VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP899/2017

CATCHWORDS

WATER ACT 1989: applicants sought damages from the respondent under s 16(1) of the *Water Act 1989* in respect of damage and loss arising out of a landslip; claims for economic loss in the nature of diminution in the value of the property and economic loss directly arising out of an inability to sell the property; respondent admitted water caused damage to the applicants' property, but denied that they suffered loss and damage as claimed and quantified; significant issues of causation and remoteness; *Wrongs Act 1958* s51 considered; *Jones v Dunkel* considered and applied*;* claims allowed to an extent.

FIRST APPLICANT	Mr David Hayden Collins
SECOND APPLICANT	Mrs Christine Elizabeth Collins
RESPONDENT	Greater Geelong City Council
WHERE HELD	Melbourne
BEFORE	C. Edquist, Member
HEARING TYPE	Hearing
DATE OF HEARING	12, 13,14, 15, 16, 19 and 27 November 2018
DATE OF ORDER	20 December 2018
CITATION	Collins v Greater Geelong City Council (No 2) (Building and Property) [2018] VCAT 2044

ORDERS

1 The respondent must pay to the applicants damages in the sum of $147,236.

2 Interest is reserved. The applicants may make an application for interest within 60 days, either in writing or at a cost hearing. Any such application is to be referred by the Principal Registrar to Member Edquist for further directions.

3 Costs are reserved. Each party may make an application for costs within 60 days. Any such application is to be referred by the Principal Registrar to Member Edquist for further directions.

4 Reimbursement of fees under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* is reserved. Any such application is to be referred by the Principal Registrar to Member Edquist for further directions.

C. Edquist
Member

APPEARANCES:

For the Applicants	Ms M. O'Sullivan of Counsel.
For Respondent	Ms M. Tsikaris of Counsel.

REASONS

INTRODUCTION

1 Mr Collins and Mrs Collins ("**the Owners**") purchased a block of land at 25 Watersedge Terrace, Highton in Geelong, Victoria in 1987. They considered the property, which sat at the end of the street immediately adjacent to a reserve and overlooked the Barwon River, beautiful. They built an architect designed home there. The block had a steep slope, and the house was constructed in levels reflecting the topography of its site. The Owners occupied the house as their family home from 1993 until 2010.

2 Almost from the outset, the Owners were concerned about the inadequacy of the drainage system in the reserve maintained by the local council, the Greater Geelong City Council ("**the Council**"). Such was their anxiety that in 2006 they engaged a consulting engineer named Peter Yttrup ("Professor Yttrup") to investigate the drainage system and to engage with the Council about it. During the night of 12 December 2008, after heavy rain, their worst fears were realised when a landslip occurred. The landslip carried away parts of their garden and deposited tonnes of liquefied earth, soil, mud and boulders, trees and other debris on the property.

3 The Council accepted responsibility and straight away agreed to remediate the block and restore the Owners' garden. Minor damage that had occurred to the house was also rectified. What the Council did not do, to the Owners' satisfaction, was recognise their claims for loss of amenity and inconvenience, and also economic loss.

4 The Owners instituted proceedings in the Supreme Court of Victoria against the Council, but those proceedings were discontinued for reasons not explained to the Tribunal.

THIS PROCEEDING

5 The Owners initiated this Proceeding in 2017 seeking damages from the Council under s 16(1) of the *Water Act 1989* ("the ***Water Act***") in respect of damage and loss arising out of the landslip.

6 The defence of time, which might have arisen under the Limitations of Actions Act, was not raised in the pleading, nor raised at the hearing. The effect of this type of statute is to bar the right to sue, but not the underlying cause of action. Accordingly, as was pointed out by Refshauge J of the Supreme Court of the Australian Capital Territory in *Piscioneri v Reardon*[1]:

> The effect of a defendant not pleading the defence that the limitation period has expired is to waive the reliance on the statute. The expiry of the limitation period must be specifically pleaded and, if it is not, then the statutory bar is not an issue in the proceedings.

[1] [2015] ACTSC 61, at [56].

It follows that the defence of time need not be considered further.

7 In their Amended Points of Claim dated 27 March 2018 the Owners had sought damages under four headings, namely:

(a) diminution in the realisable sale price of the Property between July 2009 until 5 August 2013;

(b) additional marketing costs;

(c) extra bank interest paid between July 2009 and 5 August 2013 by reason of deprivation of the use of funds otherwise realisable from the sale of the Property; and

(d) loss of amenity and use of the Property and general inconvenience, worry and anxiety occasioned by the landslide and the ongoing safety risks including but not limited to:

(i) loss of use of the Property due to the unstable hillside;

(ii) ongoing risks of landslide as evidenced by an emergency evacuation system being installed on the hillside to detect movement and sound an audible alarm;

(iii) diminished use of the Property due to mud and loss of back yard; and

(iv) the Owners and their children were exposed to construction noise, interruption to property access and airborne dust from 7.00 a.m. on working days and often on weekends over a period of three years.

8 The Council, in Amended Points of Defence filed in August 2018, had admitted the water caused damage to the Property, but denied that they suffered loss and damage as claimed and quantified, and also denied that the applicant is entitled to recover damages for loss of amenity and/or general inconvenience in a cause of action under s16(1) of the *Water Act.*

9 The final hearing of the proceeding began before me on 12 November 2018. In her opening, counsel for the Council confirmed that it was contending that the Tribunal has no jurisdiction to deal with the claim for loss of amenity and/or general inconvenience.

10 I agreed to deal with the matter immediately as a pleading point and heard arguments on the afternoon of the first day of the hearing. I reserved my decision overnight, on the following morning gave my decision, which was that the Tribunal did not have jurisdiction to deal with that claim. The relevant paragraph in the Owners pleading was struck out. That decision ("**the pleading decision**") is published.[2]

11 The claim for additional marketing costs had been qualified by the Owners at $30,000. The Council rejected the claim as it had not seen documentation

[2] *Collins v Greater Geelong City Council* [2018] VCAT 1873.

to support it. In the applicant's opening, it was indicated that the claim had been reduced to $4,236. Relevant invoices from estate agents for $2,968 and $1,268 respectively were tendered at the hearing, and the Council conceded liability for them. On this basis, the Owners are entitled to an award of $4,236 for this head of damages.

12 As the claim for damages for loss of amenity and loss of use of the property and inconvenience, and worry and anxiety has been struck out, and the claim for additional marketing expenses has been conceded, the issues to be determined are limited to diminution in the realisable sale price of the property and the claim for extra bank interest paid between July 2009 and 5 August 2013.

WATER ACT

13 Before we turn to an examination of these claims, it is necessary to address the relevant provisions of the *Water Act*.

14 The key provision is s16(1) which provides:

> (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.

15 Certain matters to be taken into account in determining whether a flow of water is reasonable or not is set out in section 20(1) which provides:

> (1) In determining whether a flow of water is reasonable or not reasonable, account must be taken of all the circumstances including the following matters—
>
> (a) whether or not the flow, or the act or works that caused the flow, was or were authorised;
>
> (b) the extent to which any conditions or requirements imposed under this Act in relation to an authorisation were complied with;
>
> (c) whether or not the flow conforms with any guidelines or principles published by the Minister with respect to the drainage of the area;

(d) whether or not account was taken at the relevant time of the likely impact of the flow on drainage in the area having regard to the information then reasonably available about the cumulative effects on drainage of works and activities in the area;

(e) the uses to which the lands concerned and any other lands in the vicinity are put;

(f) the contours of the lands concerned;

(g) whether the water which flowed was—

(i) brought onto the land from which it flowed; or

(ii) collected, stored or concentrated on that land; or extracted from the ground on that land—

and if so, for what purpose and with what degree of care this was done;

(h) whether or not the flow was affected by any works restricting the flow of water along a waterway;

(i) whether or not the flow is likely to damage any waterway, wetland or aquifer;

(j) in the case of a flow of, or interference with, water caused by the construction, removal or alteration of a levee in accordance with section 32AC of the **Victoria State Emergency Service Act 2005**, whether or not that construction, removal or alteration occurred in response to an emergency within the meaning of section 3 of the **Emergency Management Act 2013**.

16 The Tribunal is given its jurisdiction in respect of claims for damage to property or economic loss by s 19(1) which provides:

> The Tribunal has jurisdiction in relation to all causes of action (other than any claim for damages for personal injury) arising under sections 15(1), 16, 17(1) and 157(1) of this Act or at common law in respect of the escape of water from a private dam.

17 It is to be noted that under s 19(3), in exercising jurisdiction conferred by subsection (1), the Tribunal—

(a) may by order, whether interim or final, grant an injunction (including one to prevent an act that has not yet taken place) if it is just and convenient to do so; or

(ab) may make an order for payment of a sum of money awarding damages in the nature of interest; or

(b) may make an order that is merely declaratory.

18 The Tribunal may award damages in the nature of interest. Section19 (4) provides:

> In awarding damages in the nature of interest, the Tribunal may base the amount awarded on the interest rate fixed from time to time under section 2 of the **Penalty Interest Rates Act 1983** or on any lesser rate that it considers appropriate.

19 Importantly, in assessing the applicant's claims, the Tribunal is governed by s19(9) which reads:

> In determining a cause of action arising under section 15(1), 16, 17(1) or 157(1) of this Act the Tribunal must apply to the questions of causation and remoteness of damage the same tests as a court would apply to those questions in an action based on negligence.

The statutory cause of action

20 As already stated in the pleading decision, the Owners are limited in their claim in the Tribunal to claims under s16(1)(c)(ii) for damage to their property (whether real or personal), or under s16(1)(c)(iii) for economic loss.

21 As I remarked in the pleading decision, s16(1) of the *Water Act* must be read in conjunction with s17(1), which reads as follows:

> **17 Protection from liability**
>
> (1) A person does not incur any civil liability in respect of any injury, damage or loss caused by water to which section 16 or 157 of this Act or section 74 of the **Water Industry Act 1994** applies except to the extent provided by this Act.

22 I then observed that, reading the two provisions together, I thought that Deputy President Macnamara in *Kopitschinski v Song*[3] was right to say at [45] "that these provisions in the *Water Act* are a code for liability at least in non-personal injury matters for flows of water. No damages may be awarded except in accordance with the express provisions of the statute."[4]

23 Because no claim for loss arising out of a flow of water can be made outside the provisions of the *Water Act*, it is not necessary to address the Owners' alternative claim made in nuisance. I note that the Owners did not press this claim at the hearing.

24 In an action for negligence, the claimant has to establish the existence of a duty of care, breach of that duty, and damage. The establishment of damage is the gist of the action.

25 In an action brought under s16(1) of the *Water Act*, the statute creates the duty of care. In the present case, the Council has conceded breach in so far as it has admitted that the water caused damage to the applicant's property.

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[3] [2007] VCAT 1958.
[4] *Collins v Greater Geelong City Council)* [2018] VCAT 1873 at [22].

The Council by its actions has already accepted liability for some of the Owners' losses. However, not all the Owners' losses are conceded.

CAUSATION STILL A LIVE ISSUE

26 During the hearing it was contended on behalf of the Owners that the effect of the Order 2 made by Senior Member Walker on 16 October 2018 was that causation was no longer in contention. Senior Member Walker ordered:

> The respondent having admitted liability, the hearing shall proceed as an assessment of damages only.

27 Counsel for the Owners argued that as a result, in respect of the claim for diminution in the value of the Property, causation of the loss had been established, and the Tribunal's role at the hearing was simply to assess damages. Similarly, with respect to the claim for extra interest, liability was not in contest, and the Tribunal merely had to assess the damages.

28 It was clearly necessary that I should deal with the issue prior to final submissions. I referred the parties to the pleadings and noting the particulars set out by the Owners in paragraph 17 of their Amended Points of Claim. I then commented on the Council's admission that the water had caused damage to the Owners' property, and the Council's denials that the Owners had suffered the loss and damage they claimed and quantified. I concluded that although the Council had admitted causing damage to the Owners' property, causation of damage of the types claimed was still a live issue.

CLAIMS FOR PURELY ECONOMIC LOSS

29 Since the Privy Council delivered its seminal decision in *Overseas Tankship (U.K.) Ltd. v Morts Dock and Engineering Co. Ltd*[5] ("The Wagon Mound"), the law in Australia has been that in an action for negligence the defendant is liable only for damage which is reasonably foreseeable.

30 A significant distinction has developed in Australia regarding the extent to which the Court will allow recovery of damages arising directly from negligently caused personal injury or damage to property, and the recovery of damages for negligently caused purely economic loss. Damages for purely economic loss arising from a negligent act or omission are generally not recoverable, even if the loss was foreseeable, unless the victim had a particular vulnerability to damage.

31 However, cases such as *Bryan v Maloney*[6], *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*,[7] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*[8] demonstrate that the issue regarding recovery of damages for purely economic loss is an issue with respect to the existence of a duty of

[5] [1961] UK PC1; (1961) AC 388.
[6] (1995) 182 CLR 609.
[7] (2004) 216 CLR 515.
[8] [2014] HCA 36, (2014) 254 CLR 185.

care.[9] It follows from the propositions that s16(1) of the *Water Act* creates the relevant duty of care, and the duty of care includes a duty not to cause economic loss, that the usual threshold issue arising in connection with a claim in negligence for such loss does not arise. The Council did not dispute this, and no more need be said about the matter.

CAUSATION AND REMOTENESS OF DAMAGE

32 There remain significant issues of causation and remoteness in this case, which I now address.

33 Causation at law is a difficult issue. Mason CJ, in *March v Stramare (E & MH) Pty Ltd*[10] introduced the topic in these terms, at [5]:

> It has often been said that the legal concept of causation differs from philosophical and scientific notions of causation. That is because "questions of cause and consequence are not the same for law as for philosophy and science", as Windeyer J. pointed out in *National Insurance Co. of New Zealand Ltd. v. Espagne*. In philosophy and science, the concept of causation has been developed in the context of explaining phenomena by reference to the relationship between conditions and occurrences. In law, on the other hand, problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence. The law does not accept John Stuart Mill's definition of cause as the sum of the conditions which are jointly sufficient to produce it. Thus, at law, a person may be responsible for damage when his or her wrongful conduct is one of a number of conditions sufficient to produce that damage:
>
> (citations omitted).

34 The High Court in *March v Stramare* had to determine the status of the well-known "but for" test of causation, which is simply this: but for an act or omission, the result would not have occurred. The five judges sitting in the case wrote separate judgements. For present purposes it is sufficient to note that two of the judges, Toohey and Gaudron JJ expressly agreed with Mason CJ who said at [22]:

> The cases demonstrate the lesson of experience, namely, that the test, applied as an exclusive criterion of causation, yields unacceptable results and that the results which it yields must be tempered by the making of value judgments and the infusion of policy considerations.

Deane J essentially agreed.

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[9] As French CJ put it at [2]: "The principal question raised on this appeal from the decision of the Court of Appeal is whether Brookfield owed the Corporation a duty to exercise reasonable care in the construction of the building to avoid causing the Corporation to suffer pure economic loss resulting from latent defects in the common property."

[10] [1991] HCA 12, (1991) 171 CLR 506.

