

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1740/2018

CATCHWORDS

Domestic Building; claim for damages for alleged defects; counterclaim by respondent; claims for expert witness fees for reports and attendance at Tribunal to give evidence.

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| FIRST APPLICANT | Anna Dine |
| SECOND APPLICANT | Thoma Dine |
| RESPONDENT | G.T. Business Holdings Pty Ltd (ACN: 095 050 687) t/as Granite Transformations |
| WHERE HELD | Melbourne |
| BEFORE | Member B. Josephs |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 22 February 2019 and 2 May 2019 |
| DATE OF ORDER | 28 June 2019 |
| DATE OF REASONS | 28 June 2019 |
| CITATION | Dine v G.T. Business Holdings Pty Ltd t/as Granite Transformations (Building and Property) [2019] VCAT 985 |

ORDERS

The Tribunal finds that:

1. The applicants are entitled to damages of \$10,691 for their claim.
2. The respondent is entitled to damages of \$320 for its counterclaim.
3. After offsetting the above findings, the respondent is to pay the applicants the sum of \$10, 371.

The Tribunal orders and directs that:

1. The respondent must pay the applicants damages of \$10, 371 and costs of \$1,500.

MEMBER B. JOSEPHS

APPEARANCES:

For Applicants:

Mr T Dine and Mrs A. Dine, in person

For Respondents:

Mr G. Tsobanis and Ms C. Tsobanis

REASONS

Introduction:

1. The applicants, Mr and Mrs Dine, entered into an agreement with the respondent, Granite Transformations (“Granite”) for Granite to supply and install a new kitchen with a laundry included at the applicants’ residence at Unit 1/6 Meteor Street, Mount Waverley (“the premises”).
2. Mr George Tsobanis entered into the agreement on behalf of Granite. Mr Tsobanis is director of G.T. Business Holdings Pty Ltd.
3. The proceeding is an application by the applicants for compensation for rectification of alleged defects in Granite’s work and a counterclaim by Granite for a final instalment payment allegedly owing and costs of alleged extra works undertaken.
4. I commenced to hear the application on 22 February 2019. It soon became apparent that the applicants needed to call their expert witness, Mr Mackie, who had provided a report prior to the filing of the application. The respondent also sought to file further material by way of defence and counterclaim.
5. I adjourned the proceeding part-heard to 2 May 2019. The hearing continued on that day. Mr Mackie gave evidence, having provided a further report. Throughout the hearing, Mr and Mrs Dine were self – represented. Mr Tsobanis appeared with his sister, Christine Tsobanis, for Granite.
6. At the conclusion of the hearing, I reserved my decision.

The claim

7. Work began on 8 May 2018, and, according to the applicants, due to the respondent’s negligence and poor workmanship, they still did not have use of their kitchen and laundry when they made the application on 6 November 2018.
8. The applicants alleged they had notified Mr Tsobanis on numerous occasions of defects and mistakes but each time, the subsequent fix ups had been unsatisfactory and were simply “patch up jobs.”
9. According to the points of claim, the following includes events that took place after the beginning of installation of the kitchen:
 - installation of cabinets began;
 - on 9 May 2018, in the afternoon, the applicants noticed that the sink was cut to 100mm to the right of the cabinetry. According to the design, the sink was positioned in the middle of the window, however, due to the respondent’s oversight of the sink specification, which is

800 mm, the worker on the day had to cut into the cabinetry, thus causing the sink to be off centre;

-on the design plans, there were two pantry doors sketched, however, on 10 May 2018, the applicants realised that only one pantry door was installed which, when opened, hit the adjacent oven and microwave. The worker on the day placed a “rubber stop” on the oven and microwave handles to stop the pantry door hitting and damaging the applicants’ appliances. They also noticed on the same day, that according to the plans, the wood gap filler was missing between the pantry and the oven.

-on the morning of 14 May 2018, after complaining to Mr Tsobanis about the alleged defects, he attended the premises and the applicants state that upon further looking at his designs, he admitted that the sink was cut incorrectly, the pantry was missing the wood gap filler and the pantry door opened towards the appliances. He apologised for the errors, claimed that they were an oversight and would be rectified.

-on 15 May 2018, the workers began repairs, however, the applicants made the following observations.

