VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1038/2015

CATCHWORDS

Water Act 1989 – s.16(1) - flow of water - whether caused by the respondent - whether reasonable – s.20 - actions of prior occupier - steps reasonably available to the respondent to prevent the flow complained of - flow must be unreasonable - *Subdivision Act* 1988 – s.12 - whether implied easement over respondent's property entitling the applicant to carry out work necessary for reasonable use and enjoyment of the applicant's property - no implied easement entitling applicant to make improvements

APPLICANT	Robert Mills
RESPONDENT	Elana Rubenstein
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	17 -18 December 2015 and 7-9 March 2016
DATE OF ORDER	15 April 2016
CITATION	Mills v Rubenstein (Building and Property) [2016] VCAT 586

ORDER

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

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SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr K. Naish of Counsel
For the Respondent	Dr R. Sadler of Counsel

REASONS

Background

1. The Applicant and the Respondent are next door neighbours, each of them living in different parts of an old converted warehouse in Stuart Street Armadale. The Respondent's part of the warehouse includes a garden which abuts the party wall ("the Party Wall") that separates her property from that of the Applicant. The Applicant complains that there is a flow of water from the garden into his house on the other side of the Party Wall. He seeks various orders that he claims are designed to prevent the flow and also seeks damages for the losses that he claims to have suffered.

2. The Respondent does not dispute that water has passed from her side to the Applicant's side of the Party Wall but denies that she has caused the flow, denies that it is unreasonable and says that the flow is largely caused by drainage from the Applicant' roof and by extensive excavations undertaken by the Applicant on his side of the Party Wall in order to lower the floor level of his house.

The hearing

3. The proceeding came before me for hearing over two days in December last year and was then adjourned part heard until March this year when it concluded after three further days.

4. Mr K. Naish of Counsel appeared for the Applicant and Dr R. Sadler appeared for the Respondent. I heard evidence from the parties and from a number of expert and other witnesses and I visited the site with counsel and the parties. At the conclusion of the hearing, following submissions from Counsel, I informed the parties that I would provide a written decision.

The warehouse

5. The warehouse was constructed more than 100 years ago and, until the 1980s, it consisted of a two story building in the North and two single story buildings to the south of it, all three buildings being adjacent to one another. They were divided by common walls but were separately roofed. The frontage of the area of land upon which the three buildings were constructed is rectangular. The front boundary of the site is on Stuart Street, Armadale, and the full length of the rear boundary abuts a park.

6. The Party Wall separating the Applicant's house from the Respondent's property is of solid brick construction. The lower half is three bricks thick without any cavity and the upper half is two bricks thick with a cavity in between the two leaves. There appear to be no weep holes draining this cavity wall. The Party Wall is supported by four courses of base brickwork which have been laid upon a concrete footing. This base brickwork is slightly wider than the wall above it. The base brickwork extends approximately 20 to 30 mmm out from the face of the wall on the Applicant's side and approximately 50 to 60 mm out from the face of the wall on the Respondent's side. Between the base brickwork and the bottom half of the Party Wall that it supports, there is a damp course.

7. On the Respondent's side, there are some vents recessed into the Party Wall immediately above the damp course.

8. The title boundary between the two properties lies approximately in the centre of the Party Wall.

The conversion to residences

9. A strata plan of subdivision of the site together with a dwelling house on the north, known as 7a Stuart Street, was registered on 4 December 1986. This subdivided the Warehouse from number 7a Stuart Street. By an amendment to the plan of subdivision made on 19 February 1993 the Warehouse was further subdivided into the two properties now occupied by the Applicant and the Respondent. According to the plan of subdivision the lower boundary of each unit lies 2 metres below the site enclosed by the external walls and the upper boundary is 20 metres above the lower boundary. Anything beyond those boundaries is common property.

10. At some unknown time, between 1981 and 2002, the roof was removed from the middle building, being the more northern of the two single-storey buildings, leaving the walls in place, thereby converting the middle building into a central courtyard open to the sky. The remaining single-storey building to the south and the two story building to the north were each converted into separate dwelling houses. The central courtyard then became a courtyard garden appurtenant to the single story dwelling.

11. Additionally, a studio was constructed in the north-eastern corner of the central courtyard adjacent to the street and against the Party Wall and an extension to the single-storey house was constructed over the full width of the western end of the central courtyard along the rear boundary to create an additional second storey bedroom, bathroom and a third storey observation tower. I am unable to ascertain from the evidence whether this conversion occurred before or after the amendment to the plan of subdivision that occurred on 19 February 1993.

12. The two dwellings were then sold. The Applicant ultimately became registered as the proprietor of the two storey dwelling, being number 7 Stuart Street, ("the Applicant's house") and the Respondent became registered as the proprietor of the other property, comprising the single story dwelling, the central courtyard, the extension and the studio, being numbers 1 to 5 Stuart Street ("the Respondent's property").

The present works

13. The Applicant, who is an architect, lived in the Applicant's house for some time and decided to rebuild it into a three story luxury home. Plans were prepared and permits were ultimately granted. I have not been provided with the full construction drawings but some indication of what is proposed is shown in some drawings that accompany some photographs that were tendered.

14. For present purposes, the most significant alteration was the conversion of the Applicant's house from two stories to three stories. This required the removal of

the existing timber floor at ground level and also a concrete slab underneath and the lowering of the finished ground floor level of the altered building to below the existing damp proof course on the Party Wall.

15. According to the Applicant's construction drawing SK003, the vents in the Party Wall are to be bricked up and the concrete footing supporting the Party Wall is to be deepened considerably for the full width of the existing footing. Since the title boundary is in the middle of the wall, that would require work to be undertaken and concrete to be poured on the Respondent's side of the boundary.

16. Following the removal of the existing timber floor and slab, the subsoil was excavated on the Applicant's side. The excavation continued below the existing footing level, to a considerable depth in some places. Blinding concrete was then poured to support the footing of the Party Wall. At this stage, on 15 May 2015, the Applicant's workmen saw water accumulating on top of the blinding concrete which appeared to be seeping from under the Party Wall.