35 In summary, *March v Stramare* confirmed that the "but for" test had some utility as a test of causation, but could not be applied universally and rigidly.

36 In September 2002, the Commonwealth Government received the final report of the committee chaired by Ipp J into the law of negligence. At [7.41] the committee commented:

> [T]he ultimate question to be answered in relation to a negligence claim is not the factual one of whether the allegedly negligent conduct played a part in bringing about the harm, but rather a normative one about whether the defendant ought to be held liable to pay damages for that harm. In other words, the question is: should the defendant be held liable for any of the harmful consequences of the negligence and if so, for which? These questions can be said to concern the appropriate 'scope of liability' for the consequences of negligence.

37 At [7.42], the committee recommended "a legislative statement to the effect that the issue of causation has two elements — factual causation and scope of liability — both of which need to be addressed."

Wrongs Act 1958

38 In what was clearly a response to the recommendations contained in the Ipp Report, the Parliament of Victoria in 2003 inserted into the *Wrongs Act 1958 ("**the Wrongs Act**")* a new s51, which provides as follows:

> **51 General principles**
>
> (1) A determination that negligence caused particular harm comprises the following elements—
>
> (a) that the negligence was a necessary condition of the occurrence of the harm (**factual causation**); and
>
> (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (**scope of liability**).
>
> (2) In determining in an appropriate case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
>
> (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm (the **injured person**) would have done if the negligent person had not been negligent, the matter is to be determined subjectively in the light of all relevant circumstances.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

39 In *Wallace v Kam*,[11] a case of medical negligence, the High Court emphasised at [14] that, when applying s 5D(1) of the *Civil Liability Act 2002* (NSW), which is the New South Wales version of s 51 of the *Wrongs Act* , that "[t]he distinction now drawn…between factual causation and scope of liability should not be obscured by judicial glosses." The Court went on:

> 14. A determination in accordance with s 5D(1)(a) that negligence was a necessary condition of the occurrence of harm is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E. A determination in accordance with s 5D(1)(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused is entirely normative, turning in accordance with s 5D(4) on consideration by a court of (amongst other relevant things) whether or not, and if so why, responsibility for the harm should be imposed on the negligent party.
>
> 15. Thus, as Allsop P explained in the present case[11]:
>
> > "[T]he task involved in s 5D(1)(a) is the elucidation of the factual connection between the negligence (the relevant breach of the relevant duty) and the occurrence of the particular harm. That task should not incorporate policy or value judgments, whether referred to as 'proximate cause' or whether dictated by a rule that the factual enquiry should be limited by the relationship between the scope of the risk and what occurred. Such considerations naturally fall within the scope of liability analysis in s 5D(1)(b), if s 5D(1)(a) is satisfied, or in s 5D(2), if it is not."
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> 16. The determination of factual causation in accordance with s 5D(1)(a) involves nothing more or less than the application of a "but for" test of causation. That is to say, a determination in accordance with s 5D(1)(a) that negligence was a necessary condition of the occurrence of harm is nothing more or less than a determination on the balance of probabilities that the harm that in fact occurred would not have occurred absent the negligence.

40 In *Wallace v Kam* the Court went on to highlight that to determine factual causation in a case is to determine only that the first test is satisfied. The Court, at [21] said:

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[11] [2013] HCA 19.

> Satisfaction of legal causation requires an affirmative answer to the further, normative question posed by s 5D(1)(b):…

41 At [22] the Court continued:

> In a case falling within an established class, the normative question posed by s5D(1)(b) is properly answered by a court through the application of precedent. Section 5D guides but does not displace common law methodology. The common law method is that a policy choice once made is maintained unless confronted and overruled.

The burden of proof

42 As is the case under the New South Wales version of the legislation, the burden of proof on a claimant in Victoria is the balance of probabilities. Section 52 of the *Wrongs Act* provides:

> In determining liability for negligence, the plaintiff always bears the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation.

APPLICATION OF PRINCIPLES OF CAUSATION TO THE PRESENT CASE

43 Applying the "factual causation" test created by s51(1)(a) of the *Wrongs Act*, I consider that the following types of harm would have been reasonably foreseeable to the Council by reason of the landslip on 12/13 December 2008:

a damage to the property, including both to the garden and to the house;

b economic loss directly arising out of an inability by the Owners to remain in the house (eg, rent incurred in respect of alternative accommodation);

c economic loss in the nature of diminution in the value of the property;

d economic loss directly arising out of an inability by the Owners to sell the property when they wished to;

e loss of amenity and inconvenience arising out of destruction of the garden and having to live in a badly affected environment.

44 This case is not nearly as complex as it might have been, because the Council accepted responsibility for clearing up the Owners' yard at its expense. The Council also appears to have accepted at least one claim for economic loss. According to the evidence of Mrs Collins, there was an occasion when the Council insisted that the Owners and their children leave the house as a matter of urgency because of the danger arising from the installation of sensors on the embankment above the house. The Owners had been planning to hold their daughter's 18th birthday party in the house that night. Mrs Collins deposed that the Council picked up their

accommodation expense, and also paid for hire of the venue for the urgently relocated birthday party.[12]

45 Furthermore, presumably because the interior of the house itself was not damaged, the Owners made no claim for loss of use of the house such as a claim for alternative accommodation.

46 The jurisdictional issue arising out of the statutory scheme for liability from a flow of water created by the *Water Act,* determined in the pleading decision, means that any claim for loss of amenity and inconvenience, if it can be claimed at all, must be pursued in a Court.

47 The remaining categories of harm which I regard as recently foreseeable as arising from the landslip are:

a economic loss in the nature of diminution in the value of the property; and

b economic loss directly arising out of an inability by the Owners to sell the property when they wished to.

48 In respect of both of these types of harm, I consider the test of causation articulated in s51(1)(a) of the *Wrongs Act* is made out, that is to say, I am satisfied that the Council's negligence "was a necessary condition of the occurrence of the harm."

49 In respect of each category of loss, it is now necessary to address the test of causation established by s51(1)(b) of the *Wrongs Act,* namely, "that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused."

50 Before I turn to examine the first of these claims, it is necessary to examine the factual context in which the claims arise, because they are connected in the sense that they both have at their root the proposition that for a period of time the Owners were deprived of the ability to deal with their property as they wished.

PARTICULARISATION OF THE OWNERS' CLAIMS

51 In their Amended Points of Claim, the Owners provide the following particulars of their monetary claims:

> The landslide rendered the land unsaleable and much of the land unusable until such time as works were carried out by the Council on the municipal reserve to stabilise the municipal reserve [and] repair and rectify the drainage infrastructure. Remedial works to the municipal reserve, the land and the neighbouring land commenced in December 2008 and continued until March 2012. After the works were completed the Owners initiated a sale process for the land which was not able to be completed until August 2013.

52 The particulars of the respective claims for economic loss were as follows:

[12] Mrs Collins statement, at [28]-29].

A. Diminution in the realisable sale price of the land between July 2009 (when the plaintiffs needs to sell the property to acquire property in Parkville) until 5 August 2013 (when the property was in fact sold)-$275,000-$375,000.

C Extra bank interest paid between July 2009 at 5 August 2013 by reason of deprivation of the use of the funds otherwise realisable from the sale the land-$203,159.

Are the Owners limited to claiming loss arising out of damage to their property only?

53 A set of issues examined in detail at the hearing related to the extent and the effect of the admissions made by the Council in its pleading. The Council had, in paragraph 17 of its Amended Points of Defence, admitted that "the water" caused damage to the Owners' property, but otherwise denied that the Owners had suffered loss and damage as claimed and quantified. The Council contended that the landslip had not delayed the sale of the property, and said that any delay was associated with subsequent water flow events in March 2010 and October 2010, and with works related to the development of the neighbouring property at 18 Watersedge Terrace.

54 The Council said that there was a "discordance" between the Council's reliance on these matters, and the extensive admissions made in the pleading. In this respect it was noted that the council had admitted a number of matters including:

a that it was responsible for the management, maintenance and upkeep of the municipal reserve;

b that it had exercised powers and functions pursuant to the *Local Government Act 1989* in relation to drainage;

c that the drainage infrastructure was vested in the contract and under its management and control;

d the drainage infrastructure drained water which was collected, concentrated and aggregated from a catchment above the neighbouring property and the property;

e water leaked in a dangerous manner onto surrounding land, including the municipal reserve, neighbouring land and the property, lubricating the sub- soil, reducing the soil structure integrity, and softening the clay soils;

f on 13 December 2008, a landslip occurred emanating from the municipal reserve which deposited hundreds of tonnes of liquefied earth, slush, soil, mud and other debris onto the property, and carried away part of the property;

g there were flows of water from the land of a person onto other land, and these flows of water were "not reasonable" within the meaning of ss16(1)(b) and 20(1) of the *Water Act*;

h it caused the flows; and

i the water caused the Owners' loss and damage.

55 Notwithstanding these admissions, the Council contended in its closing submissions that the Owners could only claim loss arising out of damage to their property.

56 I reject the Council's argument. Reference to s 16(1) indicates that the provision is enlivened where there is a flow of water from the land of a person onto any other land, and that flow is not reasonable, and the water causes personal injury, property damage or economic loss to any other person. Accordingly, I can see no reason why the Owners cannot claim damages in relation to damage to property or economic loss suffered by them arising from a flow of water from the reserve onto the neighbouring property at 18 Watersedge Terrace, as well as arising from a flow of water from the reserve on to their property. I consider the theoretical entitlement to make such a claim is clear. The issue is causation.

Issues arising from the formulation of the claim for diminution of the value of the property

57 Several issues arise out of the Owners' formulation of this claim. Firstly, there appears to be a conflict between the proposition that the landslip rendered the Owners' property unsaleable until remedial works were carried out to the Council reserve and to rectify the drainage infrastructure, and the contention that there was a diminution in the realisable sale price in the range $275,000 - $375,000. If the Property was in fact not saleable at all because of the landslip for a period, then the diminution in the realisable price in that period would have been equivalent to the full value of the property. The fact that the claim for diminution in the realisable price is asserted to exist from July 2009, suggests that from that time the Property was saleable, albeit at a reduced figure.

58 The proposition that the realisable sale price of the property between July 2009 and 5 August 2013 was diminished by a figure in the range $275,000 - $375,000 invites further questions. Is it suggested that as at July 2009 the realisable price was reduced by $375,000, and at 5 August 2013 the reduction had come down to $275,000. Or vice versa? Is it said that through the whole of that period the realisable price of the property was diminished by an unidentifiable figure within the range? Is it conceded that after 5 August 2013 there was no further diminution in the realisable sale price of the property?

59 These questions were only answered in the Owners' opening, when it was indicated that that the claim for diminution in the value of the property had been reduced to $140,000. This figure was calculated as the difference between the actual price achieved of $740,000, and the valuation of the property at $880,000 as at 1 August 2013 by their expert witness, Mr Hemal

Ganatra, on the basis that it had been assessed on the assumption that the landslip had not occurred.

THE CLAIM FOR DIMINISHED VALUE

60 The history of the sales campaign will be traversed below, in connection with the claim for interest. For present purposes, the point to be made is that Mr Collins's evidence is that a single genuine offer was received for their property, and this was only in June 2013.[13]

61 The proposition advanced by the Owners is that they were forced to accept the amount offered in June 2013 of $740,000 because it was the only offer they had received, and they had substantial business loans and could not continue to bear holding costs of the Parkville mortgage and related expenses. They say the amount of $740,000 was significantly less than they reasonably had expected.

62 Before I turn to Mr Ganatra's evidence, it is convenient to address three other sources of evidence regarding the value of the land referred to by the Owners in their closing submissions.

Other sources of evidence as to value of the property

Fletchers Real Estate

63 Mr Collins in his statement at [103] refers to the advice received from Fletchers Real Estate in May 2012 when they were engaged to sell the property. Fletchers were said to have advised the Owners that they expected a sale price in the range is $900,000-$990,000. This advice is reflected in the Fletchers Exclusive Sale Authority signed by the Owners**.**

64 I am not prepared to place any store on this assessment. In the first place, and most importantly, the real estate agent from Fletchers who gave the advice was not called. Accordingly, he could not be cross-examined by the Council about the basis of the assessment, and the assumptions upon which it had been prepared. It is clearly not evidence of an independent expert prepared for the purposes of proceedings in the Tribunal. The estimate probably represents the advice given by a real estate agent to a potential customer prior to being awarded the commission.

Ray White Real Estate

65 Mr Collins, in the same paragraph of his statement, makes reference to the estimated sale price range quoted by Ray White Real Estate. This was in the range $950,000-$1,045,000. As with the case with Fletcher's, the agent involved at Ray White was not called to give evidence. I consider that this the estimate is to be given no more weight than the Fletcher's estimate.

[13] Mr Collins's statement at [101].

VRC Property

66 I was informed in the Owners' opening that reference would be made to a valuation of the property by VRC Property that was referred to in Mr Collins's statement. In the event, no references made to this valuation during the course of the hearing, and no submissions were made about it by the Owners' counsel in her closing address. In these circumstances it is not surprising that the Council did not address it.

67 In these circumstances, I put the VRC Property valuation to one side, and will not discuss it further.

The evidence of Mr Ganatra

68 The expert witness called by the Owners was Mr Hemal Ganatra of Accord Appraisals. Mr Ganatra had prepared three reports, which were tendered.

69 The first report purported to assess the market value of the Property as at 1 December 2008, that is to say just before the landslip. The report was prepared following an inspection that took place on 18 October 2017. At this point the property had been sold, and for this reason an internal inspection was not possible. The valuation as at 1 December 2008 was $850,000. This valuation was prepared using the direct comparison approach, and was verified using the summation method, which involved valuing the land and the improvements separately, and then allowing for depreciation.

70 The second report purported to assess the value of the property as at 1 July 2009 which, it is to be noted, was about five weeks before the Owners settled on the purchase of their house in Parkville. The value assessed by Mr Ganatra as at this date was $860,000. Again, the valuation was achieved using the direct comparison method, verified by the summation approach.

71 In his third report, Mr Ganatra valued the property at 1 August 2013. As noted, the valuation was $880,000, using the same methodologies as in his earlier two reports.

72 A critical assumption underpinning the first valuation appears at [1.8] on page 4 of the report:

> We have been advised that the subject property was substantially impacted due to a landslide from a neighbouring property sometime in December 2008. This valuation is based on the assumption that the event did not occur as on 1 December 2008 and that there was no damage, repair or any other issues directly or indirectly impacting the property as a result of the unstable ground or drainage.

73 I note that this critical qualification appears in each of the second and third reports as well.

74 It was contended on behalf of the Owners, in final submissions, that factors identified by Mr Ganatra to explain why the property had realised a price substantially lower than his assessment of $880,000 included the following:

a it takes time for the market "to forget" the landslip;

b the remediation work carried out would not create confidence in the market that there would be no re-occurrence;

c the legacy of the landslip meant that the Property was on the market between May 2012 in August 2013, which was disadvantageous, and in comparison, the property at 15 Watersedge Terrace had sold within 21 days;

d drainage pipes sitting on top of the land were visible in the reserve;

e there had been coverage of the landslip in the local newspaper; and

f any purchaser could be expected to do due diligence regarding the history of the block.

