

# **In the Provincial Court of Alberta**

**Citation: Dias v. Higgins Cabinet Works Ltd., 2011 ABPC 365**

**Date: 20111201**  
**Docket: P1190300547**  
**Registry: Edmonton**

Between:

**Paul Dias and Carol Lynne Dias**

Plaintiffs

- and -

**Higgins Cabinet Works Ltd.**

Defendant

## **Reasons for Judgment of the Honourable Judge D.G. Ingram**

[1] This is the reasons for judgment in the case of Paul Dias and Carol Dias against Higgins Cabinet Works Ltd.

[2] The plaintiffs contracted with the defendant for the defendant to manufacture and install kitchen cabinets in their Edmonton home under a contract dated August 1, 2009. The defendant completed the installation and was paid the full contract price of \$8,490.19 on October 15, 2009. The plaintiffs now say the cabinets are so defective they cannot be satisfactorily repaired and need to be replaced, at a cost of \$8,355.00, the claim in this case.

[3] When the cabinets were first installed and before the work was completed the plaintiff Paul Dias (hereinafter referred to as Dias) noticed a cabinet was covering a vent in the wall which was intended by Dias for use with a microwave oven. This was pointed out to the defendant and it was agreed the problem would be solved by raising that portion of the cupboards 3 inches in order to provide access to the vent.

[4] The plaintiffs' previous cabinets were removed by Dias and the condition of the wall prior to the work done by the defendant is shown in photographs numbers 68 and 76, part of Exhibit 2. These show a large hole in the wall which was apparently the vent for a hood for the plaintiff's stove. In the result, the hole in the wall to vent the plaintiff's microwave is off center as shown in photographs numbers 60 and 64. Dias has jerryrigged a solution by putting duct tape over one half of the opening as is shown in the photograph number 74.

[5] At the conclusion of the work and before payment was made the plaintiffs had noticed a number of apparently minor matters and discussed them with the defendant. These included the problem with the microwave alignment, the cabinet adjacent to the door from the kitchen to the patio, some screw holes were not covered, some of the trim had been installed in pieces, and portions of the kickplate were missing. The plaintiff says he discussed these matters with the defendant and the defendant said they would come and fix them.

[6] The defendant did some repairs including fixing a drawer which had come apart and replacing a panel on the face of the lower cabinets. The original installation of the panel is shown in photograph 69 and the replacement is shown in the photograph of the completed kitchen as it appears today in photograph number 46. However, the plaintiff had numerous complaints and continued to telephone and leave messages for the defendant. Unfortunately, Dias is somewhat hot-headed and became frustrated when his calls were not returned which led him to use intemperate language, to put it mildly, when demanding that the defendant come and repair work.

[7] In the days following the completion of the work, the communication between the parties broke down. It appears Dias was on night shift and Higgins was on another job site. Higgins became concerned due to the "nature of the voicemails", he "didn't feel comfortable". When a cabinet drawer came apart Higgin's father repaired it and, as late as November 2009 the defendant replaced a defective door. However, Higgins did not feel responsible for the complaints made by Dias concerning the kickplates nor the door handles as the contract, Exhibit 5, stated that the bases were to be unfinished and ready for the client to install kickplate and the door handles were to be supplied by the plaintiff. Further, Higgins practice was to provide one free service call, which was done, but took the position that repairs to the work were not within the scope of his contract and the contract did not include any warranty on the defendant's work or material. The defendant's work was limited to the supply and installation of the cabinets.

[8] There was a delay of approximately 2 weeks before the plaintiffs had a counter installed during which time the plaintiff was continuing to leave telephone messages for Higgins which were not being returned. Dias continued to discover more deficiencies in the work and became more frustrated. Dias admitted he became upset and angry and his telephone messages to the defendant progressed from begging the defendant to come and fix the cabinets to demanding in intemperate terms that the defendant fix the work. The defendant admits he turned his back on Dias and did not want to even talk to him because of the nature of the voicemails he received and he felt he had no obligation because his contract did not require him to do repairs and there was no warranty on the work done.