17. The Applicant requested the Respondent's permission to carry out extensive waterproofing works on her side of the Party Wall. When that was refused, the Applicant sought legal advice, following which he and his workmen entered or attempted to enter the Respondent's property on a number of occasions, notwithstanding the Respondent's refusal of access and her objections. A video recording of one of these attempts was tendered in which the Applicant's workmen are seen standing on the roof of the Respondent's studio and persisting in their attempts to climb down a ladder into the Respondent's garden, despite her ordering them many times to get off her roof and leave her property. There were other instances of them entering her garden without her permission even though the Applicant knew that he and his workmen were not permitted to be there.

18. In order to address the allegation that there was a flow of water from her side of the Party Wall, the Respondent engaged a plumber, who confirmed that there were no leaking pipes in her property. She also engaged a soil engineer to ascertain whether a garden pond in her courtyard was leaking as the Applicant had suggested. The engineer sank a borehole near the pond and produced a report setting out the soil profile but providing little useful information. The borehole did not fill with water at the time it was dug although it was later observed to contain water after it had been raining.

19. The relationship between the parties became progressively worse and finally this proceeding was commenced.

The law

20. The claim is brought pursuant to the *Water Act* 1989 ("the Water Act") and also the *Subdivision Act* 1988 ("the Subdivision Act"). The relevant sections of the Water Act are sections 16 and 20. Section 16 provides (where relevant):

> "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."

21. In order to recover the Applicant must prove that has been a flow of water, that the flow is not reasonable, that the water has caused him injury, damage or loss and that the Respondent has caused the flow.

22. Section 20 provides that, in determining whether or not a flow is reasonable, account must be taken of all the circumstances including a number of matters set out in that section. For present purposes, the most significant of these are the matters set out in subsection (e), which are:

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

(b) the contours of the lands concerned;

(c) 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.

The witnesses

23. I do not propose to attempt a summary of the evidence given by each of the witnesses. The following is nothing more than an account of the more significant evidence given.

Mr Pyke

24. The supervising architect for the reconstruction was a Mr Pyke, who is employed by the Applicant's architectural firm. In his description of the Party Wall he said that the base brickwork was between five and seven courses high. However most of the photographs show it to be only four courses although there are five courses in one place where the footing appears to be lower.

25. Mr Pyke gave evidence that on 18 May 2015 he observed the presence of water on the blinding concrete which had been poured in order to support the footing of the Party Wall. The excavations of the Applicant's side extended well below

the foundation of the footing, which then had to be supported. He said that the water appeared to be coming from the Respondent's side of the Party Wall.

26. Photographs of his observations were produced. He was not present when these photographs were taken but said that they depict what he saw. They show a dampening of the surface of the blinding concrete adjacent to the footing of the Party Wall and what appears to be water ponding against the soil immediately below the footing. The excavation at this point is the equivalent of three brick courses below the base of the footing and has extended below the footing where the pooling of water is pictured.

27. Mr Pyke said that the area of the Party Wall on the right of this ponding water was damp when compared with the area on the left. Certainly the area of brickwork that he referred to appears from the photograph to be darker in colour. From the photographs this discolouration seems to extend in a curve from the position of the ponding water up the wall, along to the right and then back down to the ground again. The discolouration does not appear to be regular and it is most pronounced in the bottom five courses of brickwork. Mr Pyke said that the wall to the left of this discolouration was dry.

28. He said that waterproofing work was carried out on the Applicant's side of the Party Wall but that the side of the footing could not be waterproofed. The slab for the new floor was then poured after a membrane was laid.

29. Mr Pyke said that water was also found to be entering the Applicant's property from a courtyard at the rear of the house to the north. The owner of this property agreed to the Applicant's request to tank the wall from his side and then reinstate his courtyard. That work was done, although it was initially unsuccessful and had to be redone.

Mr Noonan

30. The contractor engaged to waterproof the Party Wall on the Applicant's side was a Mr Noonan. He produced a report of his observations before he carried out the work, which was tendered. He said that he tested the Party Wall on the Applicant's side which, when entering from Stuart Street, was dry and then was wet for a distance of 11.2 m and was then dry to the rear of the property. He said that the bulk of the water appeared to be coming under the footing He said that the dampness in the wall extended up to 5 to 7 courses of brickwork which, he said made him think that there was an irrigation system on the other side.

31. He said that he entered the Respondent's garden and found the ground to be very wet. He took a number of photographs and dug a hole. He said that he believed that the water flow was coming from the garden area of the Respondent's property and suggested that the sprinkler system be removed, disconnected or altered, that the trees near the wall be removed or moved, that the wall be tanked from her side and that an agricultural drain be installed at the foot of the Party Wall on the Respondent's side.

32. In cross-examination Mr Noonan acknowledged that there had been rain in the three days before he entered Respondent's garden and found the ground to be

very wet. He also acknowledged that he had done waterproofing work on the Applicant's properties for many years. He said that when he waterproofed the Party Wall on the Applicant's side he first had to wet it because it had dried up in the meantime. He said that he had not been told that there had been a flow of water over the top of the gutter above the area of brickwork that was wet but he said that if there was an overtopping issue he would have expected the whole wall to be wet. He said that he was not provided with a copy of the report of the Respondent's expert, Mr Juers.

Mr Dimitrovski

33. The slab for the Applicant's new ground floor was poured by a Mr Dimitrovski. He said that he had worked on three projects for the Applicant over the past few years. He said that he first saw water seeping through the Party Wall on 15 May 2015, that the wall was wet right across the area of the courtyard from 5 to 6 metres from the frontage, up to a height of 1.4 metres. He said that he saw movement of water every time it rained. To remove the water they put dirt on it and shovelled it out. He said that this occurred on 7 to 10 occasions.

34. In order to establish that the water was coming from the Respondent's garden, Mr Dimitrovski and a plumber poured dyed water into her garden from a hole that they cut in the roof of the Applicant's house. He said that the dyed water flowed back under the footing.

35. On 2 June 2015 Mr Dimitrovski entered the Respondent's garden with the Applicant to examine the Party Wall from her side. He gained access through the front gate which, although locked, he was able to open by standing on a ladder and reaching over to the latch. He said that the borehole that had been dug by the Respondent's contractor, which is 1.6 m deep, had water in it to a depth of 1.2 metres. He acknowledged that it had been raining at the time. While they were there the Respondent returned home, found them in her garden and demanded that they leave. They nonetheless remained in the garden, despite her objections, until the police arrived and told them to leave the property.

