VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP113/2019

CATCHWORDS

Section 75 Victorian Civil and Administrative Tribunal Act 1998. Issue estoppel. Applicant's proceeding against respondents struck out, the issue in the litigation having been heard and determined in previous proceedings brought by the applicant against the respondents.

APPLICANT	Desmond Kong
FIRST RESPONDENT	Ngoc Hugh Bich
SECOND RESPONDENT	Shanthakumar Madhan Wilson Rajaratnam
THIRD RESPONDENT	Hugh Nguyen
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	4 October 2019
DATE OF ORDER	22 October 2019
CITATION	Kong v Bich (Building and Property) [2019] VCAT 1638

ORDERS

1. The applicant's application is, under section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998, struck out.
2. The second respondent's application under the *Vexatious Proceedings Act* 2014 is referred to an administrative mention on 24 February 2020, by which date if the second respondent has not notified the tribunal in writing that he wishes to pursue such application, the application will be struck out; and
3. No order as to costs.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicant:	Mr D. Epstein of counsel
For First Respondent	Mr T. Wynn and Mr C. Pham, personal representatives
For the Second Respondent:	Mr Rajaratnam in person
For the Third Respondent:	Mr H. Nguyen in person

REASONS

1 The applicant, Mr Kong, is the owner of a dwelling house and land in Cunningham Street Box Hill ('**the applicant's property**'). He has a problem with water pooling, after heavy rain, in the garden in his backyard on the north boundary of his property which is the lowest point of the property.

2 The first respondent, Ngoc Hugh Bich, is the owner of the dwelling house and land in Cunningham Street Box Hill ('**the R1 property**') abutting the east boundary of the applicant's property.

3 The second respondent, Shanthakumar Madhan Wilson Rajaratnam, is the owner of the dwelling house and land in Cherryhinton Street Box Hill ('**the R2 property**'), the southern boundary of which abuts the northern boundaries of the R1 property and the applicant's property.

4 The third respondent, Hugh Nguyen, is the owner of the dwelling house and land in Cherryhinton Street Box Hill ('**the R3 property**'), the southern boundary of which abuts the R1 property, and the west boundary of which abuts the R2 property.

5 Mr Wang and Ms Yuan are the owners of the dwelling house and land in Cunningham Street Box Hill ('**the Wang property**'), the eastern boundary of which abuts the applicant's property.

6 The natural slope of the land covering all the properties runs from north-east downhill towards south-west. In descending order, the R3 property is uphill, followed next by the R1 property, followed next by the R2 property, followed next by the applicant's property and followed last, that is the lowest level, at the Wang property.

7 There had once been a lane between the northern side properties (the R2 property and the R3 property) and the southern side properties (the R1 property the applicant's property and the Wang property). Sometime in the past, the boundaries of the properties were altered to take over the area that was once the lane.

8 In about late 2014 or early 2015, the applicant lowered the ground level of his back garden so that it was considerably lower than the ground level of the abutting R1 property and the abutting R2 property. When this was done, a white plastic storm water pipe was discovered ('**the stormwater pipe'**). The stormwater pipe runs from the R3 property to the R1 property, along the R1 property boundary into the R2 property, along the R2 property boundary and into the applicant's property. The stormwater pipe used to run through the applicant's property into the Wang property, but as discussed later in these reasons, this is no longer the case.

9 The path of the stormwater pipe through the R1 property, the R2 property and the applicant's property appears to be the area where the lane once existed.

10 When he lowered his garden, the applicant cut the stormwater pipe and diverted it below the lowered ground level of his own property, and reconnected it so that it continued to run into the Wang property.[1]

11 It seems that that the stormwater drain was installed a long time ago, before any of the parties purchased their properties. The Whitehorse City Council has confirmed that the stormwater drain is a private drain and not the responsibility of Council to maintain.[2] There has been no suggestion by the Whitehorse City Council that the stormwater drain is illegal.[3]

12 The applicant says that the intermittent water pooling problem in his backyard is caused by water flowing onto his property from the R1 property and/or the R2 property and/or the R3 property during heavy rain periods.

