

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1452/2017

CATCHWORDS

Water Act 1989 – s.16 – unreasonable flow of water – whether flow proven - evidence

APPLICANT:	Valentine Previsic
FIRST RESPONDENT:	Jewil Marguerite Fulton
SECOND RESPONDENT:	Robert Leigh Jackson
THIRD RESPONDENT:	Glenn Vosbergen
FOURTH RESPONDENT:	Allison May Vosbergen
FIFTH RESPONDENT:	Lisa Jackson
SIXTH RESPONDENT:	Samuel McCubbin
INTERESTED PARTY:	City of Port Phillip
WHERE HELD:	Melbourne
BEFORE:	Senior Member R. Walker
DATE OF HEARING:	17 – 20 September 2019
DATE FINAL SUBMISSIONS RECEIVED:	23 December 2019
DATE OF ORDER	2 January 2020
CITATION	Previsic v Fulton (Building and Property) [2020] VCAT 6

ORDER

1. The Application is dismissed.

2. Costs are reserved for further argument.

Rohan Walker
Senior Member

APPEARANCES:

For Applicant

In person

For Respondents

Mr K. Oliver of Counsel

REASONS

Background

- 1 The Applicant is, and has been since 1987, the owner of a house in Tennyson Street Elwood (“the House”).
- 2 The House is of solid brick construction and, in its original form, it is thought to have been built early in the 20th century. Its northern wall (“the Northern Wall”) is built on the boundary of the site adjoining the property to the north. Consequently, the northern face of that wall marks the title boundary between the two properties.
- 3 The adjoining property to the north (“the Respondents’ Land”) has built upon it a fully detached building (“the Apartment Building”) that is situated approximately in the middle of the Respondents’ Land, with open space between its southern elevation and the Northern Wall.
- 4 The Applicant claims that there has been and continues to be an unreasonable flow of water from the Respondents’ Land which has penetrated the Northern Wall and caused damage to the House. He seeks an order for damages and such other orders as the Tribunal thinks fit.
- 5 The Respondents have denied that there is or has been an unreasonable flow of water as alleged by the Applicant.

The hearing

- 6 The matter came before me for hearing on 17 September 2019 with four days allocated. The proceeding was heard in conjunction with the Applicant’s appeal to the Building Appeals Board against an order made by the municipal council (“the Council”) that required him to demolish and rebuild the eastern end of the Northern Wall, the outer leaf of which is presently propped in order to prevent its collapse into the courtyard of Unit 5 on the Respondents’ Land.
- 7 The Applicant appeared in person and Mr K Oliver of counsel represented the First, Second and Fifth Respondents. The remaining Respondents did not appear.
- 8 In the related proceeding, Ms Flanagan appeared for the Council.
- 9 The hearing of the evidence took all of the time allocated. Directions were then given for the filing and service of submissions. Submissions relating to this proceeding were received from the First, Second and Fifth Respondents on 10 October 2019 but none were received from the Applicant within the time ordered.
- 10 The Applicant sought several extensions, of time within which to file and serve his submissions and they were finally received on 13 December 2019.
- 11 On 23 and 24 December 2019, further emails were received from the Applicant raising issues concerning the evidence and suggesting improper conduct on the part of the Council officers. Those suggestions of improper

conduct were addressed by an email from Ms Flanagan on behalf of the Council. Allegations that Council officers have behaved improperly are serious and should only be made where there is evidence to that effect. However, it is not for me to investigate these claims. I can only proceed to make findings on the evidence presented at the hearing and I shall not go beyond that.

- 12 Insofar as the Applicant's recent emails concern factual matters, I have treated these emails as being supplementary to the Applicant's submissions and have considered the contents.

