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**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

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

**CITATION** : ANDERSON and CDA BUILDERS PTY LTD [2020]  
WASAT 143

**MEMBER** : MS R PETRUCCI, MEMBER  
MS S CHURN, SESSIONAL MEMBER

**HEARD** : 18 FEBRUARY 2020, 27 JULY 2020 AND 17  
AUGUST 2020 (FURTHER SUBMISSIONS FILED  
24 AUGUST 2020)

**DELIVERED** : 16 NOVEMBER 2020

**FILE NO/S** : CC 1731 of 2019

**BETWEEN** : JOHN ANDERSON  
Applicant

AND

CDA BUILDERS PTY LTD  
Respondent

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*Catchwords:*

*Building Services (Complaint Resolution and Administration) Act 2011 (WA) - Application under s 51(2) and 51(3) Building Services (Complaint Resolution and Administration) Act 2011 to revoke works order not complied with and make a monetary order - Application for costs under s 49 Building Services (Complaint Resolution and Administration) Act 2011 and s 87 of the State Administrative Tribunal Act 2004 (WA) - Turns on own facts*

*Legislation:*

*Building Services (Complaint Resolution and Administration) Act 2011 (WA), s 3, s 5(1), s 6(1), s 9(1), s 10, s 11(1), s 36, s 38, s 38(1), s 49, s 49(1), s 51, s 51(2), s 51(3)*

*Building Services (Complaint Resolution and Administration) Regulations 2011 (WA), reg 5*

*State Administrative Tribunal Act 2004 (WA), s 9, s 87, s 87(1), s 87(2), s 87(6)*

*Result:*

Application partly successful

*Category:* B

**Representation:**

*Counsel:*

Applicant : Mr J Johnstone and Mr C Louw (for 18 February 2020 only)

Respondent : In Person

*Solicitors:*

Applicant : Johnstone Crouse Lawyers and Suffolk-Law Pty Ltd (for 18 February 2020 only)

Respondent : N/A

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

Anderson and CDA Builders Pty Ltd [2020] WASAT 144

Chew and Director General of the Department of Education and Training [2006] WASAT 248

Famiano and Antonelli Investments Pty Ltd [2012] WASAT 230

J & P Metals Pty Ltd and Shire of Dardanup [2006] WASAT 282 (S)

Marvelle Investments Pty Ltd and Argyle Holdings Pty Ltd [2010] WASAT 125 (S)

Owners of Strata Plan No 46493 and Smith [2012] WASAT 218

Panegyres v Medical Board of Australia [2020] WASCA 58

Perth Central Holdings Pty Ltd and Doric Constructions Pty Ltd [No 2]  
[2008] WASAT 302  
Rae and Prima Homes Nominees Pty Ltd [2020] WASAT 24  
Western Australian Planning Commission v Questdale Holdings Pty Ltd  
[2016] WASCA 32

**REASONS FOR DECISION OF THE TRIBUNAL:**

*Introduction*

1           These proceedings concern an application by Mr John Anderson (the **owner**) for the conversion of a works order into an order for the payment of money under the *Building Services (Complaint Resolution and Administration) Act 2011* (WA) (**BSCRA Act**) in respect of remedial works at his property at 53 Harvey Street, Burswood (**the property**).

2           By way of background, on 6 February 2019, a delegate of the Building Commissioner (**Building Commissioner**) referred to the Tribunal a complaint (C153829), wherein the owner alleged that certain building works undertaken by CDA Builders Pty Ltd (**builder** or **respondent**) at the property were not carried out in a proper and proficient manner or were faulty or unsatisfactory. That matter went to a Tribunal mediation on 10 April 2019 (CC 194 of 2019) and, by consent of the parties, the Tribunal made an order (**works order of 10 April 2019**) whereby:

- complaint items 1, 2, 3, 8, 24, 26, 27 and 28 were withdrawn by the owner; and
- pursuant to s 36(1) of the BSCRA Act the builder was required to complete certain works by way of remedy of faulty and defective workmanship in respect of complaint items 4, 7, 9, 10, 12, 14, 15, 17, 19, 20, 21, 25, 29, 30 and 31.

3           On 13 November 2019, the owner lodged his application with the Tribunal alleging that the builder had failed to comply with the works order of 10 April 2019 in that the builder had failed to remedy complaint items 7, 9, 10, 12, 17, 19, 21 and 25 by 31 July 2019 and would fail to complete the required remedial work in regards to complaint item 15 by 31 December 2019. The owner made his application under s 51(2) and (3) of the BSCRA Act.

4           It is useful at this point to set out the works order of 10 April 2019 as follows:

The Tribunal orders by consent:

...

2. Pursuant to s 36(1) of the BSCA (sic) Building Services (Complaint Resolution and Administration) Act 2011 in respect of the following items of complaint:

...

- (ii) Item 7 - Lintel to windows incomplete paint finish

The respondent is to paint the 2nd story window lintels in a proper and proficient manner making good all affected surfaces;

- (iii) Item 9 - Garage ceiling unsatisfactory finish nail popping bad patching

The respondent is to carry out all necessary remedial work to the garage drop ceiling in a proper and proficient manner making good all affected surfaces;

- (iv) Item 10 - Ceiling in loft unsatisfactory finish nail popping bad patching

The respondent is to remedy defective plaster finishes in the location identified in the BIAS report dated 4 May 2018 in a proper and proficient manner making good all affected surfaces;

- (v) Item 12 - Eaves soffit timber beading uneven

The respondent is to remedy split, damaged and dislodged soffit beading in a proper and proficient manner making good all affected surfaces;

...

- (vii) Item 15 - General Brickwork excessive chipped bricks and mortar missing in several places[.]

All brickwork constructed by the builder is to be rendered with a sand finish render and painted in a colour or colours selected by the applicant. Prior to applying the render the respondent is to treat all bricks surfaces with an acid neutraliser and ensure that all appropriate and required weep holes are installed. The said works are to be commenced by 1 September 2019 and completed by 1 December 2019;

- (viii) Item 17 - Exposed aggregate floor incorrect sealer used

The respondent is to remedy the damaged floor in the area identified on page 33 of the BIAS report dated 4 May 2018. The remediated surface finish to be undertaken in a proper and proficient manner, making good all affected surfaces and blended to match the existing surfaces;

- (ix) Item 19 - Door margins insufficient gap to hinge side causing bindings

The respondent is to correct doors and frames to provide uniform gaps (from 2 mm to 5 mm) between doors and frames and so that the hinges do not bind. The remediated surface works to be undertaken in a proper and proficient manner, making good all affected surfaces and blended to match existing surfaces;

...

- (xi) Item 21 - Cracks in polished concrete floor and walls

The respondent is to carry out remediation work to the ground floor to correct the three concrete slab cracks as referred to in the BIAS report dated 4 May 2018. The remediated works are to be undertaken in a proper and proficient manner, making good all affected surfaces and blended to match existing services;

...

- (xiii) Item 25 - Ground floor shower proper grate to be fitted and floor pools water

The respondent is to ensure the water flows to the shower waste and accordance with the requirements of the National Construction Code (BCA) and AS3740 - 2010 Waterproofing of domestic wet areas. All work is to be undertaken in a proper and proficient manner, making good all affected surfaces;

...

3. In respect of all the above items of complaint where a timeframe has not been stipulated the respondent is to complete the work by 31 July 2019.

- 5 The owner now seeks a conversion of the works order of 10 April 2019 in respect of complaint items 7, 9, 10, 12, 15, 17, 19, 21 and 25 into a monetary order. We note that the owner sought leave to withdraw complaint item 25 at a directions hearing on 19 February 2019 and the Tribunal gave leave for that complaint item to be withdrawn. Because of that, complaint item 25 is not before the Tribunal and therefore it cannot be considered by the Tribunal in these proceedings. This means that we are limited to considering complaint items 7, 9, 10, 12, 15, 17, 19 and 21, and in particular determining whether those eight complaint items were remedied by the builder as set out in the works order of 10 April 2019, and if not, whether the Tribunal is to make a monetary order in favour of

the owner under s 36(1)(b) or s 36(1)(c) of the BSCRA Act, and if so, the amount of the monetary order.

- 6 There is another decision of the Tribunal concerning the parties and other building works at the property (see *Anderson and CDA Builders Pty Ltd* [2020] WASAT 144). This matter and the other matter were heard separately and determined separately by the Tribunal.

### *Procedural history*

- 7 Following a directions hearing on 4 December 2019, the Tribunal made its usual orders programming the matter through to a final hearing. The orders required, among other things, for the owner and the builder to file with the Tribunal and to provide a copy to the other party of all the documents on which they wished to rely including any expert reports, photographs and quotations or other documents relevant to the costing of the complaint items.

- 8 The final hearing was set down for one day on 18 February 2020. The owner attended the hearing and was legally represented. The builder took no part in the hearing on 18 February 2020. However, before we made our decision on the issues before us in this matter, the builder sought leave to reopen the hearing of 18 February 2020 to present its evidence. Following a directions hearing and the filing of written submissions from each party, on 11 June 2020, the Tribunal handed down its oral decision granting leave to the builder to reopen the hearing of 18 February 2020 to present its evidence. Following further directions hearings, the Tribunal heard the matter over two days on 27 July 2020 and 18 August 2020. Both parties attended by teleconference.

- 9 On 25 August 2020, the Tribunal reserved its decision.

### *Evidence*

- 10 In accordance with the Tribunal's usual practice in matters of this nature, the hearing was conducted on the basis that all of the documents filed with the Tribunal would be regarded as being in evidence, subject to any objection. There was no objection to the admission of any of the documents into evidence. During the hearing, the Tribunal marked the following documents, to which the Tribunal has had regard for the purpose of determining the issues as set out below in [17], as exhibits:<sup>1</sup>

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<sup>1</sup> Although forming part of 'exhibits', the parties' contentions and submission in Exhibit 1, 6, 8, 9, 10, 12 and 13 are taken to be submissions, rather than evidence.

