

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1281/2017

CATCHWORDS

Water Act 1995 – s.16 – unreasonable flow of water – s.19 – powers of Tribunal – water penetrating tiles and membrane of balcony forming part of Respondent’s Unit – water passing through common property and entering Applicant’s Unit - knowledge of existence of flow – obligation of the Respondent – nature of relief

APPLICANT	Elizabeth Leung
RESPONDENT	Luke Harris
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	17 - 20 July 2018 Submissions received by 31 August 2018
DATE OF ORDER	22 October 2018
CITATION	Leung v Harris (Building and Property) [2018] VCAT 1630

ORDERS

1. Order the Respondent pay to the Applicant \$52,250.39.
2. The applications for declarations and injunctive relief are refused.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr A.P. Downie of counsel
For the Respondent	Mr D. Triaca of counsel

REASONS

Background

- 1 The Applicant is, and has been since 2 June 2011, the owner of a two bedroom unit, No. 207, in Grattan Street, Prahran (“the Applicant’s Unit”) which is immediately below a unit, No. 306, owned by the Respondent on the floor above (“the Respondent’s Unit”). The Respondent became the owner of the Respondent’s Unit on 13 May 2011. The apartment block containing the two units was constructed by Maxcon Pty Ltd (“the Builder”) in about 2011.
- 2 A substantial part of the Respondent’s Unit consists of an open balcony, part of which is directly above the Applicant’s Unit. The Applicant complains that water is, and has been for a number of years, leaking through the balcony and into the Applicant’s Unit causing the growth of mould and damage to the finished services, and rendering it uninhabitable.
- 3 The Applicant claims that the water entering her unit is an unreasonable flow of water within the meaning of s.16 of the *Water Act* 1989 (“the Act”) and that she has suffered damage as a result. She seeks an award of damages, declaratory relief and a mandatory injunction requiring the Respondent to take certain steps to prevent the causing of an unreasonable flow of water from the Respondent’s Unit into the Applicant’s Unit.

The hearing

- 4 The proceeding came before me for hearing on 17 July 2018 with four days allocated. Mr A.P. Downie of counsel represented the Applicant and Mr D. Triaca of counsel represented the Respondent.
- 5 Apart from the experts, I heard evidence from:
 - (a) the Applicant’s husband, Mr Leung;
 - (b) Mr Paul, a tradesman who had carried out work on the Applicant’s Unit;
 - (c) the Respondent;
 - (d) Ms Pizzorno from the Owners’ Corporation manager, who was called to produce emails passing between the Owners’ Corporation and the Respondent; and
 - (e) Mr Riali, the Manager of a building company that provided a quotation for the rectification of the damage to the Applicant’s Unit.
- 6 Expert evidence was given by two building experts, Mr Ryan on behalf of the Applicant and Mr Martin on behalf of the Respondent, and also by a mould expert, Mr Murphy.

The law

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

“16. Liability arising out of flow of water etc

- (1) If—
- (a) there is a flow of water from the land of a person onto any other land; and
 - (b) that flow is not reasonable; and
 - (c) the water causes—
 - (i) injury to any other person; or
 - (ii) damage to the property (whether real or personal) of any other person; or
 - (iii) any other person to suffer economic loss—

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

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

8 The jurisdiction to determine claims pursuant to the foregoing section is conferred by s.9 of the Act which (where relevant) provides as follows:

“Jurisdiction of Tribunal

- (1) The Tribunal has jurisdiction in relation to all causes of action (other than any claim for damages for personal injury) arising under sections 15(1), 16, 17(1) and 157(1) of this Act
- (3) In exercising jurisdiction conferred by subsection (1), the Tribunal—
- (a) may by order, whether interim or final, grant an injunction (including one to prevent an act that has not yet taken place) if it is just and convenient to do so; or
 - (ab) may make an order for payment of a sum of money awarding damages in the nature of interest; or
 - (b) may make an order that is merely declaratory.
- (3A) Nothing in subsection (3) takes away from or affects the Tribunal's powers under section 123 or 124 of the Victorian Civil and Administrative Tribunal Act 1998.

- (4) In awarding damages in the nature of interest, the Tribunal may base the amount awarded on the interest rate fixed from time to time under section 2 of the Penalty Interest Rates Act 1983 or on any lesser rate that it considers appropriate.
- (5) The Tribunal may in respect of any works that give rise to a cause of action of a kind referred to in subsection (1) make any order with respect to—
 - (a) compensation for damage to land; or
 - (b) the continuation, removal or modification of works; or
 - (c) payment of the costs of the removal or modification of works—

that it considers appropriate.

.....”

The flows of water alleged

- 9 An important issue in the case was when the leaking from the Respondent’s Unit into the Applicant’s Unit first occurred and when the Respondent knew about it or ought to have been aware of it.
- 10 In his Points of Defence the Respondent said that, prior to being put on notice about water entry by the Applicant's agent on or about 2 December 2016, he was not aware of any leak from his Unit into the Applicant’s Unit. That date was later amended to November 2016. I am not satisfied that that is the case.
- 11 On 6 January 2013, the Respondent wrote to the Builder saying that some of the tiles on the terrace area were loose and drummy. He said that there may be water getting underneath and asked where he could buy replacements tiles. He copied that email to another person and commented to that person that he wanted to have this on file in case of any water leak or waterproofing issues that may come up because of this.
- 12 The Applicant relies upon minutes of a meeting of the Owners’ Corporation held on 29 August 2013 as evidence of leaking problems in the Respondent’s Unit at that time. The minutes referred to leaking into the unit and an adjacent unit and record that the Builder of the Units promised to attend to them. The precise nature of these leaks is not disclosed by the minutes.
- 13 At all material times the Applicant’s Unit has been let to tenants when it has not been vacant. On 6 August 2014 the managing agent notified the Owners’ Corporation manager of a leak in the bathroom ceiling and balcony of the Applicant’s Unit. On 8 August she informed the managing agent that it was a serious leak from the balcony of the unit above and that there was deep crack in the ceiling as well. She asked for details of the owner of the Respondent’s Unit.

