

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
CIVIL DIVISION  
BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP62/2015

**CATCHWORDS**

*Water Act 2003 – s.16(1) - successive flows of water – each flow causing damage a separate cause of action – extent of damage caused – evidence – no expert evidence called by one party – expert evidence called by other party not discounted but must be considered carefully - Limitation of Actions Act 1958 - only later flows within limitation period – injunctive order to restrain use of shower causing flows until repaired - same damages claimed against another respondent - claim against the other respondent settled - damages assessed less than amount recovered from other respondent - double recovery not allowed - further submissions directed as to whether any monetary order should be made*

<b>APPLICANT</b>	Dr Anne-Marie Pellizzer
<b>RESPONDENT</b>	Mrs Helen Joy Buckley
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	14-16 October 2015
<b>DATE OF ORDER</b>	3 December 2015
<b>CITATION</b>	Pellizzer v Buckley (Building and Property) [2015] VCAT 1910

**Order**

1. Direct that any further submissions in regard to the issue of double recovery be filed and served by 18 December 2015.
2. Following receipt of any further submissions, final orders will be made.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant:	Mr B. Mason of Counsel
For the Respondent:	In person

## REASONS FOR DECISION

### Background

1. The Applicant is the owner of a dwelling unit (“the Applicant’s Unit”) on the fifth floor of an apartment block in St Kilda. The Respondent is the owner of another unit (“the Respondent’s Unit”) on the sixth floor of the same apartment block directly above the Applicant’s Unit. The layout of each of the two units is identical and the bathroom of the Respondent’s Unit is directly above the bathroom of the Applicant’s Unit.
2. The Applicant bought the Applicant’s Unit in 1989 as an investment and it has been let to tenants since the date of purchase. The Applicant said that it was repainted during the 1990s on one occasion and again in 2005. She said the carpet was replaced in about 2003 or 2004. The Respondent purchased the Respondent’s Unit in 1985 and has lived there ever since.
3. The apartment block is approximately 40 years old. It fronts onto The Esplanade, which runs from the north-west to the south-east. To simplify matters, for the purposes of this decision, I shall assume that the Esplanade runs east-west. The external walls of the building are brick and the internal walls are solid masonry. Each floor of the building is a concrete slab separating each unit on one floor from any unit above or below. By reason of Clause 5 of Schedule 2 of the *Subdivision Act* 1988, the title boundary between a unit above and the unit below lies at the median point within the concrete slab. As a result, the bottom half of the slab is owned by the Applicant and the top half by the Respondent. The bathroom of the Applicant’s Unit has never been renovated although in about 1995 a leak in the shower base was repaired.
4. There is no common property between the two units save for a services duct that extends from the first to the seventh story of the building. This services duct contains sewerage and drainage pipes for all units and apparently some water pipes also, although hot and cold water pipes are contained in another duct in the lobby on each floor, extending again from the first to the seventh floor. Precisely how the water is piped from this duct into each unit is unknown but it appears likely that the pipes run through the concrete slab in each case.
5. According to the expert evidence the shower recess in each unit has a concrete base and, contrary to present building practice, the tiles lining both the base and the walls of each shower recess are fixed directly to the masonry. There is no membrane between the tiles and the masonry to waterproof either the walls or the base and there is also no puddle flange around the waste.
6. On a number of occasions unit holders have complained of leaking from the shower base of a unit above, and it appears that on those occasions the Owners Corporation has paid for the shower base in question to be repaired in some way.

### This claim

7. This is a claim by the Applicant against the Respondent for damage said to have been suffered by a flow of water from the Respondent’s Unit into the Applicant’s Unit. The flow is said to have passed through the shower base of the

Respondent's Unit, then through a crack in the concrete slab separating the two units and then entered the Applicant's Unit directly above her shower recess.

