
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

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

CITATION : VC BUILD PTY LTD and THE OWNERS OF
27 POLLARD STREET, GLENDALOUGH STRATA
PLAN 69356 [2022] WASAT 35

MEMBER : MS C BARTON, MEMBER
MR R WOODFORDE, SESSIONAL MEMBER

HEARD : 14, 15 AND 16 MARCH 2022

DELIVERED : 4 MAY 2022

FILE NO/S : CC 1212 of 2021

BETWEEN : VC BUILD PTY LTD
Applicant

AND

THE OWNERS OF 27 POLLARD STREET,
GLENDALOUGH STRATA PLAN 69356
Respondent

Catchwords:

Building service complaint - Regulated building service - Original builder in liquidation - Review of building remedy order - Commissioner's decision affirmed

Legislation:

Building Act 2011 (WA), s 3

Building Services (Complaint Resolution and Administration) Act 2011 (WA), s 3, s 5(1), s 6, s 11(1)(c), s 37, s 57(1)(c)

Building Services (Registration) Act 2011 (WA), s 3, s 17, s 18

Evidence Act 1906 (WA)

State Administrative Tribunal Act 2004 (WA), s 17, s 18, s 27, s 27(1), s 29(3), s 31(1), s 32(2)(a), s 32(2)(b)

Result:

Application dismissed

Category: B

Representation:

Counsel:

Applicant : Mr V Pindoria

Respondent : Mr G Costello

Solicitors:

Applicant : N/A

Respondent : N/A

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

Shami and Teo [2017] WASAT 73

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 On 29 July 2021, VC Building Pty Ltd (**applicant/builder**) commenced proceedings in the Tribunal under s 57(1)(c) of the *Building Services (Complaint Resolution and Administration) Act 2011* (WA) (**Building Services Act**) seeking a review of a building remedy order BC2021-137 made on 5 July 2021 (**BRO**).

2 The Building Commissioner (**Commissioner**) made the BRO under s 11(1)(c) and s 37 of the Building Services Act in respect of four complaint items concerning a regulated building service not being carried out in a proper or proficient manner or being faulty or unsatisfactory at 27 Pollard Street, Glendalough (**property**).

3 The applicant took over the completion of the building work at the property after the original builder, MI Construct Pty Ltd, went into liquidation (**original builder**).

4 The respondent in the proceedings is The Owners of 27 Pollard Street, Glendalough Strata Plan 69356 (**respondent/Strata Company**). The Commissioner is not required by the Building Services Act to participate as a respondent in review proceedings.

5 For the reasons that follow, we find that the applicant carried out a regulated building service in relation to the four complaint items in a manner that was not proper or proficient or was faulty or satisfactory and, therefore, we will affirm the Commissioner's decision to make the BRO without variation.

The issues for determination

6 The issues for determination by the Tribunal are as follows:

- 1) Did the applicant carry out a regulated building service in respect of the complaint items?
- 2) If the answer to 1) is in the affirmative, was the building work the subject of each of the complaint items carried out in a proper or proficient manner or was it faulty or unsatisfactory?; and
- 3) Should the terms of the BRO in respect of each of the complaint items be set aside, affirmed or varied?

The Tribunal's review jurisdiction

7 Pursuant to s 57(1)(c) of the Building Services Act, a person aggrieved by a building remedy order made by the Commissioner may apply to the Tribunal for a review of the order. By reason of s 17 of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**), the application falls within the Tribunal's review jurisdiction. In exercising the Tribunal's review jurisdiction, the Tribunal is to deal with a matter in accordance with the SAT Act and the Building Services Act (referred to as the 'enabling Act' for the purposes of the Tribunal's review jurisdiction, which may modify the operation of the SAT Act in relation to the matter).¹

8 The Tribunal is to review the Commissioner's decision by way of a hearing de novo for the purposes of producing the correct and preferable decision based on the information and evidence before it.² The Tribunal is not bound to apply the *Evidence Act 1906* (WA), the rules of evidence, or any practices and procedures of courts of record³ but is bound by the rules of natural justice unless authorised expressly or by implication to depart from those rules by the SAT Act or the enabling Act.⁴

9 The Tribunal is not limited to the material before the Commissioner as the original decision-maker but may consider new material.⁵ The Tribunal is to act according to equity, good conscience, and the substantial merits of the case without regard to technicalities and legal forms.⁶

10 Section 29(3) of the SAT Act confers specific power on the Tribunal to make any order that it considers appropriate, including an order to set aside the original decision, affirm that decision or vary that decision.

