

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE: OC2795/2015

CATCHWORDS

Water – gutter between adjoining buildings but on second respondent's land – water damage to basement of one of the buildings – tenant vacates the basement and landlord (applicant) suffers economic loss – whether there was sub surface water, or water from the gutter, or both, that caused the damage – whether there was a flow of water from second respondent's land – whether second respondent caused the flow – whether the water caused economic loss - quantum of compensation – reduction because of settlement reached with first respondent – *Water Act 1958* ss 16, 19, 20.

APPLICANT: Jiangzhe Holding Pty Ltd (ACN: 109 415 134)

FIRST RESPONDENT: Owners Corporation 419524E

SECOND RESPONDENT: Phileo 303 Collins Street Pty Ltd (ACN 075 015 100)

WHERE HELD: 55 King Street, Melbourne

BEFORE: Senior Member A. Vassie

HEARING TYPE: Hearing

DATE OF HEARING: 27 – 29 June 2017, 25 - 27 October 2017

DATE OF ORDER: 23 February 2018

DATE OF REASONS: 23 February 2018

CITATION: Jiangzhe Holdings Pty Ltd v Phileo 303 Collins Street Pty Ltd (Owners Corporations) [2018] VCAT 214

ORDERS

1. The second respondent must pay the applicant \$23,558.58.
2. All questions of interest and costs are reserved.
3. A party who makes an application for interest or costs must pay any fee payable in relation to the application or to the hearing of it.

A. Vassie
Senior Member

APPEARANCES:

For the Applicant: Mr. J. Luo (Director)
For the First Respondent: No appearance
For the Second Respondent: Ms. L. Hicks of Counsel

REASONS FOR DECISION

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A Case About a Gutter and Water Damage

1. By the time that I heard this proceeding, over six days, it had become a claim for compensation by the applicant, Jiangzhe Holding Pty Ltd (“JH”), against the second respondent, Phileo 303 Collins Street Pty Ltd (“Phileo”), made under the *Water Act 1958*, for loss suffered from an alleged entry of water from a gutter on land owned by Phileo onto JH’s land: a basement shop which JH had let to a tenant. The claim, for \$142,087.42 in total, is for loss of rent and other losses JH says it suffered when its tenant vacated the shop because of water damage to the basement walls.
2. The proceeding is in the Owners Corporations List because at first the only respondent named in it was the owners corporation which affected the basement shop. Later Phileo was joined as a second respondent, and JH amended its claim to include a claim against Phileo under the Water Act as well as a claim against the owners corporation, for the same damage and alleged loss. JH settled its claim against the owners corporation. For reasons I shall explain below the owners corporation nevertheless is still a party to the proceeding. But it took no part in the hearing. For administrative convenience the proceeding remained in the Owners Corporation List even though by the time of the hearing the only claim still on foot was JH’s claim against Phileo under the Water Act.

Two Adjacent Buildings

3. As its name implies, Phileo is the owner of land at 303 Collins Street, Melbourne. On the land is a multi-storey building (“the Phileo building”) which was constructed about 40 years ago. The Phileo building is on the south-west corner of Collins and Elizabeth Streets.
4. The adjacent building in Elizabeth Street, next to the south wall of the Phileo building, is number 59-65 Elizabeth Street. It was built about 100 years ago. I shall call it “the old building.” It consists of five storeys above street level, and a basement: six storeys.
5. In 2000 the old building was developed into shops, offices and apartments and became the subject of strata-title subdivision. The owners corporation, the correct name of which is probably Owners Corporation 1 Plan No. 419524E (see footnote 44 below), was created. The basement area became lot 1 on the plan of subdivision and was approved for use as a shop. Kickz 101 Pty Ltd (“Kickz”), a sporting apparel business, became tenant of the basement shop in 2002.
6. JH purchased lot 1, the basement, in 2004. Kickz remained as a tenant until 19 December 2014 when it vacated in circumstances described below. JH re-let the basement shop in November 2015 but sold the land, lot 1, on 1 July 2016.

7. The south wall of the Phileo building is slightly curved, as it is part of an arc wall that begins at Elizabeth Street and ends at Collins Street.¹ There is a small gap between the south wall of the Phileo building and north wall of the old building. The gap, however, covers land which is part of Phileo's land.

The Gutter

8. Up to the third level of the old building the gap has been filled with material which probably includes concrete, if it is not wholly concrete. There is a façade which faces Elizabeth Street, hiding the gap.
9. At the third storey level of the old building, a gutter runs along the top of the filled gap, for a distance of approximately 10 metres². It is an open three-sided gutter, with the vertical sides being attached to the walls of the two buildings. The purpose of the gutter is to collect rain water that hits the south wall of the Phileo building, where it extends above the old building, and runs down the wall, and to discharge the water onto a podium terrace at the rear of level 3 of the Phileo building, where a drain would take it away. The gutter starts at the Elizabeth Street (eastern) end of the Phileo building and runs alongside the old building to its rear, next to which is the podium terrace. There is a lip at the Elizabeth Street end. The fall of the gutter should take the water to the other end.
10. Because of the slight curve in the wall of the Phileo building, the gutter is not of uniform width. At either end it is about 850 millimetres wide, but about half-way along it narrows to about 200 millimetres wide. It is constructed of four lengths of metal, so there are three joins along its length. The join closest to Elizabeth Street is about 4 metres from the lip at that end.
11. Because it does not collect water from a roof, some witnesses in the case have called it a flashing, not a gutter. That may well be a more accurate description but for convenience and consistency I call it a gutter.
12. Phileo became the owner of the Phileo building in 2009³. There was no evidence of when or by whom the gutter was installed. In view of evidence I received about alleged disrepair of the gutter and debris in the gutter, it is likely that it was installed well before 2009, and I shall assume that Phileo itself did not have it installed. In my opinion for the purposes of this proceeding it does not matter whether the assumption is correct.

¹ The arc wall is best seen in an aerial photograph shown on page 5 of a report by Buildcheck Pty Ltd, tendered by Phileo and received as exhibit B15. A sketch by Phileo's expert witness Paul Thatcher, exhibit B14, also described it.

² Another sketch by Mr Thatcher, exhibit B13, describes the gutter and includes measurements of it. Many of the exhibited photographs show it.

³ Exhibit B16: a search of Phileo's certificate of title.

13. JH's case against Phileo is that rain water, instead of being wholly carried away down the gutter to the drain on the podium terrace, was escaping through gaps and seeping down into the basement shop, where it caused damage and compelled the tenant to leave, causing financial loss to JH.
14. There is no dispute that the gutter is on Phileo's land. So, if in fact water was escaping from the gutter and entering the basement shop, there was a flow of water from Phileo's land onto JH's land. Phileo denies that there was such a flow of water or, if there was, denies that it caused or interfered with the flow or that the flow caused any loss or damage. It alleges that all water damage to the basement shop had another cause: rising damp from sub-surface water.

The Basement

15. The basement in the old building has brick walls and a concrete floor. It has an area of approximately 225 square metres. There are stairs which give access from Elizabeth Street (to the east) and to Staughton Alley at the back of the old building (to the west).
16. The north wall of the basement is the extension of the north wall of the old building which faces the Phileo building and so the gutter runs alongside the line of the basement's north wall:
 - (a) In the north-east corner of the basement is a storage room which, at the time of Kickz's occupation of the basement, had bare brick walls. JH has referred to this room as "the vault".
 - (b) Next to the vault is another storage room and, within that room, is a lift shaft.
 - (c) In the north-west corner is a toilet and kitchenette. The point where water discharges from the gutter onto the podium terrace of the Phileo building is more or less above the toilet.
17. The east wall of the basement, parallel to and beneath Elizabeth Street, was at the time of Kickz's occupation coated with cement render.
18. It is the east wall, and the vault area, which at all relevant times were the parts of the basement most seriously water-damaged. The south and west walls were damaged also but less severely.

The Tenant Vacates: Water Damage

19. Jack Luo is the director of JH. He personally managed JH's relationship with the tenant after JH purchased the basement shop in 2004. His visits to the basement shop during the tenancy were infrequent. When he did visit, boxes of the tenant's stock were piled against the walls so he was unaware of the walls' condition.

