IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2019 04848

SALLY BARTER — Appellant

v

NICOLE JANE BUSHETT/CELEBIC — First Respondent

BALSA CELEBIC — Second Respondent

JUDGE:	Ginnane J
WHERE HELD:	Melbourne
DATE OF HEARING:	11 June 2021
DATE OF JUDGMENT:	8 April 2022
CASE MAY BE CITED AS:	Barter v Bushett
MEDIUM NEUTRAL CITATION:	[2022] VSC 172

ADMINSTRATIVE LAW – Victorian Civil and Administrative Tribunal decision – Owners Corporation – Liability of parties to repair and maintain services – Whether drains and pipes common property – Plaintiff self-represented – Whether denied natural justice – Application for leave to appeal out of time – *Subdivision Act 1988* s 12; *Water Act 1989* s 16; *Owners Corporation Act 2006* ss 46, 47, 129.

PRACTICE AND PROCEDURE – Appeal from order of Judicial Registrar refusing an extension of time to commence proceeding and dismissing proceeding – Significant delay – Prospects of success – Prejudice to the respondents – *Victorian Civil and Administrative Tribunal Act 1998* s 148.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	In person	
For the Defendants	Mr J A J Nixon	Tony Hargreaves & Partners

HIS HONOUR:

Summary

1 Ms Sally Barter appeals from the orders of a Judicial Registrar refusing her application for an extension of time to commence an appeal from orders of the Victorian Civil and Administrative Tribunal ('VCAT' or 'the Tribunal') and dismissing this proceeding.[1] Ms Barter commenced the proceeding on 24 October 2019 approximately 123 days out of time against orders of VCAT made on 27 May 2019.

2 In her VCAT application, Ms Barter had sought damages against the respondents, Nicole Bushett (Celebic) and Balsa Celebic, ('the respondents' or the 'Celebics') alleging that they were responsible for damage caused to her property.

3 Ms Barter and the respondents lived on a subdivided block of land in Toorak. Ms Barter occupies Unit 1, the front property on the block. At the time of the dispute, the respondents occupied Unit 2, the back property, but have since sold it.

4 The dwellings form a single connected building and share a common double brick cavity party wall. The block of land slopes steeply from the southern boundary at the rear to the northern boundary on the street front. Consequently, Ms Barter's unit at the front is substantially lower than the respondents' unit.

5 The plan of subdivision of the land had the effect that the common property is all the land in the parcel except the land contained in Units 1 and 2 and 15 metres above them. Anything below ground level is common property.

6 Ms Barter's application to the Tribunal was her third. In the first, she sought damages from people involved with her purchase of her unit, seeking the cost of rectifying defects that she said were present at the time of purchase. This claim settled. Her second application was against the former owner of Unit 2 for damages caused to her unit by water penetration.

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1 *Victorian Civil and Administrative Tribunal Act 1998* s 148 ('VCAT Act').

7 This appeal is a hearing de novo about whether Ms Barter should be granted an extension of time.[2] It is not necessary for Ms Barter to establish an error in the Judicial Registrar's decision orders. I must decide afresh whether to allow her an extension of time in which to file her appeal beyond the 28 day period allowed by s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* ('VCAT Act').[3] Section 148(5) permits the Court to allow an extension of time.

8 For the reasons that follow, Ms Barter's appeal from the orders of the Judicial Registrar is dismissed. The result of that is that the Judicial Registrar's orders remain in force, the extension of time is refused and the proceeding is dismissed.

9 Despite this being a de novo appeal, it is useful by way of providing context to set out two paragraphs in which the Judicial Registrar expressed his conclusions:

> I conclude the application for an extension of time must be refused. That follows from my consideration of the matters advanced by the applicant to explain the delay and to justify the need for an extension of time. I consider the reasons do not establish it would be in the interests of justice to grant an extension of time. The need for finality of litigation is important and is not displaced by the matters relied on by the applicant. The prejudice that would be suffered by the respondents is a further factor.
>
> Further, I consider the matters advanced by the applicant as the questions of law and the grounds of appeal do not have prospects of success such that it would be appropriate in the interests of justice to allow an extension of time. To the contrary, I consider the factual findings of the tribunal are against the applicant.[4]

The Tribunal proceeding

10 In 2017, Ms Barter commenced her third application to the Tribunal, on this occasion against the Celebics who had purchased Unit 2 in 2015. Her claim was for water damage to her unit caused by faulty drains and pipes and flows of water for which she alleged they bore responsibility. She sought damages and orders requiring them to carry out works. In more detail, she sought:

(a) damages of $73,812.76 for alleged damage said to have been caused to

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2 See *Supreme Court (General Civil Procedure) Rules 2015* r 84.05(4).
3 VCAT Act s 148(2)(a).
4 *Barter v Celebic* [2020] VSC 353, 20-21 [78]-[79].

[her] Unit by water penetration;[5]

(b) $20,075.00 as a contribution towards the replacement of the brick wall at the front of the Site which forms part of [her] Unit. The wall is seriously cracked and in need of replacement;

(c) damages of $504.90 to re-glaze the front door of [her] Unit;

(d) orders for the rectification or replacement of parts of the stormwater and sewerage systems together with orders for the Respondents to pay the whole or a proportion of the cost; and

(e) orders for various other works such as removal of trees, tanking the Party Wall and orders that the Respondents pay all or part of the cost.

11 In bringing her claim, Ms Barter relied on s 129 of the *Owners Corporation Act 2006* ('Owners Corporation Act' or 'OC Act') which states:

> **129 Care of lots**
>
> A lot owner must—
>
> (a) properly maintain in a state of good and serviceable repair any part of the lot that affects the outward appearance of the lot or the use or enjoyment of other lots or the common property; and
>
> (b) maintain any service that serves that lot exclusively.

12 Other relevant provisions of the OC Act are:

> **46 Owners corporation to repair and maintain common property**
>
> An owners corporation must repair and maintain—
>
> (a) the common property; and
>
> (b) the chattels, fixtures, fittings and services related to the common property or its enjoyment.
>
> **47 Owners corporation must repair and maintain services**
>
> (1) An owners corporation must repair and maintain a service in or relating to a lot that is for the benefit of more than one lot and the common property.
>
> (2) An owners corporation may, at the request and expense of a lot owner, repair and maintain a service in or relating to a lot if it is impracticable for the lot owner to repair or maintain that service.

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5 As outlined in [46] of *Barter v Bushett (Building and Property)* [2019] VCAT 774, this included re-levelling of floors, repairs to blown render, repairs to unlevel/twisted door frames and painting.

(3) In this section—

"service" includes a service for which an easement or right is implied over the land affected by the owners corporation or for the benefit of each lot and any common property by section 12(2) of the Subdivision Act 1988 .

Note

The easements or rights that may be implied under section 12(2) of the Subdivision Act 1988 are those necessary to provide—

- support, shelter or protection;
- passage or provision of water, sewerage, drainage, gas, electricity, garbage, air or any other service of whatever nature (including telephone, radio, television and data transmission);
- rights of way;
- full, free and uninterrupted access to and use of light for windows, doors or other openings;
- maintenance of overhanging eaves.

13 Section 12(2) of the *Subdivision Act 1998* ('the Subdivision Act') states:

Subject to subsection (3), there are implied—

(a) over—

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

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

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

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

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

all easements and rights necessary to provide—

(c) support, shelter or protection; or

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

(e) rights of way; or

(f) full, free and uninterrupted access to and use of light for

windows, doors or other openings; or

(g) maintenance of overhanging eaves—

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

14 Ms Barter also sought compensation for water damage to her unit in reliance on s 16 of the *Water Act 1989* (the 'Water Act'), the relevant parts of which state:

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.