- hearing book (pages 1 to 105) prepared by the owner's legal representative (Exhibit 1)<sup>2</sup>;
- owner's report from BIAS dated 4 May 2018 (Exhibit 2);
- owner's report from Mayes Drafting including the architectural drawings for Lot 36 (No 53) Harvey Street, Burswood dated 11 July 2014 (Exhibit 3);
- owner's report from Airey Taylor Consulting Engineers and Scientists dated 3 September 2018 (Exhibit 4);
- owner's quote from Perth Render #0751 dated 1 October 2019 dated (Exhibit 5);
- hearing book prepared by the Tribunal dated 23 July 2020 (pages 1 to 221) (Exhibit 6);
- builder's first bundle of documents with contractor quotes dated 7 August 2020 (Exhibit 7);
- owner's email of 7 August 2020 (Exhibit 8);
- builder's second bundle of documents with contractor quotes dated 10 August 2020 (Exhibit 9);
- builder's third bundle of documents with contractor quotes dated 10 August 2020 (Exhibit 10);
- owner's updated report from Mr Peter Beyer dated 11 August 2020 (Exhibit 11);
- owner's bundle of documents with contractor quotes dated 11 August 2020 (Exhibit 12);
- builder's fourth bundle of documents with contractor quotes dated 24 July 2020 (Exhibit 13); and
- builder's fifth bundle of documents with contractor quotes dated 17 August 2020 (Exhibit 14).

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<sup>2</sup> Order 7 of the orders made by the Tribunal on 4 December 2019.



11 During the hearing the owner called upon the following contractors to give evidence in respect of the various complaint items set out in the works order of 10 April 2019:

- 1) Mr Peter Earl of Perth TLC Group (**TLC**) in respect of the quote at page 30 of Exhibit 1;<sup>3</sup>
- 2) Mr Moses Paysuzan of Mps Plastering WA in respect of the quote at page 20 of Exhibit 1;
- 3) Mr Claude Lenzo of Texture WA/Lenzo Plasterers/Prestige Corbels & Mouldings of the quote at pages 24-25 of Exhibit 1;
- 4) Mr Daniel Colgove of Perth Render in in respect of the quote at pages 21-22 of Exhibit 1 and Exhibit 5;
- 5) Mr Daniel Cernegan of A1 Texture Coating in respect of the quote at page 26 of Exhibit 1;
- 6) Mr Benjamin Kane of Perfection Floors in respect to the quote at page 16 of Exhibit 1;
- 7) Mr John Hughes of Air Roofing Company in respect of the quote at pages 168 to 171 of Exhibit 6;
- 8) Mr Steven Francisco of Access Matrix Scaffold Pty Ltd in respect of the quote at page 167 of Exhibit 6;
- 9) Mr William Telek of Will's Plastering Service in respect of the quote at page 174 of Exhibit 6;
- 10) Mr Alex Ahmadi of Bamica Painting in respect of the quote at page 173 of Exhibit 6;
- 11) Mr Benjamin Kane of Perfection Floors in respect of the quote at page 16 of Exhibit 1;
- 12) Mr Paul Lopresti of N. & T. Lopresti & Co in respect of the quote at page 19 of Exhibit 1; and

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<sup>3</sup> At hearing on 17 August 2020, the owner stated that TLC had retracted its quote and instead requested the Tribunal to consider PRM quote: ts 116, 17 August 2020.

- 13) Mr Adrian Rains of Property Repair & Maintenance (**PRM**) in respect of his quote dated 24 January 2020 in Exhibit 8.

12 Further, the owner called upon the following experts to give evidence at the hearing:

- 1) Mr Peter Airey of Airey Taylor Consulting in respect of his report at pages 146 to 163 of Exhibit 6;
- 2) Mr Daniel Metcalfe of HNC Building Construction in respect of his report at pages 143 to 144 of Exhibit 6; and
- 3) Mr Peter Beyers in respect of his report at pages 41 to 42 of Exhibit 1 and Exhibits 8, 11 and 12.

13 During the hearing the builder called upon the following contractors to give evidence in respect of the various complaint items set out in the works order of 10 April 2019:

- 1) Mr Jamie Maguire of Impulse Painting & Decorating Services in respect of the quote at page 136 of Exhibit 6;
- 2) Mr Mark Lockyer of Plastering Makeovers in respect of the quote at page 166 of Exhibit 6;
- 3) Mr Frank Pepe of FPP Holdings in respect of the quote dated 28 July 2020 in Exhibit 7;
- 4) Mr Duilio Paccani of Joondanna Painting in respect of the quote #1316 dated 29 July 2020 in Exhibit 7;
- 5) Mr Joe Foti of Multi Scaffold Hire in respect of the quote dated 30 July 2020 in Exhibit 7;
- 6) Mr Robert Dattilo of KDATT in respect of the quote dated 18 August 2020 in Exhibit 14;
- 7) Mr Leon Messina of WA Terrazzo in respect of the Shine it Systems quote in Exhibit 7; and
- 8) Mr George Wellstead of All Surface Restorations in respect of the quote dated 5 November 2019 in Exhibit 7.

14 The builder called upon Mr Graeme Moon of Midland Brick to give  
evidence in respect of brick cleaning in respect of complaint item 15.  
Further, the builder called upon Mr Wellstead to explain his report in  
Exhibit 7.

15 An analysis of the costings evidence in respect of the various  
complaint items per the works order of 10 April 2019 follows  
sequentially later in these reasons.

16 We turn, next, to set out the issues to be determined by the Tribunal  
in this matter.

***The issues***

17 The issues to be determined by the Tribunal in this matter are:

- 1) Did the builder comply with and complete the remedial works as required by the works order of 10 April 2019?
- 2) If the builder has not complied with the works order of 10 April 2019, should the Tribunal exercise its discretion under s 51 of the BSCRA Act to revoke that order and make a building remedy order (monetary order) under s 36(1)(b) or (c) of the BSCRA Act? If the Tribunal decides to revoke the works order of 10 April 2019 and make a monetary order, what is an appropriate order?
- 3) What costs of these proceedings, if any, are payable?

18 Before setting out the relevant legal framework, we turn, next, to  
briefly set out the position of each party.

***Summary of each party's position***

19 The owner contends that despite having agreed for the builder to complete the rectification work as set out in the works order of 10 April 2019, the builder has only partially complied with that order. Consequently, the owner seeks an order from the Tribunal pursuant to s 51(2) and (3) of the BSCRA Act for the works order of 10 April 2019 that required remedial works to be carried out to be converted into a monetary order in the amount of \$84,106 (increased from the amount of \$73,008 claimed by the owner in his application to the Tribunal as he had

omitted to include the cost to remedy complaint items 17 and 21) to remedy complaint items 7, 9, 10, 12, 15, 17, 19 21 and 25.<sup>4</sup>

20 The owner also seeks costs in the amount of \$19,704.26 as set out in [109] below.

21 The builder contends that complaint items 10 and 19 have been completed and all that is required for complaint items 17 and 21 is a final buff. In regards to complaint items 7, 9, 12 and 15 the builder stated that those complaint items had not been completed because the plastering work needed to be completed first, which had not been done because the owner prevented them from doing those works by using delaying tactics and not clearing out the owner's items stored in the garage.

22 The builder opposes the owner's claim for costs in these proceedings.

### *Legal framework*

23 Subject to the BSCRA Act, a person may make a complaint within certain time limits to the Building Commissioner, including about a regulated building service not being carried out in a proper and proficient manner or being faulty or unsatisfactory: s 5(1) and s 6(1) of the BSCRA Act and reg 5 of the *Building Services (Complaint Resolution and Administration) Regulations 2011* (WA) (**Regulations**).

24 Having accepted a building service complaint, the Building Commissioner is then required to cause an investigation to be carried out and, after having regard to any report given under s 10 of the BSCRA Act, may refer the complaint to the Tribunal for it to deal with under s 38 of the BSCRA Act (s 3, s 9(1) and s 11(1) of the BSCRA Act). The Tribunal may then make a building remedy order (**BRO**) if it is satisfied that the regulated building service has not been carried out in a proper or proficient manner or is faulty or satisfactory (s 38(1) of the BSCRA Act).

25 A BRO is defined in s 36(1) of the BSCRA Act and includes an order that a person who carried out a regulated building service remedy the building service as specified in the order (s 36(1)(a) of the BSCRA Act). It also includes an order pay to an aggrieved person a sum of money specified in the order to compensate the aggrieved person for the failure to carry out the building service in a proper and proficient manner or for faulty and unsatisfactory building work (s 36(1)(c) of the

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<sup>4</sup> ts 7, 18 February 2020.

BSCRA Act). Section 36(2) of the BSCRA Act provides that a BRO may require the order to be complied with within a time specified in the order.

26 Section 51 of the BSCRA Act grants discretion to the Tribunal to revoke a BRO in relation to remedying the building service or the part in question and to make a BRO pursuant to s 36(1)(b) or (c) of the BSCRA Act. Section 36 of the BSCRA Act relevantly provides:

(1) A building remedy order consists of one of the following -

...

(b) an order that a person who carried out a regulated building service pay to an aggrieved person such costs of remedying the building service as the Building Commissioner or State Administrative Tribunal, as the case requires, considers reasonable and specifies in the order;

(c) an order that a person who carried out a regulated building service pay to an aggrieved person a sum of money specified in the order to compensate the aggrieved person for the failure to carry out the building service in a proper and proficient manner or for faulty or unsatisfactory building work.

27 In this case, the owner seeks an order from the Tribunal converting the works order of 10 April 2019 into a monetary order.

