

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D661/2005

CATCHWORDS

Kitchen renovations – scope of work – unsatisfactory evidence – credibility of witnesses

FIRST APPLICANT	Adam De Norville
SECOND APPLICANT	Sally De Norville
RESPONDENT	Paul Borg
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	21 August 2006
DATE OF ORDER	13 September 2006
CITATION	De Norville v Borg (Domestic Building) [2006] VCAT 1909

ORDER

Order the Respondent to pay to the Applicants the sum of \$5,500.00.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the First Applicant	In person
For the Second Applicant	In person
For the Respondent	In person

REASONS

The claim

- 1 In this matter the Applicants Mr and Mrs De Norville (“the Owners”) seek damages from the Respondent cabinetmaker (“Mr Borg”) with respect to kitchen cabinets supplied and installed and other work alleged to have been done in their house at 213 Olinda-Monbulk Road, Monbulk. They claim the work is defective and that to engage an alternate contractor to rectify it will cost \$26,150.00.
- 2 Mr Borg acknowledges having made and installed the kitchen cabinets but denies having done the other allegedly defective work.

The agreement proven

- 3 The kitchen cabinets were supplied pursuant to a written quotation which was prepared on 24 August 2002 but incorrectly dated 24 September 2002. The scope of works set out in this quotation is as follows:

“Supply and install new kitchen laminate top with timber edge, pine doors, arched, Paul to supply sink, staining to be done by owner, also install new PB window, owner to remove brick fireplace (Laminex R10 Paru Coral. Duropal)	\$5,400.00
GST	<u>\$540.00</u>
	\$5,940.00
Deposit	\$2,500.00
On delivery of kitchen	<u>\$3,000.00</u>
Balance	\$440.00
Balance must be paid on completion of work	
3-4 weeks to be installed	
Window installation	\$1,060.00”.

- 4 The total for the kitchen cabinets and the window installation was therefore \$7,000.00 and the whole of that has been paid. There is no evidence that any other sum was paid.

The complaints

- 5 There are 3 categories of complaint relating to:
 - (a) the cabinets and bench tops themselves;
 - (b) a bay window constructed in front of the kitchen sink where the brick fireplace was to be removed; and
 - (c) the removal and relocation of a doorway which would be covered by the new cabinets.
- 6 Most of the dispute revolves around who constructed the bay window and who moved the door. The Owners insist that Mr Borg did it but he denies

it. Mr Borg relies upon the quotation saying that all he had to do was install a new “Shugg” window in framework to be constructed by the owner.

The hearing

- 7 The matter came before me for hearing on 21 August 2006. I heard sworn evidence from the Owners who also provided:
- (a) a report prepared by a Mr Tucker from the Building Advice and Conciliation Victoria who inspected the kitchen on 21 January 2005;
 - (b) a quotation from the alternate contractor, a Mr Greenhall, to provide a new kitchen;
 - (c) a statement from a restumping contractor called “Mr Stumpy”. (The real name of the maker of this statement was not supplied);
 - (d) documents from the supplier of the Shugg window; and
 - (e) a number of photographs they took during construction.

For the Respondent I heard from Mr Borg and his wife and son. After hearing from the witnesses I visited the premises to view the work in the presence of the parties.

The evidence

- 8 It is impossible to reconcile the two conflicting accounts given by the Owners on the one hand and by Mr Borg and his wife and son on the other. The Owners allege that, after Mr De Norville had demolished most of the chimney he encountered a steel lintel and a timber lintel which supported the upper timber wall above the fireplace. He says that he telephoned Mr Borg who came down to the house, it being a Saturday morning, and cut the timber lintel, whereupon the upper wall dropped, causing the external door to jam. I cannot understand how the removal of the lintel could have had this affect, since the dropping of the upper wall in the vicinity of the removed brick fireplace ought to have lifted the load above the door. It is also difficult to believe that anyone with any knowledge of building at all would have removed a lintel supporting the roof. Mr Borg was once a member of the Master Builder’s Association.
- 9 The Owners say that Mr Borg then constructed a timber frame for a bay window, following the bottom course of bricks and sheeted it with fibro-cement sheet. They produced a photograph of this work which shows an electric wire threaded through the studs in the position where the dishwasher was to be installed. They acknowledge that they engaged an electrician to do this wiring but say that Mr Borg built the frame.
- 10 Mr Borg denies having done any such work. Both he and his son say that when they came to install the cabinets they saw that someone else had built the frame for a timber wall on top of the bottom course of bricks of the old fireplace but had not lined it. They said that when Mr Borg queried the absence of lining with Mrs De Norville she asked whether the cabinets

could nonetheless be installed. They then installed the cabinets. To this extent at least, Mr Borg's evidence is corroborated by his son.

Who to believe?