The conduct of the hearing and expert evidence

11 Prior to the hearing, the parties filed with the Tribunal and gave to each other written submissions and the documents on which they intended to rely.

¹ Section 18, SAT Act.

² Section 27, SAT Act.

³ Section 32(2)(a), SAT Act.

⁴ Section 31(1), SAT Act.

⁵ Section 27(1), SAT Act.

⁶ Section 32(2)(b), SAT Act.

12 The applicant relied on the evidence of Mr Calvin Koh, the architect who designed the building. Mr Koh gave oral testimony at the hearing but did not prepare a report or expert witness statement. The applicant also relied on an investigation report dated 22 September 2021 prepared by Mr Brian Connor of ABBC Building Inspectors (**ABBC report**). The applicant did not call Mr Connor as an expert witness. Because Mr Connor was not available for cross-examination, the weight that we can give his findings is limited.

13 The respondent relied on the oral testimony of Mr Andrew Chadbund, a building and energy inspector (**BEI**) with the Building & Energy Division of the Department of Mines, Industry Regulation and Safety (**DMIRS**). Mr Chadbund attended the property and prepared inspection reports dated 1 June 2021 and 2 July 2021 in relation to the four complaint items. The respondent also relied on the oral testimony of Mr Brian Gray, a building inspector with Houspect. The respondent commissioned a report from Houspect during the defects liability period, entitled *Strata - Builders Liability Construction Report* (**Houspect report**). The Houspect report was based on inspections of the property conducted by Mr Gray on 14 January 2019 and February 2019. In addition, the respondent called Mr Adrian Snape, Building Surveyor-Compliance, with the City of Stirling and Mr Andrew Lowery, a case manager with Sedgewick, whose evidence was limited to complaint item 1.

The Tribunal's consideration

Did the applicant carry out a regulated building service?

14 Section 5(1) of the Building Services Act provides that a person may make a complaint to the Commissioner about a regulated building service not being carried out in a proper and proficient manner or being faulty or unsatisfactory. A complaint made under s 5(1) of the Act is defined as a 'building service complaint'.⁷

15 A 'regulated building service' is defined in s 3 of the Building Services Act to be a building service carried out by a registered building service provider or an approved owner builder. A 'building service' includes 'building work' as defined in s 3 of the *Building Act 2011* (WA) (**Building Act**) which includes, amongst other things, the construction, erection, assembly or placement of a building or an incidental structure (being a structure attached to or incidental to a

⁷ Section 3, Building Services Act.

building). Relevantly, a 'registered building service provider' has the meaning given in s 3 of the *Building Services (Registration) Act 2011* (WA) (**Registration Act**), being a building service practitioner or a building service contractor registered under s 17 and s 18 of the Registration Act respectively.

16 In the decision of *Shami and Teo* [2017] WASAT 73 (*Shami*), the Tribunal concluded that a building remedy order can only be made against the person who had the role of ensuring that the entire building project, which includes the work, which is the subject of a building service complaint, is brought to completion. The Tribunal stated at [48]:

For the purposes of s 36(1), s 37(1) and s 38(1) of the BSCRA Act, it is the entirety of the work of the building project which is carried out, not the components of it. What follows from that construction is that a building remedy order can only be made against the person who had the role of ensuring that the entire building project which includes the work which is the subject of a building service complaint was 'carried out', or in other words 'brought to completion'. It does not matter whether the work was done personally by that person or by persons whom they arranged to perform the various components of the overall work[.]

