



**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**ACT** : BUILDING SERVICES (COMPLAINT RESOLUTION AND ADMINISTRATION) ACT2011 (WA)

**CITATION** : VC BUILD PTY LTD and THE OWNERS OF 27 POLLARD STREET, GLENDALOUGH STRATAPLAN 69356 [2022] WASAT 35 (S)

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

**HEARD** : DETERMINED ON THE DOCUMENTS

**DELIVERED** : 22 JULY 2022

**FILE NO/S** : CC 1212 of 2021

**BETWEEN** : VC BUILD PTY LTD  
ApplicantAND  
THE OWNERS OF 27 POLLARD STREET,  
GLENDALOUGH STRATA PLAN 69356  
Respondent

*Catchwords:*

Practice and procedure - Building dispute - Review of building remedy order -Costs - Conduct of parties

*Legislation:*

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



s 49, s 49(7), s 57(1)(c)  
*State Administrative Tribunal Act 2004 (WA), s 9, s 60(2), s 46(3), s 47, s 48, s 49, s 87, Pt 4, Div 5*

*Result:*

Costs application successful in part

Category: B

**Representation:**

*Counsel:*

Applicant : N/A  
Respondent : N/A

*Solicitors:*

Applicant : N/A  
Respondent : N/A

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

Barnett and Barrier Reef Pools (WA) Pty Ltd [2016] WASAT 50  
Carey and Commissioner for Consumer Protection [2012] WASAT 237 (S) Firestar  
Enterprises Pty Ltd and Town of Vincent [2007] WASAT 100 Medical Board of  
Western Australia and Kyi [2009] WASAT 22  
Sanders and Gemmill Homes Pty Ltd [2017] WASAT 41 (S)  
Summerville and Department of Education  
and Training & Ors [2006] WASAT 368 (S)  
VC Build Pty Ltd and The Owners of 27 Pollard Street, Glendalough Strata Plan 69356  
[2022] WASAT 35  
WA Country Builders Pty Ltd and  
Hathersage Nominees Pty Ltd [2016] WASAT 70  
Western Australian Planning Commission v Questdale Holdings Pty Ltd [2016] WASCA  
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**REASONS FOR DECISION OF THE TRIBUNAL:**

***Introduction***

1 On 4 May 2022, the Tribunal affirmed the decision of the Building Commissioner (**Commissioner**) made on 29 July 2021 that VC Build Pty Ltd (**applicant/builder**) carried out a regulated building service in a manner that was not proper and proficient or was faulty or unsatisfactory in respect of four complaint items. The Tribunal concluded that the builder was responsible for remedying the four complaint items as specified in building remedy order BC2021-137 made on 5 July 2021 (**BRO**) and published its reasons for decision in *VC Build Pty Ltd and The Owners of 27 Pollard Street, Glendalough Strata Plan 69356* [2022] WASAT 35.

2 On 27 May 2022, The Owners of 27 Pollard Street, Glendalough  
Strata Plan 6935629 (**respondent/strata company**) filed an application for costs  
against the builder following orders made by the Tribunal on 4 May 2022. Pursuant  
to those orders, we have determined the application for costs entirely on the  
documents under s 60(2) of the *State Administrative Tribunal Act 2004* (WA) (**SAT  
Act**).

3 We have concluded that the application for costs should be allowed  
in part. In reaching our decision, we have considered the written submissions (with  
invoices and receipts annexed) filed by the respondent on 27 May 2022 and the  
responsive written submissions filed by the builder on 10 June 2022.

### ***The issue for determination***

4 The issue for determination by the Tribunal is whether the respondent  
is entitled to an order against the builder for legal costs and expert fees incurred by  
the respondent in respect of proceeding CC 1212 of 2021 (**review proceeding**).

### ***The legal framework and principles***

5 The parties to a proceeding before the Tribunal must bear their own  
costs unless otherwise specified in the SAT Act, the enabling Act, or an order of the  
Tribunal under s 87 of the SAT Act.<sup>1</sup>

<sup>1</sup> Section 87(1), SAT Act.