75 Mr Ganatra was closely cross-examined at the hearing. From this cross-examination, some important points became apparent. The first related to occurrence of earlier water flow events. The second related to the age of the house. The third related to the usable area of the yard. The fourth was that he was not in a position to assess the internal state of the applicant's house at the time of sale. I address each of these matters in turn.

Earlier water flow events

76 As noted, Mr Ganatra had acknowledged in each of his three reports that his instructions were that there had been a landslide in December 2008, and that each of his valuations had been based on the assumption that that event had not occurred, and there was no damage, repair or other issue directly or indirectly impacting the property as a result of unstable ground or drainage. Under cross-examination, he conceded that he had not been made aware of a number of water flow events prior to December 2008. He agreed that this information would have affected his valuations, but added that the impact on his assessment would depend whether the event was a "one-off" or if the risk was continuous as a result of the topography of the land.

77 When it was put to him that the previous events had occurred over a 15 year period, he agreed that there would be an impact, but could not assess it without "due diligence".

78 When he was asked whether such a history would deter potential buyers, he was ambivalent. He said the impact would depend on the availability of supply.

79 In the light of Mr Ganatra's ambivalent evidence, it is necessary to review the evidence relating to the prior water events.

80 In his statement, Mr Collins had made several references to these events. For instance, at [11-12] he deposed:

> During the time that we lived at the Property from 1993 onwards, during heavy rain storms there were large flows of stormwater both overflowing from the stormwater manhole cover on my Property…

> and underflowing from the soil surrounding the stormwater drain all of which flowed over and spread mud, rocks and debris across our Property.
>
> The underflow of water from the soil was continuous throughout the period from 1990s until the landslide in 2008. Stormwater overflow events occurred intermittently, typically several times per year from the mid-1990s through to and after the landslide in 2008 during heavy rain.

81 Mr Collins deposed that these events had an impact, which he outlined in these terms.

> 15 I did as much as practicable to reduce the impact on our family, consuming a great deal of my own time, and incurring substantial construction and maintenance costs to clear up and repair the damaged parts of the Property.
>
> 16 There were many deep erosion channels …
>
> 17 Even after clean up following events approximately 1/3rd of the land area was permanently unusable. In effect our property was 2/3rd of the size of the land area that we purchased for this entire period from 1993 until 2008.

82 Much later in his statement, Mr Collins returned to this topic, when he added, at [104]:

> In the years leading up to the landslide in 2008 the Council were advised on many occasions of the continuous water underflow and intermittent water outflow events.

83 Mr Collins augmented his evidence in in his affidavit sworn 23 November 2018, when he deposed at [13]:

> I obtained a quote dated 12 March 2006 from Bruce Cotterill Garden Construction Pty Ltd for repair of the damage caused by water overflows from Council's stormwater pit on my property.… We proceeded with this quote, at a cost to me of $5,471.40 and the rectification works stated therein were performed.

84 Having regard to this evidence, I consider that Mr Ganatra should have been instructed in detail as to the prior water flow events. If he had been, he would have been able to carry out the due diligence that he had said was required, and could have quantified the relevant impact on his valuation.

85 I consider that this oversight was particularly relevant to the first valuation, and casts real doubt on its accuracy.

86 It was also, no doubt, relevant to the second valuation.

87 I doubt, however, that it would have had any impact on the third valuation, having regard to the effluxion of time between 2008 and 2013.

The age of the house will

88 In preparing each of his reports, Mr Ganatra had assumed the house had been constructed in 2000. It was not. It had been completed by 1993, when the Owners moved in. Accordingly, on Mr Ganatra's analysis, the house was only 13 or so years old in August 2013. In fact, it was about 20 years old when it was ultimately sold.

89 Under cross-examination, Mr Ganatra at first did not place any importance on this difference in the age of the house. However, his initial view was expressed on the basis that he believed that the warranties arising under the *Domestic Building Contract Act 1995* ran for 7 years. When it was pointed out to him that these warranties ran for 10 years, he agreed that whether the house was inside or outside the warranty period would make a difference to his assessment. However, he declined to quantify the difference. He said "I'd have to think about it."

90 I consider that Mr Ganatra's misunderstanding as to the age of the house, when coupled with his failure to appreciate that the warranties imported into the building contract for the construction of the house arising under the *Domestic Building Contract Act 1995* had effect for 10 years, was a material matter. This misunderstanding was particularly important in relation to the first valuation. The point here is that had Mr Ganatra appreciated the length of the life of the warranties provided under the Act, he would have assumed that a house built in 2000 had at least a year to run on its statutory warranties as at December 2008.

The usable area of the yard.

91 Mr Ganatra valued the Property on the basis that its area was 1,121 m². On its face, this was accurate. What Mr Ganatra did not know, because he had not been instructed fully, was that the usable area of the yard had been impaired by a number of water flow events prior to the landslip in December 2008. Specifically, Mr Ganatra had not been instructed that Mr Collins had estimated that one third of the Property, excluding the footprint of the house, was "perpetually unusual because of the residual debris, particularly rocks which became embedded in the soil and between vegetation which could not be easily removed without heavy machinery, hence greatly diminishing the utility of my property."[14]

92 Mr Ganatra conceded that he did not know of this reduced usable area of the land at the time he prepared his valuations. However, he did not place any importance on the matter. He observed that he was not a builder, and that a new owner may not look at the issue technically. The new owner might decide not to use the affected area.

93 I am not convinced by Mr Ganatra evidence on this point. I say this because one of the features about the Owners' house highlighted in each of Mr Ganatra's three valuations was the area of the block. Moreover, in all but

[14] See Mr Collins statement, paragraph 10 (c).

one of the comparative sales he looked at in respect of his first report be referred to the land area. In each of the comparative sales he referred to in his second and third reports, he referred to the land area. I do not understand why land area is referred to in almost every valuation, and yet can be said not to be of any importance.

94 Accordingly, I consider that the fact that Mr Ganatra was not aware that about a third of the yard area of the Owners' property was impaired when he valued it as it 1 December 2008, was a material matter. It was still a material matter when he valued it as at 1 July 2009. However, the issue would have ceased to have been important when he carried out his valuation as at August 2013, because by then the entire yard had been remediated.

The internal condition of the house

95 The fact that Mr Ganatra was not in a position to assess the inside of the Owners' house follows from the fact that he was not engaged until October 2017. At this point the house had long since been sold. Mr Ganatra could only conduct a drive by inspection, and conduct the valuation "based on and contingent to the information provided by the instructing party and the client".

96 Mr Ganatra had no difficulty in providing in his reports an accurate outline of the floor plan of the house, its fixtures and features, and its ancillary improvements. However, he had to speculate about its state of repair.

97 At [7.7] of each his three reporst, he stated:

> We have only carried out an external inspection of the subject property. Based upon the documentation and information provided by the client, it is assumed that the subject property was in an average internal and external condition without any requirement of repairs or renovation.

98 I consider that the reasonableness of the assumption that the Property was "in an average internal and external condition without any requirement of repairs or renovation" is questionable in circumstances where Mr Ganatra assumed the property was built in 2000 when it had been completed in 1993. The house *may* have been in average internal condition at the date of each valuation, but Mr Ganatra did not personally have the knowledge to make those respective assessments.

99 This issue is not of merely academic importance. The expert engaged by the Council, Mr John McEntee of WBP Property Group, was taken to task for assessing the value of the property at $670,000 at 1 July 2009. This compared with Mr Ganatra's valuation on the same date of $860,000. One of the matters relied upon by counsel for the Owners in criticising Mr McEntee was that a house which was contended to provide a close basis for comparison because it was on the same street, and was sited on only a slightly larger block, namely 15 Watersedge Terrace, had sold in April 2009

for $1,378,000. Mr McEntee had assessed 15 Watersedge Terrace as providing "superior style and standard of accommodations" when compared to the Owners' property. Perhaps he was right.

100 In the absence of an ability to assess on a first-hand basis the internal condition of the Owners' house as of the date of the assessment, it is hard to understand how a confident assessment of the value of the Owners' house could be made by Mr Ganatra.

Summary

101 Mr Ganatra agreed that the fact that there had been a history of water flow events over a long period prior to the landslip in 2008 would have affected his valuation, although he would not be drawn on the exact impact. As noted, I consider he should have been given the relevant information, so as to enable him to carry out the due diligence he insisted was required.

102 I am not convinced by Mr Ganatra's initial evidence that the age of a timber house such as the Owners is not a matter material to its valuation. I find that 20 years as against 13 years is a material age difference in a house constructed of timber and Hardiplank. Moreover, I consider the fact that Mr Ganatra assumed the house was only 8 years old when he valued it with effect from 1 December 2008 to be particularly significant, for the reasons explained.

103 As noted, I consider the fact that Mr Ganatra was not aware that about a third of the yard area of the Owners' property was impaired when he valued it as it 1 December 2008, and again valued it at 1 July 2009, was a material matter.

104 Finally, Mr Ganatra's inability to inspect the inside of the Owners' house deprived him of the ability to make an informed comparison of the condition of the house with the other properties he referred to in each of his reports.

Conclusion

105 Taking these four matters together, I find that Mr Ganatra has overestimated the value of the Owners' Property as at 1 December 2008 and also as at 1 July 2009.

106 I will turn shortly to the consideration of the comparative properties used in the preparation of those reports, with a view to identifying the extent of the respective overvaluations.

107 First, however, it is appropriate to make some general comments about the quality of the report prepared by the Council's expert, Mr John McEntee of WPB property.

The McEntee Report

108 The expert called by the Council was Mr John McEntee of WPB Property Group. He had prepared a report in which he gave retrospective valuations of the Owners' property, on the assumption that the landslip had not occurred, as at 1 July 2009 and 5 August 2013. In order to prepare the report, to McEntee carried out a kerbside inspection on 29 January 2018.

109 In her final submissions, counsel for the Owners criticised Mr McEntee's report on the basis that it was "replete with basic factual errors". Examples given were that Mr McEntee misunderstood the orientation of the Property, that he thought the house was constructed of weatherboard rather than Western Red Cedar, that he didn't know which bank of the Barwon River the property was on, that he had used the same photo to illustrate two different properties, that he had used in respect of at least one property profile a photograph purportedly taken at the time of sale but which had been taken later, and that in a couple of places he had referred to 2017 rather than 2013. For these reasons, it was submitted the Tribunal should have difficulty in accepting Mr McEntee's evidence.

110 It was also pointed out that Mr McEntee appeared to ignore one of the key questions which had been put to him by his instructors, who were the solicitors acting on behalf of the Council. That was: on the assumption that the landslip had not occurred, what was the market value of the property as at 5 August 2013?

111 It was submitted on behalf of the Owners that Mr McEntee did not answer that question, because, purportedly applying the direct comparison approach, he assessed the value of the property at $740,000. It was contended that Mr McEntee adopted this figure, because he was "anchored" to the actual price achieved for the property when it sold on 5 August 2013.

Discussion

112 I am not disposed to discount Mr McEntee's report entirely because it contained a number of minor errors, even though some of them obvious, and did not reflect well on the author.

113 I adopt this view, notwithstanding that the report contains this disclaimer:

> The assed value has a timeframe of 3 months only from the date of the valuation inspection as any period past this date will require a re-inspection and analysis of a new set of sales.

114 I put this disclaimer to one side as it was expressly included at the insistence of WPB's professional indemnity insurer. However, it is a nonsensical disclaimer when applied to 2 retrospective valuations, and cannot represent "best industry practice" as claimed.[15]

115 I consider the substantive attack made on Mr McEntee's methodology to be much more important. Mr McEntee assessed the value of the Property at

[15] See "Special Conditions" at the foot of page 5 of the WPB report.

$740,000 as at 5 August 2013, even though at page 28 of his report, he had stated:

> Recent comparable sales within the immediate area range between $760,000 and $1,225,000 depending upon factors such as: the size, condition and appeal of the dwelling; the size, shape and contour of the allotment; the level of ancillary improvements; the location and the date of sale.

116 Notwithstanding that the Owners' property was sold for a figure which was outside the range of sale detailed in his report, Mr McEntee expressed the justification for his assessment in these terms:

> Comparable sales within the immediate area indicate an improved land rate range of between $369/ m² and $1236/ m², depending upon factors such as; the size, condition and appeal of the dwelling; the size, shape and contour of the allotment; the level of ancillary improvements; the location and the date of sale. The analysed sale price equates to $651/ m² land (improved) and lies within this range.

117 I highlight that what Mr McEntee is saying is that because the price of $740,000 equates to a price per m² which sits within the range achieved for other properties within the area in the relevant time frame, it is an appropriate valuation for the Property.

118 I have a concern with this approach, as I consider it to be a different application of the direct comparison methodology than that which I understand Mr Ganatra to have applied. I understand that the direct comparison methodology requires the valuer to identify, by reference to properties having characteristics as close as possible to the Owners' property, a reasonable valuation of the property. A subset of this approach is to identify by reference to unimproved properties having characteristics as close as possible of the Owners' block, its unimproved value, and use that to come to a view as to the improved valuation. It appears that what Mr McEntee has done is to use comparative sales to establish a range within which the improved value of the land, assessed on a m² basis, ought to sit.

119 Having done that, Mr McEntee has then brought into account another factor, which is the actual price that the land sold for. That he did this is clear from his evidence at the hearing, when he indicated that the actual sale price was evidence of the value of the land.

120 Because of these issues with his methodology, I discount Mr McEntee's assessment of the value of the owners' house as at 5 August 2013.

121 I do not discard his report in its entirety, because some observations Mr McEntee makes about other properties are merely factual, and it is appropriate to look at the comparative sales he used for the purposes of assessing Mr Ganatra's evidence. However, because of the many will errors identified in the preparation of Mr McEntee's report, I will, where there is a conflict between a subjective assessment about a property expressed by Mr

Ganatra and a subjective assessment by Mr McEntee, prefer Mr Ganatra's view.

122 I conclude my remarks about Mr McEntee's report by making two comments about its form.

123 The first of these issues is that Mr McEntee did not express a view as to the impact on his assessment of the value of the property as at 5 August 2013 of the landslip. When asked about this at the hearing, he justified this omission from his report with this statement:

> The landslip occurred in 2008. Why would it effect the sale price in 2013?

124 Mr McEntee is entitled to hold this view. However, as one of the tasks set by his instructors was to assess the market value of the Owners' property when it was sold, taking into account the occurrence of the landslip, I consider that it was incumbent upon him to clearly express his opinion on the issue in his report.

125 The second comment is that Mr McEntee's report had been co-signed by Patrick J Brady, an executive director of WPB Property Group. Mr McEntee explained at the hearing that it was a requirement of WPB's professional indemnity insurer that the report be co-signed by a director. I have no reason to doubt that that is the case.

126 Mr McEntee said that Mr Brady had not altered the report in anyway. I have no trouble in accepting that evidence, because the report contained careless errors, some of which were obvious.

127 Had Mr Brady made some alterations to the report, and the Owners had objected to the report being placed into evidence on this basis, I expect that the Council would have had some difficulty in persuading me that it was not necessary for Mr Brady to be called to give evidence as well as Mr McEntee, because the report would have been a joint report.

