

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1043/2017

CATCHWORDS

Dispute about alleged amount remaining payable after completion of building works – respondent alleges amount paid in full, partly by cash – applicant alleges no cash payments and money owing.

APPLICANT	Mr Mahmood Momeni t/as Revive Repair Renovations
RESPONDENT	Armus Persia Pty Ltd (ACN: 152 560 462)
WHERE HELD	Melbourne
BEFORE	B. Josephs, Member
HEARING TYPE	Hearing
DATES OF HEARING	5 – 6 April 2018
DATE OF FINAL SUBMISSIONS	23 April 2018
DATE OF ORDER	27 June 2018
DATE OF REASONS	27 June 2018
CITATION	Momeni v Armus Persia Pty Ltd (Building and Property) [2018] VCAT 991

ORDERS

- 1 Armus Persia Pty Ltd must pay Mr Mahmood Momeni the sum of \$13,500.00.
- 2 Any application for costs by Mr Momeni is to be made by written submissions filed with the Tribunal and served on Armus Persia Pty Ltd by 31 July 2018.
- 3 Any material in reply on costs by Armus Persia Pty Ltd is to be made by written submissions filed with the Tribunal and served on Mr Momeni by 28 August 2018.
- 4 A decision by the Tribunal on any costs application will be made on the papers.

- 5 There will be no orders as to costs, and an order made accordingly, in the event that there is no application made pursuant to, and in compliance with, Order 2.

B. Josephs
Member

APPEARANCES:

For the Applicant: Mr C. Hardman, solicitor

For the Respondent: Mr N. Moghaddam, solicitor

REASONS

- 1 Mr Momeni made application on 25 July 2017 seeking payment of \$13,500 from Armus Persia Pty Ltd (“AP”). At all material times, he dealt with Mr Bahman Ghanad, director of AP.
- 2 On 8 January 2018, Mr Hardman, solicitor for Mr Momeni, filed Points of Claim.
- 3 It is necessary to set out below the relevant portions of the Points of Claim:
 - i Mr Momeni’s claim is for payment for work done pursuant to a contract, being renovation works to the shop situated at 922 Glenferrie Road, Kew (“the site”). The parties to the contract are Mr Momeni and AP.
 - ii Mr Momeni’s claim is based on an agreement which is partly in writing, partly oral and partly implied.

Particulars of Agreement

- (a) Insofar as the agreement is in writing, it is constituted by the following documents:
 - the document headed “Quote”, dated 4 March 2017 and numbered “Q00073” which was emailed by Mr. Momeni to AP on 4 March 2017 at 10.32p.m.;
 - the amended document headed “Quote”, dated 22 December 2016 and numbered “Q00073” which was emailed by Mr Momeni to AP on 22 March 2017 at 10:45p.m.;
 - the document headed “INVOICE”, dated 30 April 2017 and numbered 000081 which was emailed by Mr. Momeni to AP on 21 May 2017 at 11.56 p.m.;
 - the further amended document headed “Quote”, dated 22 December 2016 and numbered “Q00073-1” which was emailed by Mr Momeni to AP on 15 June 2017 at 11:59 p.m.;
- (b) Insofar as the agreement is oral, it is constituted by discussions between Mr Momeni and Mr Ghanad. Those discussions occurred between 5 March 2017, on which date Mr Ghanad orally accepted the quotation, and on other dates to 16 June 2017.
- (c) Insofar as the agreement is implied, it is implied by the conduct of AP in requesting and accepting works done by Mr Momeni and by Mr Momeni in performing those works in accordance with AP’s requests.
- iii Mr Momeni performed works at the site commencing 7 March 2017 and the works were completed by 16 June 2017.
- iv The agreement was varied orally during the course of the works, from the work particularised in the “Quote” document dated 4 March 2017 to the work particularised in the “INVOICE” document dated 30 April 2017.

- v Mr Momeni also performed other works at the request of Mr Ghanad. This request was made orally on 12 June 2017, when Mr Ghanad asked Mr Momeni to frame a part of the kitchen wall, to hang plasterboard, and to install overhead cabinets. Those works were done on 12 June 2017 by Mr Momeni as a gesture of goodwill, without charge.
- vi AP made various payments to Mr Momeni.

