

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1941/2020

CATCHWORDS

Water Act 1989; applicant has burden of proof; whether the flow of water was caused by works constructed or any other act done or omitted to be done on the respondents' land; evidence insufficient to find respondents liable; claim dismissed.

APPLICANT	Tarun Bhati
FIRST RESPONDENT	Ranbir Singh Pannu
SECOND RESPONDENT	Kaur Balpreet
WHERE HELD	Melbourne
BEFORE	Member N Feeney
HEARING TYPE	Hearing
DATE OF HEARING	7 July 2021
DATE OF ORDER	7 July 2021
DATE OF REASONS	20 August 2021
CITATION	Bhati v Pannu (Building and Property) [2021] VCAT 946

N Feeney
Member

APPEARANCES:

For Applicant	Mr T Bhati, in person
For Respondents	Mr R Pannu, in person, and on behalf of the second respondent

REASONS

- 1 This proceeding was listed for hearing on 7 July 2021. At the conclusion of the hearing on 7 July 2021 I gave my decision with reasons orally and made an order dismissing the proceeding.
- 2 On 9 July 2021 the applicant requested written reasons for the decision.
- 3 These written reasons reflect the material before me and the evidence given at the hearing which formed the basis of my finding of facts and the reasons given orally at the hearing, with some editing for clarification and context.
- 4 The relevant legislation, the content of some documents and the evidence given which formed the basis of my reasoning but were only briefly referred to in my oral decision, are in some instances expanded upon in order to provide context for these written reasons together with the background.

THE EVIDENCE BEFORE ME AT THE HEARING

- 5 At the hearing I considered the oral evidence and the material before me.
- 6 Mr Tarun Bhati, the applicant gave evidence and Mr Ranbir Singh Pannu, the first respondent gave evidence for himself and his wife, the second respondent.
- 7 The material before me included:
 - i Details of the applicant's claim including his calculation of loss and damages, fees and costs.
 - ii The respondents' points of defence.
 - iii Photos of water in the applicant's backyard.
 - iv Videos taken by both the applicant and the respondents of their backyards.
 - v Emails between the applicant and the respondents.
 - vi Expert report of Mr Branko Mladichek undated but based on an inspection undertaken on 29 March 2021 and prepared on instructions received from the applicant.
 - vii Expert report of Mr John Rosa undated but based on an inspection undertaken on 17 May 2021 and prepared on instructions received from the respondents.
 - viii Near Map images of the applicant and respondents' land dated 7 March 2019, 23 May 2019 and 13 October 2019.
 - ix Drainage plan of the respondents' home.
 - x VBA compliance certificate for drainage at the respondents' land dated 1 April 2016.
 - xi Storm water assets map showing the applicant's land and the respondents' land.

BACKGROUND

- 8 The applicant and the respondents both own land in the suburb of Mickleham with a common boundary at the rear of their properties. The respondents' land is about 600 mm higher than the applicant's land.
- 9 The home on the applicant's land and the home on the respondents' land were both constructed in about 2016 and the fence at the rear between the properties (**boundary fence**) was also constructed at that time.
- 10 Landscaping works were undertaken in the backyard of the respondents' land between about late May 2019 and mid October 2019, as depicted in Near Map images, by the prior owners of the respondents' land. The extent of that landscaping is not known but there is currently a retaining wall about 1 foot inside the boundary fence that retains soil to a height of about 600mm and then there is soil of that height between the retaining wall and the boundary fence.
- 11 In mid December 2019 the respondents purchased their land. They have occupied their land since then.
- 12 In about late December 2019 or early 2020 the applicant decided to undertake some landscaping works at the rear of his property. He was told at that time by the landscaper that he had engaged, about concerns with the amount of water in the backyard of the applicant's land.
- 13 The applicant said prior to that time there had been no water problems and whilst the respondents doubted this evidence, they were not the owner of their land prior to that time and therefore had no evidence of water problems prior to this time. I accept the applicant's evidence that there were no water problems prior to late December 2019 or early 2020.
- 14 Within a week or two of purchasing their land the respondents say that the applicant raised with them the issue of water coming from the respondents' land onto the applicant's land. At about the same time the applicant also discussed an issue he had with the boundary fence suggesting it was leaning due to the soil on the respondents' side pressing against it.
- 15 The respondents say that the applicant told them the water was surface water running off the landscaping in the respondents' backyard. The respondents say they sought advice about whether the landscaping on their land had caused water to enter onto the applicant's land, but they were unable to determine that anything that had been done on their land might cause such a substantial amount of water to flow onto the applicant's land. The respondents then told the applicant that they did not want to be contacted again about the issue.
- 16 Over the coming months the applicant provided videos to the respondents of the water in his backyard. The first video was in June 2020 and there are further videos taken in October and November 2020.