28 We turn, next, to determine each of the issues set out in [17] above.

### *Consideration by the Tribunal*

#### **Issue 1 - Did the builder comply with, and complete the remedial work required by the works order of 10 April 2019?**

29 The owner submitted that the builder has failed to complete most of the remedial works required by the works order of 10 April 2019. The builder disagreed. As set out earlier, the builder contends that complaint items 10 and 19 were completed and all that is required for complaint items 17 and 21 is a final buff. In regards to complaint items 7, 9, 12 and 15 the builder stated that they have not been completed because the plastering needs to be completed first and that was not possible, according to the builder, because the owner used delaying tactics and did not clear out the owner's items stored in the garage, to prevent the builder from doing the plastering.

30 We will work through each of complaint items 7, 9, 10, 12, 15, 17, 19 and 21 to determine if the builder complied with, and completed the remedial works required by the works order of 10 April 2019.

**Complaint item 7 - lintel to windows incomplete paint finish**

31 The owner stated that the second storey window lintels had not been painted. According to the owner, the work required to remedy this complaint item is to prime and prepare the lintels for painting and then supply and apply two coats of the Metalshield exterior paint.<sup>5</sup> Originally, the owner relied on quote R-Q-295A dated 10 January 2020 prepared by Perth TLC Group for this complaint item.<sup>6</sup> However, at the hearing on 17 August 2020, the owner said Perth TLC had 'withdrawn' and that he no longer relied on that quote.<sup>7</sup> Instead, the owner referred the Tribunal to a quote from PRM for \$1,820 plus GST which included scaffolding for two days.<sup>8</sup> Mr Rains of PRM explained at hearing that a 'large percentage' of the quote would 'probably [be for] the scaffold supply and install'.<sup>9</sup> Further, Mr Rains explained that, in his view, it was not necessary to render the exterior of the home before painting the lintels.<sup>10</sup> Mr Rains said that he did not think it was 'a big deal either way'.<sup>11</sup>

32 The builder conceded that it had not painted the second storey lintels to the windows. However, the builder explained that this complaint could not be completed because if the lintels were painted before the external plastering work was done, it would be highly likely that the steel lintels would be scratched and damaged during the external plastering process which would result in having to repaint the lintels again. The builder said that it is normal building practice to do such painting work after the external plastering is completed.

33 We find that the builder did not complete the remedial works as set out in the works order of 10 April 2019 for complaint item 7. We will deal further with this complaint item along with complaint item 15 at [53] to [74] below.

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<sup>5</sup> ts 16, 18 February 2020.

<sup>6</sup> Exhibit 1, at page 30.

<sup>7</sup> ts 116, 17 August 2020.

<sup>8</sup> Exhibit 8.

<sup>9</sup> ts 110, 17 August 2020.

<sup>10</sup> Ibid.

<sup>11</sup> ts 109, 17 August 2020.

**Complaint item 9 - garage ceiling unsatisfactory finish nail popping bad patching**

34 The owner said the garage ceiling was removed by the builder and that there is adhesive residue that has to be removed. Further, the owner said cleaning of the bulkhead framework is required as well as the fitting of a new ceiling, the supply and installation of new gyprock panels within the bulkhead and then ancillary work, being a full flush and sanding in preparation for the painting that is required by the application of two coats of paint.

35 Originally, the owner relied on quote R-Q-295A dated 10 January 2020 prepared by TLC for this complaint item.<sup>12</sup> However, at the hearing on 17 August 2020, the owner said TLC had 'withdrawn' and that he no longer relied on that quote.<sup>13</sup> The owner presented a quote from PRM for \$3,136 plus GST to construct the bulkhead, supply and install Gyprock, flush, sand and paint.<sup>14</sup> Mr Rains explained at hearing that he quoted on this particular complaint item only and that he was not quoting to coordinate the remedial works.<sup>15</sup> Mr Rains stated that he had not seen any plans but if the painting component was removed his quote is to be reduced by a 'few hundred bucks, probably'.<sup>16</sup>

36 The builder stated that its contractor had taken down the garage gyprock ceiling and could not find any fault with the stud framework. The builder conceded that the ceiling is still to be reinstated. The reason for this, according to the builder, is because the internal walls of the garage need to be plastered before the garage ceiling can be reinstated. The builder explained that it is normal building practice for plastering to be done past the point of where the ceiling and cornices sit and then to reinstate the ceiling and cornices to achieve the best finish. The builder presented an email from Mr Louis Mahoney of Mr Maintenance dated 28 July 2020 stating it would cost \$2,800 to undertake the remedial work for this complaint item as follows:<sup>17</sup>

Needs more supports installed

...

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<sup>12</sup> Exhibit 1 at page 30.

<sup>13</sup> ts 116, 17 August 2020.

<sup>14</sup> Exhibit 8.

<sup>15</sup> ts 111, 17 August 2020.

<sup>16</sup> Ibid.

<sup>17</sup> Exhibit 7.

Can rectify

And install extra supports

And fix and flush with cornice

For

\$2,800 plus GST

37 The builder confirmed that Mr Mahoney had not been to the property and that he had worked off the plans and photographs to prepare his quote.<sup>18</sup>

38 We find that the builder did not complete the remedial work required for complaint item 9 as set out in the works order of 10 April 2019.

39 We note that the BIAS report of 4 May 2018 (at pages 13 to 14)<sup>19</sup> refers to poor flushing of the garage ceiling and that the works order of 10 April 2019 does not provide for painting. When PRM's quote of \$3,136 plus GST is reduced by \$300 for painting this results in an amended quote of \$2,836 plus GST which, in our view, is very close Mr Maintenance's quote of \$2,800 plus GST.

40 We consider that a fair and reasonable cost to complete the remedial work required by complaint item 9 is \$2,800 plus GST.

**Complaint item 10 - ceiling in loft unsatisfactory finish nail popping bad patching**

41 The owner explained that the ceiling needs to be removed and then new fittings are to be installed to various locations, the cornice (shadow board) cracks, gouges and wall cracks are to be resealed, fully flushed and sanded and then painted.<sup>20</sup> Originally, the owner relied on quote R-Q-295A dated 10 January 2020 prepared by TLC for this complaint item.<sup>21</sup> However, at hearing on 17 August 2020, the owner said TLC had 'withdrawn' and that he no longer relied on that quote.<sup>22</sup> The owner presented a quote from PRM for \$1,960 plus GST.<sup>23</sup> At hearing the owner said the ceiling had been painted and some

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<sup>18</sup> ts 15, 17 August 2020.

<sup>19</sup> Exhibit 2.

<sup>20</sup> ts 21-24, 18 February 2020.

<sup>21</sup> Exhibit 1 at page 30.

<sup>22</sup> ts 116, 17 August 2020.

<sup>23</sup> Exhibit 8.



remedial work had been completed by Bamica Painting but that there was still work to be done which was omitted at the top section being cracks around the windows and the ceiling where it adjoins the wall.<sup>24</sup> The owner was also concerned that there was leaking.

42 The builder stated that its contractor, Bamica Painting completed the remedial work for this complaint item and referred the Tribunal to a quote dated 1 August 2019 and tax invoice 0162 dated 27 August 2019 from Bamica Painting for \$4,700.<sup>25</sup> The builder says that the owner approved the works before it paid Bamica Painting. The quote by Bamica Painting provided in part:

Ceilings in all internals - patch the cracks (sic) and dents on ceiling, sand it dust down then apply undercoat where need it and two coats of ceiling paint.

43 We note that the works order of 10 April 2019, as agreed by the parties, did not require the loft walls to have a 'total repaint' which is included in the quote by PRM.<sup>26</sup> Further, we note the works order of 10 April 2019 does not concern leaking, gouges and cracks to the wall and cracks to the cornices. In addition, we note the BIAS report of 4 May 2018 does not identify leaking as an issue.

44 We find that the builder completed the remedial work required for complaint item 10 as evidenced by the invoice from Bamica Painting. The Tribunal will therefore dismiss the owner's claim in respect of this complaint item. In other words, the Tribunal declines to revoke complaint item 10 of the works order of 10 April 2019.

### **Complaint item 12 - eaves soffit timber beading uneven**

45 The owner stated that the eaves soffit timber beading is uneven and has not been remedied.<sup>27</sup> The owner stated that there are other eaves soffit that are cracked and broken and moving away which is on the side of the house and also directly up above the fascia of the house on the second level.<sup>28</sup>

46 Originally, the owner relied on quote R-Q-295A dated 10 January 2020 prepared by TLC for this complaint item.<sup>29</sup> However, at hearing

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<sup>24</sup> ts 21-22, 17 August 2020.

<sup>25</sup> Exhibit 6 at pages 26 to 27.

<sup>26</sup> Exhibit 8.

<sup>27</sup> ts 25, 18 February 2020.

<sup>28</sup> ts 121, 17 August 2020.

<sup>29</sup> Exhibit 1 at page 30.

on 17 August 2020, the owner said TLC had 'withdrawn' and that he no longer relied on that quote.<sup>30</sup> Instead, the owner referred the Tribunal to the quote from PRM for \$2,590 plus GST which provided as follows:<sup>31</sup>

4. Eaves soffit require timber beads to be replaced (scotia).
  - Internal doors need margins adjusted to allow doors to open and close as they are binding.
  - Double doors leading to kitchen need to be switched to open opposite way.
  - The door handle to garage needs to have a leaver hand to match others to house.
  - Balcony door needs weather seals fitted (RP78)
  - Trip hazards on tips of the stringer to stairs/landing need to be trimmed.
  - Underneath stairwell needs finishing with an architrave then to doors to be installed (owner to pay separately)
  - Laundry shelf needs supporting rail installed to rectify sagging.

