VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP219/2015

CATCHWORDS

WATER ACT 1989 – Claims made against water authority and various contractors undertaking remedial work on its assets – whether action under tort of trespass or conspiracy to injure fall within the purview of a damages claim made under ss 16 or 157 of the *Water Act 1989* – Section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* – whether claims made in the proceeding are open and arguable.

FIRST APPLICANT	Matthew Norman Davies
SECOND APPLICANT	Lilis Lastiani
FIRST RESPONDENT	Yarra Valley Water (ACN 066 902 501)
SECOND RESPONDENT	Abidance Civil & General Contractors Pty Ltd (ACN 120 434 844)
THIRD RESPONDENT	Lend Lease Services Pty Ltd (ACN 081 540 847)
FOURTH RESPONDENT	Do All Drainage Pty Ltd (ACN 110 180 875)
FIRST INTERESTED PARTY	Corpella Pty Ltd (ACN 007 122 429)
SECOND INTERESTED PARTY	Manningham City Council
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	2 and 3 March 2016
DATE OF ORDER	28 April 2016
LAST DATE THAT WRITTEN SUBMISSIONS RECEIVED	21 March 2016
CITATION	Davies v Yarra Valley Water (Building and Property) [2016] VCAT 655

ORDERS

1 Pursuant to s 75 of the *Victorian Civil and Administrative Tribunal Act 1998*, the Applicants' claim against the First Respondent is struck out.

2 Pursuant to s 75 of the *Victorian Civil and Administrative Tribunal Act 1998*, the Applicants' claims against the Second, Third and Fourth Respondents is dismissed.

3 Liberty to apply in respect of any consequential orders sought arising out of Order 1 of these orders, provided such liberty is exercised no later than **13 May 2016**.

4 In the event that no party exercises the liberty afforded to them under Order 2 of these orders, then an order will be made dismissing the proceeding in whole and with no order as to costs.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants	In person
For the First Respondent	Mr Scott Stuckey, of counsel
For the Second Respondent	Mr J Tesarsch, of counsel
For the Third Respondent	Mr N Jones, of counsel
For the Fourth Respondent	Mr S Thomas, of counsel
For the First Interested Party	Mr M Alter, solicitor (as observer)
For the Second Interested Party	No appearance.

REASONS

1. The Applicants are the tenants and occupiers of a residential dwelling located in Monterey Crescent, Donvale (**'the Property'**). On 24 February 2015, the Applicants filed an application in the Tribunal claiming damages, predominantly under the *Water Act 1989*, against all of the Respondents in the amount of $5,886,087.63.

2. The claim made against all Respondents was set out in a document entitled *Points of Claim* dated 16 February 2015 and comprised 18 pages. Under the heading *LOSS AND DAMAGE SUFFERED BY THE APPLICANTS*, the Applicants described their loss as follows:

> The Applicants, and their children, suffered economic loss, and damages (including personal injury damages) as direct and inevitable results of:
>
> - long-term failure to provide sewerage and water services;
> - unauthorised works;
> - long-term continuous underground sewer disconnection and sewerage spill;
> - long-term underground water disconnection and water spill;
> - repeat and long-term refusals to perform emergency works, and;
> - associated misleading, deceptive and unconscionable conduct;
> - complicating relationships with the property manager and owner, and compelling extreme exertions by way of trying to fix the problems
>
> variously sourced to the Respondents, or additionally by a party/parties as yet unidentified.

3. The proceeding was listed for a directions hearing on 24 April 2015, at which time a number of the Respondents complained that the *Points of Claim* did not properly articulate a claim as against them, sufficient for them to fully understand the nature of the claim. Consequently, orders were made that the Applicants file and serve *Amended Points of Claim* by 19 June 2015 and that the Respondents file and serve *Points of Defence* by 17 July 2015. Another directions hearing was listed for 11 August 2015, at which time it was contemplated that further orders would be made for the future conduct of the proceeding.

4. On or about 2 June 2015, the Applicants filed *Amended Points of Claim* dated 19 June 2016, which comprised 51 pages. The total amount claimed against the Respondents increased to $5,946,337.63. That amount was broken up under various *Heads of Claim* and amounts were then allocated as against each of the Respondents.

5. All Respondents filed and served *Points of Defence* to the *Amended Points of Claim*. A common theme expressed in each of the Respondents' respective *Points of Defence* was that the allegations set out in the Applicants' *Amended Points of Claim* were *embarrassing and otherwise not capable of further* [being] *pleaded to*.

6. On 11 August 2015, a further directions hearing was convened, at which time Manningham City Council, being the responsible authority, was joined as an interested party to the proceeding on the ground that the subject matter of the proceeding was likely to concern assets owned or maintained by that entity. Although many of the Respondents reiterated their earlier complaints concerning the nature of the claims made against them as set out in the *Amended Points of Claim*, no further orders were made at that time addressing those concerns. However, orders were made that the proceeding be listed for a Compulsory Conference to be conducted on 22 October 2015.

7. The Compulsory Conference conducted on 22 October 2015 did not settle the proceeding and further orders were made on that day by the presiding member requiring the Applicants to file and serve *Further Amended Points of Claim* by 19 November 2015. In addition, the Tribunal ordered:

> …
>
> 2. By 3 December 2015 the Respondents and Interested Parties must each file and serve any application for a strikeout dismissal or security for costs, together with any supporting documents.
>
> 3. By 18 January 2016, the Applicants must file and serve any material in reply.
>
> 4. This proceeding is listed for a directions hearing before Senior Member Riegler on 28 January 2016 at 10 AM at 55 King Street Melbourne at which time any application for orders will be heard and directions made for its future conduct. Allow 2 days.

8. Each of the Respondents filed an application that the claim made against them be dismissed or struck out. However, the hearing of those applications, originally listed for 28 January 2016, was unable to proceed on that day as a result of an inadvertent failure on the part of the First Respondent to serve the Applicants with its supporting material. Accordingly, the hearing of each of the Respondents' respective summary dismissal applications was adjourned to 2 March 2016.

9. On 2 March 2016, the summary dismissal applications were heard. The hearing occupied two hearing days, with the bulk of the evidence being adduced by way of affidavits filed by all parties. The Interested

Parties did not participate in that summary dismissal application hearing as no claim is made against them in this proceeding.

10. Each Respondent separately challenged the claims made against it on the ground that the claims had no basis in fact or law or were otherwise so lacking in substance so as to justify an order being made under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**), summarily dismissing or striking out the claims. Each Respondent filed supporting affidavit material and written submissions. In response, the Applicants filed a number of affidavits, together with reply written submissions dated 18 January 2016 and 21 March 2016.

SECTION 75 OF THE ACT

11. Section 75 of the Act empowers the Tribunal to strike out a claim found in a pleading: *Yim v State of Victoria*.[1] The test to be applied in determining an application under s 75 of the Act is one that should be exercised with great care and should never be exercised unless it is clear that there is no question to be tried: *Fancourt v Mercantile Credits Ltd*.[2]

12. In *Worldwide Enterprises Pty Ltd v Westpac Banking Corporation*,[3] Judge Misso, Vice President, summarised the relevant principles relevant to an application made pursuant to s 75 of the Act:

> The authorities disclose the following principles which are relevant to this application:
>
> - The onus is on the respondent to establish that the discretion should be exercised in its favour to either summarily dismiss or strike out all or any part of the proceeding.
> - In the discharging of that onus the respondent must establish that there is no real question to be tried or where the tribunal is satisfied that the proceeding is undoubtedly hopeless, obviously unsustainable in fact or in law or bound to fail.[4]
> - The standard which the respondent must achieve in the discharge of the onus has been variously described as requiring the exercise of great care, it being "clear" that there was no question to be tried;[5] that "great caution" should be exercised by the tribunal in determining whether there is no real question to be tried;[6] that such an application is "a serious matter" and the onus is "a heavy one";[7]