6 Section 49 of the *Building Services (Complaint Resolution and  
Administration) Act 2011* (WA) Act (**Building Services Act**), the enabling  
Act in the review proceeding, 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.
- (2) The Building Commissioner must not award costs to a party for the services  
of a representative of that party unless, in the opinion of the Building  
Commissioner, it is fair to do so, having regard to -
  - (a) whether a party has acted in relation to a complaint in a way that  
unnecessarily disadvantaged another party; or
  - (b) whether a party has been responsible for prolonging unreasonably  
the time taken to deal with the complaint; or
  - (c) the relative strengths of the claims made by each of the parties; or

- (d) any other matter the Building Commissioner considers relevant.
- (3) If the Building Commissioner or the State Administrative Tribunal is of the opinion that the costs and expenses were unnecessarily incurred due to the conduct of a party, the Building Commissioner or Tribunal may make an order requiring the party to pay all or any specified part of the costs and expenses incurred under this Act in investigating the complaint.
- (4) An order may be made under subsection (3) even where no building remedy order or HBWC remedy order is made.
- (5) In determining costs to be paid the Building Commissioner or State Administrative Tribunal may take into account any refusal or failure by a party to comply with an order or direction of the Building Commissioner or Tribunal.
- (6) When any costs or expenses are ordered to be paid under subsection (3) -
- (a) the amount ordered to be paid is recoverable by the Building Commissioner in a court of competent jurisdiction as a debt due to the State; and



- (b) any amount paid or recovered must be credited to the Building Services Account.

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

7 The Tribunal may make an order for the payment by a party of all or any of the costs of another party under s 87(2) of the SAT Act (which falls within Pt 4, Div 5 of the SAT Act).<sup>2</sup> The Tribunal's discretion under s 87(2) of the SAT Act is not limited by s 49 of the Building Services Act.<sup>3</sup>

8 The principles relevant to the exercise of the Tribunal's discretion under s 87(2) of the SAT Act, in the context of building disputes, were summarised in *Barnett and Barrier Reef Pools (WA) Pty Ltd*<sup>4</sup> and *WA Country Builders Pty Ltd and Hathersage Nominees Pty Ltd*<sup>5</sup> having regard to several authorities including *Western Australian Planning Commission v Questdale Holdings Pty Ltd* [2016] WASCA 32 (*Questdale*).

9 In *Questdale*, the WA Court of Appeal observed that s 87(2) of the SAT Act is to be construed in the context that the legal rationale for an order for costs is to compensate the party in whose favour it is made and not to punish the party the subject of the order.<sup>6</sup> This rationale is evident in s 87(3) of the SAT Act which provides that the power of the Tribunal to make an order for the payment of costs includes 'the power to make an order for the payment of an amount to compensate the other party for any expenses, loss, inconvenience, or embarrassment resulting from the proceeding or the matter because of which the proceeding was brought'. The discretion to award costs is to be exercised judicially; not arbitrarily or capriciously or so as to frustrate the legislative intent.<sup>7</sup>

10 There are a range of factors that might contribute to the Tribunal making a costs order, including the non-exhaustive list set out in *Sanders and Gemmill Homes Pty Ltd*.<sup>8</sup> One such factor is where a party conducts itself unreasonably or inappropriately, particularly where the conduct leads to unnecessary costs to the other party. In a

<sup>2</sup> Section 87(2), SAT Act.

<sup>3</sup> Section 49(7), Building Services Act.

<sup>4</sup> [2016] WASAT 50 at [14]-[15].

<sup>5</sup> [2016] WASAT 70 at [10]-[15].

<sup>6</sup> *Questdale* at [51]

<sup>7</sup> *Questdale* at [48].

<sup>8</sup> [2017] WASAT 41 (S) at [8].



review proceeding, whether or not there was a genuine attempt by a party to assist the original decision-maker to make a decision on its merits is also relevant to the exercise of the Tribunal's discretion to award costs.<sup>9</sup>

11 In *Medical Board of Western Australia and Kyi* [2009] WASAT 22 (*Kyi*), the Tribunal referred to the general principles regarding costs discussed in *Summerville and Department of Education and Training & Ors* [2006] WASAT 368 (S) at [23] - [44] and observed as follows:<sup>10</sup>

... If 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, then this may give rise to an exercise of the discretion to award costs. This encompasses a situation where proceedings should not have been maintained against a party because it is clearly untenable and no reasonable person would have believed they could be successful[.]

12 It follows that conduct of a kind referred to in s 46(3), s 47 and s 48 of the SAT Act (which includes failure on the part of an applicant to prosecute a matter, frivolous proceedings and vexatious conduct) is relevant to the exercise of the Tribunal's discretion under s 87(2) of the SAT Act.<sup>11</sup> The question for the Tribunal is whether it is fair and reasonable in the circumstances of the case that a party should be compensated for the costs it has incurred. The onus of proof is on the party seeking an order in its favour.<sup>12</sup>

### ***The respondent's contentions***

13 The respondent says it has incurred significant costs in the total amount of \$36,144 (inclusive of GST) as set out in the table below.

