

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP66/2017

**CATCHWORDS**

*Water Act 1989 – s.16(1) – damage suffered by unreasonable flow of water – liability of person who caused the flow – s.19(10) – flow – evidence as the source of the flow - causation – no evidence that the Respondent caused any flow.*

<b>APPLICANT</b>	Desmond Fook Kiong Kong
<b>RESPONDENT</b>	Shanthakumar Madhan Wilson Rajaratnam
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	30 January 2018
<b>DATE OF ORDER</b>	12 February 2018
<b>CITATION</b>	Kong v Rajaratnam (Building and Property) [2018] VCAT 204

**ORDER**

Written reasons for the order made on 30 January 2018 provided at the request of the Applicant.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	In person
For the Respondent	In person

## REASONS

### Background

1. This was an application pursuant to the *Water Act* 1989 in which the Applicant sought to recover from the Respondent damages with respect to losses he claimed to have suffered as a result of what he said was an unreasonable flow of water from the Respondent's land.
2. The proceeding came before me for hearing on 30 January 2018. The parties appeared in person and gave evidence.
3. I dismissed the application for reasons that I gave orally at the time. The Applicant has now sought written reasons for my decision.

### The law

4. The relevant section of the Act is s.16, which (where relevant) provides as follows:

“Liability arising out of flow of water etc.[8]

(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. In order to recover damages it is necessary to demonstrate that the person from whom the damages are sought has caused the flow complained of. It is not sufficient simply to establish that the flow of water came from the land of that person.
6. As to proof of causation, s.19(9) of the Act provides:

“Jurisdiction of Tribunal

- (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.”

7. Causation can be established by proving some act or omission on the part of the Respondent that resulted in the unreasonable flow. For an omission to be actionable in the law of negligence, it must be found that there was a duty to act, that is, a duty to do that which was not done.

## **The facts**

8. The Applicant is the owner of a dwelling house and land in Cunningham Street Box Hill (“the Applicant’s Property”). Abutting the Applicant’s Property to the north of its rear boundary is a dwelling house and land in Cherryhinton Street Box Hill which is owned by the Respondent (“the Respondent’s Property”). The common rear boundary is irregular. There had once been a lane between the two properties but the rear fences were moved back some time in the past in order to occupy the land that had constituted the lane.
9. In the north eastern corner of the Applicant’s Property the rear fence separating the two properties extends in a westerly direction for about two thirds of the width of the Applicant’s allotment, then turns 90 degrees northwards for what was perhaps once the width of the lane and then turns again 90 degrees eastwards, continuing due east to the north-west corner of the Applicant’s Property. That last section of fence separates the Applicant’s Property from that of the Respondent’s next door neighbour.
10. 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 garden on the Respondent’s side of the fence. When he did so it was discovered that there was a white plastic storm water pipe (“the Stormwater Pipe”) which passed through the north-south section of the dividing fence from the Respondent’s Property and continued through the Applicant’s Property into the neighbouring property to the west. It would seem that the purpose of the Stormwater Pipe was to carry stormwater that would previously have been carried by the former lane. There is no evidence concerning who laid it or when it was laid.
11. When he lowered his garden, the Applicant cut the Stormwater Pipe and diverted it below the lowered ground level of his own property and continued it to the neighbouring property on the west.

## **Previous proceeding**

12. In an earlier proceeding in this Tribunal (BP3/2015) the Applicant brought a claim for damages under the Act against the Respondent with respect to an alleged flow of water into the Applicant’s Property. That proceeding was settled and terms of settlement were entered into between the parties by which it was agreed that the stormwater from the Respondent’s Property, which had previously been run into a soak pit in the south-west corner of the garden would instead be connected to the Stormwater Pipe. It was not disputed that the Respondent then connected the stormwater from his property into the Stormwater Pipe as agreed.
13. In the course of preparing for this earlier proceeding, the Respondent had a CCTV investigation of the Stormwater Pipe carried out. A copy of this report was tendered. It shows that the Stormwater Pipe extends right across the bottom of the garden of the Respondent’s Property from the Applicant’s

Property on the western boundary into a pit in an adjoining property on the eastern boundary. This pit is fed by two other pipes coming from unknown sources further to the east.

