

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP329/2020

**CATCHWORDS**

*Water Act.* Claim brought by the applicant, the owner of a ground floor unit, in respect of alleged damaging flows of water from the respondent's balcony to the applicant's unit. Finding that, in respect of the major area of internal water damage, the applicant failed to establish the liability of the respondent, the cause of the damage being extension works carried out by the applicant. In respect of a separate area of minor water damage to applicant's front porch area, finding that the respondent is liable pursuant to the provisions of the *Water Act*.

<b>APPLICANT</b>	Ms Raissa Nemirovskaya
<b>RESPONDENT</b>	Ms Stella Briggs
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M Farrelly
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	6 and 7 December 2021
<b>DATE OF ORDER</b>	22 March 2022
<b>CITATION</b>	Nemirovskaya v Briggs (Building and Property) [2022] VCAT 233

**ORDERS**

1. The respondent must pay the applicant \$1475.
2. The respondent must, within 6 months of the date of these orders, carry out works to prevent the flow of water from the northern end of the balcony of the respondent's property into the front porch area of the applicant's property.
3. Liberty to the applicant to apply for further orders in the event the respondent fails to comply with order 2 above.

4. Costs reserved. I direct the principal registrar to list any application for costs for hearing before Senior Member Farrelly, allowing 2 hours.

**SENIOR MEMBER M FARRELLY**

**APPEARANCES:**

For Applicant: Ms Anthony-Shaw of Counsel

For Respondent: Mr R Hamilton, advocate

## REASONS

- 1 In around 1999, construction of a new two-storey block of units in Glenhuntly was completed. The applicant, Ms Nemirovskaya, purchased one of the units, unit 8, 'off the plan' and moved into her unit when it was completed, and has lived there since. The respondent, Ms Briggs, purchased unit 9 in May 2007 and has lived there since with her children. Unit 9 is situated above unit 8.
- 2 In this proceeding, the applicant brings a claim under the *Water Act 1989* (Vic) against the respondent in respect of significant water damage to unit 8. The applicant says the water damage has been caused because the exterior balcony to unit 9, which is located above unit 8, is not waterproof. The respondent says the cause of the water damage is not the unit 9 balcony, but rather the extension works to unit 8 carried out by the applicant.
- 3 The hearing came before me on 6 December 2021 and ran for 2 days. On the afternoon of the first day, I attended a view of the two units. The applicant was represented by Ms Anthony-Shaw of Counsel. The respondent was represented by Mr R Hamilton, an advocate who was, early in the life of the proceeding, granted leave to represent the respondent.
- 4 For the applicant, Ms Nemirovskaya herself, with the assistance of a Russian interpreter appointed by the Tribunal, gave evidence. For the respondent, Ms Briggs herself gave evidence. The respondent also called evidence from Mr Ian Briggs, the respondent's ex-husband.
- 5 I heard concurrent expert evidence from Mr Ian Fleming, a registered builder and engineer engaged by the applicant, and Mr Roy Spencer, an architect engaged by the respondent. Each of Mr Fleming and Mr Spencer inspected the units on or around 4 November 2020. Mr Fleming produced a report dated 18 November 2020 which includes cost estimates in respect of rectification works. At the hearing Mr Fleming produced updated cost estimates to take account of the increase in building costs since November 2020. Mr Spencer produced a report dated 18 November 2020 and a supplementary report dated 14 February 2021. Mr Spencer's supplementary report was prepared at the request of the applicant's representative, Mr Hamilton, to address specific questions or statements raised by Mr Hamilton. Mr Spencer did not inspect the premises a second time.
- 6 After the hearing of evidence was completed, each party subsequently filed closing written submissions.

### Background

- 7 As noted above, the applicant moved into her new unit 8 in around 1999. Unit 8 is on the ground floor and it faces east. Unit 9 is situated above unit 8. Unit 9 has an east facing, unroofed tiled balcony. The balcony is situated

partly above the living area of unit 8 and partly above the entrance portico to unit 8.