Item	Nature and purpose of costs	Cost (\$)
1	DMIRS application fees	119.00
2	Legal Fees (Atkinson Legal) – DMIRS/SAT process and preparation	4,290.00

3	Expert Witness/Attendance – Houspect	250.00
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<sup>9</sup> See s 87(4), SAT Act.

<sup>10</sup> *Kyi* at [73].

<sup>11</sup> *Questdale* at [64].

<sup>12</sup> *Questdale* at [51].




4	Expert Witness/Attendance – Sedgwick	385.00
5	Attendance/Owner Representation (Lost Income)	30,800.00
6	Strata Management Costs - VC Build Defect Mgt	300.00
<b>Total</b>		36,144.00

14 The respondent's position in support of its application for costs may be summarised as follows:

- 1) The builder acted frivolously in failing to adduce any evidence, expert or otherwise, in support of its position or proposed remedial action. The evidence adduced by the respondent went largely uncontested by the builder.
- 2) The Tribunal found the builder's case to be without merit. During the course of the final hearing, the builder's representative acknowledged the unsatisfactory nature of the items of complaint and advised the Tribunal that '[we] thought we would wait and see how this went before addressing the items'.
- 3) The respondent incurred unnecessary expenses, loss, and inconvenience for the purposes of s 87(3) of the SAT Act because the builder failed to act in good faith and genuinely participate in the review proceeding. In contrast, the builder's decision to review the BRO meant the respondent incurred additional costs in engaging expert witnesses and commissioning technical reports in defence of its position. The respondent has also incurred costs in preparing and representing its interests at the final hearing.
- 4) The respondent contends that the builder has adopted a course of action with the intention of protracting the resolution of the complaint items. The respondent's participation in the review proceeding, and the failure of the builder to address the complaint items in a timely manner, has resulted in an extended period of stress for the respondent owners and continued deterioration of the property.





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- 5) The respondent says that it engaged meaningfully in the review proceeding and genuinely assisted the Tribunal to make a decision on its merits.

### ***The builder's contentions***

15 The builder does not accept that the respondent is entitled to any order for costs in its favour. The contentions in support of the respondent's position may be summarised as follows:

- 1) The usual practice of the Tribunal is that each party bear their own costs of the proceeding: ***Carey and Commissioner for Consumer Protection*** [2012] WASAT 237 (S) at [15]. There must be some exceptional reason for departing from the usual practice: ***Firestar Enterprises Pty Ltd and Town of Vincent*** [2007] WASAT 100 at [15]. No exceptional circumstances have been demonstrated by the respondent for departing from the usual practice about costs.
- 2) The builder rejects the respondent's contention that it failed to engage in the process of decision making or the conduct of the review proceeding. There is nothing in the Tribunal's reasons for decision to support an argument that the application was frivolous or that the review proceeding was without merit.
- 3) The builder says it is not enough to say that expenses were incurred unnecessarily. Each time an application fails it could be said expenses were incurred unnecessarily simply because the applicant lost.
- 4) The claim for loss of wages by Mr Costello, the respondent's representative, should be dismissed as there is no evidence provided in support. The invoice claiming \$30,800 (incl GST) in lost wages contains insufficient detail for a proper assessment of the costs incurred by Mr Costello and, on its face, is unreasonable.
- 5) The respondent refers to 'stress' without any medical or other evidence to support its claim and, therefore, this claim should be rejected.

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- 6) The strata management fees sought by the respondent are not within the jurisdiction of the Tribunal to award.

### ***Exercise of discretion in this case***

16 The fact that a party is unsuccessful or fails on a contention advanced during the course of the hearing does not automatically support the making of a



costs order unfavourable to that party. The presumptive position is that each party will bear its own costs in a proceeding before the Tribunal.<sup>13</sup> Although the Tribunal is a 'no cost' jurisdiction, the Tribunal has power under s 87(2) of the SAT Act to order the payment by a party of all or any of the costs of another party unless otherwise specified in the enabling Act. The Building Services Act does not limit the Tribunal's power under s 87(2) of the SAT Act.

