

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1086/2017

CATCHWORDS

Water Act 1989 – s.16 – unreasonable flow of water – water entering dwelling unit from above – claim against owners of unit on next floor – claim admitted as to part of the premises but denied in regard to bathroom - whether the flow to bathroom is from that unit or from the roof space – evidence – onus of proof on the Applicant to establish knowledge by Respondents of want of repair and failure to effect repairs to prevent flow in a reasonable time – evidence equivocal – claim not established – damages – whether amount expended by the Applicant was a repair or renovation – betterment - whether allowance should be made for Applicant’s own labour

APPLICANT	Gregory Rose
FIRST RESPONDENT	Kevin Hoare
SECOND RESPONDENT	Danialla Freeman
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	26 August 2019
DATE OF ORDER	3 September 2019
CITATION	Rose v Hoare (Building and Property) [2019] VCAT 1343

ORDERS

1. The Applicant’s claim against the Respondents for damages with respect to water penetration into the ensuite of the Applicant’s Unit in Princes Street in St Kilda is dismissed.
2. The proceeding is adjourned to an Administrative Mention on 28 February 2020, by which time the parties must advise the Registry in writing whether any further steps are required to be taken in the proceeding. If no such advice is received, the proceeding will be struck out.

SENIOR MEMBER R. WALKER

APPEARANCES:

By the Applicant:	In person
By the Respondents:	In person Mr J. McKay, of counsel

REASONS

Background

- 1 The Applicant is the owner of a residential unit in Princes Street in St Kilda (“the Applicant’s Unit”). He purchased it 19 years ago.
- 2 The Respondents are the owners of a unit (“the Respondents’ Unit”) on the floor above the Applicant’s Unit. They purchased it in 2010.
- 3 The building containing the two units is quite old , dating from the 1920s, and is situated on the north-east side of Princes Street, which runs from the south-east to the north-west. There are three floors in the building, each containing four apartments and a fourth floor, comprising an attic apartment that has been built in the roof space, which is the Respondents’ Unit.
- 4 The Respondents’ Unit was created in the roof space in 2010 and then sold to the Respondents. It is situated centrally in the roof space above all four units in the floor below. The south-eastern corner of the Respondents’ Unit is above the whole of the living area, most of the kitchen and part of the bedroom of the Applicant’s Unit. The rest of the kitchen, bedroom and all of the ensuite bathroom of the Applicant’s Unit simply have the roof space above.
- 5 There has been a long history of water penetration into the Applicant’s Unit from above and it is acknowledged that leakages into the living area have been caused by water entering from the Respondents’ Unit, resulting in complaints and then the issue of this proceeding on 18 August 2017.
- 6 During the interlocutory stages, the Owners’ Corporation of the building (“the Owners Corporation”) was joined as a joined party by the Tribunal, it being considered that it ought to be bound by any determination made in the proceeding. Notwithstanding that it has been joined, no relief has been claimed by the Applicant against it.
- 7 Following an extensive mediation process and a compulsory conference, Terms of Settlement were entered into between the Applicant and the Respondents, pursuant to which substantial rectification works are to be carried out by the Respondents to the balcony of the Respondents’ Unit. Consequently, that part of the claim has been resolved.
- 8 The Applicant also claims that there has been water damage caused to his ensuite bathroom by water penetrating from the Respondents’ Unit. He has obtained indemnity in regard to that damage from an insurer for loss of rent arising from the water penetration of the Applicant’s Unit and also \$6,000.00 towards the cost of repairs to the bathroom.
- 9 The Applicant claims that the full cost of reconstructing bathroom was \$19,493.00. After deducting the \$6,000.00 that he received from the insurer, he seeks to recover from the Respondents the balance of \$13,493.00.

- 10 The Respondents deny that any damage to the ensuite bathroom resulted from water entering the Applicant's Unit from the Respondents' Unit and also say that the amount claimed is excessive in that the work done went beyond mere repair and amounts to a complete reconstruction of the bathroom.