20. In 2010 the tenant Kickz reported that the toilet area was being water-affected. Mr Luo dealt with the owners corporation manager on the issue. There was also an incident of water entering the lift shaft and having to be pumped out. That occurred in 2011. Mr Luo dealt with the owners corporation manager on that issue too. He believed that both issues had been dealt with, eventually, to the tenant's satisfaction.
21. On 5 December 2014 Kickz served JH with a notice of default⁴ under its lease, which had been renewed on 2 August 2012. The notice, prepared and signed by Kickz's solicitors, alleged a breach of a term of the lease which required JH to keep the structure of the building in a sound and watertight condition and gave JH 14 days' notice to remedy the default.
22. When they served the notice of default Kickz's solicitors also provided JH with a copy of three expert reports. The procedure was something of an ambush upon JH, because one of the reports, from a building consultant Permewan Consulting Pty Ltd, was dated 3 April 2014 and referred to an inspection of the basement shop on 23 March 2014. Mr Luo had been given no notice of the inspection or prior notice of the report. There was a second report from Permewan Consulting Pty Ltd dated 13 November 2014 and another report from Bryan Miller, architect, dated 26 November 2014, following inspections on 7 November 2014 and 21 November 2014 respectively.
23. The substance of the reports were that the walls of the basement shop, especially the east wall, were so damaged by moisture that they needed to be repaired and waterproofed. The reports recommended that the tenant vacate the premises until the necessary work was completed. Render and paint on the walls was flaking off. There was powdering or efflorescence on the walls, caused (in the opinion of Permewan Consulting Pty Ltd) by water containing dissolved salts migrating to the surface of the wall and turning into crystals. There was a musty smell. Remedial waterproofing of the walls was required. The premises would be unfit for commercial occupation until the remedial work was completed. That work would take four to eight weeks, in Mr Miller's opinion.
24. The experts' brief appeared to have been to identify any water damage, to identify what work needed to be done to remedy the damage and prevent further damage, and to give an opinion about whether the basement shop was fit for commercial use. They were not primarily concerned to pinpoint a cause of water entry. Nevertheless they, and Permewan Consulting Pty Ltd in particular, expressed the view that the cause was a failure of, or absence of any effective, waterproofing.

⁴ The notice of default, the covering letter from Kickz's solicitors and the three expert reports referred to in it are in the ring folder which is exhibit A15. The reports themselves are exhibit A17, A18 and A19 also.

25. Mr Miller was given instructions that the toilet in the basement flooded when there was heavy rain. He considered that a sealing of the western wall would rectify the problem but that the waste pipe system needed to be checked. Neither expert made any mention of the vault area.

26. The solicitor's letter which accompanied the notice of default and the experts' reports stated:

Given the extent of the repairs and that in order for the repairs to be done, our client would be required to vacate the premises, our client by the Notice enclosed, hereby advises that it considers pursuant to clause 6.4 of the Lease, the lease to be at an end. As per clause 7.5 of the Lease our client has provided written notice of default. Having regard to the two experts' reports enclosed and referred to above, you are not and will not be in a position to rectify the damage within 14 days of the Notice pursuant to clause 7.5. Our client will be terminating the lease effective as of 19 December 2014 when it vacates the premises.

27. Having received all that documentation, Mr Luo visited the basement shop on 9 December 2014 and spoke to Roger Prain of Kickz. Mr Prain made a point of complaining about the condition of the east wall, not about anything else.

28. Mr Luo did not attempt to resist the tenant's vacation of the premises, and it did vacate on 19 December 2014. After it had vacated, Mr Luo took photographs⁵ of the vault, of the east wall and of the south wall. The photographs showed a wet area in the north-east corner of the vault, irregularly-shaped areas along the east wall where the render and paint had come away, and a relatively unscathed area of the south wall.

Repairs to and Waterproofing of the Basement Walls

29. After his visit to the basement shop on 9 December 2014, and before the tenant vacated on 19 December 2014, Mr Luo contacted a waterproofing company, F.G. James Pty Ltd. Its representative Gerry Lewis attended the basement. Mr Luo gave him a copy of Bryan Miller's report and asked him to provide to the owners corporation's manager a report and a quotation for the cost of whatever had to be done. Mr Lewis of F.G. James Pty Ltd provided two separate reports and quotations, dated 17 December 2014 and 19 December 2014 respectively.⁶

30. The reports stated that Mr Lewis had observed, and measured on a moisture meter, dampness in the form of migrating lateral damp, particularly along the east wall, in the north-east corner of the basement, in the area where the toilet was situated and in two areas of the west wall. They stated that the incidence of damp was primarily due to the breakdown of the damp proof course and of the original waterproofing behind the walls ("positive tanking"), and that an

⁵ The series of photographs is exhibit A5.

⁶ The two reports are part of exhibit A20.

accumulation of ground and masonry salts was causing the render to fret and fail. Mr Lewis recommended the installation of a new damp proof course to the affected walls, and “negative tanking”: the application of acrylic fortified crystalline cement as a membrane to the internal walls. He said that although positive tanking was preferable it would involve “prohibitive” work (presumably in terms of cost) and that negative tanking was more cost effective. In the reports he warned that, even after rising damp was arrested in that way, walls had a tendency to remain persistently damp because salts brought from the soil to the walls absorbed moisture from the air.

31. The owners corporation and its insurer acted upon the reports and authorised the recommended rectification work, but the work did not begin until 11 May 2015.
32. In the meantime Phileo somehow learned of the water damage to the basement of the old building and, presumably to protect itself against any allegation that the Phileo building was a cause of the damage, requested Antonio Aloï of Mattioli Bros Pty Ltd, a concrete and coatings manufacturer, to inspect the basement. On 1 April 2015 Mr Aloï inspected the basement. Mr Luo was present. Mr Aloï took photographs.⁷ He observed that most of the east wall was water affected, and that the plaster or render on most other walls was drummy but not water damaged. He concluded that the water damage to the east wall has “started from the ground up” and that the area where the render and paint on the wall had blistered off was “nowhere near” the Phileo building. So Mr Aloï attributed the damage to rising damp.
33. On the same day, 1 April 2015, Mr Aloï inspected the gutter and performed a water test upon it. Neither he nor Mr Luo gave evidence that Mr Luo was present when Mr Aloï performed the water test, so I infer that Mr Luo was not present. The result of the water test is crucial to Phileo’s defence, because Phileo argued that the result excluded the possibility of there having been any leak from the gutter into the basement. I shall describe Mr Aloï’s water test below.
34. F.G. James Pty Ltd began the negative tanking and other recommended work on 11 May 2015, and finished it by the end of July 2015. The owners corporation’s insurer paid for the cost of the work.

Investigation of, and Repairs to, the Gutter

35. After Kickz had vacated the basement shop, Mr Luo asked the owners corporation’s manager to arrange for Triplux Maintenance Pty Ltd (“Triplux”), a roofing and guttering company, to inspect it. On 27 February 2015, Timothy O’Brien of Triplux and Scott Gross, a sub-contractor plumber, met Mr Luo at the site. Mr O’Brien is not a plumber. He is Triplux’s managing director. He told me that he had had experience in the building industry and that he designed gutters.

⁷ Mr Aloï’s reports of his inspection, including photographs, are exhibit B7.

36. Before meeting Mr Luo, Mr O'Brien looked from street level at the façade of the Phileo building beneath the lip of the gutter. He observed some rust-coloured marks on the façade, which prompted him to think that water may have been running down the façade either from the gutter or from canopies.
37. Mr O'Brien and Mr Gross inspected the basement. Mr O'Brien wrote a report to the owners corporation's manager dated 5 March 2015⁸ as to his observations. He said in his report, and confirmed in his evidence, that in the north-east corner ("the vault") there was a heavy water ingress mark on the walls, that the ceiling plaster had been damaged by water, that the ground was wet and muddy, that water ingress had caused render and paint to flake on the east wall; the north side of the east wall was the worst, with the water damaged area reducing from north to south. He concluded that the source of the water entry would probably be on the northern side. Mr Gross's evidence of his observations was similar: that the wettest area was the vault and the section of the east wall that was closest to it.
38. Mr O'Brien, Mr Gross and Mr Luo then went onto the roof of the old building. According to Mr O'Brien's evidence, Mr Luo had suggested that they should do that and had said that he wanted to show what he thought the source of the problem was. From the roof they looked down onto the gutter, two storeys below. According to Mr O'Brien's report, he saw some debris in the gutter, which he told me was in the section between the two joins which were closest to the Elizabeth Street end. He described the size of the debris as "a handful".
39. Mr Gross used a ladder to descend into the gutter at the west end. He walked along it as far as he could. Past the point where the gutter narrowed, and where he could not walk, he observed, first, debris in the gutter near a join; secondly, a separation at the top of the join, where silicon appeared to have broken; and thirdly, a gap where a side of the gutter had pulled away from the wall. A photograph, which he took on a later occasion before any repair work on the gutter was attempted showed (so he said in his evidence) those three features as they were when he first saw them. I call it "the A8 photograph" because I received it as exhibit A8.
40. The opinion that Mr Gross expressed in his evidence was that water in the gutter had been leaking through the join and through the other gap and had been descending and entering the basement in the vault area, moistening the vault and the east wall.
41. In his report Mr O'Brien added some comments about the adequacy of the gutter and the cause of water entry into the basement:

⁸ Exhibit A16.

The subject building at 59-65 Elizabeth Street comprises of 6 storeys and is adjacent to the north of a much taller building (20-30 storeys) at 67 Elizabeth Street, Melbourne and occupied by Bendigo Bank. There appears to be a gap of approximately 500mm between these two buildings. There is a flashing between the two buildings at the top of level 3. As well as what appears to be a large gap. The box gutter appears to be inadequate for high volumes of water). During heavy rains, the wall of the bank building intercepts and directs large volumes of rain water into the box gutter and the gap. The debris therein, is restricting the water flow away from the flashing gutter. The combined result is water being directed along the subject wall and down to the bottom of the subject building. As there is no way out for the water at the bottom of the building, the water naturally flows into the basement walls.

