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| **JURISDICTION** | **:** | STATE ADMINISTRATIVE TRIBUNAL |
| **ACT** | **:** | BUILDING SERVICES (COMPLAINT RESOLUTION AND ADMINISTRATION) ACT 2011 (WA) |
| **CITATION** | **:** | DESHMUKH and DISTINCTIVE BUILDING SERVICES PTY LTD [2024] WASAT 15 |
| **MEMBER** | **:** | MR D AITKEN, SENIOR MEMBER |
| **HEARD** | **:** | 13 DECEMBER 2023 |
| **DELIVERED** | **:** | 6 MARCH 2024 |
| **FILE NO/S** | **:** | CC 1089 of 2023 |
| **BETWEEN** | **:** | SONAL RAMESH KONDE DESHMUKH<br>First Applicant<br><br>ABHIJEET KALE<br>Second Applicant<br><br>AND<br><br>DISTINCTIVE BUILDING SERVICES PTY LTD<br>Respondent |

*Catchwords:*

*Building Services (Complaint Resolution and Administration) Act 2011* (WA) - Claim for damages for delay in completion of dwelling while contract on foot - Application for leave to review decision of original Tribunal - Criteria for the grant of leave to review - Whether original Tribunal breached the rules of natural justice - Whether original Tribunal made an error in the exercise of its discretion to decline to make a HBWC remedy order - Principles in relation to

an appeal against exercise of discretion - Proper construction of discretion to make a HBWC remedy order - Considerations concerning whether a HBWC remedy order is justified - Whether the applicants would suffer a substantial injustice if leave to review not granted

*Legislation:*

*Building Services (Complaint Resolution and Administration) Act 2011* (WA), s 5(1), s 5(2), s 11(1)(d), s 12(a), s 36(1), s 36(1)(a), s 36(1)(b), s 36(1)(c), s 38, s 38(1), s 38(1)(a), s 38(1)(b), s 41, s 41(1), s 41(2), s 41(2)(d)(i), s 43, s 43(1), s 43(1)(a), s 43(1)(b), s 58, s 58(2), s 58(5),
*Home Building Contracts Act 1991* (WA), Pt 3A, s 25D
*State Administrative Tribunal Act 2004* (WA), s 27, s 42, s 42(1), s 42(3), s 74(a), s 79

*Result:*

Leave granted to review order made by original Tribunal to decline to make a HBWC remedy order

*Category:* B

**Representation:**

*Counsel:*

| | | |
|---|---|---|
| First Applicant | : | J Jacobson |
| Second Applicant | : | J Jacobson |
| Respondent | : | Mr K Hassan (acting as Agent) |

*Solicitors:*

| | | |
|---|---|---|
| First Applicant | : | Jacobson & Associates |
| Second Applicant | : | Jacobson & Associates |
| Respondent | : | N/A |

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

Alison Louise Lobbe atf Lobbe Newman Trust and Kelpie Endeavours Pty Ltd atf Testa Rossa Family Trust and Quality Builders Pty Ltd [2014] WASAT 110
Byham and Afra Construction Pty Ltd [2014] WASAT 38

Chellem and Kulowall Construction Pty Ltd [2022] WASAT 95
Filimon and Rimmer [2013] WASAT 13
Gemmill Homes Pty Ltd v Sanders [2018] WASC 179
Hadley v Baxendale (1854) 156 ER 145
House v R (1936) 55 CLR 499
Jetpoint Nominees Pty Ltd and Lee [2021] WASAT 10
Jones and Afra Constructions Pty Ltd [2014] WASAT 54
Kulowall Construction Pty Ltd v Chellem [2023] WASC 140
Lampman and Afra Constructions Pty Ltd [2014] WASAT 27
Myran Holdings Pty Ltd and Bombak [2013] WASAT 20
Ogle v Comboyuro Investments Pty Ltd (1976) 136 CLR 444
Owners of Island Apartments Strata Plan 52597 and Pindan Pty Ltd [2017] WASAT 25
Psaros Builders Pty Ltd v Owners of Strata Plan 52843 [2014] WASC 34
Waldron and Afra Construction Pty Ltd [2013] WASAT 207

**REASONS FOR DECISION OF THE TRIBUNAL**:

## Introduction

1. The applicants, Mr Abhijeet Kale and Ms Sonal Ramesh Konde Deshmukh, made a HBWC complaint to the Building Commissioner against the respondent, Distinctive Building Services Pty Ltd, under s 5(2) of the *Building Services (Complaint Resolution and Administration) Act 2011* (WA) (**BSCRA Act**).

2. The complaint arose from a home building work contract dated 25 October 2021 between the parties for the construction by the respondent of a dwelling in Piara Waters for the applicants for the price of $304,800 (**contract**).

3. There were two items of complaint. The first complaint item was that a notice of extension of time to complete the building works given to the applicants by the respondent on 9 December 2022 was invalid. The second complaint item was that the respondent had not completed the building works by the due date and the applicants claimed damages for rent they had paid, interest on their mortgage and water usage/rates (**claim for damages**).

4. The Building Commissioner referred the complaint to the Tribunal.[1] After a final hearing on 30 June 2023 (**final hearing**), the Tribunal, constituted by Member De Villiers as the presiding member, and Sessional Member Orr (**original Tribunal**), reserved its decision and then on 12 July 2023 made the following orders:

    1. The notice of 9 December 2022 which purported to be a notice of extension of time under clause 10 of the contract, was invalid.

    2. The application for damages is declined pursuant to s 43(1)(b) of the BSCRA Act (**second order**).

5. The reasons for the decision to make those orders were delivered orally by Member De Villiers on 12 July 2023 (**oral reasons**) and the transcript of the oral reasons was given to the parties by the Tribunal in accordance with s 74(a) and s 79 of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**).

[1] Under s 11(1)(d) of the BSCRA Act the Building Commissioner may refer a HBWC complaint to the Tribunal, which becomes a proceeding in the Tribunal pursuant to s 42(1) and (3) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**). Under s 12(a) of the BSCRA Act the person/s who have made the complaint to the Building Commissioner become the applicant/s in the proceeding.

6. The applicants have made an application to the Tribunal under s 58 of the BSCRA Act seeking review of the original Tribunal's second order (**review application**).

7. Section 58(5) of the BSCRA Act provides that a review application cannot be made unless the Tribunal gives leave for review.