- 1) Sink was removed and replaced in correct position to the left, however, chipboard off cuts were used under the sink.
- 2) Due to the mistakes made on the cutting of the sink, the cupboard underneath the sink which was designed for a tea towel holder had shrunk to 70mm which is of no use and looked inappropriate.
- 3) The tea towel rail was moved to the cupboard next to the stove without the applicants’ approval. The original design was to have the tea towel rail close to the sink. The cupboard next to the oven had numerous drill holes in it.
- 4) The wood gap filler was subsequently put in between the pantry and oven; however, there were now numerous holes in the pantry. This was due to not replacing the panel door when changing the door opening. In order to hide the holes, Granite placed round white stickers where the holes were located.

-on 5 June 2018, a tradesman attended the premises to replace off cuts with slabs.

-on 7 June 2018, the applicants sent a text to Mr Tsobanis asking him to come to inspect the work undertaken as they were not satisfied with the work done overall as there were still too many defects.

-on 10 June 2018 the applicants sent photographs to Mr Tsobanis of the holes in the pantry, cupboards, and drawers, and of a big gap in the corner cupboard. Additionally, all the cabinets in the cook top area were uneven.

-on 15 June 2018, the applicants lodged an application with the Domestic Building Dispute Resolution Victoria (DBDRV) but on 17 October 2018, no agreement could be reached between the parties and the DBDRV issued a Certificate of Conciliation.

10. The applicants also noted that despite the total cost of the works being \$20400, Granite did not provide either a major domestic building contract or sufficient insurance cover.
11. The applicants claim to have suffered financial loss, inconvenience, stress, anxiety, and depression, which are continuing and they sought compensation of \$17,598 from the respondent, itemised as follows: –
 - Cost of Fixing Kitchen Defects: \$11,025
 - Cost of Quote: \$ 198
 - Take outs and Laundromat costs: \$ 5,000
 - Expert Report: \$ 1,375
12. As the relationship with Granite had broken down, they intended to engage another contractor to finalise the work,

Report of Mr Mackie dated 5 November 2018.

13. Mr Mackie provided a report to the applicants after he inspected the premises, at their request, on 11 October 2018. Mr Mackie is a building consultant with 47 years' experience in domestic and commercial building. He is a qualified carpenter and joiner and was an experienced site foreman, supervisor and manager.
14. Whilst at the premises he found a number of defects in the kitchen replacement. He included photographs of them. The defects and his observations and comments about them were:
 - (1) Hot Plate Cut out - His inspection of the hot plate cut out found two factors that determine the correct fitting in the manufacturer's installation instructions.
 - a) The installer had over cut the width by 14mm, being 7mm on each side. This over cut meant that the hot plate side sealant seal on each side will not sit flat on the top's surface and spills will easily penetrate into the cupboards.
 - b) Hold down securing clips cannot be installed due to the top thickness and the draw sides not being trimmed to allow clips.

Guide to Standards & Tolerances 2015

10/09 Sealing around benches and items installed in benches

Where required, junctions between bench tops and adjoining surfaces are defective if they are not sealed with a suitable flexible sealant of matching or agreed colour. Seals around items such as sinks, hand basins or the like are defective if the joint leaks or they are not

installed in accordance with the manufacturer's installation requirements.

Analysis

Replacement of the kitchen top is the only alternative. Alterations and in fills should not be accepted, as the applicants' expectations were of capable tradesmen to read installation instructions and these should not be compromised with alternative means.

(2) Tea Towel Cupboard

The manufacturing and the installation of this under sized cupboard are due to the sink's double bowl size and dishwasher standard width. This sink cupboard size is now 800mm to accommodate the double bowl while the drawings provided by Granite show the size as 700mm. This has reduced the tea towel cupboard by 100mm, as a standard dishwasher size could not be reduced. Mr Mackie noted that the drawings as agreed and drawn show a tea towel cupboard width of some 150mm.

Granite has also installed the tea towel rail away from the sink, in another cupboard between the oven and hot plate drawers, without notifying the applicants.

Analysis

The tea towel cupboard has been reduced to an unusable size which is not acceptable. It cannot be used as intended or for storage.

(3) Under Bench Corner Cupboard Door

The under bench corner cupboard door has been cut short by 5mm. The kitchen installer noticed the manufacturer's defect and installed extra buffer stops behind the door. While this resulted in an even gap, it gave the appearance of the door being out of square and unsightly.

Guide to Standards & Tolerances 2015

10.04 Cabinet doors and drawers fronts

Unless otherwise specified cabinet door fronts are defective if they are not aligned at completion, or do not have consistent gaps between doors and between drawers.