17 There was no dispute, and we find, that the applicant is a registered builder. We further find that the applicant entered into a cost plus contract on 25 June 2014 to complete the building work at the property after the original builder went into liquidation.⁸ For these reasons, we are satisfied that the applicant was responsible for ensuring the building work at the property was brought to completion and, therefore, we find that the applicant carried out a regulated building service in respect of the building work that is the subject of the complaint items.

Was the building work the subject of each complaint item faulty or unsatisfactory?

Complaint item 1 - tiling and waterproofing of balconies

18 In relation to complaint item 1, the BRO provides:

1. Complaint

Tiling and waterproofing of balconies. Damp to patio walls unit 7 and carpark walls as a result of poor waterproofing and tiling.

⁸ Exhibit 1, pages 116-123.

Action required

The respondent is to remedy the cause and effect of the dampness to the walls. All work is to be carried out in a proper and proficient manner, including protecting and making good affected surfaces.

The respondent is to remove all building rubbish associated with the remedial work from the site.

- 19 There are two issues in relation to dampness. The first concerns the absence of weepholes affecting the patio walls of unit 7 and the higher section of the garage wall, and the second concerns the slope of the garage floor causing water to pool at the base of the carpark wall.

The absence of weepholes

- 20 Mr Chadbund observed, during his BEI inspection of the unit 6 balcony to the first floor above, that weepholes above the junction of the external cavity wall and the balcony had been omitted.⁹ He also observed that no weepholes were installed above the same junction on the opposing first floor unit 5 balcony that shares a dividing cavity wall. In Mr Chadbund's opinion, the lack of weepholes in these locations is contrary to drawing no. 11.05-A4 of the architectural plans.¹⁰

- 21 In his oral testimony, Mr Chadbund expressed the opinion that the absence of weepholes is also the likely cause of the high moisture readings at the higher section of the garage wall, which is exhibited as moisture up to about 1.8 metres off the ground in the courtyard of unit 7.¹¹

- 22 Whilst the applicant acknowledged that the architectural plans show the weepholes, it says that the original builder failed to install them and, therefore, the applicant is not responsible for remedying this complaint item. In support of its position, the applicant relied on the ABBC report which confirmed that no weepholes had been installed by the original builder as required by a notation on the structural drawings.¹² The applicant also relied on an email from its insurance broker dated 15 July 2021 which stated that the applicant was not responsible for any faulty or incomplete works before it took over the contract because the Strata Company had the benefit of the original

⁹ Exhibit 1, page 126.

¹⁰ Exhibit 1, page 126.

¹¹ ts 58, 14 March 2022.

¹² Exhibit 1, page 89.

builder's home warranty insurance.¹³ The applicant observed that QBE, the relevant insurer, had already carried out remedial works at the property in 2019.¹⁴

- 23 It is the respondent's position that the applicant had the opportunity and capability as a registered builder to identify and remediate the lack of weepholes when it assumed responsibility for completing the build. The respondent relied on the evidence of Mr Chadbund and Mr Gray who agreed that the applicant had failed to install weepholes and flashing in the walls of balcony 5 and 6.¹⁵

The garage floor

- 24 It is the applicant's position that the slope of the garage floor cannot be avoided because of the gradient of the site (which slopes from front to rear). The applicant says it installed a gully to minimise water pooling towards the garage wall, which was not part of the architectural drawings, but completed at the applicant's cost.¹⁶ The applicant also says that it was advised by waterproofing specialists that the most likely reason for the rising damp was the inadequate installation of a barrier during the bricklaying/structural works.¹⁷ The ABBC report states that the high moisture readings along the base of the garage wall indicates that the damp-proof course has failed.¹⁸

- 25 In contrast, the respondent says that the applicant undertook the installation of the carpark concrete floor and, therefore, should have been aware of the damp-proof/moisture management measures necessary to complete the works proficiently. In support of its position, the respondent relies on the evidence of Mr Chadbund and Mr Gray who were both of the opinion that there was faulty or unsatisfactory damp-proof protection to the lower parts of the garage walls to accommodate water flow in the carpark.