8. The Tribunal for the determination of whether leave will be granted is constituted by legally qualified Senior Member Aitken, in accordance with the requirements of s 58(5) of the BSCRA Act.

9. For the reasons which follow, I have decided to grant leave to the applicants for review of the original Tribunal's second order.

## Hearing of the application for leave to review

10. The application for leave to review was heard on 13 December 2023 (**leave hearing**).

11. The applicants had filed with the Tribunal and given to the respondent a statement of the grounds on which they sought leave to review the original Tribunal's second order (**applicants' statement of grounds**).

12. During the leave hearing I took into evidence the transcript of the final hearing (**final hearing transcript**)[2] and the transcript of the oral reasons (**reasons transcript**).[3]

13. During the leave hearing counsel for the applicants, Mr Jacobson of Jacobson & Associates and the representative of the respondent, Mr Kareem Hassan made oral submissions.

## The criteria for the grant of leave to review

14. As noted by the Tribunal (constituted by Parry J) in ***Jetpoint Nominees Pty Ltd and Lee***[4] at [38], the principles concerning whether leave should be granted, under s 58(5) of the BSCRA Act, to apply for an internal review, under s 58(2) of the BSCRA Act, of an order made by the Tribunal under s 38 or s 43 of the BSCRA Act are well established.

15. The main considerations are as stated by the Tribunal in ***Myran Holdings Pty Ltd and Bombak***[5] at [8], based on the discussion

[2] Exhibit 1.
[3] Exhibit 2.
[4] ***Jetpoint Nominees Pty Ltd and Lee*** [2021] WASAT 10 (***Jetpoint Nominees***).
[5] ***Myran Holdings Pty Ltd and Bombak*** [2013] WASAT 20 (***Myran Holdings***).

in ***Filimon and Rimmer***.[6] However, the range of considerations is not closed, and other matters may be relevant in a particular case.

16. In ***Myran Holdings*** at [8] the Tribunal stated:

> 8 The following principles can be gleaned from the discussion of the applicable criteria for the grant of leave to review under s 58(2) of the [BSCRA] Act as discussed in [*Filimon and Rimmer* [2013] WASAT 13]:
>
> 1) It is necessary to show that the decision of the original Tribunal was wrong or attended with sufficient doubt.
>
> 2) It must be shown that if leave were not to be granted, the applicant would suffer a substantial injustice.
>
> 3) It will normally not be sufficient that the decision appealed from is apparently wrong or attended with doubt. Something more will need to be shown, such as that there is a significant question of law to be considered, or some other feature, which requires the consideration of the Tribunal to avoid a substantial injustice of (sic) leave were not to be granted.
>
> 4) The decisions of the original Tribunal are not to be read minutely and finely with an eye keenly attuned to the perception of error.
>
> 5) A broad view should be taken of all the material before the original Tribunal, and this Tribunal should be slow to grant leave to review or to allow reviews except in cases where, clearly, there is no discernible basis for the decision or, for example, where fundamental rules of natural justice have been breached.
>
> 6) Leave may be granted in respect of only some and not other grounds of the proposed review.
>
> 7) Having regard to the objects of the Tribunal, and because any review is by way of a hearing de novo, there is all the more reason to be particularly discerning about whether sufficient doubt exists to open the possibility of leave being granted.
>
> 8) In considering challenges to the weight of evidence, regard must be given to the expertise of the members of the original Tribunal.

[6] ***Filimon and Rimmer*** [2013] WASAT 13 (***Filimon***).

## The applicants' grounds for the grant of leave to review

17. The applicants rely on the following three grounds for the grant of leave to review the original Tribunal's second order:

    1. The original Tribunal erred by breaching the rules of natural justice, in that its conduct at the final hearing demonstrated a reasonable apprehension of bias or actual bias (**ground 1**).

    2. The original Tribunal erred in taking into account irrelevant considerations, namely whether the contract was on foot or had been terminated, whether the applicants believed that the respondent had no intention to honour the contract and whether the applicants were bound to mitigate their loss, presumably by terminating the contract (**ground 2**).

    3. The original Tribunal erred in finding that although it was accepted that the applicants were likely to be awarded damages, it declined to exercise its discretion to do so and allowed extraneous and irrelevant factors to guide it and the reasons for the exercise of the discretion were unreasonable and unjust (**ground 3**).

18. The applicants refer to the considerations stated in ***Myran Holdings***[7] and contend that leave should be granted for review of the original Tribunal's second order for the following reasons:

    (1) the decision of the original Tribunal to make the second order was wrong or attended with sufficient doubt;

    (2) if leave is not granted, the applicants will suffer a substantial injustice; and

    (3) there is a significant question of law to be considered, which requires the consideration of the Tribunal to avoid a substantial injustice if leave is not granted.

## The respondent's submissions

19. The respondent was given the opportunity prior to the leave hearing to file a written response to the applicants' statement of grounds, but the respondent did not file a response.

[7] Which are set out in paragraph [16] of these reasons.

20. During the leave hearing I gave the representative of the respondent, Mr Kareem Hassan, the opportunity to make oral submissions and the only submission which Mr Hassan made was that the contract does not contain any provision regarding damages.

## Consideration of the grounds

### *Ground 1*

21. Ground 1 is that the original Tribunal erred by breaching the rules of natural justice, in that its conduct at the final hearing demonstrated a reasonable apprehension of bias or actual bias.

22. In the applicants' statement of grounds, by way of background, they say that under the terms of the contract practical completion of the dwelling should have been reached by no later than 10 January 2023 and that their claim for damages arose from the delay by the respondent in achieving practical completion.

23. The applicants say, by way of further background, that they were not prepared to terminate the contract due to the failure by the builder to achieve practical completion by the due date before making the claim for damages for the following reasons:

    (1) If they terminated the contract and the respondent subsequently went into liquidation, there was no guarantee that the applicants would be indemnified by the home indemnity insurer[8] for the cost of completing the construction of the dwelling.

    (2) If, however, they kept the contract on foot and if the Tribunal awarded them damages to compensate them for the respondent's delay, and if the respondent subsequently went into liquidation, they could be assured that the home indemnity insurance would indemnify them and pay the difference in the cost between the contract price and the cost of another builder completing the construction of the dwelling.