Particulars

10.3.17	\$3,000.00 paid by cheque
17.3.17	\$3,000.00 paid by cheque post-dated to 20 March 2017
22.3.17	\$5,000.00 paid by cheque post-dated to 3 April 2017 \$4,000.00 paid by cheque post-dated to 12 April 2017
26.5.17	\$5,000.00 paid by direct debit
Total	\$20,000.00

- vii The cheques referred to above were hand-written by Mr Momeni at the oral request of Mr Ghanad.
- viii On 21 March 2017 Mr Momeni received a telephone call from a person who said she was AP's accountant. Mr Momeni was asked to add a note to the "Quotation" document which had been provided to AP on 4 March 2017, to state that AP had paid \$15,000.00 in cash to Mr Momeni in 2016 as a deposit. Mr Momeni stated to the caller that he would confirm that he had received \$15,000.00 only if he was paid that amount.
- ix On 22 March 2017 Mr Ghanad attended the site and provided to Mr Momeni the two cheques referred to in paragraph (vi) above. Mr Ghanad asked Mr Momeni to deposit the cheques not earlier than the dates to which they were post-dated. As at 22 March 2017 Mr Ghanad had provided to Mr Momeni cheques in the sum of \$15,000.00.
- x On 22 March 2017 at 10:45pm Mr Momeni emailed an amended version of the "Quote" document to Mr Ghanad, and the amendment stated that Mr Momeni had received \$15,000.00 in cash paid on the site by Mr Ghanad and the date of the document was amended to 22 December 2016. Mr Momeni is a relatively recent immigrant who speaks English as a second language, and as at 22 March 2017 he did not know the difference between the words "cash" and "cheque".
- xi The works as particularised in the "Quote" document dated 4 March 2017 and later varied by agreement and particularised in the INVOICE document dated 30 April 2017 number 000081 were substantially completed by 27 April 2017. The work uncompleted was to remove old kitchen cabinets, install new kitchen cabinets and to frame and raise the toilet floor after the installation of pipes by the plumber.

- xii On 27 April 2017 Mr Momeni telephoned Mr Ghanad to request a further interim payment. Mr Ghanad said he would have no money for between three to four weeks, but he offered to provide a cheque, which Mr Momeni agreed to accept.
- xiii On 28 April 2017 Mr Momeni met Mr Ghanad on the site to discuss the final invoice. Mr Momeni attended with a draft invoice numbered 000081 which he had prepared in anticipation of the meeting, and the amount due according to this draft invoice was \$33,097.77. At the meeting Mr Ghanad asked Mr Momeni to amend this invoice to add the costs of the kitchen cabinet installation and the work to raise the floor in the toilet in the backyard, in the total amount of \$2,750.00 including GST. Mr Ghanad stated that the work on the backyard toilet floor was to be limited to framing the floor and to raise it by approximately 200mm to cover the waste and water pipes which were to be installed by the plumber on the existing concrete floor. Mr Momeni asked Mr Ghanad if he wanted tiles installed on the newly raised toilet floor. Mr Ghanad declined on the basis that he would ask Mr Momeni to install tiles on a later date after the rubbish in the backyard had been removed, at which time Mr Momeni's access to the backyard toilet would be easier, being from the street at the back of the building instead of through the shop. The toilet in the backyard is a secondary toilet, and the primary toilet is in the building, so it was not necessary for the secondary toilet to be completed before the shop opened for business. Mr Momeni stated that he would invoice AP for tiling the toilet floor separately and after the tiling work had been done, and Mr Ghanad agreed.

xiv It was agreed that the price for all of the works was as follows:

work performed	\$33,097.77	including GST of \$3,008.89
work in kitchen (to install cabinets) and in backyard toilet (to raise floor, but not to tile floor)	\$2,750.00	including GST of \$250.00
sub-total	\$35,847.77	including GST of \$3,258.89
less payments already made	\$15,000.00	including GST of \$1,363.64
sub-total	20,857.77	including GST of \$1,895.25
less discount	347.77	including GST of \$31.62
amount due	\$20,500.00	including GST of 1,863.64

- xv On 28 April 2017 Mr Ghanad gave to Mr Momeni a cheque in the amount of \$20,500.00 and that cheque was post-dated to a date approximately three weeks later.