- 17 The applicant in his application form says that he has built a retaining wall and installed an agriculture pipe in his backyard to protect the foundations of his home whilst he waits for the water flow from the respondents' land to be stopped.
- 18 The applicant wanted the issue resolved and sought advice from Dispute Settlement Victoria (**DSV**). The applicant said he was told by DSV that if he issued a fencing notice DSV could arrange a mediation between him and the respondents. The applicant issued a fencing notice in July 2020 but the respondents refused to participate in mediation to be arranged by DSV.
- 19 The applicant then issued this proceeding in November 2020 seeking orders against the respondents to stop the alleged unreasonable flow of water immediately, repair the alleged damage caused to the boundary fence, remove all soil and brick supporting the retaining wall against the boundary fence and pay for the costs incurred to protect his home due to alleged flash flooding from the respondents' land and pay any other costs incurred to resolve problems caused by their alleged negligence.
- 20 I advised the applicant that the Tribunal did not have jurisdiction to resolve the fencing dispute, but that under the *Water Act 1989 (Act)*, the Tribunal does have jurisdiction to determine claims about water flowing from the land of a person onto any other land.

WATER ACT

- 21 The Act contains provisions about water flowing from one person's land to the land of another.
- 22 The relevant wording of the Act is contained in section 16:

16 Liability arising out of flow of water etc.

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

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

...
- (5) If the causing of, 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.

- 23 As the respondents only purchased the land in late 2019, the applicant is not claiming that the respondents caused the flow.
- 24 The claim being made by the applicant is that the respondents are responsible for damage to his land, as they are the current occupiers of the land and they have failed to take any reasonable steps to prevent the flow of water caused by works constructed or any other act done or omitted to be done on their land.
- 25 Section 19 of the Act relevantly provides the Tribunal has jurisdiction to make orders for injunctions if it is just and convenient, for payment of money or declarations in respect of claims under section 16 of the Act except for a claim for damages for personal injury.
- 26 The wording of section 19 is as follows:

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.
- (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.

...

- (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 to those questions in an action based on negligence.

EVIDENCE PRESENTED AT THE HEARING

- 27 The June 2020 video shows water pooling on top of a tarpaulin on the applicant's side of the boundary fence. The water appears to be bubbling up from below the ground, but it is not clear from the camera angle if that water is coming from directly below the boundary fence or slightly on the applicant's side of the boundary fence.
- 28 The October 2020 video shows deeper pooling of water between the fence and a wooden structure on the applicant's side of the fence, which appears to be a retaining wall. The water appears to be coming from a location approximately under the boundary fence. The video was taken during rainfall.
- 29 The November 2020 videos taken during rainfall show considerable water on the applicant's land which has flooded not only along the boundary fence but also into their entire back yard and a photograph shows it has also entered the alfresco area of their home. The videos show a substantial amount of water bubbling up from the ground in a location approximately under the boundary fence.
- 30 On 22 April 2021 the applicant filed a report by Mr Mladichek. The report is based on an inspection undertaken on 29 March 2021 and two videos and photographs provided to Mr Mladichek by the applicant. The report says that water ingress to the applicant's land is caused by the surface water in the respondents' backyard that is not captured and discharged into a legal point of discharge. The report relevantly says:

The applicant has complained about flash flooding from adjoining property, in heavy rain there is substantial flow of water flooding rear yard of applicant's property. The adjoining property was subject of development and landscaping that does not capture surface water and discharge into LPD but instead allows escape under the fence into applicant's land. This report recommends installation of drainage and sump pit with automatic float sump pump to discharge excess water into storm water system, and required repairs to damaged fencing. The cost of such installation is included with this report. It is understood that the applicant seeks award of costs from the respondent for property

damage to date and for the cost of necessary drainage to alleviate flash flooding, and for fencing repairs.