[9] Dias has an extensive litany of complaints illustrated by the 76 photographs which comprise Exhibit 2. Most of the complaints are of an apparently very minor nature, such as: holes inside the cabinets which are not covered, a drawer which keeps coming apart, a cabinet door which rubs against the countertop and will not close properly, a gap between the kickplates and the bottom of the cupboards which is visible and unsightly, kickplates have fallen off as has some of the trim across the top of the cupboards and various misfits. Some of the other

complaints are of a more serious nature. Due to the lower cupboards being off-square the countertop does not fit properly and is uneven in its projection over the counter. In the corner next to the patio door, the intent was that both upper and lower cabinets would be finished at a 45° angle with smoked glass doors. In the result the upper cabinet is finished with a glass door and at an angle. The lower cabinet has no glass door and is not at an angle but is perpendicular and does not match the upper cabinet, as is shown in photograph number 41. In addition, the trim on the upper side of the upper cabinet extends too close to the door opening and the plaintiff says that he is unable to install the hardware for the curtains which he had over the patio door area. One of the lower cabinet doors is misaligned and will not close. This is shown in photograph number 16. An upper cabinet door cannot be opened without hitting the door handle on the adjacent cabinet door because the door on which the offensive handle projects is at an angle to the adjacent cabinet door and the door handles are all placed in their usual position at the outer edge of the door. The result is that it is necessary to open both doors in order to get access to the door which hits the handle on the adjacent door (see Exhibits 36, 43, and 45).

[10] Dias says he looked into remedies to get the kitchen fixed but found he could not get a contractor prepared to attempt to do repairs and that it would be necessary for him to remove and replace all of the cabinets. He obtained a quotation from Gem Cabinets in October 2010, for the delivery and installation of cabinets at a price of \$8,355.00 which is the amount of the plaintiffs' claim.

[11] The plaintiff called as a witness Michael Meunier who is a kitchen cabinet contractor who has been in his own business for four years but had worked in the industry previously. He builds and installs cabinets and countertops and has worked for major contractors and kitchen companies doing both new work and renovations. I was satisfied that he was familiar with the standard of workmanship in the industry in Edmonton and I considered him qualified to provide opinion evidence.

[12] Meunier stated that he inspected the plaintiff's house two or three months before the hearing and his comment was it was just "pure poor workmanship". He said he would not have a job if he did work like that. He said the moldings and seams did not fit, were unacceptable and would not be "allowed". He noted the drawers coming apart and said he had never seen such unacceptable workmanship and drawers should last 25 years. It was his opinion that in order to repair the kitchen cabinets in the plaintiff's house one would have to tear them out and take them all apart which would not be practical. He further stated you could never get a match on the finishes except by replacing the cabinets. On cross examination Meunier admitted he had not been at the plaintiffs' house until his inspection last summer but said the defects which he saw in the plaintiffs' kitchen cabinets were not due to wear and tear.

[13] In addition, the plaintiff Carol Lynn Dias gave evidence. She is the one who signed the original contract Exhibit 5. She was most unhappy with the manner in which the cabinets were completed, particularly at the corner next to the patio door. It was not as she had anticipated and she was not able to make use of that area as she believed she would have been able to. Mrs. Dias stated that after the complaints were made, she contacted the defendant and was told that there

would be no further repairs carried out or an inspection done without a \$75 charge for a service call, which the plaintiffs were not prepared to pay.

[14] The principal of the defendant company, Rodney Higgins, gave evidence. Higgins appears to have been oblivious of any problem with the hole in the wall for the microwave vent and was not conscious of it initially. When the matter was brought to his attention the design was changed and he believed that remedied that situation. Higgins stated he tried to persuade Mrs. Diaz with whom he dealt that she should not use a white lacquer finish on the kitchen cabinets but that she insisted they be white. Mrs. Diaz agreed with this evidence. However, the color or finish of the cabinets does not appear to be a factor in this case. He recalled the problem with the cabinets adjacent to the patio door and said that he had to rebuild them and thought that the adjustment to them remedied the problem. He was aware that one of the drawers had come apart and said that it had been re-glued. He was aware that a panel on the lower cabinet had to be replaced and said that was done.

[15] Higgins pointed out that the contract contemplated the plaintiff would install the kickplates and provide the door handles. Higgins felt the repair of the drawer and the panel was the extent of his responsibility under the contract. He relied on the fact “repairs” were not within the scope of the original contract and that he gave “no warranty” on his work. Higgins said that his policy was to provide one free service call, which was done, and so far as he was concerned the workmanship met the standard of workmanship required of his company. He explained that some of the holes of which the plaintiff complained were due to wear and tear and cabinet doors could be adjusted. He stated he did not want to have contact with Mr. Diaz due to the nature of the voicemails which made him feel uncomfortable. He in effect admitted he turned his back on the plaintiff as he did not want any confrontation.

[16] The defendant called a qualified gas fitter and heating ventilating and air-conditioning journeymen to give evidence concerning the venting. The witness was Michael McEwan. I was satisfied that McEwan had the necessary expertise to give opinions in this area. It was McEwan’s opinion that the previous vent which had been in the house for use with the hood over the plaintiff stove would not have been adequate to accommodate the plaintiff’s microwave in any event.

