

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP1030/2018

**CATCHWORDS**

*Water Act 1989* – s.16(1) - flow of water - whether demonstrated – respondents subsequent owners - reasonable steps taken to abate any flow after becoming aware of deficiency - *Owners Corporations Act 2006* – s.29 - deficient stormwater drainage system - pipes on common property - not servicing one lot exclusively - obligation to repair on Owners' Corporation – no order for repair can be made against a lot owner who is not liable to effect repairs

<b>APPLICANT</b>	Sally Barter
<b>FIRST RESPONDENT</b>	Nicole Jane Bushett
<b>SECOND RESPONDENT</b>	Balsa Celebic
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	29 April 2019 – 3 May 2019
<b>DATE OF ORDER</b>	27 May 2019
<b>CITATION</b>	Barter v Bushett (Building and Property) [2019] VCAT 774

**ORDERS**

1. The application is dismissed.
2. Costs reserved.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For Applicant:	In person
For Respondents:	Mr J. Nixon of Counsel

## REASONS FOR DECISION

### Background

- 1 The Applicant is the owner of a two-storey solid brick dwelling unit in Toorak (“the Applicant’s Unit”). The Respondents are the owners of a two-storey solid brick dwelling unit (“the Respondents’ Unit”) which is immediately behind the Applicant’s Unit and separated from it by a double brick cavity party wall (“the Party Wall”). The two units form a single connected building. They were constructed in about 1939 or 1940.
- 2 Below floor level there is a wall perpendicular to the Party Wall on each side, intended perhaps to provide it with some lateral support (“the Bracing Wall”).
- 3 Both units are situated on a block of land (“the Site”) that slopes steeply from the southern boundary at the rear down to the northern boundary on the street front. Consequently, the Applicant’s Unit, which has a frontage to the street to the north, is substantially lower than the Respondents’ Unit.

### The claims

- 4 On 21 April 2017, the Applicant brought proceeding OC766/2017 against the Respondents in relation to alleged water penetration problems from the Respondents’ Unit into her unit. Initially, she sought orders for inspection and testing of the plumbing within and beneath the Respondents’ Unit.
- 5 A number of orders were made permitting inspections and testing and eventually the dispute was transferred into the Building and Property List and became the present proceeding.
- 6 The Applicant’s claim has had a number of iterations, culminating in particulars of claim dated 3 April 2019, seeking:
  - (a) damages of \$73,812.76 for alleged damage said to have been caused to the Applicant’s Unit by water penetration;
  - (b) \$20,075.00 as a contribution towards the replacement of the brick wall at the front of the Site which forms part of the Applicant’s Unit. The wall is seriously cracked and in need of replacement;
  - (c) damages of \$504.90 to re-glaze the front door of the Applicant’s Unit;
  - (d) orders for the rectification or replacement of parts of the stormwater and sewerage systems together with orders for the Respondents to pay the whole or a proportion of the cost; and
  - (e) orders for various other works such as removal of trees, tanking the Party Wall and orders that the Respondents pay all or part of the cost.A claim that the Respondents pay monies alleged to be owed by the former owners of the Respondents’ Unit was abandoned at the hearing.
- 7 The Respondents deny that the Applicant is entitled to any of the orders sought.

## **The hearing**

- 8 The matter came before me for hearing on 29 April 2019. The Applicant appeared on her own behalf and the Respondents were represented by Mr J. Nixon of counsel. Five days were allocated for the hearing and it concluded halfway through the fifth day with oral submissions by Mr Nixon. Directions were then given for the filing and service of written submissions by the Applicant and any submissions in reply on behalf of the Respondents. Written submissions were received as ordered. The Applicant filed amended submissions on 20 May 2019.
- 9 At the commencement of the hearing the Respondents made an open offer that the parties arrange to have all of the stormwater and sewerage system for both units inspected, that a scope of work be prepared and that the cost for any work be shared equally. That offer was not accepted by the Applicant.

## **Evidence**

- 10 Lay evidence was given by the Applicant and by both Respondents. Expert plumbing evidence was given by two consultants, Mr Leitner for the Applicant and Mr Wenning for the Respondents. I also heard from an engineer, Mr Thorley, on behalf of the Applicant. A plumber who had previously worked on the property in 2014 was also called by the Applicant but the limited evidence that he was able to give was not contentious.
- 11 Most of the conclusions of the two plumbing consultants were based upon CCTV videos taken by plumbing investigators who were not called but the videos were received into evidence without objection.
- 12 Reference was also made to earlier reports that the Applicant had obtained from an engineer, Mr Atchison, and from an architect from Archicentre, a Mr Woledge, who carried out a pre-purchase inspection of the Applicant's Unit before she bought it. There was also a quotation from a builder, Larkin Building Group, upon which the Applicant sought to rely to establish the quantum of her damages claim.