The hearing

- 11 The proceeding came before me for hearing on 26 August 2019 with five days allocated. The Applicant and his wife and the Respondents appeared in person and the Owners' Corporation was represented by Mr J McKay of counsel.
- 12 The Applicant and the Respondents had filed substantial material which was referred to and, after hearing from them and the evidence of the former chairman of the Owners' Corporation, the evidence was completed on the first day.
- 13 After a short submission from Mr McKay and ascertaining from the other parties that there was no further evidence, I informed the parties that I would provide a written decision.

The evidence

- 14 I heard oral evidence from each of the parties and also the Applicant's wife, but the cases presented by the respective parties rely primarily on numerous experts' reports that have been obtained over the years. There was much reference to the observations and conclusions set out in these reports, although the authors were not called.
- 15 Reliance was also placed upon email correspondence and minutes of the Owners' Corporation meetings.

The law

- 16 Early in the proceeding I explained to the Applicant and the Respondents what had to be proved in order to establish liability in a case such as this.
- 17 The claim is brought pursuant to s.16 of the *Water Act 1989* which, where relevant, provides as follows:

“16. Liability arising out of flow of water etc

(1) If—

(a) there is a flow of water from the land of a person onto any other land; and

(b) that flow is not reasonable; and

(c) the water causes—

injury to any other person; or

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.”

- 18 The jurisdiction to determine claims pursuant s.16 is conferred by s.9 of the Act which (where relevant) provides as follows:

“Jurisdiction of Tribunal

(1) The Tribunal has jurisdiction in relation to all causes of action (other than any claim for damages for personal injury) arising under sections 15(1) , 16, 17(1) and 157(1) of this Act

(3) In exercising jurisdiction conferred by subsection (1), the Tribunal—

(a) may by order, whether interim or final, grant an injunction (including one to prevent an act that has not yet taken place) if it is just and convenient to do so; or

(ab) may make an order for payment of a sum of money awarding damages in the nature of interest; or

(b) may make an order that is merely declaratory.

(3A) Nothing in subsection (3) takes away from or affects the Tribunal's powers under section 123 or 124 of the Victorian Civil and Administrative Tribunal Act 1998 .

(4) In awarding damages in the nature of interest, the Tribunal may base the amount awarded on the interest rate fixed from time to time under section 2 of the Penalty Interest Rates Act 1983 or on any lesser rate that it considers appropriate.

(5) The Tribunal may in respect of any works that give rise to a cause of action of a kind referred to in subsection (1) make any order with respect to—

(a) compensation for damage to land; or

(b) the continuation, removal or modification of works; or

(c) payment of the costs of the removal or modification of works—

that it considers appropriate.

- 19 Since the Respondents’ Unit was constructed before they purchased it, by s.16(5) of the Act, they are only liable to pay damages in respect of any injury, damage or loss suffered by the Applicant if they have failed to take any steps reasonably available to them to prevent the causing of the flow.

- 20 The Tribunal's decision in *Connors v Bodean International Pty Ltd* [2008] VCAT 454 provides some useful guidance as to the nature of the obligation of a subsequent occupier, where the flow of water is from his land and the flow arises from works constructed or any other act done or omitted to be done on it before he became the occupier of the land.
- 21 The subsequent occupier must, within a reasonable time after becoming aware of the existence of the flow of water from his land, investigate the problem, ascertain what positive steps are reasonably available for him to take in order to prevent the flow, and he must then take those steps. If he fails to do so, he will be liable for any injury, damage or loss suffered by the other party which would not have been suffered but for such failure. So long as the flow is prevented, it does not matter how the subsequent occupier does it.
- 22 The questions to be answered in a case such as this are:
- (a) whether there was an unreasonable flow of water;
 - (b) whether it was the result of works undertaken by a previous occupier;
 - (c) whether and when the Respondents became aware of the existence of the flow;
 - (d) what steps they took to prevent the flow and when it was that they took those steps; and
 - (e) did the damage complained of result from their failure to take those steps?