13 The applicant has brought a number of proceedings against the respondents seeking injunctive relief and damages, alleging liability of the respondents under the *Water Act* 1989 (‘**the Water Act**’). The applicant has been unsuccessful in each proceeding.

14 Not satisfied with the outcome of those proceedings, the applicant now brings this proceeding against the three respondents, again seeking injunctive relief and damages. Each of the respondents say that the applicant’s application should be struck out because the claims brought in this proceeding are claims which have already been determined in the prior proceedings.

15 At a directions hearing on 26 April 2019, I ordered:

a) the applicant to file and serve ‘Points of Claim’ setting out the cause of action brought against each of the respondents and the relief/remedy sought as against each respondent;

b) each of the respondents to file and serve submissions and any affidavit material in support of their applications that the proceeding be struck out under section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 (‘**the VCAT Act**’);

c) the applicant to file and serve response submissions and any response affidavit material; and

d) the respondents’ applications that the proceeding be struck out be listed for hearing before me on 4 October 2019.

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1 These findings as to the past lane, the discovery of the pipe and the applicant lowering the pipe are taken from the decision of Senior Member Walker dated 12 February 2018 - [2018] VCAT 204 at paragraphs 10 and 11 - in the prior proceeding BP 66/2017 brought by the applicant against Mr Rajaratna, the second respondent in this proceeding.

2 this is confirmed in a letter dated 27 January 2015 from Whitehorse City Council to the applicant, a copy of which was produced by the applicant.

3 the above-mentioned letter from the Whitehorse City Council makes no assertion that the stormwater drainage in question is in any way illegal. Further, all of the parties before me confirmed that they had not received any notice or order from the Whitehorse City Council as to the illegality of the stormwater drain.

16 Points of Claim, affidavit material and submissions were filed and served, and the respondents' application that the proceeding as against them be struck out came before me on 4 October 2019.

17 At the hearing, the applicant was represented by Mr Epstein of Counsel. This was the first hearing of any type in all of the previous related proceedings that the applicant was legally represented.

18 The first respondent was represented by her sons, Mr Wynn and Mr Pham. The second and third respondent each appeared in person.

THE WATER ACT

19 Relevant sections of the water act provide:

> **16 Liability arising out of flow of water etc.**
>
> (1) If—
>
> (a) there is a flow of water from the land of a person onto any other land; and
>
> (b) that flow is not reasonable; and
>
> (c) the water causes—
>
> (i) injury to any other person; or
>
> (ii) damage to the property (whether real or personal) of any other person; or
>
> (iii) any other person to suffer economic loss—
>
> the person who caused the flow is liable to pay damages to that other person in respect of that injury, damage or loss.
>
> (2) If—
>
> (a) a person interferes with a reasonable flow of water onto any land or by negligent conduct interferes with a flow of water onto any land which is not reasonable; and
>
> (b) as a result of that interference water causes—
>
> (i) injury to any other person; or
>
> (ii) damage to the property (whether real or personal) of any other person; or
>
> (iii) any other person to suffer economic loss—
>
> the person who interfered with the flow is liable to pay damages to that other person in respect of that injury, damage or loss.
>
> …
>
> **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.

20 Establishing liability under the Water Act requires more than simply establishing that the flow/s of water came from the land of a respondent. To be liable, a respondent must have caused an unreasonable flow of water onto the applicant's land, or alternatively must have interfered, unreasonably, with the flow of water onto the applicant's land.

HISTORY OF PROCEEDINGS

Proceeding BP 3/2015

21 On around 1 January 2015, the respondent commenced proceeding number BP 3/2015 against Mr Rajaratnam (the second respondent in the proceeding before me). The applicant's claims in the proceeding included claims under the Water Act seeking injunctive relief and damages in respect of alleged unreasonable flows of stormwater onto the applicant's property from the R2 property.