Findings - complaint item 1

- 26 We accept the uncontested evidence of Mr Chadbund and Mr Gray, and we find, that there is an absence of a weephole above the junction of the external cavity wall and unit 6 balcony. We further find that the location of the weephole is shown on drawing no. 11.05-A4 of

¹³ Exhibit 1, page 177.

¹⁴ Exhibit 1, page 65.

¹⁵ Exhibit 1, page 126; Exhibit 1, pages 335-336; ts 58, 14 March 2022; ts 105, 15 March 2022.

¹⁶ Exhibit 1, page 64.

¹⁷ Exhibit 1, page 64.

¹⁸ Exhibit 1, page 89.

the architectural plans with a notation that provides: 'Allow weephole to bottom of wall at balcony area'.

27 Mr Chadburn and Mr Gray agreed, and we find, that the dampness to the patio walls of unit 7 and at the higher section of the garage walls may be attributed to the omission of the weepholes.

28 Whilst we acknowledge that the omission of the weepholes occurred before the applicant took over the build, the weepholes are shown on the architectural plans for the building. Based on the evidence of Mr Chadburn and Mr Gray, which we accept, we find that the applicant's failure to install the weepholes shown on the architectural plans constitutes unsatisfactory workmanship.

29 There was no dispute, and we find, that the garage (carpark) floor was installed by the applicant. We accept the uncontested evidence of Mr Chadburn and Mr Gray, and we find, that the damp-proof protection between the garage walls and floor is faulty or unsatisfactory.¹⁹ The applicant says that it has attempted to address the dampness issues in the garage by the installation of a formed gully on the garage floor. Based on the evidence of Mr Gray, which we accept, we are satisfied that there is no formed gully on the garage floor²⁰ and, consequently, we find that the applicant has not remedied this aspect of complaint item 1.

30 The applicant did not adduce any expert evidence in support of alternative actions to remedy the dampness issues in the patio walls of unit 7 and the carpark. In the absence of any alternative proposed actions, we are satisfied that the actions specified in the BRO are reasonable and necessary to remedy the faulty or unsatisfactory workmanship carried out by the applicant in respect of complaint item 1.

Complaint item 2 - tiling of walkways

31 In relation to complaint item 2, the BRO provides:

2. Complaint

Tiling of walkways. Common area tiling has a number of areas where the movement has caused the drumming of the tiles and potential compromise of waterproofing.

¹⁹ ts 59, 14 March 2022; ts 106, 15 March 2022.

²⁰ ts 111, 15 March 2022.

Action Required

The respondent is to remedy the cause and effect of the drummy tiles. All work is to be carried out in a proper and proficient manner, including protecting and making good affected surfaces. Tile and grout colour is to match adjacent tiling, and the water-proofing is not to be compromised as a result of the remedial work.

32 The applicant contends that the issue with the drummy tiles was first raised in November 2020, more than six years after the tiles were laid. Because the issue was not picked up in the defects liability report prepared by Houspect in January 2019,²¹ it is the applicant's position that it is a normal maintenance item to be rectified by the respondent.²² In support of its position, the applicant relies on the ABBC report which states that two drummy and one cracked tile after six years is not considered faulty or unsatisfactory workmanship.

33 It is the respondent's position that the drummy tiles are symptomatic of a more fundamental issue concerning the absence of control joints. In support of its position, the respondent relied on the evidence of Mr Chadbund who stated that the applicant had failed to comply with the relevant standards for the installation of control/movement joints. In Mr Chadbund's opinion, the omission of control joints at the prescribed points and distance is unsatisfactory and an unapproved departure from the relevant standards.

34 There was no dispute, and we find, that control joints were not installed when the walkways were tiled.²³ Based on the uncontested evidence of Mr Chadbund, which we accept, we find that the installation of tiling to the walkway is faulty and unsatisfactory due to the applicant's omission of control joints.