[1] [2000] VCAT 821.
[2] (1983) 154 CLR 87 at [99].
[3] [2010] VCAT 1125.
[4] *Fancourt v Mercantile Credits Pty Ltd* (1983) 154 CLR 87 at 99; *Lay v Alliswell Pty Ltd* (2001) VSC 385 at paragraph 14; *State Electricity Commission of Victoria v Rabel* [1998] 1 VR 102, and *Forrester v AIMS Corporation* [2004] VSC 506.
[5] *Fancourt (supra).*
[6] *Taitapanui v HIA Insurances Services Pty Ltd* [2002] VCAT at paragraph 8.
[7] *Burke v Victoria* [2002] VCAT 1397 at paragraph 3.

that the tribunal should be satisfied that it is "very clear indeed" that the claim is hopeless, unsustainable and bound to fail,[8] and that the onus is a "high one".[9]

- The tribunal is obliged to proceed on the assumption that the applicants will be able to prove each fact alleged in their claim.[10]
- The application is interlocutory in nature. The tribunal, therefore, should not proceed to entertain an application pursuant to section 75 unless the applicants indicate that the whole of their case is contained in the material which they have put before the tribunal.[11]
- If the application is based upon the applicants defective formulation of the claim, then the tribunal must consider that the tribunal is not a court of pleading. A failure to particularise a claim does not of itself give foundation to a finding that the proceeding is frivolous, vexatious, misconceived or lacking in substance or is otherwise an abuse of process.[12]

13. Further to the last bullet point in the summary given by his Honour, I add the following. Section 75 of the Act does not allow the Tribunal to strike out a pleading that merely displays poor drafting: *West Homes (Australia) Pty Ltd v Crebar Pty Ltd & Ors*.[13] Therefore, s 75 is not to be used as a mechanism to have a 'pleadings' summons only: *Barbon v West Homes Australia Pty Ltd*.[14] It must only be exercised when there are no merits to the claim, rather than when the pleadings have not been sufficiently detailed. In *West Homes* the Tribunal stated:

> It is basic that the Tribunal should require that this duty be observed. Otherwise, natural justice will be denied. Often, though, it is quite possible for a party to make its case known sufficiently without having to resort to fine legalese. Indeed, fine legalese can often be obscure. Moreover, the Tribunal is not bound to proceed with all technicality and undue formality. A so-called *"pleading"* summons invites excessive semantical debate. Ideally, Points of Claim, or of Defence, should normally be able to be understood by the average person.

14. In the present case, the Applicants are not legally represented. Therefore, it is not expected that the document setting out their points of claim will be prepared with the same level of legal finesse as if the document had been drawn by a lawyer. Nevertheless, even with that caveat, the document must be capable of being reasonably understood and demonstrate that the claims made are also justiciable in the Tribunal.

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[8] *Arrow International Australia Pty Ltd v Indevelco Pty Ltd* [2005] VCAT 306.
[9] *Zaparenko v Perpetual Trustees Victoria Ltd* [2006] VCAT 2147 at paragraph 11.
[10] *Klona v Cummins Engine Co Pty Ltd* [2002] VCAT 733.
[11] *State Electricity Commission of Victoria v Rabel* [1998] 1 VR 102,
[12] *Barbon v West Homes Australia Pty Ltd* [2001] VSC 405 at paragraph 16-17.
[13] [2001] VCAT 406 at paragraph 11.
[14] [2001] VSC 405.

15. With that in mind, I now turn to consider the claims made against each of the Respondents. In so doing, I have considered the *Further Amended Points of Claim* (**'the pleading'**) by reference to the groups of paragraphs set out under various headings, which describe a particular head of damage claimed by the Applicants. Where I have re-cited extracts of the pleading, I have done so verbatim, and have not sought to correct or highlight grammatical or spelling mistakes.

THE PARTIES

16. As I have indicated, the Applicants are the tenants of a residential dwelling located in Monterey Crescent, Donvale. They rent those premises from the First Interested Party. No claim is made against the First Interested Party, nor is any claim made by the First Interested Party against any of the Respondents.

17. The First Respondent (**'Yarra Valley Water'**) is a water authority. Its functions are set out in the affidavit of Anthony Campbell, a case management officer employed by it:

> …
>
> 2. The First Respondent is one of Melbourne's three water corporations. It provides water supply and sanitation services to more than 1.7 m people and over 50,000 businesses in the northern and eastern suburbs of Melbourne. Amongst other responsibilities it is responsible for the delivery of storage from private properties to the treatment plants maintained by Melbourne Water.
>
> 3. In discharge of those responsibilities the First Respondent has responsibility for much, but not all, of the sewerage infrastructure which carries waste from the home such as Monterey Crescent, Donvale to treatment facilities. Responsibility for the parts of the system is as follows:
>
> (a) the wastes in the house, consisting of toilets, sinks, showers and gully traps are the responsibility of the owner or occupier of the premises;
>
> (b) the pipe system which carries water from the wastes towards the main sewer system known as the house connection drains are the responsibility of the owner or occupier as are any inspection shafts giving access to that part of the drain system;
>
> (c) the owner/occupier's responsibility ends at a point known as a connection point. At that connection point the house connection drain ceases and the house connection branch commences. The house connection branch is the responsibility of the First Respondent although it, like the house connection

drain, will lie, at least in part, on the property being serviced;

(d) the house connection branch discharges into the sewer main or reticulation main which is located normally in an easement running through serviced properties and which is the responsibility of the First Respondent.

…

5. Consistently with the above description of legal responsibility, if a blockage occurs to the sewer system in the house connection branch, it is the responsibility of the First Respondent and the First Respondent will make arrangements to have the blockage cleared. If the blockage occurs on the house connection drain or in some other part of the house sewerage system, it is the responsibility of the owner/occupier and not the First Respondent. Notwithstanding that, if such a blockage can be conveniently cleared by workers who have attended at the site in response to a callout they will often clear the blockage without seeking to pass the charges onto the owner or occupier. Where that is not convenient or practical, the owner or occupier is advised of the presence of the blockage and advised to make arrangements for a plumber to attend at their cost to clear their infrastructure.

18. The Second Respondent (**'Abidance'**) is a subcontractor to the Third Respondent who specialises in drainage and plumbing works for water and sewerage authorities.[15]

19. The Third Respondent (**'Lend Lease'**) is Yarra Valley Water's principal maintenance contractor, responsible for engaging various subcontractors to attend to emergency callouts and associated work.[16]

20. The Fourth Respondent (**'Do All Drainage'**) is also a subcontractor to Lend Lease, specialising in drainage and plumbing works.[17]

THE PLEADING

THE CLAIM AGAINST YARRA VALLEY WATER

21. Mr Stuckey, of counsel, appeared on behalf of Yarra Valley Water. He submitted that the current version of the Applicants' points of claim still does not articulate whether the damages claimed arise as a result of an unreasonable flow of water, giving rise to an action under the *Water Act 1989*, or because of some conspiracy, fraud or an action in trespass. Mr Stuckey argued that the claim made against Yarra Valley Water has

[15] Paragraph 4 of the Applicants' *Further Amended Points of Claim*.
[16] Paragraph 5 of the Applicants' *Further Amended Points of Claim*.
[17] Paragraph 6 of the Applicants' *Further Amended Points of Claim*.

no basis in fact or law, at least insofar as any claim is justiciable in the Tribunal, and that no amendment to the current version of the pleading would cure that defect.

22. Mr Stuckey's oral submissions supplemented his written submissions. He made specific mention to various parts of the pleading, which he identified as raising allegations against Yarra Valley Water, and argued that none of those parts raised an arguable claim against Yarra Valley Water. The Applicants have responded to the submissions made by Mr Stuckey by filing written submissions dated 21 March 2016. What follows are my findings having regard to those submissions and all other material relied upon by the parties.

Paragraphs 1-30

23. Mr Stuckey submitted that the first 22 paragraphs of the pleading set out background information and do not raise any direct allegation against Yarra Valley Water. Although it is correct that the first 22 paragraphs do not make any direct allegation against Yarra Valley Water, the pleading does allege that the Applicants suffered a sewage spillage in early 2009:

> …
>
> 17. In late December 2008 the kitchen sink drained very slowly. Soon sewage and sullage spilt as toilet and laundry flows at the house's north-east gully trap.
>
> …
>
> 22. There were flows of water from their water reticulation network onto the Property's water pipes alternatively land at all material times, and the flows were run through with impurities into the sewer infrastructure to varying degrees of flow, interference, discharge and seepage as described herein.

