

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**ACT** : BUILDING SERVICES (COMPLAINT  
RESOLUTION AND ADMINISTRATION) ACT  
2011 (WA)

**CITATION** : THE OWNERS OF ONE BRIGHTON STRATA  
PLAN 51948 and PINDAN PTY LTD [No 2] [2020]  
WASAT 3

**MEMBER** : MR S ELLIS, SENIOR SESSIONAL MEMBER  
MR R AFFLECK, SENIOR SESSIONAL  
MEMBER

**HEARD** : 24, 25 AND 26 JULY 2019  
FINAL SUBMISSIONS 4 OCTOBER 2019

**DELIVERED** : 3 JANUARY 2020

**FILE NO/S** : CC 384 of 2017

**BETWEEN** : THE OWNERS OF ONE BRIGHTON STRATA  
PLAN 51948  
Applicant

AND

PINDAN PTY LTD  
Respondent

*Catchwords:*

Building services complaint - Building remedy order - Form of order

*Legislation:*

*Building Services (Complaint Resolution and Administration) Act 2011 (WA),*

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s 36(1)(a), s 36, s 38

*Result:*

Building remedy order made

*Summary of Tribunal's decision:*

This decision follows from earlier decisions in these proceedings finding that the respondent provided a regulated building service contrary to s 38 of the *Building Services (Complaint Resolution and Administration) Act 2011* (WA). The Tribunal considered that a building remedy order should be made specifying a method for determining the particular work to be done.

*Category:* B

**Representation:**

*Counsel:*

Applicant : Mr C P K Russell  
Respondent : Mr A R McPherson

*Solicitors:*

Applicant : GV Lawyers  
Respondent : N/A

**Case(s) referred to in decision(s):**

Gemmill Homes Pty Ltd v Sanders [2018] WASC 179  
Owners of Strata Plan 52843 and Psaros Builders Pty Ltd [2013] WASAT 46  
Owners of Strata Plan 52843 and Psaros Builders Pty Ltd [2018] WASAT 113  
The Owners of One Brighton Strata Plan 51948 and Pindan Pty Ltd [2018] WASAT 84  
The Owners of One Brighton Strata Plan 51948 and Pindan Pty Ltd [2018] WASAT 84 (S)

**REASONS FOR DECISION OF THE TRIBUNAL:**

***Overview***

- 1 These are proceedings brought by the strata company established in respect of the strata development at No 1 Barracks Lane, Mandurah (site). The respondent is the builder of the 11 storey apartment building (One Brighton) on that site.
- 2 The Tribunal has previously found that the respondent provided a regulated building service that had not been carried out in a proper and proficient way or was faulty or unsatisfactory within s 38 of the *Building Services (Complaint Resolution and Administration) Act 2011* (WA) (Act).

3 These reasons deal with the form of the building remedy order that should be  
made.

4 The Tribunal considers that a building remedy order should be made pursuant to  
s 36(1)(a) and s 38 of the Act requiring the respondent to remedy the building  
service as specified in the orders.

### **Background**

5 The applicant is a strata company established in respect of the strata  
development at the site. The development is an 11 storey apartment building,  
which the respondent built. The contract for the building service was entered  
into with the then owner of the land. The applicant was not incorporated at that  
time and was not a party to the contract.

6 The apartment building is situated on the waterfront in Mandurah and has many  
windows, no doubt to maximise the occupants' views.

7 The Tribunal found that the respondent had provided a regulated building  
service that had been not been carried out in a proper and proficient manner or  
was faulty or unsatisfactory.

8 The particular respects in which the building service contravened s 38 of the  
Act appear from the prior decisions of the Tribunal made on:

- (a) 16 August 2018 - *The Owners of One Brighton Strata Plan 51948  
and Pindan Pty Ltd* [2018] WASAT 84; and

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**[2020] WASAT 3**

- (b) 1 February 2019 - *The Owners of One Brighton Strata Plan 51948 and Pindan  
Pty Ltd*  
[2018] WASAT 84 (S) (Supplementary Decision).

9 The applicant originally made allegations that the building service provided by the  
respondent was defective in ways that were generally expressed. The findings made  
by the Tribunal were expressed in the very specific terms found in Attachment A to  
the Supplementary Decision.<sup>[1]</sup> The majority of the defects are those relating to  
components of the glazing built by the respondent. There are about 100 window  
assemblies which are identified in Attachment A as being defective. The defects  
generally involve problems with more than one of the components of the window  
assemblies.

10 There was a hearing on 24, 25 and 26 July 2019.

11 At the hearing, the respondent contended that the building remedy order should  
say little more than that the respondent must remedy the defects identified in  
Attachment A. It provided draft orders to this effect.