Observations about the Global Financial Crisis ("GFC")

128 Mr Ganatra considered that the residential property market in Victoria was impacted by the GFC in the middle of 2008. At page 16 of his first report, under the heading "Economy and Market", he made the following points:

a the residential property market in Victoria experience strong demand and consistent growth over 2007, notwithstanding consistent interest rate increases;

b the GFC struck somewhere around mid-year 2008 resulting in a rapid reduction in consumer confidence and a drop in property prices;

c the Federal government responded by introducing new measures including a substantial increase in the First Home Owner Grant ;and

d the Reserve Bank introduced a series of interest rate cuts between September 2008 and December 2008, reducing the interest rate from 7% to as low as 4.25% in four months;

e the First Home Owner Grant and interest rate cuts managed to stabilise the market to some extent, setting the stage for a positive outlook over the second quarter of 2009.

129 Mr Ganatra repeated these comments in his second report, but updated them in his third report to reflect the changed situation in the 2013. Relevantly he said:

> Over the past 12 months residential property market has experienced a steady decline in prices as well as consumer confidence. Interest rate cuts implemented by the RBA last year have had positive effect on the market over the first quarter of 2014…[16]

130 Mr McEntee also made some comments about the market in section 15 of his report. In summary, he said that the GFC had a negative impact on the residential market during 2007 and 2008, but was improving as at July 2009. I comment that there is tension between his view and Mr Ganatra's view about the impact of the GFC in 2007, but I take the matter no further as the point is academic in the context of this case.

131 Relevantly, Mr McEntee noted that by August 2013 auction clearance rates had softened, which he suggested was indicative of a softening of the market. This is consistent with Mr Ganatra's view.

The comparative properties used in Mr Ganatra's first report

132 The starting point of the comparison process is the Owners' house. Mr Ganatra recorded it as being a four bedroom house including an ensuite, bathroom, formal lounge, kitchen, family room, dining room and laundry, together with a double garage. It has a total built area of 285 m². It is situated on a steep block, with a total land area of 1,121 m². The house is accessed from Watersedge Terrace, which has a bitumen sealed service and a kerb. The house has polished timber floorboards, cork flooring, 2 built-in robes, 1 walk-in robe, split system heating and air conditioning, standard light fittings and window furnishings. The improvements include front and rear landscaping, timber decked balcony areas, concrete block paving and timber paling perimeter fencing.

133 As noted, as an internal inspection was impossible, it was assumed by Mr Ganatra that the property was in average internal and external condition without any requirement for repairs or renovation.

Bevington Court,

134 The first comparative sale was in Bevington Court, Highton, a two storey brick veneer cement rendered dwelling of three bedrooms. It sold in

[16] Mr Ganatra's third report, page 16.

February 2008 for $760,000. The land area was not indicated. Mr Ganatra provided the following analysis:

> A comparable dwelling providing a comparable floor plan but on a smaller allotment. It is situated in a comparable location, approximately 3 km from the subject property but in an inferior position. Overall, sale evidence is considered inferior and a higher market value is considered appropriate for the subject property.

Buckley Falls Road

135 The next sale referred to was in Buckley Falls Road, Highton, a two storey brick veneer rendered dwelling of five bedrooms, which sold in August 2007 for $900,000. It had a much larger land area than the Owners' property, at 1,789 m². In summary, Mr Ganatra said:

> A larger dwelling in comparable internal and external condition but on a larger allotment with superior ancillary improvements. It is situated in a comparable location but inferior position approximately 1 km from the subject property. Sale transaction is about 16 months old and arguably during superior market conditions. Overall, sale evidence is considered superior and a lower market value is considered appropriate for the subject property.

8 Watersedge Terrace

136 Mr Ganatra then referred to a property in the Owners' street, 8 Watersedge Terrace, which was sold in September 2007 for $800,000. This was a split level, rendered dwelling of four bedrooms. Its fittings and fixture included polished timber floorboards, carpet and tile floor coverings, ducted heating, ducted evaporative cooling, built-in robes, walk-in robes, recessed light fittings and window furnishings. Mr Ganatra provided the following analysis:

> A superior but smaller dwelling providing an inferior floor plan on a comparable allotment with comparable ancillary improvements. It is situated on the same street but does not have access to Barwon river. Sale transaction is about 15 months old and sold under superior market conditions. Overall, sale evidence is considered inferior and a higher market value is considered appropriate for the subject property on account of property attributes despite negative market movements.

Bilby Lane

137 The fourth comparison offered was in Bilby Lane, Highton, a two story brick architect designed dwelling of five bedrooms which sold on 21 March 2009 for $1,000,085. It was on a smaller allotment of 795 m², and was not facing the Barwon River. Mr Ganatra summarised it as follows:

> A significantly superior dwelling providing a superior floor plan but on a smaller allotment with an inferior location, approximately 900 m from the subject property. Sale transaction is three months after the

date of valuation and affects comparable market conditions. Overall, sale evidence is considered superior and a lower market value is considered appropriate for the subject property.

Discussion

138 Mr Ganatra valued the Owners' property as of 1 August 2008 at $850,000. I find this a surprisingly high valuation having regard to the comparative sales referred to, particularly as at this point the GFC was having an impact.

139 In this connection I note that the brick veneer five bedroom house in Buckley Falls Road, Highton, which was on a much larger allotment, sold in August 2007 for $900,000. I acknowledge that Mr Ganatra considered it was in an inferior position, but note that it was a larger dwelling with superior improvements and sold in "arguably …superior market conditions."

140 I also refer to the sale of the property at 8 Watersedge Terrace in September 2007 for $800,000. This was described as a "superior but smaller dwelling providing an inferior floor plan on a comparable allotment with comparable ancillary improvements." I comment that:

a apart from an inferior cooling system, the fittings and fixtures appear to be very comparable;

b although Mr Ganatra opined that the property was smaller than the Owners' house, it had four bedrooms, a study, an ensuite, a family bathroom, a kitchen/meals area, formal lounge and dining area, a laundry and a four car garage, and accordingly it is hard to see why it was said to be smaller;

c the area of the allotment was about 330 m² larger than the Owners' property;

d the house was said to have been built in the year 2000, and the fact that it was newer than the Owners' house is apparent from the photograph attached to Mr Ganatra's report; and

e the property was sold in a superior market.

141 I consider this property provides the best comparative evidence not only because of its location, but also because of its similar accommodation and similar level of fittings and fixtures. This property did not have the exceptional position of the Owners' house, but was at the time of valuation seven years newer, and sat on 30% more land. Bearing these factors in mind, I find it hard to understand how the Owners' property as at 1 December 2008 could be valued at more than $800,000, even without allowing for the impact of the GFC.

142 The house at Bevington Court, described by Mr Ganatra as a comparable dwelling, but on a smaller allotment in an inferior position, sold in February 2008 for $760,000. There is nothing in the evidence about the Bevington

Court property to encourage me to think that that the Owners' house should be valued in December 2008 at more than $800,000.

143 At the other end of the spectrum, the sale of the "significantly superior dwelling providing a superior floor plan" in Bilby Lane for $1,000,085, in an improving market in March 2009, is not comparable. It does not assist me.

144 In summary, I consider that but for the impact of the GFC, the Owners' house as at 1 December 2008 would not have exceeded $800,000 in value.

The impact of the GFC

145 The effect on property prices caused by the GFC is not to be overlooked. The Buckley Falls property was sold in August 2007. 8 Watersedge Terrace was sold in September 2007. The Owners' house was valued with effect from 1 December 2008 when, according to Mr Ganatra's own evidence, the impact of the GFC was at its greatest.

146 Mr Ganatra did not attempt to quantify the impact of the GFC on his estimation of the value of the Owners' house in December 2008. However, he did comment that auction results plummeted below the 50% mark and demand for new housing was reduced.[17]

147 If the Owners' house would have been worth not more than $800,000 at December 2008 but for the impact of the GFC, it must be discounted because of the GFC. The issue becomes: what should the discount factor be?

148 Clearly, even a minimal discount in percentage terms will have a significant impact in terms of dollars. For instance, a 2.5% discount on a base price of $800,000 would reduce the assessment by $20,000, a 5% discount would bring the price down by $40,000, and a 7.5% discount would reduce the valuation to $740,000.

149 I note that in her closing submissions, counsel for the Owners referred me to *Australia v Amann Aviation Pty Ltd* where Mason CJ and Dawson J wrote, at [31]:

> The settled rule, both here and in England, is that mere difficulty in estimating damages does not relieve a court from the responsibility of estimating them as best it can: (citations omitted). Indeed, in Jones v. Schiffmann … Menzies J. went so far as to say that the "assessment of damages ... does sometimes, of necessity involve what is guess work rather than estimation": at p 308. Where precise evidence is not available the court must do the best it can…

150 While I acknowledge there is an element of guesswork in making an assessment of the Owners' property as at 1 December 2008, having regard to the paucity of evidence presented, and the issues with Mr Ganatra's valuation discussed, but taking into account the GFC, I find that the

[17] Mr Ganatra's first report, page 16.

appropriate valuation of the property as at 1 December 2008, but for the landslip, would have been $760,000.

The value of the Property as at 1 July 2009

151 Mr Ganatra valued the Property on 1 July 2009 and $850,000, that is to say merely $10,000 more than he thought it was worth in December 2008. Before we have a look at the comparative values, I comment that such a modest increase in value is surprising. I say this because of Mr Ganatra's own evidence that a substantial increase in the First Home Owner Grant and interest rate cuts stabilised the market, and set the stage for a positive outlook over the second quarter of 2009. In my view, such a "positive outlook" is not consistent with a mere $10,000 increase in the value of a house previously assessed at $850,000, as this represents only a 1.2% increase in value.

152 If I were to adopt Mr Ganatra's approach, I would - without looking at comparative prices - value the Owners' property at $77,0,000 as at 1 July 2009. I do not propose to adopt that approach. Rather, I will be guided by comparative sales.

15 Watersedge Terrace

153 The first comparative sale was at 15 Watersedge Terrace, Highton, which sold in April 2009 for $1,378,000. This was an excellent result, which was heavily relied upon by the Owners at the hearing.

154 On its face, the property had significant similarities to the Owners' house, as it comprised a two storey dwelling providing four bedrooms, one ensuite, one family bathroom, a study, a formal lounge, an open plan kitchen and family area, games room and a double garage. Furthermore, the allotment was almost identical to the Owners' block, at 1,220 m².

155 However, from Mr Ganatra's report, some differential features emerged. Firstly, the house was built in 1999, and was accordingly six years newer than the Owners' house. Furthermore, at 410 m², the gross building area was significantly larger than the Owners' area of 285 m². Moreover, it was rated by Mr Ganatra as being a "superior dwelling providing a superior floorplan and situated in the same street with similar outlook".

156 Mr Ganatra did not indicate the method of construction of the house, but it is clear from the report tendered by the Council's expert Mr McEntee that the house is of brick construction, and has a slate tile roof.

157 At the hearing, Mr McEntee highlighted that this was an executive style house, not a "pole house" like the Owners'. He referred to this property's wide street frontage and its lack of visibility of the house from the street. The gentle slope of the land was also highlighted. Mr McEntee's summed that the situation up by saying that other than sharing the same street, 15 Watersedge Terrace was completely different to the Owners' property.

10 Pinnacle Close

158 The second comparative sale referred to by Mr Ganatra was 10 Pinnacle Close, which will sold in July 2009 for $720,000. This was a two storey brick veneer cement rendered dwelling of four bedrooms and two bathrooms. The land area was almost identical to the Owners'. The year of construction was not stated. Mr Ganatra summarised the property as:

> An inferior dwelling providing a comparable floor plan situated on a comparable allotment but in an inferior location. Overall, sale evidence is considered inferior to the subject property.

Nantes Street

159 The next property referred to by Mr Ganatra was not in Highton, but in the neighbouring suburb of Newtown. Situated in Nantes Street, it had sold in July 2009 for $900,000. It was a two storey weatherboard dwelling providing three bedrooms. It had a significantly smaller block of 959 m². The date of construction was not stated. It was described Mr Ganatra as:

> A superior dwelling providing a slightly superior floor plan situated on a smaller allotment within an inferior location. Overall, a lower market value is considered for the subject property.

Bilby Lane

160 A fourth property referred to was in Bilby Lane, Highton. This was a two storey brick, architect designed, dwelling including five bedrooms. It had sold in March 2009 for $1,000,085. It stood on an allotment of 795 m², and was accordingly almost 30% smaller than the Owners' land. It was almost new, having been built in 2005. It was described by Mr Ganatra as:

> A superior dwelling providing a superior floor plan but on a smaller allotment within an inferior location, possibly 900 m from the subject property. Overall, sale evidence is considered superior and a lower market value is considered appropriate for the subject property.

Kyeema Avenue

161 Mr Ganatra referred in this report to a fifth comparative property, this time in Kyeema Avenue, Highton. This two storey brick veneer cement rendered dwelling of three bedrooms had sold in August 2009 for $880,000. Mr Ganatra summarised the property as:

> A superior dwelling providing a superior floor plan but on a smaller allotment within an inferior location. Overall, sale evidence is considered superior and a lower market value is considered appropriate for the subject property.

Discussion

162 Clearly, the property at 15 Watersedge Terrace was far superior to the Owners'. It was of brick construction, offered "a superior floorplan" of 410 m², which was 30% greater than the Owners, and was significantly

newer. As it was in the same street and had a similar outlook, a far better price was to be expected. I consider that it is unreasonable for me to attempt to extrapolate from that price what a reasonable price for 25 Watersedge Terrace ought to have been in July 2009.

163 The property in Bilby Lane was, for the reasons outlined above, also a significantly superior property to the Owners'. I accordingly consider that its sale in March 2009 for $1,000,085 is not directly comparable.

164 The relatively new, brick, three bedroom home in Kyeema Avenue was said by Mr Ganatra to be a superior dwelling with a superior floorplan on a smaller allotment in an inferior location. Because of its quality, it is not directly comparable to the applicant's house, but the price achieved of $880,000 in August 2009 is notable.

165 The property in Pinnacle Close was said to be an inferior dwelling in an inferior location. However it was a two storey, brick veneer, cement rendered dwelling providing four bedrooms and two bathrooms, and was situated overlooking the Barwon River next to a reserve on a block of similar dimension to the Owners'. For these reasons I consider that it is a sale of relevance.

166 The remaining nominated comparative property in Nantes Street was a two storey weatherboard three bedroom house on a smaller allotment in a different suburb. I consider that no reliance can be placed on its sale in July 2009 for $900,000.

167 It must be remembered that the four issues which I consider caused Mr Ganatra to overestimate the value of the Owners' property as at December 2008 were still factors relevant to his second valuation. In summary, they were the history of water flow events at the property, the age of the house, the fact that one third of the land had been rendered unusable by past events, and the inability of Mr Ganatra to inspect the inside of the house.

168 A further factor to be considered in reviewing the second valuation, in my view, is the recovery from the GFC. The price for the Kyeema Avenue property, together with the price as achieved for 15 Watersedge Terrace in April 2009, and for Bilby Lane in March 2009, suggest that the effect of the GFC had substantially subsided by the end of the first quarter in 2009.