24. However, no allegations are raised against Yarra Valley Water to the effect that the Applicants suffered any loss or damage by reason of that 2008-2009 spillage. The loss and damage claimed to have been suffered by the Applicants is said to have occurred as a result of events subsequent to that spillage.

25. In particular, in paragraph 23 of the pleading, the Applicants allege that Yarra Valley Water was obliged to inform them and the owner of the Property of any impending works. Although the pleading concedes that notice was given to the Applicants of impending rectification work, the complaint seems to be directed at Yarra Valley Water's failure to notify the First Interested Party, being the owner of the Property of that impending work:

> 30. As a formative stage of causation the letters' assertions as if to Corpella and the Applicants' reliance thereupon, further

> YWV's non-disclosure to Corpella was indifferent or incommunicado on the matter of 2009 Works, compelling the Applicants later investigation and associated loss when the works caused sewer failure.

26. As I understand the pleading, it is alleged that Yarra Valley Water intended to deceive the Applicants by not informing them of planned remedial work. The allegation is difficult to accept on a factual basis, having regard to correspondence tendered in evidence, which includes a letter dated 24 February 2009 from Yarra Valley Water to the Applicants, which states, in part:

> I refer to previous correspondence of 7 January 2009 wherein I advised that Yarra Valley Water was investigating the cause of a sewerage spill that occurred at the above property. Our investigation has now been completed and we would like to take this opportunity to advise you of our findings…

27. Nevertheless, even if it could be proven that Yarra Valley Water, for whatever reason, deceived the Applicants in relation to its planned remedial work, there is no causal connection between the alleged deceit and any loss suffered by the Applicants as a result. In my view, the allegation, insofar as it is framed as a cause of action grounded under the tort of deceit, has no tenable basis in fact or law.

Paragraphs 31-50: ***Conduct in the Nature of Fraud: Pre-Works Investigation & Decision 2009***

28. As I understand the allegations set out under paragraphs 31 to 50 of the pleading, the Applicants allege that certain promises were made by Yarra Valley Water, in terms of upgrading their own infrastructure, which never came to fruition.

> 36. YVW's 24 Feb 2009 letter falsely claimed to have completed its investigation.
>
> 37. YVW knew alternatively would reasonably have known its assertion was false.
>
> 38. YVW never retracted or qualified with positive assertions to have carried out such investigation and CCTV inspection.
>
> 39. YVW despite unfinished CCTV YVW told the Applicants investigation was complete.
>
> …
>
> 43. YVW made its assertions intending that the Applicants rely on them as valid.
>
> …
>
> 48. Given YVW's own promises, the decision to effect 2009 HCB Works on the Property imposed upon the Applicants (and Corpella) a degraded level of sewerage disposal

> service which lacked reasonable standards of management and operation expected of a Licensee.

29. The Works which the Applicants referred to related to the upgrading of the Yarra Valley Water sewerage infrastructure. There is no allegation that the work involved repairing or replacing any of the sewerage infrastructure belonging to the Property.

30. It is difficult to understand how the Applicants' meaning placed on the correspondence dated 24 February 2009 gives rise to any cause of action. In particular, the letter merely states what remedial work has been done or is intended to be done:

> Yarra Valley Water has undertaken closed circuit television (CCTV) inspections of the pipes that service your property. The results from this inspection showed significant tree root infiltration in the House Connection Branch (HCB).
>
> We have arranged to rehabilitate this section of pipes which form the HCB at our cost. A maintenance contractor shall contact the occupant of the property directly to make the necessary arrangements. We will endeavour to have this work completed within the next 30 days.
>
> Yarra Valley Water has also undertaken Closed-Circuit Television (CCTV) inspections of the Reticulation pipes that service your property and that of your neighbours. The results from this inspection showed some debris and significant tree root infiltration causing structural damage to the pipe.
>
> We have arranged for this pipe to be cleaned and rehabilitated at our cost within the next 6-8 weeks. This may involve a lining being inserted into the pipe via a manhole. There should be no disruption to sewage disposal services during these works.
>
> We believe that these factors will minimise the risk of future spills from occurring at your property.[18]

31. The *House Connection Branch* is part of the sewerage infrastructure owned or maintained by Yarra Valley Water. The above correspondence indicates that Yarra Valley Water intended to undertake remedial work of its own pipework. It is common ground that this did occur.

32. In my view, the allegation that the remedial work undertaken by Yarra Valley Water of its own pipework lacking a reasonable standard does not, of itself, give rise to a cause of action. Ultimately, it is a matter for Yarra Valley Water as to how it undertakes remedial work of its own infrastructure. It bears the risk that the work it undertakes will be effective. If it is not and as a result there is further spillage causing damage to users, then it may be liable for that damage. However, I do

[18] Letter from Yarra Valley Water addressed to the Applicants dated 24 February 2009.

not accept that a cause of action lies against Yarra Valley Water, merely because a user believes that its remedial work is not up to the appropriate standard.

33. Accordingly, I find that paragraphs 31 through to and including paragraph 50 do not raise an open and arguable cause of action as against Yarra Valley Water.

Paragraphs 51-58: ***Conduct in the Nature of Deceit by Omission: Dig-Out***

34. The Applicants allege that the 24 February 2009 letter failed to state that the intended works would entail some excavation of the Property occupied by them. They contend:

> 58. As a result of the omission on dig-out the Applicants' leasehold Property underwent trespass and damage but they were unable to know, and inform Corpella of, the dig-out's incursion and damage.

35. It is common ground that excavation was carried out on the Property during the term of the Applicants' lease. This was done in order to undertake remedial work to the *House Connection Branch*, it being part of the sewerage infrastructure owned or maintained by Yarra Valley Water. As indicated above, the *House Connection Branch* is the pipework connecting the main reticulation pipe to the Property's own sewerage system.

36. Insofar as the claim made against Yarra Valley Water relates to trespass, no loss or damage has been specified. Although I accept that trespass to land does not require damage as an element of the cause of action, the failure to articulate any consequences flowing from the alleged trespass makes the allegation even more difficult to understand. Further, it would appear that the alleged trespass occurred in 2009, which is more than six years from the date this proceeding was commenced. Mr Stuckey submitted that in those circumstances, Yarra Valley Water is able to invoke s 5 of the *Limitations of Action Act 1958* as a bar to the action.

37. In any event, it is difficult to conceive how remedial work, designed to remedy a sewage spill on the Property, could constitute trespass, especially in circumstances where Yarra Valley Water and its subcontractors are the only entities which may carry out work to its sewerage infrastructure.

38. Further, Mr Stuckey drew my attention to ss 123, 133 and 173 of the *Water Act 1989*, which state, in part:

> **123. Powers of Authorities**
>
> (1) An Authority has power to do all things that are necessary or convenient to be done for or in connection with, or as incidental to, the

performance of its functions, including any function delegated to it.

…

133. Power to enter land

(1) An officer of an Authority or an authorised person may, subject to sub-section (4), enter any land for the purpose of –

…

(d) carrying out any other function under this Act.

…

(4) an officer or authorised person must not, despite sub-sections (1) and (2), enter land that is used primarily for residential purposes except between 7:30 AM and 6 PM unless –

(a) the Authority has reasonable grounds for believing that this Act, the regulations or the Authority's bi-laws are not being complied with by the occupier; or

(b) the occupier consents.

…

173. Functions of Authorities

(1) An Authority that has a sewerage district has the following functions –

(a) to provide, manage and operate systems for the conveyance, treatment and disposal of sewage and, if the Authority so decides, of trade waste.

39. In my view, the relevant sections of the *Water Act 1989* referred to above permitted Yarra Valley Water and its subcontractors or sub-subcontractors to enter upon the Property for the purpose of providing, managing and operating the disposal of sewage from the Property. This necessarily entails undertaking remedial work in order to perform that function. I do not regard the encroachment, if proved, as constituting trespass.