He appears to have inaccurately described the gutter as a “box gutter.” He gave the wrong street address for the Phileo building, to the wall of which he was obviously referring.

42. On 7 May 2015 Mr Luo performed his own water test. It was a fine day. Before performing the test he took a photograph of the lower part of the east wall near the vault.⁹ At 10.00am he began the test. He blocked the western end of the gutter and used a hose to fill it with water. The procedure took half an hour. He took a photograph which, he said in his evidence, showed water escaping through the separated join and gap which Mr Gross had identified. I received the photograph in evidence.¹⁰ It was not obvious to me that it showed what Mr Luo said it showed. At 2.00pm on the same day he saw that the area on the east wall which he had photographed earlier had become wetter. It was also wetter to the touch. He took another photograph of it.¹¹ It seemed to me to support Mr Luo’s observation. He argued that the test proved that water had gradually seeped down from the gutter into the north-east area of the basement.
43. F.G. James Pty Ltd had begun its work on 11 May 2015 to waterproof the basement. Soon, however, Mr Lewis of that company made two written reports¹² to the owners corporation’s manager and sent copies by email to Mr Luo. The first was dated 18 May 2015. It began:

Falling damp is [sic] from the vicinity of the gap between the buildings is manifesting as migrating lateral damp on the basement walls as per the sketch diagram attached.

⁹ Exhibit A9.

¹⁰ Exhibit A11.

¹¹ Exhibit A10.

¹² Those two reports are also part of exhibit A20.

The drainage issues associated with relieving the lower level water presence and the masonry salt effect on the masonry in the areas of damp need to be addressed when the source of the water has been identified and eliminated.

In order to ascertain the most effective avenue of treatment we will need to undertake a plumbing investigation.

The diagram attached to the report had indicated the north east corner of the vault. The second report was dated 20 May 2015. It began:

Idle water is seeping at the base of the brick wall of the north side sub-ground room.

The seepage noticeably increases after continuous rainfall indicating storm water entry from the upper levels. Hose flooding of the space between the buildings confirmed this.

Inspection of the upper level flashing between the buildings showed the flashing upstand riveted to the side of the adjacent building. New flashing has been installed toward the front of the subject building in the same manner. There are vertical gaps between the successive flashings.

To prevent entry of sheeting SW to the lower level gap between the buildings the flashing system needs to be comprehensive and watertight.

I infer from the reference to “hose flooding” that Mr Luo had told Mr Lewis about his water test.

44. After the initial investigation on 27 February 2015 Mr Gross returned to the site on three occasions to effect repairs. On one occasion he poured tar or “blackjack” from a bucket into the gutter. On another he sealed the separation in the join by applying noxyde with a brush. He attempted to seal the gap between the gutter and the wall, in the vicinity of the join, but found it difficult to access. His brother took a photograph of him working in the gutter.¹³ He also took a photograph of the join after the work had been completed.¹⁴ I received the photographs in evidence. On a third occasion, on Mr O’Brien’s recommendation, he installed some flashing at the top of the old building so that some of the rain that hit the wall of the Phileo building could be directed to the flashing and so that the gutter at the third storey level might be able to cope better with the rainwater.

¹³ Exhibit A24.

¹⁴ Exhibits A12 and A27.

45. Mr Gross told me of two other observations he had made about the gutter. One was that it did not fall uniformly towards the western end; there was a part where it sloped the wrong way, so that water would tend to fall back towards the separated join and the gap. The other was that the gutter tended to give as he went along it, as if what was underneath it was not completely solid.
46. The work that Triplux and Mr Gross did was complete by the end of August 2015, at about the same time that F.G. James had finished its waterproofing work in the basement. By the end of November 2015 the basement shop had a new tenant. Mr Luo gave evidence that the new tenant had made no complaint of water entry and so he believed that the work done had fixed the gutter which had been the source of the problem. However, he sold the land, lot 1, on 1 July 2016. Phileo's expert evidence, as I shall describe below, includes observations of water damage after that date.

The Law

47. The causes of action upon which HG relies are those provided for in s 16 of the Water Act. So far as it is relevant to this proceeding, the section provides:

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.

(2) If—

- (a) a person interferes with a reasonable flow of water onto any land or by negligent conduct interferes with a flow of water onto any land which is not reasonable; and

- (b) as a result of that interference water causes—
 - (i) injury to any other person; or
 - (ii) damage to the property (whether real or personal) of any other person; or
 - (iii) any other person to suffer economic loss—

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

.....

- (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.

48. Mr Luo, who conducted JH’s case in this proceeding throughout, and did so with conspicuous ability, said that JH was relying on both s 16(1) and s 16(2). Its case can be only that the flow of water onto its land was unreasonable, that is to say, that there should have been no flow of water at all from the gutter onto JH’s land and so any flow that occurred must have been unreasonable. Any reliance upon s 16(2), therefore, must be upon the second alternative in s 16(2)(a): interference, by negligent conduct, with a flow of water onto land which is not reasonable. Even so, reliance on s 16(2) presents a quandary for JH. For the cause of action to arise under the second alternative, the flow of water has to be “not reasonable” when the interference occurs. Even on the questionable assumption that a failure to have a proper gutter or to maintain and repair a gutter properly can be “interference”, JH’s case is that that very failure caused the (unreasonable) flow of water onto its land. For those reasons I consider that JH’s claim can succeed only under s 16(1), if it succeeds at all.

49. To succeed under s 16(1), JH must prove that:

- (1) there was a flow of water from Phileo’s land, the gutter, onto JH’s land, the basement;
- (2) the flow was not reasonable;

- (3) Phileo caused the flow; and
- (4) the water caused JH to suffer economic loss (for it makes no claim with respect to damage to property).

50. So far as it is relevant to this proceeding, s 19 of the Water Act provides:

19 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 or at common law in respect of the escape of water from a private dam.

.....

- (9) In determining a cause of action arising under section 15(1), 16, 17(1) or 157(1) of this Act the Tribunal must apply to the questions of causation and remoteness of damage the same tests as a court would apply those questions in an action based on negligence.

.....

51. In a court action based on negligence, a party proves causation if it proves that the act or omission complained of was a cause of the damage the party suffered; it does not have to prove that the act or omission was either the sole or the dominant cause of the damage.¹⁵ The courts have said, not particularly helpfully, that ultimately whether in the circumstances of a case an act or omission was a cause of damage is a question calling for the application of common sense and experience.¹⁶
52. When deciding proceedings brought under s 16(1) of the Act the Tribunal has consistently taken the view that a respondent's omission to do something has "caused" a flow of water only if the respondent had had a duty to do what it omitted to do.¹⁷ Ms Hicks of Counsel for Phileo submitted that I should take that view also. I accept that submission.
53. In a court action based on negligence, the question of remoteness of damage is answered by considering whether the loss or damage of the kind or character suffered by the plaintiff was reasonably foreseeable by the defendant at the time when the negligent act or omission occurred. If it was not reasonably foreseeable, the loss or damage is too remote and is not recoverable.¹⁸

¹⁵ *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 509; *Medlin v State Government Insurance Commission* (1998) 182 CLR 1.

¹⁶ *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506.

¹⁷ *Turner v Bayside City Council* [2000] VCAT 399; *Mills v Rubenstein* [2016] VCAT 586.

¹⁸ *Halsbury's Law of Australia*, vol. 7 paras [135-670] and [135-675].

54. In deciding this proceeding I shall, in accordance with s 19(9) of the Water Act, apply the tests to which I have referred in the previous three paragraphs.
55. Section 20 of the Water Act requires the Tribunal, in determining whether a flow of water is reasonable or not reasonable, to take account of all the circumstances including ten specified matters. I agree with Ms Hicks' observation that those ten specified matters seem to be directed towards flows of water from and to agricultural land and are not usefully applicable to a proceeding which has two inner city buildings as its setting. Taking account of "the uses to which the lands concerned and any other lands in the vicinity are put" (s 20(1)(e) and "the contours of the lands concerned" (s 20(1)(f)) seems more useful in deciding whether Phileo had a duty to do what it allegedly omitted to do, than in deciding whether a flow of water was reasonable or unreasonable. By "uses" I have in mind commercial tenancies and by "contours" I have in mind the slightly curved wall of the Phileo building next to the gutter, which creates a risk of the gutter pulling away from the wall and leaving a gap.
56. Once the four elements, set out in paragraph 49 above, of the cause of action under s 16(1) have been proved, the liability to pay damages for the economic loss is strict. Whether Phileo breached any duty to JH is a question relevant only to whether it "caused the flow" by omitting to do something which it had had a duty to do.