22 By terms of settlement dated 7 May 2015, the applicant and the second respondent settled proceeding BP 3/2015. Under the terms of settlement, amongst other things:

a) the applicant and the second respondent agreed to jointly submit a request to the Whitehorse City Council to initiate the process for a drainage scheme; and

b) the second respondent agreed to carry out works which included connecting the stormwater drain on the R2 property, which had previously run into a soak pit, into the stormwater pipe.

23 The terms of settlement included the following release clause:

> In consideration of the parties entering into these terms of settlement and subject to their performance, the parties mutually release and discharge each other from any liability past, present or future from all claims, demands, suits and costs of whatsoever nature, however arising out of or connected with the subject matter of the dispute and the proceedings.

24 In October 2016 the applicant sought to reinstate proceeding BP 3/2015. The applicant's reinstatement application was dismissed by orders made at the hearing on 18 November 2016. The orders included express findings including the findings that the respondent had complied with his obligations in respect of the agreed stormwater works, and that there had been no breach of the terms of settlement.

Proceeding BP 66/2017

25 On around 19 January 2017, the applicant commenced a new proceeding, BP 66/2017, against Mr Rajaratnam. The claims in the proceeding included, again, a claim under the Water Act for injunctive relief and damages in

respect of alleged unreasonable flows of water from the R2 property onto the applicant's property.

26 The proceeding went to hearing just over one year later, on 30 January 2018. At that hearing, the applicant presented reports prepared by a plumber, Mr Newell, which confirmed that there was a break in the stormwater drain in the area of Mr Rajaratnam's back garden. That breakage was repaired at Mr Rajaratnam's expense.

27 A report of Mr Newell dated 18 November 2017 produced at the hearing confirmed a further breakage in the stormwater pipe in the area of Mr Rajaratnam's yard. That breakage appeared to have been caused by a spike puncture through the pipe, and the evidence suggested that it might have been caused by Mr Newell when probing for the location of the pipe.

28 In any event, the Tribunal found that the applicant had failed to prove that the alleged unreasonable flows of water were caused by, Mr Rajaratnam and the applicant's claim was dismissed. The Tribunal's reasons were confirmed in written reasons dated 12 February 2018.

Proceeding BP 33/2018

29 On around 8 December 2017, Mr Wang and Ms Yuan, the owners of the Wang property, commenced proceeding BP 33/2018 against Mr Kong (the applicant in the proceeding before me). In that proceeding, Mr Wang and Ms Yuan claimed, amongst other things, relief in respect of drainage flooding onto their property from Mr Kong's property.

30 At the hearing on 15 March 2018, the presiding member found in favour of Mr Wang and Ms Yuan and made orders that:

- Mr Kong be restrained by injunction from causing a flow of water from his property to the Wang property
- Mr Kong, on or before 23 March 2018, remove the pipe in the rear of his property [the stormwater pipe] causing the flow of water to the Wang property
- Mr Kong pay costs fixed in the sum of $2,391.65.

31 In response to the above order that he remove the pipe causing the flow of water to the Wang property, Mr Kong cut the stormwater pipe and capped it (put a stop on the end of it) on his property.

32 It is stating the obvious to say that if a stormwater pipe is capped, water flowing down the pipe will have nowhere to go once it hits the stop cap, with the result that water will back up and overflow at the sources of entry into the stormwater pipe. In my view, this is almost certainly the cause of the pooling of water on the applicant's property. That is, in periods of heavy rain it is likely that water overflowing at the sources of entry to the stormwater pipe finds its way downhill to the low point in the applicant's rear yard. [This conclusion is supported in an expert report obtained by the

second respondent in the course of the current proceeding before me - the report of engineer Mr Ruban Kalaruban dated 25 July 2019, at page 5].

Proceeding BP 422/2018

33 On around 24 March 2018, the applicant commenced proceeding BP 422/2018 against Mr Nguyen (the third respondent in the proceeding before me). In that proceeding the applicant sought urgent injunctive relief and damages in respect of alleged unreasonable flow of water from the R3 property to the applicant's property.