12 The thrust of the respondent's case was that it was working on a solution to repair  
the existing glazing elements. Although the solution was not finished, it was  
actively progressing development of the solution. It contended that, as the builder,  
it should be allowed to carry out the repairs as it thought best. The respondent's  
solution did not involve wholesale replacement of the glazing components.

13 The applicant contended that it was not sufficiently clear that the work proposed by the respondent, that is, repairing the glazing elements, would be effective to remedy the defects. The applicant also doubted the bona fides of the respondent. The thrust of the applicant's case was that the respondent should replace the glazing elements that were defective. At the beginning of the hearing, the applicant provided draft orders to that effect.

14 The following witnesses were called by the applicant:

- (a) Mr Paul Totten - Mr Totten is the principal of WA Glass and Cladding, which carries on business as a glazing contractor;
- (b) Mr Daniel Buckley - Mr Buckley is a site engineer employed by Atelier JV, a firm of cladding engineers; and
- (c) Mr Simon Jewel - Mr Jewel is also employed by Atelier JV.

15 The respondent called Mr Christopher Gooch, a site engineer employed by Forth Consulting (see order 1(a)).

16 These witnesses had given evidence at the original hearing as to liability.

17 Messrs Buckley, Jewell and Gooch were qualified engineers.

18 Although not an expert through formal qualifications, Mr Totten had long experience in glazing work.

19 Reports of each of these witnesses were tendered.[\[2\]](#)

20 Messrs Totten, Buckley, Jewel and Gooch gave evidence concurrently. The experts, including Mr Totten, had also participated in a process of expert conferral. A joint report was prepared, which was tendered in evidence along with individual reports from the witnesses.

21 In addition, the respondent called evidence from a Mr Brennan, a technical consultant to Azuma Design. Azuma Design carried out testing on various prototypes developed by the respondent.

His evidence dealt with test results attached to Mr Gooch's report.

22 At the end of the hearing, directions were made for the provision of outlines of submissions, and for a further brief hearing to take place at which oral submissions could be made. The respondent did not comply with those directions. There was a directions hearing about the respondent's non-compliance. The in-house lawyer who appeared at the hearing, indicated that he was no longer instructed in the matter. This boils down to the respondent simply not wishing to participate further in the proceedings. Directions were made for written submissions to be filed. The respondent did not comply with those directions.

23 The applicant provided written submissions dated 4 October 2019, which included proposed orders. The orders proposed in the submissions differed significantly from the orders initially proposed by the applicant. The respondent had the opportunity to provide submissions that responded to the applicant's submissions of 4 October 2019. The respondent did not take up that opportunity.

24 The Tribunal considers that it is appropriate to make a building remedy order in terms which substantially reflect the orders proposed in the applicant's submissions of 4 October 2019.

25 The matters which justify the making of orders in the terms set out below are as follows.

### Section 36(1)(a)

26 There was no dispute between the parties that, in the first instance at least, an order under s 36(1)(a) was the appropriate form of order. There is authority that an applicant does not get to choose whether a building remedy order should require the builder to remedy the work or whether the builder should pay monetary compensation (*Gemmill Homes Pty Ltd v Sanders* [2018] WASC 179 (*Gemmill v Sanders*)). However, the parties' consensus as to the type of building remedy order should be given significant weight.

27 There is also a real advantage in making the builder who did the work originally carry out the remedial work. This eliminates the prospect that disputes will arise between the original builder and the repairing builder. There may be a costs saving as well.

28 A possible disadvantage with an order under s 36(1)(a) is that the defects appear to have arisen from poor design. The respondent does not have specialist in-house expertise about glazing issues. However, it had engaged a façade engineer, Mr Gooch, to assist it with this work. This difficulty is addressed by orders 1(a) to 1(k).

### Australian Standards (order 1)

29 It is appropriate for the various building codes and Australian Standards identified in order 1 to be specifically referred to.

30 Although the applicant was not a party to the contract and an order under s 36(1)(a) is not a contractual remedy, these standards were referred to in the contract between the respondent and the owner, pre-stratification, of the property. The versions of the standards referred to in the orders were also referred to in the building permit. Australian Standards are an accepted standard for the performance of work.

### Specificity (order 1(a) to 1(k))

31 Section 36(1)(a) provides that a building remedy order consists of an 'order that a person who carried out a regulated building service remedy the building service as specified in the order'.

32 The operation of s 36 was considered by the Supreme Court in *Gemmill v Sanders*. That case was an appeal from a decision of the Tribunal in favour of an owner granting a building remedy order under s 36(1)(a). The order made in that case was:

...