## **Earlier proceedings**

- 13 I was referred to earlier proceedings in this Tribunal brought by the Applicant. They were:

(a) Proceeding C766/2011

This was a claim for damages that the Applicant brought against a number of persons involved in the acquisition of the Applicant's Unit for the cost of rectifying defects in it that she said were present at the time of purchase including the Applicant's conveyancer and the vendor. She also sought damages in the same proceeding against Archicentre on the ground that she was not warned by Mr Woledge about the defects in the pre-purchase report he prepared for her. Her claim against these persons was settled for an amount of \$30,000.00.

(b) Proceeding OC208/2012

In this proceeding, the Applicant sought orders against the former owner of the Respondents' Unit, a Mr Bautista, in regard to water penetration.

**The nature of the subdivision**

- 14 According to the plan of subdivision, the common property consists of:
- (a) the land between the median point of the eastern walls of the building and the eastern boundary of the Site. This largely consists of a driveway, which provides access to the Respondents' garage and also pedestrian access to both units; and
  - (b) the whole of the remaining land in the Site below ground level and the whole of the air space more than 15 metres above ground level.

Consequently, anything below ground level is common property.

- 15 There is a second driveway towards the western side of the Site leading from the street to the garage of the Applicant's Unit but that forms part of her unit and is not common property.
- 16 The title boundary between the two units within the building is the median point of the Party Wall. Outside the building, it extends from the western side of the building to the western boundary of the Site on the same line as the Party Wall. Otherwise, the boundaries of each unit comprise the boundaries of the Site and the median point of the eastern walls of the building.
- 17 As a consequence, included in the Applicant's Unit at ground level and for 15 metres above is all of the front garden including her driveway. Similarly, the Respondents' Unit at ground level and for 15 metres above includes all of the back garden to the boundaries of the Site.

**Drainage of the two units**

- 18 There are two lawful points of discharge for stormwater from the Site and consequently, two stormwater drainage systems. It is necessary to describe these two systems in detail.

**The western stormwater drain**

- 19 The western stormwater drain extends down the western boundary of the Site, starting below the back garden of the Respondents' Unit, at a stormwater pit ("Pit 3") which is a short distance from the western fence line and approximately in line with the rear wall of the Respondents' garage. Pit 3 collects water from agricultural drains that run from the east near the Respondents' garage and from the north towards the rear boundary of the Site.
- 20 The stormwater drain then extends, approximately parallel to the eastern boundary, a short distance down the Site to where it is joined by a pipe receiving water from a downpipe on the west of the Respondents' Unit

("Downpipe 4"). It then continues down to a pit ("Pit 4"), which is a short distance to the north of the title boundary just inside the Respondents' Unit. At some point, it also picks up water from a surface drain in the south-western corner of the paved courtyard in the Respondents' Unit. This drain ("the Upper Courtyard Drain") was previously blocked by a covering paver but it was discovered by Mr Leitner in the course of his inspection. Its apparent purpose is to drain the Respondents' courtyard.

- 21 From Pit 4, the pipe passes under the boundary between the two units to where it is almost immediately joined by a pipe receiving water from a downpipe ("Downpipe 5") which receives water from the roofs of both units. It then continues down to a further pit ("Pit 5") near the north west corner of the Applicant's paved courtyard. Either at Pit 5 or immediately afterwards, the pipe receives water from a downpipe on the Applicant's Unit ("Downpipe 6"). It then continues down to be joined by a downpipe receiving water from the front of the Applicant's Unit ("Downpipe 7").
- 22 From there, it runs on an angle to exit the Site under the front boundary wall, then it passes under the footpath and nature strip and discharges into the gutter on the southern side of the road. The front boundary wall has a severe crack immediately above where this pipe passes underneath and the expert evidence establishes that this is likely to be due to a leak in a join in the pipe in the position where it passes under the wall.

#### **The Eastern stormwater drain**

- 23 The other point of discharge is on the north-eastern corner of the Site. That stormwater pipe drains two surface pits, ("Pit 2" and "Pit 1") in the common driveway.
- 24 Pit 2 is near the north eastern corner of the Site. Pit 1 is towards the top of the common driveway approximately in line with the Party Wall. It receives water from the downpipe taking water from the roof of the Respondents' garage ("Downpipe 1"), the downpipe on the eastern side of the Respondents' Unit ("Downpipe 2") and the downpipe on the south eastern corner of the Applicant's Unit ("Downpipe 3").
- 25 It is also able to receive water from an agricultural drain that comes from under the Respondents' Unit, just to the south of the Party Wall. How far that drain extends under the Respondents' Unit is uncertain. Mr Wenning said that he thought from the CCTV footage that it ended in a rubble pit which he described as Rubble Pit 6. He recommended that the floor above be opened to allow inspection. When this was done, the stormwater drain was observed to be going from the driveway as far as the Bracing Wall but it could not be seen on the other side of the Bracing Wall. An external agricultural drain on the same line on the western side of the building was similarly found to go as far as the external wall of the building but not through the wall to the sub-floor. Although a continuous agricultural drain

is shown in that position on the original blueprints of the building, there is no evidence that it was built like that.