Where the time limit for defects in cabinet doors, drawer fronts and similar joinery is not documented it is to be taken as six months from completion.

AS 4386:2018 Cabinetry in the built-in environment – Commercial and Domestic 12 Fitting Doors and Drawers

When all the cabinets and worktops have been installed, the doors and drawers shall be aligned to ensure a line - up of the edges of the doors

and flush fitting with other adjacent components or in accordance with the manufacturer's installation instructions.

Analysis

Replacement of this door is the only alternative.

(4) Top Right Hand Pot Drawer Base Gap

The drawer base to top pot drawer right hand side has a gap, which is equivalent to a saw blade thickness. It appears on manufacturing of the drawer, that the machinist has cut the drawer short by a blade thickness. While assembling this drawer the cabinetmaker has not picked up the gap.

Analysis

This drawer base can be removed and reinstalled to sit flush with the drawer front.

(5) Bench top not flat left hand side of hot plates.

The hot plate bench has been installed with a hump which appeared when measured to be 3 mm over a 1000 mm level.

Analysis

It appears that the hump has been caused from the poor installation of levelling the kitchen before tops were installed

AS 4386:2018 Cabinetry in the built-in environment – Commercial and Domestic

11.2 Installation of floor units

Cabinets shall be fitted square, plumb and level, and free from distortion, so that doors and drawers function. Where a floor cabinet is supported by adjustable legs all legs shall be in contact with the floor.

All cabinets shall be installed within the following tolerances:

- (a) Level; no more than 2 mm out of level within any 1000mm distance (2%) and not more than 5mm over the entire room installation.

(6) Bench top not flat left hand side behind sink.

The sink bench top has a hump in the top at the back on the left hand side. By placing a level on this surface area it was noticed that a gap on the left hand side was 5 mm.

AS 4386:2018 Cabinetry in the built – in environment – Commercial and Domestic 11.2 Installation of floor units.

Cabinets shall be fitted square, plumb and level, and free from distortion, so that doors and drawers function. Where a floor cabinet is supported by adjustable legs all legs shall be in contact with the floor.

All cabinets shall be installed within the following tolerances:

- (b) Level; no more than 2mm out of level with any 1000 mm distance (2%) and no more than 5 mm over the entire room installation.

Analysis

It appears that the cabinets have been installed out of level. The corresponding tops area is also out of level over the 5mm tolerances.

(7) Pantry door

Mr Mackie was informed by the applicants that the pantry door was to be a double door as on Granite's drawings. On installation the applicants found that the one door had been installed on the oven side and when tested it was found to interfere with the oven door handles. It appears that Granite has returned and removed the door and reinstalled it on the opposite side and in doing so the repositioning process has predrilled the fixing holes in the wrong location leaving a hole below the panel bracket

Analysis

Both pantry end panels should be replaced due to the poor installation of the door not opening freely and interfering with oven door handles.

(8) Kickboard gap

Gaps under the kickboard to the floor surface indicate that the fronts were never scribed to the timber floor.

AS 4386:2018 Cabinetry in the built-in environment – Commercial and Domestic

11.2 Installation of floor units

Before starting to fit cabinets, floor and walls shall be checked for level, plumb and wind using a level and straightedge. Irregularities in floors and walls shall be accommodated by packing scribing or similar. The gap between the kickboard and the finished floor shall be no greater than 2 mm.

Analysis

Kickboards should be refitted to the floor.

(9) Bench top joint

The bench top joint on the left hand side of the sink's drain area is not installed flat. When a straight edge was placed over the joint it was found that the return left hand side was out of level causing the joint to be raised. Adjustable base fittings have not been installed level around the kitchen.

Guide to Standards and Tolerances 2015

10.08 Joints in timber, stone and laminated bench tops

Bench tops of timber, laminate, natural stone or similar materials are defective if within six months of handover they have joints that are not uniform, close fitted, aligned and in the same plane.

(10) Bench top not flush with oven side

The bench top has been installed proud of the oven side. This appearance is unsightly and is not intended. Poor workmanship on installation has caused the disappointing, unsightly appearance.

AS 4386:2018 Cabinetry in the built-in environment – Commercial and Domestic

12 Fitting Doors and Drawers

When all the cabinets and worktops have been installed the doors and drawers shall be aligned to ensure a line-up of the edges of the doors and flush fitting with other adjacent components or in accordance with the manufacturer's installation instructions.

