath. Mr Kapadia senior instructed Mr Porto to move the posts and Mr Porto said that he would only do so if Mr Kapadia senior agreed to pay him an extra \$3,000. Mr Kapadia senior refused and Mr Porto stopped work.
- 29 Mr Porto's evidence was that he had discussed the location of the posts with Mr Kapadia senior and had installed them where agreed. Subsequently, Mr

Kapadia senior had asked him to move the posts, which he refused to do unless the Kapadias paid for the cost of doing so. He referred to an email, written by him to Mr Kapadia senior on 1 December 2015, which said in part:

As you are aware I have not been provided any plans, drawings, survey notes or markings to ensure the correct alignment of the retaining wall and posts. To overcome this lack of documentation I have sought your approval of all positioning prior to and during the works. You did observe the initial setup of the sleeper wall and subsequent upright posts, and notified me that you are pleased with both the alignment of the sleeper wall and the positioning of the posts.

On the day of installation you were overseeing the position of the steel uprights to the point where you were interfering on the job site and getting in the way of us being able to perform the work safely and in an efficient and defined manner. You had total direction of location of uprights and even requested an upright post to be moved 100 mm after concrete had been placed to accommodate your letterbox and space to drive over the footpath, off the crossover boundary to drive your vehicle into your property. This change of upright location again made my job more difficult adding the customisation of concrete sleepers which I completed to accommodate this change. These additional works added time and cost of the project and have not been charged to you as I wanted to maintain a positive relationship and continue working without delay.

It was at this point that I requested your approval of the location of the upright posts so I could make sure I was giving you your desired outcome as we had previous difficulties confirming an accurate scope of work. In addition there were witnesses to these verbal approvals. I explained that if you want the posts to be moved you could while the concrete had not yet cured but in a few hours we would not be able to budge them. You then walked around with a tape measure in hand, surveyed all the uprights and said you were all fine apart from the one we were moving for you free of charge once we had already poured concrete.

...

Given the chronology of events I have outlined above, and that you had approved the location of the wall I am not sure why you are now disputing the position. If the wall is not in a position your satisfaction I am able to alter the current position. As per the attached quote this alteration will cost a total of \$2,915 and an estimated three days.

Please advise if you would like to proceed with these works.

- 30 The contract between the parties was terminated when Mr Porto left the site on 26 November 2015, saying that he would only return to complete the works to Mr Kapadia senior's instructions if the Kapadias would pay for the cost of moving the posts. The question for decision, therefore, is whether Mr Porto was entitled to do so.

- 31 On Mr Kapadia senior's evidence, Mr Porto failed to comply with the contract terms (Mr Kapadia senior's instructions about the alignment of the wall) and demanded extra payment for doing so.
- 32 On Mr Porto's evidence, he complied with Mr Kapadia senior's instructions and when Mr Kapadia senior sought to unilaterally vary the contract terms (by requiring the posts to be moved to a different location from that agreed), refused to do so unless the Kapadias paid the cost of moving the posts.
- 33 I prefer the evidence of Mr Porto on this point, over that of Mr Kapadia senior. Not only did I find Mr Porto a more reliable witness than Mr Kapadia senior, but also I find it improbable that Mr Porto would not have followed the Kapadias' instructions. Why, on what the evidence made clear was a heavily supervised job, would Mr Porto have followed the Kapadias' instructions (about the distance which the fence should be from the footpath) for part of the run of the fence, then unilaterally decide not to follow those instructions for another part?
- 34 Accordingly, I find that Mr Porto placed the posts where instructed by Mr Kapadia senior and that Mr Kapadia senior required a variation of the contract terms, which Mr Porto refused. Mr Kapadia senior's demand that Mr Porto accept a variation of the contract terms amounted to a refusal to be bound by the contract and constituted a repudiation of the contract. Mr Porto accepted the repudiation by his conduct in refusing to return to the site to carry on with the contract works unless the Kapadias agreed to pay for the variation required by them.
- 35 As the Kapadias had repudiated the contract, Mr Porto was freed from his obligation to complete the contract works. Accordingly, the Kapadias' claim for the cost of completing the contract works is dismissed.