47 The builder conceded the remedial work for this complaint has not been done. The builder stated that the remedial work for this complaint item would be done following completion of the rendering work (which the builder conceded has not been done). The builder stated that it is normal building practice to undertake the following steps: (1) remove the beading; (2) complete the rendering work; (3) install the beading; and (4) paint the beading together with the external sand finish.<sup>32</sup> Further, the builder said the expense of hiring scaffolding is not required for this complaint item as a ladder will suffice.<sup>33</sup>

48 The builder referred the Tribunal to a quote from KTDATT dated 18 August 2020 for \$165 to 'supply and install jarrah beading to soffit lining above garage opening at front elevation (sic)'.<sup>34</sup>

49 Mr Robert Dattilo of KTDATT stated that Mr John Dattilo is his brother, however, the quote he provided is his 'standard price [he] give[s] to all [his] customers and anyone else that needs the job done'.<sup>35</sup>

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<sup>30</sup> ts 116, 17 August 2020.

<sup>31</sup> Exhibit 8.

<sup>32</sup> ts 23, 17 August 2020.

<sup>33</sup> ts 23-24, 17 August 2020.

<sup>34</sup> Exhibit 14.

<sup>35</sup> ts 119, 17 August 2020.

Mr Robert Dattilo confirmed that his quote was only for the soffit that is damaged, cracked or breaking at the front of the garage above garage roller door.<sup>36</sup>

50 We find that the builder did not complete the remedial work required for complaint item 12 as set out in the works order of 10 April 2019.

51 We find that PRM's quote includes works that were not required by the works order of 10 April 2019. We find KTDATT's quote only provides for the remedial work of the eaves timber beading above the garage opening and does not provide a scope of works for other eaves timber beading that is uneven. We accept the builder's submission that PRM's quote is to be reduced by \$1,980 for works not required by the works order of 10 April 2019. This leaves an adjusted PRM quote of \$610 plus GST. The builder also submitted that the amount of \$610 needs to be reduced further in regards to the works for underneath the stairwell but made no submission as to how much the reduction should be.

52 We consider that a fair and reasonable cost to complete the work required to remedy complaint item 12 is \$610 plus GST to remedy all the eaves soffit timber beading that is uneven.

**Complaint item 15 - general Brickwork excessive chipped bricks and mortar missing in several places[.]**

53 The owner submitted quote QU-0275 dated 31 October 2019 by Ample Power (page 18 of Exhibit 1), quote 1255 dated 18 November 2019 by N & T Lopresti & Co (page 19 of Exhibit 1), quote 316 dated 23 October 2019 by Mps Plastering WA (page 20 of Exhibit 1), updated quote #751 dated 1 October 2019 by Perth Render (Exhibit 5) and quote per email of 19 July 2019 by Mr Claude Lenzo of Texture WA/Lenzo Plasterers/Prestige Corbels & Mouldings (page 24-25 of Exhibit 1) to support his claim for complaint item 15.

54 At hearing on 18 February 2020, counsel for the owner made the following submission regarding complaint item 15 and the above listed quotes:

[In] terms of MPS Plaster, MPS Plaster has made provision for the job to take eight weeks. His price was a GST-inclusive amount of 40,667 which excluded scaffolding. It also excluded the removal of the downpipes,

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<sup>36</sup> ts 121, 17 August 2020.

the electrical fittings, the garage doors. And in terms of the acid neutraliser, by all accounts, it appeared the contractor did not deem that necessary.

...

In respect of Mr Lenzo, his quote was - including GST, 52,602, and then excluding scaffolding once again. And in respect of the other items, his quote was in that respect I would call an inclusive quote, aside from the garage door. Although he was of the view that there might be a workaround in respect of the garage door[.]

Now, in respect of Perth Render, this quote is quite detailed in the respect that it contains a number of exclusions which is removing the existing downpipes - that's at the second page - disconnecting the electrical, disconnecting the air conditioning[.]

So then in respect of the, I suppose - the exclusions, Member - the scaffolding in particular is going to be the big ticket item in that respect. Now, there is a quote from A1 Texture Coating in respect of scaffolding. Scaffolding simply states that the rehire, assemble, dismantle, required access scaffolding - 5000 - or including GST -five-five including GST. So the question there is simply going to be how long would that take - how long does that quote provide for - whether it's a week or four weeks or whatever the case might be[.]<sup>37</sup>

[S]o each of these quotes - all of these quotes excluded acid wash, so all of these quotes should in theory be - well, should - an extra 2200[.]

Now, in respect of the fixtures and fittings, if I may, Member, again, my position would be that there's no necessity to call the contractors. I think with the range we have got, we have got a fairly good estimate in terms of dealing with that. So again, if I include the acid neutraliser on the higher end, it would be in the vicinity of 60,000. On the bottom end, if I include the two-two for the acid neutraliser, it is going to be 48,300. So my submission would be that we simply adopt a midway point there of, say, 55 - 55, again, something like that. I think that would give us a good sort of estimate in terms of where we are sitting with - for practical purposes in terms of what that quote - what that range would be[.]<sup>38</sup>

55 The issue of brick cleaning was a hotly contested item at hearing. The owner made the following comments:<sup>39</sup>

Having had a brick cleaning team for over 2 years I was aware and consequently repeatedly advised the builder/John Dattilo that the bricks needed to be cleaned approximately 6 weeks after being laid and certainly

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<sup>37</sup> ts 63-64, 18 February 2020.

<sup>38</sup> ts 75, 18 February 2020.

<sup>39</sup> Exhibit 1, page 95.

no longer than 8 weeks otherwise the cement sets like concrete and is basically unremovable. Despite my continued protestations the builder elected to wait some 14 months before the bricks were cleaned.

The whole house was cleaned within a day and I was astonished by this time frame and extremely disappointed with the result... The builder/JD did ask me on a few occasions if I wanted to clean the bricks. I stated emphatically that I did not want to clean or touch the bricks and certainly not after 8 weeks.

56 Counsel for the owner (as set out above at [54]) submitted the costing for an acid wash of all of the brick surfaces would be \$2,200.

57 The issue of flashing and whether it should be removed was also a contentious issue at hearing. Mr Lockyer of Plastering Makeovers is of the view that flashings need to be removed and then put back on again to achieve a high level of quality and that he would not recommend leaving flashings that are designed to protect and work up against a flat brick to have render sliced off at the top of it.<sup>40</sup> In regards to whether, in this case, he could commence rendering work at the rear of the house, Mr Lockyer stated that it was a 'case by case basis' and that there was room to move around a little, such as if it a rainy day, he would do work under the eaves rather than out in the open.<sup>41</sup> Mr Lockyer's quote requires the roof flashings to be removed in order to undertake the remedial work for this complaint item.<sup>42</sup> Mr Lockyer reiterated that if a reasonable level of quality is to be achieved the flashing will have to be removed to do the rendering and then the flashings would be installed.<sup>43</sup>

58 In summary, counsel for the owner submitted on 18 February 2020 that the mid-range figure of the quotes submitted by the owner is \$55,000 to allow for acid neutralising of the bricks, removal of items such as the garage door and down pipes, removing of flashing from parapet wall to allow for render and then the replacement of all fillings and flashings and the hiring scaffolding.

59 The builder submitted that this complaint is to be broken down into the following components: brick cleaning, rendering, plastering, painting and scaffolding.

60 In regards to brick cleaning, the builder said the owner was not happy with the brick cleaning undertaken by Kleenit. The builder said

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<sup>40</sup> ts 97 and 102, 17 August 2020.

<sup>41</sup> ts 104, 17 August 2020.

<sup>42</sup> Exhibit 6 at page 166.

<sup>43</sup> ts 97, 17 August 2020.

the brick cleaning was completed in November 2019 as evidenced by the Keenit's tax invoice 134369 dated 27 November 2019.<sup>44</sup> The builder referred to an email from Mr Jeffrey Huang, an engineering intern, of Think Brick Australia dated 24 July 2020.<sup>45</sup> The builder conceded that Mr Huang had not been to the property, however noted that Mr Huang stated that 'it is important that the surface of the brick wall is well prepared' and that 'a steel brush [is used] to remove any dirt, dust, oil, paint or loose material that will prevent good adhesion of the render to the brick wall' and that if any brickwork had been cleaned recently that 'any cleaning solutions (bicarbonate soda, hydrochloric) have been neutralized with water and that the wall is completely dry'. The builder said that the owner had agreed with the contents of Mr Huang's email to the builder.<sup>46</sup>

61 The builder referred to Mr Moon from the Midland Brick Company who explained at hearing that the washing down of the brick with a bicarbonate of soda and water mixture is commonly used by most brick cleaners in and around Perth who want to neutralise acid on a brick cleaning job. Mr Moon stated that there are other brick cleaners, however, carbon soda is an economical product.<sup>47</sup> Further, Mr Moon explained that following the washing down of the bricks, the wall could then be plastered or rendered.<sup>48</sup> Mr Moon said that it would be preferable to do the washing down of the bricks as soon as possible so that acid does not affect the bricks or the mortar any further. However, Mr Moon said that it was possible to use the bicarbonate of soda and water mix to neutralise any remnant acid many years later such as five years after the bricks were laid.<sup>49</sup>

62 The builder stated that it had made attempts from September 2019 to commence rendering in the garage of the property. The builder says it sent to and received emails from the owner over several months, including that of 23 September 2019,<sup>50</sup> where it tried to obtain from the owner a date or a timeframe from which it could commence the rendering work. The builder said the owner was not forthcoming.

63 Because the brick cleaning was 'not sufficient' for the owner's standard, the builder said, 'it was a contentious item. We could not

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<sup>44</sup> Exhibit 6.

<sup>45</sup> Exhibit 13.

<sup>46</sup> ts 29, 17 August 2020.

<sup>47</sup> ts 34-35, 17 August 2020.

<sup>48</sup> ts 35, 17 August 2020.

<sup>49</sup> ts 38, 17 August 2020.