- 14 On 19 August the agent asked Owners' Corporation manager, Ms Sindrey, where he could get details of the agent or landlord above. Ms Sindrey replied that the apartment above was owner-occupier, that she would contact him and ask if it was alright to pass on his details. A few minutes later, on the same day, the agent sent a further email to Ms Sindrey thanking her for her email and asking her to pass on emails and photographs that were attached. He added:
- “We have the following issues:
- 1) a leak and crack on our balcony ceiling
 - 2) a leak from upstairs to our bathroom ceiling where shower is
- Am more concern about the leak and crack of our bathroom ceiling, please let me know how you go.” (sic.)
- 15 Also on the same day, there is an email from Ms Sindrey to the Respondent stating:
- “Please see the below email. Can you please advise if I may pass on your details to this agent so they may contact you and fix issue?”
- Three photographs are attached with a number of emails from the Applicant's agent.
- 16 On the same day, apparently in response to the previous email, there was an email from the Respondent to Ms Sindrey, with copies to a number of people, asking her not to give his details to the Applicant's agent, stating that the issue had been discussed in February that year, that a building report was needed and that there was nothing that he could do.
- 17 Ms Sindrey replied to the Applicant's agent on 21 August to say that the Owner of the Respondent's Unit had said that the water leak also existed in his unit and had been going on for over two years, that he had already been contacted by the owner of the Applicant's Unit, that he preferred not to have his details released as there was nothing that he could do. The agent replied the same day, asking whether the Respondent was going to repair his balcony. If there was a reply to that email, it is not in evidence.
- 18 On 30 September 2014 the managing agent again notified the Owners' Corporation of the leak and the crack on the ceiling above the balcony of the Applicant's Unit, being the underside of the balcony of the Respondent's Unit and also a leak “from upstairs” in the bathroom ceiling of the Applicant's Unit.
- 19 On 20 October 2014, the Owners' Corporation manager wrote to the Respondent, noting that after numerous requests for access to be provided to the Owners' Corporation's plumber, in order to investigate the cause of the water leak into the apartments below, being the Applicant's Unit and the unit next to it, access had been denied. The letter enclosed a notice pursuant to s.51(1) of the *Owners' Corporation Act 2006* for the Respondent to

provide access. Ms Pizzorno said that she was unable to find any response to that letter from the Respondent.

- 20 On 21 October 2014 the Applicant received an email from the agent enclosing photographs of mould and said that she had to engage a professional curtain cleaner to remove the mould. That mould appears to have related to leaking around the bedroom windows.
- 21 On 30 October 2015 the Applicant was notified by her agent that the tenants had moved out and that there was minor water damage that the agent presumed had something to do with sealing of the windows. She said that the water ingress had also caused a small amount of mould to develop on the inside of the curtain on one side as well. There is nothing in that notification to indicate any connection with the Respondent's Unit.
- 22 On 7 November 2016 the agent notified the Applicant that the tenants then in occupation had been complaining that there was a massive issue internally with mould, that they had had the unit inspected by a mould specialist and enclosed a copy of the specialist's report. This report, prepared by a Mr Lewis, is dated 4 November 2016. In the opening paragraph, the author says that there had been reportedly signs of mould throughout the unit as a result of residual condensation from internally generated humidity. He criticised the extractor fans in the Applicant's Unit and provided a quotation to supply and install a suitable extraction system. Although the agent said that she was informed by the tenants that there was a leak from the unit upstairs, there is nothing in the mould expert's report to indicate that he was told about any water leakage from the Respondent's Unit.
- 23 The Respondent admitted that, on 10 November 2016, he received an email from the Owners' Corporation enclosing an email from the Applicant's agent and photographs of water damage to the Applicant's Unit but said that he did not know "officially" that the leaks were coming from his unit until 2 December 2016.
- 24 On 14 November 2016, the Applicant's Unit was inspected by a plumber organised by the Owners' Corporation. The report, by Kilburn Plumbing, is as follows:

"Called to site for water entry into unit 207.

The unit was inspected and there are water stains on the ceiling of the bathroom and lounge/kitchen area.

We looked inside the ceiling space from the manhole in the bathroom.

There is a calcium build-up in a number of places above the bathroom.

It was raining during our inspection and water could be seen dripping from a number of these spots.

We accessed unit 306 above and there is a large tiled balcony above the water entry points.

The tiles are in poor condition and there are signs the water is tracking under the tiles.

In our opinion this is a tile/membrane issue.

Luke in unit 306 was aware there is a problem and has been in discussions with the Builder about this issue.

Unit 207 has water entry from two bedroom windows.

Access to unit 107 and a three storey ladder would be required to seal the window frames.”

- 25 In his witness statement, the Respondent denied having told the plumber that he was aware of water leaking into the Applicant’s Unit.
- 26 On 14 November 2016, the Respondent received a copy of the Kilburn report from Ms Pizzorno of the Owners’ Corporation. In his witness statement he said:
- "This is the first time that I had any contact from anyone on behalf of the Applicants and the first time that I had been advised that the water had leaked into unit 207 from the balcony of unit 306 other than being told by the plumber."
- 27 On that same day, 14 November 2016, the Respondent sent an email to Ms Pizzorno, saying that:
- (a) the plumber from Kilburn Plumbing had shown him photographs and a video of calcium staining and damage in the Applicant’s Unit;
 - (b) he had raised the issue of drummy tiles that water could get under with the Builder when he moved into the Respondent’s Unit;
 - (c) it was most likely “a bigger issue which is a crack in the membrane”;
 - (d) the rectification cost could be from \$25,000.00 to \$40,000.00;
 - (e) the issue affected both the Respondent’s Unit and the Applicant’s Unit;
 - (f) he intended to have his solicitor write to the Builder;
 - (g) the last time he had to deal with the Builder over a leak it took over two years to resolve.
- 28 In an email dated 24 November 2016 the agent informed the Applicant that he had spoken to the Owners’ Corporation and was informed that its plumbers had found that the leak in the ceiling was coming from the balcony above and that they were trying to get the Respondent to agree to rip up the balcony and have it waterproofed. She said that the leaks around the windows were a building issue. The email concluded by saying that

there was black mould in the Applicant's Unit and that it could not be re-let until the mould issues and the leaks were fixed.

- 29 In a letter to the Builder dated 25 November 2016, the Respondent's solicitors complained, amongst other things, of the poor quality of the tiling on the terrace concerned, saying that they were loose and that water may be getting underneath them. They also stated that:

“As a result, water has since been leaking from underneath the tiles into apartment 207 located directly below the premises causing significant damage. On 14 November 2016, the plumbing company, Kilburn, engaged by the Owners' of apartment 207, reported that the tiles on the terrace of the premises are in poor condition and that there are signs that water is tracking under the tiles, which is causing an issue with the tiling membrane on the premises.”