40. Consequently, I find that paragraphs 51-58 of the pleading do not raise an open and arguable case as against Yarra Valley Water.

Paragraphs 59-67: ***Conduct In the Nature of Deceit by Omission: Oblique Branch (OB)***

41. The Applicants allege that the 24 February 2009 letter did not mention that the 2009 remedial works would involve a dig-out of the *Oblique Branch*. The *Oblique Branch* essentially is the junction from the main reticulation pipe to the *House Connection Branch*. Again, this pipework is part of the infrastructure owned and maintained by Yarra Valley Water. The *Oblique Branch* is positioned either wholly or partly in the easement in which the main reticulation pipe runs. As I understand the allegation made by the Applicants, the failure to notify them of that piece of infrastructure being dug out resulted in them not being able to properly evaluate its integrity:

> 65. As a result of the omission on the OB, the Applicants (and Corpella) were unable to consider or properly scrutinise the OB's post-2009 Works condition.

42. For the reasons which I have already mentioned above, the condition of the infrastructure owned and maintained by Yarra Valley Water is a matter for it. It carries the risk of its infrastructure operating properly. If it chooses not to replace certain parts of that infrastructure and as a result, users suffer damage, then it may be liable for that damage. However, I do not accept that a cause of action arises against Yarra Valley Water merely because it has chosen not to upgrade its sewer to a particular standard. Consequently, I find that the paragraphs 59 to 67 of the pleading do not raise an open and arguable case against Yarra Valley Water.

Paragraphs 68-89: ***Conduct in the Nature of Fraud: Dating of 2009 HCB works***

43. The Applicants allege that Yarra Valley Water acted fraudulently in representing that it would undertake remedial work to the *House Connection Branch* within 30 days from the date of its letter dated 24 February 2009. The Applicants allege that the work was not completed within that timeframe, despite representations made by Yarra Valley Water. They allege further:

> 89. YVW made the false Fol2's HCB Works entry with the intent that a party or parties should rely and act upon it and thereby suffer loss and damage.

44. The reference to the *Fol2* is a reference to internal records kept by Yarra Valley Water or its subcontractors. According to the Applicants, other documents or records show that the remedial work was undertaken well after 30 days from the date of the 24 February 2009 letter.

45. There is no allegation that the Applicants or any other person relied upon the 30 day representation or even if they did, what loss flowed from any such reliance. As I have already indicated, the remedial work to the *House Connection Branch* was work undertaken to infrastructure owned or maintained by Yarra Valley Water. It was not work

undertaken to any of the sewerage infrastructure belonging to the Property. Moreover, it is not alleged that as a result of a delay in undertaking that remedial work (if proved), further spillage occurred. Consequently, I find that paragraphs 68 to 89 of the pleading do not raise an open and arguable case against Yarra Valley Water.

Paragraphs 90-99: ***Conduct in the Nature of Fraud: Identity of Constructor for 2009 HCB Works***

46. The Applicants allege that Yarra Valley Water or Lend Lease fraudulently mis-identified the relevant contractor responsible for carrying out the remedial work:

> 91. The on-site crew gave the Second Applicant a white business card with blue text identifying as a northern-suburbs-based business with the term "Engineering" in its business name and no mention of "Abidance".
>
> …
>
> 99. As a result of contradictory record on the 2009 HCB Works dating, constructor identity, costings and nature, the Applicant suffered loss in the form of liability for newly placed PVC HCD parts, ownership of which no party has admitted.

47. In my view, the relevant paragraphs make no sense. Even if it were proven that the subcontractor or sub-subcontractor of Yarra Valley Water or Lend Lease, provided false details of the relevant person undertaking the remedial work, I cannot see how that fact has any causal nexus with the loss said to have been suffered by the Applicants. Consequently, I find that paragraphs 90 to 99 do not disclose an arguable case as against Yarra Valley Water or, to the extent that the claim is made against Lend Lease, a claim against that entity.

Paragraphs 100-110: ***Conduct in the Nature of Deceit: YVW Assertion of HCD Ownership***

48. The Applicants allege that in Yarra Valley Water's letter dated 7 January 2009, it falsely referred to the *House Connection Branch* as a 'house connection drain', which implicitly asserted that it retained ownership of the *House Connection Drain*:

> 107. The Applicants suffered loss and default liability by relying on the HCD Assertion.
>
> 108. Given YVW's non-retraction of the HCD Assertion, that assertion caused the Applicant's loss when visiting contractors later told them the HCD was not YVW's.

49. Even if I were to accept that the asset was incorrectly described, there is no allegation as to how or what loss was suffered by reason of that fact. There is simply a bold assertion made by the Applicants that they suffered loss because the particular item of infrastructure was

incorrectly described. There is no allegation of any reliance on the statement or any allegation of what ramifications arose by reason of that circumstance.

50. Accordingly, I find that paragraphs 100 to 110 of the *Further Amended Points of Claim* do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 111-124: ***Conduct in the Nature of Trespass to Land: 2009 Incursion from the DSE***

51. The Applicants allege that the remedial work undertaken by Yarra Valley Water and its subcontractors and sub-subcontractors to the main reticulation sewer pipe resulted in the relevant contractors entering upon the Property. In other words, the Applicants allege that the work extended beyond the boundary of the easement and encroached upon the Property:

> 123. The trench's total southward dig would be up to 2.3 m from the Property's northern boundary, or at around half a metre beyond the DSE's southern limit.
>
> 124. The Applicants suffered damage, loss and liability by default by the fact of trespass to land is apparent in the 2009 Works photo.

52. For the reasons which I have already outlined above, I do not accept that the remedial work undertaken by Yarra Valley Water or its subcontractors or sub-subcontractors constitutes trespass, having regard to ss 123, 133 and 173 of the *Water Act 1989*. Moreover, the pleading fails to draw any link between the alleged trespass and any loss or damage suffered by the Applicants.

53. Accordingly, I find that paragraphs 111 to 124 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 125-129: ***Conduct in the Nature of Trespass to Goods: New PVC HCD-IS***

54. The Applicants allege that during the course of the remedial works in 2009, Yarra Valley Water replaced a section of the existing vitreous clay *House Connection Drain* with a section of PVC pipe as it connected onto Yarra Valley Water's *House Connection Branch*.

55. Again, the pleading does not identify any loss occasioned by the facts alleged. Moreover, the *House Connection Drain* is an asset owned by the First Interested Party. The pleading does not identify or allege that the Applicants have any right, title or interest in that asset, other than their right to ensure that the asset functions properly so as not to disturb their quiet enjoyment of their leasehold interest. The First Interested Party makes no claim or complaint against any of the Respondents in this proceeding.

56. Accordingly, I find that paragraphs 100 to 110 of the *Further Amended Points of Claim* do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 130-139: ***Reckless Conduct: Non-Compliant Condition of PVC HCD-IS Works***

57. As I have already commented, the *House Connection Drain* is an asset belonging to the Property. It is owned by the First Interested Party. It is not an asset owned or maintained by Yarra Valley Water. The Applicants allege that the condition of the *House Connection Drain* is non-compliant or defective.

58. In my view, the pleading does not clearly identify who is responsible for the poor condition of the *House Connection Drain*. The pleading states:

> 137. As a result of its objectively non-compliant features the 2009 Works PVC HCD-IS likely to disintegrate, and core sewer failure by interference to flows.
>
> …
>
> 139. As a result of the so recklessly designed and constructed, non-compliant, and disintegrated PVC HCD-IS the Applicant suffered continual loss from sewerage and sewage disposal services' failure.

59. In my view, if it is proven that the Applicant suffered loss or damage as a result of further sewage spills by reason of a defective *House Connection Drain*, then that is a matter as between the Applicants and the First Interested Party, it being the owner of the Property and landlord under the lease with the Applicants. In the absence of any clear allegation identifying that Yarra Valley Water damaged the *House Connection Drain*, I fail to see how Yarra Valley Water is liable for that loss. Moreover, the pleading does not identify any particular loss or damage attributable to the facts alleged under this head of damage.