34 By orders made 9 April 2018, the proceeding was dismissed. In the orders the presiding member made an express finding that he was not satisfied that the flow of water complained of was unreasonable. The presiding member also noted that if the applicant was dissatisfied with the decision in proceeding BP 33/2018 (the proceeding discussed immediately above) then he should seek legal advice.

Proceeding BP 238/2018

35 On or about 24 February 2018, the applicant commenced proceeding BP 238/2018 against Ms Bich (the respondent in the proceeding before me). In that proceeding the applicant brought a claim under the Water Act seeking damages in respect of the alleged unreasonable flows of water from the R1 property onto the applicant's property.

36 That proceeding came for hearing before me on 16 July 2018. In the course of the proceeding the applicant presented photos of his property, and in particular the area of water pooling in the lowest area of his property – the garden area adjacent to the northern boundary of the applicant's property. The applicant also produced the report of Mr Newell dated 18 November 2017, although Mr Newell did not attend to give evidence. Ms Bich was represented at that hearing by her sons, Mr Wynn and Mr Pham, who produced video evidence of a heavy rain event.

37 I dismissed the applicant's claim, providing oral reasons on the day. Although I was satisfied that the pooling of water, the subject of the applicants claim, was indeed occurring, I was not satisfied on the evidence that the respondent had caused the flow, or otherwise interfered with a flow of water, such as to cause the intermittent water pooling at the low point in the applicant's property.

Reinstatement hearing in proceeding BP 238/2018

38 On about 8 December 2018, the applicant sought to reinstate proceeding BP 238/2018. The matter came before me at a directions hearing on 16 January 2019. It was apparent at that directions hearing that the applicant sought to re-open proceeding BP 238/2018 in order to present further evidence the

applicant had obtained, namely a further report of Mr Newell dated 19 November 2018.

39 I dismissed the reinstatement application on the ground that the Tribunal was *functus officio.* That is, the proceeding had been heard and determined and the applicant was not entitled to re-open the case to present new evidence.

40 I note for completeness that the further report of Mr Newell referenced, amongst other things, a water test carried out by Mr Newell which led Mr Newell to opine that water directed into the stormwater pipe leaked, after some time, into the garden area in the applicant's property. Having regard to the discussion above as to the capped stormwater pipe and the likely resulting backfill and overflow, it is not surprising that water directed into the stormwater pipe would ultimately find its way to the low point in the applicant's property. That result seems assured, in periods of heavy rain, regardless of whether the stormwater pipe has any breakages or leaks.

This proceeding BP 113/2019

41 We come at last to this proceeding BP 113/2019, commenced by the applicant on around 21 January 2019.

42 The Points of Claim dated 21 June 2019 has been drawn by solicitors. This is the first occasion throughout the history of all the previous proceedings discussed above that the applicant used lawyers to draw his claim.

43 The Points of Claim outlines a claim against the respondents pursuant to section 16 of the Water Act, alleging an unreasonable flow of water emanating from the respondents' properties. Particulars of this claim are set out in a number of allegations and statements including the following:

a) that the stormwater system at the respondents' properties is not connected to the street as per Council requirements (the actual alleged Council requirements are not specified);

b) that the stormwater pipe has been capped off between the applicant's property and the Wang property;

c) that the stormwater pipe is leaking allowing water to flood rear yard of the applicant's property;

d) that testing by the plumber Mr Newell shows that water directed into the stormwater pipe is subsequently detected as groundwater on the applicant's property;

e) that Mr Newell's testing allegedly establishes that there is an unreasonable flow of water from the respondent's properties to the applicant's property;

f) that the respondents have refused to cooperate in the process of applying for a council drainage scheme (no particulars are provided as to how this relates to liability under the Water Act).

44 The Points of Claim pleads an alternative cause of action alleging liability of the respondents under the tort of nuisance. Under this cause of action, allegations are made as to run-off of stormwater from the respondents' properties 'inundating' the applicant's property, with various alleged consequential losses. I do not dwell on this aspect of the pleadings for the simple reason that this Tribunal does not possess jurisdiction to hear and determine such claim founded on the tort of nuisance. The Tribunal has jurisdiction as referred to in section 19 of the Water Act, produced above in these reasons, and that jurisdiction does not include the alternative pleaded cause of action under the tort of nuisance.