Properties referred to by Mr McEntee

169 I have expressed above my thoughts concerning Mr McEntee's report. Although I have rejected his assessment of the value of the Owners' property as at 5 August 2013, I confirm that I consider that it is appropriate to refer to the properties that he looked at for the purpose of assessing the value of the Owners' property as at 1 July 2009.

170 Mr McEntee referred to nine properties. He referred to the ninth, 61 Montrose Place, Highton, in the section of his report dealing with comparative sales in 2013, but as this was a clear mistake, I think it is appropriate to take this sale into account.

15 Watersedge Terrace

171 The first property referred to by Mr McEntee is 15 Watersedge Terrace, Highton, which sold in April 2009 for $1,358,000. This property has previously been discussed, as it was referred to by Mr Ganatra. The only new point I make about this sale is that Mr McEntee rated the property in this way:

> Expect lower quantum of value and lower rate per m² metre land (improved).

172 As the purchase price of 15 Watersedge Terrace was much higher than that achieved for the Owners' property, it is clear that by this form of words he intended to convey that the reader should expect the Owners' property to be of lesser value as well as attract a lower rate per m² of land (improved). I have made this observation because without this context, I consider Mr McEntee's observation to be ambiguous, and yet this formulation was used repeatedly by him.

3 Bilby Lane

173 The next property referred to is 3 Bilby Lane, which sold in March 2009 for $1,000,085. As with the previous property, this property was referred to by Mr Ganatra, and has previously been discussed.

37 Montrose Place

174 The property at 37 Montrose Place, Highton is a two level, three-bedroom, brick dwelling built in about 1999 situated on an elevated but irregular allotment. The land area is similar to that of the Owners', but the living area was significantly larger, at 410 m². The property sold in April 2009 for $1,100,000.

175 It is clear from the photo provided that the property has a superior view than the Owners'. The higher price can be explained partly by the significantly larger floor plan, as well as what Mr McEntee regarded as superior style and standard of accommodation.

25 Montrose Place

176 The next comparative property was at 25 Montrose Place, Highton, which sold in April 2009 for $650,000. This was also a 2 level house built in about 1999 with three bedrooms. On the basis that the property abutted a reserve, and had a view, Mr McEntee rated as having a similar location to the Owners' property. With a floor plan of 410 m², it was larger. Mr McEntee rated it as having superior style and standard of accommodation than the Owners' property, but, perhaps surprisingly, opined that the Owners' property would be worth more.

61 Montrose Place

177 This house is an executive style two level rendered brick dwelling offering four bedrooms. The floor plan is 340 m², and the land area is 991 m². The property sold in April 2009 for $1,225,000. Mr McEntee assessed it as

being a larger dwelling providing superior style and standard of accommodation, in a similar location. He rated the Owners' property as less valuable.

14 Manor Crescent

178 The next property referred to by Mr McEntee was 14 Manor Crescent, Highton, an executive style split level brick dwelling with three bedrooms, built in the 1980s that sold in April 2009 for $547,500. Mr McEntee regarded this as having similar location to the Owners' property, because it was elevated and looked over Queens Park. Mr McEntee regarded it as a similar sized dwelling, although I note that at 230 m², it was 20% smaller. Mr McEntee rated it as having a similar standard of accommodation. His overall assessment was that the Owners' property was of higher value.

10 Pinnacle Close

179 The next property referred to by Mr McEntee was 10 Pinnacle close, Highton, which sold for $720,000 in July 2009. This property has been discussed already, as it was referred to by Mr Ganatra. The expert's views regarding this property, however, were in conflict. As noted Mr Ganatra rated it as inferior to the Owners' property, whereas Mr McEntee thought the Owners' property would yield a lower value.

Block at 1 Bilby Lane

180 The next property identified for comparison was a block of land at 1 Bilby Lane, Highton, which sold in March 2009 for $250,000. The block was of 780 m², and the price obtained equates to $321 per m² of land. Mr McEntee noted that this block had a smaller than the Owners', and had an inferior location. I do not think this comparative sale assists.

Block at 2/14 Watersedge Terrace

181 The next sale referred to was also of an empty block of land. This was 2/14 Watersedge Terrace, which sold in August 2010 for $270,000. The price obtained indicated a value of $405 m². Mr McEntee opined that this smaller allotment had a superior aspect to the Owners'. Because this property is in the same street as the Owners', it is appropriate that it be paid some attention.

Discussion of the properties referred to by Mr McEntee

182 I have already indicated when discussing Mr Ganatra's July 2009 valuation that the sales of 15 Watersedge Terrace and 3 Bilby Lane should be put to one side as they were superior to the Owners' property.

183 The sale at 37 Montrose Place in April 2009 for $1,100,000 also is not a useful comparison, as it is clearly a superior property.

184 The sale at 25 Montrose Place in April 2009 for $650,000 is, in my view, instructive, because it the house was larger than the Owners' and was rated

as having superior style and standard of accommodation. However, Mr McEntee thought the Owners' property would be worth more.

185 61 Montrose Place is clearly a superior property, and its sale for $1,225,000 is not a useful comparison.

186 14 Manor Crescent sold in April 2009 for $547,500. It was an older style residence, 20% smaller than the Owners', and was rated as being less valuable. The comparison is not, in my view, useful

187 As noted, the expert's views regarding 10 Pinnacle Close were in conflict. For the reasons discussed, I prefer Mr Ganatra's opinions over Mr McEntee's, and accept that this property would have been worth less than the Owners'.

188 For the reasons discussed, I have put aside the sale of the block of land at 1 Bilby Lane.

189 However, I regard the sale of 2/14 Watersedge Terrace, which sold in August 2010 for $270,000, as instructive, because the block is in the same street as the Owners' property. The valuation of $405 per m², when applied to the owners' area of 1,121, m², yields an unimproved property value of just over $454,000. If this is combined with Mr Ganatra's assessment of the value property as at 1 July 2009 of $337,000 (rounded up), a value of $791,000 for the Owners' property is calculated as at this date.

190 In order to form a view as to the appropriate valuation of the property as at July 2009, I take into account the following factors:

a the view I have formed that the Owners' property ought to have been valued as at 1 December 2008, but for the effect of the GFC, at not more than $800,000;

b the recovery of the property market in the first half of 2009, as evidenced by the results achieved for 15 Watersedge Terrace, Bilby Lane and Kyeema Avenue;

c the sale of 10 Pinnacle Close property in July 2009 for $720,000; and

d the valuation of the Owners' property derived by combining the rate per m² on the unimproved land achieved on the sale of 2/14 Watersedge Terrace with Mr Ganatra's assessment of the value of the Owners' improvements of $790,000 (rounded).

Finding

191 Doing the best I can on the evidence, I find that the Owners' property as at 1 July 2009 would have been worth $790,000, but for the landslip.

The comparative properties used in Mr Ganatra's third report

192 Because of the way in which the Owners presented their case at the hearing, the most important of Mr Ganatra's three reports was the last one, in which he valued the Owners' house as at 1 August 2013 at $880,000.

193 In reaching this valuation, he took the direct comparison approach, and referred to four sales prior to August 2013, and one sale in November 2013.

Admiral Court

194 The first sale was of a property at 3 Admiral Court Highton, a single level, cement rendered, three bedroom dwelling two minutes away by car from the Owners' property. It had sold in July 2013 for $760,000. It did not have a river frontage. It was described as being in average internal and external condition. Mr Ganatra commented on it as follows:

> An inferior and smaller dwelling situated on a slightly larger allotment within an inferior location. Overall, sale evidence is considered inferior to the subject property.

44 Montrose Place

195 The second comparative property was in Montrose Place, Highton, and sold in May 2013 for $875,000. This was a two storey brick veneer cement rendered house of four bedrooms. It did not have a river frontage, but was described as being in excellent internal and external condition. Mr Ganatra commented that it was:

> A superior and larger dwelling situated on a smaller allotment within a slightly inferior location. Overall, a comparable market value is considered appropriate for the subject property.

Challambra Crescent

196 The third comparison property was in Challambra Crescent, Highton. It had sold in June 2013 for $740,000. This was described as a single level brick veneer four bedroom dwelling which was located in a street with no river frontage. The condition was described as "average to fair internal and external". Mr Ganatra described it as:

> An inferior dwelling in an inferior internal and external condition situated on a slightly larger allotment within an inferior location. Overall, sale evidence is considered inferior to the subject property.

Orchardview Court

197 The fourth property referred to by Mr Ganatra was in Orchardview Court, Highton, a two storey brick veneer dwelling of four bedrooms which had sold in March 2013 for $950,000. Mr Ganatra did not attempt a description of its condition but is to be noted that it had polished timber floorboards, carpet and tile floorcoverings, ducted heating, ducted cooling, built-in robes, walk-in robes, recess light fittings and window furnishings. Mr Ganatra commented that it was:

> A superior dwelling providing a superior floor plan situated on [a] comparable allotment in a slightly inferior location. Overall, sale evidence is considered superior to the subject property.

198 The November sale was of 16A Watersedge Terrace, Highton. The sale price was $788,000. The house was a split level, brick veneer dwelling including five bedrooms. It was described as being in average internal and external condition. Mr Ganatra described it as:

> An inferior dwelling situated on the same street but in an inferior position as it does not face, or have direct access to, Barwon River. Overall, a higher market value is considered appropriate for the subject property.

Discussion

199 Having regard to the price of $760,000 realised for the Admiral Court property sold the month before, which was described as "an inferior and smaller dwelling … within an inferior location" I can understand why the Owners were disappointed to receive a price of only $740,000 for their property in August 2013. Moreover, $740,000 was exactly the same price as achieved for the Challambra Crescent property in June which was "[a]n inferior dwelling in an inferior internal and external condition … within an inferior location". These sales suggest that the legacy of the landslip in 2008 did have an effect on the saleability of the Property.

200 Moreover, the price the Owners obtained of $740,000 compares unfavourably with the price of $788,000 obtained for 16A Watersedge Terrace which, although of five bedrooms, was described by Mr Ganatra as having been an "inferior dwelling situated on the same street but in an inferior position".

201 However, I do not think these three sales justify Mr Ganatra's conclusion that the Owners property, but for the landslip, would have been worth $880,000 in August 2013.

202 Mr Ganatra considered that 44 Montrose Place had overall "a comparable market value" to the Owners' property. He appears to have placed some importance on this sale, at $875,000 in assessing the Owners' property at $880,000.

203 I am not convinced that so much weight can be attached to the comparison with 44 Montrose Place, as it appears to be a much newer house and is described as being a "superior larger dwelling" although on a smaller allotment in a slightly inferior location.

204 I am also unconvinced that much guidance can be obtained by referring to the Orchardview Court property which sold in the $950,000, because it appeared to be relatively new. It also was a "superior dwelling providing a superior floorplan", and clearly had a panoramic view.

The comparative properties referred to in Mr McEntee's report

205 Mr McEntee referred to 5 comparative properties for the purposes of identifying the Owners' property's market value as at 5 August 2013. One of those was the sale of a property at 61 Montrose Place in Highton in 2009.

This appears to have been included in the wrong part of his report, and because of this it has been referred to in connection with the valuation as at 1 July 2009. Accordingly, only four properties remain to be considered.

38 Barwon Boulevard

206 The first sale in 2013 referred to by Mr McEntee was of 38 Barwon Boulevard, Highton, a 1980s brick veneer dwelling of three bedrooms which sold on 30 April 2013 for $784,250. The land, at 971 m², was significantly smaller than the Owners' block. The size of the house however was very similar, at 280 m². Mr McEntee considered that the property, with views overlooking the Barwon River, provided a "superior aspect, but had inferior style although a superior standard of accommodation." He rated it as more valuable than the Owners' property.

207 The next property referred to by Mr McEntee was 16A Watersedge Terrace, which sold in June 2013 for $788,000. It has already been discussed, as it was referred to by Mr Ganatra. Mr McEntee thought this property was worth more than the Owners'. Mr Ganatra thought the Owners' property was worth more.

208 The next property referred to by Mr McEntee is 3 Admiral Court, Highton, which sold in July 2013 for $760,000. Again, this has been discussed as it was referred to by Mr Ganatra. Mr McEntee thought this property was worth more than the Owners'. Mr Ganatra thought 3 Admiral Court was worth less.

209 The final property referred to by Mr McEntee was 18 Watersedge Terrace, which sold in December 2013 for $249,000. This property comprised an irregular allotment of land, with no house. It abutted the Owners' property on its north boundary, and also sat next to the municipal reserve. Mr McEntee thought it had a superior aspect, which makes sense as it was higher up the hill. Its relevance is that the price paid for this 1,611 m² block equated with $155 per square metre. If this valuation were to be applied to the Owners' 1,121 m² block, their land alone would be calculated to be worth $173,755. I comment that this outcome is radically different to the valuation of the land estimated by Mr Ganatra at page 24 of his report, where he valued the Owners' 1,121 m of land at $580 per square metre, creating a rounded down value of $650,000.

210 I note that if Mr Ganatra's estimate of the value of the improvements on the Owners' property of $305,000 were to be added to a land valuation of $175,000 (Mr McEntee's estimate rounded up) the total value would be only $480,000.

211 As this figure is a long way short of the price of $740,000 actually realised for the property in August 2013, I conclude that either the block at 18 Watersedge Terrace sold for a markedly cheap price, or Mr Ganatra has dramatically underestimated the estimated value of the improvements on the Owners' property.

212 For present purposes, I place no reliance on the sale at 18 Watersedge Terrace.

Conclusion

213 Doing the best I can with the limited evidence available, I am satisfied that the Owners' property would not have been worth less in August 2013 than it would have been in July 2009, if the landslip is ignored for the purposes of both valuations. On the other hand, I am not satisfied that the comparative sales referred to by Mr Ganatra justify his view that the Owners' property as at August 2013 was worth $860,000.

214 It is to be noted that Mr Ganatra assessed the Property in his third report as having increased in value by only $20,000 since 2009, when he valued it at $860,000. At 2.3%, this is a small percentage increase, achieved over a period of more than four years. However, such a small increase over time is consistent with the fact that the market had softened in 2013, as noted by both Mr Ganatra and Mr McEntee.

215 I am prepared to accept Mr Ganatra's opinion that there was a small net increase the price of the property over the period July 2009-2013. I adopt his estimate of the percentage increase in property values over this period. Accordingly, I must add 2.3% to my assessment of the property as at July 2009 of $790,000. The resulting increase is $18,170.

216 To adopt such a specific figure would be to suggest that the increase had been calculated with scientific accuracy. This is not the case.

217 In all the circumstances, I find that the value of the Owners' property as and 1 August 2013, but for the landslip, would have been $810,000.

218 The upshot is that I find that the landslip in 2008 had an impact on the price ultimately received for the Owners' property of $70,000, being the difference between $810,000 and $740,000. The Owners are entitled to an award in respect this sum.

THE CLAIM FOR ADDITIONAL INTEREST

219 The Owners seek damages for bank interest they paid between July 2009 and 5 August 2013 by reason of deprivation of the use of funds that they say would, but for the landslip, have been available to them from the sale of their Property. As explained by their counsel, the essence of the claim is that the effect of the landslip was to render their home, which otherwise would have been a relatively liquid asset, into a relatively illiquid asset.