15 The Tribunal hearing lasted five days, with the parties giving evidence and calling expert evidence. Ms Barter presented her own case, while the respondents were represented by counsel. The Senior Member conducted a view of the property, considered the nature of the subdivision, the drainage of the two units, the two stormwater drains, the sewerage system, the deficiencies in the plumbing, the surface drainage, and the subsoil drains.

Senior Member's decision

16 On 27 May 2019, the Senior Member dismissed Ms Barter's application, finding that the respondents were not liable for the damage under either the OC Act or the Water Act. He did not accept Ms Barter's submission that the relevant stormwater and agricultural pipes were a part of the respondents' unit, and found that they were not liable to pay damages. Instead, the Senior Member concluded that the pipes were common property servicing both units, and so, by s 46 of the OC Act, the Owners Corporation was responsible for repairing and maintaining them. But the Owners Corporation, the members of which were Ms Barter and the respondents, was not a party to the proceeding.

17 The Tribunal noted that both sides acknowledged that there were deficiencies in the stormwater and the sewerage systems and the underground plumbing, although the extent to which they resulted in leakage of water into the soil was unclear. Much of the evidence at the Tribunal concerned deficiencies in the pipes and drainage about which there was limited dispute. Rather the disputed issue was who bore responsibility to repair and maintain those systems and services and who was responsible for any flow of water that had caused damage to Ms Barter's unit.

Notice of Appeal

18 On 24 October 2019, Ms Barter commenced her proceeding in this Court seeking leave to appeal the Tribunal's orders. Section 148 of the VCAT Act provides for 28 days in which a party can apply for leave to appeal, which period runs from 'the day of the order'.

19 I accept Ms Barter's evidence that she did not receive the Tribunal's orders and reasons until 5 June 2019 and read it two days later. However, she commenced this proceeding approximately 123 days out of time and approximately 114 days after the orders came to her attention.

Ms Barter's affidavit evidence

20 Ms Barter relied on number of affidavits, which I have read and considered.

21 In her affidavit dated 11 November 2019, Ms Barter stated that her home had been

newly renovated in January 2005, but as she later learned, without the correct permits. This led to the first VCAT application and a claim exceeding $159,000. The claim was settled for $30,000 at a compulsory conference. Her concerns about the plumbing arose later and formed part of her second VCAT application. A plumbing inspection was ordered, but the plumbing problems were not resolved by the time Ms Barter's neighbours sold the property to the respondents. Ms Barter approached them about the plumbing issues but said that they were unresponsive. She sought mediation and engaged plumbers to inspect the property, but her relationship with the respondents deteriorated, leading to the third VCAT proceeding.

22 In the affidavit, Ms Barter explained why she had not commenced this proceeding in time: the delay in her receiving and reading the Tribunal's final orders; her difficulties contacting the Supreme Court's Self-Represented Litigant service; her discovery that documents were missing from the VCAT file when she inspected it on 5 July 2019; her health issues; the acoustic shock she suffered because of noise from the respondents' property; and her inability to obtain legal advice. It took time for her to obtain and read the complete VCAT file between 19 October 2019 and 22 October 2019, and she did not receive many of the audio files of the VCAT hearing until 30 October 2019 and 1 November 2019.

23 In an affidavit dated 8 May 2020, Ms Barter identified additional reasons for her delay: her status as a single mother, a self-represented litigant, and the primary caregiver of a child with a number of chronic illnesses; her health issues, evidenced by a letter from a general practitioner dated 27 June 2019 describing her as unwell and unfit to work from that day to 7 July 2019; and a letter from a clinical psychologist dated 10 July 2019 that described her as 'extremely overwhelmed by her legal obligations and difficulties with her neighbour'. The psychologist recommended that she take several weeks rest and considered her to be unfit to work from 10 July to 24 July 2019. She gave further details about the acoustic shock she suffered and the opinion of an audiologist she consulted that her symptoms were 'consistent with acoustic shock'. She also referred to the technological

difficulties that she experienced at the VCAT hearing on 29 April 2019, because, due to an internal miscommunication, the Tribunal did not provide the technology that she had requested for the first hearing day;

24 In this affidavit, Ms Barter stated that the day after the acoustic shock incident she saw Mr Celebic carry two large rubbish bags containing polyester, which is used to acoustically deaden the space behind a speaker in a speaker box. She stated that she understood that Mr Celebic had previously been a 'hobbyist DJ' and suggested that this supported her claims about the acoustic shock event. Ms Celebic responded in an affidavit describing the polyester as the remains of a dog bed destroyed by the respondents' new puppy. Her explanation was supported by photographic evidence.

25 In a second affidavit made on 8 May 2020, Ms Barter described the difficulties she experienced obtaining legal advice. Although she approached or engaged a number of solicitors and barristers, she found their representation to be mostly unsatisfactory, with many of them refusing to become involved. In September 2019, a barrister who was a friend of a friend said he was happy to help, but he became unavailable. Ms Barter then decided to present her case herself.

26 In her affidavit dated 7 June 2021, Ms Barter described the sale of Unit 2 by the respondents, her technical difficulties with her computer, that she felt let down by the legal system and that she had not been able to view the original signed and sealed reasons for VCAT 's decision.

27 On 29 July 2019, two months after the Senior Member's orders, Ms Barter wrote to VCAT setting out her concerns about the hearing. In a response of 3 September 2019, the Acting Principal Registrar ('the Registrar') accepted that when she inspected the file on 5 July 2019, the Tribunal 'inadvertently failed to provide you with the complete file …, in particular, by failing to provide you two large boxes which formed part of the file'. The Registrar offered to arrange for Ms Barter to inspect the two boxes. She also accepted that despite Ms Barter's application for technology at the hearing, the necessary equipment was not made available on the first hearing

day. She also responded to other matters raised by Ms Barter.

The discretion to extend time

28 The grant of an extension of time is a discretionary decision and is guided by the justice of the case.

29 Several matters are relevant in deciding whether to grant an extension of time.[6] One is the length of the delay and the reasons for it. Another is the prospects of the appeal succeeding if an extension of time is granted, because if the prospects are slight, there is no utility in extending time. Another matter is the degree of prejudice to the respondents if time is extended.

Should Ms Barter be granted an extension of time to commence this proceeding?

Ms Barter's submissions

30 The delay was approximately 123 days. I have already summarised Ms Barter's affidavits which deal with her reasons for delay, but I will again mention her key points.

31 Ms Barter relied on delays in receiving the Tribunal orders and difficulties in contacting the Court. However, she was able to speak to Court staff during her visit on 20 June 2019. She said that there were inaccuracies in the VCAT transcript and that she tried to inspect the VCAT file but, due to an error, she was not given access to the complete file which she was not able to inspect until October.[7] Ms Barter said that she attempted to obtain legal advice but with little success.[8] The acoustic shock event caused her cognitive difficulties and concentration problems which prevented her filing her appeal. She also suffered from health difficulties and had significant responsibilities for her child.

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6 *Jackamarra v Krakouer* (1998) 195 CLR 516, 519-521.

7 Affidavit of Sally Barter dated 8 May 2020 in support of the extension of time (the 'Extension of Time Affidavit'), 14-17.

8 Affidavit of Sally Barter dated 8 May 2020 concerning her difficulties seeking legal representation (the 'Legal Representation Affidavit').

