VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1378/2017

CATCHWORDS

Water Act 1989 – Claim by applicant for damages arising out of an unreasonable flow of water under ss 16(1); ss 16(1) and s 16(5) considered; ss 19(9) and the tests of causation and remoteness of damage considered; criteria set out in ss 20(1) considered; s 16 compared with s 157; test for a *quia timet* injunction considered.

APPLICANT	Carol Diane Jasen
RESPONDENT	Alessandro Demaio
WHERE HELD	Melbourne
BEFORE	C Edquist, Member
HEARING TYPE	Hearing
DATE OF HEARING	23 and 24 July, 21 November and 10 December 2018
DATE OF FILING OF WRITTEN FINAL SUBMISSIONS BY APPLICANT	10 December 2018
DATE OF FILING OF WRITTEN FINAL SUBMISSON BY RESPONDENT	5 December 2018
DATE OF ORDER	3 June 2019
CITATION	Jasen v Demaio (Building and Property) [2019] VCAT 712

ORDERS

1. The respondent must pay to the applicant damages in the sum of $3,764.

2 I declare that the applicant is entitled to a mandatory injunction to the effect that the respondent must replace that portion of the water supply pipe to his house that has not been replaced since 2017.

3. The parties are given liberty to make submissions in relation to the formulation of the required injunction, alternatively some other order directed at protecting the applicant from a further unreasonable flow of water from the respondent's property, within 30 days. Alternatively, any such application may be made at any cost hearing.

4. Costs are reserved. Each party may make an application for costs within 30 days.

5. The issue of reimbursement of fees under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* is reserved. Each party may make an application for reimbursement of fees within 30 days.

6. The Principal Registrar is directed to refer any application for costs or reimbursement of fees to Member Edquist who will make relevant orders.

MEMBER C. EDQUIST

APPEARANCES:

For Applicant	Ms C. D. Jasen, in person
For Respondent	Ms G. Berlic, of Counsel

REASONS

Introduction

1. On the south side of Spensley Street, Clifton Hill stands a handsome row of seven Victorian terrace houses, including Nos. 65 and 63. At the heart of this case is the question of whether in the early months of 2017 there was an unreasonable flow of water from No. 65 into No. 63.

2. The applicant is Carol Diane Jasen, the owner and occupier of No. 63, who brings her proceeding against Alessandro Demaio, the owner of No 65.

3. Although the action on its face is a straightforward claim for damages made under s 16 of the *Water Act 1989* ("**the *Water Act***"), it was conducted in a very adversarial manner. Before the substantive hearing, there were a number of interlocutory hearings. The attitude of the respondent was no doubt hardened by the fact that Ms Jasen in her initial application filed in April 2018 did not seek an order for damages, but sought an order that Mr Demaio immediately undertake repairs and rectification in accordance with recommendations made by her consultant architect, Mr Salvatore Mamone. The repairs demanded included repairs to a galvanised water supply pipe running under the paving in the backyard and under the house at Mr Demaio's property, and the removal of two maple trees in the backyard of that property.

4. The nature of Ms Jasen's claim had substantially changed by the time the matter came on for hearing, as the maple trees had been removed and the galvanised pipe had been partially replaced. Ms Jasen's claim for damages was limited at the hearing to $8,519.[1] This was significantly less than the first formal quantification of the claim of $15,602.77, which had been made in Ms Jasen's second amended points of claim.[2]

5. When the substantive hearing ultimately got underway on 23 July 2018, progress was slow. A delay was caused because Ms Jasen indicated shortly after the start of the hearing that she had made a claim to an insurer in respect of the losses that she was pursuing in the Tribunal against Mr Demaio. She indicated further that she has made a complaint about the insurer to the Financial Services Ombudsman ("**the FOS**") and after an investigation lasting five or six months, received a letter from the FOS advising "that the insurer would pay for almost the entire quantum of [her] claim at the VCAT, including a substantial amount of the costs."[3] It was explained to Ms Jasen that in circumstances where Mr Demaio was seeking to get on with the hearing, she had to make an election. The hearing could proceed, or it could be adjourned, or it could be withdrawn. However, it was made clear by Ms Berlic that if the proceeding was withdrawn, Mr Demaio would be making an application for costs. The matter was stood

[1] See Transcript, page 182, line 1.
[2] Dated 22 May 2018.
[3] See Transcript, P 11 at lines 5-8

down to enable Ms Jasen to talk to the insurer. After this adjournment, despite having spoken to both the insurer and the FOS, Ms Jasen was not in a position to adjourn or withdraw the proceeding. She accordingly indicated that she wished to proceed, and that she proposed to claim everything.[4] There was a further short adjournment to enable the parties to consider whether they both wished to proceed, and the hearing went ahead.

6. The hearing ran through the balance of the first day and through the whole of 24 July 2018. Even then it was not concluded. A final hearing date was set for 21 November 2018. The matter was listed for that day, but as an important witness to be called by the respondent had become unavailable shortly before that hearing, only Mr Mamone's evidence could be dealt with in the morning, and it was necessary to adjourn the hearing to 10 December 2018.

7. Because the hearing extended over several days in different months, the parties were given the opportunity to file their final submissions in written form. The respondent thought it necessary to obtain a transcript of the first two days of the hearing.

Relevance of insurance

8. On the day the hearing started, Ms Jasen had received a letter from the FOS indicating that her insurer was prepared to pay most of, her claim, but she had not formally heard from the insurer, let alone received a payment. By the time the hearing resumed in November, Ms Jasen had been paid out by her insurer. Mr Demaio made no submissions about the relevance of Ms Jasen's insurance, or his own insurance.

9. As the availability of insurance to one party or another in respect of losses caused by an unreasonable flow of water is irrelevant to the issues of liability and quantum I have ignored the existence of insurance in reaching this determination of the dispute.

Relevant provisions of the *Water Act*

10 Ms Jasen relies on section 16 of the *Water Act,* which provides as follows:

> (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.
>
> (2) If—

[4] See Transcript, P 23 at lines 3 and 8-9.

(a) a person interferes with a reasonable flow of water onto any land or by negligent conduct interferes with a flow of water onto any land which is not reasonable; and
(b) as a result of that interference 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 interfered with the flow is liable to pay damages to that other person in respect of that injury, damage or loss.

(3) If the person who caused, or interfered with, the flow (as the case requires)—
(a) is the servant of another person and acted in the course of the servant's employment; or
(b) is the agent of another person and acted within the scope of the agent's authority—that other person is liable to pay damages in respect of the injury, damage or loss.

(4) The existence of a liability under subsection (3) does not extinguish the liability of the servant or agent under subsection (1) or (2), as the case requires.

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

(6) The existence of a liability under subsection (5) extinguishes the liability under subsection (1) of the person who caused the flow or the liability under subsection (2) of the person who interfered with the flow (as the case requires).

11 That s 16 of the *Water Act* is the repository of liability for events within its purview is emphasised by s 17(1), which provides as follows:

> 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.

12 In *Kopitschinski v Song* [5] Deputy President Macnamara, as he then was, set out the background to the creation of the current legislative framework governing the flow of water as follows, at [34-37]:

> 34. For many years it was thought that an owner of lower land was obliged to receive on his land all surface water which flowed naturally onto it from higher land. This was thought to have been established by a decision of the Judicial Committee of the Privy Council in *Gibbons v Lenfestey* (1915) 84 LJ (PC) 158. The existence of any such legal

[5] [2007] VCAT 1958

principle in Australia was rejected by the High Court of Australia in *Gartner v Kidman* [1962] HCA 27; (1962) 108 CLR 12.

35. When the law as to the drainage of land was under review following the recommendations of a Joint Select Committee of the Victorian Parliament one of the principles advocated in the Joint Select Committee's report was the re-establishment of a so called *'free flow'* principle. The *Drainage of Land Act* 1975 included Section 7 which stated:

> No civil action, suit or proceeding shall lie against any person in respect of causing or permitting by that person to of any waters to flow onto the land of any other person in a reasonable manner.(Sic)

36. In moving an amendment to the *Drainage of Land Act* 1975 in the form of the *Drainage of Land (Amendment) Bill* 1984 the Minister for Water Supply, the Hon. D.R. White, said of the free flow principle:

> The statutory establishment of this principle was made necessary by a 1962 High Court decision which overturned the basis of common law which had applied in Victoria for some 60 years.
>
> *Hansard* Legislative Council 28 February 1984 Volume 373 1600 Column 1

37. The *Water Act 1989 Part 2* of which replaced the *Drainage of Land Act* contains no positive statement of the *'free flow principle'* analogous to Section 7 of the *Drainage of Land Act*. The same principle is clearly exemplified however by the provisions of Section 16 rendering persons causing unreasonable flows of water from one person's land onto another causing damage liable to pay damages but conversely imposing a liability for damages upon those who interfere with reasonable flows of water from one person's land onto another. The scheme is completed by the provision to be found in Section 18 excluding any other forms of civil liability beyond in circumstances such as the present those set out in Section 16 (sic).

13 Under s 19(1) of the *Water Act* the Tribunal has jurisdiction in relation to all causes of action (other than any claim for damages for personal injury) arising under several sections of the Act including s 16. The Tribunal is given wide powers under s 19 (3) which provides that in exercising the jurisdiction conferred by ss (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.

14 Section 19(4) of the Act provides that 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 s 2 of the *Penalty Interest Rates Act 1983* or on any lesser rate that it considers appropriate.

15 Section 19(8) allows a person to claim damages in a court for personal injury based on a cause of action arising under nominated sections of the Act including s16, or at common law in respect of the escape of water from a private dam. This provision clearly complements ss 19(1), which, as noted, excludes any claim for damages for personal injury from the jurisdiction of the Tribunal.

16 Relevantly, s 19(9) provides that in determining a cause of action arising under a number of sections including s 16 of the 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.

17 Guidance is provided in s 20 of the *Water Act* as to some of the matters to be taken into account in determining whether a particular flow water has been unreasonable. It will be necessary to go through the factors identified in s 20 in due course. This can more usefully be done when the matrix of facts underpinning this case have been established.

Some observations about Section 16(1) of the *Water Act*

18 Ms Jasen relies on s 16(1) of the Act, which creates liability for:

(a) injury to another person;
(b) property damage; and
(c) economic loss.

It is relevant to make three threshold comments.

Strict liability

19 First of all, the provision is one of strict liability. As Deputy President Macnamara remarked in 2007 in *Turner v Bayside City Council*[6], at [19]:

> It is important at this stage to keep steadily in mind precisely the question that is being addressed. The applicant relies upon a statutory cause of action in the ***Water Act***. Where the necessary facts are made out, the cause of action under Section 16(1) appears to be one of strict liability, that is, it is not necessary to demonstrate any want of reasonable care. The mere proof of causation seems to be enough. Nor are we seeking to answer the question whether the respondents owed a duty of care in accordance with the Common Law tort of negligence to Mr Turner.

[6] [2000] VCAT 399

The Tribunal has jurisdiction regarding a ruptured underground water pipe

20 In *Coles-Myer Limited v. City West Water Ltd*[7] Gillard J considered a common law negligence claim and in doing so held that s 16(1) applied in circumstances where an underground water supply main pipe owned by the defendant ruptured and flooded the basement property and ground floor levels of the plaintiffs' premises known as the Myer City Store in Lonsdale Street. In other words, his Honour held that s 16 applied to water escaping from a water main pipe that had been ruptured where there does not appear to be any issue of drainage.