Evidence of damage

- 23 Proof of damages was provided by the photographs tendered and an expert report by a Mr Limburg referred to below.
- 24 The ensuite bathroom was stripped and re-tiled with new appliances and fittings in October 2016 at a cost of \$17,493.00. An invoice in this sum from the contractor setting out the scope of works is in evidence. The Applicant said that, although he replaced the existing appliances with new ones, these were not included in the cost.
- 25 The Respondents allege that the amount claimed is for a bathroom renovation and not for repairs consequent upon water damage. In essence, they said that the amount claimed was excessive. Quite clearly, there is an element of betterment but this will always be the case where water damage is repaired. It appears that the present view of the law is that, if an Applicant incidentally derives a greater benefit than mere indemnification through the impossibility of otherwise indemnifying him, the law does not burden him with the cost of the betterment (see *McGregor on Damages* 20th edition para 2-007 and the cases there cited).
- 26 In addition to what he paid the contractor, the Applicant also claims a further \$2,000.00, being:

The Applicant's labour for demolition	\$600.00
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Tip fees	\$ 80.00
Cost of tiles	\$958.00
Cost of paint and his own labour for painting	<u>\$362.00</u>
Total	<u>\$2,000.00</u>

- 27 When the \$2,000.00 is added to the amount paid to the contractor and the sum of \$6,000.00 that he has received from the insurance company is deducted, the balance is the amount claimed.
- 28 Defending the claim for his own labour, the Applicant said that \$600.00 was what the contractor was going to charge him for the demolition and so it represents the value for the work that he did. The amount for the painting was for the cost of the paint and his own labour, but no breakdown was given between labour and materials.
- 29 Generally, the measure of damages is the monetary loss sustained which does not include an allowance for an applicant's own labour, but it would include such things as tipping fees and the cost of the paint.

Evidence concerning water penetration

- 30 The Applicant said that his tenant first reported water ingress on 28 November 2011. According to the tenant's report, there was rain water dripping down from the ceiling in the lounge room.
- 31 The Applicant's wife informed the Owners' Corporation which sent out a plumber who carried out some repairs.
- 32 On 12 June 2014 the Applicant's letting agent informed him that there were maintenance issues in the shower requiring urgent attention, sent him photographs of tiles coming away from the wall, and saying that the other shower wall is moving downwards. The agent did not mention any water penetration from above the Applicant's Unit or suggest any cause for the condition of the tiles.
- 33 In about August 2014 the Applicant received a phone call from the property manager to the effect that water was coming through a light fitting on the balcony ceiling below the Respondents' balcony. On 7 August 2014 the Applicant sent an email to the Owners' Corporation enclosing a copy of an invoice for having the light disconnected and also enclosing copies of what he said was damage to his bathroom caused, he believed, by water coming into the building from their defective balcony. It is not clear from the material how the Applicant formed the view that the condition of the tiles in the ensuite was due to the defective balcony.
- 34 The first indication of water leaking into the ensuite was in an email from the property manager of 15 September 2014 to the effect that the tenant had reported water leaking from the light in the toilet. The agent said as to the leak:

“It wasn’t anything too serious and most of the water dripped into the toilet but obviously a symptom of an ongoing problem with the roof over the last few years.

Please could you let me know when the leak issue has been resolved, and the owners corp plumber has attended this address?”