- xvi On 29 April 2017 Mr Ghanad telephoned Mr Momeni and said that the invoice was a bit high and asked Mr Momeni to meet Mr Ghanad to discuss it. Mr Momeni met Mr Ghanad at the site and discussed the costs of the works. The meeting took approximately two hours. In the course of the meeting Mr Ghanad proposed that Mr Momeni accept payment by cash in order to evade paying GST, but Mr Momeni declined to do so. However, Mr Momeni agreed to give a further discount of \$2,000.00, and the amount due and payable was agreed to be \$18,500.00. Accordingly, at this meeting Mr Momeni returned to Mr Ghanad the cheque received on 28 April 2017 in the amount of \$20,500.00 and Mr Ghanad then provided to Mr Momeni two cheques in the total amount of \$18,500.00. One cheque was post-dated to 9 May 2017 in the amount of \$5,000.00 and the other cheque was post-dated to 18 May 2017 in the amount of \$13,500.00.
- xvii Mr Momeni banked AP's cheque in the amount of \$5,000.00 on 9 May 2017 and that cheque was dishonoured.
- xviii Mr Momeni telephoned Mr Ghanad and Mr Ghanad promised to pay Mr Momeni as soon as possible.
- xix Mr Momeni revised his draft invoice number 00081 on or about 21 May 2017 to show a total of \$33,500.00 (including GST of \$3,045.45) to reflect the amount already received of \$15,000.00 and the amount agreed at the meeting on 29 April 2017 to be owing, which was \$18,500.00. The revised invoice was sent to Mr Ghanad by email on 21 May 2017 at 11:56pm.
- xx Following his request in (xiii), on 26 May 2017 Mr Momeni received from AP \$5,000.00 by direct credit to Mr Momeni's bank account.
- xxi On 5 June 2017 Mr Momeni received a telephone call from Mr Ghanad, who asked Mr Momeni to go to the site and install the kitchen cabinets, and to frame and raise the toilet floor when the plumber had completed the installation of the water and waste pipes on the existing toilet floor.
- xxii On 6 June 2017, Mr Momeni went to the site and completed the installation of the kitchen cabinets and on or about 8 June 2017 Mr Momeni commenced the work to frame and raise the toilet floor over the water and waste pipes and that work was completed by 9 June 2017.
- xxiii On 12 June 2017, Mr Ghanad asked Mr Momeni to frame a part of the kitchen wall, to hang plasterboard, and to install overhead cabinets. Those works were completed by Mr Momeni without charge on the same day as a gesture of goodwill.
- xxiv On 13 June 2017, Mr Ghanad telephoned Mr Momeni and queried the installed height of the overhead cabinets, which Mr Ghanad thought were too high. Mr Momeni explained that the distance between the top of the gas cooker and the rangehood (which was part of the kitchen cabinet assembly) must be at least 650mm and Mr Ghanad accepted this explanation.

- xxv On 15 June 2017, Mr Momeni became aware during discussions with an unrelated third party that cheque and cash are different. Mr Momeni sent an email dated 15 June 2017 timed at 11.59 pm to Mr Ghanad, attaching a corrected version of the “quote” document. The correction was that the deposit of \$15,000.00 was stated to have been paid by cheque.
- xxvi On 16 June 2017, Mr Momeni met with Mr Ghanad on site and informed him of the email that Mr Momeni had sent the previous day. There was no work left uncompleted by Mr Momeni. Accordingly, Mr Momeni then banked the cheque dated 18 May 2017 in the amount of \$13,500.00.
- xxvii Mr Momeni became aware on 19 June 2017 that the cheque had been dishonoured. Mr Momeni telephoned Mr Ghanad, who stated that he was not happy with the invoice and he would not pay it. Mr Ghanad proposed that a third party would assess the value of the work done by Mr Momeni and Mr Ghanad would pay only what the valuer assessed. Mr Momeni rejected this proposal and stated that Mr Ghanad was bound by the agreement.
- xxviii On 18 July 2017 at 12.42pm Mr Momeni sent to Mr Ghanad by email a demand for payment in the sum of \$13,500.00. No payment was received by Mr Momeni, and \$13,500.00 remains due and payable by AP.

