

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D667/2005

**CATCHWORDS**

*Domestic building – supply of cabinets – defective – assessment of damages – dispute about a defect – supplier removes cabinets and sues for price – price not recoverable*

<b>APPLICANT</b>	John Bajkai
<b>RESPONDENT</b>	Mr. Posadowski t/as Geelong Ready Cut Board Supplies
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Directions Hearing
<b>DATE OF HEARING</b>	22-23 February 2006
<b>DATE OF ORDER</b>	24 May 2006
	[2006] VCAT 927

**ORDER**

1. Order the Respondent to pay to the Applicant the sum of \$3,200.00.
2. The Respondent's counterclaim is dismissed.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	In person
For the Respondent	Mr R. Burns of Counsel

## **REASONS FOR DECISION**

### **The proceeding**

1. In this matter the Applicant seeks damages for cabinet work supplied to him by the Respondent and installed in his house at 30 Thomas Street, Lara. The Respondent counterclaims for the price of other cabinet work that was made for the Applicant but was either removed by the Respondent from the house or never installed. The parties were formerly on friendly terms but have had a bitter falling out over a fairly minor dispute they ought to have been able to resolve.
  
2. The matter came before me for hearing on 22 February 2006. The Applicant represented himself and the Respondent was represented by Mr Burns of Counsel. The principal witnesses as to the facts were the parties themselves and a carpenter, Mr White. I also heard from Mrs Posadowski. She was not directly involved in the dispute but she was present during the final argument and was able to give evidence as to the sending of a fax and the non-receipt of letters of complaint the Applicant claims to have sent.
  
3. I have some misgivings as to the reliability of the two parties as witnesses. The Applicant's credibility is affected because, on all the evidence, including that of Mrs Posadowski, I am not satisfied that the letters of complaint were sent as he alleges. I also think the amount of his claim is excessive. Other concerns will appear from the following reasons. On the other hand the evidence given by the Respondent of his telephone conversations with the Applicant is contradicted by telephone accounts tendered by the Applicant and the evidence of Mr White also damaged his credit. I place greater reliance on the evidence of the other witnesses and on the documents tendered.

### **The kitchen and laundry cabinets**

4. The cabinet work which is the subject of the Applicant's claim was for the kitchen and laundry. It was provided pursuant to a written quotation dated 14 December 2004. The price of the cabinets, inclusive of GST, was \$15,916.56. The doors and panels were to be of timber veneer blue gum "crown cut". The quotation contains the note: "door knobs and glass panes are not included in these prices".

At the foot of the quotation there is a signature which appears to be that of the Applicant adjacent to the handwritten date “14/12/04”.

5. Upon acceptance of the quotation the Applicant paid a \$7,000.00 deposit. There was no specific date for the installation of the cabinets but the Applicant said that it was agreed they were to be installed “in about 6 weeks”.
6. According to the Applicant the carcasses of the cabinets were delivered, without the veneers, on 2 and 9 February and installation commenced a week later. All of the cabinets were installed by 25 February while the Applicant and his wife were in Sydney.
7. The Applicant says that when he returned to Melbourne and inspected the cabinets he found that the two front glass doors were badly chipped and filled with the wrong colour putty. Other glass doors for the overhead cupboards were not stained or finished on the inside where the door frame was cut away to mount the glass. Although only noticeable when the doors were opened they were unsightly. He said he spoke to the Respondent who came out on about 10 March, removed the doors and took them away. He said that he made a number of other complaints about the quality of the work but no agreement was reached. It is sufficient to say at this stage of the narrative that the glass doors were taken back by the Respondent and never returned and the matters about which the Applicants were complaining were not attended to. It is not disputed that the cabinets have been fully paid for.
8. Numerous photographs were tendered in order to demonstrate the nature and extent of the complaints and ultimately, I went on site and inspected the cabinets.

### **The defects**

9. Expert evidence as to the quality of the kitchen was provided for the Applicant by Mr Hart and for the Respondent by Mr Curtain. Mr Curtain conceded that some work needed to be done and some components needed to be replaced. I deal with Mr Hart’s criticisms according to the numbered paragraphs in his report.

- 1. The fits are not as would be expected in the overhead cupboard to the right.**

Mr Curtain acknowledges there is a tapering difference of approximately 8mm which could be filled with a matching timber fillet. He said it was not in a particularly noticeable position. Mr Hart appeared to agree that this remedial work would be appropriate and I accept that it needs to be done.