The second respondent

- 36 Mr Porto applied for his father, Frank Porto, to be removed as a respondent to the proceeding. He and his father gave evidence that Mr Porto is the sole proprietor of the business of AP Contracting and Landscaping and that Frank Porto had worked on the job for Mr Porto. It was clear from the evidence that all contractual dealings about the job and the numerous variations to it were conducted between Mr Kapadia senior and Mr Porto, not Frank Porto. I find that Frank Porto was not a party to the contract which is the subject of this proceeding and I will order that he be removed as a respondent.

Counterclaim

- 37 By his counterclaim, Mr Porto sought the balance of the contract price. The Kapadias' repudiation was a breach of their contract with Mr Porto, entitling Mr Porto to payment for the works done up to the point of termination. The Kapadias tendered no evidence about how much of the

contract works had been done by Mr Porto prior to termination. Mr Porto estimated that he had done 90 percent of the works. In the absence of other evidence, I accept Mr Porto's estimate.

- 38 The contract price was \$17,369 and 90 percent of that amount is \$15,632.10. The Kapadias claimed that they had paid \$15,126 to Mr Porto, while he asserted that they paid only \$14,500. The documents provided by the parties were inconclusive and I will therefore accept Mr Porto's evidence that he was paid \$14,500. Accordingly, I will order that the Kapadias pay to Mr Porto the unpaid balance of 90 percent of the contract price, namely \$1,132.10.
- 39 Mr Porto also claimed for four variations to the contract works. One, for "extra day staff needed" is not a variation of the contract works and not a valid claim under the contract. Two of the variations were not in writing, signed by the Kapadias as is required by section 38 of the *Domestic Building Contracts Act 1995*. As such, the variations are unenforceable – section 38(6).
- 40 The fourth variation was for \$1,500 for removal and disposal of the original steps and tiles. In its first iteration, Mr Porto's quote for the steps work provided for removal of the original steps. Subsequent versions of the quotation contained no reference to removal of the steps.
- 41 Mr Porto's evidence, which was supported by emails tendered, was that Mr Kapadia senior had promised to remove the old steps and that Mr Porto's price had been amended to reflect that commitment. Mr Porto said that when he had arrived to begin work, he found that the Kapadias had failed to remove the steps. Mr Kapadia senior had then asked him to remove the steps, which he had agreed to do, on the basis that it would be at the Kapadias' expense.
- 42 The evidence of Raynal Kapadia and Mr Kapadia senior was that the Kapadias had not agreed to remove the old steps. I prefer Mr Porto's evidence on this point.
- 43 Mr Porto's agreeing to remove the steps was a variation of the parties' contract. The variation was not in writing. Such written variations are enforceable, if the builder would suffer a significant hardship and if it would not be unfair to the building owner for the builder to recover the money.¹
- 44 I am satisfied that such is the case here. \$1,500 is a not insignificant sum. At \$50 per hour, a builder would need to work for 30 hours to earn that amount. Its denial would be a significant hardship. The need for the variation arose because of the Kapadias' breach of the terms of their contract with Mr Porto (by failing to remove the steps as they had promised to do). If Mr Porto wanted to do the contract works, which he had come to do, he had no choice but to comply with Mr Kapadia's request and remove

¹ *Domestic Building Contracts Act 1995* s 38(6)

the old steps. Under those circumstances, it would not be unfair to the Kapadias for Mr Porto to recover the money claimed by him in respect of the variation.

- 45 Mr Porto gave evidence about how the amount claimed, \$1,500, was calculated. The Kapadias did not tender any evidence to the contrary and the amount claimed appears reasonable. Accordingly, I will order that the Kapadias pay Mr Porto \$1,500 for taking up and disposing of the old steps. That amount, combined with \$1,132.10, the balance owing for contract works done by Mr Porto, totals \$2,632.10. I will order that the Kapadias pay that amount to Mr Porto.

R Buchanan
Member