- 26 The eastern stormwater drain commences at Downpipe 1 at the rear of the Respondents' garage. At that point it is connected to two small agricultural drains to the east and to the west behind the garage. The connection of agricultural drains to a stormwater drain receiving water from a downpipe was criticized by the experts during the hearing.

### **The sewerage system**

- 27 There is a sewerage pipe system on both sides of the Site.
- 28 The sewer line on the eastern side commences at the rear of the Respondents' Unit at what was perhaps an old laundry next to the Respondents' garage. It then passes under the garage and down under the common driveway, where it is joined successively by two pipes receiving waste from the Respondents' Unit and then two pipes from the Applicant's Unit.
- 29 It then passes at 90 degrees under the Applicant's Unit, receiving a third pipe on the way, and exits under the western side of the building under the Applicant's courtyard where it receives a further pipe from the Applicant's Unit and then joins the western sewer line.
- 30 The sewer line on the western side commences at the kitchen of the Respondents' Unit, exits the building and then passes under the boundary between the two units. It then receives two pipes from the Applicant's Unit before joining the eastern sewer line.
- 31 After that, the combined sewer line continues in a north westerly direction to the boundary, where it exits the Site to connect with a main sewer in the easement on the other side of the fence.

### **The deficiencies in the plumbing**

- 32 It is acknowledged by both sides that there are deficiencies in both the stormwater and the sewerage systems, although the extent to which they result in leakage of water into the soil is unclear.
- 33 In his report dated 1 March 2018, Mr Wenning noted the following defects in the stormwater drains:
- (a) Downpipe 2 was not connected to the drain and water flowing into the soil had caused settlement of the concrete driveway. He said that the pipe should be connected to the stormwater pipe and that has since been done.
  - (b) There were defective joints in the stormwater drain upstream of Pit 4.
  - (c) There was a fractured earthenware pipe bend at the base of Downpipe 4.
  - (d) There was a significant fracture and component separation of earthenware pipe fittings at the base of Downpipe 6.

- 34 He said that soil moisture levels revealed that water from defects (a), (b) and (c) would not affect the building but that soil moisture levels revealed that water from defect (d) may affect the building. Mr Wenning is a plumbing expert and not a structural engineer. I place no reliance on his evidence as to the likely effect of water on building movement.
- 35 Mr Leitner generally agreed with these observations. He pointed to a number of instances where PVC pipes have been joined to terracotta pipes, which he criticised. He said that water passes through the retaining wall between the two units which forms the southern boundary of the Applicant's courtyard. There is a pipe that passes through that wall that carries the water from Downpipe 5 into the courtyard to Pit 5 and then turns 90 degrees down by a pipe elbow to the ground and then passes beneath the courtyard and joins the western stormwater line. Mr Leitner said that there was a gap around the pipe elbow that allows water to pass through the wall around it. I observed the gap on site.

### **Surface drainage**

- 36 Mr Leitner said that the large grassed area in the back yard of the Respondents' Unit formed a natural watercourse, that there was no proper stormwater drainage at the rear of the garage wall and no surface drainage system. That is not the complete picture. Even if one discounts the agricultural line below ground across the bottom of the lawn because of the impermeable nature of the soil, any surface water that reaches the paved area behind the Respondents' Unit is then directed to the Upper Courtyard Drain.
- 37 Mr Leitner said that there were excessive amounts of water against the brick walls of the garage. He demonstrated that, if water is introduced to the soil behind the garage wall it appeared through the internal brickwork up to 400 mm above the garage floor.
- 38 He also criticised the paving at the rear of the Respondents' Unit which he said should be lowered by 50 mm. However, he acknowledged that, at present, it slopes away from the Respondents' Unit with a fall towards the Upper Courtyard Drain.
- 39 Mr Wenning agreed that water was ponding on the paving behind the Respondents' Unit against the retaining wall and that a new service pit should be constructed to intercept it. However, this observation appears to have been made before the discovery and reopening of the Upper Courtyard Drain.
- 40 During a flood test of the Respondents' courtyard that he conducted, Mr Wenning tested the ground between the area where ponding occurred and the external walls of the Respondents' Unit and found that the soil was dry.

### **Subsoil drains**

- 41 Mr Wenning identified the following defects in the subsoil drains:

- (a) The two open ends of the subsoil agricultural drains behind the garage which are connected to Downpipe 1, allow soil ingress and blockages in both the drainage system and the two drains. He said that the two drains should be capped. Mr Leitner agreed and added that they had been installed 500 mm too high.
- (b) The subsoil drains upstream of Pit 3 were somewhat ineffective due to the impermeable nature of the soil above the drains.
- (c) The subsoil drain upstream of Pit 4 does not have continuous fall and is susceptible to siltration and blockages.