The Procedural History

57. The proceeding has had an unusual history:
- (a) When it was filed on 27 November 2015 the application named Jack Luo as the applicant and the owners corporation and an insurance company as the respondents. Because of the claim against the owners corporation the Tribunal placed the application into the Owners Corporations List, where it has remained.
 - (b) On 30 January 2016 Mr Luo filed Points of Claim, against the owners corporation only.
 - (c) On 8 February 2016 the claim against the insurance company was withdrawn by leave of the Tribunal.
 - (d) By an order made at a directions hearing on 1 September 2016 JH was substituted as applicant instead of Mr Luo.
 - (e) By an order made on 12 September 2016, on the application of the owners corporation, Phileo was joined as a second respondent. The stated purpose of the owners corporation's application to join Phileo was so that the owners corporation could seek a determination of proportionate liability in accordance with Part IVAA of the *Wrongs Act 1958* as between it and Phileo.

- (f) As the order on 12 September 2016 had permitted it to do, JH amended its Points of Claim by filing on 20 November 2016 a document entitled “Third Amended Points of Claim”. (The title implied that there had been a second version of the Points of Claim. If there had been, I have not been able to find it.) In the Third Amended Points of Claim JH made a claim of its own against Phileo as well as against the owners corporation. The claim against Phileo was for compensation under s 16 of the Water Act.
- (g) On 23 February 2017 an application by Phileo, for summary dismissal of the claim made by JH against it, was dismissed.
- (h) JH settled with the owners corporation the claim against it. On 27 March 2017, by the Tribunal’s order granting leave, JH’s claim as against the owners corporation was withdrawn, and the proceeding continued as against Phileo only.
- (i) By an order made on 15 March 2017, on Phileo’s application, the owners corporation was re-joined as a respondent. The stated purpose of Phileo’s application was so that it could seek a determination of proportionate liability as between it and the owners corporation in accordance with Part IVAA of the Wrongs Act. The owners corporation became named again as the first respondent.
- (j) The claim that came on for hearing before me was JH’s claim against Phileo.

58. At the hearing Ms Hicks for Phileo conceded, correctly in my opinion, that it was not open to Phileo under Part IVAA of the Wrongs Act to seek a determination of proportionate liability as between it and the owners corporation in respect of JH’s claim.

The Hearing

59. The hearing took six days: three in June 2017, and three in October 2017. As I stated above, Mr Luo represented JH at the hearing and conducted its case, and Ms Hicks of Counsel appeared for Phileo. The owners corporation, although named as a party as explained above, did not appear at the hearing.

60. The witnesses who gave oral evidence for JH were:

- (i) Mr Luo;¹⁹
- (ii) Timothy O’Brien of Triplux; and
- (iii) Scott Gross, the plumber.

¹⁹ A witness statement of Mr Luo, exhibit A14, was an overview of Mr Luo’s evidence, but the majority of his evidence was oral.

61. By way of additional expert evidence, JH relied upon the reports, referred above, from
- (iv) Permewan Consulting Pty Ltd;
 - (v) Bryan Miller; and
 - (vi) F.G. James Pty Ltd,
62. Mr Luo tendered and I received in evidence a ring folder headed “Annexures to Third Amended Points of Claim”, marked as exhibit A15, numerous photographs, to some of which I have referred, the lease to the new tenant Lightning Ridge Opal Mines Pty Ltd (“Lightning Ridge”), and to his own sketch plan of the basement.
63. The witnesses who gave oral evidence for Phileo were:
- (i) Antonio Aloï of Mattioli Bros Pty Ltd;
 - (ii) Paul Thatcher, an architect from GHD Woodhead Pty Ltd, who inspected the basement shop on three occasions during November 2016 and gave written reports²⁰ to Phileo’s solicitors dated 1 February and June 2017.
64. By way of additional expert evidence, Phileo also relied upon reports from:
- (iii) Bao Shao, hydraulic engineer, of GHD Woodhead Pty Ltd, who gave a written report²¹ to Phileo’s solicitors dated June 2017;
 - (iv) Terry O’Donoghue of Buildcheck Pty Ltd, building consultants, who inspected the basement shop on 27 July 2016 and gave a written report²² to the owners corporation’s solicitors dated 9 August 2016; and
 - (v) Fallton Pty Ltd, trading as Advance Plumbing, which gave written reports²³ to Phileo dated 9 June 2017 of a water test upon the gutter and other observations done or made in or shortly before the date of the report (presumably) and of CCTV camera footage of the gutter taken on 14 August 2017.
65. Both Mr Luo and Ms Hicks made final addresses by speaking to written submissions.

²⁰ Exhibits B11 and B10 respectively.

²¹ Exhibit B12.

²² Exhibit B15.

²³ Exhibits B6 and B9 respectively

Phileo's Evidence

66. *Mr Aloï.* With Mr Luo's knowledge and without his objection, Mr Aloï, the concreting and industrial coatings expert who had conducted the water test on 1 April 2015, had been present in the hearing room while Mr Luo, Mr O'Brien and Mr Gross had been giving their evidence. JH's case had not been completed at the end of the three days in June 2017 which had been allowed for the hearing. When the hearing resumed in October 2017, and after JH had closed its case, Mr Aloï gave his evidence. It not only dealt with Mr Aloï's attendance at the basement of the old building and his water test conducted on the gutter on that day, but also responded to the evidence which JH's witnesses had given about the gutter.
67. Before Mr Aloï conducted the water test on 1 April 2015 he had inspected the basement. In paragraph 32 above I have summarised the evidence he gave about his observations in the basement, which led him to conclude that the walls in the basement had been affected by rising damp. I need to add two things to the summary. First, he said that the ceiling in the basement had recently been re-plastered so he was unable to tell whether there had been any water damage to the ceiling. Secondly, he agreed when Mr Luo put it to him that the shape of the water marks on the walls was not the usual shape that rising damp took, but explained that the shape was probably the result of water having entered at street level as well as having risen from the ground beneath the basement; it was still accurate to call it rising damp, in his opinion.
68. Having inspected the basement, Mr Aloï proceeded to perform a water test upon the gutter. He blocked off its eastern end with a sandbag and used a hose to fill the gutter with water. He did that not only by hosing directly into the gutter but also by hosing water onto the wall of the Phileo building so that it could fall into the gutter. He did this for 25 minutes. He could see along the whole length of the gutter from the western end to the lip at the eastern or Elizabeth Street end. The gutter was filled but there was no movement in the level of the water during the 25 minutes.
69. After conducting the water test, Mr Aloï went into the car park underneath the Phileo building and saw no evidence there of water entry. He did not, however, go again into the basement of the old building.
70. The responses to JH's evidence about the gutter were contained in a document which was virtually a witness statement²⁴; Mr Aloï verified it and elaborated upon it orally. The responses were:
 - (a) He had been able to see the joins in the gutter, but did not see any separation between joins.

²⁴ Exhibit B8.

- (b) He conceded that JH's photographs showed debris in the gutter near the easternmost join, but did not regard it as significant.
 - (c) He could not see what was beneath the gutter, but from his belief as to how the Phileo building had been constructed he believed that there would be a solid mass of concrete supporting the gutter but a small gap between the concrete mass and the wall of the old building.
 - (d) Any water that entered into that gap, and through any separation between joins of the gutter, would be small in volume. The wall of the Phileo building had a pebble surface so rain water would tend to bounce off rather than run down into the gutter. Any water that entered through a separation of the easternmost join would only be water that had been to the east of that join; the fall of the gutter would have taken all water west of the join away to the western end and out onto the podium terrace and rain. Because concrete beneath the gutter was porous it would absorb water that entered a gap or the separation of a join.
 - (e) If any water had entered the basement from the gutter (although he believed that his water test showed that it had not) the volume that would have entered could only have been minuscule: less than 10% of the water that hit the Phileo's building's wall could make it through the gap, and 95% of that would be absorbed by the concrete. So it would take "a month of Sundays" of rain before it would have any effect upon the basement.
 - (f) Advance Plumbing's CCTV footage showed no damage to the gutter and was consistent with his own observations of the gutter.
 - (g) It would be very difficult, if not impossible, to have proper access to the gutter in order to repair it or replace it. To gain access from Elizabeth Street one would have to obtain a permit and to have electric power in Elizabeth Street cut off temporarily.
71. *Mr Thatcher*. When he was inspecting the basement shop and gutter at the old building on 8, 11 and 24 November 2018 and reporting to Phileo's solicitors Mr Thatcher's brief seems primarily to have been to investigate the adequacy of the rainwater collection system. He is a registered architect with more than 30 years' experience in the design and construction industry. He stated in his reports, and confirmed in his evidence, that he had "designed a number of projects with basement construction including challenging ground conditions and subsurface water".
72. He inspected the basement and found evidence of water entry along all its boundaries. The most likely source of moisture penetration, he concluded, was sub-surface water that had entered because the basement had been insufficiently waterproofed, having been built when waterproofing techniques are not as good as they are now. He thought that the basement had probably been constructed as

a wet basement in which some water ingress was to be expected and the use of which ought to have been restricted accordingly. He noticed some bubbling of recently painted interior walls, indicating that water was still entering despite negative tanking works, which were not a long term solution to the water entry problem.