The respondents' submissions

32 The respondents submitted that Ms Barter had not adequately explained her reasons for delay and contended that her affidavit evidence was inconsistent and unreliable. In particular, despite Ms Barter deposing that the acoustic shock event caused her to become incapacitated, the first respondent stated in an affidavit that she saw Ms Barter repairing pipes on her lot on 1 June 2019, shortly after the acoustic shock event.[9]

33 The respondents submitted that Ms Barter's claim of being unable to obtain legal help or advice was untrue. She had described receiving advice, and had deposed in an affidavit to communicating with two practitioners and a barrister for legal advice. The respondents submitted that, instead of Ms Barter being unable to obtain legal assistance, the likely position was that she had rejected the legal advice she was given.

34 While accepting that 'a significant part of the file was unavailable' when Ms Barter sought to inspect it, the respondents pointed out that 28 days had already passed by that time. Inspection of the file was not necessary to commence the proceeding. Similarly, any inaccuracies in the transcript did not prevent Ms Barter from filing her notice of appeal or justify her delay.

Conclusions about Ms Barter's explanation for her delay

35 Regardless of whether the nine day delay, between the Tribunal order being issued and Ms Barter receiving and considering it, is taken into consideration, the period of her total delay remains significant. Even under a favourable interpretation of events, Ms Barter was approximately 114 days, or almost four months, out of time in commencing this proceeding.

36 I do not consider that the acoustic shock event by itself establishes that Ms Barter was suffering from health issues that made her unable to file her appeal. It was not until 1 November 2019 that Ms Barter was found to be experiencing symptoms

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9 Affidavit of Nicole Celebic dated 13 May 2020.

consistent with 'acoustic shock'. However, she was not formally diagnosed as suffering from acoustic shock. Her doctors' notes from 27 June 2019 to 10 July 2019 do not record that she complained of acoustic shock.

37 Ms Barter's affidavit evidence was that the acoustic shock event caused a 'subsequent inability to concentrate, anxiety and fear' and that for much of the next three months she was 'hardly functioning and could do very little'.[10] But, in that same affidavit, she deposed to being 'curious enough to check' the respondents' rubbish bin after she had observed the second respondent disposing of two large bags.[11] Ms Celebic's affidavit evidence included that Ms Barter was observed on 1 July 2019 undertaking maintenance work on her property, only a short time after the alleged acoustic shock event.[12]

38 However, I do accept that the evidence of the opinions of the general practitioner and of the psychologist suggest that, at least in July 2019, Ms Barter was suffering from significant stress. But, that does not explain all of her lengthy delay in commencing this proceeding.

39 Ms Barter's affidavit evidence suggests that after the Tribunal's decision she sought assistance from a number lawyers Ms Barter concluded in one of her 8 May 2020: affidavits:[13]

> And so this is the story of why I feel I have been unable to obtain legal help or advice. It would be incorrect to make sweeping generalisations as I know I did get some very genuine help from several individuals. But it would also seem there are many, many different ways not to provide help.

40 Although Ms Barter did try, but failed, to obtain the legal assistance that she sought, that did not justify her delay of approximately 123 days in commencing this proceeding. I do take into account that she represented herself, but self-represented litigants often commence proceedings while continuing to seek legal representation.

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10 Extension of Time Affidavit, 4.
11 Ibid.
12 Affidavit of Nicole Celebic dated 13 May 2020.
13 Legal Representation Affidavit, 10.

After all, Ms Barter had presented her own case in a lengthy VCAT hearing and must have known of the issues in the proceeding and how they had been dealt with in the Senior Member's decision to a sufficient degree to enable her to prepare the documents required to commence this proceeding.

41 Inaccuracies in the VCAT transcript did not justify her delay. Access to a revised transcript is not necessary to prepare a notice of appeal. The appeal to this Court was limited to questions of law, which appellants often address by analysing and considering the Tribunal's reasons and orders. A transcript can be used to help establish an error in a Tribunal's decision, but inaccuracies in it can be drawn to the Court's attention if they are significant. By no later than 7 June 2019, Ms Barter had access to the Senior Member's reasons. She could have filed a notice of appeal a few weeks later, but did not do so.

42 Ms Barter's difficulties in receiving the Tribunal's decision and contacting the Self Represented Litigants coordinator do not justify her delay. She contacted the Supreme Court on 20 June 2019, over three months before she filed her application for leave to appeal.

43 Ms Barter also relied on non-provision of the entire Tribunal file for inspection until 19 October 2019, but she did not attempt to inspect it until 5 July 2019. This first file inspection was already about 11 days outside the time prescribed by s 148. A litigant seeking to commence an appeal on a question of law does not need to have access to the file before doing so.

44 After giving consideration to the matters I have mentioned, including that Ms Barter was self-represented and suffered health issues, I do not consider that she has adequately explained her lengthy delay in commencing this proceeding.

The prospects of Ms Barter's proposed appeal succeeding

45 The adequacy of the explanation for delay is only one relevant consideration to the exercise of the discretion to extend time. I will next consider a second consideration, the prospects of Ms Barter's application for leave to appeal and a resulting appeal

succeeding. The question is whether the appeal has sufficient prospects of success to give an extension of time utility.

46 Ms Barter's proposed questions of law on which her application for leave to appeal is based and the associated grounds of appeal for each question, are listed in her lengthy amended notice of appeal dated 7 February 2020. The grounds contain much detail of the arguments on which Ms Barter relies. I will first set out the four questions of law on which she relies and then consider each of them together with the proposed grounds of appeal that are associated to them:

1. Should Senior Member Walker have found that the Owners Corporation was responsible for all plumbing works and that financial liability for all plumbing is therefore 50/50 (s72, s75, s76, s77, s78, Exhibit 1, Reasons for Ruling 27 May 2019).

2. Should Senior Member Walker have found there was no case to answer for damages under 16 of the Water Act.

3. Should Senior Member Walker have found that financial liability for rebuilding front and side brick fences bordering Unit 1 and the common land and street frontage be shared equally between the 2 lot owners because they were built before the subdivision was made. (s100, Exhibit 1, Reasons for Ruling 27 May 2019).

4. Was the VCAT proceeding carried out in a fair and proper manner and was Natural Justice served during the VCAT hearing and throughout the proceeding.

The parties' submissions about the prospects of Ms Barter's proposed appeal succeeding

Question one and associated grounds

47 The first question is: '[s]hould Senior Member Walker have found that the Owners Corporation was responsible for all plumbing works and that financial liability for all plumbing is therefore 50/50 (s72, s75, s76, s77, s78, Exhibit 1, Reasons for Ruling 27 May 2019).'

48 The proposed grounds of appeal attached to Ms Barter's first question of law are:

1.1. Both units 1 and 2 in 23 Turnbull Avenue consist of a **building** and the land within their lots from the ground level to 15 metres above ground level. (Exhibit 3, title documents of 23 and 23A Turnbull Avenue).

1.2. The Owners Corporation Act and the Subdivision Act both have the definition of a building as:

building includes—

(a) a structure and part of a building or a structure; and

(b) walls, out-buildings, service installations and other appurtenances of a building; and

(c) a boat or a pontoon which is permanently moored or fixed to land;

1.3. Section 12 (2) of the Subdivision Act 1988 and section 47 (3) of the Owners Corporation Act 2006 provides that easements are implied for any lot or the common ground over any other lot or the common ground and are those necessary to provide support, shelter or protection, the passage or provision of water, sewerage, drainage, gas, electricity etc. The footings, and associated drains, and other pipes, drains and services, while they may be sited in the common land are implied easements. They are therefore part of that building and the responsibility of that lot owner.