(11) Bench top overhang

Overhang on the hot plate site is 18mm while on the other opposite side is 25mm

Guide to Standards & Tolerances 2015

10.04 Bench tops, cabinet doors and drawer fronts

Unless otherwise specified, cabinet door and drawer fronts are defective if they are not aligned, or do not have consistent gaps between them at handover, and can be seen from a normal viewing position.

Where the time limit for defects in bench tops, cabinet doors, drawer fronts and similar joinery is not documented, it is to be taken as six months from completion.

15. Mr Mackie has concluded in his first report that Granite has not made the necessary allowances for floors being out of level when installing the kitchen. The manufacturing of the kitchen has caused a number of defects, which require rectification. Defects around the pantry door and sink area from installation can only be rectified by removal and refitting correctly; this may include replacement of some members and tops.
16. He also noted that the applicants had obtained a quote from Kimera Cabinets to repair works listed in his report of \$11,025.08. While he recommended that all the items listed by him should be made good and that this would include replacing tops and expanding the return to allow for the tea towel cupboard he did not comment on the reasonableness or otherwise of the Kimera quote.

Points of Defence and Points of Counterclaim

17. Granite's points of defence are sparse and general. Of relevance are its allegations that the applicants changed their minds regarding design of the cabinets after their assembly and they chose their sink after the designs of the cabinets had been approved.
18. Attached to the points of defence were documents said by Granite to form the agreement. After the initial quote there was a price change from \$18,800 to \$20,400 for the supply and installation of the new kitchen. There were also copies of plans and confirmation of works to be carried out stated by Granite to have been approved by the applicants. However, the confirmation of works document provided with the defence does not contain a signature and is not dated. It shows that payment was to be made in three instalments, The applicants have paid the first two instalments which total \$16,200 but the last instalment of \$4,200 has not been paid, The confirmation of works document also referred to the colours of the benchtops, kickboards and doors and the type of handles. Further, it noted that there were to be standard joins and that the applicants were organising the plumber and electrician and supplying the sink, cooktop, oven and rangehood.
19. In its points of counterclaim, Granite states that on 28th September 2017 the applicants engaged it to provide a quote for the supply and installation of benchtops and cabinetry for the kitchen and laundry area.
20. In early February 2018, it says that verbal agreement was provided by the applicants. The respondent worked with the applicants to finalise floor plan and design including colour selection of cabinet doors, hinges, benchtop colour and other associated elements.
21. Initial installation was booked for 23 April 2018 but on 18 April 2018, the applicants advised Granite that the installation of cabinetry and benchtop would need to be postponed to 8 May 2018 due to delays they were encountering while preparing the kitchen for installation.
22. Granite has, on multiple occasions, replaced or rectified items that were not defective and carried out additional work outside the original agreed quote, floor plan and design to appease and seek resolution with the applicants.
23. Granite strongly maintains that no changes were made by it to the agreed layout and design without prior discussion and agreement during the installation.
24. The respondent should not bear the cost of items replaced, repaired or adjusted due to incorrect or inaccurate appliance specifications provided by the applicants.
25. It is the applicants' responsibility to provide and confirm the necessary information relating to appliances not supplied or sourced by the respondent. This is clearly written on the respondent's "Confirmation of Work to be carried out" document which forms part of the agreement.

26. Manufacturing of all elements was completed by 16 April 2018. Accordingly, charges by Granite for changes and variations outside of the supplied and agreed documentation should be considered fair and reasonable.
27. During the first day of the hearing the applicants denied knowledge of the originally installed two pantry doors. Mr Mackie's report notes that he was informed that the original design was to be double doors. It is the installation of the two doors that created the drill holes on either side of the pantry carcass and not the single door fitted to the left side. The applicants were informed of this on the day and consulted to obtain agreement to the proposed change. The double doors presented the same issue as the single door when hinged to the left side of the carcass.
28. The final solution was to mount the single door on the right-hand side of the carcass. This was actioned as discussed and requested by the applicants. The holes relating to the original installation of the double doors occurred during the initial installation of 8 to 11 May. To clarify the actions taken to resolve and appease the applicants, Granite states that the following occurred:
 - a). On 3 April 2018, the applicants agreed to, and approved the design for, the cabinetry layout showing the cabinetry doors and the direction in which they opened. The pantry had double doors which opened from the centre and would be hinged to the left and right side of the carcass. No amendment or change to the design was requested.
 - b). On 9 May 2018, on installation of the double doors an issue was identified due to the location of the left hand door handle and the potential impact of this on the applicants' appliances. The installer contacted Granite to discuss potential solutions. This was discussed with the applicants during the 3.30pm daily installation review who agreed with the proposed single door hinged and opening to the left ensuring the handle did not hit the appliances when opening. By agreement the new door was ordered, delivered and installed the following day.
 - c). On 10 May 2018 the new single door was mounted on the left utilising the original double door hinge drill holes. During the daily review at 3.30pm the applicants advised that the door (not handle) hit the appliances when opened. The installer placed protective pads on the exterior of the applicants' appliances as a form of protection. It could then have been agreed that the door should have been mounted on the right side of the pantry. However, neither the applicants nor the respondent's installer identified this as a possible solution and option at the time. The holes made during the installation of the double doors on the internal left and right sides of the carcass existed. At this point the round stickers were placed on the right-hand side of the carcass when the new single door and hinge was mounted to the left. They