45 In my view, the claims under the Water Act that the applicant seeks to bring are the claims which have previously been determined in the previous proceedings.

46 The applicant submits that there are new elements to the claims. The applicant now presents a further report of the plumber Mr Newell, dated 8 May 2019, which prescribes alternative scopes of works, and the cost of such works, to rectify the drainage problem at the applicant's property. In the Points of Claim, the applicant seeks, as a remedy, an order that the second and third respondents install, at their cost, new stormwater drainage systems as recommended by Mr Newell. The applicant also seeks general damages of $30,000 for loss of enjoyment of his property whilst residing there "during periods of inundation". In my view, this is little more than the applicant updating the particulars of the remedy/damages he is seeking, and not a new cause of action.

47 The applicant says a further difference with this new proceeding is that he seeks an order allowing access to the respondents' properties to carry out further forensic CCTV inspection of the stormwater pipe and to carry out further water testing. This "remedy" is referenced in the application originally filed by the applicant on 21 January 2019, but does not appear in the Points of Claim dated 21 June 2019. In any event, if the applicant seeks such order, it is more likely sought as interlocutory relief to enable the applicant to obtain further expert opinion in respect of his underlying claim. Alternatively, if it is a final remedy sought, it is, again, no more than the updating of the particulars of remedy sought in respect of the same underlying claim.

48 The applicant says that the claim he now brings involves new leaks of water and new site conditions. That is, site conditions, such as the condition of the stormwater pipe, the growth of trees and other variables necessarily change with the passage of time. He says he is now bringing a claim in respect of new leaks under changed site conditions, and as such he is bringing a new cause of action not previously determined. I do not accept the submission. Neither the application as originally filed in this proceeding or the subsequently filed Points of Claim reference any alleged changes in site conditions.

49 I do not accept that every heavy rain event that produces the pooling of water on the applicant's property constitutes the basis of an actionable new cause of action. The applicant's claim is that one or more of the respondents is liable under the Water Act in respect of the pooling of water which occurs on the applicant's property after the events of heavy rain. The same claim has been brought against the respondents in the prior proceedings.

ISSUE ESTOPPEL

50 There is a principle in law that an issue, once judicially determined, cannot be re-visited for further or alternative judicial determination, save to the extent that a party has a right of appeal. The principle is often referred to as *res judicata*. Where the subsequent action purports to raise a new claim or cause of action founded on issues of fact or law which were necessarily decided by the prior determination, the principle is often referred to as *issue estoppel*.

51 The principle has been described as "a fundamental doctrine of all courts that there must be an end of litigation".[4]

52 The principle extends to claims which, although not directly raised in a previous proceeding, are claims which in all the circumstances *ought* to have been brought for determination in the prior proceeding. The extended principle, often referred to as *Anshun estoppel* in reference to the High Court case *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, has been described in the following terms:

> Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.[5]

53 Under s148 of the VCAT Act, a party to a proceeding in this Tribunal may seek leave to appeal a decision of the Tribunal to the Supreme Court of Victoria. There are applicable time limits. The applicant has not sought to appeal any of the decisions of the prior proceedings discussed above.

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4 Giles J, Onerati v Phillips Constructions Pty Ltd (1989) NSWLR at page 739 quoting *Halsbury, 4th edition, volume 16, paragraph 1527 at 102*7.

5 Sir James Wigram VC, Henderson v Henderson (1843) 67 ER at page 319 as referred to by Gibbs CJ, Mason and Aickin JJ in ***Anshun*** at paragraph 598.

54 In my view, issue estoppel applies in respect of the proceeding the applicant now brings against all of the respondents. The issue – the claim that each, or one or other, of the respondents is liable under the Water Act for the water pooling on the applicant's property after periods of heavy rain – has been heard and determined against each of the respondents in one or more of the prior proceedings. It is not open to the applicant to re-open the subject of litigation, previously heard and determined, on the ground that the applicant has new evidence he wishes to present. It is too late to present new evidence.

