

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. **BP900/2017**

CATCHWORDS

Leaking water from a balcony causing damage to apartment below. Whether the owner of the upper apartment liable for damage caused under s48, s128, or s129 of the *Owners Corporations Act*. Also, whether liability attaches under s16 of the *Water Act*. Consideration of whether the flow of water is 'not reasonable' under ss1(b) and s20. Held that upper apartment owner is not liable for damage caused by the flow of water.

APPLICANT	Ms Irene Kak-Tze Ho
RESPONDENT	Ms Rosaria Bishop
WHERE HELD	Melbourne
BEFORE	MJF Sweeney, Member
HEARING TYPE	Hearing
DATE OF HEARING	29 August 2017
DATE OF ORDER	29 August 2017
DATE OF REASONS	23 October 2017
CITATION	Ho v Bishop (Building and Property) [2017] VCAT 1541

ORDER

For the reasons given orally at the hearing the application is dismissed.

MJF Sweeney
Member

APPEARANCES:

For Applicant: In Person

For Respondent: In Person

REASONS

PRELIMINARY

- 1 Having given oral reasons for my decision at the hearing, the respondent later requested reasons in writing. The following written reasons are now delivered.
- 2 I wish to make a few comments about the general nature of this case and the law. Often in disputes between parties a situation can arise, after hearing all the evidence, where it seems there are two innocent parties, where the cause of the dispute may involve a third party who is not a party to the proceeding. When that happens, the case proceeds like this one, where the third party is not a party to the proceeding, but at the end of the day after hearing all the evidence, it appears that the third party, the builder in the present case, may have undertaken faulty membrane work throughout the whole of the apartments.
- 3 Whatever the position of the builder may be, that could be a question for another day, if the owners corporation brings proceedings. So far as the present proceeding is concerned, what does it mean in terms of the two parties? It must mean that one of the two parties here today is going to be disappointed with the outcome. But whoever is disappointed with the outcome is not necessarily locked out from some future potential claim that might be taken against the builder by the owners corporation. If a proceeding is brought against the builder, if the builder is found to be responsible, if the disappointed party to this proceeding has made a claim against the builder, that party may claw back and restore themselves to their original position.

BACKGROUND

- 4 I have made the comments above by way of general background. I also make them because, in my opinion, this case, on the evidence before me, is indicative of there being two 'innocent' parties in the sense I have described. The factual background is straightforward. We have the applicant, Ms Ho, owner of unit 31, sitting in her apartment minding her own business, along comes a storm on 26 April 2017, and, through no fault of her own, damage occurs. We also have the respondent, Ms Bishop, owner of unit 35 which is located generally above unit 31, sitting in her apartment minding her own business and along comes the storm and, unbeknown to her, water pools on her balcony against the door area and causes water damage to Ms Ho's apartment below. Ms Ho claims the cost of repairs to her unit of \$1,650.00, cost of expert report and testing \$627.00 and the VCAT application fee.
- 5 It appears likely that, if water was able to escape from Ms Bishop's balcony and penetrate into Ms Ho's apartment, there must have been a fault with the

membrane. If there was no fault with the membrane the water would not have penetrated into Ms Ho's apartment. It would have remained on Ms Bishop's balcony above and eventually have flowed away.

- 6 I rely on the expert opinion of Bradley Hunt of Leakmasters, dated on or about 13 June 2017, tendered by Ms Ho. Included in the findings, following leak testing, was that water penetrated from the position identified on page 4, the left hand side door sub sill and its junction with the balcony floor tiles. I infer from this that the leaking into Ms Ho's apartment most probably is indicative of a faulty membrane. There were other areas of possible leaking identified in the report, including the parapets and wall junctions around the balcony area, but these were not identified as the source of the complained of leak. The findings of the Leakmasters report were not contested.
- 7 I find that the leaking that occurred, occurred on property owned by Ms Bishop. My finding arises from the information contained in the Plan of Subdivision. The Plan refers to lot boundaries being defined by thick continuous dark black lines. Having regard to the apartment owned by Ms Bishop, her balcony is contained within these lines and is therefore property owned by her. The Plan also refers to the location of boundaries as being on the interior face. Based on these descriptors, I find that the leak occurred on property owned and controlled by Ms Bishop. The meaning of interior face was considered in *PS 508732B v Fisher* (Owners Corporation) [2014] VCAT 1358 as being the membrane and upwards, that is, including the tiling. This is the property of the lot owner and is their responsibility. The slab itself is common property, for which the owners corporation manages responsibility.
- 8 Now what happened in this case? There was the storm. The storm took place on 26 April 2017. It was common ground that there was a very heavy rain storm of an unusual nature. The rain water penetrated greatly into the inner section of the balcony of Ms Bishop. The apartments were built in about 2000. Both parties have lived at the units for approximately 7 years. On the evidence, there was no suggestion that this leaking had occurred before into Ms Ho's apartment.
- 9 The report of Leakmasters is well written. It does not comply with all the expert report requirements of the VCAT Practise Note, but nevertheless is an independent report, clearly stated and made out by Mr Bradley Hunt. His water leak tests indicate that Ms Bishop's balcony leaked, particularly in the spot referred to above, up against the sub sill of the left hand door. I am satisfied that the test was comparable to what transpired during the heavy rain storm of 26 April 2017. It is notable that before the storm there had not been any leaking. Further, there was no subsequent leaking due to Ms Bishop, as soon as being made aware of the of the issue, undertaking a caulking operation in accordance with the findings of the Leakmasters report. The caulking repair is shown on page 11 of the Leakmasters report and was found to have stopped the leaking when re-tested by Mr Hunt.