could not be seen from a normal viewing position to the left. They could not be seen from a normal viewing position as depicted within the Guide to Standards and Tolerances 2015.

- d) On 10 May 2018 the applicants sent a text to Granite asserting that the door opening was not functional and stating they were “not happy with the way it is” and requesting rectification.
 - e). On 14 May 2018 the respondent attended the premises to evaluate and inspect the issues raised. The respondent suggested that the pantry door hinged to the right would alleviate the issue. The applicants agreed. This was actioned the same day.
29. The cost to replace the carcass should not be borne by the respondent.
30. The respondent contacted the applicants on completion of rectification work requesting they conduct an inspection and confirm acceptance and satisfaction. On receiving confirmation the respondent would proceed to request and organise the collection of remaining money owed. However, on a number of occasions, the respondent was advised, prior to an arranged time, about additional items of concern to the applicants which they had not previously identified during any installation or rectification works.

An example of this is the benchtop joins. Relevant points are as follows:

- a). Installation of benchtop occurred during 8-11 May 2018.
 - b). On 31 May 2018 the applicants stated in their points of claim that they were horrified to discover the joins in the benchtop, which was approximately 3-5 weeks after installation.
 - c). The applicants did not accept the explanation given by the respondent and denied they had been advised about the joins.
 - d). In this regard, the respondent then attempted to reference documentation supplied such as the Confirmation of Works to be carried out which referred to the joins. Additionally, physical product examples had been visible in the showroom and would have been seen by the applicants on several occasions.
 - e.) The applicants denied receipt of the documentation.
 - f.) The respondent, after leaving the premises, contacted the applicants to attempt resolution and organised replacement of the benchtop.
 - g) The benchtop was replaced on 5 June 2018. This replacement required the co-ordination of additional resources due to the weight and OH&S requirements.
31. Information presented by the applicants during the first hearing day confirmed knowledge of the joins.
32. Granite seeks to recover the following:
- 1. Payment of the outstanding instalment

2. Costs incurred as a result of changes requested by the applicants and the rectification or alteration of items requiring any change to agreed final layout and design discovered during installation. This included -
 - a) work required due to variance in sink specifications supplied which varied from actual where changes or variations had not been supplied within seven days prior to the scheduled installation including the removal and replacement of sink carcass and doors to allow for the additional 100mm
 - b) design change to pantry doors that altered from double to single door
3. Items and additional work undertaken which the applicants claimed they had not been made aware of and demanded replacement at a cost to the respondent which included the replacement of the benchtop due to the applicants' dislike of joins.
4. Additional work completed which was out of scope which included the request to remove and reinstall cabinetry to accommodate the installation of a fan by the applicants. This involved -
 - a.) on 21 May 2018 the respondent sent a text message to the applicants requesting when final payment would be made
 - b) the response on the same day received by the respondent from the applicants advising they "had not forgotten" and they then proceeded with a request to remove a cabinet to accommodate the installation of a fan and for the cabinet to then be reinstalled.
 - c) employees were sent to site on two separate occasions for the removal and reinstallation between 22 and 30 May 2018.

This was not charged by the respondent as the assistance was provided on the expectation of the payment of the remaining instalment owed. Such payment did not occur and the applicants requested a site meeting on 31 May which led to the benchtop replacement.