SECTION 75 OF THE VCAT ACT

55 The Tribunal's power to strike out all or a part of a proceeding is found in s75 of the VCAT Act which relevantly provides:

> (1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—
>
> (a) is frivolous, vexatious, misconceived or lacking in substance; or
>
> (b) is otherwise an abuse of process.
>
> (2) If the Tribunal makes an order under sub-section (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.
>
> …
>
> (5) For the purposes of this Act, the question whether or not an application is frivolous, vexatious, misconceived or lacking in substance or is otherwise an abuse of process is a question of law.

56 The applicant submits: '*If this issue is not resolved then future owners of the Applicant's property will be left with water inundation for perpetuity'*.[6] I accept that the water pooling at the low point of the applicant's property after heavy rain events will continue to occur unless and until a drainage resolution is effected. But that does not mean the applicant is entitled to re-litigate the same issue until he obtains the result he desires. As discussed above, the alleged liability of the respondents on the issue has been heard and determined in previous proceedings, and the applicant is not entitled to proceed with a new proceeding on the same issue. To allow the applicant to pursue such new proceeding would amount to an abuse of process. As such, I am satisfied that the applicant's proceeding should be struck out pursuant to section 75 of the VCAT Act.

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6 Paragraph 12 of the written submissions provided by the applicant at the hearing

COSTS

57 The second respondent seeks an order that the applicant pay the second respondent $935, that being incurred by the second respondent in obtaining the report of the engineer, Mr Kalaruban, briefly referred to earlier in these reasons.

58 Section 75(2) of the VCAT Act gives the Tribunal discretion to make an order for costs in the circumstance where, as is the case here, a proceeding has been struck out under section 75 (1).

59 Section 109 of the VCAT Act provides that each party is to bear its own costs in a proceeding, however the Tribunal may, if it is satisfied that it is fair to do so, order that a party pay all or a specified part of the costs of another party. The relevant provisions of s109 are:

> (1) Subject to this Division, each party is to bear their own costs in the proceeding.
>
> (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
>
> (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to—
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
>
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
>
> (iii) asking for an adjournment as a result of (i) or (ii);
>
> (iv) causing an adjournment;
>
> (v) attempting to deceive another party or the Tribunal;
>
> (vi) vexatiously conducting the proceeding;
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
>
> (d) the nature and complexity of the proceeding;
>
> (e) any other matter the Tribunal considers relevant.

60 In *Vero Insurance Ltd v The Gombac Group Pty Ltd*[7] Gillard J sets out the step by step approach to be taken by this Tribunal when considering an application for costs pursuant to s109 of the Act:

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7 [2007] VSC 117 at [20]

i. The prima facie rule is that each party should bear their own costs of the proceeding;

ii. The Tribunal should make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so. That is a finding essential to making an order;

iii. In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s109(3).

61 In the circumstance where the applicant's claim will be struck out as an abuse of process, it can be said that the relative strengths of the parties' claims weighs heavily against the applicant.

62 However, I am not satisfied that it is fair to make the cost order sought by the second respondent, or any other order as to costs in this proceeding.

63 At the time the applicant commenced this proceeding in January 2019, he was self-represented. He was self-represented at the directions hearing before me on 26 April 2019. Following that directions hearing, the applicant engaged lawyers to prepare the 'Points of Claim' which were required to be filed and served pursuant to orders made at the directions hearing. It appears that the only legal assistance the applicant has had in this proceeding is the preparation of the Points of Claim and the representation by Counsel in the section 75 application before me.

64 I do not consider that the applicant has acted vexatiously in commencing and pursuing this proceeding. In my view, the applicant's persistence in bringing this proceeding is indicative of the applicant's honest belief that he has a valid arguable claim, notwithstanding the outcomes in the previous proceedings brought by him. That honest belief is borne out of the fact that the applicant does have the real and persistent problem of water pooling at the low point in his backyard during times of heavy rain.