- 31 The March 2021 videos show significant water coming from under the boundary fence onto the applicant's land and the photographs show significant flooding of the applicant's land.
- 32 On 24 May 2021 the respondents filed the report by Mr Rosa which was based on an inspection undertaken on 17 May 2021. This report says that the water ingress to the applicant's land is caused by the boundary fence installer having penetrated a drainage easement with a fence post. The report also says that the boundary fence posts have not been adequately cemented into place causing the boundary fence to lean. That report relevantly says:

An investigation of the rear of allotment 1107 (3) Westcot Road, Mickleham was conducted by this firm and Patrick Reid registered plumber. The property was purchased in C 2019 by Mr. Ranbir Pannu. The original builder and/or the builder's plumber has carried out various works to the building ...

Furthermore, the escape of stormwater to the rear easement as detailed in items 1 & 2 of this report is such that the easement has been compromised during the fitting of the fence post. It is in our opinion that the builder and/or the builder's fencing contractor has punctured the easement when the fence post was installed. It is therefore the responsibility of the contractors to affect repairs to the council's easement and other items in this report, thus alleviating any further water entering the rear adjacent property and updating the plumbing works to today's standards. Furthermore, the retaining wall which is not directly under the boundary line and the soil abutting the piling fence has little detrimental affect on the stability of the fence. Also, the undulation to the fence is due to the instability of the fence posts which have not been adequately cemented into place.

- 33 Mr Rosa's report raises, for the first time, that the water ingress into the applicant's land is as a result of a punctured "easement" when the fence post was installed. I assume that Mr Rosa is referring to a storm water pipe in a water easement had been damaged when a fence post was installed.
- 34 After Mr Rosa's report was received:
- i The respondents obtained a copy of a drainage plan for their home. This drainage plan shows that the downpipes from their home all connect to drain pipes which feed to a single point near to the north east corner of the respondents' home and from there a single storm water pipe feeds to a legal point of discharge.
 - ii The applicant has obtained a storm water assets plan which shows that the legal point of discharge from the respondents' land is under the boundary fence to a local authority's storm water drain which is located on the applicant's land and runs along and inside the length of the boundary fence on the applicant's land.

- 35 The respondents provided two videos from June 2021 which appears to have been taken during light rainfall. The videos show that the respondents' backyard is not water logged. Dirt has been removed around a boundary fence post and water can be seen from the respondent's side of the boundary fence bubbling up around that fence post.
- 36 At the hearing the applicant abandoned his claim that the water flowing onto his land is caused by surface run off from the landscaping works on the respondents' land and he said he no longer relied upon the report prepared by Mr Mladichek in support of his claim.
- 37 Instead the applicant said that the water flowing onto his land has been caused by a damaged storm water pipe. He sought an order that the respondents be required to repair the damaged storm water pipe.

ASSESSMENT OF THE EVIDENCE

- 38 The applicant has the burden of proof to satisfy the Tribunal on the balance of probabilities of the facts necessary to establish his claim.¹
- 39 To establish the claims made in the proceeding, the applicant must prove on the balance of probabilities, that is, that it is more likely than not, that:
- i there is an unreasonable flow of water from the respondents' land onto the applicant's land; and
 - ii the unreasonable flow of water was caused by works constructed or any other act done or omitted to be done on the respondents' land; and
 - iii the respondents, as the current occupiers of the land, have failed to take any reasonable steps available to prevent the flow of water; and
 - iv he has suffered damage by reason of the unreasonable flow.
- 40 If the applicant does not satisfy me that these matters are more likely than not to have occurred, I must dismiss his claim.
- 41 If I am satisfied that these matters are more likely than not to have occurred, then I need to determine what orders should be made.

Is there an unreasonable flow of water from the respondents' land onto the applicant's land?

- 42 In considering whether the flow of water is reasonable, it is the flow itself that must be considered, not the actions of the respondents.²
- 43 The Act provides guidance about how the Tribunal must decide whether or not a flow is reasonable. That guidance is contained in section 20(1) of the Act, which sets out nine matters to be taken into account in determining whether a flow is reasonable or not reasonable. The Act goes on, in

¹*Reifek v McElroy* [1965] HCA 46; (1965) 112 CLR 517 at 521-2 as referred to in *Olivera v Google Homes Pty Ltd* [2015] VCAT 835 at [33].

²*Spagnolo v Body Corporate Strata Plan 418979Q* [2007] VSC 423 at [30].

subsection 20(2), to say that the first four of those nine matters should be given greater weight.