Earlier works

- 13 In 1963, a building permit was issued by the Council to allow the reconstruction of most of the Northern Wall by the then owner of the House. The section of wall to be replaced pursuant to this permit appears to have been the whole of the Northern Wall, apart from the eastern end. It is that eastern end which is now the subject of the related Building Appeals Board proceeding. It was assumed at the hearing that the section of wall which was the subject of this permit was replaced.
- 14 In April 1989, the Council issued a building permit to the Applicant for an extension to the rear of the House so as to reconfigure the kitchen, bathroom, laundry and family room and change the roofline above the affected area.
- 15 According to the Applicant's evidence, that work was carried out by him as an owner-builder with the assistance of his father-in-law, who was a bricklayer.
- 16 The extension involved increasing the height of the rear section of the Northern Wall so as to create a parapet, changing what had been a skillion rear roof into a pitched roof and the laying of an infill concrete slab.
- 17 The stamped and approved plans required a box gutter to be constructed inside the Northern Wall parapet, that would drain the northern half of the new pitched roof towards the rear garden of the House. However, what was actually built was a normal sized gutter, draining to both the front and the back ends of the new pitched roof. Water flowing towards the western end of this gutter was collected in a rain head that projected over the courtyard of Unit 5. This rain head drained into a pipe attached to the northern face of the Northern Wall that carried it back to the eastern end of the wall, re-entering the Applicant's property and joining with a downpipe. This construction was not authorised by the building permit but the Applicant said that the then owner of Unit 5 consented to him constructing the rain head and pipe in the airspace above his courtyard.

The Apartment Building

- 18 The Apartment Building is presently subdivided into five dwelling units. The owners of the five units are as follows:

- (a) Unit 1 is owned by the Fourth Respondent;
 - (b) Unit 2 is owned by the Sixth Respondent;
 - (c) Unit 3 was owned by the Second and Fifth Respondents (“the Jacksons”) from 12 July 2012 until 29 August 2019 when they transferred it to another person who is not a party to this proceeding;
 - (d) Unit 4 is owned by the Jacksons, who became the registered proprietors on 30 September 2010;
 - (e) Unit 5 is and has been, since 6 October 2000, owned by the First Respondent (“Ms Fulton”).
- 19 Extensive works modifying the Apartment Building to its present configuration took place in November and December 1997. This work involved paving part of the courtyard of each of Units 2, 3, 4 and 5, so as to create, in each case, an impermeable surface that was sloped towards the Northern Wall but stopped short of the wall.
- 20 When he noticed that this had occurred, the Applicant became concerned as to the possible consequences of water run-off towards the House.
- 21 At some stage, probably when this renovation occurred, a slotted agricultural pipe was laid in the Respondents’ Land, below ground level, between the paved areas of the Northern Wall near the wall. This pipe runs parallel to the northern wall and extends from the eastern end of the Northern Wall all the way down to the western end. It then turns in a south westerly direction past the fence line and into the Applicant’s land to finish under the front lawn of the garden in front of the House. It does not appear that this is connected to the storm water system, although the evidence about that is unclear. The Applicant said that this work was done without his permission. When I asked him how he would not have known at the time about the excavation for the pipe under his front lawn, he said that he was away from the House for much of the time.

Water Act 1989

- 22 The claim is brought pursuant to s.16 of the *Water Act 1989* (“the Act”). Where relevant, that section 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.

.....
...

(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.”

- 23 The matters to be determined are:
- (a) whether there was an unreasonable flow of water;
 - (b) whether the flow was caused by the Respondents or by one or other of them;
 - (c) whether the Applicant has suffered damage by reason of the flow; and
 - (d) whether the damage complained of was caused by the flow.

The lay evidence

- 24 The Applicant alleges that, before the work to redevelop the units was undertaken, the vents in the Northern Wall, which were intended to provide subfloor ventilation to the House, were 400 to 500 mm above ground level. He said that the ground level is now substantially higher than that and that the vents are covered or partly covered and that water can enter them in the event of heavy rain.
- 25 There was conflicting evidence about this. The Applicant said that he asked the Second Respondent, Mr Jackson, to lower the level of the land in his courtyard and that Mr Jackson told him that it was not his problem. Mr Jackson denied that such a conversation occurred and there is no contemporaneous written complaint or other document to verify that it did.
- 26 Mr Jackson also denied that there was any build-up of soil in his courtyard. The ground level adjacent to the Northern Wall behind each of the four abutting units is the same as the ground level beyond each end of the wall, which would suggest that there has been no build-up of soil. I am not satisfied that, when the units were redeveloped, there was any substantial alteration in the ground level adjacent to the Northern Wall.
- 27 The principal change caused by the renovation for the purpose of this case was the creation of the large impervious paved areas referred to. Water running off these areas was not directed into a gutter or drain connected to the stormwater system but rather, flowed onto the surface of the ground between each paved area and the Northern Wall.