- 35 On 17 September 2014 the Applicant’s agent emailed the Owners’ Corporation, stating that, as the balcony and bathroom were directly below the Respondents balcony, the issues with the bathroom and balcony of the Applicant’s Unit would originate from the Respondents’ balcony. The Owners’ Corporation replied the following day to say that the balcony was currently the subject of a legal proceeding between the Respondents, the Owners’ Corporation and the former owner of the Respondents’ Unit and that, until that matter was finalised and the defective balcony was repaired there is not much more that the Owners’ Corporation could do.
- 36 The assertion that the bathroom was directly below the Respondents’ balcony was inaccurate. Water penetrating through the balcony would not fall into the ensuite but rather, would enter the soffit above the Applicant’s balcony and photographs showed that this was happening.
- 37 On 15 October 2014 the Applicant received an email from his tenant to the effect that they were able to put a towel down to soak up water in the toilet if it rained and they had covered over the light/fan switch to avoid electrical safety issues. The tenant said that, to avoid the considerable cost and inconvenience of moving out of the Applicant’s Unit, they would remain there.
- 38 On 31 October 2014 the Applicant wrote a lengthy email addressed to the Respondents in which he complained about the water penetration. He sent it to the Owners’ Corporation to be forwarded on to the Respondents.
- 39 In May 2015, the tenant requested a reduction in rental due to the condition of the Applicant’s Unit. The Applicant said that a reduction in rental was given.
- 40 In late 2015, rectification work was carried out by the Respondents to their balcony after which the Applicant made an insurance claim which resulted in the production of the Bay Building Services report referred to below. The claim was initially rejected but, following a complaint by the Applicant to the financial ombudsman, indemnity was offered for the loss of rental and \$6,000.00, towards the cost of reinstating the ensuite in the Applicant’s Unit.
- 41 The tenant put up with the leaks until September 2016 and then vacated the Applicant’s Unit. It has been uninhabited since.
- 42 The Applicant’s insurer has removed a section of ceiling in the lounge room below the Respondents balcony as part of the effort to determine the source of the leaks. The Applicant’s Unit is presently uninhabitable.

The experts' reports

43 In the course of all of the foregoing, numerous expert reports were generated. Those that were produced and discussed are as follows.

Webb plumbing

44 This is a short report dated 16 January 2012, criticising the roofing of building, particularly over the Respondents' Unit. The report focuses on "the northern side balcony". It also criticises the downpipes and stormwater pipes which will be upgraded. It says that that section is on the western side of the main balcony and that that is probably the biggest problem amongst many.

45 Although relevant to the principal claim concerning leaking of the balcony into the living area of the Applicant's Unit, the report does not assist me for present purposes, since the main balcony adjoins the external wall of the ensuite at its south-eastern end, not its northern or western end.

The Buildspect Report (Mr Ryan)

46 Mr Ryan inspected the Respondents' balcony on 19 August 2013 in connection with a complaint made by the then owner of Unit 9 in the same block concerning water penetration from the balcony into that unit. His report of 27 August 2013 details his observations which relate principally to the construction of the balcony and also the roof of the Respondents' Unit. I can find nothing in his report to suggest what might be causing water to enter the room space above the Applicant's ensuite.

47 Mr Ryan prepared a detailed scope of works and there was subsequently an agreement entered into for the work to be carried out but that related only to the balcony itself.

The SGA report (Mr Gee)

48 Mr Gee was engaged by the solicitors for the owner of unit 9 to inspect that unit as well as the Respondents' Unit to report on the Buildspect Report and an earlier report by Mr Robert Lees that I have not been given.

49 He inspected both properties on 8 January 2014 and his observations are detailed in his report. He refers to the items raised in the Buildspect Report and generally agrees with Mr Ryan's scope of works. The report was focusing on the other end of the balcony and was concerned about the balcony itself and the roof of the Respondents' Unit. I can find nothing in the report to cast any light on where the water above the Applicant's ensuite is coming from.

The A.L. Construction's report (Mr Larne)

50 Mr Larne attended the site with the Applicant and the first respondent on 17 October 2016 to assess the situation of the water leaks. He said that they flooded the balcony and found there were no leaks, indicating that there was

no problem with the balcony. He said the problem was to do with items around the balcony.

51 He said as to these:

1. “The two storage doors to get in to the roof space show clear signs of water entering, these have not been set up to be exposed to the elements as they are, when we squirted hose at this point water was flowing in to downstairs.
2. Also the architraves around these doors need to be properly caulked with a polyurethane product and painted with an exterior paint.
3. The timber handrail /capping has insufficient flashings and caulking I would recommend to remove this and put a proper colour bond flashing and caulk ends properly.
4. The cracks in render along the barge end of roof need to be set up with a proper fascia /flashing so no water can seep through this on big downpours.
5. The terracotta roof is well overdue for a repoint and seal. There are silicon repairs all over it, which are not sufficient for long-term sun exposure and also cracked ridging and tiles everywhere.

There is also some very poor flashing patch ups there that need attention.”