[17] In addition, the defendant called Lee Stewart who was a journeyman cabinet maker with eight years experience and who was qualified to give opinions concerning the work in question. Stewart provided a brief report which was marked as Exhibit 8.

[18] In so far as Stewart’s report relates to the defendant’s workmanship, it states:

“After viewing the photographs and discussing the situation with Rodney Higgins regarding the work in question it is my opinion that the general appearance of the work has been done to an acceptable standard. The flaws seen in the photographs for the most part are minor fixes, e.g., missing screw caps, putty and door alignment. With the kitchen being two years old some of these issues are normal.

Solid wood doors expand and contract from season to season sometimes causing them to become out of line and screw caps can be knocked out of place. As for trim pieces out of alignment, it is impossible to give an opinion on quality standards two years after the installation.”

[19] The remainder of his report does not relate to the workmanship of the defendant.

[20] Stewart stated that he had never been to the plaintiffs’ house nor actually observed the cabinets in question and was relying entirely on what was told to him by Higgins and what appeared in the photographs. It also appears he has done work and has some relationship with the defendant other than examining the work for the purpose of providing opinion evidence. Stewart stated the work was done in a suitable manner and so far as he was concerned there were no major issues; there were only minor deficiencies which could be easily remedied. With respect to the plaintiffs’ complaint concerning the installation of the cabinet next to the patio door he stated it was normal for the (upper) crown molding to protrude further than the (lower) light valance, as these pieces of wood are rectangular and one is installed vertically and the other horizontally. This results in an apparent protrusion of the crown molding.

[21] Stewart commented that things do not always work out “square” particularly in an older house. It appears the plaintiff’s house is approximately 58 years old. The plaintiff had complained about false backs being put in the cabinets and Stewart said this was a common practice. He stated in his view the work was done to the industry standard and the screw cups (the coverings of the screw heads) as well as pinholes were not much of a problem. He further stated that if things shift the customer can be shown how to correct hinges by moving the screws in their fittings. In Stewart’s view Higgins did things to a workmanlike standard. Most importantly it was his opinion it was not necessary to remove the cabinets in order to carry out any repairs. It was only a matter of filling holes, putting on screw caps, and adjusting hinges as well as re-nailing or attaching the moldings and kickplates which were not attached.

[22] I cannot leave the evidence of Stewart without noting that the remainder of his written report states a number of matters which are pure advocacy and opinion on matters upon which Stewart is not an expert. Stewart’s report states:

“It is my impression that once payment has been made in full it signifies the work is done to the standard of the customer and the contract is then closed. If a warranty is not specified in the contract than [sic] a warranty should not be assumed. Any work not specified in the contract is done either as an extra or out of goodwill and unless specified in writing is not covered.”

His remaining comments are also simply supportive of the defendant’s position.

[23] Finally, evidence was given by Bernadette Higgins, the mother of the principal of the defendant company, Rodney Higgins. Mrs. Higgins stated that the defendant never refused to fix

the work and she found that the language of the plaintiff hard for her to deal with. She also stated the defendant had returned a couple of times to make some repairs to the work.

[24] Rodney Higgins was recalled to the witness stand and gave evidence that he had done kitchen renovations previously and he had also done complete renovations.

[25] The plaintiff then sought to give rebuttal evidence concerning the venting of the microwave oven. He sought to produce some information which he said he had obtained from the Internet concerning the venting required. The evidence was objected to by counsel for the defendant. It appears that the information had been obtained subsequent to the testimony given by McEwan and in the circumstances I did not allow the plaintiff to re-open the issue of the adequacy of the vent for the purpose of the microwave. His testimony was excluded.

[26] At the conclusion of the evidence Dias suggested that everyone involved in this matter should attend at his house and inspect the work first hand and offered such inspection immediately. I indicated to the parties I was prepared to accept the plaintiffs' offer and attend at the plaintiffs' house and examine the kitchen cabinets but I would do so only if both parties agreed and only in the presence of both parties, any witnesses they wished present, and their agents or counsel. The defendant declined the offer and as a result no inspection was carried out. As this offer came quite unexpectedly, I draw no inference from the offer nor its rejection.