73. He observed the gutter and, after applying equations to calculate the catchment area for the vertical wall of the Phileo building and the maximum design flow for the gutter, concluded that the design of the gutter was adequate for the maximum anticipated flow, particularly as it was open at the one end and could run onto the podium terrace. He acknowledged that the rainwater calculations were an engineer's, not his own.
74. He measured the dimensions of the gutter by extending a tape measure into it so far as it would go. He entered the gutter from the western end and found that he could walk on it without there being any deflection of it.
75. He did not report any observations of whether there were, or were not, any signs of defects in or disrepair of the gutter. On the assumption that there might be some failure in the gutter, he concluded that any failure in it would present only a "small and intermittent possibility" of water entering into a space between the buildings. Because there were multiple points of water penetration into the basement, all the water penetration could not be attributed to any failure of the gutter.
76. There were stains running down the façade to Elizabeth Street of the Phileo building, in the vicinity of the end of the gutter. These were evident in photographs that JH had tendered and I had received in evidence; similar stains appeared on a metal door at street level.²⁵ Mr Thatcher's opinion was that they were dirt marks, not rust stains from water spilt from the gutter, and that the most likely source of the marks was water which had come from canopies directly above them.
77. Mr Thatcher went into the underground car park of the Phileo building, which showed no signs of water ingress. He attributed that to the more recent construction of the Phileo building with better waterproofing.
78. He also observed and photographed an open Telstra pit in Collins Street near the Phileo building, containing water, showing the height of the water table in the area, and demonstrating (he said) that the ground surrounding the basement of the old building was saturated with water. He also noted that a main city drain ran beneath Elizabeth Street and was "an obvious source of water ingress" to the basement.

²⁵ Exhibits A3 and A8.

79. Mr Thatcher’s conclusions about the relationship of any gutter failure to the entry of water into the basement are reflected in the two following excerpts from his second report:

The basement space would not have originally been intended as a habitable space, and was probably used for storage or for some other functional purpose where some ongoing moisture ingress would not be so problematic. The conversion of the space to use as a shop means that ongoing water issues are more evident and problematic, whereas previously they may not have had serious impacts. It is likely that over the years the basement has been utilised for many non-habitable purposes and the walls and floors have been modified.

.....

The basement water ingress is part of an ongoing issue due to the location of an 80 year old construction that was likely never intended to be totally watertight that is now used for a purpose not originally intended. There are a number of likely sources of intermittent and ongoing water ingress with much higher likelihood and potential than the possible partial failure of the gutter at the level 2 boundary. It is probable that water ingress will be an ongoing issue, as it is difficult to prevent water ingress through internal surface treatments.

80. *Other expert evidence.* Bo Shao, a hydraulic engineer from GHD Woodhead Pty Ltd, prepared a report for Phileo’s solicitors in June 2017 on the adequacy of the rainwater collection option on the boundary between the Phileo building and the old building. Mr Shao is no longer in the employ of GHD Woodhead Pty Ltd. He was not called as a witness but I received his report in evidence.²⁶ He made calculations on the capacity of the gutter “based on Australian Standards with respect to the possible worst scenario” and concluded that the gutter was “more than adequate to serve the worst flowrate...during the rare event in which storm driven rain following on the Elizabeth Street tower then is collected in the gutter.” He also included in his report that he had observed plumbers performing a water test on the gutter. Presumably those plumbers were from Advance Plumbing; I shall refer below to their reports. Because Mr Shao’s observations about the test can be of no greater weight than the plumbers’ reports, I do not have regard to them. I do, however, have regard to his conclusions, based upon his engineering expertise, about the adequacy of the gutter.
81. Terry O’Donoghue of Buildcheck Pty Ltd, building consultants, prepared a report for the owners corporation’s (or its insurer’s) solicitors dated 16 August 2016 of an inspection on 27 July 2016 of the basement. The report does not state that he inspected the gutter also, although he noted the existence of the gutter at level 3 of the Phileo building. Phileo tendered the report and I received it in

²⁶ Exhibit B12.

evidence.²⁷ The substance of the report is an opinion that the basement had been designed as a wet basement with weep holes for ingress of water, that weep holes had been incorrectly rendered over, and that damage to the walls had occurred from water entry over many years. But the report included the following comment about the gutter:

Level 3 guttering defects would have added to groundwater around lot 1, but did not directly cause the damage, as water damage would have been occurring the walls by numerous other cyclic water entry events over 100 years.

I have taken the comment to reflect an assumption that there were “guttering defects”, not an observation that there were those defects.

82. Advance Plumbing produced two reports for Phileo. The first, dated 9 June 2017, was of the results of water testing of the gutter on an unidentified date. The description of the test was that the gutter was filled to the highest possible level (75 millilitres) for a period of approximately half an hour after a sandbag was placed to block it at its wester end; “no water loss was evident at any time during the test”. The second, dated 11 September 2017, was of an attendance on 14 August 2017 to inspect the gutter by using a CCTV camera. The report attached photographs from the CCTV footage said to “show some sort of sealant that may well have been applied many years ago”. I received the reports in evidence.²⁸ As to the second I comment that any sealant observed may well have been the sealant that Mr Gross applied when he effected some repairs to the gutter in 2015.

83. I give less weight to all that other expert evidence than I give to the evidence of witnesses whose evidence was able to be tested at the hearing.

84. *Other non-expert evidence.* Phileo tendered:

- (i) Documents from the City of Melbourne showing that there was no record of any occupancy permit having been issued for the basement²⁹ but there was a certificate of final inspection which classified the future use of the basement as commercial, class 6³⁰.
- (ii) A page from a “services agreement” between Phileo and a contractor whose duties were expressed to include “External canopy cleaning (under and top sides) where relevant”.³¹

²⁷ Exhibit B15.

²⁸ Exhibits B6 and B9 respectively.

²⁹ Exhibit B2.

³⁰ Exhibit B3.

³¹ Exhibit B17.

- (iii) Periodical cleaning schedules³² for the years 2013-2016 (inclusive) for the Phileo building bearing a logo for “Enterprise Services.” For “Balcony – level 2” the instruction included “look at debris between buildings that can be reached by pole.” For “Elizabeth St Canopy” the instruction was “Ensure gutters are free any any [sic] build-up of leaves and debris.”
- (iv) A Planning Property Report from the Department of Environment, Land, Water and Planning showing that the old building was the subject of a special building overlay³³, and a map of the special building overlay³⁴.
- (v) Email communications between Mr Luo and the owners corporation’s managers from time to time between 2011 and 2012.³⁵
- (vi) A quotation from Triplux to the owners corporation’s manager dated 10 March 2015.³⁶ From what I could make of the evidence about the quotations, some of the work quoted for was done (the installation of a flashing at the top of the old building) but the rest was never done.
- (vii) The title search, and Mr Thatcher’s drawings, that I have already mentioned.

Evaluation of the Witnesses

85. Mr Luo told me that he is a qualified engineer and qualified builder, although he did not give me details of his qualifications. He is entitled to ask me to treat his opinions about the state of the basement and the gutter and about the causes of water entry as being better informed than those of a lay person, but he is a director of JH and of course is not independent. He appeared to be conducting JH’s case against Phileo under the misapprehension that he needed to prove that the gutter was either the sole source of water entry into the basement or the major source of it. He needed to prove neither. He needed to prove only that water from the gutter, flowing from it into the basement because of something that Phileo ought to have done but failed to do, was a cause of water damage to the basement – not the only cause, or the major cause, but a cause – and that JH suffered economic loss as a result. His misapprehension, I consider, led to his exaggerating the importance of things that he told me he observed about the basement and the gutter. Nevertheless, I regarded him as a truthful witness and, with the qualification I have mentioned about exaggeration, I accept his evidence.

³² Exhibit B13.

³³ Exhibit B19

³⁴ Exhibit B20.

³⁵ Exhibits B1 and B5.

³⁶ Exhibit B4.

86. Of the witnesses who gave oral evidence tested during the hearing, Mr Gross was the only one who was, at all material times, a plumber by occupation, with 20 years' experience. A plumber is a person best equipped to locate any defect in a gutter, and to determine whether signs of water entry with a building are consistent with entry from a leak in the gutter. I accept his evidence about a separation in a join and a gap between the edge of the gutter and the wall of the Phileo building. The A8 photographs supports that evidence. He was emphatic that the signs he saw of water damage in the vault area were consistent with a leak from the gutter through the join or the gap or both, and that his view was that a leak was a cause of that water damage. Although I think that he too tended to over-emphasise the significance of that cause, in view of the considerable damage elsewhere in the basement, I have given a lot of weight to his opinion.
87. The other expert witnesses who gave evidence were properly careful and fair. I accept their evidence too, although, as I say below, there was evidence that Mr O'Brien gave about the adequacy of the gutter that I do not accept.