    (3) Additionally, it is not a simple matter for the applicants to terminate the contract; they would have to demonstrate that the

[8] Part 3A of the *Home Building Contracts Act 1991* (WA) provides that before a registered builder performs 'residential building work' they must take out a policy of 'home indemnity insurance' on behalf of the owner. The home indemnity insurance is to protect against the financial loss specified in s 25D of that Act if the builder cannot complete the work or meet a valid claim for faulty or unsatisfactory building work because a 'relevant circumstance' exists. Relevant circumstances include the builder becoming insolvent or their registration being cancelled or not renewed.

respondent had committed a 'substantial' breach of the contract or had unlawfully suspended the works.

24. The applicants say that prior to any evidence or submissions being presented, Member De Villiers questioned the applicants' counsel, Mr Jacobson, in detail about the applicants' strategy to seek compensation whilst the contract was still on foot, rather than terminating the contract and subsequently seeking damages, and that Member De Villiers stated that 'while there's a contract on foot, I won't make compensation orders on the run'.[9]

25. The applicants contend that this demonstrates that even prior to hearing the evidence or considering the legal submissions, Member De Villiers had effectively made up his mind that whilst the contract was on foot, he would not make compensation orders.

26. The applicants then refer to further extracts from the final hearing transcript which they say further demonstrate that Member De Villiers had already predetermined his decision.

27. The applicants refer to the following statement by Member De Villiers:

> To me (sic) to make a compensation order of or (sic) imagine what that does to the jurisdiction of the tribunal where at any stage somebody can come because the build is now halfway and they think they are losing some money.
>
> They lodge a claim and then two months later they come back and say "Well, actually, it's not finished yet and we've resided two months longer and now we want that to be", it's just not on. --- It's just not on.[10]

28. The applicants refer to the submission which the applicants' counsel then made that the applicants would abandon what he referred to as 'future claims' and seek an order for the loss incurred by the applicants from the date when practical completion ought to have occurred to the date of the final hearing. The applicants then refer to Member De Villiers' response to that submission which was: 'I'm going to disappoint you, Mr Jacobson, and it may be an interesting point to take me on a review. As you know, review is an expensive process'.[11]

29. The applicants say that although it is accepted that a preliminary view expressed by a judge (or in this case by a Tribunal member) on the

[9] Final hearing transcript, page 12.
[10] Final hearing transcript, pages 13 - 14.
[11] Final hearing transcript, page 15.

matters before them does not necessarily constitute bias, circumstances may exist where the appearance of preconceptions is ineradicable. The applicants contend that in this matter the preconception of Member De Villiers was ineradicable, particularly considering his statement set out in paragraph [28] above. The applicants submit that Member De Villiers did not simply express a provisional view of the matter, rather, he had reached a final decision which could not be altered by any evidence put or argument made by the applicants' counsel.

30. In ***Jetpoint Nominees*** at [40] - [43] the Tribunal explained the applicability of the rules of natural justice to proceedings before the Tribunal as follows:

> 40 Section 32(1) of the SAT Act states as follows:
>
> > The Tribunal is bound by the rules of natural justice except to the extent that this Act or the enabling Act authorises, whether expressly or by implication, a departure from those rules.
>
> 41 The rules of natural justice, which is also known as 'procedural fairness', have been described as follows:
>
> > There are two basic rules, sometimes referred to as "limbs", of natural justice or procedural fairness, namely:
> >
> > - The "hearing rule" – the right of a person to present their case and to know, and to be given an opportunity to respond to, the case presented against them (whether at an oral hearing or in a determination on documents).
> >
> > - The "bias rule" – the right of a person to have their case determined by a tribunal which is not either actually biased, that is not "so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented", or disqualified by a reasonable apprehension of bias in that "a fair minded lay observer might reasonably apprehend that the [tribunal] might not bring an impartial and unprejudiced mind to the resolution of the question [it] has to decide".
>
> 42 The term 'enabling Act' is defined in s 3(1) of the SAT Act to mean 'another Act, or a portion of another Act, under which jurisdiction is conferred on the Tribunal and, if relevant, it

> includes subsidiary legislation under that other Act'. The enabling Act in this case, namely the BSCRA Act, does not authorise any departure from the rules of natural justice.
>
> 43 As Buss JA explained in *Mijatovic v Legal Practitioners Complaints Committee* [2008] WASCA 115; (2008) 37 WAR 149 at [55], '[f]airness is essentially a practical concept' and is 'not abstract in nature'. As his Honour also said there, '[t]he law of procedural fairness is concerned to avoid practical injustice'. His Honour then said the following, specifically in relation to proceedings before SAT at [56]:
>
> > The requirements of procedural fairness are flexible. Proceedings before the Tribunal may be organised to ensure fairness having regard to the nature and circumstances of the particular proceeding, including the relevant facts, the statutory context, the matters in dispute, the circumstances of the particular litigants, and whether the particular proceeding is in the Tribunal's original or review jurisdiction.
>
> (Footnote omitted)

31. In ***Jetpoint Nominees*** at [64] the Tribunal stated the following regarding the tests for disqualification of a judicial officer because of a reasonable apprehension of bias and because of actual bias in the conduct of proceedings:[12]

> 64 In *Chin v Legal Practice Board of Western Australia* [2011] WASCA 110, Newnes JA said the following in relation to the tests for the disqualification of a judicial officer on the basis of a reasonable apprehension of bias and on the basis of actual bias in the conduct of proceedings at [3] and [5]:
>
> > 3. The test to be applied in determining whether, in a case like the present, a judge is disqualified by reason of the appearance of bias is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide: *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488, 492. The plurality in that case pointed out (493) that in applying that test two things need to be remembered: the observer is taken to be reasonable, and the person being observed is a professional judge whose training, tradition and oath or affirmation require the judge to discard the irrelevant, the immaterial and the prejudicial.

[12] The 'bias rule' set out in ***Jetpoint Nominees*** at [41], which is set out in paragraph [30] of these reasons.

…

> 5. Where a party contends that actual bias exists, the applicant must show that the mind of the decision-maker is so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented: *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507, 532 [72]. Actual bias will exist where the decision-maker has prejudged the case against the applicant, or acted with such partisanship or hostility as to show that the decision-maker had a mind made up against the applicant and was not open to persuasion in favour of the applicant: see *Jia Legeng* [36], [72]. Such an allegation must be 'distinctly made and clearly proved': *Jia Legeng* [69], [127].