- 28 There was extensive evidence given by the Applicant of his complaints to the Council and to his neighbours about the drainage situation on the Respondents' Land following the construction of the impervious paving in the courtyards between the southern elevation of the Apartment Building and the Northern Wall.
- 29 Evidence as to the trees growing on the Respondents' Land was not disputed, nor was it disputed that, at times, there was a large amount of ivy growing up the wall from the courtyard of Unit 5. All of this material has since been removed. The ivy was removed in 2011 and the trees were removed early in 2019. It is not clear what relevance the presence or otherwise of these plants has in regard to the present claim.
- 30 There was also evidence of extensive overflowing of the guttering system that the Applicant had created, which projected into the airspace above the Unit 5 courtyard. Stains on the wall supported the First Respondent's evidence that the rain head and drain were in poor repair and overflowed into her courtyard until they were replaced in 2013 with the present PVC pipes. In the meantime, I accept that they caused substantial wetting of the wall at the base directly below the rain head and some visual indication of that was apparent during the inspection, which is referred to in Mr McFarlane's report.
- 31 I am satisfied that the Applicant was genuinely concerned that the House was suffering water penetration as a result of the redevelopment works carried out on the units in 1997. The real issue is, whether those concerns were justified.

The expert evidence

- 32 A number of expert reports were produced which appear to be mainly concerned with addressing the cause of the bow in the eastern section of the Northern Wall that the Council has ordered the Applicant to replace.

Geotechnical evidence

- 33 On 26 April 2018, a company called Geotechnical Drilling drilled four boreholes in the Respondents' Land, adjacent to the Northern Wall, with the following results:
- (a) The borehole adjacent to the rear section of the Northern Wall was taken to a depth of 1 metre. It showed silty sand down to a depth of 700 mm and sandy clay for the last 300 mm.
 - (b) The borehole further to the west, approximately in the middle of the Northern Wall, showed fill, consisting of silty sand and gravel that was moist and poorly compacted, down to a depth of 900 mm, followed by ironstone for the next 200 mm. the bore log for this hole suggested that the concrete footing of the Northern Wall in that position was at a depth of 900 mm below the surface and extended down to a depth of 1100 mm.

- (c) The third borehole was taken to the east of the Northern Wall, well away from the Northern Wall, between a large paved area used as a car park in the Respondents' Land and the fence. That showed silty sand down to a depth of 300 mm followed by silty sand grey, dry and of medium density down to a depth of 700 mm, followed by sandy clay for a further 300 mm.
 - (d) The fourth borehole was taken adjacent to the western corner of the Northern Wall. That showed silty sand to a depth of 500 mm, medium dense silty sand for a further 200 mm, gravel for a further 300 mm, followed by 100 mm of sandy clay.
- 34 Each of the logs specified water content for the different materials found. The report said there was no free water or seepage found in any of the boreholes and generally, the soil moisture conditions encountered were dry to moist.
- 35 The Roscon report, referred to below, contains the results of two further bore logs taken in the front garden of the House, which showed fill and silty sand to a depth of 800mm and thereafter sandy clay.

The arborist's reports

- 36 On 11 November 2017, an arborist, Mr Murray, visited the property and provided a report to the Applicant, dated the same day.
- 37 His report set out a number of observations that he made of the interior of the House, which he said were consistent with footing movement. He noted that he did not have access to the Respondents' Land and had to rely upon observations that he made over the fence. He said that he thought that some silver birch trees were planted too close to the wall and estimated the distance to be within half a metre. He said the height of one of the trees was approximately 7 m.
- 38 He made some general comments about tree roots, which he said can grow underneath or into a gap in a structure and cause movement in wall footings. He said that he had no soil report for the Respondents' Land but he said that clay will expand or contract according to its moisture content. He noted that the CSIRO recommended minimum planting distances of trees from a building in order to minimise the risk of structural damage, the distance being dependent upon the height of the tree and the classification of the soil.
- 39 He said that he measured the moisture content in the walls of the House but gave no comprehensive report of the results. He suggested that the luxuriant appearance of the plants in the Respondents' Land indicated watering of the gardens.
- 40 Much of the comment in his report extends to engineering and geotechnical matters which go beyond his area of expertise. Not having gained access to the Respondents' Land, he was not able to investigate the roots of the trees about which complaint was made.