- 30 This letter and the preceding emails show that the Respondent was aware that water was passing from the Respondent's Unit into the Applicant's Unit and that it was causing significant damage. Notwithstanding this, the Respondent refused to take any steps to prevent the flows apart from demanding that the Builder attend to the problem.
- 31 Following communications with the Owners' Corporation, the agent received an email from the Respondent dated 2 December 2016. After identifying himself as a committee member of the Owners' Corporation and someone who had worked in the property industry, he stated that the Applicant had no grounds to sue the Owners' Corporation, that the works required to repair the problem spanned a 100 square metre terrace and would not be a simple repair job but could cost tens of thousands of dollars to rectify. He said that no action or repair work would be undertaken on his property until the Builder had had the opportunity to repair the damage under warranty and that failing that, he would proceed to take legal action against the Builder. He suggested that the Applicant should claim her losses of rent under a landlord insurance policy.
- 32 On 17 January 2017 the Applicant's agent wrote to the Respondent to say that the ceiling of the Applicant's Unit was about to fall in, that the unit could not be let out and that the Applicant was worried about loss of rent and damage to her unit. The Respondent replied stating that he was awaiting a response from the Builder before taking any further action.
- 33 On 24 January 2017 the agent visited the Applicant's Unit with Mr Paul. Mr Paul said that he noticed a collapsed plaster ceiling in the hallway and that water had been penetrating the slab from above. He said he could see a waste pipe from the Respondent's Unit and formed the view that a likely source of the leak was that the waste pipe was either missing a puddle flange or there was no waterproofing around it. He said that he was unable to obtain access to the Respondent's Unit and so he attempted to seal around the waste pipe from below, in the Applicant's Unit. He said that, when he was there, he did not notice any other areas of damaged ceiling. He

removed the damaged plaster, replaced and painted the ceiling and came back the following day to apply a further coat of paint. He acknowledged that it ought to have been fixed properly from above.

- 34 On 31 January 2017 the Applicant's agent sent an email to the Respondent saying that Mr Paul had reported that the leak was being caused by the drain point from his balcony not being attached correctly, that water was dripping into the insulation and sarking and was causing the ceiling to cave in. She said that she was instructed by the Applicant to have it attended to immediately to stop further damage and clear the mould that was growing in the Applicant's Unit so that the tenant did not have any further health issues. She said that she was having the works completed and that she would then be forwarding to the Respondent the invoice for payment, as it was being caused by a leak from his balcony.
- 35 The Respondent said that he then believed that the problem had been addressed by the Applicant and so, although the Builder had in the meantime refused to attend to the problem, he did not pursue the Builder any further. He did not pay for the work that Mr Paul carried out and he knew that no work was carried out of his balcony. He also had the Kilburn Plumbing report which identified that the leaking was due to a membrane issue.

Ms Watts' tenancy

- 36 The Applicant's Unit was let to a new tenant, Ms Watts, from 30 January 2017 at a rental of \$650.00 per week, with the provision that, until the works to rectify the leaking coming from the balcony upstairs was remedied, the rent would be reduced to \$600.00 per week.
- 37 On 5 May 2017 the Applicant's solicitors wrote to the Respondent complaining that the Applicant's Unit had been damaged by water leaking from the Respondent's Unit, that the Applicant had suffered loss as a result of the damage and loss of rental, that the problem was the Respondent's to rectify and that she would be looking to the Respondent to recover her losses.
- 38 On 19 May 2017 they received a response from the Respondent's solicitors to the effect that the water leakage problems at the building were due to poor workmanship and were the responsibility of the Builder, that the Respondent refused to reimburse the Applicant for the cost of the work done to repair the incorrectly installed drainpipe but offered to provide access to the Respondent's Unit to the Applicant in order to assess the water leak issues, provided that both the Owners' Corporation and the Builder attended.
- 39 On 11 August 2017 the Owners' Corporation served a notice upon the Respondent alleging a breach of the Owners' Corporation rules in that he had failed to repair the leaks into the Applicant's Unit, requiring him to undertake the building works to stop the water leak and requiring him to

indemnify the Owners' Corporation for the cost of performing repairs to the ceiling and slab affected by the leaks.

40 On the same day, 11 August 2017, the Respondent obtained a report from a firm of leak detection consultants to inspect the balcony. The report found nine areas of concern and said that moisture had penetrated through the membrane at those points. The Respondent said that he sent a copy of the report to the Builder but did not carry out any work himself in relation to the nine points that had been identified.

41 These proceedings were issued by the Applicant on 5 October 2017.

The Respondent's rectification works

42 On 19 March 2018 the Respondent engaged a contractor to apply a waterproofing material over the top of the balcony tiles that were accessible at a total cost of \$8,255.50. This did not include an area under a timber deck supporting a spa that the Respondent had installed. The invoice from the contractor that applied the material contains the note:

“As discussed at time of quote that we cannot provide a warranty for this job” (sic).

43 On 21 June 2018 the application of waterproofing material was extended over the whole of the balcony following the removal of the spa to allow access. In each case, the material was applied over the top of the balcony tiles. Four coats of material are said to have been applied.

44 In his witness statement, the Respondent said that he believed that these works have been effective and that he intends to cover the membrane with synthetic turf and a decking system which he believed would render the new membrane UV stable and allow it to last for many years.

45 He produced a quotation for over \$100,000.00 that he had obtained from a Builder to carry out the scope of works recommended by the Applicant's expert, Mr Ryan, and said that he could not afford to incur that expense.

The expert evidence

46 The Kilburn Plumbing report has already been referred to above. The following further reports are also in evidence.

Mr Ryan's reports

47 On 9 November 2017 the property was inspected by Mr Ryan, a building consultant engaged by the Applicant's solicitors.

48 He found moisture damage to the dining/living room plaster ceiling adjacent to the recessed passage area. He said that the damage was due to moisture entering the ceiling area above. He saw evidence of mould on the plaster but upon taking a moisture meter reading he found no evidence of excessive moisture in the plaster at the time of his inspection. He concluded that moisture only entered the ceiling void area when it was raining.

- 49 Through an access panel on the ceiling of the bathroom of the Applicant's Unit, he inspected the ceiling void area between the suspended concrete floor slab that supports the tiled balcony of the Respondent's Unit and the suspended ceiling of the Applicant's Unit. He observed that there were several cracks on the underside of the concrete slab. He said there was evidence that moisture has been seeping through the cracks in the slab with a build-up of calcification and stalactites dropping down from the suspended slab above. He said that stalactites were evidence of prolonged moisture ingress and he was surprised at their extent.
- 50 He then inspected the underside of the slab above the balcony of the Applicant's Unit where there is no suspended ceiling but a soffit formed by the underside of the slab. He saw that there was excessive calcification build-up on the underside of the slab below the balcony of the Respondent's Unit. He described the calcification as excessive and said that it had the potential to cause rusting of the steel reinforcement in the slab if the balcony of the Respondent's Unit is not rectified. Again, he observed stalactites forming under the slab which were moist. He said that it was evident from the calcification build-up on the soffit of the balcony that moisture has been seeping through the floor slab for some time.
- 51 He referred to the Kilburn plumbing report and said that he did not observe the calcium build-up above the bathroom mentioned in that report but noted that the Applicant had carried out some repairs since that report was prepared.
- 52 He then inspected the tiled balcony of the Respondent's Unit. He noted that the Respondent had installed balcony furniture, an outdoor kitchen and pot plants on the balcony which appeared to be permanent fixtures. He identified drummy balcony floor tiles which he said were defective and non-compliant work on the part of the Builder. He said the drummy tiles were general throughout the balcony and were not restricted to the areas where the kitchen benches and pot plants had been installed. He did not observe any expansion or movement joints on the balcony, which he described as large, and said that this may also be contributing to the drummy floor tiles.
- 53 He said that the Builder had installed four drainage outlets for the tiled balcony that he could observe. He said that one of these had a black product on the inside that did not appear to be an approved waterproofing product and the other three drains had no evidence of an approved waterproofing product installed.
- 54 He said that the Builder had not installed an approved PVC puddle flange to allow the waterproofing to be installed down into the drainage outlet, which he said was in breach of the appropriate Australian Standard. He said that some drains were holding water, indicating inadequate fall and there were two drains adjacent to the dwelling which would require the tiles to fall