<sup>50</sup> Exhibit 6 at pages 56 to 64.

commence rendering if we could not get past the brick cleaning issue'.<sup>51</sup> The builder stated that regardless of the brick cleaning issue, there was no reason why the rendering could not be started in the garage or at the rear of the home. The builder said the rendering was not done because the owner did not want J and A Plastering, a business run by Mr Datillo and Diverse Homes, to be involved with the plastering.<sup>52</sup> The builder stated that it asked the owner many times to remove his things out of the garage so that the rendering and plastering of the wall could be done, but the owner did nothing. The builder described its efforts of trying to work with the owner as 'hitting brick walls' and that it is 'frustrating ... that the owner could not allow us to do what we wanted to do back then'.<sup>53</sup>

64 The builder referred the Tribunal to a number of quotes to complete the plastering work in respect of complaint item 15. The first was a quote from J & A Dattilo Plastering QU-0586 dated 14 September 2019 for \$7,260 plus GST and the second was a quote from ID Plastering dated 4 June 2020 for \$8,000. The builder explained that these quotes were the 'builder rate' or, in other words, what the builder would pay if it engaged the contractor. The builder also provided two other quotes which were described as the 'normal rates' or in other words, what someone (other than a builder) would pay if they engaged the contractor. The first quote was from Mr Pepe of FPP Holdings Pty Ltd dated 28 July 2020 for \$9,484.20 and the other was from ID Plastering dated 29 July 2020 for \$9,000.<sup>54</sup>

65 Mr Pepe reported that he is a plaster of some 35 years' experience and has completed numerous plastering jobs where there is a tin roof and flashings. He recalled having done one job in the past for the builder.<sup>55</sup> He said he quoted for the work based on the plans provided to him and by driving past the property.<sup>56</sup> In regards to the flashing and whether it is to be removed before doing the plastering remedial work, Mr Pepe explained that the first rule is that if there is flashing (for example metal flashing or lead flashing) in place, it is there for a reason and therefore it should stay in place. The second rule, according to Mr Pepe, is to take extra precaution by using tape, drop sheets and plastic to cover and protect the flashing and then to make a control joint above the flashing so that it does not crack below or above (depending on the flashing).

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<sup>51</sup> ts 42, 17 August 2020.

<sup>52</sup> ts 41, 17 August 2020.

<sup>53</sup> ts 42, 17 August 2020.

<sup>54</sup> ts 43-44, 17 August 2020.

<sup>55</sup> ts 46-47, 17 August 2020.

<sup>56</sup> Ibid.

In response to the owner's concern that the flashing is under the gutter on the parapet wall and therefore neither the render nor the flashing are protected when it rains, Mr Pepe explained that as a plasterer he always renders from the top and works his way down the parapet wall to the edge of the flashing and then he does a control joint. Mr Pepe explained the only time he would not render from top to bottom is when there was scaffolding in the way, which he said would be rare.<sup>57</sup> Mr Pepe said it was possible to plaster the rear of the property and the garage and while that was happening to put up the scaffolding for the rest of the house.<sup>58</sup> Finally, Mr Pepe reiterated that he would only remove the flashing if it was damaged and on instruction from the builder.<sup>59</sup>

66 In regards to the painting required for this complaint item, the builder submitted a quote from Joondanna Painting Contractors dated 29 July 2020 for \$6,905.80 which the builder stated was the 'normal rate'.<sup>60</sup> Further, the builder referred the Tribunal to a quote from Impulse Painting and Decorating Service dated 5 May 2020 for \$4,719 which the builder said was the 'builder rate'.<sup>61</sup> The builder stated that both of these quotes were prepared by the respective contractors by reference to the plans and not from attending the property. Mr Paccani told the Tribunal that that Joondanna Painting Contractors has been around for 45 years and that he had been running the business for about 25 years.<sup>62</sup> Further, Mr Paccani said that for most jobs, including for nursing homes, hospitals, schools that he provides quotes using the plans.<sup>63</sup> In this case, Mr Paccani said he was confident of his calculation of 383m<sup>2</sup> to be the area to be rendered using the plans and his computer program.<sup>64</sup> Mr Paccani said that he had not worked for the builder previously.<sup>65</sup> Mr Paccani said it was normal building practice that when the window reveals are painted that the lintels are also painted.<sup>66</sup>

67 In regards to the need for scaffolding, the builder submitted that it was only required for the upper level of the house for about one week for the rendering work and for two days for the painting, or in total scaffolding was required for about nine days. On top of this, the builder said that if a week is allowed for the time between rendering and painting

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<sup>57</sup> ts 56, 17 August 2020.

<sup>58</sup> Ibid.

<sup>59</sup> ts 56, 17 August 2020.

<sup>60</sup> Exhibit 7.

<sup>61</sup> Exhibit 6 at page 73.

<sup>62</sup> ts 65, 17 August 2020.

<sup>63</sup> ts 68, 17 August 2020.

<sup>64</sup> ts 69, 17 August 2020.

<sup>65</sup> ts 64, 17 August 2020.

<sup>66</sup> ts 64, 17 August 2020.



then the scaffolding would only be required for the upper level of the house for a total of three weeks.<sup>67</sup> The builder submitted a quote from Multi Scaffold Hire which is a quote for six weeks for \$5,470 plus GST.<sup>68</sup> Mr Foti of Multi Scaffold Hire explained that he provided his quote using the plans and said that there is a fixed cost for labour and cartage. To hire scaffolding for three weeks, Mr Foti said the charge would be \$4,984 plus GST. The builder noted that Mr William Telek of Will's Plastering, called by the owner, stated during the hearing on 27 July 2020 that scaffolding would be required for about four weeks to complete the rendering and painting remedial work.<sup>69</sup>

68 The owner disagreed with the builder's estimation of the number of weeks that scaffolding would be required. The owner submitted that from speaking with painters, about six weeks will be required as the painter wants the render to sit for a minimum of three weeks before the painting is done.<sup>70</sup>

69 Finally, in regards to electrical and plumbing work where downpipes need to be removed, the builder presented a quote from Hardline Electrics dated 3 May 2020 for \$800 plus GST for the 'builder rate' and \$1,110 plus GST for the 'normal rate'.<sup>71</sup> Further, the builder presented a quote from Mr Blockage Plumbing & Gas for \$1,150 and a quote from B&D Roof plumbing dated 4 May 2020 for \$600 plus GST.

70 In conclusion, the builder submitted that it was prevented from completing the rendering remedial work and therefore it follows that it was also prevented from completing the painting required to remedy complaint item 15. Because of this the builder submitted that if any monetary order is made in favour of the owner, it should be the 'builder rate'.

71 We find that the builder did complete part of the remedial work required for complaint item 15 as set out in the works order of 10 April 2019.

72 We note that complaint item 15 in the works order of 10 April 2019 does not specify how or with what product(s) the brick surfaces are to be treated. The order provided that the builder 'is to treat all bricks (sic) surfaces with an acid neutraliser'. The evidence of Mr Haung and

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<sup>67</sup> ts 72-73, 17 August 2020.

<sup>68</sup> Exhibit 7.

<sup>69</sup> ts 73, 17 August 2020.

<sup>70</sup> ts 81, 17 August 2020.

<sup>71</sup> Exhibit 6 at page 23 and Exhibit 7.

Mr Moon was that the method used by the builder's contractor, Kleenit, to treat all brick surfaces using a broom of bicarbonate soda paste followed by a bicarbonate soda wash using a pressure pack followed by a fresh water wash day was an appropriate method. Even though the owner was astonished that the brick cleaning was done within a day and that he was extremely disappointed with the result, we find the brick surfaces have been treated with an acid neutraliser, as explained above.

73 Further, as conceded by the builder, we find the brickwork is yet to be rendered with a sand finish and painted. We accept the builder's evidence that it endeavoured to engage with the owner from about September 2019 to commence rendering the garage, but because the parties could not get past the 'brick cleaning issue', the builder was not able to undertake the rendering or the plastering remedial works.

74 We consider that a fair and reasonable cost to complete the work required to remedy complaint items 7, 15 and 21 is \$18,966 plus GST. This is a combination of the following quotes: Scaffolding \$5,470 + Electrical \$880 + Downpipes \$660 + \$1150 + Rendering \$7,260 + Painting \$4,719 (all plus GST).

### **Complaint item 17 - exposed aggregate floor incorrect sealer used**

75 The owner stated that Mr Beyers attended the property on 21 December 2019 to review the concrete finish. Mr Beyers opined that the remedial work had not achieved an overall improvement to the finish and the sealer finish was poor in sections. The owner stated that the reason he did not want Shine It Systems to return was because '[he] was not advancing' and that 'the floor looks much worse now than it was before [Shine It Systems] came back to attempt to remediate it'.<sup>72</sup> Further, the owner said 'I had a lot of faith and trust in [Mr Dunstan of Shine It Systems], but I cannot trust him now because he said he had done the whole floor, which he has not done'.<sup>73</sup>

76 The owner referred the Tribunal to the quote from Perfection Floors dated 9 January 2020 for \$14,260 plus GST for this complaint item and complaint item 21.<sup>74</sup> The quote provided a scope of works including a final buff/burnish of the floor, however it does not provide a breakdown of the costings.

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<sup>72</sup> ts 132, 17 August 2020.

<sup>73</sup> ts 133, 17 August 2020.

<sup>74</sup> Exhibit 1 at page 16.