- 41 On 24 December 2018, an arborist, Mr Collett, inspected the trees in the courtyard of Unit 5 on behalf of the Respondents. At the time of his inspection, there were three trees, being two silver birches and one olive tree, between 5.5 and 6.5 high, in good condition. They have since been removed.
- 42 He found that the feeder roots of the trees were generally found in the top 100 mm of soil growing parallel to the wall. He said the structural roots were likely to be going straight down. He said that none of the structural roots and only a small amount of the feeder roots were found near or growing towards the Northern Wall. He concluded that one could not say definitively that the tree roots had caused any damage to the Northern Wall, although they may have played a role in reducing soil moisture and potentially contributed to causing the footings to move.
- 43 The arborists' reports are of little assistance because I am not called upon to determine a claim in nuisance caused by tree roots. My concern is whether there is a flow of water causing damage to the House.

Mr Shrestha

- 44 On 16 April 2015 the House was inspected for the Applicant by a structural engineer, Mr Shrestha. There is the following note on page 3 of his report:

“It was advised that, no drainage system in place to the neighbouring pavement and adjoining garden bed immediately next to the subject wall. All the run-off water from neighbouring properties to the 48 Tennyson Street and rear side development at 22 Milton Street Elwood comes to the subject wall footing in the event of any rain.”
(sic.)

- 45 He noted that the external leaf of the rear section of wall was bowed outwards and concluded that the distress to the wall was mainly due to:

- “1. Differential foundation movement mainly due to increase in moisture to the left rear corner due to poor drainage to neighbouring property and decrease in moisture due to the trees to the neighbouring property.
2. Poor roof drainage system in the past causing the water to penetrate through the cavity between two skins of the wall consequently corroding the wall ties and moving the wall laterally.
3. Drainage pipe fixed to the external skin of the brick wall. No capping to the PVC pipe.
4. Poor joint between the original brick wall and a new extension completed in 1990.” (sic.)

- 46 The roof drainage system, the drainage pipe and the poor joint in the wall referred to were all due to work done by the Applicant. Consequently, the only one of these four contributing causes that is relevant to what I have to decide is the first.

- 47 In that regard, the assumption that the engineer has made concerning the drainage of the paving in the Respondents' Land was challenged and was the subject of contrary evidence. It was apparent from a test undertaken during the on-site inspection that water falling on the concrete car parking area does not run towards the Northern Wall as Mr Shrestha had assumed but rather, runs away from it and into the drainage system on the Respondents' Land.
- 48 The paved area of the courtyard to Unit 5 and also the paved areas to the other units do fall towards the wall but finish some distance to the north of it. Any water falling on any of these paved areas would be directed towards the wall. The issue is, whether that water is reaching, or has reached, the wall and caused damage.
- 49 As to the possibility of differential foundation movement due to increase in moisture to the left rear corner of the Northern Wall, it appears that the inner leaf of the relevant section of wall, which has not moved, is likely to be on the same footing as the outer leaf, which has moved. The mechanics of how this could occur were not explained.

Mr Zirojevic

- 50 The House was inspected by another engineer engaged by the Applicant, Mr Zirojevic, on 3 September 2016.
- 51 Again, the main focus of his report is the rear section of the Northern Wall. He criticised the presence of the two birch trees which he said were inappropriate for such a small place. He concluded, on page 2 of his report:
- “1. The bricks in the wall are heavily affected with moisture and dampness which is just showing extreme problem with draining complete area. Current state of stormwater drainage at 48 and 50 Tennyson Street, including 22 Milton Street need urgent action, it's collapsed.
2. Future drainage design must include complete area and provide appropriate solution to be adequate for next 25 years.” (sic.)
- 52 He provided photos of the sub floor vents in the Northern Wall, saying that:
- “Evidence of the water damage on the wall is everywhere in variety of aspects from the exposed wall to the weather to moisture from the ground.” (sic.)
- 53 He also noted that some of the ground had been altered, “...accelerating water and moisture effect on the wall.”