36. Notwithstanding that they had been ordered to leave by the police, Mr Dimitrovski re-entered the Respondent's property without her permission on 4 June and again on 9 June, gaining access on each occasion over the roof of the studio. Some gutter cleaning was carried out on these dates which was completed on 10 June by use of a harness attached to the roof of the Applicant's house.

37. On 25 June the Applicant requested access to the Respondent's garden and, when this was refused, he, Mr Dimitrovski and another man climbed onto the roof of her studio and placed a ladder from the roof down to the garden, despite the Respondent's protests. Mr Dimitrovski then attempted to climb down the ladder until, after loud protests by the Respondent and some wrestling with the ladder, they departed. The incident was recorded by the Respondent on a video that was tendered at the hearing.

38. Mr Dimitrovski acknowledged that the gutters and downpipe draining the southern side of the roof of the Applicant's house were blocked and were not cleaned out until 10 June 2015. He identified two photographs in the Tribunal Book of the eaves gutter of this roof on the Respondent's side, showing ponding up to the level of the external edge of the gutter in one place. It is difficult to see from the two photographs precisely whereabouts this ponding is relative to the courtyard because the camera foreshortens the image.

Mr McLeod

39. On 12 June 2015 the Applicant asked Mr McLeod, a structural engineer and the design engineer for the reconstruction of the Applicant's house, to undertake an assessment of the water penetration and to advise on the structural integrity of the Party Wall, particularly where dampness was evident.

40. Mr McLeod said in his report, dated 17 September 2015, that the wall shows a significant area that becomes damp due to rain or sprinklers from the Respondent's property. He noted that water had been observed entering the Applicant's property from below the damp proof course along the wall adjoining the Respondent's property and that there were roots showing through the wall from the plants in the Respondent's garden. It does not appear that he observed any flow of water himself but the roots appear from the photographs, taken by others, in Exhibit "A".

41. Mr McLeod said that the damp proof course appears to be providing reasonable protection from water rising up the wall as there are currently no signs of efflorescence. He said that the damp area in the wall was therefore due to moisture migrating through the wall and that this would be possible if, as is the case, there is no cavity in the existing wall. He said that for the longevity of the wall, wetting and drying should be avoided and he recommended that moisture be prevented from entering the wall by providing a tanking membrane to the external face, which is the Respondent's side. He also recommended that an agricultural drain be installed on the external face of the wall to reduce hydrostatic pressure. He recommended that this scope of works be carried out before the slab was poured. Despite having received this advice from Mr McLeod, the Applicant nonetheless poured the slab in August 2015. Mr McLeod said that it was poured contrary to his advice.

42. Mr McLeod said that it was not usual to have a solid brick wall as an external wall because bricks will absorb moisture. He believed that the dampness was generated from below because, if it had come from above, he would have expected to see a larger zone at the top and a reduced zone below. He said that lime mortar can be degraded by water and lose some of its strength. He said that the absence of efflorescence could be because the wetting has not happened for long enough. He said that it was possible that the water was coming from the garden and may be a perched water table but he thought that it was subsurface

water. He has not entered the Respondent's property and inspected the Party Wall from her side.

43. In cross-examination Mr McLeod said that he could not say why the wetness in the Party Wall was localised. He said that it was a build-up of water that was looking for a way out. He said that the eaves guttering on top of the Party Wall would need to be altered in order to comply with the current building code.

Mr Kirby

44. Mr Kirby operates a waterproofing business. He has no formal technical or trade qualification but has had over 15 years experience as a waterproofing contractor. At the request of Mr Pyke, he prepared three reports for the Applicant, setting out moisture readings that he said he had obtained and a number of suggestions of what could be done to waterproof the Party Wall.

45. In his first report he said that he measured moisture levels on the Applicant's side of the Party Wall of up to 35% but said that the results were "mixed". From the context, this appears to be the area that he said was damp. He said that the remainder of the wall was in the region of 8% to 16 %.

46. He said that he believed that the wall, being made using lime mortar, would be porous and so it should be treated with a polyester based clear liquid applied to the Respondent's side, which would render it waterproof. He suggested various ways of waterproofing the lower wall below ground level and also made recommendations as to a drainage system to be laid in the Respondent's courtyard. He gave prices for the various options that he suggested.

47. In his second report he detailed further observations that he had made concerning moisture levels. In his third report he gives the results of moisture measurements that he took on 6 November. He acknowledged that it had rained heavily the day before, which I note was the day when the overtopping of the gutter shown in the video occurred. He agreed that that would have affected his readings.

48. In his oral evidence he said that the water coming through the wall was probably rainwater but there may also have been some rising damp issues. He said that he suggested in September 2015 that the issue could be remedied on the Applicant's site with a negative tanking membrane but that he would not warrant the work.

Mr Mills

49. The Applicant's own evidence focused on his relationship with the Respondent, the correspondence between them and the damages that he said he had suffered. He denied that the source of the water was from his side of the Party Wall or that his house "leaked like a sieve", except in regard to the rear living room where there had been substantial leaking in the past below some decking.

50. He said that the lower part of the Party Wall had been tanked and an agricultural drain had been laid on his side, although he said that he had been advised that the drain would not work. He said that before the slab was laid he saw water enter when it rained and also saw some water on the tanking in the kitchen.

51. He acknowledged that he had been made aware in 2012 that the eave gutter on top of the Party Wall that drained the south face of his roof was full of vegetable matter. He also agreed that the Respondent had offered to allow him access to clean it out and that he had not done so. When shown a video of water overflowing the gutter and flowing down the exterior face of the Party Wall and into the courtyard, he suggested that it was due to water overshooting the gutter from the section of roof that had been cut away in order to tip the dye into the Respondent's courtyard. He said that this section of roof formed a ramp like a ski jump which caused water flowing down that part of the roof to overshoot the gutter. He denied that the guttering has overflowed since it was cleaned out in June 2015.

Mr Morris

52. Upon being informed of the allegation that water was flowing from her property, the Applicant engaged a plumber, Mr Morris. Mr Morris said that he visited the Respondent's property on the 28th or 29th of May and ascertained from the water metre that there were no leaks from the mains water supply into the property. He said that the gutters of the studio and the western box gutter were fine but he expressed concern that grass was growing in the eaves gutter at the top of the Party Wall. That is the gutter that drains the southern face of the roof of the Applicant's house.