Liability

(a) Sub-surface water

88. There is a great deal of evidence that supports the view that sub-surface water had entered the basement and had caused damage:
- (i) Not only was that the view of Phileo's experts, Mr Aloï and Mr Thatcher, but it was also the view of F.G. James Pty Ltd, Permewan Consulting Pty Ltd, Bryan Miller and Terry O'Donoghue of Buildcheck Pty Ltd.
 - (ii) There was evidence of moisture effect upon each wall of the basement, with the east wall being the worst affected. Allowing for the possibility that rain water had entered near the north-east corner of the basement and had migrated part of the way along the east wall, one is hard put to explain how it could have affected all the other walls.
 - (iii) The evidence about improvements in waterproofing techniques over the years points to the probability that whatever waterproofing was done to the basement originally had broken down and had failed eventually.
 - (iv) The area has a high water table and the ground near the basement tends to be saturated.
 - (v) Most tellingly of all, both the person from Permewan Consulting Pty Ltd and Mr Lewis of F.G. James Pty Ltd observed the influence of salt brought from the soil. The person from Permewan Consulting Pty Ltd noticed powdering or efflorescence on the walls. I accept the explanation given for that characteristic: that water containing dissolved salts had migrated to the surface of the walls and had crystallised.

89. Mr Luo postulated that there had been no rising damp because the shape of the damage to the walls of the basement, which he described as a “triangular” shape, was inconsistent with the usual appearance of rising damp. He produced a photograph³⁷ which, he said, showed the usual appearance of rising damp. I agree that the appearance of the damage to the walls of the basement was not what one would usually expect to see with rising damp, where water enters from below ground and migrates up walls. But here we are dealing with a basement, wholly below ground level. Water is capable of entering through the walls as well as below them. Perhaps it is wrong to call the damp areas “rising damp.” Nevertheless it is damp from sub-surface water.

90. Accordingly I find that, over time, sub-surface water had penetrated through inadequate waterproofing and had caused damage to the basement’s walls.

91. That finding, however, does not mean that there was not some other cause too.

(b) The gutter: adequacy of design

92. Both Mr Shao in his report and Mr Thatcher gave evidence that the design of the gutter was adequate for the catching and carrying away of rain water even in the worst possible scenario. There was no persuasive expert evidence to the contrary. Mr Luo challenged it but did not adduce any evidence of inadequacy in the gutter’s design. Mr O’Brien gave a one-sentence opinion that the gutter appeared to be inadequate to take large volumes of rain water, but was not specific as to any inadequacy. Because of its brief and non-specific nature, and because it was inconsistent with other evidence that I prefer, I do not accept that opinion.

93. At first sight the staining of the façade of the Phileo building below the gutter was a fact in support of the theory that the gutter was not adequate for the task of carrying rain water. The evidence, however, put paid to that theory. The fall of the gutter away from the Elizabeth Street end (even though, as Mr Gross gave evidence and I accept, the fall was not uniform) and the lip of the gutter at the Elizabeth Street end meant that it was quite unlikely that water would spill out over the lip and stain the façade. Mr O’Brien conceded that it was just as likely that the staining came from water that passed over dirty canopies on the façade as it was that it came from water spilling from the gutter.

94. JH has not proved the allegation that the design of the gutter was inadequate. Moreover, there was no evidence that Phileo itself had installed the gutter, adequate or inadequate.

(c) The gutter: disrepair

95. On the evidence of Mr O’Brien and Mr Gross, which I accept, supported as it is by the A8 photograph, I find that:

³⁷ Exhibit A6.

- (a) between 27 February 2015³⁸ and 7 May 2015³⁹ there was a separation in the easternmost join of the gutter and, at the join, a gap between the side of the gutter and the wall of the Phileo building;
- (b) on 27 February 2015 there was debris in the gutter directly to the west of that easternmost join;
- (c) the separation, the gap and the debris had been there for some considerable time;
- (d) the separation and the gap were repaired, if at all, by work that Mr Gross completed by the end of August 2015.

(d) Was there a flow of water from the gutter to the basement?

96. JH has argued that Mr Luo's water test on 7 May 2015, proved that water was flowing from the gutter down into the basement. In paragraph 42 above I summarised his evidence about the test. Four hours after he had performed the test by filling the gutter with water, he observed that an area on the basement's east wall had become wetter than it had been before the test was performed.
97. To the contrary, Phileo argued that water tests done at its request proved that there had been no flow of water from the gutter. Mr Aloï performed his test for 25 minutes and noticed no lowering of the level of water in the gutter. He, however, did not return to the basement after the test to look for any sign of water entry. Advance Plumbing's water test produced the same result as Mr Aloï's; its reports were silent as to whether there was any inspection of the basement after the test.
98. I have referred to Mr Luo's tendency to exaggerate. In view of the evidence of Mr Aloï and of Advance Plumbing I do not accept his evidence that there was a perceptible drop in the water level or a perceptible leak through the join or through the gap while he was performing his water test. I do, however, accept his evidence about having seen and felt greater moisture on the east wall four hours after his test than there had been before the test. I consider that the evidence in F.G. James Pty Ltd's two later reports gives Mr Luo's evidence credibility. Those reports were of seeing "falling damp...from the vicinity of the gap between the buildings" which was "manifesting as migrating lateral damp" on the north-east corner of the basement. Its earlier reports, written before Mr Luo's water test, made no reference to that. The two later reports were made a few days after the test. It seems likely to me that what Mr Lewis of F.G. James Pty Ltd observed, as described in the two later reports, was a consequence of the water test, water having escaped from the gutter and having found its way down into the basement.

³⁸ The date of the inspection of the gutter by Mr Luo, Mr O'Brien and Mr Gross.

³⁹ The date of Mr Luo's water test.

99. The very location of the worst water damage, in the vault and on the eastern wall near the vault, is another reason why I think it probable that there was another cause of water damage there, in addition to the penetration of sub-surface water, and that the defects in the gutter were that cause. The gutter runs along a line that was close to the vertical extension line of the northern wall of the basement. If the explanation for water damage throughout the basement was sub-surface water penetration – an explanation that I have accepted – one asks why the damage was worst in the northeast corner. An answer is that that corner was closest to the easternmost joint of the gutter where, as I have found, there was a separation and a gap.
100. Mr Aloï's evidence included his opinion that any water that leaked from the gutter would be absorbed by concrete below the gutter. There must have been filling below the gutter which was either wholly or partly concrete, but no witness was able to say exactly what it was or how complete it was. Mr Gross's evidence was that the gutter tended to give or bounce beneath him as he walked on it. Mr Thatcher's evidence was that it did not give or bounce as he walked on it. I do not make any finding on the matter. At all events, the slight curvature of the Phileo building's wall next to the gutter added, I think, to the likelihood that water leaking from the gutter would find its way past any concrete.
101. Mr Luo gave evidence that after Mr Gross had repaired the gutter the basement shop's new tenant, Lightning Ridge, which took possession of the basement under a lease commencing on 20 November 2015⁴⁰, made no report or complaint to him about water having entered the basement. Because Mr Gross had fixed the leaks in the gutter the absence of any more water entry proved, said Mr Luo, that the leaks in the gutter had been the cause of the water damage. That conclusion does not follow. Equally it might be said that the waterproofing that F.G. James Pty Ltd performed was the reason for there having been no water entry during the new tenant's occupation of the basement. JH sold unit 1, the basement, on 1 July 2016. After that date, Mr Thatcher discerned bubbling of paint on the basement's walls, indicating that there had been further water entry.
102. Nevertheless, on the balance of probabilities I find that there was flow of water from the gutter, through a separation in the easternmost join and through a gap between the gutter and the wall of the Phileo building, and that the water flowed from the gutter into the basement. The evidence on which I base the finding was the aftermath of Mr Luo's water test, the two later reports of F.G. James Pty Ltd and the fact that the water damage was worst in and near the north-east corner of the basement. The view that I take about the conflicting evidence of water testing is that the "flow" was so gradual that it was imperceptible from the vantage point of the gutter and its effects were not obvious for some hours.

⁴⁰ Exhibit A29.

(e) Was the flow unreasonable?

103. I have considered and taken into account each of the matters which s 20 of the Water Act requires one to consider and take into account. In my view none of them assists, in the circumstances of the case, in determining whether the flow of water, by way of leakage, from the gutter to the basement was reasonable or unreasonable. Ms Hicks submitted that because the flow was “not excessive” it was reasonable. It is true that the flow was probably gradual and imperceptible except for its effects. Nevertheless I consider it obvious that the flow was unreasonable, within the terms of s 16(1) of the Water Act. If the gutter had done what it had been designed to do there should have been no flow from it at all into the basement. JH has established that the flow was unreasonable.

(f) Did Phileo “cause” the flow?

104. Phileo would have caused a flow of water from the gutter to the basement (that is to say, a leakage of water from the gutter which found its way into the basement) if it had had a duty to JH to do something about the condition of the gutter which led to the leakage but failed to do it.