The Roscon report - Mr Rodrigues

- 54 The Applicant engaged a firm of consultants, Roscon, which has provided two reports. Included in the first of these was a report from an engineer, Mr Rodrigues.
- 55 The House was inspected by Mr Rodrigues on 17 and 25 October 2018. He noted that subfloor ventilators set into the Northern Wall were close to the ground on the Respondents' side. He noted that there was a tree 7 metres

high planted in the courtyard of Unit 4, which he said was too close to the Northern Wall. He also photographed a number of birch trees approximately 6 m tall and a mature ivy vine. He noted that the paved areas behind the Units 3 and 4 fell away from the Apartment Building towards the Northern Wall which he described as “poor drainage”.

- 56 He concluded that there was poor site drainage on the Respondents’ Land and that a combination of that and the trees and ivy was adversely affecting the structural capacity of the Northern Wall.
- 57 In the subfloor of the House, he measured the moisture content of the masonry on the Applicant’s side of the Northern Wall and found that it was 40% at one point and 60% at another. He also measured the moisture level of the sub-floor timbers of the House near the Northern Wall and found them to be higher than acceptable. He said that there was rising damp on the inside of the masonry in the subfloor, but he also noted rising damp on the outside of the southern wall of the House as well, which is on the opposite side of the House from the Respondents’ Land.
- 58 He concluded that there was rising damp on both sides of the House, due to the lack of a damp-proof course. He said that it was more significant in the Northern Wall due, he said to the raised soil level as well as poor drainage in the Respondents’ Land “...allowing for an increased moisture presence.”
- 59 He said that the presence of “significant trees so close to the footings”, as well as the poor drainage of the Respondents’ Land, are likely to be excessively varying the moisture content in the soil, thus allowing for excessive ground movement. He said that it is likely this has caused the movement and subsequent leaning of the Northern Wall’s footings and the wall itself.
- 60 It should be noted that the trees he refers to and the ivy have since been removed.

Mr McFarlane

- 61 The Respondents’ engineer, Mr McFarlane, inspected the Respondents’ Land and the House on 6 September 2018 and again on 9 July 2019. The purpose of his inspections was to identify what had caused the eastern end of the Northern Wall to become unstable and the most appropriate method to rectify the problem. He was also asked to comment on the Roscon reports.
- 62 Parts of his report deal with structural issues to do with the unstable eastern end of the Northern Wall and the reasons for its instability, including the removal of the internal walls by the Applicant as part of his renovation. Those parts of the report are not relevant to what I have to decide, except insofar as it is suggested that a flow of water is a possible factor.
- 63 He referred to a number of photographs taken at his first inspection which are exhibited to his report. He drew attention to the following matters disclosed in those photographs:

- (a) water stains on the Northern Wall near the ground, directly below the rain head;
- (b) an inspection opening at the top of the pipe that the Applicant has mounted on the face of the Northern Wall to drain the rain head. He said that this inspection opening was not capped;
- (c) a number of cracks in the brickwork;
- (d) that water landing on the concrete car park drains away from the Northern Wall;
- (e) a slotted agricultural drain placed parallel to, and close to, the Northern Wall below ground level;
- (f) the external edge of an old original damp proof membrane near the base of the Northern Wall;
- (g) some internal cracking at the rear of the Northern Wall;
- (h) moisture damage to the internal face of the rear of the Northern Wall.

64 He said that the internal cracks are consistent with wall rotation related to the removal of a larger brick pier during the Applicant's renovation but said that the category of cracks that he observed was very slight to slight.

65 When he returned on 9 July 2019, he took further photographs which are exhibited to his report. The external photographs show similar themes to those taken on the first occasion.

66 There were 12 photographs taken internally, about which he says:

“Some moisture ingress into the lower brickwork was evident. The subfloor timbers were generally in a sound condition, with no signs of moisture damage. However, moisture damage was evident at the ends of some floor joists where the timber joists were in contact with soil and rubble.”

67 As to the foundations of the Northern Wall, he said that the geotechnical evidence by Geotechnical Drilling was that:

- (a) the concrete footing was founded on the depth of 1.1 m;
- (b) the soil profile was of silty sand and gravels over sandy clay;
- (c) there were dense iron stones at footing level at the footing probe locations; and
- (d) the sandy clay material was at a minimum depth of 700 mm and up to depths exceeding 1100 mm.

He said that the bore hole excavations by Roscon revealed similar findings.