Tribunal has no jurisdiction in respect of a claim other than for property damage or economic loss

21 The third comment is that although the Tribunal can deal with any property damage claim or any claim for economic loss, it cannot deal with any claim made by Ms Jasen for personal injury. This is clear from the language of ss 19(1), which is set out above. Any claim for personal injury made under s 16 of the *Water Act* must be brought in a Court.

22 Ms Jasen includes in her claim "damages for loss of enjoyment of life, inconvenience and mental stress". In *Kopitschinski v Song* [8] Deputy President Macnamara held that s 19 (1) excluded a claim for $1,000 in respect of the applicant's "subjective experience of past discomfort or inconvenience".

23 Late last year, in *Collins v Greater Geelong City Council,* I had to determine a *Water Act* claim which included as a head of damages a claim for "loss of amenity and use of the land and general inconvenience, worry and anxiety…" [9]. I dismissed this limb of the claim, following the approach taken by Deputy President Macnamara in *Kopitschinski v Song*. At [45] he explained that the provisions of Part 2 of 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."

24 I observe that J Forrest J in the Supreme Court of Victoria in *Thomas v Powercor Australia Limited* (Damages ruling)[10] acknowledged that in Victoria, a right to recover damages for physical inconvenience is recognised in both contract and in tort. His Honour also recognised that a claim for physical inconvenience could be distinguished from a claim for mental distress, and that a claim for inconvenience per se can be the subject of a claim for damages. These issues are accordingly settled for the purposes of an action in either contract or negligence.

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[7] [1998] VSC 63
[8] [2007] VCAT 1958
[9] [2018] VCAT 1873
[10] [2011] VSC 586

25 However, we are concerned here with an action under s 16 of the *Water Act.* The insurmountable issue facing Ms Jasen arises from the words of the statute. As observed by Deputy President Macnamara, in *Kopitschinski v Song* at [46]:

> The $1,000 damages claim being neither an award of damages for economic [loss] nor for damage to property is therefore not available and this claim must be dismissed.

26 I respectfully adopt (again) Deputy President Macnamara's reasoning and rule that Ms Jasen's claim for damages for "loss of enjoyment of life, inconvenience and mental stress" is not a claim that can be determined by the Tribunal.

Ms Jasen's evidence regarding the flow of water

27 Ms Jasen set the scene by establishing her ownership to the property at No. 63 Spensley Street. She had owned it for about 44 years. Mr Demaio had acquired No. 65 in 2014, and had immediately let the property to Dr Marcus Ryan.

28 Ms Jasen deposed at the hearing that on 14 February 2017 Dr Ryan came to her front door and advised that there was a substantial amount of water in the rear garden at 65 Spensley Street. When she went into the courtyard at No 65. to inspect she observed that the entire courtyard was flooded and that water was bubbling up through the joints of paving. She described the water flow in these terms:

> It seemed to be bubbling up a lot in the centre of the courtyard and the flow was very rapid and it was flowing out of the courtyard down and out into the lane way that runs along behind the properties. [11]

29 Ms Jasen's evidence was that when she returned to her house after her conversation with Dr Ryan she checked her own water pipes and confirmed that they were not the source of the problem. They were above ground and in good condition, being fairly new. She noted that her garden bed along the dividing fence between her property and Mr Demaio's was "just a quagmire of mud" and concluded that a pipe had burst.

30 Ms Jasen deposed that because she was concerned about the effect that the water would have on bluetone foundations of her house, she asked Dr Ryan to report the situation to the agent straight away. Her evidence was that he did not do so, and when she became aware of this late on 15 February she contacted the agent herself on 16 February 2017.

31 At the hearing Ms Jasen gave evidence about her conversation with Mr Demaio's managing agent, "Holly". It later became clear that this was Hollie-Jayne Fielding, of Jellis Craig. Ms Fielding apparently said that she would "send someone out to have a look" but Ms Jasen insisted that action be taken. She referred at this point in her evidence to her own rear garden

[11] C Transcript, page 31 at lines 3-6.

and having turned into mud, and water seeping into her brick paving on the side closest to Mr Demaio's property.

32 Ms Jasen gave evidence that because she was concerned that the managing agent did not seem to appreciate the seriousness of the situation, she wrote to the managing agent on 16 February 2017. She tendered this letter. Relevantly she noted that the tenant had advised her on 14 February 2017 of "a serious and substantial leak from a water pipe in the rear garden of 65 Spensley Street" and that the tenant had noticed the water leak on 12 February 2017. She advised that a similar leak had occurred a few years ago from a "deteriorated galvanised iron water pipe located underground" that had been repaired, and added "it appears that the deteriorated pipe may have again sprung a leak". She confirmed that the leaking pipe required emergency attention.

33 Ms Jasen's phone call was successful in so far as the managing agent did send the plumber around on 16 February 2017. Ms Jasen was aware of this, because she spoke to the plumber. Relevantly, he confirmed that he had repaired a burst pipe.

34 The invoice relating to this attendance by a plumber was at this point put into evidence. It confirmed that a plumber from Fix My Place Group attended to repair a ¾ mains pipe in the back yard at 65 Spensley Street which had split, on 16 February 2017. It seems there must have been two breaks in the pipe, because two sections were removed and replaced.

35 Ms Jasen then deposed that following this initial repair, the water saturation in her backyard did not improve. She expected that it would dry out, but in February, it did not. This caused her to write a further letter to the managing agent on 21 March 2017. This was also put into evidence. Relevantly, she stated:

> However, despite the plumber's repair the water pipe continued to leak for **four weeks** since on or before 12 February 2017 when the water leakage was first noticed by the property's lessee Marcus. Marcus has stated that the plumbers did not stop the leak and were required to return on 9 March 2017 to again attempt to repair the leaking water pipe.

36 In this letter Ms Jasen complained about not only the flooding, but also the "problematic root system of the large Maple/Japanese Maple growing at 65 Spensley Street". She said that the roots of the tree had damaged the concrete slab under her laundry, and that the ongoing water leakage had contributed to undermining that slab. She demanded that action be taken to repair the water pipe and that the maple tree be removed.

37 The fact that the plumber attended again on 9 March 2017 is confirmed by a second invoice from Fix My Place Group, this time dated 14 March 2017. This confirms that upon inspection, the plumber found that the mains water line had burst about a metre from the old burst. Ms Jasen highlighted that this invoice carried a note:

> If this line bursts again, a new line will be required from the meter, changing the copper line to poly pipe (plastic pipe).

38 Ms Jasen then gave evidence that she had gone overseas in May and June for about six weeks. In about August she bumped into Dr Ryan, and he said that while she had been away the water line had burst again. This prompted her to write for a third time to Mr Demaio through his agent about the problem of dampness. In this letter, which was dated 26 August 2017, she notified that the rear kitchen wall in her house was subject to rising damp which she asserted was a direct result of the excessively damp clay subsoil resulting from the leaking of the pipe. She again demanded action regarding the leaking, and the removal of the maple tree, and extended the deadline for action to 30 September 2017.

39 Although Ms Jasen's evidence in chief was completed by the end of the first day, there was no time for her to be cross-examined. The following morning, it was necessary to interpose Dr Ryan as a witness. The upshot was that Ms Jasen was not cross-examined until after Dr Ryan had given his evidence.

DR RYAN'S EVIDENCE ABOUT THE FLOW OF WATER

40 Dr Ryan gave evidence on the morning of the second day the hearing. The substance of his evidence was that on Saturday or Sunday, about 12 February 2017, he saw water pooled in the backyard. This itself was not unusual, because "there was a tendency for water to pool in the backyard after rain." What was unusual was that on the following Tuesday "there was a significant body of water in the courtyard in the backyard".

41 When Dr Ryan was pressed by Mr Demaio's counsel to be more descriptive, he explained that the back courtyard of his house had a paved area in the middle about 3 metres wide, surrounded on each side by a garden bed. The paved area was full of water from one garden bed to the other, and extended close to the back of the house. It was "maybe 3 or 4 inches deep," in the depression in the middle but reducing in depth closer to the back of the house.

42 Dr Ryan suggested that he would have gone to work early, and guessed that at 5.30 or 6.00 p.m. he noticed water in the courtyard on Tuesday, 14 February 2017. It was then that he went next door to speak to Ms Jasen. He said he did so because he wasn't sure what was going on. He suggested to Ms Jasen that the water might be coming from her place, but she didn't agree. They discussed contacting the agent. He thinks the discussion was that if water remained he was to contact the agent. However, his recollection was clearly vague about this discussion.

43 When he was asked what happened next, Dr Ryan said that he got up the next morning and went to work. He didn't look in the backyard. He thinks he may have noticed water in the backyard that evening, Wednesday, and thinks he may have noticed again on Thursday morning, but added that he

couldn't remember. When he did see the water again, it had not subsided, and he thinks that he may have contacted the agent at this point. Again, he was vague, stating "I don't remember the process, whether I phoned or emailed".

44 Dr Ryan recalled that after the plumbers attended, and fixed the hole in the pipe, they excavated a hole to expose the pipe, and left the pipe still partly exposed.

45 When he was asked by Mr Demaio's counsel whether he noticed anything out of the ordinary about the water in the backyard after the pipe was fixed, he answered that he believed the water drained away. However, he couldn't say over what period that occurred. He said "Things were fine" for a period, and then noted that water was pooling in the hole that had been excavated by the plumber. He then called Ms Fielding at the real estate agent's office, and she sent the plumber around promptly.

46 When he was asked whether the plumber attended promptly in relation to the second matter, Dr Ryan answered that "It was either that day or the next day… I'm pretty sure it was the same day but again it is a degree of speculation."

47 Dr Ryan was then asked whether he had had a conversation with Ms Jasen about a third leak. He denied this, saying "there was certainly no third leak. There was just the two leaks, I'm very clear about that.".

48 When Dr Ryan was cross-examined by Ms Jasen, he did not agree there had been a conversation about the pipe bursting while Ms Jasen had been away, suggesting instead that she had been referring to a discussion after the February leak, and that he had been referring to the March leak.

Cross-examination of Ms Jasen

49 When Ms Jasen was cross-examined she was adamant that in her first discussion with Dr Ryan she had said that the agent had to be contacted "as a matter of urgency". She specifically disagreed that the effect of the conversation was that they could wait and see what happened with the water. The difference between the description of the water "bubbling up" and Dr Ryan's more measured description of water pooling in the backyard was highlighted. When pressed about her discussions with Dr Ryan after 14 February, Ms Jasen confirmed that she followed up with him at the end of the following day, and at that point ascertained that he hadn't phoned the agent as he had promised to do so. This caused her to call the agent on 16 February.