4 Mr Moghaddam, Solicitor, filed Amended Points of Defence in response to the Points of Claim on 7 March 2018 on behalf of AP. Relevantly, they state as follows:

- AP admits (i) and (ii).
- AP admits that the works were performed at the site commencing on or about 7 March 2017 but they remained incomplete on 16 June 2017.
- AP admits that the price of the works was accepted but states that the works were not completed in accordance with the particularised quote and remain outstanding. The outstanding works are the external toilet and the kitchen including caulking and tiling.
- AP says that when Mr Ghanad also complained to Mr Momeni that the height of the kitchen cabinets above the stove were excessive, a dispute resulted between them and Mr Momeni vacated the site and did not return to either reinstall the cabinets or to complete the kitchen or toilet tiling.
- AP denies (v) and maintains that the scope of works particularised in the invoice dated 30 April 2017 included the kitchen cabinets.
- AP admits various payments were made to Mr Momeni but does not admit (vi). It says that Mr Momeni has failed to include with any schedule of payments in the Points of Claim the amount of \$15,000.00 cash payments made to him. In particularising these alleged cash payments, AP says that on or about the dates noted below, Mr Ghanad at the site, made the following cash payments to Mr Momeni:

Date	Amount
6.3.2017	\$3,500.00 by cash
17.3.2017	\$3,000.00 by cash
21.3.2017	\$3,000.00 by cash
22.3.2017	\$5,500.00 by cash
Total	\$15,000.00

- AP admits (vii).

- AP denies that it was privy to conversations had between Mr Momeni and its accountant. However, AP maintains that it advised its accountant that cash payments had been made to Mr Momeni, it was requested by its accountant to provide proof of the cash payments for accounting/expense purposes and Mr Ghanad contacted Mr Momeni and requested a receipt of the cash payments.

- While admitting that the cheques were drawn and that Mr Momeni at all times drew them from AP's cheque book, AP, however, states that Mr Ghanad instructed Mr Momeni to post-date the cheques to align with the timeline for the works being undertaken as Mr Momeni had received a \$15,000.00 cash payment but the progress of the works had not entitled him to the further cheque payments.

- AP denies requesting Mr Momeni to amend the date of the invoice to 22 December 2016 as it did not own the business then.

- AP does not admit the conversation and meeting on 27 and 28 April 2017 with Mr Momeni as Mr Ghanad does not recall them and it only became aware of the "draft" invoice when Mr Momeni lodged his VCAT application.

- AP denies that it gave a \$20,500.00 cheque to Mr Momeni. Rather, it says that Mr Momeni had written such a cheque but he never had it in his possession and two separate cheques for \$5,000.00 and \$13,500.00 were given to him instead of the cheque for \$20,500.00.

- AP says that the \$5,000.00 cheque was on account of the final payment of the balance of Mr Momeni, despite works remaining incomplete.

- AP further says that the \$13,500.00 cheque was drawn by Mr Momeni and when he did so, he stated to Mr Ghanad that he had received \$15,000.00 in cash, that he was making a finance application, that as he had received the cash payment he was required to show the cash payment on his bank statement in order to prove revenue and serviceability to his bank and that prior to 18 May 2017 he would pay \$13,500.00 into AP's bank account in order to then draw on the post-dated cheque. AP does not recall the exact terms of the conversation but Mr Ghanad says that after the commencement of the works and prior to Mr Momeni vacating the site, he recalled Mr Momeni telling him that his spouse had purchased a property in her name and that he now wanted to purchase a property in his name. AP further maintains that the \$1,500.00 difference between the amounts of \$13,500.00 and \$15,000.00 also represented the cost of an oven which Mr Momeni was to purchase and install on the site but which was never completed.

- AP admits (xiii) and (xv) but says that Mr Momeni deposited the \$5,000.00 cheque prior to the date to which it was post-dated and apologised for so doing.
- AP admits (xvi) but does not recall the date of the telephone conversation.
- AP denies (xvii), (xviii) and (xix).
- AP says that Mr Ghanad informed Mr Momeni that the height at which the cabinets had been installed, being in excess of 950mm above the stove, made their use impractical.
- AP denies that there was no work left uncompleted by Mr Momeni.
- AP maintains that it had not paid Mr Momeni \$15,000.00 by cheques as at 22 March 2017 but it had paid \$15,000.00 cash to him.
- AP denies (xxii).
- AP denies owing any money to Mr Momeni but did not make any counter claim or set off.