53. He said that the only drain collecting water falling into the courtyard was on the south-west corner where it travelled north to a pit and went from there to the park at the rear. There were two other pipes in the pit that were capped off. He said that the gutter from the Applicant's property was completely blocked and so it was possible that the water was overflowing and running through the brick wall into the foundations. He said that any agricultural drain would need to have a fall in order to take water away.

54. He concluded that it was groundwater that was causing the issue with water in the Applicant's house and the depth of the excavation work. He said that it was possible that, had the excavation work being carried out during summer, the water table would have been lower and not caused the issue that, he said, was currently exacerbated with all the rain that had fallen at the time.

55. Mr Morris said that he did not check the sprinkler system or the pond. He said that it was obvious that the problem was groundwater coming from the Respondent's courtyard.

Mr Juers

56. Both properties were inspected on behalf of the Respondent by Mr Juers, a structural engineer, on 26 November 2015 and again on 2 December 2015. He took moisture readings which indicated moisture levels of between 12 to 20% in an area of the wall up to 1 metre above the slab commencing approximately 6.7 metres from the front of the Applicant's house and diminishing at the western end of the Party Wall. He said that he obtained readings of between 8 and 12%

on the Respondent's side at similar spacings. He said that moisture readings of 12 to 20% on the wall were relatively low.

57. Mr Juers said that the eaves gutter on top of the party wall was approximately 25 to 26 metres long and there were only two downpipes draining it, one at each end. He said that the Building Code of Australia requires the spacing of downpipes to be no more than 12 metres apart and so another two downpipes are needed. He said that, as well as insufficient downpipes, there were bows and buckles in the eaves gutter, and a poor fall, which would result in an overflowing of the gutter. He said that any overflow could flow down the wall and would discharge into the garden on the Respondent's side.

58. He pointed out that the downpipes intended to drain this eaves gutter discharged into box gutters on the Respondent's side of the Party Wall which in turn were designed to drain to the point of discharge. He said that excessive water flowing into the box gutters at both ends of the Respondent's property could result in those gutters overflowing. Amongst the photographs attached to his report was one showing staining on the wall where he said the box gutter from the studio roof was overflowing. He also noted the absence of efflorescence on either side of the Party Wall

59. Mr Juers concluded that there were two problems with the Party Wall. The first was water seeping under the footing and the second was dampness or rising damp in the brickwork. He said that water might have been going under the wall for some time whenever heavy rain fell but that it only became evident when the timber floors were removed and the ground on the Applicant's side was excavated.

60. Mr Juers concluded that the water photographed and reported entering onto the Applicant's side under the footings was the result of:

    - insufficient downpipes being provided to the southern eaves gutter of the roof of the Applicants house;
    - inadequate falls being provided to the eaves gutter resulting in the gutter overflowing;
    - excessive water flowing onto the box gutters of the buildings at both the east and west end of the Respondent's property which could result in the gutters overflowing, particularly the studio in the south-east corner;
    - rain falling onto the face of the brickwork of the Party Wall, particularly if there was wind, which would result in water running down the wall.

61. He said that in his opinion the water was not the result of problems with the fishpond, plumbing pipes or the sprinkler system in the Respondent's property. He also said that the installation of an agricultural drain on the Respondent's side of the Party Wall would not prevent rising damp occurring.

62. It was put to Mr Juers in cross-examination that possibly the damp course had been bridged by some decking boards in front of the studio on the Respondent's side. He said that only the first board would bridge the damp course and that was

only one small board but he acknowledged that the pipework which sits on the top of the base brickwork might compromise the damp course. As to the roots that were observed, he said that roots follow the moisture and that if one took the tanking down to the bottom of the footing, the water and the roots would simply pass underneath. The said that, since the soil in the area is sedimentary and the natural fall of the land was from the Applicant's house to the Respondent's property it is likely that the subsoil falls the same way.

Mr Nicholson

63. The Respondent's gardener, Mr Nicholson gave evidence that he had been looking after the Respondent's garden for nearly 20 years, having been employed by the previous owner as well as the Respondent. He said the sprinkler system was installed before the Respondent purchased the property. He described it as an older type of system with two solenoids. He said that all sprinkler heads are half sprays, and point in towards the courtyard and away from the Party Wall.

64. Mr Nicholson visits the Respondent's property about once a month, tidies up the garden, prunes the plants and adjusts the sprinklers. He said the sprinklers were used in spring and summer and then turned off. When in use they were timed to come on three times a week for about 20 minutes for each region.

65. He said that he was in the garden in May 2015 and found that it was not particularly wet or dry. He said the sprinkler system would have been turned off in May. He said that he does other sprinkler systems and he described the extent of watering of the Respondent's garden as being normal usage. He used to clean the box gutters but does not do that any longer. He said that the eaves gutter used to be full of weeds and attributed this to the plane trees in the park at the rear.

66. When asked about the pond he said that he had seen a drop in the water level of 4 to 5 inches on three or four occasions over the years which he attributed to evaporation.

Miss Rubenstein

67. The Respondent said that she purchased the Respondents property in about 2000. She gave evidence as to the history of the buildings and said that, save for some internal alterations to the bedrooms, she had made no alterations to her property since purchasing it. She said that she first became aware of drainage concerns on 18 May 2015 when she received a call from Mr Pyke. She gave evidence of her dealings with the Applicant and his tradesmen and the entries that they made into her property.

68. She told of the engagement of the geotechnical engineer and Mr Morris to investigate the Applicant's complaints. She produced a video of water overtopping the eaves gutter which she took on 5 November 2015. This shows a considerable flow of water down the wall and into her garden. She also produced a number of other photographs that she took on 6 August 2015.

69. She said that, until May last year Mr Nicholson controlled the sprinkler system and she never touched it. She said that the sprinkler system had been turned off and she had not watered the garden during winter and spring last year but recommenced watering the garden in December. She produced a record that she said she had kept of the dates and times upon which the garden was watered and the times when the sprinkler system was in operation. According to that record, the dates and times when the garden was watered were as follows:

Date	Period
15 December 2015	20 minutes
24 December 2015	21 minutes
3 January 2016	30 minutes
8 January 2016	25 minutes
11 February 2016	60 minutes
25 February 2016	30 minutes
8 March 2016	25 minutes

The dates and times when the sprinkler system was operated were as follows:

Date	Period
18 December 2015	less than 5 minutes (VCAT view)
19 December 2015	30 minutes
31 December 2015	10 minutes
19 January 2016	30 minutes
9 February 2016	20 minutes

70. She said that she has a man come every six months to clean out the gutters and that he last came in about November or December last year.