towards the dwelling instead of away from it. He said that was defective work by the Builder.

- 55 He said that, given the size of the balcony the four visible drainage outlets were insufficient to provide adequate drainage. He also said that there were not sufficient falls.
- 56 He concluded that the balcony waterproofing had failed. He said that in order to rectify the balcony it would be necessary to remove all items from it, remove all floor tiles, screed and waterproofing and re-waterproof the entire balcony. He also said that consideration should be given to installing additional drainage outlets in accordance with a civil engineer's recommendation.
- 57 He said that part removal of the balcony, making patch repairs and waterproofing the affected areas was not an acceptable practice and that waterproofing manufacturers will not provide a warranty in such a case. He said that the number and extent of breaches in the waterproofing membrane justifies the full removal and replacement of the balcony waterproofing.
- 58 On 16 April 2018, following the application of a waterproofing material over the whole of the balcony except for the area under the spa, Mr Ryan returned and contacted a flood test. He said that he flooded the balcony as much as he could but the levels were such that he was not able to cover the entire balcony because of the height of the window and door sub-sills.
- 59 When he returned on the following day he noted no evidence of dampness on the interior of the Applicant's Unit but there was water covering the balcony floor area where the stalactites and calcification were. He said that there was water dripping slowly and the stalactites were damp. He also observed water trickling down the east side of the pre-cast panel joints at the balcony floor.
- 60 He said that the waterproofing product supplied by the Respondent, although of adequate thickness, should have been applied to the balcony floor slab or under the floor tiles and not on top of them. He said that the tiles were drummy and that there was potential for them to move and damage the new waterproofing. He said that what had been done was not an acceptable long-term solution and was non-compliant with the relevant Australian Standard. He said that the rectification works for the Applicant's Unit should not be completed until the water leak from the Respondent's Unit had been rectified.
- 61 Mr Ryan's final report was provided on 27 June 2018 in relation to an inspection that he carried out on 22 June 2018.
- 62 He observed that the lounge room ceiling was dry but that the bathroom ceiling was damaged due to water leaking from the cracks in the balcony slab above and that the damage had worsened since his previous inspection. Upon taking moisture readings he found that the plaster ceiling to be saturated with active mould. He said that the bathroom plaster ceiling will

need to be removed and replaced. Upon removing the manhole cover in the bathroom ceiling he noticed that the cover was wet. He found a slow leaking water pipe above which was not noted previously. He said water drops were falling directly on the plaster manhole cover were confined to that area only. This appears to have been coming from a pipe rather than from the balcony but the water from that appeared to be confined to the man hole cover.

- 63 He said that active stalactites were located on the south side of the internal partition wall were falling over the hall linen cupboard and the plaster above the linen cupboard was wet and there was evidence of mould. He said this had worsened since his previous inspection. He said there was a potential that the laminated top of the linen cupboard section has been damaged.
- 64 He found evidence of damage to the hall plaster ceiling and mould adjacent to the hall linen cupboard which had not been reported previously which he attributed to the water leak from the tiled balcony above. He found the plaster ceiling directly in front of the hall linen cupboard to be saturated with evidence of mould and said that it would need to be removed and the plaster replaced. He said the linen cupboard will also need to be removed and checked for water damage.
- 65 Upon inspecting the balcony of the Applicant's Unit he found two wet patches on the floor and a build-up of efflorescence and calcification and that stalactites had formed due to a leaking of the tiled balcony above.
- 66 He concluded that there had been an increase in the damage to the living room plaster ceiling, hall area plaster ceiling, bathroom plaster ceiling and the soffit of the tiled balcony.
- 67 He repeated his opinion that the entire balcony in the Respondent's Unit needed to be completely stripped back to concrete, the cracks in the concrete repaired and new waterproofing applied. In his costing of the rectification work for the Applicant's Unit he included an allowance for a mould expert to advise on the remediation of mould problem. His costings have been redacted from his report.

Mr Murphy's report

- 68 Mr Murphy's findings are dealt with below in regard to rectification.

Mr Martin's reports

- 69 The Respondent's expert, Mr Martin, inspected the two units on 9 and 10 July 2018. He conducted a flood test of the balcony of the Respondent's Unit although it is unclear from his report whether this involved the whole of the tiled area or the specific sections to which he refers that is, the entire east side of the balcony and the area adjacent to the sills of the living room door.

- 70 After flooding the balcony, Mr Martin inspected the Applicant's Unit and found:
- (a) dampness and mould in the two bedrooms which he said was related to leaking windows and was unrelated any water penetration from the balcony. He described the carpets and underlay in both bedrooms as being very wet and mouldy;
 - (b) water damage over the bath. He said that the plaster above the bath was relatively dry, although he noted that Mr Ryan had found it to be wet a month earlier;
 - (c) moist calcium carbonate stalactites in the ceiling void along shrinkage cracks;
 - (d) further calcium carbonate stalactites above the linen cupboard in the hallway between the bathroom and the living area;
 - (e) some mildew on the plaster ceiling in front of the cupboard;
 - (f) that the plaster ceiling in front of the linen cupboard was moist. He said that the moist area corresponded with the drain from the balcony above;
 - (g) water damage to the bulkhead ceiling in the living room, although he found that the plaster ceiling above it was dry;
 - (h) on the balcony he found that the calcium carbonate leaking through the balcony soffit was damp and moisture was evident on the tiles of the balcony floor.
- 71 He concluded that there had been water flows from the Respondent's Unit into the Applicant's Unit but he believed that the moisture evident during his inspection had entered the slab prior to the final application of membrane on about 21 June 2018. He said it was highly likely that the flow has been stopped by the application of the membrane system over the tiles but that the residual moisture in the slab will take time to dry out and should be monitored. He concluded that the application of the membrane over the balcony had stopped the leaking.
- 72 His further report of 17 July 2018 comments on Mr Ryan's most recent report and Mr Murphy's report and revises out his costings.