52 This report is clear notice to the Respondents that the two storage doors were a source of water entry and that water entering the southern door would fall on the ceiling of the ensuite bathroom. Upon receipt of this report, they were put on notice of a want of repair.

The Bay Building Services Report (Mr Lea)

53 This is a report and quotation dated 8 March 2016 by Mr Lea, who was instructed to inspect the Applicant’s Unit by his insurer.

54 He said that, following discussion with the Applicant, he noted water damage to the balcony ceiling and walls, the lounge room ceiling and significant water damage resulting in deterioration to the bathroom. He said that this was consistent with water ingress about the property above. He said that, although the damage may be covered by the Applicant’s policy, he referred the matter back to the insurer to be reviewed because “... the damage has been occurring for a long period and significantly worse as a result of inadequate building works and failure by the Body Corporate to remedy this issue in a timely manner...”. He provided a quotation for remedial works.

55 His report includes a number of photographs of the bathroom.

56 It does not appear that he undertook any investigation in order to determine the precise source of the water that caused the damage. The reference to both inadequate building works and a failure by the body corporate to remedy the issue would suggest that he made no such determination.

57 He gave a scope of works for rectifying all damaged areas including the bathroom and assessed the cost of that at \$24,139.50, inclusive of GST. Since this figure is not broken down, the proportion relating to the bathroom is unknown.

The Final Inspect Report (Mr Limburg)

58 Mr Limburg inspected the Applicant's Unit on 16 September 2016. He sets out the instructions given to him by the Applicant, which includes an allegation that rain water from the Respondents balcony had also caused water to fall on the ceiling above the Applicant's ensuite and damage to the internal fabric. He observed damage to the ceiling of the bathroom and found the moisture level in the timber floor boards in front of the balcony door to be 20%, which he said was very high.

59 On page 12 of the report he said:

“The ingress of rainwater from Apartment 20's balcony had also caused water to fall down on to the ceiling above the client's ensuite and cause the following damage:

- a) Rusting of the steel fire extinguisher sprinkler system point on the ceiling immediately after entering the ensuite.
- b) Falling damp and in turn, bubbling and blistering of the paint applied to the rendered wall above the entrance to the ensuite.
- c) Delamination of wall tiles in the shower recess and around the shower recess in the ensuite.” (sic.)

60 He also noted water damage to the timber balcony ceiling in the Applicant's Unit and damage to the ceilings above the kitchen doorway, the hallway and above the bedroom. He noted that none of the water pipes or drains inside the Applicant's apartment appeared to have leaks that could cause water damage to the inside of the apartment.

61 On page 20 of his report he said (amongst other things):

“It was blatantly obvious that water has been entering the client's apartment from the apartment directly above for some time and has caused irrefutable damage to the internal fabric of the apartment.”

62 He sets out a scope of works to be done and says, in his final paragraph:

“If the owner of Apartment 20 is not prepared to accept responsibility and pay for the carrying out the above-mentioned remedial works, it is recommended that a solicitor is engaged to commence formal proceedings against the owner of Apartment 20 and the relevant Body Corporate.

63 It does not appear from Mr Limburg's report that he inspected the Respondents' Unit or the roof space above the ensuite. Although his report supports the Applicant's case that the ensuite bathroom has sustained water damage from above, it does not assist in determining whether the water came from the Respondents' Unit or from the roof.

The Roscon Report (Mr Cummaudo)

- 64 Mr Cummaudo inspected the property on 9 May 2017 for the purpose of investigating a leaking balcony from the Respondents' Unit to the lounge room of the Applicant's Unit. It does not appear that he was asked to investigate leaks into the ensuite bathroom.
- 65 He found leaking above the lounge room of the Applicant's Unit and his report criticises the construction of the balcony and he provides a comprehensive scope of works for its reconstruction. The focus of his report is on the area directly beneath the balcony and he does not make any mention of the ensuite bathroom.