He said there was limited access to inspect and maintain Rubble Pit 6.

### **Deficiencies in the sewer system**

- 42 There were a number of fractures identified in the earthenware sewer system but Mr Wenning thought that they were unlikely to have any effect on building movement. Again, Mr Wenning is a plumbing expert and not a structural engineer.

### **The Applicant's claims**

- 43 The Applicant alleges that her Unit has suffered damage as a result of flows of water from the deficiencies in the underground plumbing described above. She seeks compensation for the damage under the *Water Act 1989* ("the Water Act").
- 44 Further or in the alternative, she claims that the Respondents are required to maintain the various pipes and other parts of the drainage and sewerage systems, pursuant to the *Owners Corporations Act 2006* ("the Owners Corporation Act"), and seeks damages from them for their alleged failure to do so. She also seeks orders that they bear the cost of any necessary repairs.
- 45 Before dealing with these claims I must consider the evidence in regard to the alleged damage and its cause.

### **The damage alleged**

- 46 In paragraph 19 of her Amended Points of Claim, the Applicant says that the amount of \$73,812.70 is for:

Re-levelling of floors, repairs to blown render, repair to unlevel/twisted door frames, painting et cetera.

- 47 The work is detailed in a quotation dated 28 March 2018 from Larkin Building Group. None of the work specified in the quotation has been carried out and the author of the document was not called.
- 48 The scope of work specified in the quotation is said in that document to be to repair the existing structure as outlined in an engineering report dated 27 March 2018 prepared by Rapid Consulting Engineers, being one of Mr Thorley's reports. The quotation lists the following items:



Cover and protect required services	\$ 2,600.00
Packing and levelling the floors back to existing skirting, straightening centre to allow even flow across the rooms, removing and replacing stumps as required	\$30,600.00
Removing and replacing loose and drummy render [ <i>solid plaster</i> ] and patching all existing cracks	\$ 7,500.00
Making all windows and doors operational	\$ 2,150.00
Prepare seal, undercoat and paint all affected services	\$27,000.00
Caulking as required	\$ 2,500.00
Clean up and remove rubbish on completion	\$ 3,000.00
Builder's fee 15%	<u>\$ 8,752.50</u>
Total	<u>\$73,812.75</u>

All these figures are GST inclusive.

- 49 The report by Rapid Consulting Engineers referred to was prepared by or under the supervision of Mr Thorley, who gave evidence. The conclusion, expressed on page 8 of Mr Thorley's main report, is in the following terms:

“With the supplied information and the data gathered on site, it is the opinion of this office that the damage to the dwelling at 23 Turnbull Avenue [*the Applicant's Unit*] has been accelerated by plumbing issues at number 23A [*the Respondents' Unit*]. Whilst a dwelling of this age is expected to exhibit some degree of damage, the nature, severity and timing of damage coupled with the numerous drainage issues over time indicate the dwelling has experienced plumbing related subsidence.

Due to the additional groundwater from the leaks, the dwelling at number 23 has undergone differential settlement of its footings. This office believes that the western side of the dwelling has been most affected by the changes in moisture conditions in the foundation resulting in permanent subsidence. This has caused cracks to appear in the masonry walls and internal plaster and subsidence of the internal stumps. Door and window frames around the dwelling had become hard to operate.”

- 50 He went on to suggest that the stormwater and sewerage systems be completely replaced.
- 51 He acknowledged that the masonry of the Applicant's Unit “...does not show signs of significant distress”. Indeed, the walls are painted face brickwork and I could not see any cracks at all on any elevation to suggest that the brickwork was under any stress. There are minor cracks in internal finishes shown in some photographs in the report, being:
- (a) minor cracks between plaster sheets under the stairs;
  - (b) cracking between the stringer at the foot of the stairs and the wall;

- (c) minor cracking between the timber bead at the top of the stairs and the adjacent wall;
- (d) a crack along the join between two sheets of plaster above the kitchen cabinets;
- (e) minor cracking between windows and the ceiling and in cornices;
- (f) flaking paint work;
- (g) signs of water penetration in the ceiling in a number of places which Mr Thorley suggested was due to water penetration;
- (h) cracking, described as significant, in the hard plaster near a doorway in the northern bedroom and hallway and also between the western external wall and the perpendicular internal wall;
- (i) uneven floors which Mr Thorley said was due to the stumps under the unit having subsided;
- (j) separation of the two pieces of timber that make up the ridge beam in the roof;
- (k) cracked glass in the front door;
- (l) misalignment of the kitchen bench top, said to be due to settlement; and
- (m) a significant crack in the front brick wall believed to be due to a rotation of the footing. This is referred to above.

