



# Civil Resolution Tribunal

Date Issued: April 12, 2022

File: SC-2021-006560

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Lycan v. Mahan Counter Top Ltd.*, 2022 BCCRT 418

BETWEEN:

RANDALL LYCAN and SACHA ENTHOVEN

**APPLICANTS**

AND:

MAHAN COUNTER TOP LTD.

**RESPONDENT**

AND:

RANDALL LYCAN

**RESPONDENT BY COUNTERCLAIM**

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**REASONS FOR DECISION**

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Tribunal Member:

Micah Carmody

## **INTRODUCTION**

1. The applicants, Randall Lycan and Sacha Enthoven, hired the respondent (and applicant by counterclaim), Mahan Counter Top Ltd. (Mahan), to install custom quartz countertops in their home.
2. The applicants say Mahan's work was so poor that they had to hire another contractor to replace the countertops. The applicants seek a refund of the \$4,115.16 deposit they paid Mahan. They also seek \$714 for damage they say Mahan caused during installation. In total, the applicants seek \$4,829.16.
3. Mahan denies damaging anything and says it completed the countertop installation as agreed. Mahan also says the applicants did not let it address the alleged deficiencies. Mahan counterclaims against Mr. Lycan for \$2,743.44, the amount it says is outstanding under the contract.
4. Mr. Lycan represents the applicants. Mahan is represented by its director, Mohammad Mehrabi, who along with other installers installed the countertops at issue.

## **JURISDICTION AND PROCEDURE**

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

6. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, the parties in this dispute call into question each other's credibility. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not necessarily required where credibility is in issue. In the circumstances of this dispute, I find that I am able to assess and weigh the evidence and submissions before me. Bearing in mind the CRT's mandate that includes proportionality and prompt resolution of disputes, I decided to hear this dispute through written submissions.
7. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
8. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.
9. The applicants submitted some relevant evidence after the CRT's deadline. Mahan had the opportunity to comment on the late evidence, so given the CRT's flexible mandate, I allow it and discuss it where relevant below.

## **ISSUES**

10. The issues in this dispute are:
  - a. Must Mr. Lycan pay Mahan the \$2,743.44 balance or did Mahan fundamentally breach the contract, entitling the applicants to a refund of their \$4,115.16 deposit?

- b. Are the applicants entitled to \$714 to repair the damage Mahan allegedly caused?

## **EVIDENCE AND ANALYSIS**

11. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities, meaning more likely than not. Mahan must prove its counterclaims to the same standard. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision.
12. The applicants hired Mahan to supply and install custom quartz countertops in the applicants' home. Mahan quoted the applicants \$6,858.60 including GST for the work. On August 4, 2021, the applicants paid Mahan a \$4,115.16 deposit.
13. Mahan was responsible for measuring the applicants' kitchen and cutting the countertop pieces to fit. There were four countertop slabs required – a bar, a right 90-degree corner, a left 90-degree corner, and a straight slab. The straight slab included a sink cut-out and was joined to the left corner slab with a seam. The 2 corner slabs fit around a range.
14. On August 12, 2021, Mahan installed the 4 countertop slabs. Mr. Mehrabi, FM, and a helper provided the labour. During the process, Mr. Lycan raised several concerns, including damage to a “gable” or end panel enclosing his refrigerator. Mr. Lycan is a carpenter and observed Mahan's work closely. Mr. Mehrabi says Mr. Lycan started “going off on us” as soon as the installers put the first countertop down. By the afternoon, things had escalated and the applicants asked the installers to leave.
15. Dissatisfied with the countertops, the applicants inquired with other contractors about repair or replacement. After a few weeks, they removed and stored the countertops. They then had a different contractor fabricate and install new countertops.
16. As a general principle, a contractor is entitled to payment upon substantial completion of the work (see *Belfor (Canada) Inc. v Drescher*, 2021 BCSC 2403). Deficiencies are common in construction work. There is often an implied term in construction contracts

that a contractor will have an opportunity to address deficiencies in its work. If an owner fails to provide the contractor with a reasonable opportunity to correct non-fundamental deficiencies in its work, the owner is generally not entitled to claim damages after having the deficiencies repaired by a different contractor (see *Lind v. Storey*, 2021 BCPC 2, paragraph 91).

17. Mahan's position is that the defects were minor and repairable, and the applicants deprived Mahan of the opportunity to address the issues. The applicants' position is that Mahan's work contained fundamental deficiencies in measurement, fabrication and installation that neither Mahan, nor any contractor, could have addressed without removing and disposing of the countertops and installing new countertops. The applicants also say Mahan's installer's conduct prevented the applicants from allowing the installers back into their home. For the reasons set out below, I find in favour of the applicants.
18. The applicants hired Ken Johnson to inspect and give an opinion on Mahan's countertop installation before they removed it. Mr. Johnson has 30 years' experience installing countertops, and I accept his evidence under the CRT's rules as expert evidence on countertop installation. Mr. Johnson described 9 deficiencies in Mahan's work. It is not necessary to list them all here. I find the more serious deficiencies were:
  - The sink hole did not line up with the sink, and the problem could not be remedied by moving the sink farther forward as Mahan suggested because the sink was already moved as far forward as possible.
  - The corners near the range were rounded in a different shape than other corners, and the edges were not square.
  - The seam connecting the left L-shape countertop and the sink countertop was broken and the gap was tight at the rear but over 1/16-inch at the front.

- The seam had been polished leaving a depression on the adjoining countertops that could not be repaired without polishing the entire surface. This process is costly and cannot be made the same as factory original.
- There was a 5/16-inch gap between a countertop and a wall that was too large to caulk.
- Overhangs at different places varied by up to ½-inch.