220 The Owners put their case as a "counterfactual" in this way:

a the Council must take the Owners as it found them;

b it was in the contemplation of the Owners from late 2008 that they would sell their property at 25 Watersedge Terrace and buy a property in Melbourne;

c because of the landslip the Owners were deprived of the opportunity to sell the Watersedge Terrace property from 13 December 2008 for a significant period while remediation works were being carried out, and as a result they did not have the proceeds of the sale of the property available to them when they purchased a property in Parkville in July 2009;

d the claim for extra interest is not just the interest that they incurred on a loan of $750,000 they took out to purchase the Parkville property, but also on interest incurred on a loan taken out to buy an investment property; and

e being rational people, the Owners in July 2009 would have applied the proceeds of the sale against the loan they held with the highest interest rate, and accordingly they would have paid off an investment loan first.

221 In her closing submissions, the Owners' counsel submitted that the issues to be determined in respect of this claim are as follows:

a what is the amount of money the Owners lost the use of by reason of the landslip;

b what would they have done with the money; and

c what is the quantification of their loss?

222 These questions were posed in the context that the Owners, in their pleadings, had asserted that their claim began to run in July 2009, when they acquired the Parkville property, and concluded on 5 August 2013, when they settled the sale of the Highton Property. In my view, this assumption must be tested.

223 In determining the Owners' loss, the relevant legal principle is that the purpose of an award of damages is to compensate the Owners for the loss or damage suffered by them. The measure of damages is that sum which would put them in the position they would have been had the wrong not occurred.

224 Applying these principles, the Owners say that but for the landslip they would have sold their property in Watersedge Terrace in July 2009, and applied the sale proceeds - which they say on the basis of Mr Ganatra's evidence would have been $860,000 if the landslip and not occurred - and applied that sum to paying off debt in July 2009. The first loan to be paid off would be the loan with the highest interest rate, which happened to be on an investment property. The second loan to be paid off was the loan taken out specifically to buy the Parkville property.

Did the landslip interfere with the Owners' ability to deal with their property as they saw fit?

225 I think the starting point in analysing this claim is whether the Owners' ability to dispose of the Property was affected by the landslip.

226 The Owners say this is self evident, as they contend that the consequences of the landslip were disastrous, including the fact that some of the yard disappeared. Because of the landslip, they could not sell their house for a considerable period after July 2009. They say that the period during which they could not sell the property extended beyond the point when their garden had been recreated, because it took some time for the plants to regrow, and because the remediation of their property involved more than that landscaping. It also involved drainage works in the easement crossing their property, and the replacement of a drainage pit. Quite apart from the conduct of the physical works on the property, their ability to sell it was affected by the works being carried out on the neighbouring reserve and on the neighbouring property at number 18 Watersedge Terrace.

227 I turn now to examine the evidence relating to this aspect of the Owners'claim.

Effect of the landslip

228 On the basis of the Owners' evidence, I accept that they could not practicably have sold the Property in the weeks, even months following the landslip.

229 In her witness statement, Mrs Collins says on the night of the landslip, she and Mr Collins had been at Woodend. On the morning of Saturday 13 December 2008, they received a telephone call from their son Lachan who advised them of the landslip. She described the scene that met them when they arrived home in these terms:

> 15 We couldn't drive up to the house, because there was mud and dirt all over the road - about 6 inches deep. We had to park a couple of doors up; and walk up to the house. There was mud everywhere - all through the garden and across the front pathway. The mud was about 6 - 8 inches deep on our front pathway…
>
> 16 We inspected the property, wearing gumboots. The garden was ruined. There were shrubs that had been completely washed away. There was a decent sized mandarin tree which had been washed over. Our small lemon tree had been de-rooted. Our garden down the reserve side of the house, was wiped out. Prior to the landslip, it had been planted with climbers, creepers, cottage plans and grass. There was a tree which had previously been located outside our property, which had been de-rooted and washed into what was left of our garden.
>
> 17 The washing line area was effected (sic) too. That area was covered in mud as well.
>
> 18 Paved areas of the garden were covered in mud. Thankfully, the interior of the house was okay.

230 Mr Collins in his witness statement gave consistent evidence. He deposed, at [37]:

> The landslide carried away (down towards the river) parts of our southern and eastern yards and deposited hundreds of tonnes of liquefied earth, slush, soil, mud and boulders, trees and other debris onto our east, north and western yards.

231 Mr Collins continued, at [40-42] in these terms:

> 40 All parts of the Property, both on Property surrounding and beneath our house, were affected with up to two metres depth of mud and debris such as whole trees in our south yard.
>
> 41 There was mud and debris all over our Property; on the patio and underneath the house. The yards had disappeared beneath debris, mud and soil. The trampoline pit was full of mud.
>
> 42 Also destroyed was a large mandarin tree and other trees planted by my father-in-law before he passed away in 1998.… Many other special and beautiful plants that our children and my wife and I had cared for were carried down the hill by the landslide.

232 Mr Collins exhibited a number of photographs to his witness statement, which demonstrated the extensive nature of the damage.

233 At [58], Mr Collins deposed:

> Once we were allowed to access the Property, the workers seemed to be there every day and all the time. The initial phase was just to clean up and remove all the debris and mud to provide safe access to the house.

234 From this evidence, it is clear that there would have been health and safety issues associated with access by real estate agents and prospective buyers in the weeks following the landslide.

How long did the remedial works to the property take?

235 It is necessary to determine when it would have become feasible to sell the property.

236 The Council very promptly began the clean-up process. Mrs Collins deposed in her witness statement:

> 19 Someone for the local council turned up that day to inspect the damage. A few days later, Council cleaned up the front pathway.
>
> 20 Eventually, Council replaced all our plants, and re-landscaped the garden; but it took a very long time.

237 Mr Collins gave consistent evidence in his statement, as follows

> 58 Once the obvious debris was cleared, the repair was started. We had four large paved areas, all of which had to be ripped up and re-laid or replaced because of damage from the landslide. That

> involved the use of trucks, bob-cat, vibrating impactors, clouds of dust from clay and crushed rock, and the re-laying of pavers.

238 There was limited evidence regarding when the clean up of the Owners' property, as distinct from the other remedial works, was completed.

239 Mr Collins in his witness statement, at [46], refers to a conversation he had with Michael Stott, the senior engineer with Council who was the contact person at the Council throughout the four years of the reinstatement works. In this conversation, which was said to have occurred prior to the commencement of the works, Mr Stott told Mr Collins that they would take six months to complete. This appears to have been an optimistic estimate.

240 Mrs Collins deposed, at [22] of her statement, that after the Council cleared the front pathway, it took some months before the Council started on the landscaping. She added, at [24], that he could not recall the precise length of time it took Council to complete the landscaping, but she remembers being "amazed" at how long it was taking. It took much longer than she had expected.

241 At [63] of his statement, Mr Collins deposed:

> Whilst I cannot recall the exact sequencing of the rectification works, I do recall that by November 2009, the landscaping repairs to the Property had been started. Council had replaced soil in our backyard, and our yard facing the river.

242 Mr Collins, at the hearing, referred to a photograph which he said established that there was considerable reinstatement and associated dust, noise, vibration and disruption required along the east fence line, and 2 metres from the west end of the house where a bedroom was located.

243 Mr Collins continued his narrative at [61] of his statement, where he deposed that it was not just the garden and landscaping that had to be reinstated. Council also performed structural repairs to the house, for example to the undercroft. The drainage system also had to be repaired. Council had to redo the paving, reinstall retaining walls, reinstate the foundations and effect many other repairs. Mr Collins said that these works lasted longer than 12 months. The Council then had to replant the garden, but this was not finished until after 12 months. It took 24 months before the garden resembled the previous garden.

244 Regrettably, when Mr Collins, at [60], listed examples of the reinstatement works undertaken by the Council both on the property and the neighbouring municipal reserve, he did not distinguish between the different places where the work had been carried out. It is clear that some work was specific to the Property, such as "removal of hundreds of tonnes of soil and debris from the rear, front and beneath our house". Some works, such as installation of sub-surface drains and surface rains, and the replacement of tonnes of soil in sequential layers, presumably took place on the Owners' property, as well as on the reserve. Compaction of layers of soil by a vibrating

compactor would have taken place wherever new soil was laid. Landscaping certainly would have taken place on the property, but may have taken place on the reserve as well.

245 After the Owners complained during the hearing that they had been taken by surprise by lines of questioning pursued by the Council in the course of cross-examination, they were given leave to submit further evidence in affidavit form. In an affidavit sworn by Mr Collins stated 23 November 2018, the following evidence appears, at [4]:

> As explained previously, it was self-evident that we could not sell our property in the aftermath of the landslide. Following the landslide, Council engaged in extensive remediation works, to both our property, and to 18 Watersedge Terrace, the Council Reserve and to the Barwon River Reserve. Those works were not complete until early 2012.

246 It is part of the Owners' case that the point at which they should have sold their property was not demarcated by the completion of the physical works on it. They say that they sought to mitigate the loss in the nature of diminution in value of their Property by delaying the sale while all the works around their property were being completed. In this connection, Mr Collins deposed, again at [4] of his affidavit:

> We were concerned that those remediation works, which at times involved large, mining scale, earthmoving equipment, construction camps, and [a] large number of workers surrounding the Property - at the front, side and rear - would deter potential purchasers. We were concerned that these activities would greatly deter potential purchasers and suppress the sale price if we sold the Property whilst the remediation works were still underway.

247 I observe that this evidence is not particularly helpful, because it fails to differentiate between the remediation of the Property and the remediation of the two reserves and No. 18 Watersedge Terrace. However, Mr Collins deposed, at [9] of his affidavit:

> Council's remediation works following the landslide were still underway when …two further water flows occurred in 2010. Those remediation works included not only work still underway on the Council Reserve, but also work still underway on our Property. The construction work on our Property was extensive and not limited to reinstatement of the hole in the land and associated major landscaping works. There was also the relaying of pavers, repairs to the undercroft of the house, the repair and decommissioning of Council' pipework in the easement on our Property, the decommissioning of Council's storm water pit on our Property, and remediation of the sub-soil and the voids around the Council's storm water pipe work.

248 In this paragraph of his affidavit, Mr Collins further reinforced his evidence that the remediation process both on and off his property had a long-term effect. He continued:

> On my observation, there was almost always something occurring on and around our Property, involving workers and tools or machinery, from the time of the landslide to early 2012. We were anxious for these works to be finished so that we could sell the Property. We responded to questions from Counsel and their various contractors promptly and offered suggestions to reduce Council's costs and expedite completion of the remediation and associated construction activities.

249 Mr Collins provided further insight into the long process of remediation in his witness all statement at [95] where he said:

> In 2012 we repaired deterioration that had occurred to the Highton property over the four years of Council works associated with replacement of decayed Oregon beams, eaves, paining (sic) cleaning of mud and dirt etc.

The documentary evidence regarding remedial works

250 It is clear that the required remediation works were significant. Exhibited to Mr Collins's witness statement is a report from Parsons Brinckerhoff ("**PB**") dated August 2009 ("**the PB Design Report**").[18] PB were commissioned by the Council to investigate, analyse and then prepare remedial design for the landslip. For present purposes, what is to be noted is the description of the landslip contained in this report the Executive Summary, as follows:

> The main features of the landslip, as observed by PB, included a backscarp approximately 2-3 metres high and standing at approximately 60 degrees. The slip backscarp was observed to extend approximately perpendicular across the slope for a length of approximately 15-20 metres. A sidescarp feature was observed to extend down the slope for a length of approximately 15-20 metres. The sidescarp was "wedge -shaped" in that its height decreases to zero at its southern extent. The height of the side scarp, where it adjoins the backscarp, was estimated to be approximately 2 metres high.

251 The PB Design Report provides direct evidence of the timing of the planning of the remedial works. PB's services were provided in three stages, namely, a geotechnical ground investigation, a slope stability analysis and detailed design and documentation, and reporting. The detailed design and documentation stage was completed by the beginning of April 2009. This facilitated the issue by PB of the final specification and design documentation to the Council on 7 April 2009.

[18] Exhibit DHC6.

252 Also appended to Mr Collins's statement was a PB documentation package dated 3 April 2009 titled the "Watersedge Terrace Landslip-Instructions to Tenderers, Specification & Bill of Quantities." Regrettably, the project milestones identified at [1.6] of this documentation package were left blank, and so I cannot identify from the package when the project was put out to tender, when tenders were received, or when a contractor was appointed. However, as the package was made available to Council early in April 2009, it might have been reasonable to assume that some progress with the remediation of the Owners' property would have been achieved by the end of July 2009.

253 This assumption is supported by documents referred to in Mr Collins's statement. At [52], he refers to a site safety plan prepared in March 2009. This is consistent with the commencement of works soon after this point. Mr Collins exhibited calculations prepared by PB in connection with the repairs to the undercroft. These are dated 7 April 2009, and so the development of these plans could not have delayed the works. Mr Collins also refers to landscaping works plans dated 11 May 2009 and 10 June 2009, produced by Mexted Rimmer Landscape Architects.

254 However, the proposition that the remediation works of the property should have been well progressed by July 2009 is directly repudiated by Mr Collins, who said at [67] of his statement that as at July 2009, most of the reinstatement works had not been started, let alone completed.

255 Mr Collins asserted at [52] that "[m]ost of 2009 was taken up by cleaning up and design of reinstatement" and that "[l]ate in 2009 and into 2010 and 2011 the reinstatement was carried out".

256 Support for Mr Collins's contention that the remediation of the reserve and of the neighbouring property at 18 Watersedge Terrace continued for some years is to be found in the Council's Site Safety Plan prepared prior to the performance of "Permanent drainage Works & Remedial Works on #18 Watersedge" dated 25 October 2010 which was exhibited to Mr Collins's witness statement.[19]

The relevance of further water flow events in 2010

257 Council placed importance on two further water flow events which occurred in 2010. One was in March, and the other one was in October. On both occasions, water had flowed from the Council's storm water infrastructure on to the Owners' Property.

258 Mr Collins acknowledged these events in his affidavit sworn 23 November 2018. He conceded that the March 2010 flow caused damage to the property, but denied that the October event had affected the property.

[19] TDC 21.

259 Mr Collins disputed that either of these subsequent events constituted a separate cause of delay to the sale of the property. He specifically stated in his affidavit, at [8]:

> These flows and Council's work to repair the consequent damage did not delay us putting the Property on the market. As noted above, we waited until Council's remediation works consequent on the landslide were complete, before putting the Property up for sale. Those works were not complete until early 2012.

The relevance of the cut at 18 Watersedge Terrace

260 The Council also contended that works at this neighbouring property carried out by its developer affected the completion of the remediation following the landslip in 2008.

261 Mr Collins addressed this issue in his affidavit. At [3] he deposed that he had no first-hand knowledge of the cut at 18 Watersedge Terrace. At [4], he said:

> Nothing about 18 Watersedge Terrace delayed us putting the Property on the market. In terms of the timing of putting the Property on the market, we waited until the Council's remediation works, consequent on the landslide, were complete, before putting the Property up for sale.