- 10 Ms Ho submits that Ms Bishop is liable to her for the damage she suffered under the *Owners Corporation Act* (OC Act) S48, s128 and s129. She also submits that liability lies under the *Water Act*, s16.

LIABILITY UNDER OWNERS CORPORATION ACT

- 11 Ms Ho's claim under s48 of the OC Act is misconceived. That section is concerned with actions that an owners corporation may take against a lot owner for failure to maintain the lot. It is not concerned with an action by a lot owner to seek recovery against another lot owner. Also, in respect of her claim under S128, that section is concerned with specifying a lot owner's duty to comply with the OC Act, Regulations and Rules. Breaches of the Act, Regulations and Rules have not been relied on by Ms Ho in bringing her claim, other than her specific claim made under s129, to which I will now turn.
- 12 S129 of the OC Act relevantly states that a lot owner must properly maintain in a state of good and serviceable repair any part of the lot that affects the ... use or enjoyment of other lots or the common property.
- 13 Under s129 the duty is upon the lot owner to maintain the lot owner's property in good repair. However, in my opinion, this duty is not expressed as one of strict liability. If that was the legislative intent, it would be expressly stated. There is no basis for interpreting the section as importing the concept of strict liability.
- 14 A lot owner under the section must act reasonably so that, if he or she becomes aware of some defect, it is required of him or her to rectify it, consistent with maintaining the lot in a state of good and serviceable repair. In the present case, there had been no leaking prior to the storm. As soon as Ms Bishop became aware of the leak from her balcony following the storm and identified as such by the Leakmasters report, she undertook caulking repairs. No leaks have been experienced since the repair. Ms Bishop's actions are consistent with compliance with her duty under s129 of the OC Act.
- 15 In so far as Ms Ho's claim is based on a breach of s129, the claim is not proven and is dismissed.

LIABILITY UNDER WATER ACT

- 16 The other head of claim is made pursuant to S16 of the *Water Act*. S16(1) provides as follows:
- 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-

(ii) damage to the property ... of any other person;

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

- 17 Unlike the provision discussed above for the OC Act, s16(1) of the Water Act, subject to its limitations, is one that imposes strict liability on the party that causes the flow of water.
- 18 The uncontested evidence is that there has been a flow of water from the land of Ms Bishop and it has caused damage to Ms Ho's property. Subject to the limitations in s16, Ms Bishop is liable to pay damages to Ms Ho in respect of that damage caused.
- 19 The relevant limitation is contained in s16(1)(b). The issue to be determined is whether the flow is not reasonable. Before considering that question, there is another consideration. S16(5) states:
- if the causing ... of the flow was given rise to by works constructed or omitted to be done at any time at the time before the current occupier became the occupier of the land, the current occupier is liable to pay damages in respect of the ... damage ... if the current occupier has failed to take any steps reasonably available to prevent the causing of the flow.
- 20 The apartments were constructed in about 2000, prior to Ms Bishop's occupancy several years later. Ms Bishop and Ms Ho have become aware that the membrane works in this property are not good. However, in relation to the leak and possible membrane failure at the location identified in the Leakmasters report, there is no evidence before me that Ms Bishop had any knowledge of the potential leak point. In fact there had been no leakage prior to the heavy rain storm on 26 April. On the evidence before me, it has not been proven that Ms Bishop failed to take any steps reasonably available to prevent the causing of the flow. There is no liability of Ms Bishop arising under s16(5).
- 21 Returning to the issue of whether 'the flow is not reasonable' under s16(1)(b). The matter to focus on under this sub section is whether the flow itself (from the land of Ms Bishop) is not reasonable, rather than the behaviour of the owner (*Hazelwood Power Partnership v Latrobe City Council* [2016] VSCA 129 (3 June 2016)). The flow of water, in one sense, may be considered as 'not reasonable' given that it was common ground that it arose from a very heavy and unusual rain storm. However, in my opinion, that is not the sense of being 'not reasonable' that the sub section is referring to.
- 22 In my opinion, the flow of water was not an unreasonable flow in that it arose from an unexpected and unusual natural rain event, which caused the flow of water from Ms Bishop's land. The flow of water itself does not fit the condition prescribed by s16(1)(b), with the result that Ms Bishop is not liable for the flow of water.

- 23 The flow of water from Ms Bishop's land might be considered 'not reasonable' if it was somehow collected or controlled by her. But on the evidence, it was not. Moreover, s20 specifies that all the circumstances must be taken into account in determining whether the flow of water is reasonable or is not reasonable. There are a number of matters in s20 which must be taken into account, relevantly including those at ss(g), whether the water which flowed was –
- brought onto the land from which it flowed; or
 - collected, stored or concentrated on that land;
 - and, if so, for what purpose and with what degree of care this was done.
- 24 Ms Bishop had no role in the unusual natural rain event. She was not an actor who brought water onto her land, or collected, stored or concentrated water on her land. She was not therefore an actor possessed of any relevant purpose and not therefore exercising any relevant care of any particular degree. The flow in all the circumstances was 'reasonable' as that expression is understood under s16(1). For these reasons, I find that s16(1) of the Water Act, otherwise imposing strict liability, does not impose on Ms Bishop liability arising out of the flow of water.
- 25 The party making the claim is required to prove her case, on the balance of probabilities. It is a difficult hurdle, it is a high hurdle and Ms Ho has been unable to get over that hurdle today.
- 26 For the reasons given, in the claim of Irene Ho against Rosaria Bishop, the application has not been proved and must be dismissed.

MJF Sweeney
Member