The flows

71. It seems to me that there are two flows complained of, namely, a dampening of the Party Wall over the area described above and water entering below ground level either through the base brickwork or under the footing into the excavated area on the Applicant's side.

72. Mr Naish submitted that there was no drainage for any water that might find its way into the courtyard. The evidence suggests that there is one source of drainage out to the park at the rear but it is unclear which part of the courtyard this drains and to what extent and in which direction water drains from the property at a subterranean level.

The dampening of the wall

73. It was suggested by the Applicant that the likely source was the sprinkler system in the garden. There are sprinkler heads near the Party Wall which are pointed away from the wall in the opposite direction. During the demonstration of the

system at the on-site inspection there was a certain amount of drift of the spray which reached the Party Wall but this did not seem to me to amount to a great deal of water.

74. The usage of this system does not appear to have been excessive. According to Mr Nicholson's evidence, the zone near the wall was set to operate for 20 minutes three times a week during the warmer months of the year when the system was in use and that it was switched off in May.

75. In view of these limited operation times, the damp patch does not seem to be consistent with water from the sprinklers in the Respondent's garden passing through the Party Wall. The sprinklers are pointed away from the wall and although I observed some drift of spray back onto the wall, it seems unlikely that there was sufficient to penetrate the thickness of the wall. The spray would only last 20 minutes and it seems likely that the wall would have dried out before it had a chance to do that.

76. Further, the shape of the damp patch is inconsistent with the notion that the sprinklers were the cause. If the water were from the sprinklers then one would have expected the damp patch to coincide with the location of the sprinklers but it does not. It is one patch, in the shape of a dome, in one place on the wall. This would suggest a single source in the centre of the shape towards the top. I therefore accept Mr Juer's evidence that it is likely to be the result of the overflowing eaves gutter which has now been cleaned out and which is to be upgraded to accord with current standards as part of the Applicant's renovation.

Water through the base brickwork and underground

77. The second source appears to be subterranean water which may not have been noticed but for the extent of the excavations carried out on the Applicant's side.

78. There is no evidence that the pond in the Respondent's garden is leaking and it is established by Mr Morris's evidence that there are no leaks in the plumbing on her side of the Party Wall.

79. Mr Naish submitted that the use of a sprinkler system and maintaining garden beds without proper drainage is a significant cause of water ingress into the Applicant's side of the Party Wall. Quite obviously, a garden requires water in the soil or the plants will die. The complaint can only be about excessive water.

80. How water drains from the courtyard is unclear. There would be some evaporation and the plants would take up some of the water and dispose of it by transpiration. The rest would soak into the soil and an unknown proportion would be expected to be taken away by the single drainage pipe that was found.

81. No correlation has been demonstrated between the times the sprinkler system was in use and the times the migration of moisture was observed. The first such observation appears to have been on 15 May 2015. That was of water migrating under the wall and a dampening of the darkened area. Rainfall records indicate that on that day and the preceding two days, 20.8 mm of rain fell. It seems unlikely that, on or shortly before these observations were made on 15 May 2015

the Respondent would have been using her sprinkler system. Indeed, the evidence is to the contrary.

82. The preponderance of evidence seems to be that the source of the water is rainfall, either falling directly into the courtyard or overflowing from the gutters referred to. Indeed, Mr Dimitrovski said that he saw movement of the water every time it rained.

83. The limited observations of the Applicant's witnesses occurred on days after rain which in some cases was heavy. Mr Morris said that, in May 2015, the garden was not particularly wet or dry. The ground appeared to be fairly dry at the time of the on-site inspection, although that was December.

84. The eaves gutter was not cleaned and the downpipes were not unblocked until 10 June 2015. If the gutter was not able to drain then the water could only have escaped by flowing over the outside edge of the gutter and either running down the wall to the Respondent's garden or falling directly onto the garden adjacent to the wall. This appears to me to be a much more likely source of the water that was observed on 15 May than the Respondent's sprinkler system.

85. Mr Naish suggested that this does not explain dampness along the length of the wall adjacent to the garden but it is not established that the whole length of the wall was damp. The damp area extended up from the damp course in a curve, albeit, not entirely regular, and then back down to the damp course again some metres further along the wall. I think that is consistent with Mr Juer's suggestion that the water is hitting the wall and wetting it. As the water descended it might be expected to spread out on either side.

86. Mr Juer pointed out a number of deficiencies in the drainage system of the roof of the Applicant's house namely, insufficient downpipes and inadequate falls in the eaves gutter. I accept his evidence that there ought to have been two additional downpipes and that there ought to have been a better fall for the gutter. His evidence as to the bows and buckles in the gutter is supported by the photographs.

87. His evidence that there is excessive water flowing onto the box gutters of the buildings at both the east and west end of the Respondent's property does not appear to have been contested. It seems plausible that two small box gutters, which receive run-off from their own roofs, would be inadequate to also drain the southern face of the roof of the Applicant's house as well. I therefore accept Mr Juer's evidence that the run-off into these box gutters is excessive and that it could result in the gutters overflowing, particularly the studio in the south-east corner where the photographs show staining of the wall where overflowing has occurred. That was also pointed out on site.

88. The other source identified by Mr Juers was rain falling onto the face of the brickwork of the Party Wall, which would result in water running down the wall, particularly if there was wind. The Respondent's side of the Party Wall faces south and being wholly exposed would be unlikely to remain dry when it rains. Further, the video taken by the Respondent shows rainwater overtopping the

gutter and hitting the wall. I do not accept the Applicant's interpretation of this video that this water is running down into the North East box gutter. It appears to me to be running down the wall further to the west.

89. There does not appear to be any evidence that there was any flow observed after the gutters were cleaned out on 10 June 2015 although the floor slab and internal tanking for the Applicant's house would have obscured any further water penetration. The gutters overtopped on 8 August, 15 September and 5 November 2015, suggesting that, even when cleaned out, the drainage system was inadequate as Mr Juers suggested.