44 The relevant wording of section 20 is as follows:

20 Matters to be taken into account in determining whether flow is reasonable or not reasonable

- (1) In determining whether a flow of water is reasonable or not reasonable, account must be taken of all the circumstances including the following matters—
- (a) whether or not the flow, or the act or works that caused the flow, was or were authorised;
 - (b) the extent to which any conditions or requirements imposed under this Act in relation to an authorisation were complied with;
 - (c) whether or not the flow conforms with any guidelines or principles published by the Minister with respect to the drainage of the area;
 - (d) whether or not account was taken at the relevant time of the likely impact of the flow on drainage in the area having regard to the information then reasonably available about the cumulative effects on drainage of works and activities in the area;
 - (e) the uses to which the lands concerned and any other lands in the vicinity are put;
 - (f) the contours of the lands concerned;
 - (g) whether the water which flowed was—
 - (i) brought onto the land from which it flowed; or
 - (ii) collected, stored or concentrated on that land; or
 - (iii) extracted from the ground on that land—and if so, for what purpose and with what degree of care this was done;
 - (h) whether or not the flow was affected by any works restricting the flow of water along a waterway;
 - (i) whether or not the flow is likely to damage any waterway, wetland or aquifer;
 - (j) in the case of a flow of, or interference with, water caused by the construction, removal or alteration of a levee in accordance with section 32AC of the **Victoria State Emergency Service Act 2005**, whether or not that construction, removal or alteration occurred in response to an emergency within the meaning of section 3 of the **Emergency Management Act 2013**.

- (2) In taking account of the matters specified in subsection (1), greater weight must be attached to the matters specified in paragraphs (a), (b), (c) and (d) than to the other specified matters.

- 45 None of the first four matters are relevant to this claim. The only matter in section 20(1) of the Act that is relevant to the current claim is subsection (g) that requires the Tribunal to consider whether the water which flowed was collected, stored or concentrated on that land and if so, for what purpose and with what degree of care this was done.
- 46 I am satisfied that the water is collected from the respondents' land in that the water from the respondents' home is collected into the down pipes on that home, before it is discharged via a storm water pipe which goes from the respondents' land onto the applicant's land and then into the local authority's storm water drain which is on the applicant's land.
- 47 I also am satisfied that the flow of water from the respondents' land into the local authority's storm water drain on the applicant's land is reasonable, on the basis that the discharge of water into the local authority's storm water drain is authorised as the legal point of discharge for the water from the respondents' land.
- 48 However, I find the flow of water from the respondents' storm water pipe that is not discharged into the local authority's storm water drain, but instead floods the applicant's land, is not reasonable for the following reasons.
- 49 From the videos and photographic evidence and the evidence given by the applicant at the hearing, I am satisfied that the extent and volume of the flow of water that does not discharge into the local authority's storm water drain but instead into the applicant's backyard is unreasonable in that it completely floods the entire backyard and the alfresco area to such an extent that their entire backyard and alfresco area cannot be used at least during some periods of time.
- 50 In so far as the water was on the respondents' land before it flows onto the applicant's land, I also find that the unreasonable flow of water is from the respondents' land onto the applicant's land.

Was the unreasonable flow of water caused by works constructed or any other act done or omitted to be done on the respondents' land?

- 51 The applicant says that the damaged storm water pipe is causing the flow of water onto his land.
- 52 The applicant admitted that he does not know who damaged that storm water pipe and he does not know in exactly what location the storm water pipe is damaged.
- 53 No investigations have been undertaken by or on behalf of the applicant to determine the location and the cause of the damage to the storm water pipe.
- 54 The applicant has no expert evidence about the cause or location of the damage to the storm water drain. His expert, Mr Mladichek said the cause of

the water flow was surface water and does not address whether the cause could be a damaged pipe or give any opinion about the location or cause of a damaged pipe.

- 55 The respondents accept the storm water pipe has been damaged and this is causing a flow of water onto the applicant's land but as they did not own their land before December 2019, they also do not know where the pipe is damaged or who damaged the pipe.
- 56 I am satisfied that the cause of the flow of water onto the applicant's land is from the damaged storm water pipe.
- 57 However, I am not satisfied that it is more likely than not that the damage to the storm water pipe was caused by works constructed or any other act done or omitted to be done on the respondents' land for the following reasons.