50 The cross examination of Ms Jasen highlighted the tension between her evidence about what happened after the plumber attended on 16 February 2017 to fix the burst pipe, and that of Dr Ryan. Dr Ryan had stated that he considered the plumber had fixed the pipe properly. It was only when he noticed water was pooling in the hole that he called the agent, resulting in the plumber attending on the second occasion on 9 March 2017. Ms Jasen

confirmed that Dr Ryan had told her previously that water had continued to leak, and this was why he had had to call the agent. She added:

> [T]he reason I consider he was correct at the time was that my garden was increasingly saturated. The brick paving, which had been saturated in only a section towards the fence, was now completely saturated from one side of the brick paving to the other on the west side…[12]

51 When it was put to her again that Dr Ryan's evidence had been that the plumber had left the hole open and that it took some weeks for the hole to fill with water, Ms Jasen was adamant that the leak had continued for weeks. In a key passage, she said:

> Look, it's what I was told at the time, and I can't help what Mr Ryan is saying now. I would not write a letter purporting that Mr Ryan said things at the time that he didn't say. When I wrote this letter what he said was fresh in my mind, because he's only said it very recently. I have not made any mistake about what Mr Ryan told me after the pipe burst for the second time in March.[13]

52 A further issue came out of the cross-examination of Ms Jasen. This related to whether Ms Fielding had told Ms Jasen in February 2017 that the owner Mr Demaio did not wish to replace the pipe at that point because of the "enormous" cost.

53 A point of tension was that Ms Jasen said that at some point after sending a letter to the owner, care of his new managing agent, she had a conversation with that agent, Mr Randall Sharp. Her evidence was that Mr Sharp had said to her that he had recommended to Mr Demaio that the entirety of the defective water supply line should be replaced, but that Mr Demaio had refused to do it. Against this, it was explained that Mr Sharp would give evidence that he had not said this to Ms Jasen, but that Mr Demaio was investigating whether or not it was necessary to replace the pipe.

DISCUSSION OF MS JASEN'S CLAIM

54 To succeed, Ms Jasen will have to establish:

(a) a flow of water from the land of another person onto her land;
(b) that the flow is not reasonable; and
(c) that the flow caused damage to her property or caused her to suffer economic loss.

55 The first element, that is to say a flow of water from Mr Demaio's onto Ms Jasen's property, is not in issue. In fact there were at least two relevant flows. The first occurred when the pipe initially burst on or before 12

[12] Transcript, P175, lines 1-5.
[13] Transcript, P176, lines 13-20. All in all

February 2017[14]. The second occurred when the pipe burst again after 16 February 2017 but before 9 March 2017, or resulted from a leak that was in existence on 16 February but was not repaired on that day. However, the unreasonableness of the flow, and the causation of damage, are very much in issue.

56 Ms Jasen contends that the water flow arising from the events was not reasonable "as the flow was very substantial".

57 Mr Demaio's defence is that his managing agent had moved quickly on both occasions to have the burst water pipe repaired after the managing agent became aware of the problems. On this basis, neither flow of water could be regarded as "unreasonable".

RELEVANCE OF S 20 OF THE *WATER ACT*

58 Section 20(1) the subsection sets out a list of matters to be taken into account in determining whether flow is reasonable or not reasonable. Before I embark on an analysis of that subsection, it is relevant to note that Robson J in *Spagnolo v Body Corporate Strata Plan 418979Q*[15] *("Spagnolo")* observed at [38]:

> The matters referred to in s 20 of the *Water Act 1989*, being matters to be taken into account in determining whether a flow of water is reasonable or not reasonable, arguably do not by their terms expressly relate to the flow of water through reticulated domestic water pipes. The matters arguably relate to drainage water.

59 His Honour turned to a related point when he said at [54]:

> In my opinion, there is still an unresolved issue as to whether or not sections 16, 17 and 19 apply to water flow other than drainage water. It is unnecessary for me on this appeal, however, to express any view on this issue one way or the other as the appeal was argued solely on the issue of whether the relevant flow of water was from the land of a person onto other land as referred to in paragraph 16(1)(a) of the *Water Act 1989*.

60 The Tribunal has consistently proceeded on the basis that s 16 of the *Water Act* applies to a flow of water in the urban setting. Notwithstanding Robson J's reservations about the issue, I have no hesitation in adopting this approach in the present case.

61 With respect to the related question of whether s 20 of the *Water Act* applies to the flow of water through reticulated domestic water pipes, I must make a decision, as the matter is directly before me. I will proceed on the basis that it does, for two reasons. Firstly, if Parliament had intended that ss 20(1) was not to apply in the urban setting, it would have been an easy

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[14] Although Dr Ryan gave evidence that the first informed Ms Jasen of the body of water in his backyard on or about 14 February 2017 he also gave evidence that he had first noticed the flood on 12 February 2017.

[15] [2007] VSC 423.

thing to have drafted the subsection accordingly. Secondly, although some provisions of the subsection appear to apply only to flows of water over open land, it seems to me that subsection 20(1)(g) clearly has scope for application in the domestic setting.

62 Relevantly, ss 20(1) 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
>
> (iii) 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**.
>
> (2) In taking account of the matters specified in subsection (1), greater weight must be attached to the matters specified in paragraphs (a), (b), (c) and (d) than to the other specified matters.

63. The Court of Appeal of the Supreme Court Victoria in *Hazelwood Power Partnership v Latrobe City Council*[16] observed, at [181]:

> When determining whether a flow is reasonable under s 16(2), regard must be had to all relevant circumstances. The list of matters set out in s 20(1)(a)–(i) is a non-exhaustive one. Nevertheless, in considering the stipulated matters, greater weight must be given to the factors initially set out in sub-ss (1)(a)–(d).

64. The Court of Appeal then referred to two decisions which at the trial had been treated as conveniently setting out contextual background to the provisions of Division 2 of the *Water Act.* The first decision referred to, at [182], was the decision of Deputy President Macnamara in *Kopitschinski v Song*. The relevant passage in this decision referred to by the Court of Appeal, concerning the Free Flow Principle, has already been set out above[17]. The second was *Spagnolo*. Of relevance to the present case is the following observation of Robson J, at [30]:

> A further similarity in the schemes in the Drainage of Land Act 1975 and the *Water Act 1989* involves the concept of "reasonable". As indicated above, s 16 of the *Water Act 1989* requires that the flow of water from the land of a person onto any other land to be "not reasonable" in order to make out the statutory cause of action. Sub-section 16(2) of the Act refers to a "reasonable flow of water". The Act contemplates that a flow of water from one property to another is either reasonable or is not reasonable. It is the flow of water which has to be characterised as reasonable or unreasonable and not the conduct of the person sought to be held liable.

Consideration of the factors identified in ss 20(1)

65. Bearing the final point in mind, I now turn to the criteria set out in ss 20(1). The issue under ss 20(1)(a) is whether or not the flow, or the act or works that caused the flow, was or were authorised. The second criterion, arising in ss 20(1)(b), is related as it is concerned with the extent to which any conditions or requirements imposed under the *Water Act* in relation to an authorisation were complied with. Section 3 of the Act defines "authorised". In brief, the term means authorised by an Act or by a licence, permit or other authority. I acknowledge that plumbing is work regulated under part 12A of the *Building Act 1993* but observe that no evidence about

[16] [2016] VSCA 129
[17] See [12] above.

the laying of the pipe or its authorisation was put before me. I accordingly disregard these criteria.

66. Subsection 20(1)(c) interrogates whether or not the flow conforms with any guidelines or principles published by the Minister with respect to the drainage of the area. No such guidelines were drawn to my attention. In any event, it hard to see how drainage guidelines could be relevant to the present case. I put this criterion to one side.

67. The fourth issue, arising under ss 20(1)(d), is 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 that was reasonably available about the cumulative effects on drainage of works and activities in the area. There was no evidence about these matters, which is not surprising, as the criterion appears to be directed towards large projects.

68. Under ss 20(1)(2) greater weight must be attached to the first four criteria. Nonetheless, I must examine the balance of the items identified in s 20.

69. Subsection 20(1)(e) highlights the uses to which the lands concerned and any other lands in the vicinity are put. I consider the impact of this criterion to be neutral, because both Ms Jasen's property and Mr Demaio's are used for domestic purposes.

70. Subsection 20(1)(f) demands consideration of the contours of the lands concerned. This criterion would appear to be more relevant in a rural setting, but it is relevant in the present case because it is self-evident that in a flow of water from Mr Demaio's property is likely to impact Ms Jasen's property as it is down the slope.

71. Subsection 20(1)(g) sets out what appears to be, in the present context, the most relevant enquiries. It justifies a separate discussion, which follows below.

72. Subsection 20(1)(h) is concerned with whether or not the flow was affected by any works restricting the flow of water along a waterway. This is clearly not relevant in an urban setting.

73. A similar comment can be made about the criterion raised in ss 20(1)(i) namely, whether or not the flow is likely to damage any waterway, wetland or aquifer.

Subsection 20(1)(g)

74. The enquiry directed by ss 20(1)(g) is whether the water was brought onto the land from which it flowed; or 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.

75. It is common ground between the parties that water was brought on to Mr Demaio's property, as it was connected to the public water supply system. The water was carried to the house from a connection point at the rear

boundary through a water pipe that ran for a distance under the surface of the soil in Mr Demaio's backyard. In this manner it can be said to have been "collected, stored and concentrated".

76. This is done for the ordinary and reasonable purpose of transmitting water from the public water supply system to the dwelling. That is certainly to the point, having regard to the way in which to the first part of the test articulated in ss 20(1)(g) has been formulated. The remaining issue determinative of liability is whether bringing the water onto the land and then concentrating it in a pipe under pressure was done with an appropriate degree of care.

77. As to this, Ms Jasen said that she had purchased her property about 44 years ago. Mr Demaio's house must be of similar age to her own, as they sit in the same row of terraces. She gave evidence that the pipe on Mr Demaio's property was old, but she also said that her first experience of the pipe bursting occurred several years before Mr Demaio purchased his property in 2014. One inference to be drawn is that the pipe was many years old when it first failed. A further inference that can reasonably be made is that the pipe, having apparently operated without issue for decades, was installed with appropriate care at the outset.

78. However, this cannot be the end of the matter, because it is self-evident that even a well laid and properly plumbed metal pipe will corrode over time. The question to be answered is, accordingly, whether a failure to maintain such a pipe constitutes a deviation from the required degree of care.

79. It is apparent that unless a metal pipe used for that purpose is properly maintained, ultimately it will corrode, and damage to downhill adjoining property holders is very likely to ensue. In the present case, the pipe was not maintained or replaced in whole or in part by Mr Demaio until after it had burst. It appears clear that Mr Demaio's policy regarding maintenance of the pipe, if he had one at all, was to use it without maintenance until it failed. Having regard to the clear foreseeability of damage being caused to any adjoining downhill property by water flowing from the pipe after failure, I consider that such a policy does not reflect the required level of care. I find, taking into account the second part of the test set out in s 20(g), that Mr Demaio had a positive duty to maintain the pipe.

80. I accordingly also find that the flow of water from Mr Demaio's property to Ms Jasen's land arising from even the first burst (or bursts) of the pipe in February 2017, was unreasonable.

81. The failure by Mr Demaio to have the pipe renewed after the first burst (or bursts) is a second reason why the March burst was unreasonable.

CAUSATION

Respondent must cause the flow

82. Mr Demaio in his final submissions set out some contentions about causation. The key proposition advanced at [6] was that Ms Jasen had to show that Mr Demaio had caused the flow of water complained of. This proposition was supported by a quotation from Senior Walker's decision in *Kong v Rajaratnam*[18], who said at [5]:
In order to recover damages it is necessary to demonstrate that the person from whom the damages are sought has caused the flow complained of. It is not sufficient simply to establish that the flow of water came from the land of that person.

