

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP745/2016

### CATCHWORDS

Small Claim Hearing. Applicants' claim for money owed in respect of construction of a pergola at the respondent's home. No fixed agreed price and no signed contract in writing. Arrangement terminated by respondent before all works completed. First applicant entitled to reasonable cost of works in respect of which the respondent has retained the benefit. No contractual arrangement as between the second applicant and the respondent. Second applicant was engaged by the first applicant. As such, the second applicant's claim against the respondent fails, and the second applicant must look to the first applicant for monies owed.

<b>FIRST APPLICANT</b>	Campbell Homes and Construction Pty Ltd (ACN155 110 080)
<b>SECOND APPLICANT</b>	J & R Barry Pty Ltd (ACN117 482 998)
<b>RESPONDENT</b>	Mr Andrew Maghamez
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Farrelly
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	15 August 2016
<b>DATE OF ORDER</b>	15 August 2016
<b>DATE OF WRITTEN REASONS</b>	7 September 2016
<b>CITATION</b>	Campbell Homes and Construction Pty Ltd v J & R Barry Pty Ltd (Building and Property) [2016] VCAT 1463 (7 September 2016)

### ORDERS

1. The respondent, Mr Maghamez, must pay the first applicant, Campbell Homes and Construction Pty Ltd, \$4,050.
2. The second applicant's application as against the respondent is dismissed.
3. No order as to costs.

**SENIOR MEMBER M. FARRELLY**

**APPEARANCES:**

For the First Applicant:	Mr Stuart Campbell, director
For the Second Applicant:	Mr Ross Barry, director
For the Respondent:	Mr Andrew Maghamez, in person

## REASONS

- 1 At the conclusion of the hearing of this matter on 15 August 2016, I made final orders and provided oral reasons for those orders. The respondent, Mr Maghamez, subsequently requested that written reasons be provided. I provide these written reasons in response to the respondent's request and as confirmation of the reasons provided orally at the conclusion of the hearing.
- 2 In this proceeding, the first applicant Campbell Homes and Construction Pty Ltd ("**Campbell Pty Ltd**"), and the second applicant J & R Barry Pty Ltd ("**Barry Pty Ltd**"), sought an order for payment from Mr Maghamez in the sum of \$4,050, such sum alleged to be owing in respect of the construction of a pergola at the Mr Maghamez' home in Maddingley, Victoria in around December 2015 to March 2016.
- 3 At the hearing I heard sworn evidence from:
  - a) Mr Stuart Campbell, director of Campbell Pty Ltd;
  - b) Mr Ross Barry, director of Barry Pty Ltd; and
  - c) Mr Maghamez.
- 4 The pertinent facts, and my findings in respect of such facts, are summarised as follows:
  - a) In late 2015, Mr Maghamez decided to construct a pergola at his home. He placed an advertisement in an on line service called "Hipages" which links customers seeking tradesmen for particular jobs with available tradesmen.
  - b) Mr Campbell, on behalf of Campbell Pty Ltd, answered the advertisement and spoke to Mr Maghamez by phone. Mr Maghamez described the proposed pergola and advised Mr Campbell that his budget was \$10,000.
  - c) Mr Campbell suggested that Mr Maghamez purchase a pergola/shed kit, and that Campbell Pty Ltd could then construct the kit pergola for an estimated charge of around \$3000. Mr Maghamez accepted the proposal and duly purchased a pergola/shed kit from a supplier at a cost of \$7090.
  - d) There is email and phone text communications between Mr Campbell and Mr Maghamez around the time that Mr Maghamez entered the agreement with Campbell Pty Ltd, but otherwise there is no written contract and there is no document signed by either party. The written communications, such as they are, do little more than confirm Mr Maghamez' stated budget of \$10,000, and Mr Campbell's initial estimate of around \$3000 as the cost to erect the pergola. I do not accept Mr Maghamez' submission that Campbell Pty Ltd, having been made aware of Mr Maghamez' \$10,000 budget, contracted to construct the pergola at a cost of not more than \$10,000 (including the supply

cost of the pergola kit). The written communications do not support that submission. Having regard to the written communications and the evidence of Mr Campbell, I find that Campbell Pty Ltd did no more than provide an estimate of \$3000 as the cost, all things going well, to erect the pergola kit. There was no agreed fixed price for the construction of the pergola.