- 8 The building was originally constructed to provide for water drainage from the balcony as follows. The balcony has rendered parapet walls. The east facing parapet wall has a gap of around 20 mm between the bottom of the wall and the tiled balcony. The fall of the balcony is such that water falling on the balcony flows towards the eastern edge of the balcony, through the gap under the parapet wall and over the edge of the balcony. Most of that water is caught by a gutter installed under the edge of the balcony slab and is directed to a downpipe. I say 'most' of the water in the sense that some water, instead of falling into the gutter, will track down the face of the slab and along the underside of the balcony slab which protrudes beyond the wall of the building. The underside of the balcony slab has a drip groove adjacent to the gutter. Water that does not make its way into the gutter, and instead tracks to the underside of the protruding portion of the balcony slab, will meet the drip groove and then fall to the ground or perhaps dribble down the wall to the ground.
- 9 Not long after she moved into unit 8, the applicant arranged for the construction of a small extension to the eastern side of her unit. The applicant says the builder she engaged to construct the extension was the same builder who constructed the whole development. Planning permission for this extension was granted on or around 4 April 2000, and a *building permit* was issued on 17 April 2000. The extension was completed by around 6 October 2000 when the *certificate of final inspection* was issued by the responsible surveyor.
- 10 The extension became the dedicated bathroom/laundry for unit 8, and it is accessed through a sliding door from the living room. The sliding door, location wise, is within the wall that was the original exterior eastern facing wall of the unit, prior to the extension. The extension is around 2 m in width and approximately 6 ½ m in length running north to south, with a (near) flat skillion roof (**'the skillion roof'**) which slopes gently to a box gutter on the east edge of the roof.
- 11 The skillion roof begins, at its northern end, at about the halfway point of the eastern edge of the unit 9 balcony, and extends perhaps 3 m past the southern boundary of the balcony. Where the balcony and the skillion roof coincide (the northernmost 3 metres or so of the skillion roof and the southernmost 3 metres or so of the unit 9 balcony) the skillion roof abuts the eastern wall of the building, and an L-shaped flashing sits atop the roof so that the vertical side of the flashing runs up against the balcony face/edge and abuts the underside of the ceramic tiles which over lip the balcony slab edge (**'the skillion flashing'**). The drainage intention for this section of the skillion roof was that water flowing from the balcony would flow over the balcony edge onto the face of the skillion flashing and then across the skillion roof to the box gutter. That is, the skillion roof and the skillion

flashing effectively overtook the earlier described original water drainage from the balcony.

- 12 The applicant says that the surface to the skillion roof is common property falling under the responsibility of the Owners Corporation of the building. The respondent does not concede this, and it was not an issue ventilated at the hearing before me. It is not a critical issue as there is no allegation that the respondent has interfered with the skillion roof and/or the skillion flashing. I do note that, as discussed below, there is evidence that the Owners Corporation has arranged attempted remedial works to the skillion roof and the skillion flashing.
- 13 The applicant is unable to recall with accuracy approximately when she first noticed signs of water damage to the ceiling of her unit. It would certainly be at least as early as August 2012. Produced in the Tribunal book<sup>1</sup> is a brief report dated 6 August 2012 from 'Tymaline Building Services Pty Ltd' ('**Tymaline**') addressed to the (presumed) manager of the Owners Corporation of the development which references investigations to locate the source of water damage to the laundry wall, cupboard and ceiling in unit 8. The report also references a water test of the unit 9 balcony (no details are provided as to how the water test was carried out) with the conclusion that water, from the water test, made its way into unit 8. The report also provides:
- We removed section of flashing where U9 balcony tiles end and dried & sealed this area and coated with fibreglass sealant.
- We then re-fitted flashing which we then sealed and fibreglassed to section of wall.
- 14 It seems to me that the flashing referred to in the above excerpt from the report must be the skillion flashing.
- 15 It appears from a further report in the Tribunal book<sup>2</sup> that Tymaline returned in February 2013 to carry out consequential repair works to the water damage in the unit 8 bathroom/laundry.
- 16 Unfortunately, the water leaking into unit 8 did not stop.
- 17 There is no dispute that the Owners Corporation subsequently arranged for further works to be carried out to the skillion roof in an attempt to rectify the water leaking. The works included the fixing of a protective sheet covering a section of the skillion roof adjacent to the balcony. Neither the applicant or the respondent was able to recall when these works were carried out, and no other witnesses were called to give evidence that might assist. It appears that these works were carried out between February 2013 and July 2019, and the parties believe it may have been several years prior to July 2019.

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<sup>1</sup> Tribunal book page 134

<sup>2</sup> Tribunal book page 139

18 It is apparent that the skillion flashing has, perhaps on more than one occasion, been covered with some type of flexible membrane product. There is no direct evidence as to when these works were carried out, but it seems likely that such works may have been done at the same time as the installation of protective sheet to the skillion roof referred to above. It is obvious that the skillion flashing has been coated by the membrane in an attempt to eliminate the water leak problem.