83. I respectfully accept that it represents the law, as it follows directly from the words of s 16, which makes "the person who caused the flow" liable. As Robson J observed in *Spagnolo:*

> In my opinion, the relevant flow of water as referred to in s 16 is identified by other words referred to in that section. In particular, that flow must not be reasonable and, importantly, that flow must be caused by a person who, under the section, is liable to pay damages to the other person in respect of injury, damage or loss.

Section 19(9) of the *Water Act*

84. It was accurately observed in Mr Demaio's submissions that under s 19(9) of the *Water Act* in a cause of action arising under s 16 (amongst others) the Tribunal must apply 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. Following on from that submission, reference was then made to s 51 of the *Wrongs Act 1958*, which sets out general principles for causation in an action for negligence. Section 51(1) of the *Wrongs Act 1958* provides:

> 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**).

85. In *Collins v Greater Geelong City Council* [19] at [43-49], I accepted that s 51 of the *Wrongs Act 1958* applied to a case brought under s 16 of the *Water Act*. For the purposes of the present case, it is unnecessary to say more on the topic.

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[18] [2018] VCAT 204
[19] [2018] VCAT 2044

Is it necessary to establish a duty of care?

86. Reference was then made in Mr Demaio's submissions to *Kong v Rajaratnam,* where Senior Member Walker said at [7]:

> Causation can be established by proving some act or omission on the part of the Respondent that resulted in the unreasonable flow. For an omission to be actionable in the law of negligence, it must be found that there was a duty to act, that is, a duty to do that which was not done.

87 I am not sure that Senior Member Walker was suggesting that for liability to arise under s 16 of the *Water Act* there must be a breach of a duty of care arising under the law of negligence. He was making the observation that for an omission to be actionable under the law of negligence, there must be a duty of care to act. His comments must be read in the light of ss 19(9), which he set out in the immediately preceding paragraph, which mandates that in assessing liability under a number of provisions including ss 16 it is necessary to apply to the questions of causation and remoteness the tests applicable in an action based on negligence.

Comparison of s 16 and s 157 of the *Water Act*

88 In considering the issue, it is useful to compare the wording of s 16 and s 157 of the *Water Act.* Relevantly, s157 provides:

> (1) If—
>
> (a) as a result of intentional or negligent conduct on the part of an Authority in the exercise of a function under Part 8, Part 9, Division 2, 3 or 5 of Part 10, or Part 11 or any corresponding previous enactment, a flow of water occurs from its works onto any land; and
>
> (b) 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 Authority is liable to pay damages to that other person in respect of that injury, damage or loss.

89 Thus, under s 157, an authority is only liable if a flow of water occurs from its works onto any land "as a result of intentional or negligent conduct". The difference in drafting highlights that under ss 16(1) a finding of negligence on the part of the respondent is not necessary to establish liability.

90 An important feature of the mechanism for imposing a liability under s 157 is that there is a reverse onus of proof. This arises under s 157(2) which reads:

(2) If it is proved in a proceeding brought under subsection (1) that water has flowed from the works of an Authority onto any land, it must be
presumed that the flow occurred as a result of intentional or negligent conduct on the part of the Authority unless the Authority proves on the balance of probabilities that it did not so occur.

91 Intentional and negligent conduct are given statutory meaning by ss 157(3)(a) and (b). Subsection 157(3)(a) provides a non-exhaustive definition of 'intentional conduct', and s 157(3)(b) describes the considerations relevant in determining whether there has been 'negligent conduct on the part of an Authority'. For present purposes, the point to be noted is that the question of whether the authority has been negligent is a key one.

92 The nature of the cause of action arising under s 157 was discussed by the Court of Appeal in *Patsuris v Gippsland and Southern Rural Water Corporation*.[20] There Garde J, with whom Tate and Kyrou JJA agreed said, at [55]:

> Section 157 provides a freestanding statutory cause of action. It is very different from any cause of action available at common law. It does not require a duty of care akin to that required to establish the tort of negligence. If a claimant proves that a flow of water has occurred from the works of an Authority onto any land causing injury, damage or economic loss to any other person, the Authority is liable to pay damages to the other person unless the Authority proves on the balance of probabilities that the flow did not occur as a result of intentional or negligent conduct.

Section 16 creates a statutory cause of action

93 Despite the obvious differences between s 157 and s 16 of the *Water Act*, I think Garde J's statement that s 157 "provides a freestanding statutory cause of action" gives guidance as to how s 16 is to be read. In my opinion, it too provides a freestanding statutory cause of action that does not require a duty of care, such as that required in an action for negligence, to be established.

94 On this basis, I consider that all that is required for liability to be created under s 16 is for it to be established that the respondent caused a flow of water from the land of one person onto that of another, and that the flow was not reasonable, and that the water has caused injury, damage or economic loss.

95 I observe that this view is consistent with that expressed by Deputy President Macnamara in *Turner v Bayside City Council*[21] where he stated at [19]:

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[20] [2016] VSCA 109
[21] [2000] VCAT 399

> It is important at this stage to keep steadily in mind precisely the question that is being addressed. The applicant relies upon a statutory cause of action in the *Water Act*. Where the necessary facts are made out, the cause of action under *Section 16(1)* appears to be one of strict liability, that is, it is not necessary to demonstrate any want of reasonable care. The mere proof of causation seems to be enough. Nor are we seeking to answer the question whether the respondents owed a duty of care in accordance with the Common Law tort of negligence to Mr Turner. The issue of *"duty"* arises only in so far as the establishment of its existence and breach is the only means whereby it can be said that the respondents *"caused"* the flow of water.

96 I now address the question of whether Mr Demaio caused the flow of water.

Mr Demaio caused the flow of water

97 In *Turner v Bayside City Council*[22], Deputy President Macnamara at observed [16]:

> Reference in section 16 (1) to "the person who caused the flow" is presumably to be read as meaning the person whose acts or omissions caused the flow.

I respectfully agree.

98 I find that Mr Demaio did cause the flow of water. He did so not by an act, but by an omission. The relevant omission was failing to maintain the pipe, which I have found he was under a positive duty to maintain under ss 20(1)(g) of the *Water Act.* I emphasise that the duty arose under that subsection, not by operation of common law negligence. Negligence in the normal sense is not a necessary ingredient for a finding of causation.

REMOTENESS OF DAMAGE

99 A separate submission was made regarding the issue of remoteness. It was contended that the applicant must establish that the damage was of a kind that a reasonable person, having regard to Mr Demaio's knowledge and experience, should have foreseen. This proposition is not controversial.

100 The application of this defence is discussed below, at 187-189 after the allegations of damage have been discussed.[23]

FIRST FINDING AS TO LIABILITY

101. As I have found that the initial flow of water from Mr Demaio's land onto Ms Jasen's was unreasonable, he is liable to Ms Jasen for damage to her property under s 16(1)(c)(ii) of the *Water Act*.

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[22] [2000] VCAT 399.
[23] See paragraphs 187-189 below.

102. This finding involves a rejection of the submission put on Mr Demaio's behalf by his counsel that the first flow was not unreasonable because he had immediately acted, through his managing agent, to engage a plumber to rectify the leak as soon as he became aware of it. As noted above, I consider it to be misconceived, because it focuses on the behaviour of the property owner, when, as Robson J emphasised in his judgement in *Spagnolo,*[24] it is the unreasonable nature of the flow of water that is in issue.

SECOND FINDING AS TO LIABILITY

103 Ms Jasen contends that Mr Demaio's plumber failed to adequately repair the burst pipe in February 2017. She says that water had continued to flow into her property for a period of almost 4 weeks until the plumber attended again and fixed a different section of the water pipe on 9 March 2017.

104 The plumber engaged by the managing agent to fix the burst pipe issued an invoice dated 22 February 2017 stating that it found "the ¾ copper mains in the backyard had split". To repair this, the mains water was disconnected, pavers were removed, concrete under the fence was removed to facilitate location of the pipe, and then two sections of pipe were removed and disposed of. A new section of pipe was welded up, and the mains water was reconnected. The pipe was tested and was stated to be "working OK at time of inspection".

105 On the basis that the pipe was tested and found to be working, Mr Demaio could argue that the plumber performed its work satisfactorily. However, there is contemporaneous evidence that the repair was not satisfactory, in the form of Ms Jasen's letter to the agent dated 21 March 2017.[25] It is to be emphasised that she stated:

> However, despite the plumber's repair the water pipe continued to leak for four weeks since on or before 12 February 2017 when the water leakage was first noticed by the property's lessee Marcus. Marcus has stated that the plumbers did not stop the leak *and* were required to return on 9 March 2017 to again attempt to repair the leaking water pipe.

106 There is obvious tension between this passage and Dr Ryan's evidence at the hearing. It will be recalled that Dr Ryan deposed that after the first repair "Things were fine" for a period before he noted that water was pooling in the hole that had been excavated by the plumber. I note that Dr Ryan was specifically asked whether, between the time that the plumber had come in February and the occurrence of the second leak, he had noticed a regular pooling in the backyard. He answered that he had not. I also note that Ms Jasen robustly defended her account under cross-examination, observing that she couldn't help what "Mr Ryan" was now saying and

[24] [2007] VSC 423 at [30].

protesting that she would not write a letter attributing things to Mr Ryan which he did not say.[26]

107 I prefer Ms Jasen's evidence on this contested issue. I do so because the events occurred about 15 months before Dr Ryan gave evidence. He was merely an observer, not a party to the dispute. Understandably his recollection of some details was uncertain. For instance, he was vague about the details of his first discussion with Ms Jasen on Tuesday, 14 February 2017 about the critical issue of the need to contact the agent. Furthermore, his recollection of a number of points was tentative, prefaced by the phrase "I think".

108 On the other hand, there was nothing vague about Ms Jasen's recollection of events at the hearing. Moreover, she recorded her recollection of Dr Ryan's comments in a letter written within a fortnight of the second attendance by the plumber. If the assertion that the pipe continued to leak had been questioned then by the managing agent, there would have an opportunity for a contemporaneous investigation by asking questions of the plumber and Dr Ryan. There was no evidence that this occurred.

109 I am cognisant that the managing agent Ms Fielding in her affidavit deposed at [6] that between 16 February 2017 and 9 March 2017 she received no further reports of leaking or flooding from the tenant, Ms Jasen or anyone else. I have no reason to doubt this evidence. However, I consider that it is not determinative of anything. I ask rhetorically: why would Ms Jasen make a further report of flooding when she knew the plumber had attended on 16 February to fix the leak? She would have been entitled to assume that the rectification work had been successful, and in due course the flooding in Mr Demaio's yard would dry out.

110 As I accept Ms Jasen's evidence that water continued to pool in the hole excavated by the plumber when he first attended, I am satisfied on the balance of probabilities, and find, that the pipe was not properly repaired on the first occasion. In other words, I consider that the burst that was repaired in March had already occurred. The upshot is that the flow of water continued, and that even if my conclusion that the first flow was not reasonable is wrong, the continuing flow certainly became an unreasonable flow, thereby independently triggering liability for Mr Demaio under s 16(1) of the *Water Act*.

A FURTHER OBSERVATION ABOUT LIABILITY

111 If I had not made this finding, I would have found, in any event, that Mr Demaio was liable in respect of loss flowing from the further failure of the pipe. This is because the evidence of the plumber, according to its first invoice of 22 February 2017, was that he removed and disposed of two sections of pipe. This suggests two sections had failed. This information

[26] Transcript page 176, lines 13-16.

was sufficient, in my view, to have put Mr Demaio on notice that the pipe was liable to fail again at any time.