11. I have some concerns about the evidence of Mr De Norville. He said that the doorway had to be moved because Mr Borg made a mistake with the cabinets that is, he made the bank of cabinets that were to go against the interior wall too long so that it obstructed the doorway. Mr De Norville said that it was because of this "mistake" that Mr Borg agreed to move the doorway at no cost. Mr Borg denies this and says that the cabinets were the correct length. The length of that bank of cabinets appears to be in accordance with the design that Mrs De Norville signed before the work commenced so I think Mr Borg's version is to be preferred. He is unlikely to have agreed to move the doorway at no cost unless it was his mistake that made that work necessary.
12. Mr De Norville suggested that the bay window was Mr Borg's idea. He said that when he saw the kitchen Mr Borg said that he had a bay window in his kitchen and would do the same for them, yet according to Mr De Norville, by the time of Mr Borg's first visit, other contractors had already quoted to supply a kitchen with what Mr De Norville described as "the same window".
13. I also have concerns about Mr Borg's evidence. He had no satisfactory explanation for an angled line on the kitchen plan that he prepared and Mrs De Norville signed. This line is in the position of the right hand pane of glass in the bay window as constructed. There is also a dotted line extending beyond the window which shows where the cabinets were to be constructed underneath. I think those lines are too close to what was finally built to be a coincidence.
14. Mr Borg said that the frame for the window was built by others and that the Shugg window was fitted to it by an employee of Shugg. The Shugg window fits exactly into a very slim timber frame which has the appearance of having been built at the same time as the roof and other parts of the bay window. The invoice that Mr Borg produced from Shugg relates to a different window. Documents relating to the correct window were produced by the Owners which show that the window was produced using "client glass" and was "installed by others". It is unlikely that the Owners would have supplied any glass. The Owners' evidence is also supported by the statement from the restumping contractor which I now turn to.
15. The restumping contractor said that he visited the property in October 2002 at the Owners' request due to concerns expressed by a man who was renovating their kitchen who was introduced to him as "Paul". He said that Paul was in the final stages of building a window where there used to be a brick enclosure and was placing a large piece of glass in the window frame

on his arrival. He said that Paul placed a level on the cabinets he had fitted to show that the floor was not level. It is clear from the other evidence that the work was finished on Mr Borg's birthday on 20 September so the date given in this statement is wrong. The restumping contractor did not attend to give evidence. All I have is his statement. Evidence in the form of unsworn written statements must be used with great care and cannot stand against contrary sworn evidence. Nevertheless, the detail given in the statement is quite inconsistent with Mr Borg's account of the window and provides some corroboration of the Owners' sworn evidence, despite the obvious mistake as to the month of the contractor's visit.

16. The Owners claim that Mr Borg did the plumbing for the sink. Mr Borg and his son deny that. There is nothing in the quote about plumbing and the Owners did not suggest that there was any further agreement or other amounts paid. I cannot speculate as to the possible existence of some other agreement or cash arrangement between the parties which might explain some of these anomalies. There is no evidence about that.
17. I conclude that neither side has told me the whole truth. On this very unsatisfactory state of the evidence I find that Mr Borg did install the bay window but there is insufficient evidence to support a finding that he did anything else other than supply and install the kitchen cabinets. The defects in the bay window and the cabinets are set out in Mr Tucker's report.
18. The scope of rectification works set out in Mr Tucker's report were as follows:

Item No.	Description
1	Securely fix sink to the bench top with a full seal.
2	Provide doors and drawer fronts that are securely fitted to the cabinets and are plumb.
3	Realign the cabinets so that they are square and securely fix the bench tops to the cabinets. Rectify gap in corner of bench top.
4	Obtain a building permit with appropriate documentation and provide a window and building enclosure in accordance with normal building practice.
5	Provide a flat infilled wall where the internal door has been built in without obvious peaking or jointing.
6	Determine whether or not the kitchen framework is constructed in accordance with the appropriate standard.
7	Provide securely fixed door fronts that do not jam.

Of these items, item no. 6 is not determined to be a defect and I am not satisfied that item 5 was within the scope of works.

19. The Owners have not produced a quotation for carrying out the scope of works that Mr Tucker has identified nor any expert evidence of the reasonable cost. Instead, they have produced a quotation from Mr Greenhall for the supply and installation of a whole new kitchen and the straightening of the ceiling and walls for a price \$26,150.00. The only relevant item separately dealt with in the quotation is for a new bay window, for which a figure of \$3,000.00 has been quoted. Mr Greenall has quoted a further \$550.00 to replace the lintel over the window. The comment in his quotation is “No lintel has been placed over existing window or framework”. There is no evidence that this is the case. Indeed, without a lintel the ceiling over the window would be sagging since there would be nothing to support the heavy tile roof immediately above it.

20. I do not have any satisfactory evidence of the reasonable cost of making good the defective workmanship. There is no justification for replacing the whole kitchen. What is required by Mr Tucker’s scope of works is repair, not replacement and the scope of repair required does not appear to be as extensive as the Owners apparently believe. I can allow the \$3,000 for the window because that has been separately priced. Apart from that, in the absence of any better evidence I am left with what Mr Tucker said was necessary and the extent of the defects as they appeared to me on site. Doing the best I can I will allow a further \$2,500 in damages in addition to the cost of replacing the window. In this figure I have included some allowance to do something about the pantry doors which require attention in two respects namely, the doors are the wrong size and there is no room to fit the architrave of the adjoining kitchen door.

Conclusion

11. I will order the Respondent to pay to the Applicants the sum of \$5,500.00.

SENIOR MEMBER R. WALKER