19 The leaking into unit 8 did not stop, and in early July 2019 the Owners Corporation again engaged Tymaline to investigate. Produced in the Tribunal book<sup>3</sup> is an invoice from Tymaline addressed to the Owners Corporation (care of the Owners Corporation management) dated 12 July 2019. The invoice references inspection of unit 8 on 10 July 2019, noting water damage to the bathroom ceiling, cornice and walls. It also references a water test to the unit 9 balcony (again with no details as to how the water test was carried out) and a finding that water from the test dripped into unit 8. The invoice includes the following note:

In our opinion Unit 9 balcony tiling requires full upgrade including re-tile and membrane as a long-term solution. Suggest OC refer back to owner/agent for their attention to obtain their own independent report and quote. Once upgrade works completed we can return and follow-up resultant damage in unit 8.

...

TBS [Tymaline] recommend when unit 9 upgrade balcony they also replace the flashing under the tiles which goes over the roof.

20 Again, it seems to me that the above reference to the flashing under the tiles is a reference to the skillion flashing.

21 Nobody from Tymaline was called to give evidence. I understand that the Tymaline representative who produced the most recent report has passed away.

22 The applicant says that she approached the respondent on a number of occasions to discuss the water leak problem, and on one occasion she wrote the respondent a letter, however the applicant is unable to recall when she had such discussions and wrote the letter. The respondent says she cannot recall receiving a letter from the applicant and is unable to recall discussions with the applicant in this regard.

23 I am satisfied that the respondent was, by July 2019 at the latest, well aware of the unit 8 water leak problem and the assertion/opinion that the cause of the leaking was the respondent's balcony. Produced in the Tribunal book<sup>4</sup> is an email dated 24 July 2019 from the (then) manager of the Owners Corporation, Mr Chad Wilson, addressed to the respondent which states:

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<sup>3</sup> Tribunal book page 148

<sup>4</sup> Tribunal book page 149

Hi Stella,

I hope this email finds you well.

There has been a leak recently in the bathroom of Unit 8 below your Unit 9. Upon investigation it was determined that the cause of the leak (originally thought to be from the roof) was from your balcony. Attached is the invoice from the investigating contractor and in the notes section details the issue that needs to be rectified. The balcony is the individual owners responsibility and works will need to be actioned at your cost. I have also passed on the invoice to the owner of Unit 8 who is aware of the situation and will most likely be in contact to find out further details regarding the rectification works and timeframes. Once works have been completed, there will need to be rectification works carried out to the bathroom ceiling of unit 8 at your cost also.

If you have any questions, feel free to contact me.

...

- 24 The respondent says that she attempted to arrange a plumbing investigation to ascertain the cause of the leaking into unit 8, but because the applicant refused access to her unit the investigation did not happen.
- 25 In any event, the respondent did not attend to any balcony rectification works and the applicant filed her application in the Tribunal, commencing the proceeding, on about 28 February 2020.

### Water Act

- 26 Section 16 (1) of the *Water Act* 1989 provides:

#### **16 Liability arising out of flow of water etc.**

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

Section 19 of the Act relevantly provides:

#### **19 Jurisdiction of Tribunal**

- (1) The Tribunal has jurisdiction in relation to all causes of action (other than any claim for damages for personal injury) arising

under sections 15(1), 16, 17(1) and 157(1) of this Act or at common law in respect of the escape of water from a private dam.

- (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.

### **Owners Corporations Act 2006**

27 The applicant also relies upon sections 128 and 129 of the **Owners Corporations Act 2006** which provide:

#### **128. Compliance with laws**

A lot owner must comply with this Act, the regulations under this Act and the rules of the owners corporation.