[27] In summation, the plaintiff argued his kitchen was falling apart and the defendant had failed to come and repair it. He apologized for his outbursts and explained the whole process had been very stressful. The defendant took the position that the contract had been performed by the defendant in accordance with its terms and the plaintiffs' evidence did not show there was poor workmanship. The defendant says the plaintiffs failed to mitigate their damages and there are obvious repairs which could be done which were not. It was the defendant's position the claim for \$8,355.00 was ridiculous. The defendant's position was that the defendant had failed to carry out any further repairs for safety reasons in that Higgins felt there was a threat to his person.

[28] The plaintiffs are self represented litigants. The evidence was adduced in a haphazard fashion. The photographs were not organized. They were a shuffled deck of pictures. The plaintiffs' Claim is that the materials and the installation of the cabinets were inadequate and there are so many deficiencies no other contractor will accept responsibility and the only alternative is to have another contractor replace the cabinets.. The defendant's Dispute Note states the work was done in a good and workmanlike manner with adequate materials and installation methods to the standards of the defendant and work was done to make adjustments and provide minor modifications at the request of the plaintiff at no cost of the plaintiff. The Dispute Note further states no warranty was offered in the original contract. At the Pretrial Conference in this matter an Order was made for the provision of documents and of expert reports. Other than the report of the witness Stewart referred to above, no such reports were delivered. Specifically the defendant did not receive a report from Menuier and the plaintiff did not receive a report from McEwan. There is literally no evidence as to what the probable cost of

carrying out repairs to these cabinets might be. The plaintiff took the position the only remedy is to replace them and the defendant simply says only very minor repairs are required.

[29] In this case there are basically two issues. The first issue is whether the defendant is in breach of the contract to install the kitchen cabinets. If so, then the second issue is the proper assessment of the damages suffered by the plaintiffs as a result of any breach by the defendant. In my view, in the absence of express terms as to the standard of performance, the law implies in any contract for the performance of work, a standard of good and workmanlike quality in accordance with industry standards. It is not a standard of perfection but it requires that work be appropriate in quality in the circumstances of the case. The cupboards in question were to be built and installed in the plaintiffs' kitchen in the plaintiffs' residence. The plaintiffs were entitled to and did expect that they would receive a new kitchen to the standard of new construction suitable for a family's residence. A relatively high standard of workmanship was required. This was not a garden shed project; this was a project requiring a relatively high standard of finishing carpentry. On the whole of the evidence I conclude the defendant did not meet that standard. It is no answer for the defendant to say there was no warranty given because the law implies a warranty of good workmanship. I therefore find there was a breach of the contract to make and install the kitchen cabinets. I am satisfied the plaintiff has met the onus of showing and satisfying the court on the balance of probabilities that the standard was not met.

[30] What then are the plaintiff's damages as a result of the defendant's breach of the contract? The only evidence of the amount of the damages is the quotation from Gem cabinets, Exhibit 4, in the amount of \$8,355.00. There is no evidence as to what the cost of repair would be if the cabinets could be repaired without being removed and replaced. The key issue in this case is whether I accept the evidence of Meunier to the effect that in order to remedy the situation and provide the plaintiff with proper cabinets it is necessary to tear out the cabinets and replace them or whether I accept the evidence of the witness Stewart who says that there are only minor deficiencies which can be easily remedied.

[31] Usually where the issue is whether a plaintiff is entitled to replacement cost, as distinct from cost of repair, the plaintiff has remedied the situation by replacement before the matter comes to trial and the question is as to the reasonableness of the plaintiff's action. In such cases, the reasonableness of the decision is bolstered by the fact that the plaintiff has proceeded at a higher cost without assurance that the greater cost would be recoverable in the action, that is, the plaintiff proceeded at his risk. That is not the case where the plaintiff has done nothing to remedy the situation.

[32] I am also mindful that another possible yardstick for determining damages would be the difference between the value of the plaintiffs' property had the work been done to the appropriate standard and the value of the property in its present condition, a measure which might be appropriate had the value of the property been a relevant factor as where, for instance, the property were merely an asset and not the personal residence of the plaintiffs. I would reject any such approach. In any event, there was no evidence of the relative valuations and neither

party seriously argued that the value of the property was a factor, other than the egregious exaggeration of the plaintiff Dias in his summation that he couldn't sell the house.

[33] I prefer the evidence to of Meunier to that of Stewart for a number of reasons. First, Meunier actually went to the house and inspected the cabinets in question. His opinion is not based on secondhand knowledge, it is based on his own observation. Stewart's evidence was based only on looking at some photographs and on what he was told by the defendant. It would have been possible and very little trouble for the defendant to have arranged to have Stewart or any other expert attend at the plaintiff's residence and actually inspect the work in question. If the plaintiffs had any objection, it is the invariable practice of the court to make directions to ensure that an inspection be done. I also preferred the evidence of Meunier to that of Stewart because Meunier does not appear to have had any other connection with the plaintiff other than attending to inspect and provide an opinion whereas Stewart has done work, and has had some association, with the defendant.