33. Granite therefore claims the below amounts as detailed above which total \$8,400:

| | |
|---|---------|
| Remaining instalment outstanding as of 31 st May 2018 | \$4,200 |
| Change to Pantry doors | \$320 |
| Removal of original benchtop with standard joins | \$440 |
| Installation of new benchtop | \$2300 |
| Work requested to allow installation of fan | \$320 |
| Items effected due to sink specification variations, including sink carcass removal and replacement | \$820 |

Reply of applicants

34. In reply to Granite's defence and counterclaim, the applicants agreed that the original quote (first of three) was given in approximately October 2017. Mr Tsobani came to the premises and roughly measured the area in the existing kitchen.
35. Granite failed to mention in its defence that before "verbal go ahead" was given by the applicants, Mr Tsobanis came to their premises a second time to take exact measurements. With the assistance of Mr Dine, measurements were made inside the kitchen area and the external area where the new window was going to be placed. The frame of the window had already been delivered to the applicants. Mr Dine explained to Mr Tsobanis where the new window would be placed and he made notes. Therefore, Mr Tsobanis was aware of a new window being installed.
36. At no stage were the applicants asked to sign or date the Confirmation of Work to be carried out.
37. The applicants agree that there was a delay in the scheduled date of works. They were to start on 23 April and Mr Dine went to the respondent's factory one week before this date to ask for an extension of around a further week. He also pointed out to Mr Tsobanis that there was something wrong with the measurement on the plans in that the pantry and laundry side was long and the sink side of the kitchen where the island bench is located was short. However, this did not seem to concern Mr Tsobanis.
38. In response to Granite's counterclaim, the applicants state that the "filler" between the wall oven and the pantry was shown on the plans, however, it was not installed in accordance with the plans. This omission was identified by the applicants who advised Granite. The filler was eventually installed, but the size of the cupboard next to the oven had to be modified, which meant that it would be smaller. The applicants were not happy with this as the overhead cupboards would be uneven in size. Unfortunately, there was no choice but to agree to a smaller size cupboard.
39. The major mistake made by Granite was that it did not confirm the sink size. Despite Granite's claims that it was not supplied with the actual sink specifications, the applicants maintain that all specifications (except for the sink) were hand delivered to the respondent's factory in late December 2017 as soon as they were emailed by the supplier to the applicants. The applicants were still waiting for the sink specifications and these were emailed to them on the 30th January 2018. They were then forwarded to Granite by email the same day. Documents provided by the applicants showing other models of sinks confirmed that measurements between sinks vary.
40. A very important note on the bottom of the applicants' copy of the sink specification for the Blanco SONA8S says: "Measurements are within 2-3

mm of factory tolerance. It is advisable to check dimensions of physical product when measuring for installations and before doing any cut outs.”

41. In relation to the pantry doors, on the second set of plans, sliding doors were sketched. On the third and final set plans there were two doors sketched the day prior to the installation of the pantry doors, Mr Dine then asked the installer about the pantry doors to which he was informed that Granite was still discussing what would happen with them. Then on the day of installation, the applicants saw that only one door was put in. It was Granite’s decision to change from two doors as on the plans to one door.
42. The applicants could not accept the pantry door bumping into their brand new appliances, so they asked that the door be changed to open from right to left (opening away from the oven and microwave). The changeover was made but there were holes left in the pantry door, which were covered by paper stickers and not white caps as Granite states. Mr Tsobanis was not at the premises on these days to see what happened.
43. The applicants have had to compromise many times to variations to the design of the kitchen due to the numerous mistakes made by Granite.
44. Again, contrary to Granite’s assertions, the applicants did not agree to pay the outstanding balance as they were not satisfied with the “repairs.”

Report of Mr Mackie dated 15 April 2019

45. Mr Mackie re-inspected the premises on 28 March 2019, at the request of the applicants, to respond to the respondent’s defence and counterclaim.
46. He asked the applicants to obtain quotes for rectification works as a true indication of cost.
47. In its filed material, Granite commented on Mr Mackie’s first report. It is appropriate therefore to again set out in some detail his second report:-

(1). Hotplate cut out – Granite’s position:

Point 1 – Install 7 mm granite strips with epoxy resin glue to sides of a cut out to make hole comply with manufacturer’s recommendations.

Point 2 – Top thickness was specification standard

Replacement of benchtop is not required to adjust hole size. Stone infills glued with epoxy resin.

Mr Mackie’s response:

Point 1 – He agrees that strips can be glued but not without supports under the strips. These should also be installed glued and screwed and may be constructed in height to support the fixing clips.

Point 2 – The sheet top thickness is too thick for the hold down clips as supplied by the hot plate manufacturer.