No witnesses were called by the Council regarding the remediation works

262 In final submissions on behalf of the Owners, much was made of the fact that the Council did not call any employee such as Michael Stott to give evidence about the nature of the remediation works, or the time it took to complete them. I was invited to draw an adverse inference under *Jones v Dunkel*[20] to the effect that the evidence of such a witness would not have assisted the Council's case.

Jones v Dunkel

263 As during the course of final submissions I was invited by the Council to draw an adverse inference under *Jones v Dunkel* twice and by the Owners once, it is convenient to discuss the case briefly.

264 *Jones v Dunkel* concerned an appeal to the High Court of Australia by a widow whose husband had been killed when driving up a winding road through wooden hills south of Sydney. The widow brought proceedings against the owner and the driver of the other truck alleging that the driver had been negligent. There were no eyewitnesses to the collision, which took place in darkness. The defendant sought a direction from the trial judge that the case be dismissed before it went to the jury, but the judge allowed the case to go to the jury. The jury found in favour of the defendant. The issue on appeal was whether the trial judge had misdirected the jury regarding the

[20] (1999) 101 CLR 298.

weight which ought to be attached to the fact that the driver of the other truck, who had survived the accident and had given a statement to police, was not called as a witness. In separate judgements, Kitto J, Menzies J, and Windeyer J found that the trial judge had misdirected the jury. As they constituted a majority, the appeal was allowed.

265 The relevant passage in the judgement of Kitto J is:

> [A]ny inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence.

266 Windeyer J expressed the principle in these passages:

> 82 Then, I think, his Honour should, when the juryman asked his question, have given an answer in accord with the general principles as stated in *Wigmore* on Evidence 3rd ed. (1940) vol. 2, s. 285, p. 162 as follows: "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party.
>
> As *Wigmore* points out (*Evidence* 3rd ed. (1940) vol. 2, ss. 289, 290, pp. 171-180), exactly the same principles apply when a party, who is capable of testifying, fails to give evidence as in a case where any other available witness is not called. Unless a party's failure to give evidence be explained, it may lead rationally to an inference that his evidence would not help his case.

Should an adverse inference be drawn against the Council in respect of its failure to call employees or contractors involved in the remediation works?

267 I turn now to the question of whether an adverse inference under *Jones v Dunkel* should be drawn against the Council in respect of its failure to call employees or contractors involved in the remediation works.

268 The issue of whether the landslip had an effect on the Owners' ability to sell their Property was central to the case. It was an issue highlighted in the pleadings. One of the Council's defences to this aspect of the claim was that the landslide was not causative of any difficulty and/or delay experienced by the Owners in selling their Property.[21] Notwithstanding, the Council elected not to call Mr Stott or any other employee or contractor to

[21] Council's defence, paragraph 17 (j).

substantiate this defence. No explanation was offered as to why no such witness had been called. As a consequence, I am prepared to draw the requested adverse inference against the Council. I infer that had Mr Stott or any other employee or contractor of the Council been called to contest the Owners' proposition that the performance of the remediation works to their property, or on the neighbouring property, affected their ability to sell the land until 2012, the evidence would not have assisted the Council.

269 If I am wrong in drawing such an inference, the fact remains that Mr Collins's evidence on these issues is uncontested by other evidence. His witness statement and his affidavit provide evidence on the question of when the remediation works came to an end that is considered, detailed, internally consistent, and is also consistent with some of the documentary evidence available.

270 I accept Mr Collins's evidence on this aspect of the claim, and find that the effect of the remediation works on the Owners' Property and on the reserve and on the neighbouring property at 18 Watersedge Terrace had an effect on the Owners' ability to sell their property until 2012.

Timing of the sale

271 Mr Collins deposed, at [96] of his statement, that in May 2012 they engaged Fletcher's Real Estate to sell the Property. This evidence comes straight after his evidence at [95] that during 2012 the Owners repaired deterioration that had occurred to the property over the four years of Council works, and it therefore supports his contention that the Owners were not realistically in a position woman to put the property on the market until this point.

272 During the hearing, neither Mr Collins nor Mrs Collins were asked whether it would have been possible or reasonable for them to put the Property on the market at an earlier point.

273 As noted, the Council led no evidence that might have justified a finding that the Property could reasonably have been put on the market before May 2012.

274 For these reasons I find that the Owners were justified in not putting the property on the market before May 2012.

275 Because of the direct relationship between the landslip and the remediation works, and the clear linkage between the remediation works and the Owners inability to put the property on the market, I also find that the Council, by causing the landslip, created a situation where the Owners could not begin the process of selling the property until May 2012.

276 Now that I have dealt with this major causation issue, I turn to two significant sub-issues. The first of these is to identify from what date the Owners' claim ought to run. The second is to identify when it ought to finish.

Date from which the Owners' claim is to be allowed

277 Even though the landslip occurred in December 2008, the Owners claim no loss until July 2009, when they bought the Parkville property. They make this concession even though Mr Collins deposed in his witness statement, at [36]:

> In 2008, my wife and I made the decision to start to prepare and place the Property on the market for sale and so resolution of the stormwater overflows became a priority.

278 By contending that the claim runs from July 2009, the Owners implicitly accept that the evidence would not sustain a finding that they had intended to sell the supports the Owners' supports the Owners' Highton property before they had purchased the Parkville property.

279 If it had not been for the landslip, then the Owners in July 2009 would have had a choice concerning the Highton property. One option would have been to sell it, which is what they contend they would have done. The other option would have been to retain it, even though they had purchased the house in Parkville. This is what the Council contends they would have done.

Would the Owners have sold the property in July 2009 but for the landslip?

280 Mr Collins, at [36] of his witness statement, enumerates the reasons why they wanted to sell the Property. Although the paragraph is quite long, on close analysis, only these reasons emerge:

a their son was starting at Monash University in Melbourne, but they would have preferred to have him live with them (in Melbourne); and

b Mr Collins was commuting to Melbourne and back for work on most days.

281 Having made these points, Mr Collins then says that he and his wife were reluctant to put the property on the market until they had secured a home in Melbourne. They spent a considerable amount of time looking for a terrace house near the CBD. Mr Collins takes up this aspect of the case again at [47] of his statement when he deposed:

> It was not until early 2009 that we found a suitable house situated at [number deleted] Degraves Street, Parkville. We purchased the property and settlement took place on 6 August 2009.

282 Mr Collins explains the delay in selling the property as follows:

> 65 As indicated previously, had it not been for the landslide and the consequent damage to the Property, and on-going reinstatement works, we would have sold the Property at this time, and pay (sic) off high interest rate commercial debts.

> 66 However, because of the landslide, I made the decision that it would be unwise to sell the Property at this time. That decision was based on several considerations.

283 Mr Collins went on to explain the decision not to sell. Firstly, as at July 2009, the property was a construction zone. Secondly the landslip was well known in Geelong, and had been featured in the Geelong Advertiser. He was concerned the property would be stigmatised. Thirdly, he was concerned that potential purchasers, even if they had not heard about the landslip, would be concerned about the ongoing reinstatement works both on the property and on the neighbouring reserve. These works were evidenced by the existence of above ground pipes, and public landslide alarms fitted in the reserve.

284 On the basis of this evidence, the Owners contend that the Tribunal should find that the only reason they did not sell the property in July 2009 was because of the landslip.

The Council's position

285 The Council's contention is that it suited the Owners to retain their property in Highton for the balance of 2009 and throughout 2010, because it was not until the end of 2010 that their daughter finished high school in Geelong. Also, the Owners had lived for a long time in Highton, and Mrs Collins had her social network in the area.

286 Mr Collins appears to have anticipated this argument when he deposed, at [36(c)] of his statement:

> Our youngest child, Erin whilst still having two years to complete high school at Geelong College, had a widespread social network and would be happy to stay with friends in the boarding school in Geelong or alternatively live in Melbourne and commute to Geelong.

287 Mrs Collins did not address the reasons for moving to Melbourne in her witness statement, other than to say that they bought a property in Parkville in about August 2009, and to observe that for years her husband had been commuting from Geelong to Melbourne for work.

288 At the hearing, she was cross-examined. She agreed that she had worked until 2009. She said that in 2010, the family had completed the move to Melbourne.

289 Mrs Collins augmented her evidence in her affidavit sworn on 23 November 2018, in which she deposed:

> 3 My husband and I had been looking for a home in Melbourne, since before the landslide occurred. My husband had been commuting between Geelong and Melbourne for a long time and was sick of it. We had decided to move to Melbourne and it was just a matter of finding the right home. We found the right home in 2009-the house at Degraves Street, Parkville.

> 4 Had the landslide not occurred, we would have put 25 Watersedge Terrace up for sale when we bought the Melbourne (Parkville) property. For financial reasons, we would not have kept both properties. Although our daughter, Erin, had not yet completed VCE by July 2009, and I wished for her to remain at her Geelong school until the end of year 12, there were options we had canvassed to enable to enable Erin to complete her schooling in Geelong. One option was for Erin and I to rent a little flat in Geelong; another was for Erin to become a boarder at her school….

290 Mrs Collins was cross-examined about this further evidence in the last day of the hearing. When pressed, she agreed that she did not want to move her daughter as she was very happy.

291 She also agreed that she wanted to remain in Highton because that was where her friends were.

292 Having considered the evidence of Mr Collins and Mrs Collins carefully, I am not satisfied that the only reason they did not sell the Highton Property in July 2009 or during 2010 was the landslip. Their daughter was in year 12, and maintaining a stable environment for her was clearly important to them.

293 Even if they had been able to get her into the boarding house at Geelong College on short notice, there would have been considerable expense involved. This expense may have substantially reduced, perhaps even eliminated, any net financial benefit from selling the property as soon as possible.

294 The option of renting a small flat would also have been expensive, and may have rendered a quick sale of the property financially pointless. It also, no doubt, would have inconvenient because it would have involved Mrs Collins and her daughter moving out of their large and familiar house, and living in a smaller place.

295 It may have been theoretically possible for their daughter to have commuted to school in Geelong from Parkville, but I doubt that this was really a realistic option for a year 12 student with an ambition to go to university, because of the time and inconvenience involved.

296 For these reasons, I cannot be satisfied that had it not been for the landslip the Owners would have sold the Highton property in July 2009. On the contrary, I find, on the balance of probabilities, that they would have held the property at least until the end of 2010 when their daughter had finished year 12. Such a decision would have been far more convenient in any event, as they would not have had to pack up the house, and put it on the market in a rushed manner.

297 However, from the evidence, I can identify no reason why the Owners would not have sold the house early in 2011 if they could have done so. I

accordingly turn to the issue of when they might reasonably have put the property on the market in that year. I consider on the balance of probabilities that they would not have done so until after the Australia Day weekend. Allowing a four week campaign, I find that would have been reasonable for them to have put the property up for auction by the start of March 2011. Following the auction, it is likely there would have been a standard 60 day settlement period. On this basis, I find that the Owners, but for the landslip, would have had the use of the proceeds of the sale of the property by the start of May 2011.

To what date should the claim for interest run?

298 This issue arises because, although the Owners put the property on the market in May 2012, they did not effect the sale until June 2013. It is necessary to consider whether there was a point after May 2012, but earlier than June 2013, at which they should have accepted an offer.

299 Mr Collins addressed the sale process in detail in his statement. He deposed:

> 97 Despite extensive promotion of the Property in The Weekly Review Geelong, Summer Places Magazine, and The Age, I remained concerned that prospective purchasers would be deterred by the stigma of having been the subject of the landslide. My concerns were realised when at option on 30 October 2012, not a single bid was received.
>
> 98 Fletcher's then actively promoted the Property for sale with open inspections held every weekend for five months from the auction date until March 2013. No offers were received during that time.

300 From this evidence, it seems that no offers were received for the first 10 months of the property was on the market. Why this is so, is a matter of speculation.

301 During final submissions, the Council's counsel drew my attention to the exclusive sale authority signed in favour of Fletchers Real Estate. The estimated range of the sale was $900,000-$990,000 although the asking price was indicated as $1.1 million. It may be that would-be purchasers were deterred by the quoted price. However, there is no evidence about this, and neither Mr Collins nor Mrs Collins were cross-examined about the point.

302 Mr Collins continued with his evidence about the sale in these terms at [100-103]:

> 100 On 20 March 2013, we changed estate agents and engaged Ray White to sell the Property. Ray White estimated the selling price to be in the range $950,000-$1,045,000…. The Appointment included extensive advertising and listing to reach the premium buyers that were expected to be interested.

> 101 A single offer was received for the Property from a construction engineer and his wife - the first genuine offer of any kind - in June 2013, subject to payment of considerable incentives…
>
> 102 We had substantial business loans and could not continue to bear holding costs of the Parkville and related expenses. We had no choice but to accept. We executed a contract of sale, and the Property settled on 5 August 2013 for a price of $740,000.…
>
> 103 The amount of $740,000 received in 2013 is substantially less than we had expected….

303 Whether would-be buyers in the period after Ray White took over the mandate to sell the property in March 2013 were deterred by an unrealistic asking price is not known. That is a matter of speculation, and was not established at the hearing.

304 Both Mr Collins and Mrs Collins gave evidence, but neither were were asked about the matter.

305 In her final submissions, counsel for the Council observed that neither the sales agent from Fletchers nor the sales agent from Ray White had been called to give evidence. After noting that the agent from Ray White was not available to be asked questions about how purchasers had responded to the price being sought for the property, she invited the Tribunal to draw an adverse inference against the Owners on the basis of *Jones v Dunkel*[22] to the effect that the evidence of the two sales agents would not have assisted the Owners. I decline to draw such an inference in either case.

306 It follows from the analysis of *Jones v Dunkel* above[23] that for the principle to be enlivened there must be a failure to bring before the Tribunal some circumstance or document or witness which one party or the other party claims would elucidate the facts. Where there is a failure by a party to tender or call such evidence, that failure may justify an inference being drawn that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party.

307 In the present case, the Owners are entitled to take the view there was no gap in their case. Mr Collins had given detailed evidence about the manner in which the property was put on the market. Details were given about the successive agents engaged, and their respective exclusive sale authorities were tendered. The Fletcher's authority actually indicated the asking price. Neither Mr Collins nor Mrs Collins were asked about the price at which the property was put on the market. The Council did not cross-examine either of them about that matter. In these circumstances, I do not think drawing an adverse inference against the Owners on the basis of the principle in *Jones v Dunkel* would be justified.

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[22] (1959) 101 CLR 298.
[23] See paragraphs 260-262 above.

308 In the absence of any such adverse inference, the Tribunal is left with the Owners' uncontradicted evidence that no genuine offer was received until June 2013, and that this offer was accepted.

309 On the basis of this evidence, I find that the Owners were deprived of the use of the proceeds of the sale of their property in Watersedge Terrace from early May 2011 until 5 August 2013.

What was the sum of which the Owners were deprived the use?

310 The answer to this question turns on the value of the property in May 2011. There was no direct evidence on this point. I have found above that the value of the house as at July 2009 was $790,000. I consider, on the basis of Mr Ganatra's evidence at the hearing, that the market rose after 2009 until it experienced a decline in the 12 months leading up to December 2013.