- 2. The recess in the Island bench is 50mm short on either end.**

This occurred because the Respondent believed the granite to be fitted to the bench was to be of a greater thickness which he allowed for. The source of this belief was a page from a magazine he was given by the Applicant and his wife, showing what they wanted. The bench depicted in the magazine had the thicker granite. I think this problem is the fault of the Applicant, not the Respondent.

- 3. No veneered 19mm finished rebate was provided for the top of the bench. Instead, a sawn substrate of particle board was provided.**

The Applicant said that a rebate was discussed but the Respondent denied that it was. No rebate is shown in the magazine picture the Respondent was given and I am not persuaded that it is indicated on any of the computer generated pictures that were tendered. The rebate now on the bench was constructed by the Applicant from an aluminium extrusion. Nothing like that appears in any of the drawings. I am not satisfied that the contract was to supply a veneered finished rebate for the top of the bench.

- 4. The finish to the door and drawer edges and seen ends forming the horizontal plane of the shadow line are unevenly adjusted**

Mr Curtain said that this is a matter of adjustment except in regard to the top drawer on the left which is too small and requires replacement. Mr Hart agreed that a lot of the doors can be adjusted and said that this should have been done at the time of fitting. I accept that the doors, drawer edges and seen edges require adjustment and the undersize door requires replacement.

**5. The top rails of the carcasses need to be veneered because they are partly exposed**

Mr Curtain says that the problem is exacerbated by the fact that the bench top is flush with the drawers rather than protruding over them, as is usually the case. The bench top was installed by the Applicant and the choice to construct it in this way was his. There does not appear to be any indication in the documents that the carcasses or any part of them would be veneered. I am not persuaded that this was required by the contract.

**6. Door drawer and seen end faces are not on a flat plane**

Mr Curtain says that this is a matter of adjustment. I accept that this is the case but the adjustments will need to be made.

**7. One bank of drawers does not have matching grain**

This is acknowledged. Both drawers will have to be replaced to match the veneer grain to the fronts.

**8. The up-stand behind the sink has not been veneered.**

Mr Hart said that he made this comment because he was told that the up-stand was to be veneered. The drawings do not show a veneered up-stand.

**9. Some seen ends are not clear finished.**

I did not see this. The ends are now covered in granite which the Applicant was to supply.

**10. Some seen faces to the overhead cupboards appear to have been clear finished with the shelves in place during at least one application.**

This is a difficult question. The Respondent said that it was caused by light darkening the exposed timber. Mr Hart seemed to doubt this, saying that the same problem was in a number of cupboards in very different locations. The Respondent denied that the shelves were painted in situ and although after looking at the photographs I had some suspicion that this may have been the case, the method of application of the “two pack” material with which the shelves and cupboards were painted makes it most unlikely. There is no

direct evidence to establish the cause of the problem and although Mr Hart said that he had never seen it before I think the Respondent's explanation, supported by Mr Curtain, seems as likely as the Applicant's suggestion. Where two possible explanations are available I cannot draw an inference in favour of one and reject the other. It was not disputed that the specified two pack material had been used.

**11. The screws holding the overhead cupboards are uneven in number, unevenly set out and not capped.**

I accept that this is the case, although the screws would have to be installed over a stud in the wall. Mr Curtain says that there are sufficient screws but I accept Mr Hart's evidence that they need to be tidied up and capped.

**12. Shelving has not been edge stripped all around but only on the exposed edge**

Mr Curtain says that it is not usual to edge the shelves all around. Even Mr Hart says that it is not always done. I am not satisfied as this item.

**13. Glazing rebates have not been veneered.**

Mr Curtain acknowledges that this is the case. I accept that the doors require replacement because the rough unpainted rebates have now had silicone applied to them.

**14. The finish between the fridge and the dishwasher is generally poor and unfinished with no panel separating them**

It is acknowledged by Mr Curtain that the insert above the dishwasher is raw MDF board and that a panel needs to be provided to separate the two appliances but it is uncertain how much these carcasses were altered during the Applicant's removal of the particle board substrate. There was some damage to the tops of the cabinets which I find was caused by the Applicant removing it with a chisel.