(2). Tea towel cupboard and sink – Granite’s position:

To accommodate the sink purchased by the applicants and their instruction to centre the sink to the window, there was no alternative but to increase the size of the sink cupboard and reduce the size of the tea towel cupboard. The tea towel cupboard could have been made as a fixed panel.

Mr Mackie agreed with this position.

(3) Under bench corner cupboard door – Granite’s position:

This can easily be replaced at a cost of \$200.

Mr Mackie also agreed with replacement and cost.

(4) Right hand pot drawer base gap – Granite’s position:

It was never informed about this, but it is a simple fix at a cost of \$50.

Again, Mr Mackie agreed with the replacement and cost.

(5) & (6.) Bench not flat – Granite’s position:

It was never informed about this issue. It notes that Mr Mackie’s first report states “appeared 3mm” so therefore it asks was it 3mm or not? This can be fixed by an adjustment to the cabinet legs to make level at a cost of \$50.

Mr Mackie’s response is that the cabinet legs cannot be simply adjusted. In this regard, he points out that the cabinets are fixed to the wall studs, and the tops have been glued down with a curve in the top. He used a 3mm drill to prove the heights. The highest point is the right hand side of the dishwasher, which is also the left hand side of the sink cupboard. From this point the cabinets fall away on both sides of over 3mm in 1 metre. The island bench falls away a further 5 mm.

The only way to adjust the tops to level is to reverse the installation process, by removing tops, removing fixing screws to cabinets, re-adjusting legs to ensure cabinets are level, and refitting cabinets to wall studs. He then opines that the tops cannot be used as they cannot be removed without damaging them, so there is a need to supply and install new tops.

(7) Pantry Door – Granite’s position:

The proposed fix is to re-supply standard white screws with hole caps and cover the holes.

Mr Mackie agrees with screws and cover caps.

(8) Kickboard gap – Granite’s position:

It was never informed about this issue but a proposed fix is to supply and fit new kickboards at a cost of \$150.

Mr Mackie again agrees with replacement and cost.

(9) Pantry Door – Granite’s position:

It was not made aware of this problem. The join in this area is directly above where the applicants have removed a load-bearing wall. It believes there is a strong possibility there may have been some movement in the floor over 6 months between the wall being removed and now, which has caused the problem. It queries whether the removal of the wall was engineered or approved by the council. Its proposed fix is to adjust the base feet to be level.

Mr Mackie's response is that as stated in numbers (5) and (6), the high point is the left hand side of the sink cupboard. The removed wall is about 1 metre away.

He disagrees with Granite's position as it is not as simple as just adjusting the base feet as the cabinets are fixed to the wall studs.

(10) Benchtops not flush with oven side – Granite's position:

A proposed fix is to compensate the applicants or remove stone edge and refit at a cost of \$400.

Mr Mackie's agreed with the compensation proposed.

(12) Bench top overhang – Granite's position:

It was not made aware of this problem. The measurement should be taken from the carcass, not the front of the doors. The overhangs are parallel to the carcass, 18 mm on 600 mm deep benches and 25 mm to edge of breakfast bar on 1000mm deep bench. Cost for any proposed fix is \$550

Mr Mackie's response: The Guide to Standards and Tolerances 2015 is quite clear and states: "Cabinet door and drawer fronts are defective if they are not aligned at overhead". Accordingly he disagrees with the cost.

48. Mr Mackie maintains the conclusions he reached in his first report. He states that Granite has not made the necessary allowances for floors being out of level when installing the kitchen. The manufacturer of this kitchen has caused a number of defects, which require rectification and the defects around the sink area from installation can only be rectified by removing and refitting tops correctly. This may include replacement of some members and tops. He then reviewed the quotations obtained by the applicants to repair the defective kitchen which were as follows:

-Kimera Cabinets had quoted to repair works listed in his report at \$11,025.08.

-Established Stone has quoted to supply and install benchtops at \$4,966.50

-Kelvin Stoneworks has quoted to supply and install benchtops at \$5,830.00

-John Bolton has quoted to repair defects and supply and install new templates at \$3,850.00

-Kelvin Yu has quoted to remove existing tops at \$500.00.

49. He regarded the quotes obtained by the applicants for repairs and replacement, to be a true indication of the cost range in this area. In this regard, noting a range of costs quoted between \$4906 and \$5830 to supply and install benchtops, a cost of \$3850 to repair defects and supply and install new templates, and \$500 for removal of existing tops, the resulting total cost is between \$9316 and \$10180. When looked at individually and as a total, he regarded them as fair and reasonable.