105. There was debris in the gutter. Mr Gross and Mr O’Brien noticed it. The A8 photograph showed it. Mr Alois acknowledged that the A8 photograph showed it. The debris was directly to the west of the easternmost join in the gutter, where there was the separation in the join and the gap between the gutter and the wall of the Phileo building. Mr Gross and Mr O’Brien noticed the debris on 27 February 2015, a little more than two months after Kickz had vacated the basement shop on 19 December 2014. From the size and appearance of the debris shown in the A8 photograph I think it likely that it had built up over a considerable time and had not suddenly materialised during those two months. It was there for Phileo to see if it had looked.

106. The periodical cleaning schedules for the years 2013-2016 (inclusive) that Phileo have tendered and I had received in evidence included instructions – presumably from Phileo to its contractor – to “look at debris between buildings that can be reached by pole” and “ensure gutters are free any any [sic] build-up of leaves and debris”. There was no evidence that those instructions were carried out. If they had been carried out, the separation on the join of the gutter and the gap between the gutter and the wall should have been evident to whoever was clearing away debris that had built up next to the join.

107. Because the gutter adjoined the old building Phileo ought to have known that any leakage of water from the gutter was likely to affect not only its own building but also the various owners and occupiers of the old building next door. The vulnerability of those owners and occupiers to water damage from any leakage that Phileo had a duty to them to keep the gutter clear of debris and in good

repair, in their interests as well as in Phileo's own interests. Either by not clearing debris from the gutter and so not knowing of the defects in the gutter of which it should have known, or by not rectifying the defects once a clearing of the debris ought to have brought them to its attention, Phileo did not perform that duty.

108. The likelihood that the gutter was in place, and that the defects in it were present, before Phileo became the owner of the Phileo building, does not affect Phileo's liability. By virtue of s 16(5) of the Water Act Phileo is liable if it failed to take any steps reasonably available to prevent the causing of the flow.

109. I conclude that Phileo caused the flow of water from the gutter to the basement by failing properly to maintain and repair the gutter.

(g) Did the water cause economic loss?

110. JH's tenant Kickz vacated the basement shop on 19 December 2014. The new tenant Lightning Ridge did not take possession until 20 November 2015 under a lease that provided for a four-month rent free period so that it did not begin to pay rent until 20 March 2016. Kickz had been in possession under a five-year lease which had commenced on 15 October 2012.⁴¹ JH's claim in this proceeding is for economic loss, most of which is comprised of what Kickz was liable to pay under the lease and JH could have received, but did not receive, between 19 December 2014 and 20 March 2016.

111. Phileo knew, or ought to have known, that there were commercial tenancies in the old building. It was reasonably foreseeable that, if water flowed from the Phileo building into premises that were occupied under a commercial tenancy and caused damage to those premises that made them unfit for occupation by the commercial tenant, the landlord would suffer economic loss.

112. More than one expert upon whose view Phileo has relied has expressed the view that if there had been an entry of water into the basement that originated from the gutter its amount was so small that it could not have caused any damage, all damage already having been caused by the entry of sub-surface water. That is a wrong view of the matter, in my opinion. It is true that the entry of the sub-surface water was a much more significant cause of damage to the basement than the entry of water that had leaked from the gutter. But it was the eastern wall of the basement, and in particular the part of the wall that was closest to the vault in the north-east corner that had sustained the worst damage, and I have found that water had leaked from the gutter and had probably entered the basement at or near the north-east corner. Mr Luo's evidence was that Roger Prain of Kickz told him that it was the damage to the east wall that had made him decide that Kickz had to vacate the basement. I am satisfied on the balance of probabilities that the flow of water from the gutter into the basement was a cause of the damage to the east wall.

⁴¹ A copy of the lease is marked as "Annexure 3" in the ring folder which is exhibit A15.

113. Although, as I have said, JH was the victim of somewhat of an ambush when Kickz served its notice of default under the lease between JH and it, I am satisfied that it would have been futile for JH to have attempted to hold Kickz to the lease or to sue Kickz for damages for repudiation of the lease. The water damage to the basement shop was so severe that Kickz was entitled to terminate the lease. The termination led to economic loss for JH. I am satisfied on the balance of probabilities that water which flowed from the gutter into the basement was a cause of economic loss for JH.

Quantum of Damage

114. The lease from JH to Kickz was for a term of five years commencing on 15 October 2012. Under the lease Kickz covenanted to pay:

- (a) rent of \$75,000.00 per annum plus goods and services tax (GST), or \$6,250.00 per month plus GST, a total of \$6,875.00 per month, for the first year of the term;
- (b) thereafter, rent increased annually in accordance with movements in the Consumer Price Index (CPI)⁴²;
- (c) outgoings⁴³, as follows:

Land Tax on a single holding basis, Council and Water authority rates and levies, Owners Corporation levies, fees and charges, insurance, all utilities and all other outgoings and charges assessed in respect of the property.

115. The lease also required Kickz to pay a security deposit. In item 20 of the schedule to the lease, beside the side-heading “Security deposit”, were typed the words “Two (2) months initial rent being \$12,500.00 plus GST.” In handwriting, the figure “\$12,500.00” was struck out, a figure “\$9,333.33” inserted instead, and the word “Paid” was added together with what appeared to be the initials of Mr Prain and of Mr Luo. There was no other evidence of the amount of the security deposit, or whether the security deposit was, or was intended to be, \$9,333.33 plus GST. Taking the view of the document which is more favourable to Phileo – for I consider that the security deposit paid to JH has to be taken into account when the quantum of its loss is determined – I will take the security deposit as having been \$9,333.33 plus GST, i.e. \$10,266.66.

116. Kickz vacated the basement shop on 19 December 2014. JH re-let the basement shop to Lightning Ridge under a lease the commencement date of which was 20 November 2015, at a commencing rent of \$95,500.00 per annum plus GST. An additional provision, clause 22.1, in the lease to Lightning Ridge stated: “The

⁴² Clauses 2.1.1 and 18 of the lease.

⁴³ Clause 2.1.2 and item 10 of the schedule in the lease.

landlord agrees to grant four (4) months rent free from Commencement Date”. So Lightning Ridge did not become obliged to pay rent until 20 March 2016. The lease to Lightning Ridge also required the tenant to pay “building outgoings” that include rates and owners corporation fees.

117. The period, therefore, during which JH alleges it lost rent and payment or reimbursement of outgoings, following Kickz’s vacation of the basement shop, was 20 December 2014 to 17 March 2016, taking into account the four-month rent-free period under Lightning Ridge’s lease: a period of 15 months.

118. In the Third Amended Points of Claim JH claimed \$142,087.42, summarised as follows:

Rent	\$108,760.81
Owners Corporation (1) fees	\$ 10,298.46
Owners Corporation (2) fees	\$ 3,367.03
Council rates	\$ 4,187.66
Water rates	\$ 1,027.02
Cost of re-letting	\$ 10,384.00
Electricity	\$ 1,082.45
VCAT fee	\$ 1,081.20
Expert report	\$ 1,238.60
“Discovery cost”	\$ <u>147.50</u>
	\$142,087.42

119. I can deal with the last three items immediately. They are recoverable, if at all, as legal costs, not as economic loss claimable under s 16(1) of the Water Act. The expert report was by an expert whom JH did not call as a witness and upon whose report JH did not seek to rely in the hearing. The “discovery cost” was a sum paid to the City of Melbourne for producing copies from its file about the basement shop in response to a summons to witness which JH served upon it. When those last three items are removed from the claim its total becomes \$139,620.12.

120. Mr Luo gave evidence that upon settlement of its claim against the owners corporation in this proceeding JH received \$100,000.00. Because JH cannot achieve double recovery, \$100,000.00 must be deducted from its claim, which then at best becomes \$39,620.12.

(a) Rent

121. Mr Luo managed the lease to Kickz himself. He did not have a managing agent. In his evidence he detailed how he calculated the rent increases each year in accordance with movements in the CPI so that by October 2014 the rent had become \$7,215.96 per month and that by October 2015, had Kickz not vacated, the rent would have increased further by 1.014%. He verified the detailed

calculation, set out on the last page of the Third Amended Points of Claim, of rent that would have been payable under the lease to Kickz between 20 December 2014 (the day after Kickz vacated) and 19 March 2016 (the day on which the new tenant Lightning Ridge began to pay rent). The calculation was \$108,760.81.