- 52 The report stated that the subfloor under the Applicant's Unit in the centre was observed to be dry whereas dampness was noted along the northern wall, that is, the wall furthest away from the Respondents' Unit.
- 53 I asked Mr Thorley whether the separation of the two pieces of timber making up the ridge beam might be due to timber shrinkage and he acknowledged that there would have been some shrinkage since construction in 1940.
- 54 When I inspected the Applicant's Unit, I noted that the Applicant had stripped the hard plaster off the internal wall immediately to the left of the front door as one enters the unit. She said that this was related to the replacement of the sewer plumbing servicing the bathroom directly above. I also noted that all of the internal linings including the floor tiles and ceiling plaster had been stripped from the bathroom and that there was no serviceable shower, bath or even a toilet there. I was informed that the Applicant and her daughter shower outside the unit in the open air, in an area between the western wall and the western boundary.
- 55 During the inspection I did not observe anything remarkable about the condition of the internal finishes of the Applicant's Unit. It was constructed 79 years ago and appears to have received little in the way of recent maintenance. The cracks all seem to be relatively minor and when I asked whether the signs of water penetration of the ceilings of the upper floor were indicative of broken tiles, the Applicant agreed that that was the case.

56 The gaps between the jamb around the front door and the door itself were uneven, suggesting movement of the doorframe which Mr Thorley said indicated settlement. I was informed by the Applicant that the door was binding on the jamb and that she broke the glass in the door by slamming it in order to close it.

#### **When did the damage occur?**

57 Significantly, Mr Thorley acknowledged in cross-examination that it would not be possible to say when this damage was sustained. Earlier reports the Applicant obtained would suggest that much of it was long-standing.

58 In support of her initial application in 2011 claiming damages, the Applicant obtained a report dated 18 November 2011 from Mr John Atchison, another engineer. Mr Atchison's report, which was produced by the Applicant, refers to:

- (a) separation of the same ridge beam that Mr Thorley saw;
- (b) cracks and distortions to the skirting boards and quads;
- (c) movement of the flooring in the subfloor area;
- (d) displacement in the meals area which could be due to expansion of the timber flooring due to the lack of adequate subfloor ventilation;
- (e) poor quality paintwork and paint flaking in a number of places;
- (f) leaking from the toilet pan;
- (g) moisture ingress in the kitchen; and
- (h) broken stormwater drains;
- (i) inadequate support for the floor with excessive packing to support it.

59 It would seem from this report that damage very similar in nature to that referred to in Mr Thorley's report was present at least as early as 18 November 2011. That was several years before the Respondents became the registered proprietors of the Respondents' Unit.

#### **The Respondents' knowledge of any defects**

60 The Respondents purchased the Respondents' Unit by a contract of sale dated 30 September 2015. Settlement occurred on 27 November 2015 and they moved in shortly afterwards.

61 According to the Second Respondent, the Applicant told the Respondents the day before settlement that there were problems with the plumbing but did not say what they were. The Respondents said that they raised the matter with their conveyancer who informed them that there was a plumbing compliance certificate in the vendor's statement and so the Respondents believed that everything was in order.

62 On 13 February 2016 the Applicant left a note under the Respondents' door, stating:

“I woke to hear water from your place and checked the meter and it’s not moving. I suspect it may be our friend from 20 Myrnong Crescent again! Can I come and look at the back to see if we can clinch where it’s coming from.”

The property at 20 Myrnong Crescent is at the rear of the Site.

- 63 The Second Respondent said that, upon receipt of this note, she checked in the back garden, found no water and sent a note to that effect to the Applicant.
- 64 In November 2016, the Applicant informed the Respondents that there were water issues but when they sought details she told them that there were too many reports and that it was too hard for her to find. The Respondents said that they would be willing to allow the Applicant’s plumber to come onto their property to inspect but she declined.
- 65 In late April 2017 the Respondents received the application that commenced this proceeding. Attached to the application was a report from one Byron Kennedy dated 11 June 2014.
- 66 The Byron Kennedy report set out an approximate description of the stormwater and agricultural drains. It contained a list of deficiencies in the drainage system as it then was, with recommendations for rectification works.
- 67 According to a compliance certificate exhibited to the First Respondent’s witness statement, after the Byron Kennedy report was prepared, work was carried out by the previous owners on the stormwater and agricultural drains under the Respondents’ Unit. It is unclear from the very general description in the certificate what that work was but it was completed on 2 April 2015.
- 68 Upon receipt of the application and the Byron Kennedy report together with the Application, the Respondents engaged a drain cleaning and inspection service to inspect the stormwater and agricultural drains laid in the ground beneath the Respondents’ Unit. According to the report of the drain inspector, which is dated 29 May 2017, it was apparent that some major work had been undertaken since the Byron Kennedy report was prepared. The author of this documents says, in the third paragraph:

“First-class drain cleaning inspected the drains with CCTV and most stormwater drains seem to be in quite good condition without any major problems, except for one downpipe near the kitchen window. This downpipe collects water from [*both Units*’] roofs. Due to the drain layout we are unable to get an exact location of where the drain goes, but it appears to be blocked and overflowing.

