

SANDERS and GEMMILL HOMES PTY LTD [2017] WASAT 41

FACTS

On July 2016, the original Tribunal dismissed two complaints brought by the Geoffrey Frank Sanders (**Sanders**) against Gemmill Homes Pty Ltd (**Gemmill Homes**) and found a third complaint of faulty workmanship to be successful. Sanders sought an order from the original Tribunal requiring work to be performed to remedy the faulty workmanship. Gemmill Homes submitted that due to a significant breakdown in the relationship between the parties that a momentary order was more appropriate. The original Tribunal accepted the submission made by Gemmill Homes and made a monetary order in favour of Sanders.

Sanders filed an application pursuant to s 58 of *Building Services (Complaint Resolution and Administration) Act 2011* (WA) seeking leave to review each orders made by the original Tribunal.

ISSUES

Two issues were important:

- 1 The criteria for granting leave – Whether original decision was wrong or attended with sufficient doubt?
- 2 Factors relevant in exercise of discretion when deciding appropriate building remedy order – Whether remedial order or monetary order appropriate?

FINDINGS

The Review Tribunal found that the original Tribunal had not erred in finding liability on the third complaint, and the decision was not attended with sufficient doubt to justify granting leave to review that decision. However, the Review Tribunal did find that the original Tribunal erred in their approach to determining what was the appropriate remedy to order in favour of Sanders. The original Tribunal also erred in giving weight to the fact that Sanders did not agree with Gemmill Homes' proposed remedial methods.

The Review Tribunal found that original Tribunal, in exercising its discretion to make a monetary order rather than a remedial order in favour of the applicant, failed to take into account relevant factors including: the owner's preference to elect a remedial order; the advantages to both parties afforded by a remedial order which are not afforded to them by the making of a monetary order; and that the usual order where a finding of faulty workmanship is made is to require the respondent to rectify those works.

The Review Tribunal also found that there would be substantial injustice done by leaving the decision in respect to the appropriate remedy unreversed.

Leave for review was granted limited to the question as to what building remedy should be made in favour of Saunders on the basis of a finding that the cracking of the cornices was work which was faulty and/or unsatisfactory. All other grounds seeking leave to review were dismissed.

QUOTE

Senior Member Wallace held that:

- [31] “The usual practice, built up over considerable time, is to give a builder respondent the opportunity to remedy its own defective work.”
- [32] “Those cases where an order to pay has been made by the Tribunal normally occurs at the election of the applicant and on a sufficient basis being established.”
- [32] In *Nelson v Mardesic* (1998) 22 (WA) 42 (*Nelson*) at [49] “... the Committee cannot compel an owner to elect a particular remedy. The owners have elected to seek an order to pay and they are entitled to it. If the builder had demonstrated that the owners were acting unreasonably in insisting on this remedy, the reasonable costs to which the owners would be entitled under s 12A(1a)(b) [of the *Builders' Registration Act 1939* (WA)] would be the cost to the builder of carrying out that remedial work, but that is not the case on the evidence before us.”

IMPACT

Although particularly relevant to this jurisdiction, Builders and Owners should note the benefit of the Builder rectifying his defects and that this is often beneficial to both parties and favoured by the Courts or Tribunal.

© Doyles Construction Lawyers 2017

This publication is intended to be a report on recent cases in the construction, development and engineering industries. This publication is not intended to be a substitute for professional advice, and no liability is accepted. This publication may be reproduced with full acknowledgement.

Jim Doyle
1800 888 783

jdoyle@doylesconstructionlawyers.com
www.doylesconstructionlawyers.com.au