35 We do not accept the applicant's contention that the time period for raising complaint item 2 has expired. A complaint is made out of time if it is made more than six years after the completion of the regulated building service to which the complaint relates.²⁴ We find that the certificate of practical completion was issued by Mr Koh on 15 May 2015.²⁵ We further find that the respondent's building complaint, which includes complaint item 2, was received by DMIRS

²¹ Exhibit 1, page 65.

²² Exhibit 1, page 65.

²³ ts 6, 16 March 2022.

²⁴ Building Services Act, s 6.

²⁵ Exhibit 1, page 115.

on 17 January 2021.²⁶ Consequently, we are satisfied that the respondent's complaint in respect of item 2 was made within the statutory timeframe.

36 The applicant did not adduce any expert evidence in support of alternative actions to remedy the drummy tiles. In the absence of any alternative proposed actions, we are satisfied that the actions specified in the BRO are reasonable and necessary to remedy the faulty or unsatisfactory workmanship carried out by the applicant in respect of complaint item 2.

Complaint item 3 - cracking of carpark concrete flooring

37 In relation to complaint item 3, the BRO provides:

3. Complaint

Carpark concrete flooring. Extensive cracking and lack of appropriate joints.

Action Required

The respondent is required to remedy cause and effect of the cracking to the floor of the carpark, where the cracking exceeds the tolerance as specified in AS 3727-1993 Guide to residential pavements; Section 5 Performance Objectives; 5.2 Cracking, subsidence and stepping - Table 1. The surface finish is to be consistent in colour, texture and trowelling pattern with adjacent areas.

All work is to be carried out in a proper and proficient manner, including making good affected surfaces.

The respondent is to remove all building rubbish associated with the remedial work from the site.

38 The applicant contends that the engineering drawings specified 100 millimetre concrete but no reinforcement fabric, such as fabricated steel mesh. Because the spacing of control joints was not specified in the drawings, the applicant says that the joints were laid according to the architect's decision on site.²⁷ The applicant acknowledged that some of the cracks in the concrete are in excess of tolerances in the AS3727-1993 guide to residential pavements (**AS3727-1993**).²⁸

²⁶ Exhibit 1, pages 638-641.

²⁷ Exhibit 1, page 66.

²⁸ Exhibit 1, page 66.

The applicant produced an invoice to demonstrate that the soil was compacted prior to laying of the contract.²⁹

39 The respondent says that the applicant's work in relation to the concrete installed in the carpark is faulty and unsatisfactory because it does not comply with the maximum control joint spacing for medium traffic under AS3727-1993. The respondent relied on the evidence of Mr Chadbund who identified that the control joints were not consistent with the prescribed spacing or depth and, therefore, were not compliant with the relevant standards.³⁰ The respondent also pointed to the evidence of Mr Gray who observed that the location of the control joints on site departed from their position as shown on the architectural plans.³¹ In Mr Gray's opinion, the cracking has been caused by the expansion and contraction of the concrete without appropriate control joints to allow for movement.³²

40 There is no dispute, and we find, that the applicant supplied and installed the carpark concrete without fabricated steel mesh. Based on the uncontested evidence of Mr Chadbund and Mr Gray, which we accept, we find that the location of the control joints is not consistent with industry standards, and that the absence of control joints in certain locations has resulted in significant cracking. We observe that the expert testimony of Mr Chadbund and Mr Gray is consistent with the findings of the ABBC report which identified similar faults with the carpark concrete. Consequently, for these reasons, we find that the applicant's work in relation to the installation of the concrete flooring for the carpark is faulty or unsatisfactory.

41 The applicant did not adduce any expert evidence in support of alternative actions to remedy this complaint item. In the absence of any alternative proposed actions, we are satisfied that the actions specified in the BRO are reasonable and necessary to remedy the faulty or unsatisfactory workmanship carried out by the applicant in respect of complaint item 3.

Complaint item 4 - driveway pavement and subsidence

42 In relation to complaint item 4, the BRO provides:

4. Complaint

²⁹ Exhibit 2.