65 I am not satisfied that it is fair to depart from the prima facie rule that each party bear their own cost. For the same reason, I decline to make a cost order under section 75 (2) of the VCAT Act.

66 I expect that after he has received and read this decision, the applicant will have a better understanding as to why he cannot continue to pursue proceedings on the issue that has been heard and determined. In the event he commences yet a further proceeding on the same issue, the outcome in respect of costs could well be different.

THE SECOND RESPONDENT'S APPLICATION UNDER THE *VEXATIOUS PROCEEDINGS ACT* 2014.

67 On 26 September 2019, a week prior to the hearing before me, the second respondent filed an application seeking:

a) leave, under section 16(2)(b) of the *Vexatious Proceedings Act* 2014 (‘**the VP Act’**), to apply for an *extended litigation restraint order* against the applicant; and

b) and *extended litigation restraint order* against the applicant under section 17 (1) of the VP Act.

(‘**the VP application’**)

68 The VP Act, which came into operation on 31 October 2014, provides a new regime for the management and prevention of vexatious litigation in Victorian courts and tribunals. It aims to improve the effectiveness of the justice system by ensuring that unmeritorious litigation is disposed of at an early stage and that persons are prevented from wasting court time with further unmeritorious cases.[8]

69 Section 17 of the VP Act provides:

> **Court or VCAT may make extended litigation restraint order**
>
> (1) A Court or VCAT may make an extended litigation restraint order against a person if the Court or VCAT is satisfied that the person has frequently commenced or conducted vexatious proceedings—
>
> (a) against a person or other entity; or
>
> (b) in relation to a matter.
>
> (2) In determining whether it is satisfied of the matters specified in subsection (1), a Court or VCAT may take into account any matter it considers relevant, including but not limited to any of the following—
>
> (a) a proceeding commenced or conducted by the person, or an entity controlled by the person, in any Australian court or tribunal;
>
> (b) the existence of an order made by an Australian court or tribunal against the person, or an entity controlled by the person, including—
>
> (i) a litigation restraint order; or
>
> (ii) an acting in concert order; or
>
> (iii) a vexatious proceeding order;
>
> (c) any other matter relating to the way in which the person conducts or has conducted litigation.
>
> (3) A Court or VCAT may take into account a matter referred to in subsection (2) that relates to a proceeding commenced or conducted before, on or after the commencement of this section.

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[8] Excerpt of explanatory memorandum, as referenced by Harbison J, Vice President, in Sheehan v Kitson (Human Rights) [2016] VCAT 1964 at paragraph 2.

(4) A Court or VCAT may make an extended litigation restraint order—

(a) on its own motion; or

(b) on an application under section 16.

70 The applicant had received notification of the VP application only a couple of days prior to the hearing before me. Counsel representing the applicant had no knowledge at all of the VP application.

71 Having regard to:

- the applicant's short notice of the VP application, and the applicant having inadequate time to prepare and respond to the application; and
- the nature of the substantive matter before me – the hearing of the application by the respondents that the proceeding against them be struck out pursuant to section 75 of the VCAT Act,

I determined, and informed the parties, that the VP application would not proceed that day.

72 Having regard to these written reasons, which the parties will have time to read and consider, it may be that the second respondent does not seek to proceed further with the VP application. The second respondent might also consider it unnecessary to bring any further application under the VP Act unless the applicant commences a further proceeding against the second respondent. I consider it appropriate to order that the proceeding, insofar as it relates to the VP application, be listed for administrative mention in 4 months, by which time if the second respondent has not notified the Tribunal in writing that he wishes to proceed with the VP application, the VP application will be struck out.

CONCLUSION

73 For the reasons set out above, I will order that:

a) the applicant's application be struck out pursuant to section 75 of the VCAT Act; and

b) the second respondent's application for orders under the *Vexatious Proceedings Act* 2014 be referred to an administrative mention on 24 February 2019, by which date if the second respondent has not notified the tribunal in writing that he wishes to pursue such application, the application will be struck out; and

c) no order as to costs.

SENIOR MEMBER M. FARRELLY