#### **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

### **Applicant's Claims**

- 28 The applicant says that the respondent has allowed or permitted water to flow from the respondent's balcony into the applicant's property causing water damage, and is therefore liable under section 16 (1) of the *Water Act*.
- 29 Alternatively, the applicant says that the respondent has, in respect of the respondent's balcony, failed to comply with section 129 of the *Owners Corporation Act*, with resulting damage to the applicant's property.
- 30 The orders/relief sought by the applicant are:
- Order/s compelling the respondent to repair the respondent's balcony to eliminate the leaking. The applicant says the required repair works include the stripping and retiling of the balcony. Mr Fleming estimates the cost of such works, inclusive of contingency, project management allowance, builder's margin and GST, as \$22,315;<sup>5</sup> and
  - Damages measured as the reasonable cost to rectify the significant water damage to the applicant's unit. Mr Fleming estimates the cost of such works, inclusive of contingency, project management allowance, builder's margin and GST, as \$66,641.<sup>6</sup>
- 31 The applicant is concerned that the unit 9 balcony be properly repaired, seeks orders to the effect that Mr Fleming be appointed as project manager to project manage the balcony repair works. Mr Fleming's above-mentioned cost estimate for the balcony repair, \$22,315, includes a project management allowance of \$2347.13. The applicant effectively seeks an order that Mr Fleming be appointed to carry out the project management.
- 32 Further, the applicant is concerned that the respondent may not comply at all with orders the Tribunal may make as to balcony repair works. Having regard to this, the applicant seeks further order/s to the effect that in the event the respondent fails to comply with any balcony repair orders within a reasonable time, the applicant have leave to seek further orders, in the form of mandatory injunction orders and damages, which would in effect compel the respondent to provide access to her unit to allow rectification works to be carried out by contractors engaged by the applicant.
- 33 The above-mentioned proposed orders as to the appointment of Mr Fleming as project manager, and the possibility of return to the Tribunal to seek mandatory injunction orders in the event the respondent fails to comply with the Tribunal's orders, were raised by the applicant in closing written submissions. I note for clarity that I requested each party to address in their closing submissions potential orders as to prescribed scope of repair works

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<sup>5</sup> Mr Fleming's updated cost estimate (updated attachment B to his report) produced at the hearing.

<sup>6</sup> Mr Fleming's updated cost estimate (updated attachment A to his report) produced at the hearing.

to address the water leak problem, and orders to ensure that any prescribed scope of repairs is carried out.

34 The applicant also seeks costs of the proceeding.

### **Respondent's defence**

35 The respondent denies liability in respect of the water leaks to the applicant's unit.

36 The respondent says that the flow of water from her balcony, as it was designed and constructed, is reasonable and is not the cause of the water damage to the applicant's unit. At most, says the respondent, the balcony requires some maintenance works.

37 The respondent says the cause of the water leaks is the extension works to the applicant's unit. The respondent says also that to the extent the water leak issue may have been exacerbated by attempted remedial works to the skillion roof and the skillion flashing, the respondent bears no responsibility because such remedial works were authorised and organised by others, namely the Owners Corporation and/or the applicant.

38 The respondent says that the applicant has failed, on the balance of probabilities, to prove the liability of the respondent in respect of the water damage to the applicant's unit.

39 In the event I find the respondent liable, or partially liable, the respondent rejects any order as to the appointment of Mr Fleming to project manage repair works. The respondent submits, in effect, that to the extent I find liability on the part of the respondent, in making any orders I might reference scope of rectification works as raised by the experts. I might also reference Mr Fleming's cost estimates for rectification works, excluding any allowance for project management. (Only Mr Fleming provided detailed cost estimates).

40 And, as I understand it, the respondent is against any order that contemplates future return to the Tribunal for what the respondent calls 'enforcement' type orders in the event a party fails to comply with any orders made by the Tribunal as to rectification works.

### **WATER LEAKS - FINDINGS.**

#### **Major area of water damage**

41 The primary water damage, in respect of which the applicant brings her claim, is the significant interior damage around the ceiling area where the bathroom/laundry extension meets the living room. Having heard the evidence from the parties, in particular the expert evidence of Mr Fleming and Mr Spencer, and having viewed the premises in some detail on the afternoon of the first day of the hearing, I am satisfied that the cause of this damage is the extension works carried out by the applicant.

- 42 As discussed earlier in these reasons, the design and construction of the unit 9 balcony allowed for water to flow across the balcony towards the eastern edge of the balcony. The water would then fall over the tiled edge of the balcony, with most of the water being caught by a gutter. To the extent a small amount of water tracked on the underside of the balcony slab, a drip groove was in place in order to catch such 'tracking' water and dispel it down the exterior wall of the building. This drainage function was interfered with by the extension works carried out by the applicant, in particular the abutting of the skillion roof to the balcony slab edge and the installation of the skillion flashing.
- 43 The skillion flashing was intended to direct water overflowing the eastern edge of the balcony down the *exterior* face of the skillion flashing on to the skillion roof, and from there the water would be directed to a box gutter at the edge of the skillion roof. Having viewed the skillion flashing from the exterior, and having also viewed, from the inside of unit 8 via an investigative hole cut in the ceiling, the roof space where the skillion roof meets the balcony slab edge, I am satisfied that the skillion flashing has created a source of water entry into unit 8 via the *interior* face of the skillion flashing, causing the significant water damage. Water flowing over the eastern edge of the balcony, instead of flowing down the exterior face of the skillion flashing on to the skillion roof, tracks along the underside of the balcony tiles to the interior face of the skillion flashing, and from there it falls into the unit 8 roof space.
- 44 It appears that this was identified as a source of water entry to unit 8 by whomever it was (most probably Tymaline) who applied flexible membrane over the exterior face of the skillion flashing. The intention might well have been to prevent water tracking behind the flashing, but it was never an effective long-term solution, and much damage would have already occurred by the time these attempted remedial works were undertaken.
- 45 On the evidence before me, I am not satisfied that this major area of water damage to the applicant's unit has been caused by the acts or omissions of the respondent. On the evidence before me, the water damage is the direct result of the extension works carried out by the applicant.
- 46 The applicant has failed, on the balance of probabilities, to establish the liability of the respondent in respect of this major area of the water damage.