112 If the pipe was not already ruptured on 16 February at the point at which it was repaired in March, as I have found, it certainly ruptured between 16 February and 9 March 2017 when the plumber attended again. The plumber reported:

> Upon inspection found the mains water line burst, coming from the meter and split has occurred one meter (sic) closer from the old burst.

113 Significantly, in my view, the plumber warned in his second invoice of 14 March 2017:

> If this line burst again, a new line will be required from the meter, changing the copper lines to poly pipe. (plastic pipe)

114 I acknowledge that this warning was given only in the second invoice. However, it could have been, and probably should have been, given in the first invoice. The key point is that even without the express warning from the plumber, Mr Demaio was on notice from the description of the works set out in the first invoice, which indicated that two sections of pipe had been replaced, that the pipe was old and liable to fail in multiple places.

115 It is for this reason that, even if I had not found that the plumber had failed to repair the pipe on the first occasion, I would have found that Mr Demaio was liable for loss flowing from the March pipe burst event.

LIABILITY ARISING UNDER S 16(5) OF THE *WATER ACT*

116 Before leaving the topic of liability under s 16, it is necessary to say something about the liability of Mr Demaio under s 16(5). It was contended by Mr Demaio's counsel that this provision governed the situation, as he "did not install the water line that is alleged to have burst".[27] That provision has been set out above. In summary, if the causing of a flow of water was given rise to by works constructed or any other act done or omitted to be done on any land at a time before the current occupier became the occupier of the land, the current occupier is liable to pay damages in respect of the relevant injury, damage or loss if they have failed to take any steps reasonably available to prevent the causing of the flow.

117 Counsel for Mr Demaio drew my attention to the recent Tribunal decision in *Leung v Harris*[28] and contended that the following passage, which addresses the responsibilities of a subsequent owner of land giving rise to an unreasonable flow of water, should be adopted. The passage, from [85] of Senior Member Walker's decision, reads as follows:

> In summary, the subsequent owner must, within a reasonable time after becoming aware of the existence of the flow of water from his land,

[27] Respondent's closing submissions, at [7].
[28] [2018] VCAT 1630

> investigate the problem, ascertain what positive steps are reasonably available for him to take in order to prevent the flow and take those steps. If he fails to do so, he will be liable for any injury, damage or loss suffered by the other party which would not have been suffered but for such failure. I should add that, so long as the flow is prevented, it does not matter how the subsequent owner does it.

118 I do not think ss 16(5) of the *Water Act* is engaged in this case. *Leung v Harris* and at least one other case[29] determined by the Tribunal under ss 16(5), were concerned with a situation where a new occupier came into possession of land which was already causing an unreasonable flow of water. It may be that the subsection is exclusively concerned with that type of situation.

119 However, for the purposes of argument, I am prepared to accept that ss 16(5) may have scope for operation in circumstances where a new party occupies land which is not on the date of occupation causing an unreasonable flow of water, but at a later point a flow of water from the land occurs as a result of works or some other act done or omitted to be done on the land by the previous occupier. This is the sort of situation which Mr Demaio submits exists.

120 I disagree, because I do not think it can be said that the bursting of the pipe in February and possibly again in March 2017 "was given rise to by works constructed or by other act done or omitted to be done" by a previous occupier. As noted above, the inference to be drawn from the apparent fact that it had operated for decades without mishap is that the pipe that burst had been laid and plumbed correctly in the first instance. The unreasonable flow of water complained of arose because an aged pipe ultimately lost its ability to contain water under pressure, and not from anything done or not done concerning the pipe prior to Mr Demaio (or his tenant under a lease from him) becoming occupier in 2014.

DAMAGE

121 I now turn to examine the damage caused by the unreasonable flow of water. In undertaking this analysis, I do not distinguish between damage which may have been caused by the first pipe bursting event, or the second. Mr Demaio is, on my analysis, liable for both events, if indeed there were separate events. As noted, it is quite possible that the failure of the pipe was rectified in March was present at the time the plumber attended on 16 February 2017.

122 Ms Jasen contends of the unreasonable flow of water from Mr Demaio's property caused property damage and economic loss, including the following:

[29] Connors v Bodean International Pty Ltd [2008] VCAT 454.

(a) water saturation of the brick paved courtyard causing discoloration and excessive weed growth between the bricks;

(b) excessive dampening of the double brick party wall in the kitchen, causing white efflorescence and significant rising damp;

(c) excessive dampening of the double brick party wall in the laundry, causing white efflorescence and degradation of the mortar, together with significant rising damp;

(d) extensive cracking of the concrete slab subfloor and a tiled concrete laundry floor due to ground heave caused by moisture absorption;

(e) cracking of the double brick party wall in the ground floor kitchen and in the plastered double brick party wall on the second level directly above the kitchen; and

(f) postponement of her renovation and extension works.

123 Ms Jasen relied principally on the evidence of Mr Salvatore Mamone, a consulting forensic architect. Mr Mamone inspected the property on 20 October 2017, and prepared his first report on that day. He inspected the property again on 23 March 2018 and prepared a second report three days later. The reports were later combined into a report prepared in accordance with the Tribunal's expert report guidelines contained Practice Note 2. Mr Mamone adopted the combined report at the hearing.

124 In summary, he opined at [15] that damage had occurred to Ms Jasen's property as a direct result of three factors operating next door at 65 Spensley Street, i.e. Mr Demaio's property. The factors were:

(a) two large maple trees growing in the rear courtyard;

(b) continually bursting of the old original galvanised water supply line running underneath the paving and underneath the house;

(c) inadequate site drainage within the courtyard and garden beds.

125 In his report of 20 October 2017, Mr Mamone had recommended that the maple trees be removed. They had been removed by the start of the hearing.

126 In the same report, Mr Mamone recorded that a detailed inspection of Ms Jasen's property identified "potential adverse effects of the water saturated ground within the rear courtyard" following bursts in the underground water pipe on or about 12 February 2017 and continuing for a period of approximately four weeks, and a subsequent burst in May 2017 when again it was left unrepaired for a period of four weeks. The "potential adverse effects" identified were:

(a) exceptionally high moisture levels detected within brickwork in the kitchen accompanied by white efflorescence developing across the wall; and

(b) exceptionally high moisture levels detected within brickwork in the laundry together with visible degradation of the mortar between brick work and rising damp; and

(c) extensive cracking across the top floor considered to have occurred within "the past few months", although Mr Mamone noted that the Japanese maple trees would also adversely affect the performance of the laundry floor.

127 In his March 2018 report, Mr Mamone added that the paving in the middle of Ms Jasen's courtyard had cracked and become stained, and the data collected within the centre of the courtyard. This report also identified the development of a new crack on the east wall of the laundry, but noted the cracking to the floor tiles did not appear to have changed the laundry. New cracking was noted in the kitchen in the south east corner, and along the course line along the underside of the top of the south wall on the west wall elevated moisture within the eastern part was again found. Upstairs in the bedroom above the kitchen, new cracking was found through hard plaster within the south-east corner of the room.

128 Mr Mamone in this report recommended that the galvanised water supply pipe be completely replaced; that the tree roots of the two maple trees be poisoned to prevent further growth; and that the garden beds be regraded with an agricultural drainage system being installed to ensure surface water and subsurface water was directed away from Ms Jasen's property.

129 Ms Jasen referred to a soil test report obtained from a geotechnical engineer, Mr Alex Rodriguez of Soil Test Melbourne. She had engaged Mr Rodrigues to carry out tests in relation to the proposed new building works at the rear of her house. This report classified the soil as "Highly Reactive (H 2)" and classified the site as "Class P Problem Site in accordance with AS2870-2011" I say no further about the report.

130 Ms Jasen also relied on a report from a consulting engineer, Mr Richard Drew, who inspected the double brick party wall, and the laundry in the rear garden at Ms Jasen's property, and also the corresponding areas in Mr Demaio's property. He prepared a report dated 19 April 2018. He observed [in section 1] that the laundry floor at the rear of Ms Jasen's property on the boundary with number 65 had badly cracked and bowed up upwards. He suggested this was "possibly due to reactive clay expansion under the action of water and/or adjacent vegetation". Moreover, in his conclusion, Mr Drew opined:

> I find it probable that the damage to the laundry floor and the rising damp experience to the party wall in the kitchen of No. 63 have been exacerbated by the reported, uncontrolled flows of water from the adjacent site (number 65 Spensley Street) saturating the foundations of the party wall. There are also nearby plantings (trees and irrigated vegetable garden) on the property of number 65 that may be contributing to cracking of the party wall and damage to the laundry wall of number 63.

131 Having regard to Mr Drew's guarded language, and to the fact that Mr Drew did not attend at the hearing and accordingly could not be cross-examined, I place little weight on the report. It is obviously in a general sense supportive of Mr Mamone's conclusions, but it is not a report upon which forensic conclusions can be based.

MR DEMAIO'S FACTUAL DEFENCE

132 The principle argument relating to damage was that Ms Jasen had not established that any flow of water from Mr Demaio's property had caused damage to hers. Essentially, this turned on attacking the evidence of Mr Mamone, and relying on the evidence of the expert civil engineercalled by Mr Demaio, Mr Elias Eracleous of FMG Engineering.

The attack on Mr Mamone's evidence

133 The first line of attack was based on the inadequacy of Mr Mamone's instructions. The second was that the many instances where his conclusions were based on an assumption that the water line underneath Mr Demaio's house was "potentially" leaking. Thirdly, Mr Mamone had identified three causes of the damage he observed it Ms Jasen's property, and it was self-evident that one, the maple trees, had been removed as a potential issue by the time of the hearing. Fourthly, Mr Mamone accepted that where his opinion was inconsistent with that of a civil engineer that the findings of the engineer should be preferred. Finally, Mr Mamone during cross-examination corrected his evidence in a significant manner. I deal with these criticisms in turn.

Inadequacy of instructions

134. It was contended that Mr Mamone had proceeded on the basis of instructions that the first leak on 12 February 2017 had continued for four weeks, rather than four days. Furthermore, he had referred to a second leak, in May 2017, that went for four weeks.

135. The first limb of this criticism is based on the proposition that the first leak was rectified within four days. I have made a contrary finding above, and accordingly Mr Mamone was entitled to proceed on the basis of the first incident continued for four weeks. On the other hand, there is no evidence of a further substantial leak continuing for four weeks from May 2017. As the continuation of the first leak for four weeks is consistent with the damage which was observed by Mr Mamone, his report is not to be discounted on the basis of inaccuracy of instructions in this respect.

136. The next point was that Mr Mamone had not been instructed that there was a history of rising damp in Ms Jasen's kitchen. This observation is factually justified, as there is no reference to any such history in the introductory section of Mr Mamone's October 2017 report, nor in his March 2018

report. However, the failure to disclose this history is not fatal in the light of Ms Jasen's evidence, which Mr Demaio was not in a position to contradict, that rising damp had been "damp coursed" [1] and that the rising damp in 2006 was "minimal, it was low on the wall, and the rising damp that has occurred since the flooding has risen up the wall". [2] Relevantly, Ms Jasen was able to put into evidence a quotation from a firm called Damp Guard Australia in respect of damp proofing of her house dated February 2006, and the invoice from that contractor the $3,086 dated 3 April 2016 which confirmed the work had been carried out.