90. For the foregoing reasons I find that the source of the water complained of is rain, either striking the wall on the Respondent's side and dampening it, or landing on the ground and percolating through the soil and seeping through the wall below ground level, possibly dampening the base brickwork below the damp course or passing under the footing.

91. In regard to the water passing through the soil, it is not possible on the evidence to say how long this has been happening. It seems likely that, had there been no deep excavations on the Applicant's side this water would not have been observed.

Causation

92. In order to recover the Applicant must show that the Respondent caused the flow. The test for causation is the same as one would apply in the case of negligence (see s.19(9)).

93. Quite obviously, the Respondent has not caused the rain to fall. She has also not caused the blockages in the Applicant's own gutter system or the inadequacies of the design of that system. Consequently, she has not caused the water overtopping the gutter to hit the Party Wall and soak into it in the manner shown in the video.

94. The complaint is that she has failed to install an adequate drainage system in her garden so as to prevent the water that lands in the courtyard from passing into, through and under the Party Wall to the Applicant's side. In this way she is said to have caused the flow of subsurface water.

95. Dr Sadler relies upon what is known as the "free-flow principle", which is that the occupier of lower land is obliged to receive the flow of water from higher land. He referred me to a number of authorities but the principle is well-established. The evidence is that the natural terrain in the area slopes downwards from north to south, so that, before any development, the natural ground level on the Applicant's side of the Party Wall would have been higher than the natural ground level on the Respondent's side. However following the deep excavation carried out by the Applicant the ground level is now much lower on his side.

96. Mr Naish submitted that the free flow principle relates to the management of water flows in large broad acre rural properties. It does not fit neatly into a suburban streets with substantial urban development. He gave the example of a

flow of water in an apartment block from a residential unit into a unit below. Quite obviously the lower unit is not obliged to receive the flow from the one above. I can understand that, but if one removes soil from the ground one might expect groundwater from the surrounding soil to flow into the excavation when beforehand, it might have flowed in the opposite direvction.

97. It is unclear in the present case what moisture there was in the ground beneath the floor level of the Applicant's house before his excavations commenced but since it was seen to be necessary to undertake waterproofing works on the other side of the Applicant's house, to the north, as well as the Respondent's side, it would seem that the flow of water into the soil under the Applicant's house was not simply from the Respondent's courtyard.

98. Additionally, it was acknowledged by the Applicant that an area under decking at the rear of the Applicant's house which is unroofed "leaked like a sieve". Whether any of this water leaked into the ground below the Applicant's house was never explored in the evidence.

99. Insofar as a flow below ground level may have been contributed to by the sprinkler system, the Respondent caused the flow by using the system. The only question there is whether that part of the flow was reasonable and that is dealt with below. Otherwise, the only basis upon which it is argued that the Respondent has caused a flow of water below ground level is by neglecting to prevent the flow.

100. Mr Naish submitted that there was a positive duty on the Respondent to act in order to prevent water flow to the Applicant's house. He said that this arose because the Applicant's house was uniquely vulnerable to the Respondent failing to act to prevent the water flow and the circumstances giving rise to the risk of damage were a result of the acts of the former occupier of her property. He said that, unlike a new development of land, it is not possible for the Applicant to waterproof his land from within his title boundaries.

101. As to inactivity as a form of causation under section, Dr Sadler referred me to the case of *Cullinane v Owners Corporation 1 Plan No. PS434498R & Anor* [2013] VCAT 608 where Deputy President Macnamara said (at Para. 75):

> "For the purpose of Section 16(1) a person can be regarded as having caused something by nonfeasance but only if the person was under a duty to take the steps which were, in fact, omitted."

I respectfully adopt that opinion.

102. Dr Sadler submitted that the Respondent was under no duty to prevent rain from falling on the Party Wall, to waterproof the Party Wall, prevent water from reaching it or to install a drainage system in her garden. He said that, at the time the flows occurred, the Respondent was not aware and could not reasonably have foreseen that there was a likelihood of water passing through or under the Party Wall onto the Applicant's side because this had not been observed before. I accept that submission.

103. Mr Naish said that vulnerability is the touchstone of a duty of care. Of course, liability under the Water Act is not dependent upon the breach of a duty of care. It is strict, but the essential ingredients of the statutory cause of action must be established. To find that the Respondent has caused the flow by omission I must be satisfied that she was under a positive duty to do something and she omitted to do it. I think that is the duty that Mr Naish is referring to. He said that it was the unique vulnerability of the Applicant's house coupled with the actions of the prior owner of her property in removing the roof that gave rise to the duty. Her responsibility, if any, for the acts of prior owners is dealt with below.

104. The Respondent did not remove the roof or create the garden or construct whatever drainage system there is there. There is nothing that she has done to add to the water that falls into the courtyard, apart from a reasonable watering of the garden. I do not accept that the Respondent was under a positive duty to take any steps to prevent a subterranean flow of water of which she was unaware and which only manifested itself as a result of the Applicant's unusually deep excavations on his side of the Party Wall.

105. Mr Naish appeared to suggest that the Respondent should not have a garden at all but rather, should tile the whole area and direct all run-off water into a drain. In effect, he asserts that she is under a positive obligation to remove her garden and reconstruct the courtyard in the manner described, even though it has not been established that there was any flow of water or at least, any complaint of any flow of water, until May 2015.

106. I do not believe that it could be sensibly suggested that, by failing to remodel her garden she has caused the flows complained of.

Was the flow reasonable?

107. The evidence is that the sprinkler system was not used excessively and the level of watering was reasonable. Accordingly, insofar as any flow is contributed to by the sprinkler system or the Respondent watering her garden I do not find that it was unreasonable. It is reasonable to have plants in a garden and it is reasonable to water them, providing the watering is not excessive and I am satisfied that it was not.

108. Mr Naish said that the flow from the Respondent's courtyard is not reasonable because it impacts on the integrity of the Applicant's house. It does not appear to have affected the Applicant's house until he excavated the soil below the level of the footing of the Party Wall. There is no evidence of any intrusion of water before those excavations took place. Mr Naish submitted that the water flow has not stopped but there is no clear evidence of that. It is not known what has happened to the flows of water since the slab was poured, the tanking was done and the eaves gutter and the downpipes were cleaned out

109. Insofar as the flow is as a result of rainwater falling into the courtyard and dissipating through the soil then that is a reasonable flow. An owner of higher land is under no obligation to intercept natural run-off onto lower ground if she has not caused or contributed to it. Indeed, the "free flow principle is contrary".