68 He concluded that the presence of the silty sands, sand and gravels near the ground surface provide good natural site drainage which is enhanced by the agricultural drain adjacent to the Northern Wall. He said that the site classification was Class M; that is, slightly to moderately reactive.

- 69 He referred to the photographs taken of the trees referred to in the other reports but said that these had not caused the current wall cracking at the rear of the Northern Wall, because:
- (a) the deep sand and gravel soil profile provides a good medium for root growth;
 - (b) a ready supply of water into the trees near the rear of the Northern Wall due to roof drainage issues from the House;
 - (c) a large tree growing near the rear of the Northern Wall has not caused any wall cracking; and
 - (d) the trees growing, and previously growing, adjacent to the Northern Wall near the front of the House have not caused wall cracking.
- 70 He said that the bow in the external face of the Northern Wall, the wider wall cavity measurements at the external wall and the flatness of the internal face of the Northern Wall, all indicate that the outer skin of brickwork has moved away from the internal skin of brickwork. He said that this is due to either insufficient or inadequate brick ties at the time of the original construction or the corrosion of the original brick ties. During the course of the hearing, it became apparent that there are no brick ties in the wall at all and that it was built as a solid wall.
- 71 As to the roof drainage, he said that the current building regulations require a box gutter of at least 300 mm wide and that that was specified in the permit drawings. Instead, he said a gutter only 100 mm wide had been constructed and that this was a factor contributing to water flow down the external face of the Northern Wall. He also suggested that it is possible that water could flow down the brick cavity, although there is no evidence that that occurred.
- 72 He said that he disagreed with Mr Rodrigues's suggestion that a combination of poor site drainage and the trees had adversely affected the structural capacity of the Northern Wall. He said the site drainage was good and that the trees have not caused the cracking or adversely affected the structural capacity of the wall.
- 73 He said he agreed that there was rising damp but did not agree that it was caused by a raised soil level or poor site drainage. He pointed out that the soil adjacent to the eastern end of the Northern Wall was below the original damp proof course and said that site drainage was not an issue. He agreed that the original damp proof course had failed.

Was there a flow?

- 74 In the particulars provided to paragraph 8 of his Points of Claim, the Applicant alleged that all drainage collected on the southern boundary of the Respondents' Land has discharged directly onto the footing of the Northern Wall and entered the sub floor vents in the Northern Wall and caused extensive damage to the timber sub floor elements of the House.

- 75 The cause of these flows is said in paragraph 9 of the Points of Claim to be:
- (a) the failure of the Respondents to prevent it; and
 - (b) alterations to paving and to the landscaping of the Respondents' Land.
- 76 It is common ground that, on 20 November 2014, the Council sent a show cause notice to the First, Second, Fourth, Fifth and Sixth Respondents, stating that the Municipal Building Surveyor was of the opinion that:
- “The run-off storm water from the paved, hard surface and open areas to the courtyards of the existing residential apartment building located adjacent to the southern boundary of the site are graded towards the existing building and site at 50 Tennyson Street Elwood and is discharging in an uncontrolled manner posing a danger of structural damage in the medium-term.”
- 77 The notice required them to show cause why they should not:
- “Alter the paved, hard surface and open areas to the courtyards of the existing residential apartment building as referred to above and grade away from the adjoining property at 50 Tennyson Street, Elmwood and connect to a legal point of discharge by a strip drain or series of stormwater pits.”
- 78 That notice was subsequently put on hold by the Council, pending the replacement of the outer leaf of the eastern end of the Northern Wall, which is considered to be structurally unstable. Consequently, nothing has been done by the Respondents in regard to the notice.
- 79 The Applicant expressed concern during the hearing about the Council's conduct in regard to enforcement proceedings against the Respondents and the proceedings that it has taken against him. He appears to consider that the Council has sided with the Respondents against him, notwithstanding that he was the one who first complained. He has made allegations of falsification of Council records, alterations of documents, improper keeping of records and the provision to this Tribunal and to the Board of copies of documents that are said to be inaccurate.
- 80 I am not concerned with the enforcement of notices served by the Council, nor am I concerned with proceedings between the Applicant and the Council before the Magistrates' Court or whether the Council's officers have behaved appropriately. The primary issue I must determine is, whether the Applicant has proven on the balance of probabilities that the alleged flows of water occurred.
- 81 Of the conflicting engineering opinions, I prefer that of Mr McFarlane. Neither Mr Shrestha nor Mr Zirojevic appear to have based their opinions upon any investigation but rather, seem to have proceeded on the basis of casual observation.
- 82 Mr Rodrigues has provided a considered opinion but I think that the opinion of Mr McFarlane accords more with the geotechnical findings and the arborist's evidence. Moreover, although he suggested in his report that sub-

floor vents were very close to ground level and possibly allow rain water run-off to enter the sub-floor area, from my own observation, they were all above ground except for one, recently found, which was below ground.