77 The builder explained that the remedial work was commenced in November 2019 by WA Terrazzo via their contractor, Shine It Systems, where the cracks were filled with a white filler/sealer which the owner had approved. When the contractor tried to return to do a final buff of the areas where the remedial work had been done, the builder stated that the owner would not allow the contractor to return.<sup>75</sup> The builder referred the Tribunal to an email dated 28 November 2019 that it had sent to the owner and to Mr Dunstan of Shine It Systems noting that Mr Dunstan would be returning to the property on 3 December 2019 and 12 December 2019 at 8 am to complete the remedial work. Further, the builder referred the Tribunal to an email from the owner dated 27 February 2020 stating that the 'matter is currently before the [Tribunal] and therefore we shall wait'.<sup>76</sup>

78 Mr Messina from WA Terrazzo explained at hearing that the reason why the remedial work was not completed by 1 December 2019 would have been because Mr Dunstan from Shine It Systems was not able to get there to do the work.<sup>77</sup>

79 The builder submitted that the cracks were remedied and all that was required was the final buff. The builder submitted that if the Tribunal found that it had not completed the remedial work for complaint item 17, then any monetary order made by the Tribunal should be limited to \$400 plus GST which is the amount set out in Invoice 00002579 dated 5 November 2019 from All Surface Restorations for 'concrete crack - repair'.<sup>78</sup>

80 We note that at page 33 and 34 of the BIAS report dated 4 May 2018 which was referred to in the works order of 10 April 2019 in respect of this complaint item, it is stated that at the time of inspection there was damage to the sealer (specifically window cleaner) of the exposed aggregate concrete floor.<sup>79</sup> We find that the builder did not complete all the required remedial work for complaint item 17 as set out in the works order of 10 April 2019, in that it did not do a final buff of the area identified in the BIAS report of 4 May 2018 at page 34. We accept the builder's evidence that its contractor, Shine It Systems, was ready to complete the remedial works on 3 and 12 December 2019, which was after the deadline of 31 July 2019 per order 3 of the works order of

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<sup>75</sup> ts 123, 17 August 2020.

<sup>76</sup> Exhibit 6 at page 82.

<sup>77</sup> ts 131, 17 August 2020.

<sup>78</sup> ts 146, 17 August 2020.

<sup>79</sup> Exhibit 2.

10 April 2019. However, we find that the owner agreed, by his conduct, for the builder to undertake the remedial work after 31 July 2019.

81 We consider that a fair and reasonable cost to complete the work required to remedy this complaint item and complaint item 21 (see below at [86] to [92]) is \$400 plus GST.

**Complaint item 19 - door margins insufficient gap to hinge side causing bindings**

82 The owner stated that the builder has partially completed the remedial work for this complaint item. He said that one bathroom door and frame is still to be corrected to provide uniform gaps.<sup>80</sup> Originally, the owner relied on quote R-Q-295A dated 10 January 2020 prepared by TLC for this complaint item.<sup>81</sup> However, at hearing on 17 August 2020, the owner said TLC had 'withdrawn' and that he no longer relied on that quote.<sup>82</sup> The owner stated that the door margins were never rectified by the builder and that the information he supplied to the builder was in regards to the double doors and not the doors that concern this complaint item.<sup>83</sup>

83 The builder's position is that its contractor, Bestway Carpentry, attended the property and completed the required remedial work in October 2019.<sup>84</sup> The builder referred to an email from the owner dated 21 October 2019 wherein the owner stated '[t]he doors have been replaced and painted – one door sticks out a bit as it is warped but not too bad'.<sup>85</sup> Further, the builder referred to an email dated 9 December 2019 from the owner who wrote '[f]our doors replaced and painting, including frames, done'.<sup>86</sup> The builder noted the quote from TLC for the owner quoted \$100 to remedy each door which would include a margin, but its position is that the cost to remedy a door would be \$50 per door.<sup>87</sup>

84 The evidence is at odds. The builder says the work was completed in October 2019 by Bestway Carpentry. No evidence (for example, a tax invoice) to support this position was submitted by the builder. The owner says the door margins were never done. Counsel for the owner at hearing on 18 February 2020 submitted that only two doors required remedial

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<sup>80</sup> ts 26-27, 18 February 2020.

<sup>81</sup> Exhibit 1 at page 30.

<sup>82</sup> ts 116, 17 August 2020.

<sup>83</sup> ts 142-143, 17 August 2020.

<sup>84</sup> ts 139, 17 August 2020.

<sup>85</sup> Exhibit 6 at page 57.

<sup>86</sup> ts 140-141, 17 August 2020.

<sup>87</sup> ts 141 and 145, 17 August 2020.

work for a total of \$200.<sup>88</sup> On balance, we accept the submission from counsel for the owner that two doors require remedial work. We therefore find that the builder did not complete all of the remedial work required for complaint item 19 as set out in the works order of 10 April 2019.

85 We consider that a fair and reasonable cost to complete the work required to remedy complaint item 19 is \$200 plus GST.

### **Complaint item 21 - cracks in polished concrete floor and walls**

86 The owner stated that Mr Metcalfe of HNC Building Construction inspected the concrete floor at the property. On viewing the floor on 3 December 2019, Mr Metcalfe stated that the floor needs to be completely stripped as it is very evident that a 'patch job looks terrible and totally unacceptable to any building owner'.<sup>89</sup>

87 Mr Beyers stated that on his inspection of the concrete floor of the property on 21 December 2019, he found that cracks on the ground floor concrete slab were filled with a grey grout which did not match the specification/colour of the base concrete.

88 The builder's position is that this complaint item was remedied by All Surface Restorations. The builder referred the Tribunal to the invoice dated 5 November 2019 from All Surface Restorations for 'concrete crack repair' totalling \$440.<sup>90</sup> Mr Wellstead from All Surface Restorations stated that when he telephoned the owner on or about 6 February 2020, the owner told him that he was satisfied with the work.<sup>91</sup>

89 At hearing on 17 August 2020, the owner said the only disparity he had with Mr Wellstead's evidence was that when he asked if the front crack would be done, he was told no because the builder said not to worry about it.<sup>92</sup> Further, the owner explained that his issue is with the smearing of the grey that has not been taken off the floor alongside the crack.<sup>93</sup> In reply, Mr Wellstead explained that he understood that there

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<sup>88</sup> ts 37, 18 February 2020.

<sup>89</sup> Exhibit 1 at page 43.

<sup>90</sup> ts 145, 17 August 2020 and Exhibit 7.

<sup>91</sup> ts 152, 17 August 2020.

<sup>92</sup> ts 152, 17 August 2020.

<sup>93</sup> ts 152, 17 August 2020.

would be a buffing or a cut and seal over what was done which would remove any of the grey smears that were on top of the existing sealer.<sup>94</sup>

90 The builder submitted that the owner's expert, Mr Airey of Airey Taylor Consulting, stated that the repair of the cracks was nicely done and that cracks are unavoidable.<sup>95</sup>

91 We note that the works order of 10 April 2019 requires three slab cracks on the ground floor as referred to in the BIAS report dated 4 May 2018 (pages 38 to 40 of the report) to be remedied.<sup>96</sup> We accept Mr Wellstead's evidence that the owner was satisfied with the remedial works apart from smearing of the grey that has not been taken off the floor alongside the cracks. We therefore find that the remedial work was completed by the builder in respect of complaint item 21 apart from the removal of the grey smears that are on top of the existing sealer.

92 We consider that the removal of the grey smears that are on top of the existing sealer of the floor forms part of the scope of works required to remedy complaint item 17 (as detailed above at [75] to [81]). It is therefore not necessary for us to separately determine a monetary amount for complaint item 21 as this has already been incorporated into complaint item 17.

93 Following is a summary of our findings in respect of each of the complaint items for Issue 1:

| <b>Complaint</b>                                                                  | <b>Fair and reasonable cost to complete the remedial work per the works order of 10 April 2019</b> |
|-----------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------|
| Complaint item 7 – Lintel to windows incomplete paint finish                      | See complaint item 15                                                                              |
| Complaint item 9 – Garage ceiling unsatisfactory finish nail popping bad patching | \$2,800 plus GST                                                                                   |

<sup>94</sup> ts 152, 17 August 2020.

<sup>95</sup> ts 146 and 154, 17 August 2020.

<sup>96</sup> Exhibit 2.

|                                                                                                                   |                                                     |
|-------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------|
| Complaint item 10 –<br>Ceiling in loft<br>unsatisfactory finish nail<br>popping bad patching                      | Remedial work<br>completed                          |
| Complaint item 12 –<br>Eaves soffit timber<br>beading uneven                                                      | \$610 plus GST                                      |
| Complaint item 15 –<br>General brickwork<br>excessive chipped bricks<br>and mortar missing in<br>several place[s] | \$18,966 plus GST                                   |
| Complaint item 17 –<br>Exposed aggregate floor<br>incorrect sealer used                                           | \$400 plus GST                                      |
| Complaint item 19 –<br>Door margins<br>insufficient gap to hinge<br>side causing bindings                         | \$200 plus GST                                      |
| Complaint item 21 –<br>Cracks in polished<br>concrete floor and walls                                             | See complaint item 17                               |
| <b>Total</b>                                                                                                      | <b>\$22,976 plus GST or a<br/>total of \$25,273</b> |

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We turn, next, to determine if the Tribunal should exercise its discretion under s 51 of the BSCRA Act to revoke the Order of 10 April 2019 and make a BRO pursuant to s 36(1)(b) or s 36(1)(c) of the BSCRA Act.

**Issue 2 - Should the Tribunal exercise its discretion under s 51 of the BSCRA Act and revoke the works order of 10 April 2019 and make a monetary order pursuant to s 36(1)(b) or (c) of the BSCRA Act? If the Tribunal decides to revoke that order and make a monetary order, what is an appropriate order?**

95 Section 51(2) of the BSCRA Act confers discretion on the Tribunal to revoke an order made under s 36(1)(a) of the BSCRA Act and then to make a monetary order pursuant to s 36(1)(b) or (c) of the BSCRA Act. Section 51(2) of the BSCRA Act provides as follows:

- (2) If the responsible adjudicator is satisfied that a building remedy order referred to in section 36(1)(a) to remedy a building service has not been complied with, or has been complied with in part only, by the person to whom it was given by the responsible adjudicator, the responsible adjudicator may -
  - (a) revoke the order in relation to remedying the building service or the part in question; and
  - (b) make a building remedy order referred to in section 36(1)(b) or (c) in relation to that building service.

96 To exercise its discretion to revoke the works order of 10 April 2019 and make a BRO under s 36(1)(b) or (c), the Tribunal needs to be satisfied that the remedial works required by the order had not been completed satisfactorily, and that the remedial works and the costs thereof sought by the owner are both reasonable and necessary.