### **Entry Porch Area Damage**

- 47 There is a further relatively minor area of water damage to the applicant's front porch entry area which is located below the northern end of the unit 9 balcony. There is a rendered brick pier at the entrance which supports the balcony. There are signs of minor water damage to the render at the top of the pier and the surrounding ceiling area to the porch. Once the cause of the water leak is addressed, rectification of the water damage is a modest task

that would include minor repairs to the render, caulking and repainting the affected areas.

- 48 Mr Fleming and Mr Spencer agree that this damage is caused by water leaching through the edge of the unit 9 tiled balcony. The northern end of the balcony has a rendered parapet wall. Unlike the parapet wall on the eastern side of the balcony, the northern parapet wall does not have a 20 mm gap at the bottom. It was apparent at the view that where the northern parapet wall abuts the tiled balcony there is noticeable dirt and moss growth. One can also see dirt and moss growth under the lip of the exterior edge tiles in this area.
- 49 Mr Spencer says this is a maintenance issue, although he does not specify the required maintenance works. It seems to me that maintenance would include cleaning away the dirt/moss and re-caulking.
- 50 Mr Fleming says it is unclear, looking at the exterior edge tiles, whether there is a waterproof membrane between the tiles and the underlying balcony slab surface. He gave evidence also, however, that the concrete slab itself is waterproof.
- 51 On the evidence before me, I am satisfied that the water damage to the porch area of unit 8 is the result of a lack of maintenance to the unit 9 balcony, particularly where the northern parapet wall abuts the balcony. I am satisfied that the water leak will be adequately addressed by maintenance works, and it is not necessary to remove and replace the balcony tiles.
- 52 Mr Fleming allows a sum, not including contingency, builder's margin and GST, of \$2062.40 (\$1462.40 as estimated in November 2020, and an additional \$600 in his updated estimate), for repairs to '*External – brick pier and balcony edge*'. It is not clear what these works actually entail, however it seems to me, having looked at Mr Fleming's entire cost estimate, that this is Mr Fleming's estimate for the maintenance works required to address the water leak in this area and the repair of the render to the brick pier, but excluding re-painting. (Painting works overall are addressed as a separate item in Mr Fleming's estimate).
- 53 I am satisfied that the respondent bears liability for this area of water damage. The respondent's failure to attend to reasonable maintenance works is the cause of flows of water from the respondent's property to the applicant's property, that is the leaching of water from the respondent's balcony into the applicant's entry porch ceiling area. The flows are not reasonable in that they have caused apparent water damage, albeit relatively minor.
- 54 I will order that the respondent carry out works out to prevent such flows of water. I will allow 6 months as a reasonable time for attending to such works. I think it reasonable also to allow the applicant to return to the Tribunal for further orders in the event the respondent fails to attend to

these works within the 6-month period. Such further orders may include an order in the form of mandatory injunction requiring the respondent to provide access to her property to contractors engaged by the applicant to attend to the requisite maintenance works, and an order for damages in respect of the cost of having such works attended to.

- 55 I will also order the respondent to pay damages to the applicant, being my assessment of the reasonable cost the applicant will incur to rectify the water damage to her front porch area. As noted above, it seems to me that such rectifications will include repair to the render on the brick pier, caulking works and repainting. Doing the best that I can, I allow \$1031.20 (half of Mr Fleming's above-mentioned estimate of \$2062.40) plus a 30% builder's margin, plus GST for a total of \$1474.61, rounded off to \$1475.

### **Conclusion**

- 56 For the reasons set out above, I will make orders that:
- (a) the respondent must pay the applicant \$1475
  - (b) the respondent must, within 6 months of the date of these orders, carry out works to prevent the flow of water from the northern end of the balcony of the respondent's property into the front porch area of the applicant's property;
  - (c) liberty to the applicant to apply for further orders in the event the respondent fails to comply with the above order; and
  - (d) costs reserved.

**SENIOR MEMBER M FARRELLY**