60. Accordingly, I find that paragraphs 130 to 139 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 140-150: ***Deceit & Reckless Conduct: No Compliance for Altered HCD-IS***

61. The Applicants allege:

> 140. YVW was required to comply with s 221ZH of the *Building Act 1993*, by which any HCD alteration must have a Compliance Certificate.
>
> 141. The 2009 HCB Works' removal and alteration of the HCD-IS parts, had no Compliance Certificate issued to either the Applicants or Corpella.

…

150. The Applicant's suffered ongoing loss trying to mitigate effects of the PVC HCD-IS which was left on the Property after unclear and non-compliant processes.

62. Leaving aside the issue whether Yarra Valley Water was required to issue a compliance certificate under s 221ZH of the *Building Act 1993*, the pleading again fails to establish a causal nexus between the failure to provide a compliance certificate (if required) and any loss or damage suffered by the Applicants. In my view, even if expenditure was required in order to make the *House Connection Drain* compliant or to obtain a compliance certificate, the loss occasioned by that act would be a loss falling on the shoulders of the First Interested Party, as owner of the Property, and not a matter which would financially concern the Applicants.

63. As I have already commented, the Applicants have a right to enjoy their leasehold interest without interference. I fail to see how the failure to issue a compliance certificate, if required, impacts on the quiet enjoyment of the Applicants' leasehold interest. In particular, it is not alleged that, as a result of there not being a compliance certificate, further sewage spills occurred occasioning them loss and damage.

64. Accordingly, I find that paragraphs 140 to 150 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 151-166: ***Deceit & Reckless Conduct: Stormwater Drain Works 2009***

65. The Applicants allege that Yarra Valley Water failed to comply with s 151 of the *Water Industry Act 1994* (as it existed in 2009) by failing to notify the municipal council that its work would interfere with an asset owned or maintained by the municipal council. In essence, the Applicants allege that work carried out by Yarra Valley Water or its subcontractors or sub-subcontractors interfered with a stormwater drain owned or maintained by the Second Interested Party. The Applicants allege:

158. Alteration of the Council drain at the Property caused interference to rain water flows from … Monterey to the Property.

Particulars

i. … Monterey's Corner drain pit area inundated for several years.

ii. Council contacted the Applicants over the drain in 2013.

…

> 160. Alteration of the Council drain caused subsidence in the DSE above and beside the side of HCB dig-out Works in 2009 (and later on 20 September 2011).
>
> …
>
> 165. As a result of 2009 Works to remove and alter the Council drain, the DSE suffered severe subsidence which possibly contributed to sewer failure, and did contribute to YVW explanations of unspecified "subsidence" for such failure.
>
> 166. YVW's explanations of "subsidence" causalty would be unconscionable given the role of YVW's Works in causing such subsidence.

66. It is not clear to me what loss has been suffered by the Applicants. Even if the Applicants prove that the Property suffered subsidence, nothing is alleged which draws a causal nexus between that subsidence and any loss suffered by them. For example, it is not alleged that the Applicants expended monies in remedying any such subsidence. Moreover, insofar as the Applicants allege that an asset owned by the responsible authority has been interfered with, that is a matter as between the responsible authority and the entity which caused that interference. I find that the Applicants do not have standing to prosecute a claim for damage caused to an asset owned by the responsible authority.

67. Accordingly, I find that paragraphs 151 to 166 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 167-170: ***Events on or around 27 March 2009: On-site Works***

68. Paragraphs 167 to 170 recite certain background facts that make no allegation against any of the Respondents, nor do I consider those background facts to have any direct relevance to the claims made against any of the Respondents.

Paragraphs 171-179: ***Events on or around 28 March 2009: Deceit in Visit & "Inspection" of Works***

69. Paragraphs 171 to 179 relate to the backfill of pits or trenches excavated by Yarra Valley Water's subcontractors or sub-subcontractors, when remedial work was carried out in 2009. The Applicants allege that the backfill resulted in a clay pile located in the rear of the Property. They state:

> 179. The Applicants suffered loss as a result of the clay pile concealing the IS, leaving it effectively inaccessible and is non-compliant condition hidden.

70. As I understand the allegation, the *IS* referred to in the above paragraph is the inspection shaft of the *House Connection Drain*. The allegations do not, however, explain how or what loss was suffered by the Applicants. In my view, if the inspection shaft or inspection opening

for the *House Connection Drain* was covered or damaged, then that is a matter as between the First Interested Party and the entity which caused that situation. I fail to see how the Applicants, as tenants, have standing to prosecute any claim relating to that asset, especially where there is no allegation that this situation has adversely affected their quiet enjoyment of their leasehold interest.

71. Accordingly, I find that paragraphs 175 to 179 of the *Further Amended Points of Claim* do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 180-185: ***Events on or around 29 March 2009: Deceit in Offer of Post-Works CCTV***

72. The Applicants allege:

> 180. Post-Works CCTV is industry-standard activity for a new or altered sewer.
>
> 181. YVW never arranged for such CCTV for the 2009 HCB Works.

73. The Applicants allege that they suffered loss because of a representation or expectation that a CCTV survey would be undertaken after the remedial works were completed in 2009. They allege that as a result of their reliance on there having been a CCTV survey, they suffered loss by being unable to *identify faulty sewer assets as soon as possible*.

74. There is no allegation of any representation on the part of any of the Respondents that a CCTV survey would be conducted. Moreover, the pleading does not identify what loss was suffered, in any event. Finally, the allegation relates to work carried out to the assets owned or maintained by Yarra Valley Water. As I have already indicated, the manner in which Yarra Valley Water carries out its remedial work of its own assets is a matter for it. It carries the risk that its work is done properly and in the event that this is not the case, any loss to users of those assets may result in liability. For example, if it fails to remedy problems with its assets, with the result that a user suffers sewage spill causing damage, then it may be liable for that damage. However in the present case, no allegation is raised identifying any causal nexus between the failure to carry out a CCTV survey (if indeed required) and any financial loss suffered by the Applicants.

75. Accordingly, I find that paragraphs 180 to 185 of the *Further Amended Points of Claim* do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 186-196: ***Conduct in the Nature of Conspiracy: 2009 HCB Works***

76. The Applicants allege:

> 186. Further to allegations disclosing conduct in the nature of trespass and fraud, YVW, Lend Lease and Abidance (**the 1st Combination**) combined to use unlawful means of trespass both to land and to goods (**Combined Means of Trespass**) and various means to evade Compliance (**Combined Means of Compliance Evasion**) in 2009 HCB Works.

77. As I understand the allegations raised by the Applicants, the alleged trespass relates to an encroachment over the southern boundary of the easement when remedial works were undertaken in 2009. As I have already indicated, I do not consider that entering upon the Property in order to perform remedial work constitutes trespass, having regard to ss 123 and 133 of the *Water Act 1989*.

78. The Applicants allege that they suffered loss and damage as follows:

> 195. The Applicant suffered loss and damage from the 1st Combination by:
>
> a. Becoming accountable for cost of non-compliant Works and expert inspection thereof, as for the post-20 September 2011 HCB-IS; and
>
> b. Deception and non-disclosure by YVW, Lend Lease and Abidance, such damage was realised as implied liabilities pursuant to ss177C(6) of the *Water Industry Act 1994* and s 178 of the *Water Act 1989*.

79. The allegation set out in paragraph 195 of the pleading fails to draw any causal nexus between the alleged conspiracy and any financial loss suffered by the Applicants as a result thereof. Moreover, I am not persuaded that the Tribunal has jurisdiction to entertain a claim founded upon the tort of conspiracy.

80. Accordingly, I find that paragraphs 186 to 196 of the *Further Amended Points of Claim* do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 197-204: ***Conduct in the Nature of Fraud: Reticulation Sewer (retic) Works 2009***

81. The allegations set out under paragraphs 197 to 204 relate to the relining of the main reticulation sewer pipe. As I have already indicated, this is an asset owned or maintained by Yarra Valley Water. In Yarra Valley Water's letter dated 24 February 2009, it stated that this work would be done within 6 to 8 weeks. Yarra Valley Water concede that this work was not done until 2010. Although it is not clear from the pleading, it appears that the Applicants allege that the work was never done.