2. ... the Respondent must:

- (a) Carry out and complete all necessary work at the Applicant's dwelling ... so as to remedy the cause and effect of all cracking to the cornices and ceilings within the dwelling in a proper and proficient manner so as to achieve an aesthetically acceptable result, save for [cracking in specified rooms] ...;
- (b) Make good any damage caused by compliance with (a) above[.]

33 The respondent builder in *Gemmill v Sanders* argued that an order under s 36(1)(a) must 'state in detail how the remedy is to be carried out' (at [164]). Her Honour considered the meaning of the work 'specify' and then went on to say (at [169]):

... I do agree that in light of the Tribunal's clear and unambiguous findings made about the method that is to be implemented to make good the cornices and ceilings, to simply state in the order that Gemmill Homes is required to remedy 'the effect' of all cracking is not to specify how the regulated building service is to be remedied. Put another way, an order that simply requires Gemmill Homes to remedy the effect of the cracking is not to implement the findings made by the Tribunal as to how the defects in the work were to be remedied.

34 This passage may suggest that it is necessary for a building remedy order to specify precisely how the remedial work is to be carried out.

35 Her Honour's remarks must be considered in the context of the particular circumstances before her. It appears that there was evidence before the Tribunal from the owner's expert that the work should be done in a particular way, which included installing 'scrim'. That evidence was not entirely accepted. The Tribunal accepted evidence that there was little benefit in installing scrim. The orders did not clarify or identify which approach to the remedial work should be adopted.

36 There are risks associated with specifying the particular way in which a defective building service should be remedied. *Owners of Strata Plan 52843 and Psaros Builders Pty Ltd* [2013] WASAT 46 and *Owners of Strata Plan 52843 and Psaros Builders Pty Ltd* [2018] WASAT 113 demonstrate this risk. A method for remedying the building service was specified but it did not work because the specified method did not comply with the requirements of the *Building Code of Australia* and could not be carried out.

37 When specifying work in a remedial order, the Tribunal is not required to approve a set of plans. The orders 'specify' the work to be done by specifying a method for doing the work, including designing it. Although the orders set out a method by which the work is to be done, at the end of the day, the Builder is required to achieve the result identified in the chapeau to order 1.

38 The design of the glazing components on a structure such as One Brighton would ordinarily be carried out by a façade engineer. Remediation of existing glazing components was a more complicated task than the work of initial design of glazing system. The respondent is not a specialist designer of glazing systems. It had initially engaged a sub-contractor to carry out the design and installation of the glazing system and had subsequently engaged Mr Gooch to assist it in designing the repairs. It is appropriate that the remedial work, including the design of the remedial work, should be done under the close supervision of an expert engineer. The orders provide for this.

39 The method identified in the orders reflected the evidence given at the hearing about the appropriate method for designing and carrying out the work. The orders do not specify whether the defective service must be remedied by repairing glazing components or replacing them. This reflected evidence at the hearing that repairing glazing components might successfully remedy the defects. It may be that the independent engineer will decide that some of the glazing components must be repaired while others must be replaced in order to make good the defective service. That is a matter for the independent engineer.

40 A site survey is necessary because the apartment building, as constructed, did not reflect the architectural drawings (ts 185-192, 25 July 2019; ts 50 and 65, 26 July 2019). Further, some remedial work had been attempted by the respondent (ts 192-193 and 261, 25 July 2019).

41 A regime for design and approval which was more rigorous than for the original  
construction of a building would be appropriate (ts 67 and 68, 26 July 2019). A quality  
assurance program needed to be developed for the remediation program (Joint Report,  
Exhibit 6 at point 7). The quality assurance should provide for certification, including by  
the independent engineer, but certification of remedial proposals and work could only be  
done on the basis of testing and proper test reports (Joint Report, Exhibit 6 at item 14).

42 It was also apparent that some of the remedial work would be quite complicated and  
detailed. The quality of workmanship would affect the effectiveness of the remedial  
work. An inspection testing programme on site was important to ensure that the remedial  
work was successful (Joint Report, Exhibit 6 at item 4.3).

43 Given the history of disputation between the parties it would be helpful for  
representatives of the applicant to be provided with the opportunity to attend testing  
work.

#### ***Non-glazing defects (orders 2 - 4)***

44 These orders deal with the 'non-glazing' defects, which are much more straightforward than  
the glazing defects. It appears to the Tribunal that these orders adequately specify in  
'tradesman-like language' the remedial work to be undertaken.