We recommended to owner of [*the Respondents’ Unit*] to replace this drain which we believe is being undertaken as of today 29 May 2017.”

The downpipe referred to is Downpipe 5.

- 69 The Respondents then engaged a plumber to excavate and repair this stormwater drain and connect it to the system. The work was completed on 30 May 2017. Unfortunately, that work was done defectively in that:
- (a) the pipe was broken below ground level; and
  - (b) the stormwater was connected into a slotted agricultural pipe for a distance of a little over a metre, which would have permitted leakage from the pipe when water passed along it.
- 70 When the defect was discovered, the Respondents engaged another plumber to reconnect the pipe properly.

### **Liability under the Owners Corporations Act**

- 71 The Applicant relies upon s.129 of the Owners Corporations Act, which provides as follows:

“A lot owner must—

(a) properly maintain in a state of good and serviceable repair any part of the lot that affects the outward appearance of the lot or the use or enjoyment of other lots or the common property; and

(b) maintain any service that serves that lot exclusively.”

- 72 The Applicant argues first, that the Respondents are responsible to maintain the stormwater and agricultural pipes because they are part of the unit. That is not maintainable because all of the stormwater drains and agricultural pipes that are said to be defective are below ground. They are not part of either unit. Consequently, the Respondents have no obligation to maintain them in a state of good and serviceable repair pursuant to subsection (a).
- 73 Alternatively, the Applicant argues that all pipes under the Respondents’ Unit serve that unit exclusively and that therefore, the Respondents are responsible to maintain them pursuant to subsection (b).
- 74 She said that although the drains and footings of the buildings are below ground level, they do not serve the Owners Corporation. She pointed out that the Owners’ Corporation did not have any common tap or similar service. She said the agricultural drains were there to preserve the integrity of the structures, that is, the fences, retaining walls and the building and its footings.
- 75 On the Applicant’s argument:
- (a) the Respondents would be responsible for maintaining the stormwater pipes under the Respondents’ Unit;
  - (b) the Applicant would be responsible for maintaining the stormwater pipes under the Applicant’s Unit that did not also carry water from the Respondents’ side of the boundary; and
  - (c) the Owners Corporation would be responsible for maintaining any pipes that served more than one unit exclusively.

- 76 However, under the section, a lot owner is only responsible for maintaining a service that serves that lot exclusively. It says nothing about part of a service. Subsection (a) draws a distinction between a lot and part of a lot but there is no distinction made in subsection (b) of a service or part of a service. There are two stormwater services as described above and they service both units.
- 77 Further, the stormwater pipes that are laid under the Respondents' Unit are designed to receive water from the agricultural drains. The Applicant argued that she was not aware that there was any requirement under the Owners Corporation Act to keep the common property drained or evenly saturated. The absence of a specific provision to that effect is not to the point. The stormwater drains are intended to remove groundwater from the common property and so they serve the common property as well as the Respondents' Unit. The removal of groundwater from the Site benefits both units as well as the common property.
- 78 Consequently, I find that the Respondents were not under any obligation to maintain the stormwater drains or the agricultural pipes. The pipes are common property servicing more than just the Respondents' Unit and so, by s.46 of the Owners Corporation Act, it is the Owners Corporation that must maintain them.

**Liability under the Water Act**

79 Section 16 of the Water Act, where relevant, provides as follows:

“16. Liability arising out of flow of water etc

(1) If—

(a) there is a flow of water from the land of a person onto any other land; and

(b) that flow is not reasonable; and

(c) the water causes—

(i) injury to any other person; or

(ii) damage to the property (whether real or personal) of any other person; or

(iii) any other person to suffer economic loss—

the person who caused the flow is liable to pay damages to that other person in respect of that injury, damage or loss.

.....

(5) If the causing of ...the flow ...was given rise to by works constructed or any other act done or omitted to be done on any land at a time before the current occupier became the occupier of the land, the current occupier is liable to pay damages in respect of the injury, damage or loss if the current occupier has failed to take any steps

reasonably available to prevent the causing of, or the interference with, the flow (as the case requires) being so given rise to.”

- 80 The jurisdiction of this Tribunal to determine claims pursuant to s.16 is conferred by s.9 of the Water Act.
- 81 In order to establish a claim under s.16, the Applicant must prove that there was a flow of water which caused her injury, loss or damage and she must also show that the flow was caused by the Respondents or that they are liable under subsection (5).