1.4. The definitions of appurtenances (Exhibit 4, Definitions of Appurtenances) confirm the interpretation that easements and associated pipe work are appurtenances, are part of the building and therefore part of each lot. (Exhibit 3, Title documents)

1.5. The Appellant reports every Owners Corporation Manager she has spoken to maintains the branch of any drain, group of pipes or service providing a service to a particular lot exclusively, or servicing that lot, is the responsibility of that particular lot (subject to any other conditions of the Owners Corporation Act). (emails available on request). The distinction between service or part of a service (s76, Exhibit 1, Reasons for Ruling, 27 May 2019) is unnecessary and arbitrary considering many 'services' 'service pipes' or 'service drains' are thousands of miles long, punctuated by entries and exits into individual and multiple occupation properties, and slipping in and out of easement upon easement. The general principle operating here is not the owner of the land in which the service runs being responsible for maintenance but the 'owner' or user of the service pipes or 'service' (subject to other (changing) regulations - think of the dividing line of responsibility in a sewer, water or gas provision between customers and service providers).

1.6. Section 46 (b) of the Owners Corporation Act states the Owners Corporation must repair and maintain the Common Property and any of the *related services, fittings , fixtures etc related to the common property or its enjoyment*. There is no mention, except for some other exceptions specified elsewhere, that the Owners Corporation must repair and maintain any services that run through the Owners Corporation land that are easements subject to section 12(2) of the Subdivision Act.

1.7. Section 47(1) specifies the Owners Corporation must repair and maintain a service that is for the benefit of more than one lot as well as

the common property. The word between the phrases more than one lot and common property is an **and** not an **or**. Section 47 also specifies that section (a) is referring to services that may be implied easements under s12 (2) of the Subdivision Act and running through the Owners' Corporation land. This would mean that if a water mains that supplied the Owners' Corporation tap and units 4 and 5 needed works, the OC would organise the repair. But if that service pipe needing attention served just units 4 and 5, those two units would organise the repair - unless they requested the OC (s47(2), Owners' Corporations Act 2006) to repair it on their behalf.

1.8. Section 49 of the Owners Corporation Act 2006, refers to the benefit principle operating in allocating financial responsibility for upkeep and that it also applies to works within the common property. It does not follow therefore that all pipes and services within the common property are the responsibility, financial or otherwise, of the Owners Corporation.

1.9. Despite the evidence apparently not being welcome, the Appellant did present evidence from both the Building Plumbing expert and the Engineer, Hayden Thorley, as to which pipes, waterproofing and drains served which unit. The only AGs and other extensions of drainage such as tanking not specified were the ones along the party wall between the two units. (AG 1 and 1A) The Appellant is now given to understand the responsibility for drainage behind a party wall belongs to the party responsible for that side of the party wall.

1.10. Both Senior Member Walker and Building and plumbing expert Peter Leitner agreed that the function of an AG drain is to a) relieve hydrostatic pressure on a structure (building, wall etc) and to minimise water related damage to a structure (erosion of mortar, rotting of stumps etc) (BP1030/2018 Hearing 29 April - May 3 2019 - audio available on request). Further to this, the Appellant is given to understand it is also to maintain a relatively even saturation of the soil so as to preserve the stability of the footings and hence the building. The AG drains therefore serve the building and not the Owners Corporation.

1.11. The question of whether the Owners Corporation should have been joined to the VCAT proceeding has been a vexed one.

1.12. The Appellant was given to believe that it is not possible to join a party as both Applicant and Respondent and was also told by one legal practitioner it was not possible to join an Owners Corporation as an applicant. The Appellant now notes S 163 1A Owners Corporation Act Foss v Harbottle 1843 does not apply.

1.13. The Appellant had previously asked Senior Member Vassie about joining the Owners Corporation when the proceeding was in the Owners Corporation List. His reply was that there was no need and asked the question "Who are the Owners Corporation?" and then stated we are both here, no need - or words to that effect (copy of audio available on request)

1.14. On day 1 of the VCAT hearing the Appellant asked on several

> occasions if the Member would join the Owners Corporation to the application if he felt it necessary (without specifying as an Applicant or Respondent) which he declined. The VCAT act specifies that a member may join a party at any time. The VCAT act also specifies that a proceeding must be based on the merits of the case and that the Tribunal must act fairly (s 96 and 97. Division 7, of The VCAT Act).
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> 1.15. On 7 Feb 19, the Appellant joined the Owners Corporation as an interested party but it was apparently not noted or accepted (proposed points of claim - copy available on request or in VCAT book 1)

Ms Barter's submissions about question one and associated grounds

49 Ms Barter submitted that the Senior Member made an error of law when he concluded that 'the Celebics were not under any obligation to maintain the storm water drains or agricultural pipes'.

50 Ms Barter submitted that when a pipe only services one lot, then that lot owner must repair and maintain it. In addition, the lot owner must maintain the branch line that services the lot exclusively, whether or not the branch line is located in common property or private property. None of the pipes relevant to the dispute benefited, or were used by, the Owners Corporation and therefore, it was not responsible for their repair or maintenance. The obligations imposed on the Owners Corporation by s 46 of the OC Act are confined to services connected to the common property or its enjoyment. None of the drains or pipes in contention served the Owners Corporation or common property, but were all associated with one or the other unit, or were possibly shared pipes.

51 Ms Barter argued that a service that serves a lot exclusively may just be a branch of a sewer line or water line or storm water drain. Such a service does not serve the Owners Corporation or the common property and, therefore, the individual lot owners are responsible for their repair and maintenance or share that liability. Section 129 of the OC Act applies to a branch or a portion of pipes that exclusively serves a lot. The owner of the lot that receives the benefit of the pipes is responsible for the cost of their repair. A lot owner must maintain the branch line that serves the lot exclusively, irrespective of whether the branch line is located on common property or private property. Ms Barter's expert witnesses, Mr H Thorley, a

consulting engineer and Mr P Leitner, a plumbing expert, gave evidence of which drains and pipes served which unit and the path of the flow of water.

52 Ms Barter also contended that the pipes and drains, whose condition had caused damage to her unit, were easements and a service within the meaning of s 47(3) of the OC Act. By s 12(2) of the Subdivision Act, easements are implied for the benefit of any lot or the common property that are necessary to provide support, shelter or protection, and the passage or provision of water, sewerage, drainage, gas and electricity. She argued that the footings and associated drains, pipes and services were easements. They were therefore part of the building and their repair and maintenance were the responsibility of the lot owner on which that building was erected.

53 The Owners Corporation is responsible to repair and maintain services in or relating to a lot that is for the benefit of more than one lot and the common property. 'Service' includes the easements or rights implied by s 12(2) of the Subdivision Act. If a pipe needing repair or maintenance serves two units, then the unit owners are responsible to maintain it. The person or persons benefiting from the easement have to maintain the pipes that provide that benefit. The person over whose land the pipes providing the service, for example the Owners Corporation, are generally only obliged not to obstruct their use and to give reasonable access to them.

54 Ms Barter said that she was told by lawyers and by a Tribunal member, during a hearing, that it was either not possible or not necessary to join the Owners Corporation as a party.