### **New complaint**

14. On 19 January 2017 the Applicant brought this current proceeding claiming that unreasonable flows of water were still occurring from the Respondent's Property. He sought to recover the issuing fee, expenses for various plumbing investigations and certain other sums from the Respondent pursuant to s.16 of the Act.
15. On 25 March 2017 the Applicant obtained a report from a plumber, Mr Newell, to the effect that there was a break in the stormwater drain in the Respondent's back garden not far from the eastern fence.
16. On 26 May 2017 the Respondent also obtained a plumber's report and the existence of the break was confirmed. The Respondent then immediately had a large section of the pipe replaced at his own expense.
17. On 29 July 2017 the Applicant engaged Mr Newell to examine the pipe again. The whole drainage system in the Respondent's Property was thoroughly investigated and a plan was prepared by Mr Newell showing how the Respondent's Property was drained.
18. It was discovered that all of the stormwater from the Respondent's Property runs into a tank and the overflow runs into the Stormwater Pipe in the south-western corner to which it was connected pursuant to the terms of settlement. No leak appears to have been detected in that report
19. The Applicant considered that there were still leaks coming from the Respondent's Property and so a further report was obtained dated 18 November 2017. This discovered that there were two holes in the pipe in the Respondent's garden near the eastern boundary. One hole was in the top of the pipe and the other was directly below it, raising the possibility that something long and sharp had passed through the pipe from the top to the bottom. These holes were not detected in any of the earlier plumbing investigations suggesting that they were recent.
20. The Respondent denied having done anything in that part of the garden that might have caused this damage.
21. A statutory declaration by a builder, Mr Arrowsmith, was tendered by the Respondent. In it, Mr Arrowsmith declared that he was present when the Applicant's plumber, Mr Newell, was using a metal spike to locate stormwater pipes near the rear boundary of the Respondent's Property. He said that he observed the spike being used in the area of the holes referred to above. He said that, since neither he nor his plumbing contractor had used such a spike on the Respondent's Property and he could see no evidence of any garden work having been undertaken in that area by the residents, it was his opinion that the damage to the Stormwater Pipe had been inadvertently caused by the metal spike used by the Mr Newell. He

said that he examined the damaged section of pipe and found that the damage was consistent with having been caused by metal spike. Moreover, he said that he discussed the matter with Mr Newell who confirmed by telephone that that was the likely cause of the damage. Mr Newell repaired the holed section at no charge.

### **Causation**

22. I asked the Applicant how, on the evidence, I could find that the Respondent had caused the flow of water about which he complained. He said that the water came from leaks in the Stormwater Pipe and that, since the Stormwater Pipe was on the Respondent's Property he was liable for the state of disrepair of the Stormwater Pipe.
23. He also pointed to a large tree in the Respondent's Property and suggested that that had caused the breaks in the Stormwater Pipe.
24. There is no direct expert evidence linking the water flows alleged by the Applicant to the holes that were found in the pipe.
25. In his report of 25 March 2017 Mr Newell said that the damaged section was 3.4 metres from the eastern boundary of the Respondent's Property and the squashed section was 1.5 metres further to the west. There is no evidence as to the condition of the Stormwater Pipe further east. Indeed, the photographs of the damaged section of pipe that was replaced show only one hole, from which I infer that was no other hole in the pipe further to the west.
26. In his report of 29 July 2017, Mr Newell stated that all of the stormwater drainage from the Respondent's Property ran independently of the stormwater drain and that the broken and squashed section of storm water drain had since been replaced. He concluded by saying that he had advised the Applicant to monitor the area at the rear of his property during heavy rain to identify whether there was still stormwater entering his yard and if so, further investigation would be required to identify where it was coming from.
27. It is clear from this later report that any water passing through the break in the Stormwater Pipe could not have come from the stormwater discharge from the Respondent's Property because that entered the Stormwater Pipe well to the west and downhill of the break in the Stormwater Pipe.
28. Further, I am not satisfied that the Respondent was under any duty to repair the Stormwater Pipe. There is no evidence that he laid the Stormwater Pipe or that he was even aware of its existence until the first of the Applicant's complaints was made. In any case, as soon as a want of repair was brought to his attention he had the broken section replaced.

### **The tree**

29. The break in the Stormwater Pipe and the squashed section were some considerable distance from the tree. If the tree were to blame, and there is no expert evidence that it did, then I would have expected the damage to be under or near the tree. In any case, there is no evidence as to when the tree was planted or who planted it. Further, I am not satisfied that the Respondent was under any duty in the circumstances to ensure that anything planted in his land did not adversely affect something that someone else put there earlier.

### **Conclusion**

30. Since it was not proven that the flows alleged by the Applicant were caused by the Respondent the application was dismissed.

**SENIOR MEMBER R. WALKER**