32. The respondent did not make any submission regarding ground 1.

33. In my view, ground 1 has not been made out, for the following reasons.

34. I accept that it certainly appears, from the comments made by Member De Villiers during the final hearing which I have referred to in paragraphs [24], [27] and [28] above, that Member De Villiers had a strong view (which he did not describe as a preliminary view) at the outset of the final hearing that he was not prepared to make an order regarding the applicants' claim for damages because the contract was still on foot. However, I think he resiled from that initial view as the final hearing progressed and was then open to persuasion in favour of the applicants. Also, the decision of the original Tribunal regarding the applicants' claim for damages was made jointly by Member De Villiers and Sessional Member Orr.

35. Immediately following his comment which I have referred to in paragraph [28] above (that he was going to disappoint Mr Jacobson), Member De Villiers stated that (in his view) it had never been the practice of the Tribunal, and he did not know about case law in the courts, to award compensation (for damage suffered) while a contract was on foot, but that he was willing to reconsider his view if the applicants' counsel, Mr Jacobson could cite any decisions by the Tribunal to order compensation in such a situation.

36. Mr Jacobson identified a Tribunal decision[13] and there was a short break in the final hearing while Member De Villiers read that decision. Then when the hearing resumed Member De Villiers stated that he would need to consider that decision further. Mr Jacobson then said that there may be other decisions and Member De Villiers said that he would give Mr Jacobson time to make further submissions on that issue.[14] At the conclusion of the final hearing on Friday, 30 June 2023, although no order was made, Member De Villiers said that he would allow Mr Jacobson until close of business on the following Monday (3 July 2023) to file written submissions identifying any other decisions in which compensation was awarded for a delay in the completion of building works while a building contract remained on foot.[15] Mr Jacobson filed submissions on 3 July 2023 which identified five previous decisions of the Tribunal in which compensation was awarded for a delay in the completion of building works while a building contract remained on foot. During the delivery of the oral reasons on 12 July 2023 Member De Villiers acknowledged that he and Sessional Member Orr had considered those submissions.[16]

### *Grounds 2 and 3*

37. Grounds 2 and 3 both raise the issue of whether the original Tribunal made an error in the exercise of its discretion under s 43(1) of the BSCRA Act to make the second order (declining to make an order in favour of the applicants regarding the claim for damages). Therefore, I will consider them together.

38. Ground 2 is that the original Tribunal erred in taking into account irrelevant considerations, namely whether the contract was on foot or had been terminated, whether the applicants believed that the respondent had no intention to honour the contract and whether the applicants were bound to mitigate their loss, presumably by terminating the contract.

39. Ground 3 is that the original Tribunal erred in finding that although it was accepted that the applicants were likely to be awarded damages, it declined to exercise its discretion to do so and allowed extraneous and irrelevant factors to guide it and the reasons for the exercise of the discretion were unreasonable and unjust.

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[13] ***Chellem and Kulowall Construction Pty Ltd*** [2022] WASAT 95.
[14] Final hearing transcript, pages 15 - 20.
[15] Final hearing transcript, pages 80 - 82
[16] Reasons transcript, pages 7 and 10.

***The principles in relation to an appeal against the exercise of discretion***

40. The applicants have referred to the following statement by Dixon, Evatt and McTiernan JJ in ***House v R*** (1936) 55 CLR 499 at pp504 – 505 regarding the principles in relation to an appeal against the exercise of discretion:

> … The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If a judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed …

41. Error in the exercise of discretion by the original Tribunal may be shown by establishing that it acted on a wrong principle, took into account an extraneous or irrelevant consideration, or failed to take into account a material (relevant) consideration.

42. To determine whether there has been an error in the exercise of discretion by the original Tribunal under s 43(1)(b) of the BSCRA Act to not make a HBWC remedy order[17] regarding the applicants' claim for damages I need to consider the proper construction of s 43(1) of the BSCRA Act.

***What is the proper construction of the discretion to make a HBWC remedy order under s 43(1) of the BSCRA Act?***

43. Section 43(1) of the BSCRA Act provides:

> (1) If the Building Commissioner refers a HBWC complaint to the State Administrative Tribunal, the Tribunal may —
>
> (a) if satisfied that the order is justified, make a HBWC remedy order; or
>
> (b) otherwise, decline to make the order.

44. Section 41(1) and (2) of the BSCRA Act provides:

> (1) In this section —
>
> ***specified*** means specified in the HBWC order.

[17] A HBWC remedy order is an order made under s 41(2) of the BSCRA Act.

> (2) A HBWC remedy order in respect of a complaint by an owner or builder under a home building work contract referred to in the *Home Building Contracts Act 1991* section 17 (other than a complaint about a breach of section 15 of that Act) consists of one or more of the following —
>
> (a) an order —
>
> (i) restraining any specified action in breach of the contract or of a provision in the *Home Building Contracts Act 1991* Part 2;
>
> (ii) requiring any specified work to be done in the performance of the contract;
>
> (iii) requiring any specified work to be done to ensure compliance with a provision of the *Home Building Contracts Act 1991* Part 2;
>
> (iv) requiring any specified work to be done to remedy a breach of the contract or of a provision of the *Home Building Contracts Act 1991* Part 2;
>
> (b) an order that a person pay a specified amount payable under the contract;
>
> (c) an order declaring that a specified amount is not payable to a person under the contract and, if already paid, an order that the builder or owner repay that amount;
>
> (d) an order that a person pay specified compensation for loss or damage —
>
> (i) caused by any breach of the contract or of a provision of the *Home Building Contracts Act 1991* Part 2; or
>
> (ii) referred to in the *Home Building Contracts Act 1991* Schedule 1;
>
> (e) an order declaring that a specified amount of money claimed or money claimed for specified work is not payable by a person.

45. In ***Gemmill Homes Pty Ltd v Sanders***[18] Smith AJ (as her Honour then was) considered the proper construction of the discretion of the

[18] ***Gemmill Homes Pty Ltd v Sanders*** [2018] WASC 179 (***Gemmill Homes***).