137. The next complaint was that Mr Mamone had he been provided with a report from MCS Engineering authored by Mr Robert Capello dated 1 March 2018, that had been prepared on instruction from Ms Jasen's insurer Suncorp. It was submitted that this report was relevant in so far as it related to factual matters.

138. I do not accept this criticism. Mr Capello addressed his report to Ms Jasen's insurer. It was prepared, presumably, for the purpose of assisting the insurer to respond to Ms Jasen's claim. It was not in the form of expert report prepared in accordance with the Tribunal protocols. Mr Capello was not called by either party, and accordingly was not available for cross-examination. His report accordingly has no standing as an expert's report.

139. In so far as it relates to factual matters, Mr Capello's report does not assist, because Mr Mamone inspected Ms Jasen's premises in October 2017, that is to say before Mr Capello carried out his inspection on 21 February 2018, and in March 2018, after that inspection. If Mr Demaio wished to use Mr Capello's report as a basis for criticising or challenging Mr Mamone's observations, Mr Capello should have been called.

Mr Mamone's assumption that the pipe was "potentially" leaking

140. I consider that there was nothing in this criticism. I have made a finding that following the first pipe burst event in February 2017, the leak had continued for about four weeks. There was nothing potential about this leak.

The maple trees had been removed by the time of the hearing

141. There is nothing to suggest that the maple trees were relevant to the allegations concerning excessive dampness in the brickwork. It is arguable they were relevant to cracking. The maple trees are actually identified by Mr Mamone as relevant to damage to the laundry. However, Mr Demaio's expert Mr Eracleous did not see them as significant in this respect. Specifically, Mr Eracleous discussed the cause of the cracking of the floor of the laundry over five paragraphs [4.6- 4.20] and did not expressly mention the maple trees. He may have intended to refer to them when he obliquely referred to "nearby trees/shrubs" but this is not clear.

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[1] Transcript page 187 line 21.
[2] Transcript page 186 lines 19-22.

The expert opinion of it civil engineer is to be preferred to that of Mr Mamone

142. This is not contentious. Mr Mamone made this concession in the summary section of his March 2018 report when he said:

> In the event of a clash between recommendations made within this report & the Structural engineers report,[30] the Structural engineer's report principles are to take precedence over recommendations made within this report.

143. This concession will be relevant if there is a significant clash between the opinion of Mr Mamone and that of Mr Eracleous

Mr Mamone changed his evidence during cross-examination

144. In final submissions, Mr Demaio contended that Mr Mamone changed his evidence at paragraph 4.4. This must be a reference to clause 4.4 of the March 2018 report, as this is the only report where a clause 4.4 appears. Reference to clause 4.4 of the March 2018 report states:

> The adjoining property No. 65 Spensley Street Clifton Hill is potentially directing & resulting in water flow into the subject property in direct violation of the *Water Act 1989* and *Water Bill 2014*.

145. It is true that under cross-examination, Mr Mamone conceded that the reference to the *Water Bill 2014* was inappropriate, as the *Bill* did not become law. I do not regard that concession as significant. It certainly does not cause me to question the whole of Mr Mamone's evidence as an expert.

146. I now turn to an examination of the evidence of Mr Eracleous.

THE EVIDENCE OF MR ERACLEOUS

147. Mr Eracleous works at FMG engineering. He holds a bachelor's degree in engineering (civil/structural) and has worked in structural design for over 10 years before he moved into forensic investigative work. He had been an engineer for just over 15 years of the time of the hearing.

148. After being engaged in May 2018, Mr Eracleous inspected the reported damage at Ms Jasen's property and prepared the report dated 15 June 2018. He adopted it at the hearing. His evidence was summarised in Mr Demaio's final submissions as follows:
    (a) the repair work, and the later replacement of the water supply, was the appropriate course of action;
    (b) the water leak may have contributed to the alleged settlement and cracking in the laundry slab and floor tiling, however the proximate cause of this alleged damage related to inadequate construction of the infill ground slab;
    (c) the water leak did not cause the alleged condition of the external segmented clay-brick paving, rising damp to the party

[30] The reference to the structural engineer's report is understood to be a reference to the Drew report.

(kitchen/meals) and brickwork to the lean-to laundry, nor wall cracking in the south east corner of the party wall;

(d) he did not find any evidence of rising damp in the adjoining wall at 65 Spensley Street, including the area not covered by cupboards closest to the leak location and adjacent to Ms Jasen's laundry;

(e) he identified elevated moisture levels in other parts of Ms Jasen's kitchen that were not proximate to the leak events; and

(f) he did not notice any water degradation to the floorboards in Mr Demaio's house.

149 With this overview in mind, I will turn shortly to an examination of the evidence relating to each of Ms Jasen's claims.

150 Before I do so, it is appropriate that I make a comment about Mr Eracleous's conclusion that the burst pipe gave rise to a water leak. Mr Eracleous repeatedly makes reference to "the reported water leak Event" and "the water leak" and the "leak location".

151 I have several concerns regarding Mr Eracleous's terminology here. The first is the repeated reference to the "reported" event, since it seems to suggest that there is a question over whether an event ever occurred. There may be issues about how many times the pipe burst and when it burst, but there is no issue about the fact that it did burst. This leads to the second point, which is that there is not merely a leak in the pipe. There were repeated bursts in the pipe. I consider that they were at least three separate bursts. Two were repaired on 16 February and the third was repaired on 9 March 2017. Finally, to suggest that the nature of these events were mere leaks is, frankly, inaccurate. The bursts prior to 16 February (irrespective of whether there were two or three of them) created a flood which saturated Mr Demaio's yard and flooded Ms Jasen's yard. Mr Eracleous's inaccurate use of language makes me wonder whether he truly understood the nature of the events in question.

MS JASEN'S CLAIMS

The replacement of the water supply pipe

152 Ms Jasen does not contend that the replacement of the water supply pipe in the backyard was not appropriate. Her remaining issue about the pipe is whether the portion under Mr Demaio's house should be replaced as well.

The laundry

153 In his report, Mr Eracleous described at [2.4] Ms Jasen's laundry as a single-story lean-to structure comprising timber purlins supporting corrugated metal roof sheeting, a single skin brickwork wall on the eastern side, timber framed walls on the southern and western sides, and an infill concrete slab supporting ceramic floor tiles. Later, at [3.4] Mr Eracleous observed that the laundry structure was not watertight, and lacked ventilation. It also noted that the concrete infill slab was at or near the same

level as the external ground level, and was of varying thickness, ranging from 30 mm to 50 mm, and was founded on poor subgrade material comprising silty/organic filled soil. Significantly, he acknowledged that there was notable cracking (up to possibly 6 mm wide) to the tile floor and possibly the concrete substrate below.

154 Mr Eracleous addressed causation of the cracking at [4.16-4.19]. Relevantly, at [4.16] he advised "it is my opinion that the reported water leak Event may have contributed to the alleged condition". He went on to note at [4.17] that the slab appeared to be founded on relatively loose silty organic soil which is not considered to be an appropriate sub grade. This may have been affected by saturation, and softened and lost its sheer and bearing strength. The loose nature of the soil may also have caused it to "washout".

155 At [4.18] Mr Eracleous suggested that the substandard construction of the laundry slab may have contributed to its failure, noting that it comprised a relatively thin layer of reinforced concrete poured over poorly prepared subgrade. He opined that "had the slab been appropriately constructed (i.e. min 100 mm thick reinforced concrete slab over an appropriate crushed rock sub base and appropriately compacted/prepared subgrade), then the slab would not have undergone such notable settlement and cracking to the slab and floor tilework.". On this basis, he concluded at [4.19] that the water leak was not the "proximate cause of the damage", and that the proximate cause was inadequate design and construction of the laundry slab. They added that the situation was likely to have been exacerbated by the adverse site and building additions i.e. nearby trees and shrubs, poor site and building conditions and other water sources such as discharge of the hot water unit.

156 In his examination in chief, Mr Eracleous elaborated, explaining that "proximate cause" is a term commonly used where a problem may have multiple or a number of contributing causes. The proximate cause is "the cause or the element that it be taken away, then the damage would not occur." He confirmed that he considered the inadequate construction of the slab and inappropriate subgrade was the proximate cause of its failure, merely a contributing factor.

Finding about the floor

157 I accept Mr Eracleous's explanation of the nature of a "proximate cause", but I disagree with his conclusion that the construction of the slab and the inappropriate sub-base was in this instance the proximate cause of the cracking in the tiling and the sub-base. Ms Jasen had been in occupation of the building for about 44 years at the time of the burst pipe events. She had been using the laundry for years. Her evidence, as reflected in her instructions to Mr Mamone, was that approximately 12 months before the time of Mr Mamone's inspection in October 2017 there had only been a hairline crack in the floor, and this crack had dramatically worsened over

"the past few months". As Mr Eracleous himself acknowledges that the flood was a contributing factor, I find the flood was the proximate cause of the current failure of the concrete floor.

The rising damp in the laundry

158 Mr Eracleous dealt with this limb of the claim indirectly at [4.9] when he indicated that there may be possibly inadequate roof drainage flashing along the interface between the lean-to laundry and the external southern wall of the house, and that there was possibly regular water discharge from the overflow pipe of the hot water unit. He had noted separately at [3.4] that the laundry was not watertight.

159 On balance I accept Mr Eracleous's explanation for the damp conditions in the laundry and find against Ms Jasen in respect of this claim. I acknowledge that Ms Jasen contested Mr Eracleous's view that the laundry was not watertight but, having regard to the age and state of the laundry, I find on balance that it was not.

The backyard paving

160 Mr Eracleous observed at [25] of his report that the rear of Ms Jasen's house was bounded by segmented clay-brick pavers and nearby garden beds with large shrubs and small trees. He addressed the allegation that the water saturation of the area after the "reported water leak Event" had resulted in discolouration of the surface of the pavers as well as the growth of moss and weeds between the pavers at [4.4]. He opined that the leak did not cause the alleged problems. He advised the following reasons for this conclusion:

(a) the water leak was repaired promptly after discovery and is unlikely to have permeated extensively to Ms Jasen's property;
(b) photographs provided that on the real estate website which are understood to date from November 2015 showed that the alleged condition was pre-existing, long before the leak Event.

161 I reject Mr Eracleous's opinion, primarily on the basis that his opinion is based on the proposition that the leak was repaired promptly. I have made a finding that after the first burst pipe event the pipe was not satisfactorily repaired for possibly four weeks. Moreover, Mr Eracleous did not appear to have taken into account Ms Jasen's evidence regarding the extensive and consent continuous flooding of her backyard in the weeks following the bursting of the pipe on or about 12 February 2017.

162 I consider that in the normal course of affairs, saturation of brick pavers for a month would be likely to add to their discolouration, even if they had partly discoloured due to age already. However, I find it hard to accept that the flooding led to excessive weed growth between the bricks. I expect that weeds would have developed in any event. Accordingly, I find for Ms Jasen in respect of the discolouration claim, but not the weeds.

Rising damp in Ms Jasen's kitchen

163 Mr Eracleous acknowledged at [3.4] of his report the build-up of white efflorescence on the exposed face of the eastern brick party wall emanating from the base towards the southern end of the kitchen/meals area. Testing of the wall at the south-based core of the kitchen meals area using a Survey Master Electrophysics Moisture Meter yielded moisture readings in the range "AT RISK" and "WET". Readings taken at the north-west corner of the kitchen/meals area also indicated conditions classified as "WET", although the point tested was remote from the reported leak location.