[34] In addition Meunier appeared objective and fair in his answers. He did not appear to be trying to exaggerate or minimize anything in giving evidence. Without leading questions, Meunier simply said this was pure poor workmanship and that he would not have a job if he did work like this. He was of the opinion that because of the installation of the moldings and the seams and the work generally that it would be necessary to tear it out in order to fix it. While Stewart's conclusion that the work met acceptable standards was clear, his report is couched in qualified terms: "the general appearance of the work has been done to an acceptable standard", "the flaws...for the most part are minor fixes", and "impossible to give an opinion on quality standards two years after the installation".

[35] Stewart was not objective in his evidence; in fact, much of his evidence was quite argumentative. His statements as to when contracts are "closed", that work is not covered unless expressed in the contract, and comments of this kind were purely argumentative and showed favoritism and indeed bias in favor of the defendant by whom Stewart was called to give evidence. Such bias necessarily adversely affects the credibility of any expert witness. In addition Meunier was not cross-examined on the key opinions which he expressed. Meunier freely admitted that he was not there directly after the work was finished but only saw the work two or three months before trial. The court does not have any reason to not accept Meunier's evidence.

[36] I find it is necessary to remove and replace the cabinets in order to provide the plaintiffs with cabinets to industry standards. The vent for the microwave oven was not part of the defendant's work and, in the result, is a non-factor. The only evidence as to the cost required to replace the defendant's work is Exhibit 4, a quotation from Gem Cabinets. In the circumstances of this case and having regard to the fact the plaintiffs are self represented and notwithstanding this quotation was provided only in the provision of documents and not as an expert report, I accept as evidence of the cost of replacement the figure of \$8,355.00 expressed in Exhibit 4. The quotation is clearly hearsay and based on opinion and would not be admitted as evidence under the laws of evidence, but I consider it proper to accept its content as evidence. The



quotation was not objected to when tendered as proof and it appears reasonable as the amount is, to some extent, corroborated by the fact that the defendant's quotation for the same work was \$8,490.00.

[37] Based on the above findings I direct there will be judgment for the plaintiffs against the defendant for the sum of \$8,355.00. The plaintiffs are entitled to monetary compensation to the extent of their damages whether they choose to use the compensation for the actual replacement of the cabinets or not. This conclusion does not overlook the requirement that a plaintiff may only recover for unavoidable loss, that is, a claimant is required to take all reasonable steps to mitigate his damages and cannot recover for any damages which could have been avoided by reasonable steps. I am mindful of the fact the plaintiffs have done nothing to take any steps to make their kitchen more acceptable, a situation which on the face of it appears unreasonable. The plaintiffs were prepared to live with the defects (and preserve the evidence of them) rather than carry out any work of any kind. On its face, this appears unreasonable. However, the plaintiffs are entitled to kitchen cabinets built to a standard of good and workmanlike work or to the equivalent in money damages.

[38] It should be noted the plaintiffs have not made any claim by way of any general damages or for loss of amenity for having a sub-standard kitchen for two years. Had any such claim been made, it would not have been allowed because the plaintiffs could have had a new kitchen installed directly after the defendant abandoned the work in their house. Any such loss of amenity claim would be defeated by their own lack of diligence in having the cabinets replaced.

[39] There will be judgment accordingly for \$8,355.00. I further direct the defendant pay to the plaintiff the costs of this action. Unless an application is made to this court by telephone arrangements with the Clerk's office within two weeks of the date of these reasons in order to deal with the question of costs I direct the plaintiffs' costs be limited to the amounts for the issuance of the Claim, \$200.00, and the attendance of three witnesses, a further \$30.00. The plaintiffs' evidence was disorganized and a good deal of time was spent on non-issues, in particular, the question of the microwave vent. The plaintiffs' claim was for the cost of re-doing the work. Whether or not the vent would accommodate the microwave would affect neither the claim nor the damages. I direct there will be no interest.

Heard on the 27<sup>th</sup> day of October, 2011.

Dated at the City of Edmonton, Alberta this 1<sup>st</sup> day of December, 2011.

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D.G. Ingram  
A Judge of the Provincial Court of Alberta

**Appearances:**

Paul Dias and Carol Dias, on their own behalf

Ms. Michelle Freebairn, of Venture Law Group LLP  
for the Defendant