The ground is only lower on the Applicant's side because he has chosen to lower it artificially.

110. Insofar as it is due to the overtopping of the Applicant's gutter or water from his own roof, the Applicant cannot complain that it is unreasonable that this water should come back onto his side of the Party Wall since he has caused that part of the flow himself by failing to maintain his own property.

111. In conclusion I am not satisfied that the Respondent has caused any unreasonable flow of water into the Applicant's side of the Party Wall

Tree roots

112. The Applicant also complains that tree roots from the garden bed have worked their way under the Party Wall to the Applicant's side. This is not a claim in nuisance or trespass but Mr Naish suggests that it is reasonable for the Respondent to do something about the root ingress. Certainly, the roots should not be intruding, but the few roots shown in the photographs are very small indeed, being only a few millimetres across, and they do not appear to have caused any damage. The roots depicted have been cut off on the Applicant's side and it is not apparent that anything else needs to be done about them because concrete has now been poured where they came in.

Liability for the actions of the previous occupier

113. It was also argued by Mr Naish that the Respondent is liable for the actions of previous owners of her property for removing the roof over the garden area which has allowed the rain to enter an area which would otherwise have been dry and to fall onto a wall which would otherwise have been an internal wall. Certainly the bottom part of the Party Wall may well have been an internal wall but it is not suggested that the top part of the Party Wall was ever anything but external.

114. Mr Naish relies upon section 16(5) of the Water Act, which is as follows:

> "(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."

115. I accept Dr Sadler's submission that this section would only apply if I were to find that the flow was unreasonable and I do not make that finding. Nevertheless, in case I am wrong I should consider the application of this section.

116. In *Connors v Bodean International Pty Ltd* [2008] VCAT 454, after considering the authorities relating to the adoption of a nuisance, the tribunal found that this section imposes an obligation upon the current occupier to take reasonable steps to prevent the causing of an unreasonable flow within a reasonable time after he knew or ought to have known of the flow. It was also held that the current

occupier's obligation is limited to the time from which such steps should reasonably have been taken. I think that is right.

117. Mr Naish submitted that, having removed the roof, the occupiers of the Respondent's property were required to provide sufficient means of drainage for the courtyard that they introduced. He submitted that the Party Wall was an internal wall. The evidence is that it is undesirable to have a brick external wall without any cavity.

118. It is by no means certain that the Party Wall was constructed as an internal wall. The upper section clearly was not and the presence of vents in the lower section, which appear in the photographs, would suggest that perhaps even that was built as an external wall, although a number of the witnesses assumed that it was built as an internal wall.

119. The evidence is that there is no subterranean drainage system near the Party Wall on the Respondent's side. There is some subterranean drainage some distance away but how effective it is and what area it drains is unknown. It is for the Applicant to prove that the drainage from the courtyard is inadequate.

120. The suggestion seemed to be made that water landing in the courtyard has no way to get out but that is not established. It appears from the photographs tendered on behalf of the Applicant that the footings of the party wall allow water to pass underneath. If the footings are the same on all sides then water can drain from the courtyard under the walls in all directions. Since the natural lie of the land is to the south, one would expect that most of the subterranean drainage would occur away from the Applicant's house but the evidence does not permit me to make any findings about where the water goes. Overall, the state of the drainage of the Respondent's garden area is unclear from the evidence.

121. Mr Naish suggested that the installation by the Respondent of an agricultural pipe was the very least that one could expect in order to deal with water retained in the courtyard area.

122. Mr McLeod recommended in his report that an agricultural drain be installed "…on the external face of the wall where possible and above the footing/founding level, to reduce the hydrostatic pressure…" but although he is the design engineer for the project he produced no complete design of what he proposed. There is a very limited design on page 18 of Exhibit "A" which simply shows an agricultural pipe wrapped in a geo-fabric sock below the base of the footing and covered with aggregate. On the following page there is a sketch showing the course this proposed pipe is to take but no indication in any of the documents as to the fall to be provided from the start of the pipe to the drain or its ultimate destination. I note that Mr McLeod has not examined the Party Wall from the Respondent's side.

123. Mr Kirby said that he thought that a quality drainage system installed at or below footing level against the Party Wall "will go a long way towards reducing the excess moisture in the garden soil alleviating the problem of seepage onto the Applicant's side". He said the depth of the drain would be dependent on the available

discharge point. The height of this discharge point does not appear in any of the documents before me.

124. Mr Juers said that such a drain would be placed at footing level and would only collect water at or above it. He said that water could still pass underneath it.

125. If the pipe were to start at footing level at the eastern end and then have a constant fall, as is required if it is to be effective, then presumably it would have to be placed progressively deeper as it continued along the wall. If that is so then by the time one got to the end of the wall at the rear boundary the pipe would have to be very deep indeed.

126. No detailed design of such a system was produced by either party for the experts to offer an opinion on and so I am unable to determine whether it would be practicable to lay such a pipe. As to its effectiveness, Mr Juers doubted that it would work. He is an engineer and although Mr Kirby has experience in applying various waterproofing products he does not have any formal technical qualification. I should therefore prefer the evidence of Mr Juers. Mr McLeod, who is an engineer, also recommended a drain but did not produce a design of what he proposed or explain how it would work. In the end, I am unable to make any finding as to the effectiveness of a system that has not been fully designed and assessed by appropriately qualified people.

127. The act of the previous occupier is said to have been the removal of the roof which protected the ground underneath which is now receiving rainwater, without installing an adequate drainage system. The adequacy or otherwise of the drainage of the courtyard is unknown. Further, in the absence of an easement or some other right, the owner of a house does not owe an adjoining landowner a duty not to demolish it simply because by doing so, rain might fall on the vacant land which is now exposed to rainfall.

128. Mr Naish said that other steps that could have been undertaken by the Respondent to prevent the flow were allowing the Applicant access to investigate the problem and accepting his offer to carry out and pay for the remedial works to be undertaken on her side of the Party Wall.

129. The three main components of the scope of works proposed by the Applicant were the tanking of the wall below ground level, the construction of a storm water drain along the length of the wall at footing level and the treatment of the brickwork above ground level in order to render it waterproof. To carry out the scope of works would have resulted in the destruction of part of her garden and the substitution of immature trees and shrubs for what is already there.