82. As I have already indicated, whether the work was done in 6 to 8 weeks from 24 February 2009 or 2010 or not at all, of itself, does not give rise to a cause of action, even though that in-action may be the reason why users have suffered loss or damage. In particular, if the main reticulation pipe is defective and no remedial work is done to rectify that problem, then Yarra Valley Water runs the risk of causing sewer spillage. It is the spillage and any consequential damage caused thereby which gives rise to the cause of action against Yarra Valley Water. The fact that Yarra Valley Water failed to carry out remedial work, if proved, is merely evidence pointing to the reason why the spillage occurred.

83. However, the pleading makes no allegation that the Applicant suffered financial loss as a result of any further spillage occurring because of a failure to re-line the main reticulation sewer within the timeframes suggested in the 24 February 2009 letter. All that is said in the pleading is:

> 204. As a result of YVW failure to effect relining to mend the retic's structural damage, the Applicant suffered interference to sewage disposal, and to enjoyment of the Property by themselves and their children.

84. No details are provided as to what is meant by the word *interference*. In the absence of any allegation to the effect that the failure to re-line the main reticulation pipe caused a sewage spill – which then led to loss or damage being suffered by the Applicants, the pleading is meaningless.

85. Accordingly, I find that paragraphs 197 to 204 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 205-212: ***Conduct in the Nature of Conspiracy: 2009 retic Works***

86. Paragraphs 205 to 212 of the pleading alleges that as a result of Yarra Valley Water failing to re-line the main reticulation pipe within the 6 to 8 weeks stated in the 24 February 2009 letter, it committed a fraud and it conspired with Lend Lease in effecting that fraud.

87. For the reasons that I have already outlined above, this aspect of the pleading fails to disclose a justiciable cause of action as against either Yarra Valley Water or the other Respondents. There is no allegation of any reliance placed on the alleged misrepresentation, nor is there any allegation making a causal nexus between the alleged misrepresentation and any loss or damage suffered by the Applicants.

88. Accordingly, I find that paragraphs 205 to 212 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 213-226

89. Paragraphs 213 to 226 recount various factual events – primarily concerning notification or attempts to notify Yarra Valley Water.

There are, however, some allegations concerning the effects of sewer spillage:

> 221. In or around July 2009, the Applicants detected intermittently sewage odours carried by wind at the front of the house in the evenings.
>
> …
>
> 223. From around this period the house's landline phone started to become very unreliable to the extent that the Applicant is resorted to pre-paid mobile phone and even the shopping centres' public phone.
>
> 224. A landline socket in the bedroom next to the bathroom was later found to have extreme oxidisation and crystallisation from long exposure to moisture…
>
> …
>
> 226. From around this time also the Applicants' rear-left bedroom attracted severe mold [sic] on the walls, compelling intensive weekly and sometimes daily cleaning.
>
> **Particulars**
>
> The mold [sic] was a result of constant spill at the westernmost (bathroom) gully trap under the balcony.

90. Although the above paragraphs allege that the Applicant's quiet enjoyment of their leasehold interest has been adversely affected by sewage spills, it is not alleged that the spill is tied to any act or omission on the part of the Respondents.

91. Accordingly, I find that paragraphs 213 to 226 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 227-232: ***Events: Early Spring 2009 External Sewage Spills***

92. The Applicants allege that in or around September 2009, the *Second Applicant found a sewage spill at the house's northeast gully trap.*

93. These paragraphs of the pleading do not suggest that any of the Respondents are responsible for that sewage spill; nor do those paragraphs raise any other allegation against the Respondents.

94. Accordingly, I find that paragraphs 227 to 232 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraph 233-247: ***Conduct in the Nature of Deceit: External Sewage Spill, 14 November 2009***

95. The Applicants allege that on 14 November 2009, they discovered another external sewage spill. They further allege that Yarra Valley Water advised them that the sewage spill stemmed from a blockage in the pipework belonging to the Property, rather than from any problem in the assets owned or maintained by Yarra Valley Water:

> 243. YVW document *Sewer Blockages* states that crew will "provide your [sic] with options for clearing the blockage in your pipes. These options include you engaging your own plumber or we can clear it for you for a fee".
>
> **Particulars**
>
> An historical AMS entry for the Property from 13 June 2000 sites a quote of $140 for clearance action by contractor Barry Bros.
>
> 244. YVW never gave the Applicants an option for clearing the sewer for a fee.
>
> 245. In the premises YVW and Lend Lease knew or should have known as false its assertions on "internal stoppage", and advice to call a plumber.
>
> 246. The Applicants relied on the assertions and advice as representing an individual's mistake or apathy and not a clear refusal by the Licensee to meet its obligations.
>
> 247. As a result of the deceit the Applicant suffered loss by continued recourse to public toilets, laundromats and an Internet cafe, with associated expenses.

96. It is unclear to me how a blockage in the sewer pipes belonging to the Property give rise to a cause of action as against any of the Respondents. There simply is no causal nexus between the factual allegation that there was a blockage in the sewerage pipes belonging to the Property and any act or omission on the part of all Yarra Valley Water or its subcontractors or sub-subcontractors. Nowhere in paragraphs 233 to 247 is it alleged, for example, that any of the Respondents are responsible for the blockage.

97. Accordingly, I find that paragraphs 227 to 247 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 248-252: ***Events: Further Contact with YVW, Continued Spill***

98. The Applicants allege that in January 2010, the First Applicant phoned Yarra Valley water to seek help with the external sewage spill. They allege:

> 250. YVW told the First Applicant that they refused to send someone unless the Applicant's first cited as referee a registered plumber's license number.
>
> 251. In the premises,YVW's refusal was unconscionable.

252. The Applicants' loss continued by recourse to public toilets, laundromats and an internet cafe and the associate loss in time, travel and expense.

99. For the reasons which I have already set out above, without establishing any causal connection between a malfunction in an asset owned or maintained by Yarra Valley Water to any loss or damage suffered by the Owner, the allegation that Yarra Valley Water refused to send someone to investigate the cause of a sewage spill does not give rise to a cause of action.

100. Consequently, I find that paragraphs 248 to 252 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 253-270: ***Events: Further Contact with Corpella, Continued Spill***

101. Paragraphs 253 to 270 recount certain events surrounding the sewage spill in 2009-2010. The Applicants allege that Yarra Valley Water eventually sent someone to investigate:

268. YVW sent the same man as before, who found the IS buried and its cover ajar.

269. The man sent performed by:

a. telling the First Applicant to leave the IS cover lid ajar;

b. rodding the entire HCD and beyond with several cable;

c. checking the IS to find a narrow muddy seepage;

d. staying silent again on the First Applicants query on the Call to Return.

102. That allegations set out in paragraphs 253 to 270 do not raise any allegation as against any of the Respondents. Indeed, paragraph 269 concedes that Yarra Valley Water attended the Property and undertook work, even though the work related to the sewerage belonging to the Property, rather than its own asset.

103. Accordingly, I find that paragraphs 253 to 270 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 271-278: ***Deceit: YVW Notice of Inspection Visit 2010***

104. The Applicants allege that by letter dated 19 July 2010, Yarra Valley Water stated that it would *determine a solution to prevent sewer blockages*:

273. Based on YVW's conduct in events for more than a year later, the letter's assertion about determining a solution was clearly a falsehood.

> 274. In the premises the letter of request was misleading and unconscionable because YVW, not the Applicants, bore responsibility for YVW's Works.
>
> …
>
> 277. The Applicants were confused by the letter's request and vagueness about Works, and worried intensely that the letter portended more trouble, but they relied on the letter's assertion that YVW was deferring decision and responsibility.
>
> 278. The Applicants relied on the assertions and began accepting as normal the dysfunctional sewer, as loss continued.

105. The allegations set out under paragraphs 271 to 278 are difficult to reconcile with the pleading as a whole. In particular, it is not alleged that the asset owned and managed by Yarra Valley Water is currently defective or that there are continual sewer spillages of more recent time. That being the case, I fail to understand how any representation that Yarra Valley Water would determine a solution can give rise to damages. The pleading simply did not make that allegation clear.