The Contract Check report (Miss McKay)

- 66 Ms Mackay inspected the Respondents' Unit in April 2018. Her report deals with the construction of the balcony and the drainage problems from it. In particular, she criticised the lack of any overflow drainage system which allowed water backing up in the downpipes to flood the balcony.
- 67 The photographs in her report of the Applicant's Unit are of the parts of the lounge room and the balcony that are directly below the balcony on the Respondents' Unit. However, there is a photograph of an access door in the south wall of the Respondents' balcony where she says that there are water stains around the terms of the base of the door. This is relevant, because the door is directly above the top of the external wall of the ensuite.

Building Check Pty Ltd (Mr Simpson)

- 68 Mr Simpson inspected the Applicant's Unit and the Respondents' Unit on 1 February 2018 and his observations are detailed in his report. His report deals with the construction of the balcony and, although he refers to water penetration into the lounge room and the balcony of the Applicant's Unit, he makes no mention of any water penetration into the ensuite bathroom.

What to make of this evidence

- 69 The most relevant evidence is that of Mr Larne and Mr Limburg.
- 70 Mr Limburg has said that damage has been sustained by the ensuite bathroom as a result of water penetrating the Applicant's Unit from above. Unfortunately, he did not identify where the water was coming from. His assumption that the Respondents' Unit was "directly above" the Applicant's Unit was wrong and appears to have led him to the further assumption that the water must necessarily have come from the Respondents' Unit. That is an assumption, not a finding.
- 71 More relevant on the question of causation is the report of Mr Larne, who attended the site with the Applicant and the First Respondent on 17 October 2016 and found that the access door created on the southern end of the Respondents' balcony was not waterproof and admitted water when a hose was sprayed on it. That discovery was made in the presence of both the

Applicant and the First Respondent. I think that I should find on the balance of probabilities that the defective door is the source of at least part of the water penetration referred to by Mr Limburg.

- 72 Apart from that, none of the above expert evidence has established on the balance of probabilities that the water affecting the internal finishes in the ensuite bathroom that is referred to by Mr Limburg in his report was the result of works undertaken by the previous occupier of the Respondents' Unit. However, since the Respondents' Unit is above other parts of the Applicant's Unit and is divided by a single wall from the ensuite bathroom, the Respondents' Unit is a possible source.

Alternate sources of water ingress

- 73 The Respondents suggested that there were significant deficiencies in the drainage and stormwater system for the building. In the course of the hearing I viewed a video showing a backflow of water from the roof entering the balcony through the drainpipe, indicating that the stormwater was not draining from the building. Those problems have apparently been addressed by the agreed scope of works presently being undertaken, but in any event, I cannot see that this has any bearing on the Applicant's claim in the absence of some evidence that a pipe is leaking into the roof space above the ensuite and there is no such evidence.
- 74 Mr Mackay suggested to the First Respondent in cross-examination that, due to the proximity between the defective balcony and the ceiling above the Applicant's ensuite, it was likely that that was the source of the water. The First Respondent did not agree with that suggestion. Further, the Applicant himself pointed out that water could not run uphill from underneath the balcony to the ceiling space above the ensuite. I think that failed waterproofing on the balcony is unlikely to be the source of the water in the ensuite.
- 75 The other source of ingress suggested by the Respondents was the roof directly above the ensuite. Photographs produced show missing tiles which remained missing for a number of years, despite complaints by the Respondents.
- 76 An internal memo of the Owners' Corporation manager states that, at 1:41 PM on 4 September 2012, the Respondents telephoned the body corporate manager to say:
- “A roof tarp was put out by VBC a few weeks ago, the ropes have come loose and 4 x roof tiles have now been broken. Requires attention now that it is raining and water may cause internal damage to apartments.”
- 77 The memo said that a contractor, Tymaline Building Services Pty Ltd, attended and re-secured the tarp. Notwithstanding that memo, it is clear from the photographs that the roof tiles were not replaced. It is possible to see inside the roof space from the angle from which the photograph was taken.