- 5 The parties, as ordered, provided discovery of documents to each other and the proceeding was heard by me on 5 and 6 April 2018. Pursuant to my orders at the conclusion of the hearing, each solicitor has filed and served submissions and I otherwise reserved my decision.
- 6 Both parties gave evidence, with Mr Ghanad having the assistance of a Farsi interpreter. Mr Momeni's wife, Mozghan Taimori, also gave very short, specific evidence.
- 7 Documents discovered by Mr Momeni were credit reports for him and his wife. These documents and oral evidence given by each of them confirmed that neither had ever owned a property and that on 6 July 2017, Mr Momeni applied for a mortgage loan which was rejected. Mr Momeni's un rebutted evidence was that he and Ms Taimori were looking at purchasing a property within a particular price range and the amount of the loan applied for had been structured accordingly. However, his loan application was rejected due to Mr Momeni not having sufficient deposit rather than there being any issue with revenue of his business.
- 8 AP discovered a number of documents. These included 25 consecutive cheque butts for a Commonwealth Bank business account for AP. Some were undated and those which were dated bore various dates between 9 March 2017 and 23 October 2017. Some were completed in English and some in Farsi. There were various payees. Most relevantly, Mr Momeni or his business, Revive Repair Renovations, was shown as the payee in butts 102 (dated 9 March 2017 for \$3000), 103 (dated 21 March 2017 for \$3000), 110 (dated 13 April 2017 for \$4000), 112 (dated 4 May 2017 for \$20500), 113 (dated 9 May 2017 for \$5000) and 114 (dated 18 May 2017 for \$13500).

- 9 A copy of the entire cheque for \$20500, being 112 and dated 4 May 2017, was also discovered by AP showing payment for that amount to Revive Repair Renovations. Only a portion of the signature was visible. The original was produced at the hearing and I accepted evidence, after hearing both parties, that the signature was that of Mr Ghanad but it had been torn off.
- 10 I also observed that cheques to other payees were post-dated or dated non-sequentially. For example, butt 104 bore the date of 10 April 2017, butt 107 was dated 20 March 2017 and butt 108 was dated 4 April 2017.
- 11 Finally, AP provided copies of Mr Ghanad's personal Commonwealth Bank account statement for 1/1/17 to 30/6/17 and the statement for the Commonwealth Bank business account for 4/2/17-3/5/17. Of particular note from these statements were the considerable number of cash withdrawals from Mr Ghanad's personal account of often significant amounts but with no cheques written on the account during the same period.
- 12 During the hearing, AP tendered the bank statements and cheque butts together with a letter from Mr Momeni's bank showing that the cheque dated 9 May 2017 for \$5000 was, in fact, deposited into his account by Mr Momeni on 5 May 2017 and was dishonoured. A Bendigo Bank account cheque book was also produced by AP on the second day of the hearing from which, as I accept from the evidence, the cheque for \$5000, post – dated to 3 April 2017, was drawn.
- 13 Included in the exhibits tendered by Mr Momeni at the hearing were the documents and covering emails set out in the Points of Claim as constituting the “written” part of the agreement and copies of Mr Momeni's ANZ business account statements for each of the months between 7 March 2017 and 7 June 2017. Additionally, Mr Momeni tendered a Victorian Building Authority notice about overhead clearance requirements for the installation of gas cookers and rangehoods which confirmed that the overhead cabinets he installed had to be at a minimum of 650mm. The height beyond that minimum then varied according to circumstances. Also included in Mr Momeni's exhibits was the original “draft” invoice which showed various hand-written calculations made on it in blue pen and black pen. Mr Momeni's evidence, which I accepted, was that the blue pen represented markings made by him during the 28 April 2017 meeting and the black pen was used for the markings made during the 29 April 2017 meeting.
- 14 Mr Momeni gave evidence that Mr Ghanad first contacted him by phone on 1 March 2017. He had not known Mr Ghanad before this call. Mr Momeni had been recommended to Mr Ghanad by another tradesman to undertake renovation works at the site. Mr Momeni met with Mr Ghanad the next day at the site and the “Quote” document dated 4 March 2017 set out the works discussed at this first meeting.