Tribunal to make a building remedy order under s 38 of the BSCRA Act and at [96], [102], [103], [106] - [111], [125] - [129], [133] and [134] stated:

> 96 The proper construction of a statute or instrument is a question of law.
>
> …
>
> 102 Section 38(1) of the Complaint Resolution Act provides:
>
> > (1) If the Building Commissioner refers a building service complaint to the State Administrative Tribunal, the Tribunal may –
> >
> > > (a) if the Tribunal is satisfied that the regulated building service that is the subject of the building service complaint has not been carried out in a proper and proficient manner or is faulty or unsatisfactory, deal with the building service complaint by making a building remedy order; or
> > >
> > > (b) otherwise, decline to make a building remedy order.
>
> 103 Section 36(1) of the Complaint Resolution Act provides:
>
> > (1) A building remedy order consists of one of the following -
> >
> > > (a) an order that a person who carried out a regulated building service remedy the building service as specified in the order;
> > >
> > > (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.

…

106 The preconditions which enliven the discretion conferred on the Tribunal to make a building remedy order is that the Tribunal must be satisfied that the regulated building service (that is the subject of the complaint) has not been carried out in a proper and proficient manner, or is faulty, or unsatisfactory. There are, however, limitations upon the making of a building remedy order prescribed in s 32(2) of the Complaint Resolution Act which are not relevant to the matters raised in this appeal.

107 The general discretion conferred by s 38(1) of the Complaint Resolution Act to make a building remedy order is not limited by any mandatory considerations.

108 Legal reasonableness provides the boundaries of the area within which a decision-maker has a genuinely free discretion. It is, however, implied in a discretionary power conferred by statute that the discretion must be exercised reasonably.

109 To determine the boundary, regard must be had to the scope, subject matter and purpose of the statutory discretionary power.

110 Thus, it is necessary to consider the subject matter, scope and purpose of the statutory scheme that creates and confers on the Tribunal a discretion to make building remedy orders.

111 By its long title, the Complaint Resolution Act is to provide for, among other matters, a system for dealing with complaints about building services, home building work contract matters and disciplinary matters and a system for ensuring compliance with laws about building services.

…

125 Although s 36(1) could be construed as providing an unfettered discretion to make any of the orders specified in s 36(1)(a), (b) and (c), where a statutory grant of power is silent on the matters to be taken into account, as set out in [107] - [110], the matters that a statutory decision-maker (such as the Tribunal) are required to take into account may arise by implication from the subject matter, scope and purpose of the legislation.

126 In *Sean Investments Pty Ltd v MacKellar* Deane J observed:

> [W]here relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards. The ground of failure to take into account a

> relevant consideration will only be made good if it is shown that the decision-maker has failed to take into account a consideration which he was, in the circumstances, bound to take into account for there to be a valid exercise of the power to decide.

127 In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* Mason J had regard to this observation made by Deane J in *Sean Investments* in the context of considering a ground of appeal. Taking into account irrelevant considerations in judicial review Mason J summarised the following propositions:

> (b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard: see *Reg v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49–50 , adopting the earlier formulations of Dixon J in *Swan Hill Corp v Bradbury* (1937) 56 CLR 746 at 757-8, and *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505. By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act.
>
> (c) Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised

> according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision: see, eg, the various expressions in *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] AC 663 at 693; *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999 at 1020; *R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society* [1984] QB 227 at 260. A similar principle has been enunciated in cases where regard has been had to irrelevant considerations in the making of an administrative decision: *Reg v Bishop of London* (1889) 24 QBD 213 at 226-7; *Reg v Rochdale Metropolitan Borough Council; Ex parte Cromer Ring Mill Ltd* [1982] 3 All ER 761 at 769-70.

128 More recently, Mitchell J explained in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation:*

> It follows from this definition of the concept that, where action taken in the purported exercise of a statutory power is sought to be impugned for jurisdictional error, the only question will be whether what was done was authorised by the empowering legislation. The answer to that question will turn on the identification of the limits of the authority conferred by the relevant statutory provision, and an analysis of the facts to ascertain whether those limits have been exceeded. The identification of those limits may also be described as identifying the conditions for the valid exercise of the statutory power.
>
> The identification of the conditions for the valid exercise of the relevant statutory power is entirely a question of statutory construction. The proper construction of the relevant statute is 'reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy'.
>
> Those rules require primary attention to be directed to the text of the relevant provisions. There must be regard to the language of the statute viewed as a whole, considered in its context. An important part of that context will be the purpose of the legislation, ascertained from what the legislation says (rather than any assumption about the desired or desirable reach or operation of the relevant provisions). Once the purpose of the legislation is established, a construction that would promote that purpose shall be preferred to a construction that would not do so.

> Some rules of statutory construction relate to assumptions which are to be made in reading legislation. For example, it is presumed that legislation does not overthrow fundamental principles or depart from the general system of law without expressing that intention with irresistible clearness. Where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred.
>
> 129 Any failure to form the necessary requisite opinion governing the exercise of the power to make a building remedy order would have the effect that the decision is not authorised by the statute and is thus invalid as an excess of power.
>
> …
>
> 133 It must be borne in mind that the statutory limits on the exercise of the discretion to make a building remedy order are only those set out in s 38. The repository of the power conferred to make an order (the Tribunal) must form an opinion that the regulated building service (that is the subject of the building service complaint) has not been carried out in a proper and proficient manner, or is faulty or unsatisfactory.
>
> 134 If the requisite opinion is formed, the Tribunal is required to make a building remedy order. It then has to exercise the discretion conferred in s 36(1) to make a particular order in the form of s 36(1)(a), (b) or (c). Thus, no 'right' or requirement on a party to a complaint to elect arises.

(Footnotes omitted)

46. Section 38 of the BSCRA Act gives the Tribunal the power to deal with a building service complaint[19] referred to it by the Building Commissioner and s 43 of the BSCRA Act gives the Tribunal the power to deal with a HBWC complaint referred to it by the Building Commissioner.

47. In ***Gemmill Homes*** at [134], Smith AJ stated that if the Tribunal forms the opinion (is satisfied) under s 38(1)(a) of the BSCRA Act that the regulated building service which is the subject of a building service complaint has not been carried out in a proper and proficient manner or is faulty or unsatisfactory (the requisite opinion), the Tribunal is *required* to make a building remedy order (emphasis added).

[19] A building service complaint is a complaint made under s 5(1) of the BSCRA Act about a regulated building service not being carried out in a proper and proficient manner or being faulty or unsatisfactory.

The Tribunal then has a discretion regarding a building remedy order it will make under the provisions of s 36(1) of the BSCRA Act. If the Tribunal does not form the requisite opinion, then, under s 38(1)(b) of the BSCRA Act, it may decline to make a building remedy order.