- 78 On 13 November 2013 the Respondents informed the Owners' Corporation that tiles had been dislodged from the roof. They enclosed a photograph showing one of the tiles sitting on the gutter which they said was too far down for them to get. The Buildspect Report has a photograph of the missing tile (Photo 69). This would indicate that the Owners' Corporation was aware of the problem from at least that date.
- 79 The want of repair of the roof was raised at Annual General Meetings of the Owners' Corporation. At the Annual General Meeting held on 6 August 2015 it was minuted that a Mr Freeman, representing the Respondents, believed "that there were some issues with shifted and deteriorated roof tiles of the common area roof". The manager noted in the minutes that repairs had been carried out to the roof in early 2013 but that she would arrange for a couple of roof contractors to inspect the roof and provide feedback on quotations required for any needed repairs.
- 80 It is unclear what, if anything, was done about replacement of the missing tiles because photographs of them appear in subsequent reports.
- 81 On 19 December 2017 the Respondents sent by email to the Owners' Corporation a photograph they had taken that day of rain water overtopping the gutter. They also reported leaks in the stairwell, the lower floor and through a light fitting.
- 82 The witness statement of the former chairman of the Owners' Corporation, Professor Cattapan, is concerned mainly with the dispute about the repairs to the balcony and said that he and the committee of the Owners' Corporation saw their role only as mediating a satisfactory outcome between the Applicant and the Respondents. No consideration appears to have been given to the powers of the Owners Corporation pursuant to s.48 of the *Owners Corporations Act 2006* to require the Respondents to affect repairs to their unit in circumstances where a want of repair was adversely affecting the Applicant's Unit. It would seem from its email of 18 September 2014 that it considered that there was nothing that it could do.
- 83 The Respondents criticised the Owners' Corporation for failing to act when it was aware of the want of repair of the roof and the missing tiles above the ensuite of the Applicant's Unit. However, although the Owners' Corporation is a joined party, the Applicant has not made any claim for damages against it.
- 84 The issue before me is the extent, if any, of the Respondents' liability.

A duty to prevent the flow

- 85 Apart from the *Water Act 1989*, by s.129(a) of the *Owners Corporations Act 2006*, a lot owner must properly maintain in a state of good and serviceable repair any part of the lot that affects the outward appearance of the lot or the use or enjoyment of other lots or the common property.
- 86 Consequently, if the flow arose as a result of the want of repair of any part of the Respondents' Unit, it could be said that they had a duty to prevent the

flow. However, under s.16(5) of the *Water Act*, the duty would only rise when they became aware of the want of repair and that it was causing an unreasonable flow. They would then have a reasonable time to investigate the matter and take reasonable steps to effect the repairs necessary to prevent the flow.

Conclusion as to liability

- 87 Although it is clear that the defective balcony caused the water penetrations into the lounge room of the Applicant's Unit, I am not satisfied that it was the source of any water entering the roof space above the ensuite bathroom.
- 88 I think that more likely sources of the water penetration are the access door in the roof space above, which was constructed as part of the Respondents' Unit, and the numerous deficiencies in the roof identified in the various reports and the missing tiles that were left uncovered.
- 89 The Respondents were not responsible for the state of the roof but they were on notice in October 2016 when they received Mr Larne's report, that the access door leading into the roof space directly above the Applicant's ensuite was a source of water ingress. They then had a reasonable time to investigate the matter and determine upon a cause of action to rectify the deficiency.
- 90 The door was removed by the Respondents in January 2017 when the Applicant constructed alternate roof access in the form of a man hole in the ceiling of his unit. In the meantime, it appears that the balcony was covered.
- 91 It is clear from the evidence that the damage observed by Mr Limburg was long-standing. It is therefore not established that the damage complained of by the Applicant occurred in the period between the time the Respondents ought to have acted on Mr Larne's report and January 2017, when they removed the door.
- 92 Accordingly, no liability is established and the claim for damages against the Respondents with respect to water penetration of the ensuite of the Applicant's Unit is dismissed.

Orders to be made

- 93 I was informed that there are works proceeding in regard to the balcony pursuant to the Terms of Settlement that have been entered into to resolve the balance of the dispute.
- 94 The proceeding will therefore be adjourned to an Administrative Mention on 28 February 2020, a which time the parties must advise the Registry in writing whether any further steps are required to be taken in the proceeding. If no such advice is received, the proceeding will be struck out.

SENIOR MEMBER R. WALKER