164 Mr Eracleous discussed the issue further at [4.7]. He opined that the leak "Event" did not cause the alleged dampness, because:

(a) the water leak was repaired promptly upon discovery and is unlikely to have permeated extensively across Ms Jasen's property;
(b) no elevated moisture levels were recorded within Mr Demaio's property in the south-east corner closest to the location of the leak;
(c) photographs provided on the real estate website, which are understood to date from November 2015, show that the alleged condition was pre-existing, long before the leak Event;
(d) rising damp is still present in Ms Jasen's kitchen wall, notwithstanding that the water leak was repaired over a year ago, which suggests that the rising damp is inherent to the wall;
(e) the report concerning rising damp treatment from about 2006/2007 suggested that rising damp had been an ongoing problem;
(f) elevated moisture levels have been observed in regions remote from the north-west corner of the kitchen meals area which indicate that rising damp is inherent in the wall construction and unrelated to the leak.

165 Mr Eracleous elaborated on his evidence concerning the waterproofing of Ms Jasen's kitchen in examination in chief. He opined that if damp proofing was adequately installed, you would probably get 25 years life.[31] but, he added, "the fact that there is rising damp, there is evidence of rising damp at the moment, and it was undertaken in 2006/07 suggested that… there may have been areas that haven't been adequately covered during the application.".[32]

166 When Mr Eracleous was asked by me as to whether "a massive event of water saturation underneath the house" might overcome adequate damp-proofing, he responded that if the damp proof course was there, then rising damp would not occur. He then emphasised that the lack of evidence of rising damp in the same zone in the adjoining property led him to the opinion that the flood had not contributed to the rising damp.

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[31] Transcript page 233, lines 25-27.
[32] Transcript page 233, lines 27-31.

167 Despite the apparent clarity of Mr Eracleous's observation that in Mr Demaio's house no elevated moisture levels were recorded in the south-east corner closest to the location of the leak, he made some important concessions under cross-examination by Ms Jasen. In the first place, he agreed that access to the party wall in Mr Demaio's house was partly restricted by cabinetry. Having made that concession, he then agreed he had not said "there is no evidence of rising damp on the party wall".[33] He then refined his evidence by saying that in the areas that he had investigated, that is to say the areas he had access to, including the area closest to the location of the leak, he undertook moisture readings and did not identify any evidence of rising damp.[34] He later returned to his observations regarding the party wall, and expressly confirmed that there was evidence of rising damp in that wall.[35] Having confirmed that the leak had been repaired and that water pressure testing confirmed that there was no drop in pressure in the supply line to Mr Demaio's house, he suggested that maybe other sources of moisture in the ground were causing the rising damp.[36]

Discussion

168 Before addressing Mr Eracleous's evidence, I make an observation about the pre-existence of rising damp in Ms Jasen's house. The existence of this problem was acknowledged by her. A relevant fact is that she paid a lot of money in 2006 to have the problem rectified by a firm called Damp Guard. Her evidence was that the problem had been fixed.

169 Ms Jasen now alleges that the rising damp has returned as a result of the burst pipe event. The fact that there is rising damp in her kitchen/meals area has been confirmed by Mr Eracleous. This means that the damp course treatment undertaken in 2006 has now failed. The failure of that treatment says nothing about the source of the current rising damp.

Finding

170 As to this issue, Mr Eracleous's major argument is that there was a short period of leaking after the first burst in February 2017 and that Ms Jasen's property could not have been permeated in that time. I reject this contention on the basis of my finding that the leaking continued for approximately four weeks after the first bursting event.

171 I find, on the basis of Ms Jasen's evidence, that the soil under the foundations to the kitchen/meals area had become saturated following the first burst event. The question is whether this saturation was the cause of the rising damp which was later observed.

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[33] Transcript page 244, lines 18-19.
[34] Transcript page 245, lines 9-13.
[35] Transcript page 246, lines 22-24.
[36] Transcript page 247 lines 13-15.

172 On balance, I am satisfied that it is. Given Mr Eracleous's concession under cross-examination that the party wall even on Mr Demaio's side has rising damp, his finding that the accessible part of the wall in Mr Demaio's residence, near the site of the burst pipe, does not have rising damp is not conclusive. That part of the wall may have adequate damp proofing. It remains to observe that the lack of water degradation in the floor boards in Mr Demaio's house, noted by Mr Eracleous and confirmed by the managing agent, is also not determinative of whether there is rising damp in the party wall caused by the burst pipe events.

173 I have looked at the real estate agent's photos sourced by Mr Eracleous attached to his report. I do not think they are determinative of the question of whether there was rising damp in Ms Jasen's kitchen in or about November 2015, as asserted.

Cracking in the wall of Ms Jasen's kitchen

174 Mr Eracleous recorded his observations about cracking in Ms Jasen's kitchen/meals area at [3.4] of his report. He noted isolated cases of localised gaps and cracks along the vertical interface between the plastered southern wall and the exposed brick party wall at the south-east corner. He said that there was "no evidence" that the cracks had occurred recently. He also noted minor longitudinal hairline cracking along the cornice-wall interface at the southern and western walls, and minor hairline plaster cracking to the brick pier of the party wall in the first floor room above the kitchen meals area in the south east corner.

175 Mr Eracleous set out his opinion regarding the question of whether" the reported water leak Event" had caused the cracking at [4.11]. He opined that the leak did not cause the cracking, on the basis that:

(a) the leak was repaired promptly and is unlikely to have permeated extensively across Ms Jasen's property.

(b) the results of the floor level tests do not indicate any localised pattern of relative slab/footing he associated with swelling of reactive clay soils, which would be expected had water leaking been sufficient to manifest itself in foundation movement and associated building damage. This conclusion is supported by the lack of any stepped brickwork cracking propagating diagonally in the direction of the leak location.

(c) photographs from the real estate agents website understood to be from November 2015 show localised misalignments along the south east corner interface between the plastered southern wall and the eastern exposed brickwork party wall was a pre-existing condition. This is supported by the nature of the paint marks along the corner and the lack of any tearing to the caulking of the tiling at the corner interface. This indicates the absence of any recent building movement at this location.

176 At [4.12] Mr Eracleous opined that that the localised gaps to the south-east corner interface of the kitchen/meals area relates to the finish of the plasterwork and paintwork carried out in about 2006/2007, and is not related to the longitudinal cracking of the building.

177 Mr Eracleous also opined, at [4.13] that the diagonal hairline plaster cracking in the brickwork in the first floor room above the kitchen/meals area was related to "flexural tensile stresses to the brickwork directly related to wind loading actions on the cantilevered chimney."

178 At [4.14] Mr Eracleous observed that there was no evidence that the cracking was related to differential foundation movements.

179 Mr Eracleous was cross-examined about this aspect of his evidence by Ms Jasen. He agreed that he could not see the cupboards that obscured the entire kitchen party wall in Mr Demaio's house from floor to ceiling, and acknowledged "I haven't observed any building movement cracking"[37] and soon after explained "I can't see through cupboards unfortunately".[38] He then went on to note that there was no evidence of building damage to the south-western region, which was closest to the report of leak location.[39]

DISCUSSION

180 I am not persuaded by Mr Eracleous's evidence that the flooding following the first water burst did not cause the cracking complained of by Ms Jasen. He proceeded on an unjustified assumption, namely that the first pipe burst event had been rectified within days, not weeks. I acknowledge his evidence is that the floor levels he took did not demonstrate any relative distortion of the floor which he considered would have been expected had there been soil movement caused by the interaction of excess moisture with the reactive soil sufficient to shift the foundations and cause the cracking complained of. However, it may be that the highly reactive soil was affected by moisture at a deep level which affected the foundations, but not the floor.

181 I also observe that it is possible that pre-existing cracks in the house have reopened. In this connection I note that Ms Jasen acknowledged that there were cracks in the kitchen wall above the fan as a result of an earthquake in 2012.[40]. She later clarified that this crack was approximately 12 inches in length.[41] She then added that there was "very minor cracking" at the cornice just above the kitchen window and on the south wall.[42] She agreed that she made an insurance claim about this cracking. She was shown a report from a consulting engineer engaged by her insurer, Mr John Juers, which referred to the cracking in the house. However, Ms Jasen protested that her property

[37] Transcript, page 242, at lines of 30-31
[38] Transcript, page 243, line 4
[39] Transcript page 243, lines 16-18.
[40] Transcript page 145 at lines 27-29.
[41] Transcript page 148 at line 20.
[42] Transcript page 148 lines 22-28.

didn't have a history of cracking, that the cracking in the kitchen that occurred as a result of the flow of water was not minor, but "much bigger than even the earthquake crack", and that the party wall had never cracked until this point [43]. I accept her direct evidence on these matters.

182 It was put to Ms Jasen that Mr Juers had determined that the cracking in her house, and movement, had resulted due to seasonal changes in the moisture content of the soil, and was not directly related to the earthquake. She acknowledged that that was his finding, but protested that it was incorrect.[44] She added that subsequently the insurance company had agreed that the earthquake did do the damage, and had paid her claim.[45]

183 I am not prepared to draw any conclusion from Mr Juers's observation that the cracking in Ms Jasen's house had resulted from seasonal changes in the moisture content of the soil. I say this for the following reasons:

(a) Mr Juers prepared his report in his capacity as a consulting engineer engaged by an insurance company, and not as an expert governed by the Tribunal protocols for expert witnesses;

(b) he was not available for cross-examination; and

(c) according to Ms Jasen's evidence, which I accept, the insurance claim was paid anyway. This prompts the question whether Mr Juers amended or qualified his advice after preparing his report.

184 On the basis of Ms Jasen's evidence, I find on the balance of probabilities that the flood was the cause the cracking in the kitchen and in the bedroom upstairs.

Summary so far

185 Taking Ms Jasen's claims in the order in which she made them in her final submissions. I have found for Ms Jasen in respect of:

(a) the discolouration of the bricks in her backyard as a result of the saturation following the flood, but not for the alleged excessive weed growth.

(b) the dampening of the double brick party wall in the kitchen, causing white efflorescence and significant rising damp;

(c) the cracking of the concrete slab subfloor and the tiled floor in the laundry;

(d) the cracking of the double brick party wall in the ground floor kitchen and in the plastered double brick party wall on the second level directly above the kitchen; but

(e) I have found *against* Ms Jasen in respect of dampening of the double brick party wall in the laundry,

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[43] Transcript page 154 at lines 1-18
[44] Transcript page 155, lines 5-10.
[45] Transcript page 156, lines 3-5

Postponement of her renovation and extension works.

186 No evidence was given by Ms Jasen in respect of any loss arising out of this particular claim. I accordingly make no finding in respect of it. Having made this point, I note that any claim may well have been too remote in law to be recoverable in any event.

MR DEMAIO'S SECONDARY DEFENCE

187 Before I turn to the issue of assessment of damages, I must address Mr Demaio's secondary argument regarding damage. This was that if the Tribunal found the damage had been caused by the two water burst events referred to, the damage was "too remote" on the basis that Ms Jasen must establish that "the damage is of a kind that a reasonable person, having the respondent's knowledge and experience, should have foreseen". Reliance was placed by Mr Demaio on *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* ("The Wagon Mound (No 1)") [46] and *Overseas Tankship (UK) Ltd v Miller Steamship Co-Pty Ltd* ("The Wagon Mound (No 2)")[47].