- e) I also note that, having regard to the fact that the pergola kit alone cost \$7090 and, in addition to erecting the pergola kit, the proposed works included the installation of concrete footings for the pergola posts and the installation of an infill concrete slab after the pergola was erected, and noting also that it would be necessary to obtain a building permit and final certification of the works by a building surveyor, it is unrealistic in my view to expect that all of the works, including the supply cost of the pergola kit, could be carried out for \$10,000.
- f) Mr Campbell is a registered builder. He arranged to obtain the requisite building permit for the construction of the pergola from the relevant building surveyor, Mr Wayne Eastwood. The building permit was issued by Mr Eastwood on 8 December 2015. The permit notes the builder as Campbell Pty Ltd. Mr Maghamez paid Mr Eastwood his fee of \$1097 for the issuing of the building permit.
- g) Mr Campbell was advised by the surveyor, Mr Eastwood, that because of the close proximity of the proposed pergola to the boundary fence of the neighbouring property, and because the pergola area would be used for activities such as barbecues, it would be necessary to construct a firewall where the pergola abutted the neighbouring property. I am satisfied that Mr Campbell told Mr Maghamez that the extra cost of the firewall would be around \$2500.
- h) Mr Campbell arranged for a concreter to lay concrete footings for the pergola posts. He also arranged for a second concreter to install concrete steps on top of the footings at the precise height of the intended infill concrete slab which was to be poured after the construction of the pergola. Mr Maghamez paid both concreters, the first \$1900 and the second \$700. Mr Maghamez says that the second concreter was engaged to rectify unsatisfactory work carried out by the first concreter. There is insufficient evidence for me to find that the works carried out by the second concreter were the direct result of defective works of the first concreter. I prefer the evidence of Mr Campbell that the concrete works were always to be carried out in two stages.
- i) After the concrete works were done, Mr Campbell arranged for Barry Pty Ltd to erect the kit pergola. Mr Campbell informed Mr Barry that such works should be priced at around \$3000 to \$3500. Barry Pty Ltd duly attended to construction of the pergola.

- j) There is no dispute that Mr Maghamez played no part in the engagement of Barry Pty Ltd. Barry Pty Ltd did not provide to Mr Maghamez any quotation or other document as to the charge or estimated charge for the works to be carried out by Barry Pty Ltd. Nor were there any discussions between Barry Pty Ltd and Mr Maghamez, before the works were done, as to the cost of the works. The only documents provided by Barry Pty Ltd to Mr Maghamez were its final invoices (two) totalling \$4,050. Barry Pty Ltd addressed the invoices direct to Mr Maghamez at the instruction of Mr Campbell.
- k) The \$4,050 charged by Barry Pty Ltd includes \$3500 as the cost to erect the pergola, and a further charge of \$550 for the “extra” works of cutting the pergola kit down to the correct size to fit the space, and for connecting spouting to the house.
- l) Mr Maghamez refused to pay Barry Pty Ltd’s invoices. Having purchased the kit pergola, and having paid for the building permit and the two concreters, Mr Maghamez had already expended in excess of his budget of \$10,000, and the firewall and the infill slab were still to be completed. Believing that Campbell Pty Ltd was committed to a price of \$10,000 to construct the pergola (including the supply cost of the kit pergola), Mr Maghamez considered he had no obligation to pay any further sum to Campbell Pty Ltd or Barry Pty Ltd. The relationship between Mr Maghamez and Mr Campbell deteriorated and no further works were carried out by Campbell Pty Ltd or any of its sub contractors.

5 Mr Campbell is particularly aggrieved that Barry Pty Ltd has not been paid for the works it carried out, and he initiated this proceeding to recover the sum owed, \$4,050. Being unsure as to whether Campbell Pty Ltd or Barry Pty Ltd, or both, had standing to sue for the sum owed, Mr Campbell and Mr Barry agreed that both Campbell Pty Ltd and Barry Pty Ltd would bring the proceeding against the respondent.