The respondents' submissions about question one and associated grounds

55 The Celebics submitted that Ms Barter had no reasonable prospect of succeeding on her appeal. The source of the water causing the damage to Ms Barter's property was on common property, and therefore they were not liable to pay damages or the costs of repair. The Senior Member's conclusion about the respondents' obligations to maintain pipes and drains was based on factual findings about the location of the pipes on the land, the fact that they were underground, and the fact that the pipes

serviced more than just the respondents' unit. As these were findings of fact, Ms Barter's challenges to them did not give rise to questions of law as was required for an appeal to VCAT. The Celebics pointed out that Ms Barter had applied to join the Owners Corporation as a party, but that application had been dismissed.

Prospects of success of question one and associated grounds succeeding

56 The Senior Member identified the common property according to the plan of subdivision in the following passage:

> According to the plan of subdivision, the common property consists of:
>
> (a) the land between the median point of the eastern walls of the building and the eastern boundary of the Site. This largely consists of a driveway, which provides access to the Respondents' garage and also pedestrian access to both units;
>
> (b) the whole of the remaining land in the Site below ground level and the whole of the air space more than 15 metres above ground level.
>
> Consequently, anything below ground level is common property.
>
> There is a second driveway towards the western side of the Site leading from the street to the garage of the Applicant's Unit but that forms part of her unit and is not common property.
>
> The title boundary between the two units within the buildings is the median point of the Party Wall. Outside the building, it extends from the western side of the building to the western boundary of the Site on the same line as the party Wall. Otherwise, the boundaries of each unit, comprise the boundaries of the Site and the median point of the eastern walls of the building.
>
> As a consequence, included in the Applicant's Unit at ground level and for 15 metres above is all of the front garden including her driveway. Similarly, the Respondents' Unit at ground level and for 15 metres above includes all of the back garden to the boundaries of the Site.[14]

57 Ms Barter did not dispute this description of the effect of the plan of subdivision. Indeed, in her written submissions to VCAT, she stated:

> The strata title documents indicate the plot is divided into Lot 1, Lot 2 and some common land to the east which is used as a common walkway and vehicular access for Lot 2. The Lots begin at ground level and for 15 metres above ground level which means all land under the lots is owned by Owners Corporation RP19604. Each lot owner has an undivided share in the Owners

14 *Barter v Bushett (Building and Property)* [2019] VCAT 774, [14]-[17].

Corporation.

58 The Senior Member's findings about the location of the pipes and drains were central to his rejection of Ms Barter's application for damages as the following passages demonstrate:

> However, under the section, a lot owner is only responsible for maintaining a service that serves that lot exclusively. It says nothing about part of a service. Subsection (a)[15] draws a distinction between a lot and part of a lot but there is no distinction made in subsection (b) of a service or part of a service. There are two stormwater services as described above and they service both units.
>
> Further, the stormwater pipes that are laid under the Respondents' Unit are designed to receive water from the agricultural drains. The Applicant argued that she was not aware that there was any requirement under the Owners Corporation Act to keep the common property drained or evenly saturated. The absence of a specific provision to that effect is not to the point. The stormwater drains are intended to remove groundwater from the common property and so they serve the common property as well as the Respondents' Unit. The removal of groundwater from the Site benefits both units as well as the common property.
>
> Consequently, I find that the Respondents were not under any obligation to maintain the stormwater drains or the agricultural pipes. The pipes are common property servicing more than just the Respondents' Unit and so, by s 46 of the Owners Corporation Act, it is the Owners Corporation that must maintain them.[16]

59 The Senior Member made findings about the nature and location of the drainage system and the defective pipes, including that the pipes were not for the exclusive benefit of the respondents' unit. He found that the stormwater drains were intended to remove groundwater from the common property and so serve it as well as the respondents' unit.

60 An appellant cannot challenge VCAT's findings of fact in an appeal under s 148 save in limited circumstances which are not present here.[17]

61 The Senior Member's findings that the relevant pipes were common property were open on the evidence and the effect of the plan of subdivision was not disputed.

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15 Section 129(a) of the OC Act.

16 Ibid [76]-[78] (emphasis in original).

17 *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 88-89; *Kyriackou v Law Institute of Victoria Limited* [2014] VSCA 322, [13]-[21].

Because he found that the services, being the pipes and drains, benefited more than one lot and the common property, it followed that s 46 of the OC Act applied so that the Owners Corporation was responsible for their repair and maintenance.[18] This is so whether there are two members of the Owners Corporation or many.

62 Ms Barter's pointed out that the words in s 47(1) 'that is for the benefit of more than one lot and the common property' contain the conjunctive 'and' and not the disjunctive 'or'. But I do not consider that to be relevant in this case in deciding who bore responsibility for repairing and maintaining the pipes and drains.

63 Easements and associated rights were appurtenances to the building on each lot. The repair or maintenance of the branch of any drains or pipes providing a service to a particular lot exclusively is the responsibility of that particular lot owner. The Owners Corporation did not have to maintain and repair services that run through the common property pursuant to easements implied by s 12(2).

64 The respondents submitted that the existence of an implied easement running through the common property does not determine whether the service associated with that easement serves one lot exclusively.

65 In my opinion, the important question is whether the pipes and drains are part of the common property or are services related to the common property or its enjoyment. The Senior Member found that they were part of the common property for the purposes of the obligations imposed by s 46 of the OC Act. He found that s 46 did not distinguish between a service and part of a service.

66 In my opinion, that conclusion was based on the correct interpretation of s 46. It followed from this interpretation that the pipes and drains running through the land below ground level, were part of, or related to, the common property. The Owners Corporation was responsible for repairing and maintaining them.

67 I consider that question one and the associated grounds have no real prospects of

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18 *Barter v Bushett (Building and Property)* [2019] VCAT 774, [78].

success.

Non-joinder of the Owners Corporation

68 Ms Barter argued that when both lot owners are parties to a proceeding arising from a dispute about their obligations, it is unnecessary to join the Owners Corporation as a party. I do not accept that submission, because the Owners Corporation is a separate legal person and if orders are sought against it, it must be joined as a party. In fact, Ms Barter did seek to join it as a party, but the President of the Tribunal, refused her application.

Question two and associated grounds

69 The second question is: '[s]hould Senior Member Walker have found there was no case to answer for damages under 16 of the Water Act 1989.'

70 The associated proposed grounds of appeal are:

> 2.1. Much of Senior Member Walker's (SMW) argument centres on the assumptions that:
>
> a) all services within the Common Property are the responsibility of the Owners Corporation to repair;
>
> b) that the costs of all works are divided equally; and
>
> c) that despite both members of Owners Corporation 19604 being present at the hearing and being asked several times during the hearing if he would join the Owners Corporation (OC) as a party, that because the OC was not joined as a party (audio of hearing, 29 April 2019, copy available on request), no orders could be made.
>
> If we assume those points are not in the equation (see grounds relied upon for question of law 1), then the following points become relevant:
>
> *Were pipes repaired as soon as the Respondents knew about them*
>
> 2.2. Sections 70 and 93 found the Respondents had carried out repair works as soon as they knew about plumbing defects therefore truncating potential liability under s16 of the Water Act. (Exhibit 1, Reasons for Ruling, 27 May 2019). The Appellant presented evidence at the hearing showing that a) there was an extreme unlikelihood if not impossibility of there ever being a blockage in downpipe 5 as claimed (pvc sawdust was found directly under cut section in downpipe 5 and pipe

cctv when compared with before when there were no problem and during contractors pipe cctv when it was claimed the blockage existed, was largely identical). The Appellant also presented evidence that the downpipes were now plumbed into an AG drain. (cctv video and photographs on Memory stick, VCAT book 2)

2.3. Evidence was also presented by the Appellant that was highly suggestive of a possible intended misplumbing. (submissions, copy available on request) And yet despite this section of plumbing being in a state of excavation at the time of the site inspection on May 2 and clearly unrepaired, it was found that the Respondents had repaired it (s70, Exhibit 1, reasons for ruling May 27 2019). (photo taken after the hearing showing these works not completed available on request).