8. On 21 January 2015 the Applicant commenced this proceedings seeking damages against both the Respondent and the Owners Corporation for the cost of rectifying what she said was the damage caused by the flow of water and also for loss of rent which is claimed to have been suffered because, it is claimed, the rental value of the Applicant's Unit has been reduced as a result of the flow and the Applicant has been unable to increase the rent.
9. The claim against the Owners Corporation was based upon an allegation that the flow of water was from the common property. This appears to have been based on the mistaken assumption that the slab dividing the two units was common property. Although that is not the case, reference was made in the Applicant's Points of Claim to correspondence in which representatives of the Owners Corporation acknowledged responsibility. The claim against the Owners Corporation has been settled and I am told that the Applicant recovered an amount of \$12,500 from it.
10. The damages sought against the Respondent in the original application were \$7,590 for the cost of rectifying the damage and \$34,320 for the alleged loss of rent.
11. On 13 May 2015 the Applicant's solicitors filed amended particulars of loss and damage claiming \$40,351.50 for the cost of repairing and restoring the Applicant's Unit, \$12,333.50 for the cost of repairing the Respondent's Unit to ensure no further leaking will occur and \$37,368.57 for loss of rent.
12. The claim for the cost of repairing the Respondent's Unit is curious. I have no power to order that the Applicant be authorized to carry out work on the Respondent's Unit.
13. According to updated particulars of loss and damage produced at the beginning of the hearing the amount now sought is \$83,181.50 of which slightly more than half is for "loss of rent". The claim with respect to repairs to the Respondents Unit appears to have been abandoned.

### **The hearing**

14. The proceeding came before me for hearing on 14 October 2015 with three days allocated. Mr B Mason of Counsel appeared on behalf of the Applicant and the Respondent appeared on her own behalf.
15. I heard lay evidence from the Applicant, the Respondent and the Applicant's solicitor. The tenant who was occupying the Applicant's Unit at the time of the alleged flow, and has been occupying it ever since then, was not called. Expert evidence was given by a building expert, Mr Naughton and by a plumbing expert, Mr Newell. No expert or other witness was called by the Respondent.
16. I visited both the Applicant's Unit and the Respondent's Unit during the hearing.

## The law

17. The claim is brought pursuant to s.16(1) of the *Water Act* 1989 (“the Water Act”). That provides as follows:

“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.”

## The first flow alleged

18. On 29 July 2008 the Applicant wrote to the Owners Corporation manager, a Mr Csapo, complaining that her tenants had advised her of leaks from the bathroom above. The email reads:

“I am the owner of flat 53, 13 the Esplanade St Kilda. My tenants have advised of leaks through the roof from the bathroom above (flat 63). This same problem occurred with my own shower so presumably it has happened elsewhere in the building. I would appreciate your advice regarding how to proceed.”

19. In a witness statement she said that, so far as she was able to recall, the tenant’s description was that water was seen coming through the ceiling above the shower in the Applicant’s Unit. There is no evidence of any earlier complaint of leaking from the shower of the Respondent’s Unit. She said in examination in chief that she was told by Mr Csapo that this problem was happening throughout the building.

20. On 13 October 2008 the Applicant sent a further email to the Owners Corporation manager as follows:

“I am owner of Flat 53. The shower ceiling has some water damage most likely related to leaking from the shower above (this has happened to the flat below me and I understand is a not uncommon problem in the building). Please advise of the Body Corporate responsibility in this matter. If it is not a Body Corporate issue, please provide me with the name and contact details of owner of Flat 43.”

21. It is unclear whether anything was done about these complaints because on 21 January 2009 the Applicant sent another email to the Body Corporate manager which dealt with other matters and then continued:

“On another but closely related matter, I have a problem with water leaking down from the flat above (63) from the shower cubicle. This is causing damage to my ceiling and has been doing so since at least August 2008 when I first raised the issue with you as body corporate. To date I have been unsuccessful in obtaining a response from you despite two emails and a letter and I’m increasingly unhappy about your lack of response and the ongoing damage.”

The letter referred to has not been produced but it would seem to have been sent to the Body Corporate and not to the Respondent.

22. In January 2009 there was a leak from a pipe between the Applicant’s Unit and the Respondent’s Unit that was repaired. This appears to have been done on insurance and the source of the water appears to have been a leaking pipe in the service duct and so it was not a flow from the Respondents Unit. Repairs were completed in March.
23. In January 2010 the tenant, Mr Velasco, took a video of water penetrating through the ceiling above the shower recess. The video shows water drops forming on the ceiling and dropping to the shower base below. It is not a continuous flow of water but rather, occasional dripping.
24. On 8 February 2010 the Applicant sent another email to the Owners’ Corporation manager which, where relevant, states:

“I have been unsuccessful in having any attention from the Body Corporate to the very important matter of leakage into my flat via the shower base from the flat above. I was advised by telephone that the Body Corporate was attempting to contact the owner of the flat above. No further action has taken place. I have just completed an inspection of the premises and the water damage which has been allowed to continue is now becoming severe. It will now be necessary for there to be repairs to the wall and to the roof of the bathroom and the bedroom (please see attached photos). I am very disappointed that the Body Corporate has taken no action since this matter was brought to your attention October 2008. Please provide advice now on what is becoming a very serious and potentially expensive issue.”
25. On 24 May 2010 the Owners’ Corporation manager wrote to the Respondent alleging that there was water coming from the Respondent’s Unit penetrating into the Applicant’s Unit, suggesting that she was under an obligation to maintain her unit in a good state of repair and warning her that the Applicant might claim damages from her. The author of the letter suggests that she contact a reputable contractor to have the works carried out and supply to the Owners’ Corporation a plumber’s certificate of compliance.
26. The Respondent’s reaction to this letter was to cease using her shower altogether. She said that she re-grouted the tiles in her shower recess and, much later, she engaged a plumber to replace the taps. However she did not engage a plumber to make the shower recess waterproof.
27. On 1 July 2010 the Owners Corporation manager again wrote to the Respondent suggesting that the membrane of her shower recess had been breached and required replacement and requesting her to attend to that at her earliest

convenience and provide them with a copy of the plumber's compliance certificate as previously requested. As stated above, because of the age of the block of units, there is no membrane lining the shower recess in the Respondent's Unit or any of the other units in the building, as originally constructed. The letter does not suggest that there had been any further leakages since she ceased using the shower.

28. An exchange of correspondence then followed with the Owners Corporation attempting to obtain a certificate from a plumber to the effect that the Respondent had repaired her shower recess and the Respondent denying that her shower recess was to blame.
29. The concern of the Owners Corporation to obtain a plumber's certificate arose from the fact that the damage had been claimed on insurance but the insurance company would not pay until satisfied that the cause of the leak had been addressed.
30. However there is no provision in the Water Act which would require the Respondent to carry out any particular work on her unit. Her obligation was simply not to cause an unreasonable flow of water from her unit into the Applicant's Unit which might cause damage. She chose to address that by ceasing to use the shower. However practical the requirement of a plumber's certificate might have been and however reasonable it might have been for the Owners' Corporation to ask her for one, the Respondent was not under any legal obligation to provide it.
31. Nevertheless, by not cooperating with the Owners Corporation the situation has now arisen where its insurer and the Owners Corporation itself are no longer prepared to make good the damage and the Respondent now finds herself facing a claim from the Applicant for the damage alleged to have been caused by the flow of water from her unit. A wiser course for her to have adopted might have been to fix the shower recess and provide the requested certificate to the Owners Corporation. She was under no legal liability to do so and she chose not to.

### **The September flow**

32. On 9 September 2010 there was a leak from the hand basin in the Respondent's Unit and the Applicant's tenant observed water entering the ceiling above the shower recess in the Applicant's Unit. This flow was short lived because the following day the Applicant's personal assistant said to her in an email that the tenant had told her "...that the leak has just about totally dried up and all looks okay today – so he is fine with it."
33. By letter dated 1 November 2010 the Respondent wrote to the Applicant apologising for allowing her hand basin to overflow and offering to pay for repainting the Applicant's ceiling below. It does not appear that the Applicant accepted this offer although she responded to it and sent the Respondent's letter to the Owners Corporation manager. It is unlikely that this second flow caused any significant damage because it was so short lived. Indeed, an email from the plumber to the Owners Corporation manager sent on 13 September 2010 says

that the ceiling was dry the following morning (10 September), there were no watermarks and there were “..no further leaks and Nil damage to U 53 at this time”.

### **The tests**

34. There were further emails sent to the Respondent by the Owners Corporation manager in which he demanded of the Respondent that she engage a plumber.
35. A plumber attended the Respondent’s Unit on behalf of the Owners Corporation on 24 September 2010 and carried out tests. The report of these tests states as follows:

“After inspection as requested by Westcorp Management [*the Owners Corporation manager*] to attend to report of water leaking into Unit 53 [*the Applicant’s Unit*] at the above property.

Arranged access and attended site.

Upon inspection we knocked on Unit 53 door– no one home. We then accessed Unit 63 above and tested their tiled shower base and had a drop in water level.

We then tested shower rose and breech – no leaks. Unit 63 owner would not allow us to carry out any further testing and asked us to leave.”

36. The Respondent persisted in her denial that there was any leak from her shower base and suggested that the problem might be due to leaking pipes.
37. On 13 January 2011 an order was made by this tribunal that the Respondent make her unit available for inspection before 14 February 2011. The inspection took place and it was discovered that there was a large crack in the slab between the shower recess in the Respondent’s Unit and the shower recess in the Applicant’s Unit. In a letter from the Owners Corporation manager dated 28 July 2011 it was suggested that this crack was the main reason for the leak. However the cause of the leak and its consequences are a matter of expert evidence and observation.