48. In the case of a HBWC complaint, s 43(1)(a) of the BSCRA Act provides that the Tribunal may make a HBWC remedy order if it forms the opinion (is satisfied) that a HBWC remedy order is *justified*. The Tribunal then has a discretion regarding the HBWC order it will make under s 41(2) of the BSCRA Act. If the Tribunal does not form the opinion that a HBWC remedy order is *justified* then under s 43(1)(b) of the BSCRA Act it may decline to make the order (emphasis added).

49. The task of the Tribunal when dealing with a HBWC complaint under s 43(1) of the BSCRA Act is to decide whether a HBWC remedy order is justified.

50. Like s 38(1) of the BSCRA Act (regarding building remedy orders), the general discretion conferred by s 43(1) of the BSCRA Act to make a HBWC remedy order is not limited by any mandatory considerations. However, as stated in ***Gemmill Homes*** at [108] - [110], it is implied in a discretionary power conferred by statute that the discretion must be exercised reasonably.

51. In my view the statement by Smith AJ in ***Gemmill Homes*** at [125] regarding the proper construction of s 36(1) of the BSCRA Act is applicable to the proper construction of s 43(1) of the BSCRA Act. The matters which the Tribunal is required to take into account in exercising the discretion to make or to decline to make a HBWC remedy order (that is, to form an opinion as to whether the order is justified) arise by implication from the subject matter, scope and purpose of the legislation.

52. In ***Gemmill Homes*** at [111] Smith AJ noted that the long title of the BSCRA Act states that 'it is to provide for, among other things, a system for dealing with complaints about building services, home building work contract matters and disciplinary matters and a system for ensuring compliance with laws about building services'.

53. In ***Kulowall Construction Pty Ltd v Chellem***[20] at [44] and [45] Tottle J agreed with the observation made by the Tribunal in ***Owners of Island***

[20] ***Kulowall Construction Pty Ltd v Chellem*** [2023] WASC 140.

***Apartments Strata Plan 52597 and Pindan Pty Ltd***[21] at [57] that the BSCRA Act is at its core consumer legislation and Tottle J went on to state that the making of a complaint under the BSCRA Act is the first step in *the process of resolving disputes* (emphasis added).

54. In my view the purpose of the BSCRA Act as consumer legislation, in relation to complaints about disputes which arise under home building work contracts, is to provide a system and process for *resolving* those disputes (emphasis added).

55. In ***Gemmill Homes*** at [133] and [134] Smith AJ considered the task the Tribunal must undertake to exercise the discretion conferred by s 38(1) of the BSCRA Act to make a building remedy order in the form of one or more of the orders specified in s 36(1). Her Honour said that the Tribunal must form an opinion that the regulated building service that is the subject of the building service complaint has not been carried out in a proper and proficient manner or is faulty or unsatisfactory and that if the requisite opinion is formed, the Tribunal *is required* to make a building remedy order (emphasis added). The Tribunal then must exercise the discretion conferred in s 36(1) to make a particular order in the form of s 36(1)(a), (b) or (c).[22]

56. In my view the same approach should be applied to the task the Tribunal must undertake to exercise the discretion conferred by s 43(1) of the BSCRA Act to make a HBWC remedy order in the form of one or more of the orders specified in s 41(2).

57. The Tribunal must form an opinion whether a HBWC remedy order is justified. If the requisite opinion is formed (that a HBWC remedy order is justified) then the Tribunal is *required* to make a HBWC remedy and *must* exercise the discretion conferred in s 41 to make one or more of the orders specified in s 41(2), to thereby resolve the dispute which is the subject of the HBWC complaint (emphasis added).

[21] ***Owners of Island Apartments Strata Plan 52597 and Pindan Pty Ltd*** [2017] WASAT 25.

[22] It should be noted that the Tribunal may make more than one building remedy order where that is required to deal with a building service complaint: ***Psaros Builders Pty Ltd v Owners of Strata Plan 52843*** [2014] WASC 34 at [43].

***What are the considerations concerning whether a HBWC remedy order is justified?***

58. The ordinary meaning of the term 'justified' includes 'acceptable or having good cause or reason'[23] and 'supported by reason, evidence, or right; warranted'.[24]

59. In my view the considerations concerning whether a HBWC remedy order is justified to resolve a HBWC complaint that a respondent has breached a home building work contract are:

    (1) Is there a valid home building work contract between the applicant and the respondent to the proceeding?

    (2) What are the relevant terms of the contract?

    (3) Has the respondent breached the relevant terms of the contract?

    (4) Has the applicant suffered loss, damage, or detriment which can be addressed by a HBWC remedy order?

60. In my view, if the Tribunal is satisfied that there is a valid home building work contract between the applicant and the respondent, and that the respondent has breached a relevant term of the contract which can be addressed by way of a HBWC remedy order then the Tribunal is required to make a HBWC remedy order. It then has a discretion regarding the HBWC remedy order it will make under the provisions of s 41(2) of the BSCRA Act.

***The reasons of the original Tribunal for declining to make an order in favour of the applicants regarding the claim for damages***

61. In the oral reasons[25] the original Tribunal stated that the claim for damages sought by the applicants is 'premature' and gave the following reasons for declining to award damages to the applicants:

    (1) The original Tribunal accepted that the applicants have suffered and will continue to suffer a loss due to the failure of the respondent to complete the construction of the dwelling within the time required under the contract. The original Tribunal said the question was whether damages should be 'apportioned' while the contract remains on foot or whether it is appropriate

[23] *Macquarie Dictionary Online*.
[24] *Oxford English Dictionary Online*.
[25] Reasons transcript, pages 7 - 10.

for the contract to be performed or otherwise terminated and to then calculate damages.

(2) The original Tribunal accepted that termination of a contract is not, by law, necessary as a precondition for damages to be awarded, noting the High Court judgment cited by the applicants' counsel in ***Ogle v Comboyuro Investments Pty Ltd***[26] (***Ogle***) at 450 as authority for this. The original Tribunal said that what also appears from this judgment of the High Court is that facts giving rise to a claim for damages while a contract remains on foot are essential to determine if the relief sought should be granted.