6 In my view, there were no contractual obligations as between Barry Pty Ltd and Mr Maghamez. So far as Mr Maghamez was concerned, Barry Pty Ltd simply arrived on site to erect the pergola as instructed by Mr Campbell. I find on the evidence that Barry Pty Ltd has no claim against Mr Maghamez, and it must look to the party that engaged it, Mr Campbell or Campbell Pty Ltd, for payment for the works it carried out.

7 If Mr Maghamez is obliged to pay for the works carried out by Barry Pty Ltd, it is obliged to pay Campbell Pty Ltd. This is because Mr Maghamez entered an agreement in respect of the construction of the pergola with Campbell Pty Ltd, and no one else.

8 As discussed above, I am satisfied that there was no fixed price agreed as between Mr Maghamez and Campbell Pty Ltd. In the absence of a fixed price contract, and the absence of a written, signed contract, it is appropriate

and fair that Mr Maghamez pay the reasonable cost of the works in respect of which he has obtained and retained the benefit.

- 9 I am satisfied that Mr Maghamez has retained the benefit of the works performed. He paid the surveyor's fee for the cost of obtaining the mandatory building permit. There is no evidence that the charge was unreasonable. He has paid for the above-mentioned concrete works carried out by the two concreters. As noted above, I do not accept that the concreting works were defective. There is insufficient evidence to find that the charges for the concreting works were unreasonable.
- 10 There is no evidence that the works carried out by Barry Pty Ltd are in any way defective, or that the sum charged by Barry Pty Ltd, including the extra works charge, is unreasonable. I am satisfied that the sum charged by Barry Pty Ltd, 4,050, is reasonable and that Mr Maghamez has retained the benefit of such works.
- 11 Accordingly, I am satisfied that it is fair that Mr Maghamez pay the cost of the works carried out by Barry Pty Ltd, \$4,050. For the reasons discussed above, I find that the payment should be made to Campbell Pty Ltd.
- 12 It is noteworthy that Mr Campbell and Campbell Pty Ltd have received no payment, made no charge, and bring no claim against Mr Maghamez in respect of Mr Campbell's time and effort in obtaining the building permit, arranging for the two concreters and Barry Pty Ltd to carry out works, and providing general advice to Mr Maghamez in respect of the construction of the pergola. Having regard to this, I am fortified in my view that Mr Maghamez suffers no injustice in bearing the cost of the works carried out by Barry Pty Ltd.
- 13 For the above reasons I ordered that the respondent must pay Campbell Pty Ltd \$4,050, and I also ordered that the claim of Barry Pty Ltd as against Mr Maghamez be dismissed.
- 14 I also ordered that there would be no order requiring any party to pay another party's costs of the proceeding.
- 15 Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* ("the Act") provides the general rule in respect of costs incurred in a proceeding, namely that each party is to bear their own costs, however the Tribunal may, if it is satisfied that it is fair to do so, order that a party pay all or a specified part of the costs of another party.
- 16 Section 115 of the Act makes special provision in respect of the application fee paid to commence a proceeding in the Tribunal. In certain proceedings [this proceeding being such a proceeding], where an applicant has substantially succeeded in its claim against the respondent, the applicant is entitled to an order that the respondent reimburse the applicant the application fee paid by the applicant. However the Tribunal, having regard to the nature of the proceeding and the issues involved and the conduct of the parties, may decline to make such an order.

- 17 In my view, the dispute in this proceeding is largely the result of a failure on the part of both Mr Campbell and Mr Maghamez to clarify in writing at the outset the details of their agreement, including details as to the works to be carried out, the price to be charged and the circumstances in which the price might vary. I do not doubt that they are both honest men. The dispute arose because each of them had a different understanding as to the agreement reached. Campbell Pty Ltd has succeeded in its claim because, in the absence of a clear agreement in writing, I have determined that Mr Maghamez should pay the reasonable cost of the works in respect of which he has retained the benefit. That does not mean that Campbell Pty Ltd bears no responsibility for the creation of the dispute.
- 18 In such circumstance, I think it fair that there be no order as to costs under section 109 or section 115 of the Act.

**SENIOR MEMBER M. FARRELLY**