### **The expert evidence**

38. No expert evidence was called by the Respondent and so the Applicant’s experts have no contradicter. That is no reason to discount the Applicant’s experts but in the absence of any contradictory expert evidence I must look carefully at the expert evidence that I have, at what I was able to observe during the site visit and at the photographs that have been provided, always bearing in mind that there has been no expert to point out any matters that might have favoured the Respondent’s case.

### **Defences**

39. At the start of the hearing the Respondent said that the Applicant had failed to mitigate her loss by properly maintaining her unit. She also suggested that the water had come from a leak from another unit, number 73, in the same building. She pointed out that the Applicant had already received a payment from the Owners’ Corporation which Mr Mason said was \$12,500.00 but which the

Respondent said in her witness statement was \$38,000.00. I have no evidence as to what the real figure was but it is acknowledged that it was at least \$12,500.00.

40. She also submitted that, since the leak was first complained of in July 2008 and the proceeding was not commenced until 21 January 2015, the claim was statute barred.

### **Observations made during the site inspection**

41. The bathroom in the Applicant's Unit is rectangular and narrow. The western wall of the bathroom is only long enough to accommodate the shower recess and the door out to the passageway. Although no measurements were taken during the inspection it appeared to be less than 2 m wide and was perhaps 4-5 m long.
42. The shower recess is situated at the western end, in the north-west corner. On the other side of the western wall is the passageway and on the other side of the northern wall is a bedroom. Between the eastern wall and the shower recess there is a washing machine. There is no exhaust fan above the shower recess nor elsewhere in the bathroom. The only ventilation for water vapour is a narrow openable window on the eastern end of the bathroom which was open at the time of the inspection. Below this window there is a bath which occupies the full width of the room and the whole length of the eastern wall.
43. The vanity is situated on the northern wall between the washing machine and the bath. There is a mirror above it and both the hand basin and mirror back onto the services duct that contains the plumbing. The wall above the mirror is hard plastered. The plaster over this whole area is crazed and it is also drummy in parts. According to the expert evidence given during the hearing the crazing is due to moisture. The bathroom smelt quite damp.
44. The vermiculite ceiling soffit over the shower recess is cracked and coming away into areas and shows some water staining. Its appearance is consistent with the expert evidence that this is the result of water penetration from the Respondent's Unit above.
45. The wall in the passageway separating the passage from the shower recess and forming the western side of the shower recess had efflorescence up to a height of approximately 500-600 mm above the floor but in the wall above that there were no signs of efflorescence. The wall in the bedroom forming the northern side of the shower recess was in a similar condition. The efflorescence was towards the floor. On the corner where the two walls joined, pieces of plaster had broken away in parts and appeared as though it had been knocked by something heavy.
46. The vermiculite ceiling at the entrance to the bedroom had a narrow stain which the experts agreed appeared to be dampness from a continuation of the crack in the slab above the shower recess.
47. In the Respondent's Unit I observed efflorescence on the passageway wall and the bedroom wall adjacent to the shower recess that looked very similar to the efflorescence that I saw in the Applicant's Unit. Again, it was up to a height of approximately 500 to 600 mm above the floor. In the bathroom of the



Respondent's Unit above the mirror the plaster is crazed and looks very similar to that in the Applicant's Unit.

### **Mr Newell's report and evidence**

48. Mr Newell is a licensed plumber of 23 years' experience. He said that his area of expertise was in plumbing and identifying plumbing related problems. He inspected the Applicant's Unit, the Respondent's Unit and two other units in the building on 28 May 2015. He said that his brief was to inspect the Applicant's Unit to identify any water ingress and its origin, to pressure test water pipes in the drainage system, to identify new leaks and to use thermal imaging to help identify the presence of water ingress or the presence of moisture.
49. He concluded that there were no leaking or burst water pipes in any of the units. In the Applicant's Unit he observed the efflorescence on the walls in the bedroom and the passageway next to the shower. He observed that the tile grout in the shower recess was stained and discoloured, that there were stains along the front step up into the shower recess under the shower screen, that there was the appearance of moisture on the tiles behind the washing machine next to the shower recess and the ceiling above the shower recess was damaged. No pipework in the bathroom was found to be leaking but he said that there appeared to be moisture in the wall behind the washing machine beside the shower.
50. He found that the moisture on the floor tiles outside the shower was much higher than on the wall below the towel rail. He removed the inspection plate from the service duct. He said that access to the duct was very difficult and limited a complete inspection of it but that with the use of a small inspection camera he was able to view the inside of the duct and it looked dry and had no evidence of any water leaking. He said that a more comprehensive inspection of the duct is required to gain a better view of all services and to confirm that there was no leaking pipe work.
51. Thermal imaging showed apparent moisture in the corner of the shower recess which he said was consistent with water ingress behind the tiles. However thermal imaging of the two walls in the passageway and the bedroom backing onto the shower recess showed no apparent moisture. The finding of moisture in the shower recess in the Applicant's Unit contrasts with the thermal imaging of the shower recesses in Units 52 and 62 and in the Respondent's Unit where there were no signs of moisture.
52. In Unit 52 Mr Newell observed a similar stain above the shower recess to that in Unit 53 which he said was a sign of past water damage. In Unit 62 the ceiling above the shower appeared to have been freshly painted.
53. In the Respondent's Unit Mr Newell found the efflorescence that I observed on the external surface of the walls of the shower recess in the passageway and the bedroom. He also noticed that the ceiling above the shower recess showed signs of water damage. He said that he was unable to test the shower base for leaks