(3) The original Tribunal said that they had formed the view that the respondent has no intention of complying with the terms of the contract, noting that the only work which had been performed was the pouring of the slab, the respondent had not ordered bricks, the respondent did not have any signage on the site and had not made any representations during the final hearing of a proposed date of practical completion. The original Tribunal noted that the applicants, knowing that there is little or no intention on the part of the respondent to honour the contract, continued to elect to keep the contract on foot and hence continued to suffer damages. The original Tribunal stated that while they accepted that the applicants are likely to be awarded damages, it was not clear why they were electing to claim damages up to the date of the final hearing, when they elected at the same time for the contract to remain on foot. The original Tribunal said that this opens the door to the applicants claiming further damages as time progresses.

(4) The original Tribunal noted that the applicants' counsel had explained during the final hearing that the strategy of the applicants was to keep the contract on foot, to claim damages, to commence enforcement proceedings if the respondent did not pay, to 'declare the respondent bankrupt'[27] if necessary and then to lodge a claim under the home indemnity insurance policy, all while the contract remains on foot. The original Tribunal stated that while they could not comment on the merit of this strategy

[26] ***Ogle v Comboyuro Investments Pty Ltd*** (1976) 136 CLR 444.

[27] Mr Jacobson stated during the final hearing that the applicants would consider putting the respondent into liquidation (it being a corporation) if they were given an award of damages which was not paid by the respondent: see final hearing transcript, pages 8, 12 and 36.

or the understanding of the applicants' counsel of the home indemnity insurance policy, they must exercise their discretion independently.

(5) The original Tribunal then stated that the facts of a matter will determine whether damages are awarded while a contract is on foot and stated that 'As a general proposition, as far as responsible case management is concerned, we would suggest that the award of damages while a contract remains on foot should be approached with circumspection … for obvious reasons' such as:

1. The damages proceeding may in itself damage the relationship between the parties irrevocably.

2. The damages proceeding may bring about 'the hearing in a hearing', which may give rise to confusion.

3. The practical completion of the build may be further delayed as a result of a hearing about damages.

4. The outcome of a damages award may be reviewed or appealed, which may further complicate the contractual relationship between the parties.

5. A claim for damages may give rise to cross-claims by the builder and multiple and consecutive applications for damages by the owners while the contract remains on foot.

6. The question may arise if the owner should not mitigate losses by terminating the contract.

7. The principle of finality in litigation may be eroded since multiple proceedings of a final nature may be ongoing at the same time.

8. In the context of the building dispute jurisdiction of the Tribunal, which is already subject to resource constraints, damages claimed during the life of a building contract could cause further delays to finalise this and other matters.

9. Furthermore, to allow a claim for damages whilst the contract is on foot would not be consistent with the

objectives of the Tribunal to resolve disputes speedily and effectively with as little as possible formality and cost to the parties.

62. The original Tribunal then said that they were not satisfied that their discretion should be exercised in favour of the applicants in light of their foregoing analysis of the evidence and submissions and the original Tribunal therefore declined to make a HBWC remedy order for damages.

63. The original Tribunal acknowledged that the applicants' counsel had cited cases in the Tribunal in which damages have been awarded while a contract has been on foot.[28] The original Tribunal then said that in each of those cases the finding turned on its own facts and that in none of those cases, as far as the original Tribunal could ascertain, had the Tribunal (as constituted in those cases) given consideration to the concerns the original Tribunal had raised and the original Tribunal therefore declined to make an order for the damages sought by the applicants.

### *Applicants' contentions*

64. The applicants contend that each of the nine considerations set out in paragraph [61(5)] above were either irrelevant or unreasonable for the following reasons:

1. The applicants say that the relationship between the parties is already significantly damaged, and it was irrelevant for the original Tribunal to consider whether making an order for the respondent to pay damages to the applicants may damage the relationship between the parties.

2. The applicants say that the original Tribunal received evidence at the final hearing regarding the damages the applicants had suffered as a result of the respondent's breach of the contract and if the original Tribunal had exercised its discretion to award damages there would have been no need for a further hearing to determine the quantum of the damages (and hence no need for a 'hearing in a hearing').

[28] ***Waldron and Afra Construction Pty Ltd*** [2013] WASAT 207; ***Lampman and Afra Constructions Pty Ltd*** [2014] WASAT 27; ***Byham and Afra Construction Pty Ltd*** [2014] WASAT 38; ***Jones and Afra Constructions Pty Ltd*** [2014] WASAT 54; ***Alison Louise Lobbe atf Lobbe Newman Trust and Kelpie Endeavours Pty Ltd atf Testa Rossa Family Trust and Quality Builders Pty Ltd*** [2014] WASAT 110.

3. The applicants say that there was no evidence before the original Tribunal that an award of damages might lead to further delay in the practical completion of the dwelling and this amounted to a speculative and irrelevant consideration by the original Tribunal.

4. The applicants say that the possibility that the respondent may seek a review of a decision by the original Tribunal to award damages to the applicants was an unreasonable consideration. The applicants also say that the relationship between the parties was already strained and for the original Tribunal to say that an award of damages might further complicate that relationship was an irrelevant consideration.

5. The applicants say that it is not clear what cross-claim the respondent might have against the applicants, but even if the respondent has a legitimate cross-claim such a claim could be made by the respondent at any time whether or not an award of damages was made in favour of the applicants by the original Tribunal, and this is an irrelevant consideration. The applicants also say that there was no evidence before the original Tribunal that the applicants would make any consecutive claim or claims for damages if they were awarded damages in the first instance and that the possibility of this was an irrelevant consideration. The applicants say that the original Tribunal was aware of the applicants' strategy, which was to be paid damages for the delay, or if the respondent failed to pay, put the respondent into liquidation which would enable the respondents to make a claim under the home indemnity insurance policy.

6. The applicants say that the question of whether they should mitigate their losses by terminating the contract was an unreasonable and irrelevant consideration, particularly in light of the original Tribunal's finding that it had the power to award damages (for breach of contract) whilst the contract was on foot. The applicants also say that if they terminate the contract and, subsequently, they were awarded damages and the respondent went into liquidation, there would be no guarantee that they would be able to rely on the home indemnity insurance policy.

7. In respect of the consideration by the original Tribunal that the principle of finality in litigation may be eroded since multiple

proceedings 'of a final nature' may be ongoing at the same time, the applicants refer to what they have said in paragraph 5 above.

8. The applicants say that the assumption that damages claimed by the applicants whilst the contract is on foot could cause further delays to the finalisation of their matter and other matters because of resource constraints of the Tribunal is an irrelevant consideration. The applicants say that this is predicated on the assumption that the applicants will attempt to have one or more further 'bites of the apple' without any evidence to support that view.