- 83 Mr McFarlane pointed out that the soil structure is free draining, that no excessive moisture was found in the boreholes and that site drainage was not an issue. In those circumstances, it is difficult to see how any water from the run-off of these paved courtyard areas would affect the wall.
- 84 The onus of proving the existence of a flow of water is on the Applicant. What he has demonstrated is dampness in the subfloor of the House and rising damp in both the Northern Wall and the southern wall.
- 85 Both Mr McFarlane and Mr Rodrigues agreed that there is no effective damp course and that, as a consequence, the House is suffering from rising damp. There is also insufficient crossflow ventilation of the subfloor area, particularly following the construction by the Applicant of the infill slab in the rear section of the House which has blocked any subfloor ventilation from that direction.
- 86 I am not satisfied on the balance of probabilities that there is or has been an unreasonable flow of water from the Respondents' Land that has affected the Northern Wall of the House.
- 87 However, in case I am wrong I will consider the other factors necessary to support a claim.

Whether the Applicant has suffered damage by reason of the flow

- 88 If I should find that there was a flow of water, the next question is whether the flow has caused the Applicant to suffer any damage.
- 89 The damage that the Applicant claims has been caused by the alleged flows is:
- (a) a tilting of the foundation of the Northern Wall;
 - (b) the instability of the outer leaf of the western end of the Northern Wall;
 - (c) rot and mould in the subfloor timbers of the House.
- 90 It is common ground that the outer leaf of the rear section of the wall is tilting outwards and the presence of mould is indicated in the report from the mycologist annexed to Mr Rodriguez's report.
- 91 The only apparent instability in the Northern Wall is the delamination of the outer leaf of the western end. The only mechanism suggested by Mr Rodrigues to attribute the delamination to a flow of water is movement of the foundation, causing movement of the footing. I accept Mr McFarlane's opinion that, if that had occurred, there would be evidence of cracking or distress in the wall and there is none. Moreover, it appeared to be common ground that both leaves of the wall were on a common footing.

- 92 As to the rot and mould, I accept that Mr Rodrigues found elevated moisture levels in the subfloor timbers in the House and indeed, when I looked below the floor the brickwork on the inside did appear to be damp and I could see calcite deposits. Most of the timber samples obtained by Mr Rodrigues proved to be contaminated to some degree with mould and it is likely that the presence of the mould is due to the fact that the timber in question became damp. However, the subfloor brickwork of the Northern Wall is below ground level and it is common ground that there is no functional damp course in either the Northern Wall or the external wall on the southern side of the House, where there is also rising damp.
- 93 The mere presence of damp conditions in the sub-floor of the House does not in itself prove that those damp conditions were caused by a flow of water from the Respondents' Land. Dampness under the floor may equally be attributable to lack of subfloor ventilation.
- 94 In this regard, Mr McFarlane pointed out that the rear extension built by the Applicant was on an infill slab which removed whatever crossflow ventilation there was coming from the rear of the House. It is also apparent that extra sub-floor ventilation has been put into the Northern Wall in the past and that the soil has been dug away from the inside face of the Northern Wall below floor level. Both of these factors would suggest some historical concern about sub-floor dampness.
- 95 Further, the rising damp in the Northern Wall is consistent with the lack of an effective damp course. In this regard, it is highly relevant that there was also rising damp in the southern wall.

Limitation of actions

- 96 A further defence taken on behalf of the Respondents was that the claim is statute barred. To determine such a defence would require a flow of water to be identified and find when it occurred. I have found no such flow. In any case, it is not necessary to consider such a defence because the claim fails on the merits.

Conclusion

- 97 The application will be dismissed. Costs will be reserved for further argument.

Rohan Walker
Senior Member