17 It is relevant to the exercise of the Tribunal's discretion under s 87(2) of the SAT Act whether, and to what extent, the party who bears the onus on costs can establish that the other party's conduct has impaired the attainment of the Tribunal's objectives.<sup>14</sup> One of the objectives of the Tribunal in s 9 of the SAT Act is to achieve the resolution of disputes, fairly, and according to the substantial merits of the case. A further objective is to act speedily and with as little formality and technicality as is practicable and minimise the costs to the parties.

18 There was no evidence before us to support a finding that the builder failed to genuinely assist the Commissioner in making a decision on its merits in respect of the BRO. As a person aggrieved by the Commissioner's decision, the builder was entitled to seek a review of the BRO by making an application to the Tribunal under s 57(1)(c) of the Building Services Act. However, in doing so, the builder should have been fully prepared to prosecute its case. Whilst the builder acknowledged certain deficiencies with the quality of the work that was the subject of the complaint items, it failed to make its expert witness available to be examined on alternative actions to remedy those deficiencies. Consequently, we find that the builder acted inappropriately in the conduct of the review proceeding and in a manner that was inconsistent with the objectives in s 9 of the SAT Act to assist the Tribunal in the resolution of the complaint items and minimise the costs to the parties. In the absence of the builder's expert witness, the evidence of the expert witnesses engaged by the respondent

<sup>13</sup> Section 87(1), SAT Act.

<sup>14</sup> *Questdale* at [54].



was of assistance to the Tribunal in determining whether or not to affirm the decision of the Commissioner. For these reasons, we accept the respondent's claim for the costs of the attendance of its expert witnesses at the final hearing in the amount of \$635 (including GST).

19 Although we have found that the respondent should be compensated for the attendance of its expert witnesses at the final hearing, we do not accept the respondent's claim for loss of wages by Mr Costello in the amount of \$30,800. The claim relates to the time spent by Mr Costello preparing for and attending directions hearings and the final hearing being a total of 20 days at a rate of \$1,400 per day (excluding GST). Because Mr Costello appeared at the final hearing as a representative of the respondent and not as a party to the proceeding, we do not



consider that it would be fair or reasonable for the builder to be ordered to pay compensation to the respondent for Mr Costello's time.

20 The respondent was not legally represented at the final hearing but did obtain legal advice on 10 March 2022 in relation to the Tribunal's hearing procedure in the amount of \$1,650 (including GST). Given our finding that the builder's conduct during the final hearing was inappropriate and inconsistent with the objectives in s 9 of the SAT Act, we are satisfied that the builder should pay to the respondent the amount of \$1,650 (including GST) in legal fees because those fees relate to the respondent's attendance at the final hearing. We are further satisfied that the legal fees of \$1,650 are reasonable and not excessive having regard to the nature of the dispute. The balance of the legal fees claimed by the respondent in the amount of \$2,640 is in respect of invoices dated 23 August 2020 and 28 October 2020 and, therefore, the fees were incurred before the builder lodged its application with the Tribunal on 29 July 2021. Because those legal fees were incurred before the review proceeding was commenced by the builder, we do not consider it would be fair or reasonable for the builder to be ordered to pay them.

21 The respondent seeks the cost of a Department of Mines, Industry Regulation and Safety (**DMIRS**) application fee in the amount of \$119 which it incurred on 18 January 2021. We do not accept the respondent's claim for the DMIRS application fee because it was incurred by the respondent before the review proceeding was commenced by the builder on 29 July 2021. For the same reason, we do not accept the respondent's claim for \$300 in strata fees for the management of building defects incurred in November 2020.



22 We are unable to make a finding in respect of the respondent's claims relating to stress and the deterioration of the property because the claims are unquantified and unsupported by any evidence. We also consider that the respondent's stress-related costs claim is misconceived because neither Mr Costello nor the respondent owners are parties to the review proceeding in their individual capacities.

### ***Conclusion***

23 The presumptive position is that parties to a review proceeding before the Tribunal will bear their own costs. However, the Tribunal can order a party to pay all or any of the costs of another party under s 87(2) of the SAT Act. In the circumstances of this review proceeding, we consider it would be fair and reasonable for the respondent to be compensated for its expenses in the amount of \$2,285 (including GST).

24 Accordingly, we will order that the applicant pay to the respondent the amount of \$2,285 (including GST) by 5 pm on 31 August 2022.

### ***Orders***

The Tribunal orders:

1. By 5 pm on 31 August 2022 the applicant must pay to the respondent the amount of \$2,285 (including GST) pursuant to s 49 of the *Building Services (Complaint Resolution and Administration) Act 2011* (WA) and s 87(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 22 JULY

2022