Concurrent evidence

- 73 Mr Ryan and Mr Martin gave evidence concurrently. The following issues were canvassed:

The flooring

- 74 Although he acknowledged that moisture testing showed that the moisture level of the flooring in the living area was within an acceptable range, Mr Ryan said that there was dark staining on the ends of floorboards which he said was evidence of moisture in the timber floor. He said there was staining in several spots. He attributed the staining to water that had been leaking from the bulkhead which was directly overhead.
- 75 Mr Martin said that he did not believe that the dark marks on the floor were water damage. He identified what he described as a bit of wear and tear on the floor generally and slight cupping of floorboards near the door onto the balcony but it was not suggested that that had anything to do with water leaking from above. Mr Ryan said that there was a little bit of cupping apart from that near the door.
- 76 A short video was shown and the sound of water being compressed between the slab on the underside of the flooring material could be heard, from which I find that there was water under the floor.
- 77 As to rectification, Mr Ryan said that the whole floor needed to be sanded and resurfaced. He said that a spot fix would be noticeable because it is one open floor.
- 78 At the on-site inspection, I could not see damage to the floor although, as Mr Martin said, it did appear to have had some wear and tear.

The living room plaster

- 79 Both experts agreed that, following the application of the membrane over the tops of the tiles, the leaking from the balcony appears to have stopped. Mr Ryan said that it was not a long-term solution because the tiles were drummy and the membrane should not have been put over the top of them. He identified a number of areas of the balcony when he found drummy tiles.
- 80 Mr Martin said that, although the company that applied the membrane refused to provide a guarantee, the membrane should last up to 10 years if it is covered by the artificial grass that the Respondent proposes to use to protect it from UV radiation and physical damage. He said that he did not observe drummy tiles but, by the time he visited the site, the tiles had been covered by the membrane. He agreed that, if the tiles were drummy and someone walked on them, the membrane could tear.

Conclusion as to water penetration

- 81 On the foregoing evidence I am satisfied that the membrane on the external balcony forming part of the Respondent's Unit is, and has been since at least August 2014, defective and has allowed water to penetrate into and through the slab and cause damage to the Applicant's Unit. I am satisfied that some water has also penetrated through the windows of the two bedrooms but that the primary source of water is from the leaking balcony.

82 I am satisfied that the flows of water through the balcony have occurred each time it has rained and that the flows were not reasonable.

Responsibility of the Respondent

83 Since the slab, the membrane and the tiling were done by the Builder before the Respondent became the occupier of the Respondent's Unit, by s.16(5) of the Act, the Respondent is liable to pay damages in respect of the injury, damage or loss suffered by the Applicant if he has failed to take any steps reasonably available to prevent the causing of the flow.

84 Mr Downey referred me to the Tribunal's decision in *Connors v Bodean International Pty Ltd* [2008] VCAT 454 for useful guidance as to the nature of the obligation of a subsequent owner. I agree with the Tribunal's observations in that case.

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

86 Mr Triaca said that, from the time the Respondent agreed to carry out the works on his balcony in about February 2018, he acted diligently in preparing the property for works, engaging contractors, having works carried out by his contractors in March 2018, making the property available for testing in April 2018 and engaging contractors to carry out further works in June 2018.

87 The Respondent should have started to take reasonable steps to investigate and stop the flows of water as soon as he became aware that they were taking place. That was as early as 2014, although he knew as early as January 2013 that the tiles were drummy and that water might be getting under them and was concerned about possible water leaks or waterproofing issues that may come up as a result.

88 On his own admission, he was fully apprised of the situation in November 2016 but I am satisfied that he knew of the problem well before that and he then took no positive action to do anything about it, apart from making demands upon the Builder which produced no response. Reasonable steps should have been taken well before December 2016 and, had he taken them, the flows would have been stopped before Ms Watts moved in on 30 January 2017.

89 It was not until March 2018 that the Respondent engaged a contractor to apply the sealing material over the tops of the tiles on part of the balcony and not until 21 June 2018 that the waterproofing material was extended over the whole of the balcony following the removal of the spa.

90 I accept Mr Ryan’s opinion that what has been done is of a temporary nature and not an adequate solution for the long-term but for the moment at least, the flows have now stopped. The damage to the Applicant’s Unit can now be repaired. If there are further leaks they will be the subject of a future claim.

Rectification

91 Rectification will involve both repair of internal finishes to the Applicant’s Unit and also remediation of the mould problem.

Remediation of the mould

92 Mr Murphy inspected the property on 9 July 2018 and found a very strong odour which he said was generally associated with water damage and mould. He photographed mould in various parts of the Applicant’s Unit, finding it to be present in every room. He said there were five areas of visual damp and mould, two of them being the bedrooms and the other three being the open plan living area and the bathroom.

93 He said that the Applicant’s Unit in its present condition was not fit for occupation and that access should be restricted. He said that, even if the mould in the bedrooms did not exist, the unit would still not be fit for occupation.

94 He said that the mould affected services should be removed and that there should then be structural drying which he described as a very lengthy process. He recommended that the mould spores be removed from the air using a HEPA filter and that the premises then be certified by an occupational hygienist before rectification work could be carried out.

The claim for rectification of the ceiling

95 The plan of subdivision provides that the common property is all of the land on the plan except for the lots, and includes the structure of the building, structural support beams, columns and service risers. The boundaries are defined on the plan by thick continuous lines. Those marked with an “M” were median boundaries but all other boundaries were the interior face of the element that was marked.

96 Mr Triaca pointed out that, since the upper boundary of the Applicant’s Unit was the internal surface of the ceiling, the water and mould affected plaster was common property and she could not bring a claim for its rectification. He relied upon Regulation 10 of the *Subdivision (Registrar’s Requirements) Regulations 2011* which (where relevant) is as follows:

“Use of buildings to define boundaries

r. 10

- (1) A boundary may be shown on a plan by reference to a building.
- (2) Any building or part of a building that defines a boundary must be identifiable from the plan.