97 In this case, we are satisfied that the Tribunal should revoke the works order of 10 April 2019 made pursuant to s 36(1)(a) of the BSCRA Act and to make a monetary order pursuant to s 36(1)(b) of the BSCRA Act in respect of complaint items 7, 9, 12, 15, 17, 19 and 21. In other words, it is appropriate in this case to exercise the Tribunal's discretion under s 51 of the BSCRA Act to convert the works order of 10 April 2019 to a monetary order in respect of the above listed complaint items. This is because, on the evidence before the Tribunal as set out earlier, we find the builder had only partly completed the remedial works that it was required to complete by 31 July 2019 in respect of complaint items 7, 9, 12, 17, 19 and 21 and by 31 December 2019 in respect of complaint item 15 as set out in the works order of 10 April 2019. We are satisfied that the builder completed the remedial works required in respect of complaint item 10 and therefore the works order of 10 April 2019 in relation to complaint item 10 remains in place.



98 In conclusion, the Tribunal is satisfied that \$22,976 plus GST, or a  
total of \$25,273 is the fair and reasonable cost to remedy complaint items  
7, 9, 12, 15, 17, 19 and 21 as set out in the works order of 10 April 2019.

99 Finally, we turn to consider the owner's application for costs in these  
proceedings.

**Issue 3 - Should costs be awarded in these proceedings?**

100 The owner claimed his costs in these proceedings before  
the Tribunal.

101 The builder filed written submissions with the Tribunal opposing  
the owner's claim for costs.

102 It is useful to first set out how costs in relation to these proceedings  
are to be considered by the Tribunal.

103 Section 87(1) of the *State Administrative Tribunal Act 2004* (WA)  
(**SAT Act**) directs that unless otherwise specified in the SAT Act, the  
relevant enabling Act or any other order of the Tribunal made pursuant  
to s 87(2) to s 87(6) of the SAT Act, the parties bear their own costs in a  
proceeding of the Tribunal. However, s 87(2) of the SAT Act confers a  
discretionary power on the Tribunal to make an order for the payment of  
all or any of the costs of another party, unless specified to the contrary in  
the relevant enabling Act. Section 49 of the BSCRA Act (the enabling  
Act in this proceeding) relevantly provides:

(1) Subject to this section, the Building Commissioner or the State  
Administrative Tribunal may make such orders for costs as they  
think fit in relation to proceedings arising from a building service  
complaint or a HBWC complaint.

...

(7) This section does not limit the powers of the State Administrative  
Tribunal under the *State Administrative Tribunal Act 2004* Part 4  
Division 5.

104 Therefore, s 49 of the BSCRA Act, by conferring a broad  
unrestricted discretion on the Tribunal to award costs, appears to be a  
departure from s 87(1) of the SAT Act. This means that the Tribunal in  
considering a claim for costs made pursuant to s 49(1) of the  
BSCRA Act, is not required to start from the position that each party  
bears its own costs. However, having said that, it is well understood that  
costs do not follow the event at the Tribunal and the broad discretion

conferred on the Tribunal is to be properly exercised by taking into account relevant considerations.

105 In *Western Australian Planning Commission v Questdale Holdings Pty Ltd* [2016] WASCA 32 (*Questdale*) the following principles were set out in relation to cost applications:

- (1) There is no presumption that a successful party is entitled to costs;
- (2) The discretionary power is to be exercised judicially; that is not arbitrarily, capriciously or so as to frustrate the legislative intent;
- (3) The power to award costs is to be exercised if it is fair and reasonable in all the circumstances of the case to do so;
- (4) The onus is on the party seeking an order in its favour to establish that a favourable order ought to be made;
- (5) The nature of the dispute is a relevant consideration in any application for costs;
- (6) Every party to a proceeding before the Tribunal is taken to be cognisant of the objectives of the Tribunal as expressly provided for in s 9 of the SAT Act. It is therefore necessary for the applicant to establish that the respondent's conduct has impaired the attainment of the Tribunal's objectives to have the proceedings determined fairly and in accordance with the substantial merits, with as little formality and technicality as possible and in a way which minimises the costs to the parties; and
- (7) The mere fact that a party ultimately fails on a contention advanced during the course of the hearing does not, in itself, signify that the party has acted inconsistently with the objectives set out in s 9 of the SAT Act.

106 The procedures of the Tribunal are designed to achieve the objectives prescribed by s 9 of the SAT Act. Where an order for costs is made by the Tribunal, the Tribunal's obligation to minimise the costs to

parties will be reflected in the costs assessed by the Tribunal as recoverable. That approach reflects an expectation that parties will approach proceedings in a way that minimises costs of the proceeding: *J & P Metals Pty Ltd and Shire of Dardanup* [2006] WASAT 282 (S) at [38]. Therefore, an order for costs should be approached in a broad and relatively robust fashion: *Perth Central Holdings Pty Ltd and Doric Constructions Pty Ltd [No 2]* [2008] WASAT 302 at [67] and *Marvelle Investments Pty Ltd and Argyle Holdings Pty Ltd* [2010] WASAT 125 (S) at [49]. Even though fixing costs involves a relatively broad brush approach, the Tribunal must nevertheless be satisfied that the costs claimed are reasonable and not excessive in nature: *Rae and Prima Homes Nominees Pty Ltd* [2020] WASAT 24 at [69].

107 The factors relevant in exercising the discretion to award costs pursuant to s 87 of the SAT Act are equally relevant in the exercise of the discretion pursuant to s 49(1) of the BSCRA Act and were usefully identified in *Chew and Director General of the Department of Education and Training* [2006] WASAT 248 at [85] as follows:

We take the view that in proceedings under the Act, the Tribunal should not generally make an award for costs unless a party has conducted itself in such a way as to unnecessarily prolong the hearing; has acted unreasonably or inappropriately in its conduct of the proceedings, has been capricious; or the proceedings in some other way constitute an abuse of process. The Tribunal might also make an order as to costs where a matter has been brought vexatiously or for improper purposes.

108 In *Panegyres v Medical Board of Australia* [2020] WASCA 58 at [415], Vaughan JA provided guidance on the minimum amount of information required by the Tribunal for it to be in a position to evaluate and assess a claim as to cost as follows:

... At the least this requires that the Tribunal be appropriately informed as to the work done and time taken as is claimed for and the rates which are said to apply to that work. The detail required in this respect is a matter for the Tribunal. It may take the form of an affidavit attaching the tax invoices as charged. Alternatively, the Tribunal may consider it appropriate to require a short form bill of costs[.]

109 For the purposes of its costs application, the owner provided the Tribunal with the following list of expert costs and legal costs supported by invoices:<sup>97</sup>

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<sup>97</sup> Exhibit 1 at pages 74 to 90 and the owner's submission dated 26 February 2020.

- (a) Paintspec invoice 437 (29 October 2018) Inspection site visit and inspection report<sup>98</sup>  
\$1,237.50
- (b) SHS Building Consultants invoice 1477 (5 March 2015) Stage completion inspection<sup>99</sup>  
\$511.50
- (c) Resiservices invoice 180322 (22 March 2018) dispute building inspection<sup>100</sup>  
\$550.00
- (d) Resiservices invoice 180402 (2 April 2018) revised dispute building inspection<sup>101</sup>  
\$175.00
- (e) BIAS Industry Group Pty Ltd invoice 00157.1 (8 May 2018) Building Commission and inspection report<sup>102</sup>  
\$2,200.00
- (f) BIAS Industry Group Pty Ltd invoice 00157.2 (17 May 2018) Building Commission and inspection report balance<sup>103</sup>  
\$2,200.00
- (g) Airey Taylor Pty Ltd (17 July 2018) consultation<sup>104</sup>  
\$825.00
- (j) Peter Beyers invoice 2165 (9 January 2020) site inspection to review concrete finish for items 17, 20 and 21<sup>105</sup>

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<sup>98</sup> Exhibit 1 at page 74.

<sup>99</sup> Ibid, page 75.

<sup>100</sup> Ibid, page 76.

<sup>101</sup> Ibid, page 77.

<sup>102</sup> Ibid, page 78.

<sup>103</sup> Ibid, page 79.

<sup>104</sup> Ibid, page 80.

<sup>105</sup> Ibid, page 85.

\$500.00

- (k) Airey Taylor Pty Ltd invoice 38483 (23 August 2018) site visit, review letter from Building Commissioner<sup>106</sup>

\$1,361.25

- (k) Riverslea Holdings Pty Ltd trading as ABC receipt dated 13 April 2019 for removal of curtains to paint ceiling<sup>107</sup>

\$105.00

- (k) Airey Taylor Pty Ltd invoice 18138 (10 July 2020) attend on site to inspect the polished concrete floor and provide written report.<sup>108</sup>

\$1,320.00

- (k) Peter Beyers invoice 2169 (10 July 2020) to view and report findings for complaint items 17, 20 and 21.<sup>109</sup>

\$425.00

**Sub-total expert costs**  
**\$11,410.26**

Legal cost of Suffolk-Law Pty Ltd and counsel to attend:

- (l) Directions hearing 19 February 2019 (matter CC 194/2019) - 2 hours at \$319 (preparation and attendance)

\$638.00

- (m) Mediation on 10 April 2019 (matter CC 194/2019) – 7 hours at \$319 (preparation and attendance)

\$2,233.00

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<sup>106</sup> Ibid, page 86.

<sup>107</sup> Ibid, page 29.

<sup>108</sup> Exhibit 8.

<sup>109</sup> Exhibit 8.