122. Ms Hicks did not challenge the arithmetic. She did, however, challenge the entitlement of JH to claim for the whole period up to 19 March 2016.
123. The issues about the claim for loss of rent, either raised by Ms Hicks or occurring to me, are:
- (a) whether the security deposit paid by Kickz should be taken into account;
 - (b) whether JH could have re-let the premises by the end of May 2015 and so has failed to mitigate its economic loss;
 - (c) whether there were supervening events in 2015 which caused or contributed to delay in re-letting; and
 - (d) whether JH is entitled to claim for the rent-free period that it had allowed to Lightning Ridge.
124. *Security deposit.* Mr Luo gave evidence that he attended a mediation between JH and Kickz which did not result in any agreement. He has retained the security deposit and JH has made no claim against Kickz. Likewise Kickz has made no claim against JH for the return of the security deposit. It appears that each party to the lease has ended it on a “walk away” basis.
125. Mr Luo did not give evidence that Kickz owed any rent up to 19 December 2014 or that there was any other reason for JH’s retention of the security deposit than compensation for loss of future rent. So I consider that JH is obliged to take into account the security deposit, which I have taken to have been \$10,266.66, and deduct it from the claim for \$108,760.81, otherwise there would be double recovery of that amount of \$10,266.66.
126. *Re-letting by the end of May 2015.* In his cross-examination Mr Luo gave evidence of JH’s attempts to re-let the basement after Kickz vacated. He said that at first he had engaged a firm called CPRE to try to find a replacement tenant. That firm put forward “two or three” prospective tenants. One of them was rejected by the owners corporation. Another had a student visa which was about to expire, so was unsuitable. When CPRE had not found a suitable tenant by June or July 2015 he instead engaged Gross Waddell Pty Ltd. They introduced Lightning Ridge which entered into a lease on 20 November 2015.

127. During her final address Ms Hicks submitted that Mr Luo had made an admission during cross-examination that he could have re-let the basement by the end of May 2015. I did not have any recollection or note of Mr Luo having made any such admission. After I reserved my decision I listened to the Tribunal's digital audio recording of the relevant part of Ms Hicks' cross-examination of Mr Luo. In the context of Mr Luo having said that prospective tenants were not prepared to pay the asking rent, Ms Hicks put this question: "Had you been able to deal with the dollars, and if the owners corporation had not rejected one tenant, could you have had a tenant in May?" Mr Luo is softly spoken and speaks with an accent. The recording did not always capture clearly what he was saying. As best as I could make it out, Mr Luo's answer to the question was "maybe May, maybe July, it would take a few weeks to organise".
128. It must be remembered that the evidence was that F.G. James Pty Ltd had not begun the negative-tanking waterproofing work until the middle of May 2015 and did not complete it until August 2015, and that Triplux also did not complete its work to fix the leak in the gutter (once Mr Luo was convinced, by his water test on 7 May 2015, that the leak existed) until August 2015. It is improbable that the basement was in a condition fit to be let by the end of May 2015, and improbable that a tenant, even if willing and suitable, would have entered into a lease that commenced at the beginning of June 2015. So it is improbable that Mr Luo would admit that he could have had a tenant by the end of May, and I am not satisfied that he did make such an admission or that his answer to Ms Hicks' question amounted to such an admission.
129. *Supervening events.* In mid-2015, when the basement was vacant, there was a sewerage overflow and part of the ceiling collapsed. Mr Luo gave evidence that the work necessary to rectify those matters was complete by 11 November 2015. Those events certainly would not have made any easier the task of re-letting the premises quickly. But there was no evidence that those supervening events were a cause of the basement remaining vacant; for example, there was no evidence that Lightning Ridge had been ready and willing to enter into a lease earlier in 2015 but delayed because those events occurred. They are not a reason for reducing the period in respect of which compensation for loss of rent should be allowed.
130. *The rent-free period.* Lightning Ridge's lease allowed it a four-month rent-free period. It is very common for leases to new tenants to be negotiated on the basis of the tenants being allowed an initial rent-free period. Ms Hicks did not submit that I should not permit JH to be compensated for those four months. Nevertheless I wondered whether four months was an unusually long rent-free period to allow to a new tenant. Because the matter was not taken up in the evidence or in submissions, I do not propose to deny JH compensation for lost rent during any part of that four-month period.

131. *Other matters.* It emerged from the evidence that the owners corporation's insurer had offered JH the equivalent of one month's rent in settlement of JH's claim for economic loss. JH accepted an offer from the insurer of compensation for damage to property but rejected the offer of settlement of its claim for economic loss. Ms Hicks submitted that JH had, to that extent, failed to mitigate its loss. I reject that submission. JH was entitled to reject the offer and to take its chances in this proceeding against both the owners corporation and Phileo.
132. Ms Hicks also submitted that in failing to contest Kickz's claim of right to terminate its lease JH had failed further to mitigate its loss. I do not accept that submission either. As I have already said, the expert reports that Kickz obtained well and truly made out its claim that the basement shop was not fit for occupation, and it would have been futile for JH to contend otherwise.
133. In the result, the only limitation that I consider should be placed upon the claim for loss of rent of \$108,760.81 is that the security deposit of \$10,266.66 should be deducted, so that the amount allowed is \$98,494.15.

(b) Outgoings

134. In his evidence Mr Luo verified the detailed calculation of the figures claimed, at the end of the Third Amended Points of Claim, for the Council rates, water rates and two sets of owners corporation fees⁴⁴ which, under the terms of Kickz's lease, Kickz was liable to bear. Copies of rate notices and owners corporation fee notices, on which the calculations were based, were contained within the ring folder which is exhibit A15.
135. As with the claim for loss of rent, JH made its claim for those outgoings for the period between 20 December 2014 and 19 March 2016. The lease to Lightning Ridge which included a provision for a four-month rent-free period did not expressly provide for a four-month moratorium with respect to outgoings also. It would be very odd, however, if the lease had been negotiated on the basis of the tenant not being obliged to pay rent during the first four months but being obliged nevertheless to pay the outgoings with respect to those first four months. The probable commercial reality was that the parties to the lease intended the moratorium to apply to the outgoings also. So I allow the full amounts claimed for the loss of reimbursement of outgoings.

⁴⁴ JH received fee notices for two different owners corporations, numbered 1 and 2 on the notices. I speculate that there were two owners corporations of which JH was a member. Owners Corporation 1 Plan No 419524E, an unlimited owners corporation which bore legal responsibility for maintaining and repairing common property which included the exterior half of the basement walls, and Owners Corporation 2 Plan No 419424E, a limited owners corporation which did not bear that legal responsibility. I did not see the entire plan of subdivision, which would show whether my speculation is correct.

(c) Cost of re-letting

136. Mr Luo verified the amounts claimed at the end of the Third Amended Points of Claim for advertising costs and leasing fees. They were \$357.50 and \$1,116.50 respectively for advertising signs and a fee of \$8,910.00 charged by Gross Waddell Pty Ltd for the finding of the new tenant Lightning Ridge. The total was \$10,384.00.

137. JH would have incurred expenses like these eventually if the tenant Kickz had remained in possession for the remainder of its five year term, due to expire on 14 October 2017, and had then vacated. It would have incurred them in 2017 or 2018 instead of in 2015 or 2016. Allowing the whole amount claimed, \$10,384.00, would be over-compensating JH. Its loss arose because it incurred the expenses earlier than it would otherwise have incurred them. Kickz vacated after having occupied the basement shop, under its lease, from 15 October 2012 until 19 December 2014: 26 months. The term of the lease was 60 months. JH incurred these expenses 34 months too early. In my view its loss is 34/60th of the expenses it incurred. I allow \$5,884.26 which is 34/60th of \$10,384.00.

(d) Electricity

138. Mr Luo verified a total amount of \$1,082.45 in electricity charges incurred between 20 December 2014 and 19 March 2016. He explained the claim by saying that electricity had to remain connected to the basement while it was unoccupied so that the repair work to the walls could be completed and for the purpose of illuminating an advertising sign. To my mind the electricity charges are an overhead expense for a property owner and cannot be said to have been incurred as a consequence of a tenant having vacated the premises because of water damage to the walls of the premises. I do not allow the claim for \$1,082.45.

(e) Conclusion

139. The amounts I have allowed are:

Rent	\$ 98,494.15
Owners corporation (1) fees	\$ 10,298.46
Owners corporation (2) fees	\$ 3,667.03
Council rates	\$ 4,187.66
Water rates	\$ 1,027.02
Cost of re-letting	\$ <u>5,884.26</u>
	\$123,558.58

140. The compensation that JH claimed against Phileo was exactly the same as the compensation that JH had claimed against the owners corporation. It settled its claim against the owners corporation for \$100,000.00 and has received that sum. So that JH does not achieve double recovery, \$100,000.00 must be deducted for the \$123,558.58 that I have allowed by way of compensation for Phileo.

141. The result is that I order that Phileo must pay JH \$23,558.58.

Other Matters

142. In the Third Amended Points of Claim JH made a claim for interest upon any compensation awarded. I shall reserve to JH liberty to make an application for an award of interest.

143. In Phileo's written submissions to which Ms Hicks spoke in her final address, Phileo expressed a wish to be heard on the issue of the costs of the proceeding. I shall reserve to Phileo and to JH liberty to make an application for costs.

144. Ms Hicks told me that in the event that there was an order that Phileo must pay compensation to JH Phileo's intention was to make its own claim against the owners corporation. The only comment that I make about that is that Phileo could have commenced a cross-claim against the owners corporation and could have asked that the cross-claim be heard together with this proceeding. It did not do so.

145. After I had reserved my decision JH attempted to make a further written submission in correspondence sent to the principal registrar. I had not given JH permission to do that. Phileo objected to it, as it was entitled to do. I have ignored the further written submission.

A. Vassie
Senior Member

23 February 2018