106. Moreover, according to Mr Stuckey, the letter dated 19 July 2010 stated precisely the opposite to what the Applicants allege; namely, that Yarra Valley Water would undertake work. Indeed, it is common ground that that is precisely what occurred in 2011.

107. Consequently, I find that paragraphs 271 to 278 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 279-301: ***Deceit YVW Visit, CCTV & Turbojet September 2010***

108. In paragraphs 279 to 301 of the pleading, the Applicants raise various allegations that contractors engaged by one of the Respondents (it is not clear which of the Respondents engaged the contractors) made certain representations concerning the *House Connection Drain*, to the effect that its *condition was in a devastated, irrepairable condition, with collapsed pipes and tree roots near the house, near the corner and in between.*

109. The Applicants allege that the representation was false. They further allege:

> 299. In all of the false assertions during the September 2010 period, YVW and Lend Lease knew they were making false positive assertions but did so intending to permit ongoing damage to the Property's sewer assets.
>
> 300. The Applicants relied on the false assertions as being borne of abuse of authority but accepted the warnings without expense to themselves alternatively Corpella, and resigned themselves to YVW's unwillingness to resolve the problem in an area of their exclusive charge.

301. The Applicants continue to incur a loss as a result of YVW's and Lend Lease's conduct, through now with added loss from exertion to investigate and solve the problems themselves.

110. The allegations referred to in paragraphs 279 to 301 of the pleading are difficult to understand. On one hand, it is alleged that Yarra Valley Water and Lend Lease represented that there were problems with the sewer within the Property (rather than the assets owned or maintained by Yarra Valley Water). However, it is not alleged that this state of affairs is incorrect. Indeed, the narrative set out in the allegations exemplifies a problem within the Property's sewer. The bold assertion that the representations were false is unsupported with any allegation that the Property's sewerage is in a serviceable condition.

111. Moreover, nothing is alleged to show a causal nexus between the damaged sewerage and any particular loss suffered by the Applicants. In fact, no actual loss is pleaded in reliance upon the alleged representation.

112. Consequently, I find that paragraphs 279 to 301 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 302-311: ***Failure to Protect Sewers: Condition of OB in CCTV 2010***

113. In paragraphs 302 to 311, the Applicants allege that Yarra Valley Water and Lend Lease failed to protect the reticulation sewer pipe and associated fittings, as they were obliged to do *under s 93 of the Water Industry Act 1994 and s 178 of the Water Act 1989*.

114. Even if it can be established that either or both of Yarra Valley Water and Lend Lease failed to carry out their statutory functions, with the result that the reticulation sewer pipe and associated fittings were either not maintained or fell into disrepair, no allegations are made as to what loss was suffered by the Applicants as a consequence thereof.

115. Further, as I have previously observed, the mere fact that assets owned or maintained by Yarra Valley Water fall into disrepair does not, of itself, give rise to a cause of action. Something needs to happen as a consequence of that circumstance, which ultimately leads to a loss suffered by the Applicants. Without establishing any loss occasioned by reason of the alleged misconduct on the part of Yarra Valley Water or Lend Lease, no cause of action arises.

116. Consequently, I find that paragraphs 302 to 311 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 312-320: ***Events: Ongoing Spill, Dead Sewer***

117. Paragraphs 312 to 320 of the pleading recount events relating to the work that was done to the Property's sewer from October 2010 to the

middle of 2011. This entailed replacing some of the vitreous clay sewer pipe and unblocking sections of that sewer.

118. The Applicants allege that the *House Connection Drain* was filled with some obstruction, comprising an accumulation of black septic sewage. However, no allegation is made that the blockage arises because of any act or omission on the part of the Respondents. Moreover, nothing is alleged to indicate that the Applicants have suffered any loss and damage as a result of the blockage.

119. Consequently, I find that paragraphs 312 to 320 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 321-326: ***YVW Visit 21 August 2011: Still Refusal of responsibility***

120. Paragraphs 321 to 326 of the pleading sets out various actions taken by the First Applicant. No allegations are raised against any of the Respondents.

121. Consequently, I find that paragraphs 321 to 326 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 327-329: ***Events: Defective HCB-OB, Emergency Dig-Out***

122. Paragraphs 327 to 329 allege that Yarra Valley Water made certain admissions regarding the condition of the *House Connection Branch*. However, no allegations are raised against any Respondents in those paragraphs.

123. Consequently, I find that paragraphs 327 to 329 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraph 330-336: ***2011 Conduct in the Nature of Conspiracy***

124. Paragraphs 330 to 336 of the pleading again raise the issue of trespass and a conspiracy to injure. On this occasion, the allegations are raised in the context of remedial work undertaken in 2011. For the reasons which I have already articulated above, I do not consider that undertaking remedial work to the assets owned or managed by Yarra Valley Water constitute an actionable trespass, even in circumstances where work encroaches beyond the boundary of the easement onto the Property.

125. In any event, the allegations as to any loss or damage suffered do not provide adequate detail to enable me to be satisfied that there is any causal connection between the alleged acts and the alleged loss:

> 335. By such combinations of trespass and Compliance evasion, and with such intent to damage, the 4th Combination carried out the acts thereof.

336. The Applicant suffered loss from the 4th Combination's means, where:

a. the Applicants became accountable for the cost of non-compliant Works, including expert inspection thereof, is clear from the later post-20 September 2011 non-compliant HCD-IS;

b. as a result of the 4th Combination's deception and non-disclosure, and further to that previously in the premises and also involving Abidance, such damage was realised as implied liabilities pursuant to ss 177C (6) of the *Water Industry Act 1994* and s 138 and s 178 of the *Water Act 1989.*

126. The Applicants allege that they *became accountable for the cost of non-compliant work*. However, the work referred to in paragraphs 330 to 336 relates to work carried out to the assets owned or maintained by Yarra Valley Water. No allegation is made as to any actual loss suffered by the Applicants.

127. Consequently, I find that paragraphs 330 to 336 of the pleading do not disclose an arguable claim as against Yarra Valley Water.

Paragraphs 337-339: ***Conduct in the Nature of Breach of Contract***

128. The Applicants allege that Yarra Valley Water had *duties to the Applicants in a Customer Service Code of the Essential Services Commission*. They further allege that *Yarra Valley Water failed to honour its Guaranteed Service Level* [which caused a] *profound breach of the trust expected between the Applicants and Licensee*.

129. The Applicants do not allege that they suffered any loss as a result of the alleged breach of trust. Moreover, it is unclear on what legal basis such a claim is made or whether the Tribunal has jurisdiction to deal with a claim couched in those terms.

130. In my view, paragraphs 337 to 339 of the *Further Amended Points of Claim* do not disclose an arguable claim as against Yarra Valley Water and I so find.

Paragraphs 340-343

131. Paragraphs 340 to 343 of the pleading purport to set out the Applicants' *Prayer for Relief.* In particular, allegations are made that by reason of the matters referred to in the pleading, Yarra Valley Water are liable to the Applicants under s 74 of the *Water Industry Act 1994* and the *Water Act 1989*.

132. Section 74 of the *Water Industry Act 1994* has been repealed and it is unclear whether any of the alleged flows occurred during the period when that section was operative. In any event, relief is also sought under the *Water Act 1989*.

133. However, as I have already indicated, the pleading suffers from significant defects in failing to establish any causal connection between any act or omission on the part of Yarra Valley Water and the loss or damage suffered by the Applicants.

134. Having regard to the fact that the Applicants are not legally trained and embracing a generous interpretation of the pleading, I assume that the pleading relies, in part, on s 16 or s 157 of the *Water Act 1989* to establish a cause of action justiciable in the Tribunal. However, fundamental to an action under either s 16 or s 157 of the *Water Act 1989*, is a requirement to establish a causal connection between the unreasonable flow of water or interference with a reasonable flow of water (in the case of an action under s 16) or flow of water as a result of intentional or negligent conduct on the part of the water authority (in the case of an action under s 157) and the injury or damage suffered by the claimant.