2.4. Furthermore, Mr Celebic in his correspondence to the Appellant after the hearing listed this pipe as needing replacement (October 6 2019 copy available on request). It has also been claimed that a disconnected downpipe (number 2) had been repaired (s 33 (a) Exhibit 1, Reasons for Ruling 27 May 2019) but Mr Celebic's letter also mentions replacement of all stormwater pipes in this area (email 6 October, 2019). The Appellant has previously requested receipts or plumbing certificates for any plumbing carried out and has not received any replies. It is difficult to see how those drains can be claimed to have been repaired (s 33 (a) and 70 Exhibit 1, Reasons for Ruling 27 May 2019).

2.5. The Appellant had also reported her discovery of the misplumbing of downpipe 5 into an AG pipe many months prior to the hearing (written evidence available on request)

Breaking of front door glass

2.6. Within the Reasons for Ruling there are contradictory sections regarding the breaking of glass of the front door.

2.7. Section 56 of Reasons for Ruling, suggests there were uneven gaps around the door frame suggesting movement and settlement. See also statement of August 2017 (9.3, VCAT folder 2).

2.8. S 101 of Reasons for Ruling states it has not been suggested that any structural failure or movement of the Appellant's unit caused the glass to fracture.

2.9. Photographs of the door clearly show the break occurred because the door was sticking on the LHS (VCAT file). The Appellant also reports the door had been adjusted previously, could not be adjusted any further without removing the frame of the door and the complete window above, that the stickiness of the door against the jamb was historically transient or relatively transient and that since the incident, the door has not stuck.

On the balance of probability, was the missing, disconnected and faulty plumbing the cause of damage to the Appellant's house

2.10. The Appellant provided several engineering reports from Mr Hayden Thorley who was also present at the VCAT hearing as a witness. He clearly stated that in his opinion, the damage observed was caused by the plumbing defects (audio available on request). The respondents did not provide the opinion of an Engineer.

2.11. Mr Thorley may have said he was unable to state when damage began or occurred, however the Appellant was able to offer many photographs showing the gradual appearance of much of the damage. Further to this, it is important to keep in mind that the Appellant purchased a fully renovated property in 2005 which was during a protracted period of drought. There weren't any cracks, the kitchen was newly installed and there was no subsidence (see Archicentre Report) - only a damp kitchen cupboard that may or may not have been there at the time of inspection. (VCAT books 1 & 2)

2.12. Section 87 (c) suggests the flow from properties from the west and north may have been the cause of the flow, however if the AG system was in good repair, it would have protected the building from this free flow of water.

2.13. Section 88 cannot be an accurate appraisal of the damage to the stormwater and AG system as there are many complete disconnections in the stormwater system each of which must be the cause of a 'flow' (reference Mudmap , Exhibit 6)

(a) Breaks 1, 2, 3 and 4 on the east side are complete disconnections - not cracks.

(b) Breaks 5, 6, 8, 9 and 12 are complete disconnections on the west side (flow from break 12 because of the gradient of the land, only affecting the integrity of the fence).

(c) Breaks 11 and 12 are sewer breaks. Break 11 is a large break on the sewer branch from the Respondent's WC which is within the double brick wall and, on the Appellant's advice, very likely to cause soil erosion. Break 12 because of its position and the gradient of the land has a flow which is downhill from the Appellant's lot.

(d) Break 10, referred to in 87 (f) of reasons for ruling has been tested on a number of occasions (one of which was videoed) and found to be not leaking. The Appellant also provided photographic and other evidence that this occurred for the first time along with other movement in the courtyard in late 2015 and early 2016.

Was the law (s16, the Water Act, 1989) interpreted correctly?

2.14. On the issue of whether "there is a flow of water from the land of a person onto any other land", the Appellant maintains that as the pipes, drains etc serving unit 2 are deemed appurtenances to the building, the building is the lot and therefore owned by the Respondents (see 1.1-1.14) water has flowed from those (faulty) pipes onto another land (Owners Corporation land). It is not necessary for the water to flow onto the Appellants land as described in S89 - only that it flowed from the land of one person onto any other land.

2.15. Liability under section 5 of the Act must be found as the Respondents have very clearly not taken steps reasonably available to them to stop the flow (see sections 2.2-2.5 above)

2.16. Section 85 outlines the argument that the Respondents were new lot owners 'who did not lay the drains in question' and that any failure to repair was that of the prior lot owner. This does not abide by section 5 which states if the conditions that caused the flow were in existence before the current occupier became the occupier of the land 'the current occupier is liable to pay damages in respect of the injury…'

Ms Barter's submissions about question two and associated grounds

71 Ms Barter argued that an unreasonable flow of water had damaged her unit and it came from the state of the stormwater drains and sewer plumbing and tanking of walls made somewhat worse by the plumbing of downpipe five into an agricultural drain. The faulty or substandard drains/tanking were in the sections of drains that served only Unit 2, on the respondents' lot, subject to exceptions that are not material. The unreasonable flow of water was from a pipe that exclusively serviced the respondents' unit or property. Ms Barter described her claim as being based on the broken and substandard drainage and sewer pipes which were appurtenant to each lot, which, because they had not been maintained, allowed water to escape, not necessarily to her land, but to the Owners Corporation's land to cause uneven saturation and movement in the building.

72 Ms Barter relied on the evidence of her engineering expert witness, Mr H Thorley. He considered that damage was being caused to Unit 1 by many breaks in pipes or between pipes or substandard agricultural drains, particularly from the western side.

73 Ms Barter maintained that as the pipes and drains serving Unit 2 were deemed appurtenances to the building, the building is the lot and therefore owned by the respondents. Water has flowed from those faulty pipes onto another's land. It was not necessary for the water to flow onto Ms Barter's land, only that it has flowed from the land of one person to another.

74 Ms Barter disputed the proposition that the respondents did not know, or could not reasonably have known, about the plumbing problems associated with the pipes and drains servicing their unit. She also relied on s 16(5) of the Water Act and contended that the respondents had failed to take steps reasonably available to prevent the causing of the flow.

The breaking of the glass in the front door

75 One item of damage to which Ms Barter made particular reference in connection with question two was the breaking of the glass in the front door. She contended that photographs of the door clearly showed the break occurred because the door was sticking on the LHS. She said that the door had been adjusted previously and could not be further adjusted without removing the door frame and the window above.

76 The Senior Member found that:

> The Applicant admitted having broken the glass to the front door herself by banging the door. It is not suggested that any structural failure or movement of the Applicant's Unit caused the glass to fracture.
>
> If the Applicant had difficulty in closing the door, she should have had the door repaired or adjusted instead of slamming it so hard as to break the glass. She cannot now blame the Respondents for damage she has caused herself.

The respondents' submissions about question two and associated grounds

77 The respondents submitted that the Senior Member correctly concluded that the claim for damages under s 16 of the Water Act failed for want of proof.

Prospects of question two and associated grounds succeeding

78 Section 16 of the Water Act provides in relevant parts:

> (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.

79 The Senior Member correctly stated that, in order to establish a claim under s 16, Ms Barter had to prove that there was a flow of water which caused her injury, loss or damage and that the flow was caused by the respondents or that the operation of s 16(5) made them liable. He found as a fact that Ms Barter's claim failed for want of proof linking any of the items of damage to a flow of water for which the respondents were responsible.