- (n) Directions hearing 4 December 2019 (matter CC 1731/2019) - 2 hours at \$319 (preparation and attendance)

\$638.00

- (o) Preparing hearing book as per Tribunal orders (105 pages) - 2 hours at \$319 (preparation and attendance)

\$638.00

- (p) Preparing for hearing 18 February 2020 – perusal and consider of hearing book documents, expert reports and quotes 8 hours @ \$319

\$2,552.00

- (q) Attendance at hearing on 18 February 2020 - 5 hours @ \$319

\$1,595.00

**Sub-total legal costs                      \$8,294**

**TOTAL  
\$19,704.26**

110            In relation to expert costs the owner referred the Tribunal to *Owners of Strata Plan No 46493 and Smith* [2012] WASAT 218 and *Famiano and Antonelli Investments Pty Ltd* [2012] WASAT 230 and submitted that he had no option but to obtain expert reports on the defects to the building which should have been within the builder's knowledge as registered builder.

111            The reasons given by the owner for seeking costs in these proceedings were stated as follows:

- 1)            The basis of the proceedings is a residential building works contract (Contract) entered into between the parties on 2 April 2014 to be completed in 356 days (page 45 of the hearing book).
- 2)            The respondent took an additional 5 months to complete the build under the Contract (page 92 of the hearing book).

- 3) The Applicant received occupation of the property on 1 March 2016 finding various items not completed (page 91 to 105 of the hearing book).
- 4) The Applicant has been attempting to get the Respondent to complete the items under the Contract as listed for the past 4 years.
- 5) The application was properly sought by the Applicant pursuant to Section 9 of the SAT Act;
- 6) The Applicant submits it was reasonable to engage a lawyer to represent him in a complex contractual matter leading to a substantial number of defects to be repaired;
- 7) The applicant and his lawyers approached the proceeding in a way which sought to minimize the cost to the Respondent and consequently to the Tribunal, parties and experts by consenting to building remedy orders on mediation;
- 8) The building remedy orders were to be completed in a timeframe to which the Respondent agreed with and consented to;
- 9) The Applicant was substantially successful in his application by obtaining building remedy orders from the Tribunal on 10 April 2019 for the respondent to complete 17 defect items (refer to SAT CC 194/2019);
- 10) Instead, the Respondent intentionally breached the building remedy orders by failing to complete the items listed in the agreed timeframe or at all (refer to letters and emails pages 1 to 15 of the hearing book);
- 11) The Applicant subsequently had to embark in proceedings to vindicate his clear contractual entitlements and incur further costs by applying to the Tribunal for the building remedy orders to be converted in monetary orders under Section 51(2) and (3) of the BSRA;
- 12) Some of the repairs done by the Respondent led to further damage to the Applicants property;
- 13) The Respondent's conduct is unreasonable and or vexatious as referred to in *Gileno [Gileno and Riviera Homes WA Pty Ltd [2018] WASAT 48(S)]* in that the Respondent, inter alia:
  - a) failed to attend the directions hearing;
  - b) failed to file any documentation in response to the Applicants claim as ordered by the Tribunal; and

- c) failed to attend the Hearing in this matter or submitting any defence to the Applicants application.

112

In opposing the owner's application for costs, the builder submitted that it was not necessary for the owner to get legal advice when the owner had been dealing with the dispute himself since May 2020. The builder's main points in opposing the owner's application for costs may be summarised as follows:

- There are no special circumstances in this case that requires legal advice. It is a building contract dispute that is very straight forward.
- The builder is not vexatious. Rather, the builder was working its way through the works order of 10 April 2019 and doing its best.
- The owner was difficult to work with and prevented the builder from carrying out some of the remedial works.
- The owner has been vexatious by lodging two separate applications with the Building Commissioner which has caused the parties to waste time and money in having to deal with the separate applications. The complaints should have been consolidated. The actions of the owner have not minimised costs in these proceedings.
- The owner obtained multiple reports from different sources on the same issue. For example obtained reports from Resiservices, BIAS, Airey Taylor and Peter Beyer regarding the concrete floor. The majority of the reports were not used by the Building Commissioner or relied on in these proceedings. The only relevant report was that of Paintinspec. However that report also contained areas that were not part of the owner's complaints to the Building Commissioner.
- Eight expert reports were obtained by the owner prior to these proceedings. Another three reports obtained by the owner do not provide any information that remedial works had not been done.



### Costs sought for previous proceeding

113 We note that the owner seeks to recover costs, some of which relate to proceedings CC 194 of 2019, through the owner's application for costs in these proceedings. That is, the owner has sought recovery of costs incurred by him in this and related proceedings before the Tribunal. This is on the basis that the costs pertain to 'the same defect items'.

114 The Tribunal is not able to allow such a wide application for costs to be made. This is because proceeding CC 194 of 2019 was presided on by the Tribunal differently constituted. Further, that Tribunal made orders by consent of the parties.

115 The Tribunal understands that from the parties' perspective, the litigation constitutes one entire dispute arising between them. However, from a jurisdictional perspective, the relevant proceedings (CC 194 of 2019 and CC 1731 of 2019) are separate. In the case of CC 194 of 2019 it was mediated and determined with final orders being made by the Tribunal differently constituted. If the owner wishes to make an application for costs in proceeding CC 194 of 2019, then the owner was required to make it to the Tribunal as relevantly constituted. This Tribunal simply has no jurisdiction to consider an application for costs made outside of these proceedings, that is, in CC 1731 of 2019.

### Conduct of the builder

116 In exercising the Tribunal's discretion to consider making an order for costs, it is necessary to consider whether, and to what extent, the owner has established that the conduct of the builder impaired the attainment of the Tribunal's objectives: *Questdale* at [54]. One of the objectives of the Tribunal in s 9 of the SAT Act is to act speedily and with as little formality and technicality as is practicable, and to minimise the costs to the parties.

117 The owner contends that the builder failed to attend the directions hearing on 4 December 2019 and the hearing on 18 February 2020 and that the builder failed to file documents when ordered to do so. As a result of these failures to comply with orders of the Tribunal, the owner contends that the builder's conduct was unreasonable and/or vexatious with the result that he had to incur further costs in order to have the works order of 10 April 2019 converted to a monetary order.

118 The builder fully explained its reasons for not complying with the orders of the Tribunal in its application to have the hearing of

18 February 2020 reopened in order to adduce its evidence for these proceedings. The Tribunal gave both parties leave to file any additional documents to assist the Tribunal in its determination of the matter.

119 In general, compliance with orders of the Tribunal assists the Tribunal to achieve its objective of acting speedily in the resolution of disputes and to minimise the costs to the parties. On this occasion, we find that once the builder's director, Mr Datillo, had put into place appropriate medical supports around him, he was able to attend and engage in these proceedings, and the Tribunal was able to proceed to conclude the matter in accordance with its objectives as set out in s 9 of the SAT Act. In the circumstances, we do not find the builder acted unreasonably or vexatiously.

### **Exercise of discretion in these proceedings**

120 The nature of the dispute is a relevant consideration to the Tribunal's exercise of its discretion to make an order for costs. These proceedings concerned the conversion of the works order of 10 April 2019 to a monetary order. At hearing, the issue of brick cleaning was a contentious item as was the issue of flashing and whether the flashing was required to be removed to undertake the remedial work. The experts had differing views on these issues as did the parties. The owner pointed to the builder not completing the remedial works as a reason for an order for costs in his favour, while the builder contends that because the parties could not get past the brick cleaning issue, the builder was not able to complete the remedial works by the date(s) specified in the works order of 10 April 2019.

121 The dispute did raise a technical issue about the brick cleaning which the Tribunal accepts that it was open to the builder to properly put forward its position supported by evidence. Similarly in regards to the flashing issues, we find it was open to the builder to properly put forward its position supported by evidence. The fact that the builder was successful on the issue of brick cleaning and the issue regarding flashing, supports a finding that the builder had a reasonable basis to challenge the costings sought by the owner to complete the remedial works for the relevant complaint items.

122 In relation to the expert fees sought by the owner, we will not award any costs on the basis that we did not rely on any of expert evidence put forward by the owner in our determination of whether the remedial works had been done and what it would now cost to have the remedial works done. In any event, much of the expert evidence was primarily incurred

by the owner for the related proceeding CC 194 of 2019 and not for these proceedings.

123 In relation to the legal costs incurred by the owner, as already set out above, those costs incurred in relation to proceeding CC 194 of 2019 and are not capable of being claimed in these proceedings. In relation to the legal costs incurred by the owner in regard to these proceedings (items (n), (o), (p) and (q) in [109110] above), we are of the view that it is appropriate for the builder to be ordered to pay a portion of the owner's legal costs for the following two reasons. First, the builder was substantially unsuccessful against the owner in converting the works order of 10 April 2019 into a monetary order. Second, the owner was forced to pursue a final hearing in order to bring the litigation to a finality by the conversion of the works order of 10 April 2019 into a monetary order.

124 Taking a broad brush approach in a relatively robust fashion, we consider that \$1,000 ought to be recovered by the owner from the builder as fair and reasonable in all the circumstances of this case and not excessive in nature. The Tribunal will therefore order the builder to pay to the owner, within 28 days of its order, the amount of \$1,000 pursuant to s 49 of the BSCRA Act.

### ***Conclusion***

125 For the reasons set out above, the Tribunal will make the following orders.

### ***Orders***

The Tribunal orders:

1. Pursuant to s 51(2) of the *Building Services (Complaint Resolution and Administration) Act 2011* (WA) the order of the Tribunal made by the Tribunal on 10 April 2019 (in matter CC 194 of 2019) is revoked in respect of complaint items 7, 9, 12, 15, 17, 19 and 21.
2. Pursuant to s 36(1)(b) of the *Building Services (Complaint Resolution and Administration) Act 2011* (WA), the respondent shall pay to the applicant \$25,273 within 28 days of this order (in respect of complaint items 7, 9, 12, 15, 17, 19 and 21).

3. Pursuant to s 49 of the *Building Services (Complaint Resolution and Administration) Act 2011* (WA), the respondent shall pay to the applicant \$1,000 within 28 days of this order.

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

MS R PETRUCCI, MEMBER

16 NOVEMBER 2020