188 The legal principle is not controversial. What I struggle with, in connection with this defence, is the argument that any of the damage to Ms Jasen's house would not have been reasonably foreseeable to a person in Mr Demaio's position, having regard to the knowledge and experience of his agent-at-law, that is to say the managing real estate agent.

189 I find that the remoteness principle does not assist Mr Demaio. I now turn to the assessment of damages.

ASSESSMENT OF DAMAGES

190 In respect of the claim for discolouration of the bricks in her backyard, Ms Jasen claims the cost of cleaning the bricks at a cost of $180. This is based on a quotation obtained from Jetclean Australia dated 3 November 2017. No contrary evidence was presented by Mr Demaio, and no submission was made to the effect that the quotation was unreasonable. I accept it as reasonable, and award Ms Jasen **$180** in respect of this item.

Dampening of the party wall

191 In respect of the dampening of the double brick party wall in the kitchen, Ms Jasen claims $2,310 as the cost of drying out and damp proofing the kitchen and the laundry walls. I am not inclined to allow this claim. Taking the kitchen first, there was no evidence that the flood had caused the damp proofing carried out in 2006 to fail. On the contrary, the evidence of Mr Eracleous was that the effectiveness of damp proofing treatment was "highly dependent on the workmanship that is undertaken at the time of the installation". If it was adequately installed, then "you're probably going to

[46] [1961] AC 388.
[47] [1967] 1 AC 617.

get the 25 years generally given as a guarantee". He added "the fact that … there is evidence of rising damp at the moment, and it was undertaken in 2006/07 suggest that there may have been areas that haven't been adequately covered during the application."[48]

192 It follows that Ms Jasen will have to fund the re-damp proofing of the kitchen wall herself. Once that damp proofing has been applied, the wall above the brick course where the application has been placed will dry out over time. The process of drying out could no doubt be accelerated by the use of fans, which may result in an additional electricity charge, but there was no evidence about this, and I am not prepared to speculate and make any allowance for damages in this regard.

Laundry wall

193 I make no allowance for the cost of rectifying the damp course in the walls of the laundry as I have rejected the underlying claim.

Laundry floor

194 In respect of the cracking of the concrete slab subfloor and the tiled floor in the laundry; Ms Jasen claims a number of costs. Firstly, she seeks $880 inclusive of GST in respect of re-screeding the floor to fix the levels and to lay tiles and supply an angle for the door. This is based on a quote from Creative Tiling data for November 2017. This was not challenged by Mr Demaio, and I accept it as I consider it to be reasonable.

195 Next, Ms Jasen claims the cost of tiles for the floor, at the rate of 28 m², which is derived from a quotation received from Delucia Tile Gallery. This is a reasonable rate, and I also accept it. It is asserted that 6 m² of floor are involved, which is consistent with the evidence. The total cost claimed accordingly is $168, which I accept.

196 Next, she claimed $792 in respect of the disconnection of the laundry trough and hot water service to enable the repair of the floor and re-tiling. She refers to a quotation from a plumber in respect of this sum. It was not challenged by Mr Demaio, and I accept it.

197 Next, Ms Jasen claims $690 for the cost of removing and later returning items in the laundry $191 as the cost of storing them with Fry's Storage during the course of rectification. The items to be stored, according to a quotation from Peter Sadler Removals & Logistics dated 9 April 2018, include a small storage cupboard, washing machine, dryer, a laundry tub, the hot water service, a chest of drawers and a toolbox. I accept the necessity for storing the hot water service and the electrical goods, in particular, out of the weather. No attack was made on the reasonableness of these items by Mr Demaio. I accept the claims as reasonable, noting that the storage fee claimed was for the minimum allowable period.

[48] Transcript page 233, lines 21-31.

198 In total then, I allow $880 to rectify the concrete and lay tiles, $168 in respect of tiles, $792 to disconnect the laundry equipment and then reconnected it after the floor has been rectified, $690 for removing and returning the items and $191 for their storage. The total claim allowed accordingly is **$2,721.**

Cracking

199 In respect of the claim for cracking of the double brick party wall in the ground floor kitchen and in the plastered double brick party wall on the second level directly above the kitchen; Ms Jasen claims $1,133. This is based on a quotation from Steve Johnson. I note that the method of repair selected is limited to re-mortaring the brick party wall cracks, repairing the cracked cornice and repainting the kitchen, laundry and the second floor room. I regard this as a very reasonable approach to rectification. The cost of painting the laundry is $270, which I disallow. The other costs appear to me to be reasonable, and they were not disputed by Mr Demaio. I reduce the amount claimed of $1,133 by the cost of painting the laundry of $270 and allow **$863** in respect of this claim.

Summary

200 I have allowed $180 in respect of cleaning the discoulored bricks, $2,721 in respect of the laundry and $863 in respect of the treatment of the cracking, a total of **$3,764.**

THE CLAIM THAT THE PIPE UNDER THE HOUSE BE REPLACED

201 Ms Jasen contends that the old water line to Mr Jasen's property has been there at least as long as she has lived in her property, which was 44 years as of the date of hearing. She is concerned, as Mr Demaio's original pipe has so far been replaced only from the connection at the boundary to a junction near the house, but not under the house. She accordingly seeks an order that the balance of the pipe be replaced.

202 Mr Demaio in his final submissions rejects this claim on the basis that the evidence does not establish that the water line under the house is still leaking.

203 As noted previously, the Tribunal has power to grant the relevant injunction under s 19(3)(a) of the *Water Act.* The real issue is whether the injunction should be granted.

204 In *Leung v Harris*[49] at [130], Senior Member Walker had to consider an application by the applicant for a mandatory injunction that the respondent take certain steps to prevent the causing of an reasonable flow of water. He was referred to the Tribunal's decision in *Reynolds v. Southern Quality Produce Co Operative.*[50] There an injunction had been sought to restrain

[49] [2018] VCAT 1630.
[50] [2011] VCAT 692.

the construction of a grain terminal until off-site works to enhance the local drainage infrastructure were completed.

205 The Tribunal in *Reynolds v. Southern Quality Produce* (constituted by Deputy President Macnamara sitting with Member Chuck) said at [108]:

> Turning now to the proceeding under the *Water Act*. The principal relief sought by Mr Reynolds was a *quia timet* injunction (that is an injunction to restrain future action which it is feared will damage Mr Reynolds' property) to restrain the construction of the proposed development without the offsite works advocated by his expert Mr Berry. All parties were agreed that the proper test to apply to determine whether a *quia timet* injunction should be granted is the one to be found in the joint judgment of Starke, Murphy and Brooking JJ as Judges of the Full Court of the Supreme Court in *Grasso v Love* [1980] 163, 167 where their Honours said at line 25 and following:
>
> - What we are disposed to think is the true position is that, to obtain a quia timet injunction, the plaintiffs must prove that there is a real probability that activities of the defendants are imminent and if performed will cause substantial damage to the plaintiffs.

206 The present case, of course, is not one where Ms Jasen seeks to restrain Mr Demaio from carrying out any particular activity, but seeks an order that he carry out the replacement of the balance of the water pipe in order to protect her from future damage. In this respect it is unlike *Reynolds v. Southern Quality Produce*, but bears a similarity to *Leung v Harris.*

207 In *Leung v Harris*, Senior Member Walker reviewed the evidence and concluded at [132]:

> Although I am satisfied that the method used by the Respondent to stop the leaks on the balcony was less than ideal and that there is a possibility that it might fail and further leakages might occur in the future, I am not satisfied that it has been demonstrated that there is a real probability that the Applicant will suffer substantial damage if [the relevant] scope of works is not carried out.

208 I now turn to the evidence regarding the issue. Ms Jasen relies on Mr Mamone's observation at [2.4.3.1.4] of his report dated 20 October 2017 that "[t]he 46-year-old galvanised iron water supply line of No. 65 Spensley Street has undoubtedly reached the end of its service life."

209 Mr Eracleous, on behalf of Mr Demaio, relies on two pressure tests of the pipe, which confirmed that was no pressure drop, to indicate there is no continuing leak. It was pointed out that Mr Mamone had conceded in cross-examination that if the Australian Leak Detection Pressure Test indicated there was no pressure drop, then there was no leak.

210 I accept this evidence, and find that as at the conclusion of the hearing there was no continuous leak from the water line.

211 However, I consider that that is not the end of the matter. Firstly, Ms Jasen deposed, I accept, that the pipe under Mr Demaio's house had failed on at least one occasion prior to his purchase of his house in 2014. Secondly, we know from the plumber's invoice that when the pipe burst in February 2017, there were at least two failures, because two sections of pipe were removed and disposed of. Thirdly, I have found that the pipe was not completely rectified by the plumber when he attended on 16 February 2017, as the pipe continued to leak. Certainly the plumber attended on 9 March 2017 to fix a further failure in the pipe. Looking at the evidence cumulatively, it can be seen that the pipe has failed on at least four occasions. On this basis, I find that there is a real probability that the section of the pipe which has not yet been replaced will fail at any time. Clearly, there is the potential for further substantial damage to Ms Jasen's property if the pipe fails again. Accordingly, I think there is justification for a declaration that Ms Jasen is entitled to an order that Mr Demaio undertake the replacement of that section of his water pipe which has not been replaced so far.

212 Furthermore, I note that in *Reynolds v. Southern Quality Produce,* the Tribunal noted at [110] that in *Grasso v Love* the Full Court had approved a formulation of the rule as to *quia timet* injunctions by Dr Spry in the first edition of his work on *Equitable Remedies*. The final sentence of the formulation as approved is as follows:

> Accordingly, the greater the injury or distress that would be caused by the apprehended injury, if it occurred, the more readily will the court intervene despite uncertainties and deficiencies of proof.

213 I think this passage provides further justification for ordering that Mr Demaio must replace the old section of pipe which runs under his house. If the old pipe is not replaced in its entirety and fails again, then Ms Jasen will likely suffer significant loss and associated distress. This is because, even if she does not undertake the planned renovation at the rear of her house, she is likely to suffer a re-run of the damage she suffered in early 2017. If she does undertake the renovation she is planning, then the difficulties may be compounded, because the new works may also be affected by a leak from the pipe.

214 A relevant consideration is that any further leak from the old pipe, if it is not repaired, is most likely to be under Mr Demaio's house. It follows that any new leak may not be readily observable, and Ms Jasen may become aware of it only when she observes water in her garden, or cracking or rising damp caused by the leak.

215 On balance, I am satisfied that Mr Demaio should replace that section of the pipe which has not yet been replaced. Having expressed this view, I note

that any order directed at Mr Demaio will require careful crafting because there are issues of timing and scope to be determined. It may be that some other form of order directed at protecting Ms Jasen from a further unreasonable flow of water could be made as an alternative to the granting of an injunction requiring the replacement of that part of the pipe that is under the house. I will give leave to the parties to address me on the formulation of the relevant order or orders at a further hearing.

COSTS AND REIMBURSEMENT OF FEES

216 Costs are reserved. Both parties will have liberty to make an application for costs within 30 days. The attention of the parties is drawn to s 109 of the Victorian Civil and Administrative Tribunal Act 1988 ("***the VCAT Act***")

217 Similarly, the issue of reimbursement of fees under s 115B of the *VCAT Act* is reserved, and each party will have liberty to make an application for reimbursement of fees within 30 days.

C Edquist
Member