80 The Senior Member stated that he was unable to identify any particular flow of water, or its source, that had caused damage to Ms Barter's unit. He stated that water in the ground beneath the respondents' unit was on the common property and if it flowed through the ground below the boundary between the two units, it remained throughout on common property. That being so, Ms Barter had not established that there was any flow of water from the respondents' land onto her land.

81 The Senior Member found that while there was evidence of deterioration in Ms Barter's unit, at least some of which was said to have been caused by water entering the masonry and settlement, that might have been at least partly due to water in the

soil. There was no evidence of where the water came from or when the flow of water took place. At least six possible sources of the water were identified in the evidence. The evidence pointed against any flow of water from the respondents' property to Ms Barter's as there was no evidence of water escaping from the sewer and stormwater systems, which were the most likely places where that would have occurred. If water had entered the soil from the stormwater system and affected Ms Barter's unit, the water would have entered the stormwater system through the soil which was common property or from the collection of surface run-off from one or other of the units into the common property. No flow of water to Ms Barter's unit would occur until such time as the water entered her unit, and, for that to occur, the water would need to rise above ground level. Although there was some evidence of water penetration into the masonry, there was no evidence of when that occurred.

82 Mr Thorley, Ms Barter's expert engineering witness, gave evidence that during the site inspection and from his review of the plumbing reports, it was clear that Unit 2 had significant civil drainage issues that were resulting in water entering Ms Barter's Unit 1. The civil drainage set up resulted in stormwater runoffs during heavy rain events entering the western courtyard in Unit 1. He believed that the current set up required complete replacement. He also made recommendations about the waste water plumbing as a review of the plumbing reports and CCTV footage showed broken and blocked plumbing. Mr Leitner, Ms Barter's plumbing expert, made similar recommendations. But the Senior Member noted that there was little dispute between the parties that agricultural pipes and stormwater drains required replacement. That was not the issue, as the issue was who bore the responsibility to repair and maintain them.

83 Both sides acknowledged that there were deficiencies in the stormwater and sewerage systems, although the extent to which they resulted in leakage of water into the soil was unclear. The Senior Member stated that during the inspection of Ms Barter's unit, he did not observe anything remarkable about the condition of its internal finishes, that it was constructed 79 years ago and that it appeared to have

received little recent maintenance.

84 Mr Thorley was unable to say when the damage was sustained. Most of it may have occurred by November 2011, several years before the respondents became registered proprietors of their unit in 2015. That fact was relevant because, if the flow was given rise to by acts occurring before the respondents became occupiers, they were only liable if they had failed to take any steps reasonably available to prevent the causing of, or the interference with, the flow being so given rise to. As the Senior Member put it:

> If the Respondents were under an obligation to maintain the pipes and drains, it was an obligation to take reasonable steps to prevent the causing of an unreasonable flow within a reasonable time after they knew or ought to have known of the flow. They did that, at their own expense, notwithstanding that the pipes were part of the common property.[19]

85 After receiving Ms Barter's application and the attached Byron Kennedy report, containing a list of deficiencies in the drainage system, the respondents engaged a drain cleaning and inspection service to inspect the stormwater and agricultural drains laid in the ground beneath the respondents' unit. The service recommended that the respondents replace a drain which appeared to be blocked and overflowing. The respondents then engaged a plumber to excavate and repair the stormwater drain and connect it to the system, but the work was done defectively. Upon the respondents discovering this defect, they engaged another plumber to reconnect the pipe properly. The Senior Member found that there was no evidence that water leaked from the break or the slotted pipe.

86 Ms Barter's proposed grounds of appeal challenge the Senior Member's appraisal of the damage to the stormwater and agricultural pipe system. But, as I have mentioned, there was no dispute that the replacement of pipes and drains was required. Rather in issue was who bore the responsibility for those repairs.

87 There was no proof that the respondents had failed to repair and maintain the pipes

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19 Ibid [96].

and the drains. If they were under an obligation to do so, they were obliged to take reasonable steps to prevent the causing of an unreasonable flow of water within a reasonable time after they knew or ought to have known of the flow.[20] They did so by engaging the service and plumber.

88 Ms Barter's proposed grounds of appeal appear to suggest 'possible intended misplumbing',[21] but the Senior Member clearly did not accept any such contention.

89 All of these findings by the Senior were findings of fact that were open for him to make on the evidence. Ms Barter's claim failed for lack of proof as to the cause of the flow of water.

90 I consider that question two and the associated grounds have no real prospects of success.

Question three and associated grounds

91 The third question is: '[s]hould Senior Member Walker have found that financial liability for rebuilding front and side brick fences bordering Unit 1 and the common land and street frontage be shared equally between the 2 lot owners because they were built C1939 and before the subdivision was made. (s100, Exhibit 1, Reasons for Ruling 27 May 2019).'

92 The details of this ground are:

> 3.1. The Appellant could find no reference to this concept in either the Fence Act 1968 or the Subdivision Act 1988. Searching the Subdivision Act for 'fence' found one unrelated match. Searching the Fence Act for 'strata title' or 'subdivision' produced 0 results. Searching the Fence Act for Owners Corporation produced 17 results-none of which were relevant to s100 Exhibit 1, Reasons for Ruling, May 27 2019.
>
> 3.2. The Appellant is of the opinion that should this section of the Reasons for Ruling remain, it could lead to some measure of mayhem. Apart from this section implying that since the building that makes up lots 1 and 2 of 23 Turnbull Avenue was built before the subdivision, (Exhibit 3, Title Documents) any

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20 The Senior Member applied the decision in *Connors v Bodean International Pty Ltd* [2008] VCAT 454.

21 Proposed ground of appeal 2.3.

> damage to it would therefore be the responsibility of both lot owners, the possible implications for all buildings within Owners Corporations built before subdivision is not unimportant. Stonnington Council website, planning and subdivision notes subdivision can occur before, during and after building works (copy available on request.) A phone call with a Stonnington Officer who deals with subdivisions (copy of recording available on request) revealed that in his opinion more than 50% of subdivisions are subdivided during the building process and that a minority are subdivided after building is completed.

93 Ms Barter's case about the fences was limited to the front fence or wall which was a brick fence at the front of her unit. She submitted that the failure which caused it to crack was in a storm water pipe built underneath it, which had broken leading to the soil expanding and the agricultural drain, which was on top of the storm water drain, disintegrating. As she and the respondents were both owners of those stormwater pipes, they both should have to pay for the repairs. The front fence or wall failure was caused by a pipe that was shared by both units.

94 The respondents submitted that the front fence was part of the lot before the subdivision and therefore formed part of the common property and was not something for which the respondents were responsible.

Prospects of question three and associated grounds succeeding

95 The Senior Member found that the crack in the front wall complained of was in existence well before the respondents became the owners and occupiers of their unit, although it had increased in size over recent years. He found that:

> Insofar as the condition of the wall had been aggravated by the groundwater on the Site, that is not something for which the Respondents are liable for the reasons given. The obligation to maintain the drainage system is upon the Owners Corporation.
>
> I should add that, since the front wall was in existence at the time the two units were subdivided, the whole of the wall is common property and its repair or replacement is also the responsibility of the Owners Corporation.

96 The Senior Member therefore found that the whole of the wall or fence was common property and that insofar as its condition had been aggravated by the groundwater on the site, that was the responsibility of the Owners Corporation and not the

respondents.