Findings

50. I have set out in some detail the allegations of the parties and the reports of Mr Mackie. This has been necessary due to the considerably contrasting versions of the parties about the agreement, and key events with particular reference to the sink and pantry, the significant disputes that have occurred between them, and details of and surrounding the “repairs” by Granite after the complaints of the applicants. Additionally, there is a dearth of documentation and the only witness other than the parties was Mr Mackie. Accordingly, to reach a determination, my views of the evidence given by the parties themselves and by Mr Mackie are key factors for consideration.
51. I preferred the evidence of the applicants to that of Mr Tsobanis. He was less specific which was not assisted both by the lack of any signed documentation or the existence of appropriate and required documentation. Other than providing statutory declarations from two employees on the second day of the hearing to which I could give no weight, he did not seek to call evidence from any other party. A further significant problem for the respondent was the apparent lack of attendance by Mr Tsobanis at the premises during the works including at the installation of the pantry door.
52. Even without Mr Mackie’s evidence, I regarded the respondent as having the ultimate responsibility, as the contractor, to be satisfied about the specifications of the sink prior to installation. I find on the evidence that it did not make all reasonable and appropriate enquiries about the sink.
53. I found Mr Mackie, with his understated manner, to be a very credible and knowledgeable witness, and I accepted his evidence and conclusions. He remained firm even in the face of robust and appropriately relevant cross – examination by Mr Tsobanis. Even though the Guides to Standards and Tolerances 2015 are exactly that – a guide, I also accepted his application of them to the defects.
54. I therefore allow in respect of the applicants’ claims the sum of \$9316 for repair of the kitchen defects, I will also allow the cost of the second expert report of \$1375. I disallow the first report fee and quote fee as they were obtained prior to the commencement of the proceedings. I also disallow the cost of laundry and take – out. Aside from applicable mitigation of loss issues, the calculation and proof of these alleged expenses is insufficient and inappropriate. The agreement between the parties is at an end. It has been repudiated by Granite’s breaches, which repudiation has been accepted by the applicants. The applicants are entitled to engage another

contractor to repair the defects and complete the works. I therefore allow damages for the applicants' claim at \$10,691.

55. In relation to the counterclaim, given my findings in favour of the applicants, I dismiss the claim for payment of the final instalment to Granite. The agreed works are not completed. Likewise, save for the work to install the fan, I disallow the remaining items in the counterclaim as I find that the respondent was not intending to charge for these works as they were performed as repairs which I find were inadequate.
56. I will, however, allow the \$320 for the works performed to enable the fan installation. No evidence was led by the applicants to rebut this item and text messages confirm the works were performed at the request of the applicants. The charges are fair and reasonable.
57. In relation to the claims for the attendance of Mr Mackie to give evidence and for the applicants' loss of earnings, I regard these items as claims for costs. Section 109 of the Victorian Civil and Administrative Tribunal Act 1998, as to the power to award costs, relevantly provides:
- 1) Subject to this Division, each party is to bear their own costs in the proceeding
 - 2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding
 - 3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to-
 - a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as-
 - i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
 - ii) failing to comply with this Act, the regulation, the rules or an enabling enactment;
 - iii) asking for an adjournment as a result of (i) or (ii)
 - iv) causing an adjournment
 - v) attempting to deceive another party to the Tribunal
 - vi) vexatiously conducting the proceeding
 - b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
 - c) relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
 - d) the nature and complexity of the proceeding;
 - e) any other matter the Tribunal considers relevant

58. While the general rule in VCAT that each party bears their own costs is designed to promote access to justice generally and to minimise the overall level of costs in tribunal proceedings as far as is practicable (*Stonnington CC v Emporium Pty Ltd* [2004] VCAT 1441 at [13]), each case depends on its own facts and circumstances.
59. Given the need to respond to the respondent's arguments as put on the first day of the hearing, I regard it as appropriate and necessary for Mr Mackie to have attended to give evidence. However, I regard his fee as excessive and will allow \$1500 for costs for this item as I find it fair to do so. There is no evidence to support the claim for loss of earnings. Finally, as I do not regard the applicants to have substantially succeeded, I will not order reimbursement of application and hearing fees
60. Orders have been made according to my findings.

MEMBER B. JOSEPHS