311 Mr Ganatra's evidence on this point is supported by the following passage which appears in Mr McEntee's report, under the heading "Market Considerations":

> The REIV data for Highton indicates that the median sale price for a dwelling in the 4th quarter was $346,000 and by the 4th quarter 2013 had increased to $490,000.[24]

312 This evidence suggests that the property, which I have found above would have been, but for the landslip, worth $790,000 in July 2009[25], would have been worth significantly more by May 2011. However, in the absence of direct evidence on the matter from either Mr Ganatra or Mr McEntee, it is difficult to identify what the adjusted price would have been.

313 I have found above that the value of the Owners' property as at 1 August 2013, but for the landslip, would have been $810,000[26]. On the basis that I understood Mr Ganatra to have said that property prices in Highton continued to increase until the start of 2013, when they began to slide, I think the appropriate course to adopt is to assume that by May 2011 the value of the Owners' property would have had risen to $810,000.

314 On this basis, I find that the sum the Owners were denied the use of from early May 2011 until 5 August 2013 was $810,000.

What is the quantum of the Owners' loss?

315 As noted, the Owners' case is that they would have applied the proceeds of the sale of the property, when they had become available, to eliminate debt. They say, being rational people, they would have eliminated the loan with the highest interest rate first, and then applied the balance to reduce the loan they took out to facilitate the purchase of the Parkville property in July 2009.

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[24] Mr McEntee's report, at page 15.
[25] See paragraph 186 above.
[26] See paragraph 212 above.

316 On the basis that Mrs Collins, under cross-examination, conceded that she found dealing with finances "stressful" and that she left the matters to her husband and to their accountant, I put her evidence on these matters to one side. It was clear that she, personally, had a limited understanding of the relevant facts.

317 The Owners' counsel opened the case on the basis that had the proceeds of the sale of their property been available to them in 2009, they would have paid off an investment property loan first, because it had a higher interest rate than that attaching to the Parkville loan. In support of this contention, emphasis was placed on the evidence of Mr Collins, who deposed as follows:

> 49 When the settlement took place in August 2009, the Highton Property was still a disaster zone and sale of the property was impossible. Consequently, my wife and I had no choice but to secure a loan for the National Australia Bank (NAB) for $750,000.
>
> 50 At this time, we also had debt against investment properties at [address deleted] and [address deleted]. If we had been able to sell the 25 Watersedge Terrace property earlier we would have used the funds to pay of any debt on 25 Watersedge Terrace, followed by the debt with the highest interest rate.

318 I have no difficulty in accepting Mr Collins's evidence that once the proceeds of the sale of 25 Watersedge Terrace became available, any debt against that property would have been retired first. The reality is that the Owners would have had no choice about this, because they could not have settled the sale without clearing any debt secured by the property in order to facilitate the discharge of any mortgage over the property.

319 It became clear during the course of Mr Collins evidence, that in fact two loans from NAB were secured against the Property.

320 It follows from the finding I have made above that the Owners would not have received the proceeds of the sale of the Property until May 2011, that the time at which the extent of the indebtedness secured by the property must be identified is May 2011.

What debt was secured by the Highton property in May 2011?

321 The accounts for the two loans against the Property issued by NAB were identified by numbers ending respectively in the digits 6506 ("loan #6506") and 2229 ("loan #2229").

322 Reference to the statements for loan #6506 indicates that as at 9 May 2011, the account was in credit to the extent of $715.87.

323 Reference to the statements for loan #2229 indicates that as at 29 April 2011 the account was substantially in debit, but as a result of a major

deposit made on 2 May 2011, the account moved into credit by a significant margin, even allowing for some minor withdrawals on that day.

324 The upshot is that as at 2 May 2011 neither account was in debit. Accordingly, it would not have been necessary for the Owners to apply the proceeds from the sale of their property in reduction of any indebtedness secured by the property.

325 The upshot is that the whole the proceeds would have been available to pay off other debt.

What other debts would have been paid off first?

326 I now turn to Mr Collins evidence that after paying off debt secured by 25 Watersedge Terrace he would have used the proceeds of the sale to pay off debt with the highest interest rate, and that accordingly he would have paid off an investment loan.

327 Mr Collins was asked what he did with the proceeds of the sale of the property when they were ultimately received in August 2013. He deposed that at this point, he consulted his accountant, who advised him that he should pay off non-tax-deductible debt first. It was for this reason that he gave an instruction to NAB which resulted in the application of the net proceeds of the sale of the property of $722,431.40 pay debts as follows:

a pay out loan # 6506, secured against the property;

b pay out loan #2229, secured against the property; and

c apply the balance of $322,431.40 to reduce the loan taken out to purchase the Parkville property ("loan #0669").

328 When it was put to Mr Collins during the hearing that the act of paying off the Parkville loan was inconsistent with his evidence that he would have paid off the investment loan first, he sought to explain this action by explaining that the economy in 2013 was in a different cycle to 2009, and warranted a different strategy. I do not accept this evidence, as I note that during his oral evidence Mr Collins changed his position regarding what he would have done in 2009 had the proceeds of the sale of the Property become available. His evidence at the hearing was that he would have asked his accountant what to do.

329 If Mr Collins's accountant had been called, he could have been asked what debts he would have recommended should be paid off first, had the proceeds of the sale of the Property become available in July 2009. However, the accountant was not called.

330 The Council contended that the accountant's evidence would have been relevant, and that the fact that he had not been called justified the drawing of an adverse inference under *Jones v Dunkel* to the effect that the evidence of the account would not have been helpful to the Owners' case.

331 I am prepared to draw such an inference, as there was a clear inconsistency between what Mr Collins said he would have done with the proceeds in July 2009 and what he did with the proceeds in 2013. I would have been surprised if the accountant expressed the view that although the appropriate strategy in August 2013 was to pay off non-tax-deductible debt, a different strategy would have been recommended in July 2009.

Finding

332 In the circumstances, I find that what the Owners would have done with the proceeds of the sale of their property, had they received them in at the start of May 2011, is pay off the loan on the Parkville property.

Loan #0669

333 The statements for loan #0669 were exhibited by Mr Collins. Reference to those statements indicates that the loan taken out to facilitate the purchase of the Parkville property was for $750,000. The account was opened on 5 August 2009, and the full amount of the loan was drawn down to pay the balance of the purchase price, stamp duty and registration and other fees. The full amount of $750,000 remained outstanding for the balance of 2009, throughout 2010, and was still outstanding during the month 29 April -31 May 2011.

334 I find that had the proceeds from the sale of the Property of $810,000 become available in early May 2011, $750,000 would have been applied in paying out loan #0669 in its entirety. This would have relieved the Owners of the burden of interest on the entire sum of $750,000 from early May 2011 (which I round back to 30 April 2011 to align with the commencement of the statement cycle) until on 5 August 2013 when the loan could have been paid off in full.

Loss too remote

335 I have not attempted to quantify this loss, as I consider this task is unnecessary. The reason for this is that I accept the Council's contention that interest incurred on the Parkville loan is too remote to be recovered as a result of the landslip.

336 As the High Court explained in *Wallace v Kam,* once the factual causation test (established by the New South Wales equivalent of s51(1)(a) of the *Wrongs Act*) is satisfied, "[s]atisfaction of legal causation requires an affirmative answer to the further, normative question posed by [s51(1)(a) of the *Wrongs Act*]"

337 A causation issue arises because the landslip occurred in December 2008, and yet the Owners did not require the Parkville property until July 2009.

338 The Owners argued in their opening, and reiterated in their closing submissions, that the Council must take them as it found them. The Owners contend that the Tribunal should, on the basis of their evidence, find that at

the time of the landslip they were contemplating the purchase of a house in Melbourne, and on that basis should be prepared to award damages to the Owners associated with the purchase of a property in Melbourne in July 2009.

339 I reject that contention, as I regard the purchase by the Owners of the property in Parkville in July 2009 as a novus actus interveniens, that is to say, a new act intervening to break the chain of causation between the landslip and the loss suffered by the Owners. The loan establishment costs and the interest costs associated with loan #0669 had not been incurred at the time of the landslip. The costs and interest only became payable when the Owners decided to purchase the property in Parkville, and take out that loan. I find accordingly that the costs and interest payable in respect of the Parkville loan are not recoverable.

Synergetics Trust loans

340 In the light of this finding, it is necessary to examine the Owners' claim for interest on other loans they held.

341 Evidence was given by Mr Collins that a loan of $437,500 had been taken out with the NAB to fund the purchase of an investment property. The loan number ended in digits 2548 ("**loan #2548**").

342 I do not think costs or interest associated with this loan are recoverable by the Owners for two reasons. Firstly, the loan was taken out in January 2009, that is to say after the landslip. As with the Parkville property loan, the Owners' act in voluntarily entering in to this loan after the landslip breaks the chain of causation between the landslip and the claim.

343 Secondly, the loan was taken out in the name of "The Synergetics Trust" Mr Collins gave evidence that this was a family trust, of which Mrs Collins was the trustee, and that he and Mrs Collins, and possibly their children, were beneficiaries. He did not go into detail.

344 At the hearing, Mr Collins was challenged to explain why bank charges and interest associated with a loan taken out by a trust could be claimed by him and Mrs Collins. His answer was that Mrs Collins was the trustee of the trust, and that he and Mrs Collins were beneficiaries of the trust.

345 I am not satisfied with these answers. The trust deed was not put into evidence. It may, or may not, have been helpful to the Owners' case. Nor was the Owners' accountant called to give evidence. Presumably he could have given evidence as to the nature and workings of the trust.

346 Under ordinary principles of equity, Mrs Collins as trustee would not be the beneficial owner of the assets of the trust. Without seeing the trust deed, it is not possible to know where the beneficial ownership of the assets of the trust lies. It is possible Mr and Mrs Collins are the beneficiaries only of an income stream from the trust. For these reasons I think the claim for damages connected with any property owned by the trust must fail.

347 Statements relating to another loan held by The Synergetics Trust ("**loan #9501**") was put in the evidence, but no claim was made in relation to this loan. Given that the account was opened in May 2013, any costs and interest associated with this loan are too remote, for the reasons explained. Furthermore, as the loan is held by the trust, for the reasons given in relation to loan #2548, I would not have been prepared to allow any claim made in respect of it, in any event.

A permissible claim for interest

348 The upshot is that I consider that the damages that the Owners are entitled to recover in relation to the loss of use of the proceeds of sale of their property as from the start of May 2011 is limited to a claim for the interest which might reasonably foreseeably have been earned on the proceeds. As was conceded by the Council at the hearing, such a claim was recognised by the High Court in *Hungerfords v Walker*.[27] It is instructive to have reference to the following passages, taken from the judgement of Mason CJ and Wilson J:

> 25 Indeed, such a policy would be at odds with the fundamental principle that a plaintiff is entitled to restitutio in integrum. According to that principle, the plaintiff is entitled to full compensation for the loss which he sustains in consequence of the defendant's wrong, subject to the rules as to remoteness of damage and to the plaintiff's duty to mitigate his loss. In principle he should be awarded the compensation which would restore him to the position he would have been in but for the defendant's breach of contract or negligence. Judged from a commercial viewpoint, the plaintiff sustains an economic loss if his damages are not paid promptly, just as he sustains such a loss when his debt is not paid on the due date. The loss may arise in the form of the investment cost of being deprived of money which could have been invested at interest or used to reduce an existing indebtedness. Or the loss may arise in the form of the borrowing cost, i.e., interest payable on borrowed money or interest foregone because an existing investment is realized or reduced.
>
> 26 The requirement of foreseeability is no obstacle to the award of damages, calculated by reference to the appropriate interest rates, for loss of the use of money. Opportunity cost, more so than incurred expense, is a plainly foreseeable loss because, according to common understanding, it represents the market price of obtaining money. But, even in the case of incurred expense, it is at least strongly arguable that a plaintiff's loss or damage represented by this expense is not too remote on the score of foreseeability. In truth, it is an expense which

[27] [9089] HCA 8; (1989) 171 CLR 125.

> represents loss or damage flowing naturally and directly from the defendant's wrongful act or omission, particularly when that act or omission results in the withholding of money from a plaintiff or causes the plaintiff to pay away money.

349 The Owners have been deprived of the use of $810,000 from May 2011 to August 2013. That deprivation has caused them forseeable loss. No loan that they had entered into prior to the landslip in December 2008 remained outstanding as at May 2011. Nonetheless they still suffered loss by reason of the deprivation of their money, because it was not available to them to put to good use.

350 The Owners' loss, as observed by the High Court in *Hungerfords v Walker*, is to be calculated by reference to "appropriate interest rates". Regrettably, the Owners provided no direct evidence as to what interest rate they might have earned had they put the proceeds of the sale of the property in a bank or elsewhere for the purposes of earning interest. They no doubt overlooked tendering such evidence as they put their case on a different basis, namely that they were entitled to be indemnified for interest incurred on loans they had taken out.

351 I consider that the lack of direct evidence is not fatal to the Owners' claim for loss of interest, if for no other reason that the Tribunal is not a Court, and although it is bound by the rules of natural justice, it is not bound by the rules of evidence.[28] Furthermore, the Tribunal must act fairly and according to the substantial merits of the case.[29]

352 Had the Owners had the use of the proceeds of the sale of the Property from May 2011 until August 2013, they could have put the money in a bank, lent it, or bought fully franked high dividend earning shares. Each of these possibilities would have been reasonably foreseeable to the Council.

353 Evidence of what the NAB was charging the Owners on the Flexiplus facility they had secured on the Watersedge Terrace property is available in the form of the statements tendered in connection with loan #2229. As at the start of May 2011, the current debit interest rate was 7.67%. On the loan taken out to secure the purchase of the Parkville property, the interest rate being charged to the Owners in May 2011 was 6.97%. These figures do not mean that the bank would have paid the Owners on any monies put on deposit. The interest rate offered would have been significantly less.

354 It is likely that a better return than interest offered by bank on a term deposit could be achieved by investing in high dividend earning shares

355 In the absence of direct evidence from the Owners as to what they would have done with the proceeds, and what they would have earned, I adopt in fairness to the Council what I regard to be a conservative figure, and find

[28] *Victorian Civil and Administrative Tribunal Act 1998* ("the VCAT Act") s 98 (1).
[29] VCAT Act s 97.

that the Owners could have earned 4% per annum on the proceeds of the sale of their property had they be able to sell it by May 2011.

356 4% per annum on $810,000 is $32,400. Over the period of 2.25 years between May 2011 and August 2013, I calculate their loss to be $72,900, which I round up to $73,000. I find that the Owners are entitled to an award of $73,000 in respect of loss of use of money

Summary

357 I have found above that the claim for diminution of value of the Property is sustained, and that the Owners are entitled to an award in respect of that claim of $70,000.[30]

358 As noted, the Owners greatly reduced claim for marketing expenses was conceded, at $4,236.[31]

359 When the finding relating to loss of use of money is taken into account, the total amount of damages to which the Owners are entitled is $147,236.

360 I will reserve the question of interest.

361 I will also reserve costs, and the issue of reimbursement of fees under s115B of the *Victorian Civil and Administrative Tribunal Act 1998*.

C. Edquist
Member

[30] See paragraph 215 above.
[31] See paragraph 11 above.