97 The Senior Member's findings followed from his conclusions about the common property, which I have accepted.

98 The Senior Member's comments about the significance of the front wall or fence being in existence at the time the two units were subdivided were an additional comment in the nature of obiter, which did not contain his principal reason for rejecting Ms Barter's claim about the wall or fence. As I have mentioned that principal reason was the whole of the wall was common property. I consider that the Senior Member's principal reason was correct. It is therefore unnecessary to consider the correctness of the additional comments about the significance of the wall being in existence at the time that the two units were subdivided.

99 Any claim by Ms Barter about the side fence was not part of her claim made in the Tribunal and therefore could not be pursued on appeal.

100 I consider that question three and the associated grounds have no real prospects of success.

Question four and associated grounds

101 The fourth question is: '[w]as the VCAT proceeding carried out in a fair and proper manner and was Natural Justice served during the VCAT hearing and throughout the proceeding.'

102 The proposed grounds of appeal associated with question of law four were:

> 4.1. The VCAT Act 1998 - especially but not limited to - Sections 97 and 98, 102 (1), 136
>
> 4.2. The Laws of Natural Justice
>
> 4.3. Australian Solicitors' Conduct Rules 2011 - especially but not limited to sections 4, 8, 18, 19.
>
> There are many, many examples within the proceeding and hearing to illustrate the grounds of appeal for question of law 4. The Appellant believes they are best elucidated within an affidavit.

Ms Barter's submissions on question four and associated grounds

103 Ms Barter argued that she had been denied procedural fairness and natural justice at the Tribunal hearing. She explained that she experienced technical difficulties in using her computer because the Tribunal had not supplied the connectors she had requested. She said that it took her until the afternoon of the first day of the hearing to get one computer connected and that she did not receive the second connector until the third day of the hearing. These technical issues made it difficult for her to hear and follow the proceedings and present her evidence in the form of a slideshow. But, Ms Barter accepted that she bore:

> …some responsibility because I didn't tell the member fully that I was limping along, that I only had half of the computer system working.[22]

104 She further submitted that she was unable to respond to the final report of the respondents' expert witness despite 'writing three urgent letters' to the respondents requesting that she be able to inspect the site. She said that she never heard back from them and that her opportunity to inspect their site was inadequate being only for two minutes.[23]

105 Ms Barter also said that the Senior Member refused to grant her an adjournment to arrange a site inspection because her experts did not request it, that the Tribunal failed to listen to her submissions, that her evidence was truncated on the fifth day of the hearing, and that she was not given a right of reply.

106 She received the reasons and orders from VCAT nine days late and she struggled to obtain legal advice, despite the recommendations of a Deputy President for her to do so.

107 She conceded that she should have done more to join the Owners Corporation as a party. However, she maintained that the failure to join it was not fatal to her claim, as all its members were already part of the proceeding.

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22 Transcript of Proceedings, *Barter v Bushett* (Supreme Court of Victoria, S ECI 2019 04848, Ginnane J, 11 June 2021) 35.

23 Ibid 36.

The respondents' submissions on question four and associated grounds

108 The respondents submitted that Ms Barter was afforded natural justice. They cited examples from the transcript of the Tribunal hearing where the matter was stood down for her to receive IT assistance,[24] where Ms Barter addressed the Senior Member and he responded and where Ms Barter was given a right to cross-examine the Celebics' expert when they gave concurrent expert evidence. Ms Barter agreed that the expert she retained was able to comment on a supplementary expert report of the Celebics' expert.

109 Lastly, the respondents submitted that Ms Barter's difficulties securing legal advice were a refusal on her part to accept the legal advice she was given, and noted that a Deputy President had told Ms Barter on two occasions to obtain legal advice about joining the Owners Corporation to the proceeding.

Prospects of question four and associated grounds succeeding

110 The proceeding, including the hearing, had to comply with the principles of natural justice and the right of Ms Barter, as a self-represented litigant, to receive a fair hearing.[25]

111 While I acknowledge Ms Barter experienced difficulties during the Tribunal hearing, these difficulties are not sufficient for me to conclude that she has any real prospects of succeeding on question of law four. The technical difficulties were resolved by the second hearing day and did not prejudice her case. She had filed extensive affidavit evidence and exhibits, and was given the opportunity to file final written submissions. She was provided sufficient opportunity to cross-examine experts and her expert was provided with an opportunity to comment on a supplementary report. There is no evidence that the Senior Member refused to listen to her. I consider that she was treated fairly by the Senior Member and provided with natural justice.

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24 Transcript of Proceedings, *Barter v Bushett (Building and Property)* (Victorian Civil and Administrative Tribunal, BP1030/2018, Senior Member Walker, 29 April 2019 – 3 May 2019) 2.8, 11.6-14, 12.29-31.

25 VCAT Act s 98(1)(a) and *Tomasevic v Travaglini* (2007) 17 VR 100.

112 She did not tell the Senior Member that she was continuing to have problems with her computer after the adjournment that granted her. She said that she was unable to respond to the final report of the respondents' expert, but the experts gave concurrent evidence and were cross-examined.

113 So far as her ability to obtain legal representation was concerned, she had retained the services of several lawyers but had found their representation and advice unsatisfactory.

114 I consider that question four and the associated grounds have no real prospects of success.

Overall conclusion about the prospects of Ms Barter's appeal succeeding

115 I consider that Ms Barter's proposed appeal against VCAT's orders has no real prospects of succeeding.

The prejudice to the respondents if the extension is granted

116 Another issue relevant to whether an extension of time should be granted is whether the respondents would suffer significant prejudice as a result. The respondents submitted that the matter has continued for five years and that an extension of time would impede the proper and timely administration of the appeal processes legislated by Parliament. Ms Barter had already served at least seven different versions of her claim, and at this stage, the finality of litigation was important. The *Civil Procedure Act 2010* obliged all parties to ensure litigation was conducted on a timely basis, and in this case, there was no good reason to disrupt the finality of the litigation.

Consideration of prejudice to the respondents if an extension of time was granted

117 In deciding whether to grant an extension of time, the burden thereby placed on respondents to the litigation is relevant.[26] The finality of proceedings is an important consideration, as is the obligation for the Court to ensure the just, efficient, timely, and cost-effective resolution of a dispute as required by the *Civil Procedure Act*

26 *Hughes v National Trustees, Executors & Agency Co of Australasia Ltd* [1978] VR 257, 263.

2010.[27]

118 This litigation has been on foot for five years and the respondents have suffered the costs and stresses of litigation.[28] They are unlikely to recover all of their costs, although they have been successful. This is a significant factor in the exercise of the discretion.

119 In my opinion, the respondents are likely to suffer significant prejudice if an extension of time is granted to Ms Barter.

Conclusion

120 Ms Barter has not provided an adequate explanation for her delay in commencing the proceeding. I consider that her proposed questions of law and grounds of appeal lack sufficient prospects of success to justify the grant of the extension of time that she seeks. I also consider that an extension of time would cause significant prejudice to the respondents. I have considered each of these separately, but also in combination. In the exercise of the Court's discretion, I refuse Ms Barter's application for an extension of time to commence this proceeding. The appeal from the Judicial Registrar's orders is therefore dismissed.

121 The result of this outcome is that the Judicial Registrar's orders remain in force. The proceeding remains dismissed.

122 I will make directions for the parties to exchange submissions about costs and thereafter decide that issue on the papers.

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27 Section 7.

28 *AON Risk Services Ltd v Australian National University* (2009) 239 CLR 175, 214 [101].