- (3) If a boundary on a plan is defined by reference to a building or part of a building, the plan must specify whether the boundary is one or more of the following—
 - (a) Interior Face;
 - (b) Median (floor and ceiling);
 - (c) Median (wall, window, door, balustrade);
 - (d) Exterior Face;
 - (e) in some other location.
- (4) Unless otherwise specified on the plan, the location of any building boundary defined as—
 - (a) *Interior Face* lies along the interior face of any wall, floor (upper surface of elevated floor if any), ceiling (underside of suspended ceiling if any), window, door or balustrade of the relevant part of the building. Any internal coverings, waterproof membranes and fixtures attached to walls, floors, and ceilings are included within the relevant parcel;”

97 The Applicant’s Unit has a suspended ceiling. Mr Downie submitted that the plaster was the internal covering of the suspended ceiling and so formed part of the Applicant’s Unit. He referred to the Tribunal’s decision in *Owners’ Corporation PS508732B v. Fisher* [2014] VCAT 1358, where Member Rowland said (at para 21):

“I am of the view that the interior face of the building means, the interior face of the structure of the building rather than the top surface of whatever is fixed to the structure of the building. So that the where balconies are constructed of concrete and then tiled over, interior face means the upper face of the concrete structure not the tile. I am supported in my view by Section 132 of the *Owners’ Corporations Act* 2006 and the 2011 *Subdivision (Registrar’s requirements) Regulations*.”

98 I respectfully agree with that statement. However, with a concrete slab there is an interior face upon which one may affix other things, such as a membrane and tiles. With a ceiling, you don’t get an interior face until you have hung your plaster on the joists, battens or whatever else supports it. I think that the word “ceiling” in the normal sense means more than just the battens and other components that hold the plaster up. The ceiling is the plaster surface that separates the roof space from the room below. That is what you paint and attach your light fittings to.

99 That view is consistent with s.132 of the *Owners’ Corporation Act* 2006, which provides as follows:

“Right to decorate interior walls, floors and ceilings

- (1) If a boundary of a lot is shown on a plan of subdivision as being the interior face of the building, the lot owner has the right to decorate or attach fixtures or chattels to that face.
- 2) This section permits works such as curtaining, painting, wallpapering and installing floor coverings, light fittings and other chattels.”

- 100 Since any screw, masonry anchor or other fixing device would need to penetrate beyond the external finish in order to gain purchase and be able to provide support for whatever is to be fixed, this section permits the common property to be used for the purpose.
- 101 I therefore accept Mr Triaca’s submission that the upper boundary is the underside of the ceiling and so the affected plasterboard on the ceiling is the property of the Owners’ Corporation and not the Applicant.
- 102 Mr Triaca submitted that persons cannot claim damages for damage to property that they do not own. That is true, but this is not a normal action in tort or contract. This is a special statutory cause of action that provides statutory remedies. What the Applicant is seeking here is not compensation with respect to damage to someone else’s property but damages in respect of the injury, damage or loss she has suffered as a consequence of unreasonable flows of water.
- 103 It would, of course, be open to her to demand of the Owners’ Corporation that it remove the water and mould affected ceiling plaster and insulation and replace it with new materials, and then it would be for the Owners’ Corporation to seek to recover the cost of doing that from the Respondent whom I have found to be ultimately responsible. How long that process would take is unknown. The Owners’ Corporation has known of the damage to its property for a number of years and has not repaired it. It is the Applicant who suffers the consequence of its disrepair and until it is repaired her unit will remain uninhabitable and un-tenanted and the Applicant’s loss of use will continue.
- 104 What I have to assess is not simply the cost of restoring the Applicant’s property but the loss and damage she has suffered as a result of the unreasonable flows of water, and that must include the cost of putting her back into the position she would have been in had those unreasonable flows not occurred.
- 105 By s.9(5) of the Act, I am able to make any order with respect to compensation for damage to land, the continuation, removal or modification of work or payment of the costs of the removal or modification of work that I consider appropriate. The “work” in this context includes the ceiling.
- 106 In order to rectify the damage done to her unit by the unreasonable flows of water, it will be necessary for the Applicant to remove and replace the mould and water affected plaster and replace it. Even though she does not

own the relevant building elements she is the only person interested in affecting the repair and in practical terms, it is an expense that she must incur in order to restore her unit to its former habitable condition.

- 107 I consider it appropriate to make an order that the Respondent pay to the Applicant the cost of removing and replacing the water and mould affected internal linings of her unit which had been damaged by unreasonable flows of water from his unit.

Scope and cost of the rectification works

- 108 Both experts provided a scope of works with costings. Mr Ryan allowed an amount of \$17,697.00 including contingencies, margin and GST for preliminaries and \$16,340.00 including contingencies, margin and GST for rectifying the internal surfaces of the unit and the balcony soffit.

- 109 Mr Martin assessed a total of \$13,067 for the whole of the work, including contingency, margin and GST. Both experts provided for a contingency of 5% and a margin of 35%.

- 110 Examining the two opinions:

- (a) I note that Mr Martin makes no allowance to remove and replace the linen cupboard which Mr Ryan said was necessary. In the light of Murphy's evidence I prefer Mr Martin's opinion and find that this will be necessary to ensure that all of the mould is eradicated. I will allow Mr Ryan's assessment for that, which is \$1,920.00 for labour and \$80.00 for materials.
- (b) For plaster removal and replacement, Mr Ryan assessed a base figure of \$2,520.00 whereas Mr Martin has a base figure of \$1,623.68.
- (c) For painting, Mr Ryan has assessed a figure of \$2,880.00 whereas Mr Martin's figures for painting total of \$1,207.00.
- (d) For an electrician to disconnect and then re-connect the electricity Mr Ryan has allowed \$760.00 whereas Mr Martin has allowed \$360.00. Considering the time that it is likely to take to disconnect and reconnect the electricity, I prefer Martin's figure and will allow \$360.00.
- (e) For cleaning and containment, Mr Ryan has allowed only \$995.00 and I presume that the work of any additional cleaning and containment is included in his other costings. Mr Martin has allowed \$1,740.00.

- 111 The totals for items (b), (c) and (e), are \$6,395.00 for Mr Ryan and \$4,570.68 for Mr Martin. Since I can see no reason to prefer one assessment over the other I will allow \$5,150.00 for those items.

- 112 As to the outside balcony soffit, Mr Ryan has assessed a total cost of \$1,325.00 to clean up the calcium and repair the damage, whereas Mr

Martin has assessed \$749.21, comparing the two scopes of work, Mr Ryan has allowed \$105.00 for a safety barrier which I accept will be necessary. Taking a halfway point but adding in the cost of a safety barrier, I will allow a base figure of \$1,089.60.