130. I am not satisfied that it has been demonstrated that it was unreasonable for the Respondent to refuse to allow the Applicant to do that because of the impact that that would have upon her and because:

    (a) even if the tanking of the wall beneath ground level would be effective to prevent ingress of water through the tanked area directly from the Respondent's side, it was acknowledged that water could still pass underneath, through and under the footing or migrate to the base brickwork

through the unprotected concrete footing. The damp course would still be above the base brickwork.

(b) although laying a stormwater drain on her side of the wall would intercept at least some of the water from above but it would not prevent subterranean water from passing under the title boundary below the level at which it is laid. Further, it has not been demonstrated that an effective system can be constructed, having regard to the fall required to the lawful point of discharge and the distance the water will have to travel in the pipe;

(c) it is uncertain whether waterproofing the brickwork above ground level will still be required when the guttering and stormwater drainage from the Applicant's house is replaced. The Applicant's house has stood for many years with the Party Wall acting as an external wall without there having been any prior complaints of water penetration into the brickwork. I am satisfied that the penetration complained of was the result of the Applicant's eaves gutter overtopping and I am not satisfied that it was due to any propensity of the wall to admit water because the rest of the wall was said to be dry.

131. The Applicant is changing the nature of the building on his side of the Party Wall. He purchased the Applicant's house knowing that the area adjacent to it was unroofed and, as an architect, he had the expertise to understand the consequences or possible consequences of that.

132. The Applicant has waterproofed the Party Wall on his side. A number of witnesses said that it was preferable to waterproof a wall on the positive side and I accept that is the case but the additional benefits to be derived from the proposed scope of works is uncertain. It was also not established that no steps could be taken to prevent the ingress of water or intercept water on the Applicant's side.

The Subdivision Act 1988

133. Mr Naish relies upon section 12 to the *Subdivision Act* 1988, which states as follows:

"(2) Subject to subsection (3), there are implied—

(a) over—

(i) all the land on a plan of subdivision of a building; and

(ii) that part of a subdivision which subdivides a building; and

(iii) any land affected by an owners corporation; and

(iv) any land on a plan if the plan specifies that this subsection applies to the land; and

(b) for the benefit of each lot and any common property—

all easements and rights necessary to provide—

(c) support, shelter or protection; or

(d) passage or provision of water, sewerage, drainage, gas, electricity, garbage, air or any other service of whatever nature (including telephone, radio, television and data transmission); or

(e) rights of way; or

(f) full, free and uninterrupted access to and use of light for windows, doors or other openings; or

(g) maintenance of overhanging eaves—

if the easement or right is necessary for the reasonable use and enjoyment of the lot or the common property and is consistent with the reasonable use and enjoyment of the other lots and the common property."

134. Mr Naish submitted that the easement in favour of the Applicant's property is one of support, shelter or protection of the Party Wall from the ingress of water. He said that the existence of the easement allowed the Applicant to go onto the Respondent's land in order to perform work.

135. He referred to the case of *Hopkins v Owners Corporation RP449200* [2011] VCAT 1192. In that case a unit holder wish to install gas central heating in her unit but the only way in which gas could be brought to the heating unit was by a gas line passing through the common property. The tribunal held that an easement over the common propertyfor the passage of gas was necessary because there was no other way of bringing gas to the unit. The tribunal referred to and adopted the following passages from the Court of Appeal decision in *Body Corporate 413424R v Sheppard* [2008] VSCA 118.

"80 In my opinion, the word 'necessary' bears its ordinary meaning of 'essential'. It is not, however, to be construed in isolation, but in the context of the composite phrase, in which it is qualified by the broad concept of reasonable use and enjoyment of the benefited property. Further, it is the easement, rather than the function it secures, which must be 'necessary'. The reasonable use and enjoyment of the property not only clearly exceeds mere use, but also admits consideration of the effect on the reasonable use and enjoyment of property if the function to be achieved by the easement is unavailable and of the costs or detriments of securing the function by means other than the easement.

81 His Honour, in my view, correctly concluded that 'necessary' meant that the easement was essential to achieving the specified function, in the sense that no alternative means of achieving the relevant function was feasible or reasonably available. In determining whether an alternative to the easement was reasonably available, all relevant circumstances, including physical factors, legal restrictions, safety considerations and cost should be considered.

82 While the mere possibility of an alternative to the easement would not preclude the satisfaction of the first condition, his Honour did not hold the contrary, but rather, correctly concluded that if the alternative were reasonable, although involving some inconvenience or additional cost, an implied easement would not be necessary in the relevant sense."

136. If there is an easement over property the owner of the dominant tenement entitled to the benefit of the easement is entitled to enter the property for the purpose of giving effect to the easement. In the *Hopkins* case the unit holder was permitted to enter the common property and lay her gas line. She would also be entitled to enter the common property for the purpose of maintaining the line.

137. I think what is necessary for the reasonable enjoyment of a lot must be judged at the time of the subdivision. It is unclear what easement the Applicant is claiming in the present case. There is no evidence as to the state of the two properties at the time the subdivision of the Warehouse was registered. If by then the roof had already been removed from the courtyard area, it could not sensibly be suggested that there was an implied easement over the Respondent's property to provide shelter in favour of the Applicant's property by roofing the courtyard area.

138. The suggestion seems to be that the Applicant is somehow entitled under this section to enter the Respondent's land and carry out the work that he wishes to do. It may be that he has an implied easement to enter the Respondent's property for the purpose of carrying out any necessary maintenance work to the Party Wall that can only be done on her side, but that would be in order to maintain it, not transform it into something else. I cannot see that he has any easement to enter her property for the purpose of changing the nature and character of the wall from what it was at the time of the subdivision. That does not seem to me to be necessary for the reasonable use and enjoyment of his property as it was at the time of subdivision that is, a two story house without excessive excavations below footing level.

Conclusion

139. The foregoing reasons I am not satisfied that the Respondent has caused any unreasonable flow of water from her property to that of the Applicant and I am not satisfied that the Applicant is entitled to the benefit of any implied easement under the Subdivision Act entitling him to enter the Respondent's property to carry out the work that he wishes to do.

140. For these reasons the application is dismissed. Costs will be reserved.

SENIOR MEMBER R. WALKER