

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D346/2008

CATCHWORDS

Domestic building work – contract to install window shutters to roof an outdoor entertainment area – term acknowledging that shutters not waterproof - shutters admitting more water than anticipated – work and materials not defective – no breach established

APPLICANT	Johanna Van Vliet
RESPONDENT	Benmel Pty Ltd t/as Eurotec Window Shutters
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	18 July 2008
DATE OF ORDER	30 July 2008
CITATION	Van Vliet v Benmel Pty Ltd trading as Eurotec Window Shutters (Domestic Building) [2008] VCAT 1613

ORDER

1. Order the Respondent attend at the subject premises and seal the corner blocks of the roof structure as identified in the report from the Building Control Commission dated 4 July 2008.
2. Save as aforesaid, the claim is dismissed.
3. Liberty to apply in regard to the implementation of this order.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Ms J. Van Vliet in person
For the Respondent	Mr B. Winning in person

REASONS

Background

- 1 The Applicant (“the Owner”) is the owner of the dwelling house at 17 Hillcrest Road, Oak Park. The Respondent (“Eurotech”) is a manufacturer and installer of window shutters.
- 2 In May 2006 the Owner approached Eurotech about erecting a gabled structure at the rear of her house (“the Structure”) and roofing it with window shutters in order to create an outdoor living area. The structure was to be erected without sides and the shutters forming the roof were to be retractable by means of electrical motors which were also to be supplied.
- 3 The Owner had already seen similar shutters installed to shade the windows in the roof of a friend’s house above his billiard room but they had a window beneath them and the use intended by the Owner was quite different.
- 4 In conversations between the Owner and Eurotech’s production manager, Mr Winning, it was discussed that Eurotech would erect the Structure and then roof it in window shutters of the type the Owner wanted. A quotation was prepared which was signed by the Owner on 15 January 2007. On the following day, Mr Winning came to the Owner in order to collect the deposit but before doing so it was agreed that the following words would be added to the quotation:

“Note: Not a 100% water proofing”.

Performance

- 5 The Structure was then erected and the shutters were installed on it on 9 February. Of the contract price of \$17,682.50 it appears that at least \$8,550.00 has been paid. A letter from Eurotech to the Owner dated 1 May 2008 suggests that there is further money due but since there is no counterclaim I do not need to concern myself with that. Any claim in that regard would have to be the subject of separate proceedings.
- 6 Following construction of the shuttered Structure the Owner found that some water leaked through when it rained. Most of the water appears to have run off but it leaked water at various points identified in the evidence. Sometimes it was in the capping and at other times it was in the corners where the shutters joined the frame.
- 7 It is acknowledged that, in terms of quality, the particular shutters used were at the high end of the product range sold by Eurotech but it is clear enough that they were designed for use as shutters, not as roofing material.

Attempts to address the owner’s concerns

- 8 Following the Owner’s complaints, employees of Eurotech removed channels and replaced them with stoppers, installed flashing, siliconed joints and the ridge capping, drilled into the side channels to divert water away from the shutters and adjusted the tension on the motors which rolled

the shutters up. Despite numerous attempts to address the Owner's concerns, water still penetrates at various points although it would seem that most of the water that hits the shutters runs off. This is not sufficient for the Owner's purposes. She wants to install sides to the Structure in order to make it useable for entertaining during wet weather.

- 9 The property was inspected on 27 June 2008 by Mr Stan Webb on behalf of the Building Commission. He found evidence of water penetration but said that since the quotation contained the words "Not a 100% water proofing" he did not consider the work to be defective on account of water penetration. He did however go on and find that there was a defect in the structure as the open ends of the corner blocks had not been sealed. This finding is not challenged by Eurotech and so I find the work to be defective to this extent.

The evidence

- 10 Apart from Mr Webb's report, I heard evidence from the Owner and from Mr Winning. There is little dispute as to the facts and the terms of the contract are set out in the written quotation.
- 11 It is not disputed that it was a term of the contract that the shutters would not be 100% waterproof. However the Owner says that she only agreed to include the words "Note: Not a 100% waterproofing" when Mr Winning said that this meant that there would be "a drip and a drop" of water. She says that the extent of water penetration is more than that. She now brings these proceedings and has obtained a quotation from another supplier for quite a different product who will install vertical louvres at a cost of \$22,000.00.
- 12 Mr Winning acknowledged that there had been discussion about the extent of the water penetration and that although the shutters would block out the rain and a high percentage of the water would run off, some water would "sneak through". He said that it was impossible to predict beforehand where that would happen. He said that Eurotech had done its best to minimise the water penetration and could do no more.

Findings

- 13 I find that the parties agreed that Eurotech would erect the Structure for the Owner according to an agreed design and also supply 6 high density roller shutters with remote motors and a group controller for a total price of \$17,682.50. This information is contained on the quotation the parties have signed. Also on this document are the words referred to that it is not a 100% water proofing.
- 14 I find that the parties contemplated that some water would enter through the shutters. It is clear from the Owner's evidence that she expected less water to enter, her expectation being, to use her own words, that it would be "a drip and a drop".

- 15 There is no evidence that the Structure was defectively built, that the shutters were defectively installed or that the materials used were insufficient, save for the failure to seal the corner blocks, which I find is established.
- 16 It seems to me that the problem here is the Owner's selection of this material. They are window shutters, not roofing material and there is no evidence that they were represented as being suitable roofing material. In the absence of the words on the invoice I might have been able to find that Eurotech warranted that the shutters would be sufficient for the purpose that is, roofing the area in question without admitting water. However I cannot find that it was a term of this contract that no water would get in because the contract says that it is not waterproof.
- 17 There is a possible alternate claim that, by representing to her that the extent of water penetration would be limited to "a drip and a drop" the Owner was induced to enter into the contract. She said that if this had not been said she would not have entered into the contract. Mr Winning frankly admitted that he could not recall the exact words that he used but agreed that the ingress of water had been discussed.
- 18 I think both sides knew that they were using window shutters for a purpose for which they were not designed and that some water would enter. I do not believe that anyone could have predicted with any accuracy how much water would enter. I have seen a video which shows water running down from various places but it would suggest that these are leaks and not a wholesale admission of rainwater. I am not able to say whether what I saw was more than a "drip and a drop" because of the very imprecise nature of those words.
- 19 The contract was to supply and install the shutters described in the quotation and the problem has arisen because they did not perform as the Owner hoped. Yet had Eurotech used other materials it would have been in breach. The Owner bears the onus of proof and in the absence of evidence of defective workmanship or materials, that part of the claim must fail.

Conclusion

- 20 There will be an order that the Respondent attend at the subject premises and seal the corner blocks of the roof structure as identified in the report from the Building Control Commission dated 4 July 2008. The rest of the claim is dismissed.

SENIOR MEMBER R. WALKER