Landscaping on the respondents' land

- 58 The applicant says that the storm water pipe could have been damaged during the landscaping works which occurred on the respondents' land at a time between late May 2019 and mid October 2019 and in particular during the construction of a retaining wall near the fence and the installation of bricks between the retaining wall and the fence.
- 59 I accept that this could be the cause of the damage but I am not satisfied that it is more likely than not, this is the cause of the damage for the following reasons.
- 60 There are other acts, referred to below, which also could have caused the damage which I am satisfied, for the reasons below, are no less likely to have caused the damage.
- 61 The flooding of the applicant's land did not occur until late December 2019 or January 2020 which could be up to 7 months after the landscaping works were undertaken as the exact timing of the landscaping works is not known.
- 62 The extent of water that flowed onto the applicant's land is so significant that it appears unlikely that if the damage had occurred between late May 2019 and mid October 2019 that the applicant would not have noticed any water prior to late December 2019 or January 2020.

The construction of the boundary fence

- 63 The respondents rely upon the opinion given by Mr Rosa in his expert report that the storm water pipe was damaged by the fencing contractor when installing the fence posts for the boundary fence. Mr Rosa is of the opinion the break in the storm water pipe is at the boundary fence line because that is the location at which the water appears to be escaping.
- 64 I accept that this could also be the cause of the damage, but I am not satisfied that it is more likely than not, that this is the cause of the damage for the following reasons.

- 65 The evidence is that the boundary fence was constructed in 2016 but that the flooding on the applicant's land did not occur until late December 2019 or January 2020 which is more than 3 years after the boundary fence was constructed.
- 66 The extent of water that flowed onto the applicant's land is so significant that it appears unlikely that if the damage had occurred in 2016 that the applicant would not have noticed any water prior to late December 2019 or January 2020.
- 67 Further even if the storm water pipe was damaged during the construction of the boundary fence, I am not satisfied that it is more likely than not, that the damage occurred due to an act on the respondents' land.
- 68 I accept that the photograph taken of the fence post in Mr Rosa's report is taken from the respondents' land and that the fence post could be on the respondents' land but the fence post could also be on the applicant's land or partially on both properties.
- 69 Whilst it is often assumed the fence line is on the boundary of properties, no evidence was presented by either party about the precise location of the boundary fence or the fence posts, in order to prove whether the fence post was, or was not, on the respondents' land.

Landscaping on the applicant's land

- 70 The respondents also say that it is possible that the applicant damaged the storm water pipe, or exacerbated any previous damage, when he was undertaking landscaping works in his backyard in late December 2019 or January 2020.
- 71 In response the applicant said that the water was coming onto his land before he undertook any landscaping works and denied his landscaping works caused the damage.
- 72 The applicant's evidence was that the person he engaged to undertake the landscaping works, told him about the excessive water in his backyard.
- 73 The landscaper was not called to give evidence about the discovery of the water or what works had or had not been done at that time. I have not been shown any photographs or videos of the status of the applicant's backyard at the time the water problem was discovered.
- 74 The discovery of the water was at the same time the landscaper was engaged. The video evidence shows the flooding appears to have become worse over the period between May 2020 and March 2021 and during this time the applicant had undertaken landscaping works on his land, including installing a retaining wall and an agricultural pipe.
- 75 Even though the applicant denies the works on his land caused the damage to the storm water pipe, given it was the landscaper who first drew the water issues to the attention of the applicant, I accept that the works on the

applicant's land could be the cause of the damaged storm water pipe, but I am unable to determine if these works are more likely than not to have caused the damage.

Conclusion as to what damaged the storm water pipe

- 76 The cause and location of the damage to the storm water pipe which goes from the respondents' land to the local authority's storm water drain on the applicant's land is not known and the applicant and the respondents have both offered plausible different scenarios.
- 77 Based on the evidence that has been given, I am not satisfied that any one of the above scenarios is more likely than the other scenarios to have caused the damage to the storm water pipe.
- 78 I am not satisfied that it is more likely that the cause of the damage to the storm water pipe was due to an act on the respondents' land, rather than an act which occurred on the boundary between the properties or an act which occurred on the applicant's land.

CONCLUSION ABOUT THE CLAIM

- 79 The applicant has not satisfied me that it is more likely than not, the unreasonable flow of water was caused by works constructed or any other act done or omitted to be done on the respondents' land.
- 80 Therefore I do not have to consider whether the respondents failed to take reasonable steps available to prevent the flow of water and whether the applicant suffered damage by reason of an unreasonable flow.

ORDERS

- 81 I dismiss the applicant's claim against the respondents.

N Feeney
Member