135. In the present case, the pleading is plagued with largely unsubstantiated allegations of deceit, conspiracy and trespass, which appear to be the cornerstone of the alleged loss or injury suffered by the Applicants. This is not a case where it is alleged that a person's property or goods have been damaged by reason of an unreasonable flow of water or because of a flow of water resulting from intentional or negligent conduct on the part of a water authority.

136. Here, the particulars of loss and damage, which are set out under paragraph 355 of the pleading, claim rental costs, cleaning costs, and other associated costs but do not tie those costs to any act or omission on the part of the Respondents. Although the pleading concedes that there were problems with the Property's own sewerage system, nothing is said how any costs associated with that fall at the feet of the Respondents. In particular, there is no clear allegation to the effect that a sewage spill was caused as a result of a blockage in the assets owned or maintained by Yarra Valley Water and which then led to the Applicants suffering loss or damage.

CLAIM AGAINST SECOND RESPONDENT (ABIDANCE)

137. Mr Tesarsch of counsel appeared on behalf of Abidance. He adopted the submissions made by Mr Stuckey. He further added that the pleading and the affidavits filed in behalf of the Applicants, miss a fundamental point; namely, they do not disclose a cause of action against Abidance.

138. Mr Tesarsch submitted that there is no allegation of negligence against Abidance and no allegation that it did anything wrong. He argued that Abidance was two steps removed from the relationship between Yarra Valley Water and the Applicants. In particular, Abidance was a

subcontractor of Lend Lease, who was contracted by Yarra Valley Water.

139. Mr Tesarsch submitted that the pleading was so defective that it could not be cured by amendment. He further argued that the voluminous affidavit material filed by the Applicants further confused the situation and, on any view, it was impossible to identify a cause of action from reading that material. According to Mr Tesarsch, the claims made by the Applicants, as set out in their *Prayer for Relief*, ought to be directed at the First Interested Party, pursuant to ss 68 and 72 of the *Residential Tenancies Act 1997*.

140. I accept the submissions made by Mr Tesarsch. In my view, nothing in the pleading establishes a cause of action justiciable by the Tribunal as against Abidance. Further, I am unable to distil any cause of action from the affidavit material filed by the Applicants which may provide some lifeline to cure defects in the pleading. In my view, the claim as against Abidance should be dismissed.

CLAIM AGAINST THE THIRD RESPONDENT (LEND LEASE)

141. Mr Jones of counsel appeared on behalf of Lend Lease. Like Mr Tesarsch, he adopted the submissions made by Mr Stuckey. Mr Jones submitted that apart from paragraph 137 of the pleading, the remainder of the pleading only raised allegations against Lend Lease which were couched in terms of a conspiracy to injure or alternatively trespass.

142. He submitted that the Tribunal does not have jurisdiction to hear and determine a claim couched in terms of trespass or the tort of conspiracy. Mr Jones referred me to extracts of *Pizer's Annotated VCAT Act* (5th Edition) where the learned authors state:

> The VCAT is a creature of statute and its jurisdiction "derives entirely from statute": *Director of Housing v Sudi* (2011) 33 VR 559; [2011] the SCA 266 at [19] per Warren CJ. Thus, it has been said that:
>
> - The VCAT's jurisdiction, "extensive though it is, is precisely defined in the various enabling enactments": *Roads Corporation v Maclaw No 469 Pty Ltd* (2001) 19 VAR 169; [2001] VSC 435 at [19] …
>
> As a creature of statute the VCAT has no inherent jurisdiction: *R v Perkins* [2002] VSCA 132 at [16]; …

143. I respectfully accept the commentary set out by the learned authors in *Pizer's Annotated VCAT Act*. Insofar as the Applicants claim against the Second, Third or Fourth Respondents, the enabling legislation is the *Water Act 1989*, as there being no direct contract or service provided between those entities and the Applicants. The relevant provision of that Act; namely s 16, specifically defines the ambit of any enquiry to loss or damage caused either by an unreasonable flow of

water or interference with a reasonable flow of water. Causes of action based on the tort of conspiracy or trespass do not, in my view, fall within the purview of s 16 of the *Water Act 1989*.

144. It appears that Mr Jones concedes that paragraphs 137 to 139 of the pleading, implicitly allege that remedial work performed in 2009 adversely impacted on the Property's *House Connection Drain*, leading to the Applicants suffering *continual loss from sewerage and sewage disposal services failure.*

145. Even if that allegation can be understood from a plain reading of the pleading, nothing is alleged to draw a causal link between such an allegation and any actual loss suffered by the Applicants. In particular, if the *House Connection Drain* was damaged as a result of work carried out by one or more of the Respondents, nothing is pleaded to link that damage to any loss suffered by the Applicants. The Applicants are tenants of the Property and have no reversionary interest in the sewer assets belonging to the Property. If those assets are damaged, then the cost to make good those assets is a loss incurred by the First Interested Party.

146. However, the mere fact that Property assets are damaged does not mean that a cause of action arises between the Applicants and the entity responsible for causing that damage. More needs to be shown, linking that damage to the Applicants' loss. On my reading of the pleading, I am unable to identify that link. For that reason, I am of the opinion that there is no arguable case raised against Lend Lease and the claim against it should be dismissed.

CLAIM AGAINST FOURTH RESPONDENT

147. Mr Thomas, of counsel, appeared on behalf on the Fourth Respondent (Do All Drainage). Like Mr Tesarsch and Jones, he adopted the submissions made by counsel for the other Respondents. Mr Thomas noted that only 13 paragraphs make reference to Do All Drainage. Those paragraphs relate to allegations of conspiracy. For the reasons which I have already outlined above, I am of the opinion that the Applicants' claim against Do All Dainage, grounded under the tort of conspiracy or trespass is not arguable, at least in the Tribunal.

148. The involvement of Do All Drainage, like Lend Lease and Abidance is one or more steps removed from any direct relationship with the Applicants. Those entities did not provide any direct service to the Applicants, nor enter into any contractual relationship with them. Moreover, no allegation is raised against Do All Drainage under the *Water Act 1989*. In my view, the claim against Do All Drainage is not open and arguable and should be dismissed.

CONCLUSION

149. The Applicants have filed written closing submissions in reply, to supplement their oral submissions made during the hearing and their affidavits filed prior to the hearing. Taking the Applicants' oral submissions and all material filed by them into consideration, I am unable to identify further facts or points of law which would cure the defects so patently obvious in the pleading.

150. At its best, the pleading together with all material filed on behalf of the Applicants alleges that one or more of the Respondents carried out remedial work which encroached upon the Property, thereby creating a trespass. The pleading alleges that, for some unknown reason, one or more of the Respondents had conspired to deceive and injure the Applicants, although it is not clear what injury was suffered as a result of that alleged conspiracy. Those facts and circumstances do not give rise to an arguable claim as against any of the Respondents.

151. The only allegation which might raise the potential for a cause of action against Yarra Valley Water concerns the implicit suggestion that the sewerage system of the Property was damaged by remedial work carried out by Yarra Valley Water through its contractors or the subcontractors of those contractors. However, as I have already indicated, the allegation (if made) stops short of alleging that this factual circumstance resulted in an unreasonable flow of water or an interference with a reasonable flow of water, giving rise to injury, loss or damage suffered by the Applicants. In the absence of a pleading setting out the factual and legal basis of this circumstance, the pleading does not disclose an arguable case against Yarra Valley Water or any of the other Respondents.

152. Notwithstanding that the Applicants have filed voluminous affidavit material, made three attempts at formulating points of claim, made oral submissions; and were given leave to file closing written submissions, no further material has been advanced to persuade me that the pleading is capable of being cured. For that reason, I find that the claims made against the Respondents are misconceived or lacking in substance, justifying an order under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* summarily dismissing those claims. In making that order, I am mindful that it is a serious matter for the Tribunal, in an interlocutory proceeding, to deprive a litigant of the chance to have their claim heard in the ordinary course. However, I am persuaded that the claims made against the Respondents are so obviously unsustainable in fact or law and are bound to fail.

SENIOR MEMBER E. RIEGLER