- 15 Mr Ghanad's evidence was that AP had purchased a supermarket business on 27 December 2016 to be operated at the site. It had also for around two years been operating a coffee shop. The renovations were being undertaken for the opening of the business.
- 16 In his submissions on behalf of Mr Momeni, Mr Hardman noted at the outset that the Tribunal had received conflicting evidence from the parties. Mr Momeni maintained that he had received payment only by cheque or direct credit (his invoice included details of his bank account for transfer of funds). Mr Hardman further contended that AP's defence depended on whether I accepted Mr Ghanad's assertion that he paid \$15000 in cash to Mr Momeni and Mr Ghanad's evidence that he agreed to participate in a scheme to inflate Mr Momeni's income received in Mr Momeni's bank account for the purpose of qualifying Mr Momeni for a bank loan. As is clear from earlier in these reasons, Mr Momeni denies having received any payment in cash and denies that there was any such scheme to inflate his income.
- 17 Mr Moghaddam, in his submissions on behalf of AP, contended that Mr Momeni's claim rested on his insistence that he did not understand the difference between the terms "cash" and "cheque" and that he had not received cash payments from AP. It was conceded by Mr Moghaddam that if I found Mr Momeni's evidence in this regard to be plausible then his claim must succeed but if I found it merely a possibility as opposed to a probability, his claim must fail.
- 18 On this core issue of cash and cheque, Mr Momeni's evidence was that at the time of receiving the cheques totalling \$15000 in March 2017 (and indeed until 15 June 2017 when the position was clarified for him by an unrelated third party) he did not realise that cash and cheque were different in Australia.
- 19 According to his evidence, they are basically the same in Iran where a party can be given a cheque which can be written to pay cash or names that party as payee. However, without first "cashing it" or depositing it into their own account, that party can hand the cheque to a third party and that third party can deal with it including being able to deposit it directly into their own account even if not shown as the original payee. All that is required for this to occur is for both the original payee and the third party to whom it has been handed, to sign the rear of the cheque. This form of endorsement resulted in the cheque becoming effectively a bearer cheque. Mr Momeni further deposed that this practice of negotiating cheques was undertaken in many business transactions in Iran and hence his understanding, until being informed otherwise, of the apparent lack of practical difference between cash and cheque.
- 20 This explanation was not directly rebutted by any evidence from Mr Ghanad. Under cross-examination, Mr Momeni credibly deposed that although he has lived in Australia since 2012 he had not dealt with cheques

previously. His experience had only been with cash, bank card or electronic funds transfer. Mr Ghanad admitted that under his instruction and with his approval, given his limited command of the written and spoken English language, Mr Momeni wrote the cheques in AP's cheque book. However, despite Mr Ghanad's denials. Mr Momeni also maintained that the post – dating of the cheques was also at the instruction of Mr Ghanad to ensure that they were presented when funds were available.

- 21 I find Mr Momeni's explanation about the cash and cheque issue to be plausible. Indeed, I found Mr Momeni to be a reliable and credible witness throughout whose evidence, both when given orally and when reliant on supporting documentation, accurately reflected his Points of Claim on all the main issues to be determined. As is also apparent from earlier in these reasons, I do not accept that Mr Momeni was involved in any way in any scheme to inflate business revenue to support a bank loan application and I accept, also contrary to the Amended Points of Defence that Ms Taimori did not, and had never, owned land in Australia.
- 22 Contrastingly, I found Mr Ghanad to be an unreliable witness. He frequently gave evidence which was quite contrary to his Amended Points of Defence. He could not give any credible evidence either orally or with the assistance of documentation, contemporaneous or otherwise, to support any cash payments being made to, and accepted by, Mr Momeni. I have no doubt that he had a poor memory and it was apparent that his keeping of business records was equally inadequate. His evidence, in reality, effectively invited me to find only that he must have paid cash to Mr Momeni because of the many cash withdrawals made by him during the period of the works.
- 23 Mr Momeni, established on the balance of probabilities that each of his agreement with AP was as alleged in his Points of Claim, that his payments from AP were either by cheque or direct credit and that AP remains indebted to him for \$13500 and I have made orders accordingly.

B. Josephs
Member