**15. No clear finish was applied to the exposed surfaces in the recesses for the dishwasher and the fridge.**

The insert needs to be veneered and painted to match. In addition I saw some edges of drawers where they had been planed down and re-veneered where the veneer needs to be coloured and painted. I accept the Applicant's evidence that this was because the drawers were slightly too wide. I do not think it likely that the carcasses were moved as the Respondent suggested. Mr Curtain acknowledged that it appeared that the oven was slightly wider than the cavity that had been made for it.

**16. Naturally occurring blemishes in the veneer have been filled with non matching fillers**

This relates to a split in the face of a drawer and some edges in the veneer of the island bench which were extensively photographed and pointed out to me. I accept that this is a defect and the fillers will have to be coloured and repainted. The Applicant insisted that this could not be done because of the nature of the two pack finish. Mr Hart said that you would have to take it back to bare wood and recoat it after the fillers had been matched. How this could be done and what it would cost neither expert said.

**17. Internally angled dividing beads not fabricated correctly to cause a neat interface to the joints**

Mr Hart says these will have to be replaced and then painted appropriately.

**Assessment of damages**

10. Overall, apart from the missing doors, the present appearance of the kitchen is not unsightly and the defects are not very noticeable unless pointed out. One of the worst problems is the damage done by the Applicant himself to the top of the island bench. At the time of the on-site inspection, the Respondent delivered replacement glass doors to the site although they have not been painted with two-pack or glazed. I must take into account that this has occurred which will reduce the loss to the Applicant somewhat. The lack of glazing is not significant because the quotation excluded glazing.

11. It is not appropriate to award a sum equivalent to the replacement of the kitchen. The problem is that neither expert has costed any rectification work so I am left with little guidance as to how much to award. The onus of proof is on the Applicant to prove the extent of his loss. I think the appropriate course is to make an award of compensation for the respects in which the work is incomplete, components need to be replaced or the finish has fallen below the standard that might have been expected. The sum awarded might be used by the Applicant to carry out rectification work or replace panels or it might be used as compensation for having to put up with a lesser quality job. I will assess the award as a proportion of the contract price, since I have no other guide. I will order the Respondent to pay to the Applicant \$3,200.00, the Applicant not having established an entitlement to any greater sum..

**The cabinets for the rest of the house**

12. The Respondent counterclaims for the cost of other cabinets made for the rest of the house. The parties referred to this in their evidence as “Stage 2”. According to the Applicant’s evidence, on 14 January he received a quotation for \$6,435.00 for the rest of the cabinet work in the house. This seems a very low price for the whole of Stage 2. The quotation document specifying this sum that the Applicant relies upon has been tendered but, despite what he says, it is not a quotation for all of the Stage 2 cabinets and work he described in his evidence. It is solely for vanities for the bathroom, en suite and powder room. The doors and panels are again to be of timber veneer blue gum crown cut without door knobs or glass panes. This quotation was never accepted.
13. The Respondent uses a computer to draw the plans for the cabinet work that he builds. The design is loaded into the computer which can then draw the plans, determine how the material is to be cut and even display in three dimensions how the completed items will appear. The designs for the work were provided to him by the Applicant and comprised vanities, shelving and some room dividers. On 2 June 2005 the Respondent sent some computer generated plans to the Applicant for perusal. The Applicant says that on that day he went into the Respondent’s premises and selected Laminex as the veneer for the cabinet work in order to save costs. Delivery was discussed and he says that it was to be at the end of June. He

says the Respondent was to get back to him with a revised quote but because Laminex was cheaper than the timber veneer that was previously intended he did not expect the price to increase greatly from what had originally been quoted for the vanities only, despite the greater scope of work. I find this suggestion unlikely and impossible to accept.