9. The applicants agree that the objectives of the Tribunal are to resolve disputes speedily and effectively but say that does not override the requirement that the Tribunal exercise its discretion justly, even if doing so might cause some sort of delay. The applicants say that their key objection to the reasons given by the original Tribunal is its unwillingness to award damages unless the contract has been terminated.

***Did the original Tribunal make an error in the exercise of its discretion under s 43(1) of the BSCRA Act?***

65. The contract is clearly a home building work contract for the purposes of the BSCRA Act. This was not in contention at the final hearing.

66. The original Tribunal was satisfied that the respondent has breached the contract by failing to complete the construction of the dwelling within the time required under the terms of the contract (paragraph [61(1)] above).

67. The original Tribunal was also satisfied that the applicants have suffered and are continuing to suffer a loss due to that breach of contract (paragraph [61(1)] above).

68. As I mentioned in paragraph [20] above, the respondent made a submission during the leave hearing that the contract does not contain any provision regarding damages. There is no requirement at law that damages for breach of a contract are only recoverable if there is a provision in the contract concerning damages for breach. A contract may include a provision which sets out the 'liquidated damages' which will be payable by a party if they breach the contract. Such a provision will function as a limitation on the damages which are recoverable by the innocent party if it is a genuine pre-estimate of the loss likely to be

suffered by them in the event of a breach of the contract by the other party. However, the absence of a liquidated damages provision does not prevent damages being awarded in the event of a breach of the contract.

69. The original Tribunal, correctly, accepted that the termination of the contract is not, by law, necessary as a pre-condition for the award of damages (paragraph [61(2)] above).

70. In ***Ogle*** at [13] Barwick CJ stated:

> … It was submitted in argument by counsel for the appellant that the respondent could not sue upon that failure to complete without first rescinding the contract. However, in my opinion, that submission was erroneous and misconceived. Where a promisor has failed to perform his promise, he may without more, be sued for such damages as flow from the breach. Where the promise which is not performed is the promise to complete a purchase, the damages will include the loss of the benefit of the performance of that promise, properly referred to as damages for loss of bargain. There is no need first to rescind the contract in order to recover damages in that case, which is a case of actual, as distinct from anticipatory, breach or repudiation. In the latter case, there must of course be an acceptance of the anticipatory breach or repudiation and thus a termination of the contract, as from that time. But it is otherwise in the case of an actual breach (at p450).

71. In my view, it is clear from the decision in ***Ogle*** that if there is an actual breach of a contract by a party (as distinct from an anticipatory breach or a repudiation) the other party can sue for damages with the contract remaining on foot. The only relevant factors will be whether there was a valid contract between the parties, whether there has been a breach of the relevant terms of the contract by one party and whether the other party has suffered a loss, damage, or detriment. Those are, therefore, the only relevant factors to be considered by the Tribunal when it exercises its discretion under s 43(1) of the BSCRA Act as to whether to make a HBWC remedy order or to decline to make such order.

72. There may be other factors which are relevant to the exercise of the discretion of the Tribunal under s 41(2) of the BSCRA Act regarding the terms of the HBWC remedy order it makes (and quantum in the case of a monetary order). For instance, if an order for compensation for loss or damage caused by a breach of contract is under consideration pursuant to s 41(2)(d)(i) of the BSCRA Act, the measure of the compensation may depend upon the Tribunal considering the

application of the well-known rule in ***Hadley v Baxendale***[29] and an issue may be raised by a respondent as to whether an applicant has 'mitigated' their loss (or more correctly stated, has acted reasonably to avoid loss). However, it is only the factors which I have referred to in paragraph [71] above which are relevant to the exercise of the discretion of the Tribunal under s 43(1) of the BSCRA Act.

73. In my view, on the basis of the findings made by the original Tribunal which I have set out in paragraphs [65] - [67] above and the legal principles I have referred to in paragraphs [68] - [71] above, the original Tribunal should have been satisfied under s 43(1)(a) of the BSCRA Act that it was justified in making a HBWC remedy order and the original Tribunal should then have proceeded to make a HBWC remedy order of one or more of the types set out in s 41(2) of the BSCRA Act exercising its discretion under s 41(2) in accordance with its findings of fact on the evidence before it in respect of the damages claimed by the applicants. The other factors which the original Tribunal referred to in its reasons for its decision to make order 2 (to decline to make a HBWC remedy order in respect of the applicants' claim for damages) were extraneous or irrelevant considerations.

74. Consequently, I have concluded that the original Tribunal made an error in the exercise of its discretion under s 43(1) of the BSCRA Act regarding the applicants' claim for damages and grounds 2 and 3 are made out.

**Should the applicants be granted leave to review the decision of the original Tribunal to decline to make an order that the respondent pay damages to them?**

75. The proper construction of s 43(1) of the BSCRA Act regarding the exercise of the discretion by the Tribunal whether to make a HBWC remedy order is a question of law: ***Gemmill Homes*** at [96].

76. I have concluded that the original Tribunal made an error in the exercise of its discretion under s 43(1) of the BSCRA Act regarding the applicants' claim for damages.

77. The applicants are seeking an award for the damages they have suffered of more than $11,000 to enable them either to be paid those damages by the respondent or failing that to enable them to seek to place the respondent into liquidation in the hope that they may then be able to

[29] ***Hadley v Baxendale*** (1854) 156 ER 145.

make a claim under the home indemnity insurance policy. I am satisfied that if leave is not granted to them for a review the decision of the original Tribunal under s 43(1)(b) of the BSCRA Act to make order 2 (declining to make an order that the respondent pay damages to them) they would suffer a substantial injustice.

78. Therefore, I have decided to grant leave to the applicants for the review of order 2 made by the original Tribunal.

79. The review will be by way of a hearing de novo pursuant to s 27 of the SAT Act.

80. I will make the following orders.

## Orders

The Tribunal orders:

1. The applicants are granted leave pursuant to s 58(5) of the *Building Services (Complaint Resolution and Administration) Act 2011* (WA) to review order 2 of the orders made by the Tribunal on 12 July 2023 in proceeding CC 698/2023.

2. The proceeding will be listed for a directions hearing at the earliest opportunity to make programming orders for the review hearing.

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

MR D AITKEN, SENIOR MEMBER

6 MARCH 2024