#### ***Other matters***

45 To avoid doubt, there should be specific provision for the respondent to make good any  
damage caused by carrying out the remedial work.

#### ***Orders***

1. The respondent remedy, as soon as reasonably practicable and in any event  
by 30 June 2020, in a proper workmanlike manner and, at least, in  
compliance with BCA 2006, AS 2047-1999,  
AS 1170.2-2002, AS 1288-2006, AS 1664.1-1997 each of the doors,  
frames, glass, glazing, head, jamb, mullions, sashes, sills, stiles,  
transoms, window assemblies identified as unsatisfactory in Attachment  
A to the Tribunal's decision made on 1 February 2019 (*The Owners of  
One Brighton Strata Plan 51948 and Pindan Pty Ltd* [2018] WASAT  
84 (S)) (as amended by the orders of the Tribunal made on 26 July  
2019). In the course of remedying those items, the respondent do:
  - (a) by 14 February 2020, appoint an independent, suitably qualified  
practising façade engineer, (with qualifications and experience as  
good or better than those of Mr Simon Jewell of Atelier JV or Mr  
Christopher Gooch of Forth Consulting Pty Ltd) to oversee the  
remediation works (independent engineer) and inform the  
applicant of the appointment;
  - (b) retain the services of the independent engineer throughout the  
course of the remedial works;
  - (c) by 13 March 2020, carry out a site survey of the apartment  
complex at No 1 Barracks Lane, Mandurah for the purposes of:

- (i) deciding whether any invasive or destructive testing needs to be carried out prior to preparing preliminary drawings;
  - (ii) preparing as-built shop drawings of the doors, frames, glass, glazing, head, jamb, mullions, sashes, sills, stiles, transoms, window assemblies referred to in Attachment A;
- (d) prepare as-built shop drawings of the doors, frames, glass, glazing, head, jamb, mullions, sashes, sills, stiles, transoms, window assemblies referred to in Attachment A as unsatisfactory and any other items that are impacted, or need to be taken into account, in remedying the items referred to in attachment A as unsatisfactory;
- (e) provide the independent engineer the as-built shop drawings referred to in 1(c) above for approval;
- (f) once the independent engineer has approved the as-built shop drawings, prepare preliminary design drawings for the remediation works;
- (g) provide the independent engineer with the preliminary design drawings for the remediation works for approval and carry out, or cause to be carried out, any testing required by the independent engineer;
- (h) once the independent engineer has approved the design drawings for the remediation works (including any necessary calculations and testing witnessed by the independent engineer), prepare shop drawings for the items to be procured (in the case of new replacement items), fabricated, constructed or modified;
- (i) provide the shop drawings to the independent engineer for approval;
- (j) once the independent engineer has approved the shop drawings, cause the independent engineer to prepare an installation plan and inspection test plan which is to include:
- (i) the provision for a prototype apartment in which the tradespeople will be inducted and a regime of frequent inspection will be adopted in order to monitor workmanship;
  - (ii) regular inspection by the independent engineer throughout the works, of at least one inspection per fortnight, which can be scheduled or without notice;
  - (iii) a requirement on the respondent to give four weeks' notice to the independent engineer of anticipated practical completion of the remedial works;

- (iv) an inspection regime once the respondent has notified the independent engineer that the respondent considers practical completion has been achieved; and
  - (v) a sign-off process by the independent engineer to certify that practical completion has been achieved (including the ability for the independent engineer to require any further works to be carried out by the respondent to remedy any defects).
  - (k) record in a document including (where applicable) photographs each of the steps taken as set out in paras (b) to (j) above and produce a copy to the applicant within 14 days of request.
2. By a date within two months of the publication of the reasons for decision in this matter, the respondent remove the doors to the switchboard rooms on levels 1 to 7 (near lift 3) and make good any affected doorframes.
  3. By a date within two months of the publication of the reasons for decision in this matter, the respondent make good cracks and chips to the water feature wall tiling in the foyer.
  4. By a date within two months of the publication of the reasons for decision in this matter, the respondent make good expansion cracks to the western-edge of the concrete slab at the level 1 pool area.
  5. The respondent do make good and damage caused by the remedial works.
  6. There be liberty to apply in relation to costs within 21 days.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MR S ELLIS, SENIOR SESSIONAL MEMBER

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[1] The Tribunal as presently constituted amended Attachment A on 26 July 2019 by consent of the parties under the slip rule, to correct a minor error.

[2] Mr Buckley and Mr Jewell prepared joint reports in the name of Atelier JV. There was an objection to parts of Mr Totten's report because it dealt with defects other than those identified in Attachment A.



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