14. On about 22 June 2005 some carcasses were delivered and about a week later there was a second delivery. On 29 June the Applicant rang to ask when they would be installed and was told by the Respondent that he would get back to him after speaking to the installer. Installation commenced a few days later.
15. What then happened is the subject of some dispute. According to the Applicant the bulk of the cabinets for Stage 2 were delivered on 2 and 3 July. Installation was carried out by a Mr Gareth White, a carpenter engaged by the Respondent and since he appears to be independent of the parties I am greatly assisted by his evidence. According to Mr White he had difficulty in fitting the downstairs bathroom vanity and had to cut it to shape. He also found there were items missing and some were the wrong size. When he returned to the site on the following Wednesday more material had arrived. He checked the bits and pieces and found that the bench to be put in the pantry was too short. He contacted the Respondent who suggested putting in a splash back to hide the resulting gap between the bench and the wall but, according to Mr White, the dimensions were too far out for that to be a workable solution. He proceeded to install a downstairs toilet unit, started on the bathroom and installed other items.
16. In cross examination Mr White acknowledged that there are generally adjustments to be made when cabinets are installed but he said that he does not normally have to cut down carcasses. He said the Respondent was not prepared to replace the bench top in the pantry. He said he was there on Saturday 2<sup>nd</sup> July from 9.00 a.m. until 5.30 p.m. and a further 7 hours the following day. On the Monday he went back to the Respondent to talk to him about it and was sent to another job. He returned to the site on the Wednesday and was asked by the Respondent to remove the cabinets but he did not do so. He was there from 8.00 a.m. until 1.30 p.m. and then packed his tools and left. Altogether he was there for 2 ½ days. He

said he was never paid for the job by the Respondent. The Respondent and other employees removed the cabinets for Stage 2 and took them back to the Respondent's premises.

### **The argument over Stage 2**

17. The removal of the cabinet work for Stage 2 followed an argument between the Applicant and the Respondent about the bench top and whose fault the mistake was. In the course of this the Respondent demanded payment of a deposit. Before this argument arose he was, it seems, content to install the Stage 2 material without payment of a deposit because, at the time removal of the material started, delivery and installation were well advanced.
18. The Applicant came into the Respondent's premises with his cheque book to pay a deposit and a further argument developed. In essence, the Respondent was demanding payment of a deposit and the Applicant was demanding that the cabinet work be rectified. The Applicant says that the Respondent was demanding a 75% deposit but the Respondent's evidence was that he was demanding a 50% deposit. On balance I accept the Respondent's version that he was seeking 50%, which is what the original quotation had provided for.
19. The Respondent's wife was a witness to the meeting and prepared a tax invoice but the Applicant left without it and so she faxed it to him. Her evidence in this regard is supported by the Respondent's fax journal.
20. I am satisfied that there was a price agreed upon for the Stage 2 cabinet work but no written quotation has been produced. The documents tendered in this regard by the Respondent appear to be internal documents and are not in the same form as the quotation for the kitchen cabinets. Nevertheless I find it hard to believe that the Applicant would have gone ahead without being told what the cost would be. I found his evidence to the contrary unconvincing. However although I think there was an informal quotation, the material was delivered before any deposit had been paid. I am satisfied the Respondent would have been content to install the cabinet work without any deposit because, in his own words, the Applicant was a friend who was in a hurry. When the argument commenced, the goodwill disappeared

and the Respondent then insisted upon what he apparently believed to be his strict legal rights.

21. I am not satisfied that the Respondent accepted responsibility for the mistake in the pantry bench. He blames the error on the Applicant's drawings. However he went to the house and prepared a template for the bench. Either the template was wrong or the bench was not made in accordance with it. The contract was to prepare a bench to fit the dimensions of the pantry. In delivering material that did not fit the Respondent did not comply with the contract and the Applicant was entitled to reject it. The Respondent was not prepared to accept the rejection but wished to "negotiate" the matter.
22. When the Applicant left the Respondent's office after this very heated argument the Respondent sent around his tradesmen and removed all his cabinet work for Stage 2. His justification for this was that a deposit had not been paid but I am not satisfied that this entitled him to remove what had already been installed. A more likely explanation for his change of mind is the Applicant's complaint about the bench top which might have led him to suspect that perhaps he would not be paid and that by removing the cabinets some pressure would be applied on the Applicant to make payment. If this is the case it did not work. The Applicant went off and engaged another cabinetmaker who made and installed cabinets although I am not sure whether they were to the same design.
23. A repudiation by the Applicant of the contract for Stage 2 is not established on the evidence and by pulling out the cabinets the Respondent has not performed his contract and so is not entitled to the price he seeks in his counterclaim. Further, I find on the evidence of Mr White that the Respondent was in breach of his contract in that the goods delivered for Stage 2 that Mr White installed were not of merchantable quality. The counter claim will be dismissed. It is not appropriate in all the circumstances to make any order as to costs for either party.

**SENIOR MEMBER R. WALKER**