- 113 For supervision Mr Ryan has allowed 60 hours at \$110.00 per hour, amounting to \$6,600.00. He pointed out that the owner resides overseas and there was nobody to grant access to tradesmen. Mr Martin has allowed two hours per day for seven days at \$110.00 per hour, amounting to \$1,540.00. He said that an external project manager to act as the owner's agent would not be required, that the work was fairly straightforward and the Builder would get the key to the unit from the agent. Apart from the appliances, there is nothing of value in the unit. Considering the limited extent of the work I accept Mr Martin's figure.
- 114 I will also allow lift padding and floor protection as assessed by Mr Ryan, totalling \$1,170.00.
- 115 Finally, Mr Ryan has allowed a base figure of \$5,000.00 for mould remediation which he justified in his evidence, whereas Mr Martin has only allowed the cost of a heater. Mr Martin said that he had not included post remediation verification because he thought it would not be necessary for such a small remediation. However Mr Murphy's evidence was that mould remediation would be necessary and so I think some allowance should be made. Although there is no precision in the amount allowed, it is apparent that there would need to be a report prepared and several visits by the expert. I will accept Mr Ryan's figure. There is a question whether this figure should be apportioned because there has been some leaking around the windows in the bedrooms and some consequential mould there also. I do not think that is appropriate because:
- (a) Mr Murphy's evidence was that, even without the bedroom mould the Applicant's Unit would still have been uninhabitable and would require remediation;
 - (b) the evidence establishes that the bulk of the water entering the apartment came from the balcony, not through the windows. The water from the balcony was collected in buckets whereas the entry around the window frames appears to have been comparatively minor;
 - (c) when mould was found in the curtains during the tenancy it was dealt with by simply cleaning the curtains, following which the unit was occupied.

I will allow Mr Ryan's base figure.

- 116 These figures that I have allowed amount to \$16,309.60. With a 5% contingency, a 35% margin and GST, that results in a final figure of \$25,430.75.

The quotations

- 117 Both sides obtained quotations from tradesmen. The Applicant obtained a quotation for \$39,814 inclusive of GST and the Respondent obtained a quotation of \$15,498 plus GST. Mr Martin said that he thought that the Applicant's quote was excessive and Mr Ryan said that the scope of works in the Respondent's quote was inadequate.
- 118 Whereas both Mr Ryan and Mr Martin have given expert evidence as to what the reasonable cost of carrying out the remedial work would be, quotations are not of that nature but rather, state the price for which the author of the document is prepared to carry out the work. For that reason, I prefer to rely upon the evidence of Mr Ryan and Mr Martin.

The time taken to carry out the rectification work

- 119 Mr Ryan said in his report that, if the membrane over the tiles is effective, there will nonetheless be residual water in the slab that will take some months to dry out. In view of the time that this case has taken to hear and determine that period would seem to have expired.
- 120 For the time taken to carry out the rectification work, Mr Martin thought that it would take no more than two weeks for a tradesman to start, four weeks to dry out the unit, after removing the damaged plaster and opening up the affected areas, and then 7 to 10 days to finish. He said that from quotation to completion should be no more than eight weeks. Mr Ryan said that 4 to 6 weeks should be allowed to commence work and then 6 to 8 weeks to finish the job.
- 121 From the discussion during the concurrent evidence, the timing may depend upon the availability of tradesmen who carry out this sort of remedial work, commonly for insurance companies. I think that the Applicant should address the rectification with some sense of urgency because no rental is being earned while the unit is unoccupied. Much of the time appears to be needed to organise appropriate tradesmen and dry the premises out. I think that 10 weeks would be a reasonable time to allow for the work.

The relief sought

Declarations

- 122 The Applicant claims a declaration to the effect that there is an unreasonable flow of water from the Respondent's Unit to the Applicant's unit given rise to by works constructed by the Builder before the Respondent became the occupant of the Respondent's Unit. Mr Triaca had no issue with the making of a declaration but took exception to the word "is", on the basis that the flows of water have, he submitted, stopped. He sought a different declaration which would accord with the Respondent's view of the facts.
- 123 By s.124(1) of the *Victorian Civil and Administrative Tribunal Act 1998* ("the VCAT Act"), the Tribunal is empowered to make a declaration

concerning any matter in a proceeding instead of, or in addition to, any other orders that it makes.

- 124 The purpose of a declaration is to state the rights of the parties with respect to a particular matter with precision and in a binding way and it must finally declare the rights of the parties (see Pizer: *Annotated VCAT Act* 6th Ed. Para 124.40 and the cases there cited).
- 125 There must also be some point in making a declaration. I have already made findings in regard to the flows of water that have occurred which bind the parties and I will grant appropriate relief. I do not see any point in also making a declaration to the same effect. I am not satisfied that there is an unreasonable flow of water at the present time.

Injunction

- 126 The Applicant also seeks a declaration that the waterproofing membrane applied by the Respondent is not a step reasonably available to prevent the causing of the unreasonable flow of water from the Respondent's Unit to the Applicant's Unit. She also seeks a mandatory injunction that the Respondent take steps to prevent the causing of the unreasonable flow of water by engaging a builder within a reasonable time to undertake the scope of works identified in Mr Ryan's report.
- 127 In support of that application, Mr Downey said:
- (a) the waterproofing product applied by the Respondent's contractor might, according to Mr Ryan, fail at any time and even Mr Martin agreed that, if the tiles are drummy, the membrane could tear when someone walks on them;
 - (b) the method of repair suggested by Mr Ryan, although expensive, is a permanent repair and so it is warranted;
 - (c) the Respondent has the means to pay for the scope of works suggested by Mr Ryan;
 - (d) the Respondent intends to issue proceedings against the Builder for breach of warranty under sections 8 and 9 of the *Domestic Building Contracts Act* 1995 to recover damages and will be seeking to recover from the Builder the cost of having the balcony properly repaired. The Respondent then might obtain a windfall if he is successful against the Builder in that action, given that he has only expended a much lesser sum on the temporary solution that he has paid for;
 - (e) Mr Ryan's scope of works is consistent with s.129 of the *Owners' Corporations Act* 2006, which provides:

“A lot owner must—

- (a) properly maintain in a state of good and serviceable repair any part of the lot that affects the outward appearance of the lot or the use or enjoyment of other lots or the common property; and
- (b) maintain any service that serves that lot exclusively.”
- (f) the Applicant does not want to relitigate the matter in 6 to 12 months’ time when the waterproofing product supplied by the Respondent fails.

128 By s.9(3) of the Act it has power to grant an injunction, including an injunction to prevent an act that has not yet taken place. This supplements its general power to grant injunctions conferred by s.123 of the VCAT Act.

129 In opposing the granting of an injunction, Mr Triaca referred me to the following passage from the judgment of Finkelstein J in *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd* [2000] FCA 672:

“8 This being a *quia timet* application, the Applicant has the burden of proving such a possibility of danger as amounts to a "moral certainty" that the Respondent threatens and intends to do something that will cause imminent and substantial damage to the Applicant: *Royal Insurance Co Ltd v Midland Insurance Co Ltd* (1908) 26 RPC 95 at 100; *Bendigo and Country Districts Trustees and Executors Co Ltd v Sandhurst and Northern District Trustees, Executors and Agency Co Ltd* [1909] HCA 63; (1909) 9 CLR 474; *Byrne v Castrique* [1965] VicRp 23; [1965] VR 171.”