³⁰ Exhibit 1, page 132; ts 70, 14 March 2022.

³¹ ts 114, 15 March 2022.

³² ts 115, 15 March 2022.

Driveway paving and subsidence. Driveway subsiding and visible movement indicating insufficient reinforcement and/or compaction for appropriate use of driveway.

Action Required

The respondent is to remedy the subsidence to the common area brick paving so that the alignment of all segmental units are consistent, and all edge restraints are appropriate for the loads to be imposed upon the paving by vehicular traffic. All work is to be carried out in a proper and proficient manner, including making good affected surfaces and associated landscaping.

The respondent is to remove all building rubbish associated with the remedial work from the site.

43 The applicant contends that there was no mention of any sub-base requirements in the design documentation for the driveway. Because the driveway was installed over seven years ago, the applicant says that the subsidence and displaced concrete edging are maintenance issues for the respondent.³³ The applicant further contends that the driveway was designed for light vehicular traffic and not for removalists or commercial trucks.³⁴ The applicant says that the replacement of the fence adjacent to the driveway was the cause of or contributed to the subsidence. However, Mr Koh was unable to confirm that this was the case because 'the fencing was carried out much later in the job'.³⁵

44 The respondent says that the installation of the driveway paving is faulty or unsatisfactory and observed that the faults are not aligned and could be multiple. In support of its position, the respondent relied on the evidence of Mr Gray who stated that the lack of edge support contributed to the movement of the driveway paving and subsidence.³⁶ The respondent also relied on the evidence of Mr Chadbund who attributed the subsidence to the lack of appropriate sub-base.³⁷

45 There was no dispute, and we find, that the driveway was installed by the applicant. Based on the evidence of Mr Chadbund and Mr Gray, which we accept, we find that the driveway paving is faulty or unsatisfactory due to a range of factors which include the lack of edge support and inappropriate sub-base. We do not accept the applicant's

³³ Exhibit 1, page 66.

³⁴ Exhibit 1, page 66.

³⁵ ts 53, 14 March 2022.

³⁶ ts 115, 15 March 2022.

³⁷ ts 78, 14 March 2022.

contention that the subsidence was caused by the installation of a replacement fence adjacent to the driveway. We find, based on photographs of the driveway taken in 2018, that subsidence around the soak wells and movement in the brick paving was present before the installation of the replacement fence.³⁸

46 The applicant did not adduce any expert evidence in support of alternative actions to remedy the subsidence and movement in the driveway paving. In the absence of any alternative proposed actions, we are satisfied that the actions specified in the BRO are reasonable and necessary to remedy the faulty or unsatisfactory workmanship carried out by the applicant in respect of complaint item 4.

Conclusion

47 Having regard to the evidence before us, we find that the applicant's workmanship in respect of the four complaint items is faulty or unsatisfactory. We further find that the actions specified in the BRO are reasonable and necessary to remedy the complaint items.

48 Accordingly, we are satisfied that the correct and preferable decision is to dismiss the application. We will affirm the Commissioner's decision made on 5 July 2021 and the terms of the BRO without variation.

Orders

The Tribunal orders:

1. The application for review is dismissed.
2. The decision of the Building Commissioner to make building remedy order BC2021-137 dated 5 July 2021 requiring the applicant to rectify building services not carried out in a proper or proficient manner or being faulty or unsatisfactory at 27 Pollard Street, Glendalough, is affirmed.
3. The respondent may within 21 days from the date of this order file with the Tribunal and give to the applicant an application for costs including written submissions and any supporting documentation.

³⁸ Exhibit 3.

4. If the respondent elects to make an application for costs, the applicant has 14 days from the date of the application to file with the Tribunal and give to the respondent written submissions and any supporting documentation in reply.
5. Subject to any further order an application for costs will be determined entirely on the documents pursuant to s 60(2) of the *State Administrative Tribunal Act 2004* (WA).

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

MS C BARTON, MEMBER

4 MAY 2022