### **A flow of water**

- 82 It must be borne in mind that the water that is alleged to be flowing is said to be rain water falling onto the Respondents’ Unit or groundwater from adjoining properties that is not collected by the stormwater system.
- 83 In the present case I am unable to identify any particular flow or its source. Water in the ground beneath the Respondents’ Unit is water that is on the common property and if it flows through the ground below the boundary between the two units it remains throughout on common property. That being so, there is no flow from the land of one person onto any other land.
- 84 Apart from that, I cannot see how it could be said that the Respondents have caused any flow. It is not shown to be water that they generated from watering their garden or in any other manner.
- 85 The complaint is that the alleged flow is the result of defective stormwater or agricultural drains. The Respondents did not lay the drains in question and so any “flow” coming from the drains as designed was given rise to by works constructed before the Respondents became the occupier of the Respondents’ Unit and any failure to repair was that of a prior owner. It is clear that the issues about which the Applicant complains were in existence long before the Respondents came on the scene.
- 86 Mr Wenning concluded that there did not appear to be any water supply plumbing, roof plumbing or sanitary plumbing in either unit. The problem was solely related to the stormwater drainage.
- 87 There is evidence of deterioration in the Applicant’s Unit, at least some of which are said to have been caused by water entering the masonry and settlement that might have been at least partly due to water in the soil, but there is no evidence as to where the water came from or when the flow of water took place. A number of possible sources were identified in the evidence. They were:
- (a) the stormwater and agricultural drainage systems which are in want of repair;
  - (b) the sewerage system which is also in want of repair;
  - (c) the property to the west, which has flooded into the Site on at least two occasions previously;

- (d) the property at the rear, which was referred to in the note that the Applicant put under the Respondents' door;
- (e) the Applicant and her daughter have been showering next to the Western Wall of the Applicant's Unit since 2013 and although when doing so they stand in a plastic container with a hose attached for drainage, the effectiveness of this arrangement is unknown;
- (f) downpipe 6 had a broken collar at the bottom which would have permitted water to escape onto the Applicant's courtyard in heavy rain.

- 88 If water has escaped from the sewer and stormwater systems, the most likely place where that would have happened would be the broken pipe and the faulty connection under Downpipe 5. However, the subfloor of the Respondents' Unit immediately adjacent to both the agricultural pipe and the broken pipe was observed to be dry, even though that was at a lower level. Moreover, the whole of the subfloor observed from the trapdoor that had been cut into the kitchen floor of the Respondents' Unit, was found to be completely dry with no evidence, according to Mr Wenning, of any flow of water.
- 89 If water has entered the soil from the stormwater system and affected the Applicant's Unit, it should be borne in mind that the water entered the stormwater system through the soil, which was common property, or from the collection of surface run-off from one or other of the units into the common property. No flow to the Applicant's Unit would occur until such time as the water had entered the Applicant's Unit. In order to do that, it would need to rise above ground level. Although there is some evidence of water penetration into the masonry, there is no evidence establishing when that occurred.
- 90 Unless there is liability under subsection (5), the claim fails for want of proof linking any of the items of damage to a flow for which the Respondents are responsible.

### **Failure to repair and maintain**

- 91 The argument pursuant to subsection (5) is that the flows were given rise to by works constructed before the Respondents' became the occupiers of the Respondents' Unit, and they have failed to take any steps reasonably available to them to prevent the flow.
- 92 The Applicant's case is that the Respondents are responsible for water leaking from the agricultural pipes and stormwater drains because they were responsible to maintain them. I have rejected that argument but even if the Respondents were liable to maintain the agricultural pipes and stormwater drains, since the want of repair pre-dates the Respondents' occupancy, the question arises whether they have failed to take any steps reasonably available to them to prevent the flow since becoming the occupiers.