That case concerned an application to restrain the calling up of a bank guarantee given under a building contract. It did not concern a mandatory injunction.

130 He also referred me to the Tribunal’s decision in *Reynolds v. Southern Quality Produce Co Operative* [2011] VCAT 692, where the injunction sought was to restrain the construction of a grain terminal until off-site works to enhance the local drainage infrastructure were completed. As to the principles to be applied, the Tribunal said (at para. 180):

“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.’”

- 131 Mr Triaca pointed out that the two flood tests undertaken by the experts had shown that the balcony was no longer leaking and that the Respondent’s expert, Mr Martin, believed that the four coats of membrane were unlikely to crack.
- 132 Although I am satisfied that the method used by the Respondent to stop the leaks in 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 Mr Ryan’s scope of works is not carried out. The obligation of the Respondent is set out in the section. He must take reasonable steps to stop the flow but he is not required to do that in any particular way.
- 133 It is open to the Owners’ Corporation to enforce the Respondent’s obligation under s.129 of the *Owners’ Corporations Act 2006* to maintain his unit if it considers that it is not in good and serviceable repair but there is no such application before me.
- 134 It is also not relevant what damages or other relief the Respondent might recover from the Builder in the proceedings that he apparently proposes to take against it.

The loss of rent claim

- 135 The Applicant claims to recover the rental that she would otherwise have received during the periods in which there was no tenant in the Applicant’s Unit, the reductions in rental that she gave to Ms Watts due to the condition of the premises as well as the re-letting fees and disbursements that she had to pay the agent for obtaining a new tenant on two occasions, which amounted to \$1,841.07 each time.
- 136 On 3 December 2016 the then tenants vacated the Applicant’s Unit. It appears from the agent’s email of 10 November that the tenants at the time told her that the cause of the mould was the apartment upstairs. There is no evidence from either the agent or the tenants to establish on the balance of probabilities that they left because of the mould. The existence of a substantial mould problem at that time is established but it may be that that they left for other reasons.
- 137 The Applicant’s Unit was then let to Ms Watts, whose tenancy commenced on 30 January 2017. The residential tenancies agreement that she signed contains the following condition:

“The rent for this property is \$2,824 pcm however, there is a leak coming from the balcony upstairs that is to be remedied by the body corp. and the Builders of the building.

We are told that as of 17/01/2017 these works should be completed in the next 6-12 weeks.

The landlord agrees that until these works are finalised and completed that the rent for the property will be set at \$600 per week (\$2,607 pcm).”

138 Mr Triaca said that these discounts were an illusion. He pointed out that the previous tenants had paid \$600.00 per week and said that Ms Watts was, according to the agent’s email of 17 January 2017, happy to pay \$650 per week. From the text of the email, it was the agent’s suggestion that it be reduced to \$600.00 per week. There is some force in Mr Triaca’s argument. However, if the premises had been let at a full rental without any reduction for its condition, there is the possibility that Ms Watts might have claimed compensation with respect to the water entry. The terms of the tenancy agreement would have prevented that. I accept that the tenancy agreement in evidence is not contrived and that this was a genuine reduction agreed upon between the Applicant and Ms Watts due to the condition of the premises arising from leaking from the balcony above.

139 The second reduction was suggested by the Applicant’s husband and was agreed upon after he had inspected the interior of the Applicant’s Unit, seen the bucket that she used to collect the water that came from the ceiling and was able to see its damaged condition. It is not known whether Ms Watts would have continued to live there had a further reduction not been offered. The further reduction appears to have been a business decision made by the Applicant’s husband. It was not solicited by Ms Watts. It may well have been necessary for the Applicant to agree on this further reduction but I am unable to make a finding to that effect.

140 Then, on 29 December 2017, Ms Watts gave notice of intention to vacate the Applicant’s Unit because of the ongoing leaks. An extract from the text of her notice is as follows:

“Unfortunately I cannot put up with the situation any longer. The now continuous dripping, rising floor and smell meant I had to cancel having friends over for a long planned dinner. I have not been told the content of the fluid leaking from the roof. There must be a concern for health implications.

Having returned from overseas on 26/12/17 I have collected approximately 5 litres of fluid. I am concerned that there must be a considerable amount under the floor also.”

141 The text of this email bears out the genuineness of the reductions that were given by the Applicant. The tenant vacated on 29 January 2018 and no rental has been received by the Applicant since then.

- 142 Loss of future rental is claimed for the period that it will take to carry out repairs and render the Applicant's Unit habitable. I think that it was reasonable for the Applicant to leave her unit in its present state until the hearing but after that, repairs ought to have been undertaken. On that basis, a loss of rental for a period of 10 weeks following the date of the hearing is fairly attributable to the flows of water.
- 143 The total loss of rent would therefore be \$24,978.57, calculated as follows:
- | | | |
|-----|---|-------------|
| (a) | \$50 a week from 30 January 2017 until
29 January 2018 (364 days) | \$2,600.00 |
| (b) | 650 a week from 30 January 2018 until
28 September 2018 (241 days) | \$22,378.57 |
- 144 Loss of rental is also claimed until such time as the Respondent carries out the scope of works recommended by Mr Ryan in regard to the replacement of the tiling and membrane on his balcony. As stated above, so long as the flow has stopped and there is no immediate threat of it resuming, the Applicant is not entitled to any further relief. In particular, it is not for the Applicant to dictate to the Respondent how he stops the flow.

Reletting fee

- 145 Mr Triaca said that no reletting fee should be allowed because Ms Watts had remained in the premises for the full 12 month period of her tenancy agreement. That is so, but the Applicant has lost an existing tenant who was sufficiently attracted to the Applicant's Unit to want to live there despite its condition and she remained there until she found it intolerable. In those circumstances it seems likely that she would have continued as a tenant for a considerable, although indefinite, period. The Applicant must now advertise for a new tenant and pay a commission to the estate agent for finding one. I think that is a recoverable loss.
- 146 I am not satisfied that it is demonstrated that the loss of the previous tenants is attributable to the flows of water but the loss of the second tenant certainly was. One amount of \$1,841.07 will therefore be allowed.

The Builder

- 147 Mr Triaca said that there was no explanation as to why the Applicant had not pursued the Builder or the Owners' Corporation. Whether or not the Applicant had some other cause of action against other parties is relevant to the present proceeding.

Conclusion

148 There will be an order that the Respondent pay to the Applicant \$52,250.39, calculated as follows:

Repairs	\$25,430.75
Loss of rent	\$24,978.57
Re-letting fee	<u>\$ 1,841.07</u>
Total	<u>\$ 52,250.39</u>

149 The applications for declarations and injunctive relief will be refused.

150 Costs will be reserved for further argument.

SENIOR MEMBER R. WALKER