19. All the deficiencies are supported by photographs. Mr. Johnson concluded that although some of the deficiencies could be repaired, the labour costs would exceed the cost of replacing the countertops, and the result would not be acceptable. He said new countertops are required to address the issues.

20. Mahan says Mr. Johnson's evidence should be given less weight because Mr. Johnson is retired and a "friend" of the applicants. Even if Mr. Johnson is a friend of the applicants, which is unproven, that does not necessarily mean his evidence should be discounted. As a retired contractor, Mr. Johnson did not stand to gain financially from being critical of Mahan's work in order to secure the work of installing new countertops. I accept Mr. Johnson's expert opinion given his 30 years' experience and the consistency of his evidence with that of 2 other contractors, described next.

21. The applicants sought a repair estimate from Blackstone Marble Care Ltd. (Blackstone), a company that specializes in resurfacing and repair of stone surfaces. Blackstone noted essentially the same deficiencies as Mr. Johnson. Blackstone concluded that it could not fix the issues in a way that would satisfy the client. I take this to mean that Blackstone declined to repair the countertops.

22. The applicants then hired Swinstones Granite Shop (Swinstones) to replace the countertops. Photos show that the deficiencies have now been addressed with entirely new countertops. The seam is tight and barely visible, the corners are

uniform, the sink hole lines up with the sink, and there are no gaps between countertops and walls or the oven.

23. Mahan argues that the applicants simply changed their mind about the quartz stone they selected. Given the deficiencies identified above, I do not accept this. I also note that the colour and pattern that Swinstones installed is very similar to the colour and pattern that Mahan installed.
24. Mahan also says many of the deficiencies are the result of the applicants' walls or cabinets not being true or square. I find this is no justification, because Mahan was responsible for measuring the kitchen and could have declined the work if it felt it was too difficult to make countertops to fit. As well, it is clear from the photos that Swinstones was able to avoid the same deficiencies in its work.
25. Swinstones' owner and installer, Paul Swindells, provided a statement. They said they have been servicing the stone industry since 1993, and I accept their evidence as expert evidence under the CRT's rules. In particular, Paul Swindells confirmed that the kitchen walls and cabinets did not prevent them from installing the countertops in an accurate and well-fitting manner with even over-hangs. Based on this and the photos showing the results, I find that a professional countertop installation does not leave gaps of up to 5/16 of an inch, even with imperfect walls.
26. In contrast, Mahan provided no independent expert evidence to support its assertion that the deficiencies could be repaired, and did not sufficiently explain how it proposed to remedy the deficiencies. I am satisfied based on the parties' post-installation emails that Mahan did not agree with many of the deficiencies identified, and was not prepared to remove the countertops entirely and install new ones, which I find was the only way to satisfactorily remedy the deficiencies.
27. Even if Mahan could have addressed the deficiencies, I find it would be unreasonable to expect the applicants to allow Mahan back into their home to do so. The applicants say they asked the installers to leave after the installers became aggressive and belligerent. Video evidence taken from the installation shows one installer frequently

yelling, and aggressively demanding that Mr. Lycan “Get my money!” Later, he is heard driving away with tires squealing.

28. Based on the above evidence, I find that Mahan’s work overall was substantially deficient, the deficiencies could not be repaired, the countertops had to be discarded, and in any event the applicants could not reasonably be expected to allow Mahan back into their home. This deprived the applicants of substantially the whole benefit of the contract. In law, this is known as a fundamental breach. This means the applicants were entitled to end the contract, and so I dismiss Mahan’s counterclaim for payment of the balance under the contract.
29. As for the applicants’ requested deposit refund, damages for breach of contract are generally intended to place the wronged party in the position they would have been in if the contract had been carried out as agreed. There is no evidence of what the applicants paid Swinstones for their new countertops, but on balance, I find it was likely as much or more than the deposit they paid to Mahan. I say this in part because Mahan says it under-estimated the job, and that its stone and fabrication costs alone exceeded the deposit. So, it is unlikely that the applicants were able to have new countertops installed for less than the \$4,115.16 deposit they paid Mahan. I order Mahan to reimburse the applicants \$4,115.16.
30. As noted, the applicants also claim \$714 for damage to a large gable or end panel covering the fridge. They say Mahan hit the panel when carrying a countertop and left a scratch. Although Mahan generally denies causing damage, its installers acknowledged making the scratch on video. I find they failed to take reasonable care not to damage the panel, and are responsible to replace it. I allow the claim for \$714, which is supported by an unchallenged estimate from Heppner Woodcraft. I order Mahan to pay the applicants a total of \$4,829.16.
31. The applicants say they have safely stored the countertops Mahan installed until the resolution of this dispute. Mahan did not make any claim for return of the countertops, so I make no order about them.



32. The *Court Order Interest Act* applies to the CRT. The applicants are entitled to pre-judgment interest on the \$4,115.16 deposit from August 12, 2021, the installation date, to the date of this decision. This equals \$14.53. I order no interest on the panel repair as there is no evidence the applicants have incurred this expense yet.
33. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find the applicants are entitled to reimbursement of \$175 in CRT fees. I dismiss Mahan's claim for CRT fees. Neither party claimed any dispute-related expenses.

## **ORDERS**

34. Within 14 days of the date of this order, I order Mahan to pay the applicants a total of \$5,018.69, broken down as follows:
  - a. \$4,829.16 in damages,
  - b. \$14.53 in pre-judgment interest under the *Court Order Interest Act*, and
  - c. \$175.00 in CRT fees.
35. The applicants are entitled to post-judgment interest, as applicable.
36. I dismiss Mahan's counterclaims.
37. Under section 48 of the CRTA, the CRT will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the CRT's final decision.
38. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and

the time for filing a notice of objection has passed. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

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Micah Carmody, Tribunal Member