- 93 Mr Nixon said that, even if the Respondents were responsible to maintain the agricultural pipes and stormwater drains, as soon as they were made aware that there was any want of repair, they took steps to have the necessary repairs effected.
- 94 He referred me to the following passages from the decision by the Tribunal in *Connors v Bodean International Pty Ltd* [2008] VCAT 454:
- “51. The Act does not address the two differences between the statutory and common law positions; and, to this extent I consider the statutory scheme set out in the Act to be ambiguous; and, potentially, leads to injustice, for the reasons set out above. Adopting the principle of statutory interpretation that a statute will only be regarded as limiting a common law right if it does so clearly and unambiguously; *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277, at 304, *Director of Public Prosecutions v Zarah Gardewilson* [2006] VSCA 295 at [22] and [23]. I consider that the words “*steps reasonably available*” includes a requirement that the current occupier has a sufficient and reasonable time in which to carry out those steps after being given notice, or constructive notice of the unreasonable flow is imputed. Further, that their liability in the event of them not taking reasonable steps to cease the flow after such notice is limited to the time from which such steps should reasonably have been taken.”
- and
- “53. Therefore, I find that “*reasonable steps*” in the Act infers that the current occupier takes the necessary steps within a reasonable time..... I would allow the Respondent a reasonable time to carry out investigations, assess the results and to implement measures to ensure the unreasonable flow is ceased by the disconnection of the hydronic heating. Given the difficult nature of the investigation, the assessment of various methods of rectification and the disconnecting and disposal of the hydronic heating and the installation of a replacement heating system; whilst on the other hand the damage suffered is not acute, catastrophic or endangering to persons or other property, so that urgent action was immediately required, I would allow four months to carry out the necessary steps. Therefore, I consider the Respondent is liable for any damage incurred by the Applicants after the first week in January 2007.”
- 95 The approach taken in that case has been adopted and applied in a number of other cases before the Tribunal (see for example *Sidoti v Owners Corporation 633715B* [2016] VCAT 1880; *Mills v Rubenstein* [2016] VCAT 586).
- 96 If the Respondents were under an obligation to maintain the pipes and drains, it was an obligation to take reasonable steps to prevent the causing of an unreasonable flow within a reasonable time after they knew or ought to have known of the flow. They did that, at their own expense, notwithstanding that the pipes were part of the common property.

97 After the repairs were effected, the only source revealed on the evidence of possible water penetration into the soil near the Applicant's Unit was the pipe carrying the water from the Downpipe 5, which the rectifying plumber had carelessly connected to a slotted stormwater pipe and which, when later excavated by the First Respondent, was found to be broken. Notwithstanding that, there is no evidence that any water leaked from either the break or the slotted pipe. Indeed, the subfloor next to this defective plumbing, which was at a lower level than the slotted pipe or the break, was found to be dry.

### **The front wall**

- 98 It is clear from the evidence that the crack complained of was in existence well before the Respondents became the owners and occupiers of the Respondents' Unit, although it has increased in size over the last few years.
- 99 Insofar as the condition of the wall has been aggravated by the groundwater on the Site, that is not something for which the Respondents are liable for the reasons given. The obligation to maintain the drainage system is upon the Owners Corporation.
- 100 I should add that, since the front wall was in existence at the time the two units were subdivided, the whole of the wall is common property and its repair or replacement is also the responsibility of the Owners Corporation.

### **The front door**

- 101 The Applicant admitted having broken the glass to the front door herself by banging the door. It is not suggested that any structural failure or movement of the Applicant's Unit caused the glass to fracture.
- 102 If the Applicant had difficulty in closing the door, she should have had the door repaired or adjusted instead of slamming it so hard as to break the glass. She cannot now blame the Respondents for damage she has caused herself.

### **Conclusion**

- 103 The claim is based on an allegation of general dampness under the Applicant's Unit. The only dampness observed under either unit was under the north wall of the Applicant's Unit, well away from the Respondents' Unit. The subfloor under the Respondents' Unit was seen to be completely dry. The subfloor under the middle of the Applicant's Unit was also observed to be dry.
- 104 Any dampness could have come from a number of sources and I cannot simply assume that it must necessarily have come from the stormwater system.
- 105 Any dampness that did come from the stormwater system could have come at any time. There is no evidence at all linking any particular item of damage to any flow of water for which the Respondents are responsible,

having regard to the date upon which they became the registered proprietors and occupiers of the Respondents' Unit.

- 106 The Respondents were not under any obligation to maintain the stormwater system. Even if they had been, they would not have been responsible for any flows that took place before they were made aware of the want of repair and before they had a reasonable opportunity to effect repairs.
- 107 For all of these reasons, the claim for damages must fail.

**The claim for an order for the performance of work**

- 108 The Applicant seeks extensive orders directing the Respondents and, in some cases, herself, to carry out further investigation and work.
- 109 She has set out a scope of works in great detail that was not explored with the experts during the hearing.
- 110 Since all of this work is to the common property, the obligation to repair is on the Owners Corporation which is required by s.46 of the Owners Corporation Act to maintain the common property. If it is ordered to be done, that order must be made against the Owners Corporation. Since the Owners Corporation is not a party to this proceeding, I am unable to make such an order. I am also not able to make an order against the Respondents for work to be done because they are not liable to do it.
- 111 The concern is that there is no active Owners Corporation, although the Applicant claims that she has made some attempt to convene meetings to address the drainage problem.
- 112 It appears that both sides recognize that the work needs to be done. Any expense in that regard must be shared equally.
- 113 The sensible course would be to proceed by agreement but if that is not possible, then it might be necessary for one of the parties to apply to the Tribunal for the appointment of an administrator. That would involve substantial expense which the parties should try and avoid.

**Orders to be made**

- 114 The application will be dismissed. Costs will be reserved for further argument.

**SENIOR MEMBER R. WALKER**