because the Respondent would not allow him to turn the tap on in the shower for fear that the water would leak into the Applicant's Unit below.

54. Mr Newell said that he estimated the building to be approximately 40 years old and that all of the bathrooms and plumbing that he inspected were original and unrenovated. He said that he did not pressure test the pipes because of the risk of damage. He said the shower bases in the building were made of concrete that can absorb water and will leak through any cracks if not properly waterproofed. He said that, when the building was constructed, waterproofing was not required and showers of that age and condition are susceptible to leaking via the concrete bases.
55. He said that water damage on the wall towards the floor at the bedroom entrance in the Applicant's Unit was consistent with a leaking shower recess. However he concluded that the damage to the ceiling and walls above the shower recess in the Applicant's Unit was most probably caused by a leaking shower in the Respondent's Unit.

#### **Mr Naughton's report and evidence**

56. Mr Naughton is a building consultant who inspected the Applicant's Unit and the Respondent's Unit on 31 March 2015. His findings are contained in a report dated 30 April 2015.
57. In the Respondent's Unit, he noted in his report that there had been previous moisture present within the walls for a sustained period of time due to the presence of efflorescence salts. The photographs that he provides to illustrate that are of the crazing in the hard plaster above the mirror that I observed during the inspection. They are very similar to the crazing in the hard plaster above the mirror in the Applicant's Unit.
58. He noted the crazing and efflorescence on the bedroom wall against the shower on the opposite side of the wall that I noticed. That was also referred to in Mr Newell's evidence. He tested the wall for moisture and found the moisture level to be very low. He said that the original shower had been decommissioned some time prior to his inspection. He concluded that the water ingress into the Applicant's Unit from the Respondent's Unit happened "some considerable time ago".
59. Mr Naughton said that the estimated consequential damage caused by the shower leak was listed within the detailed costings that he provided at the end of his report. He recommended some remedial work to be done to the Respondent's Unit including the repair of the crack in the slab between the two units.
60. In the Applicant's Unit Mr Naughton noted that the shower base may need remediation due to the mould and level of moisture detected in the wall behind. He noted the ceiling soffit above the shower and at the entrance to the bedroom referred to above and said it was evidence of water penetration.
61. He found that the moisture reading of the bathroom wall near the ceiling at the far end of the service duct towards the window was very high. I note that this is a

considerable distance from where the water passed through the ceiling above the shower. He also found moisture on the bedroom side of the wall behind the shower recess. That differs from the findings of Mr Newell. He thought that the moisture ingress had been apparent for some time due to the extent of dilapidation to the hard rendered surfaces.

62. He concluded in his report that water ingress from the Respondent's Unit caused initial damage to the Applicant's Unit in the south wall of the bedroom, the shower ceiling and walls.
63. Mr Naughton said in his report that, in his opinion, the services duct next to the shower where the plumbing pipes would be housed were the likely cause of water ingress into the walls of the Applicant's Unit. He said the more recent leaks may have exacerbated the moisture levels due to the likely plumbing leaks within the services duct which had contributed to the damage.
64. In his oral evidence, after being informed that Mr Newell had found no evidence of any leaking in the services duct, he said that he thought that the moisture in the walls was due to water from the Respondent's Unit.
65. In his report Mr Naughton makes a number of recommendations as to what ought to be done. His first recommendation is that the exact location of the water ingress needs to be determined and remedied prior to carrying out remediation works. He said that the shower in the Applicant's Unit needs to be completely reconditioned by having the tiles removed and replaced which, he said, will ensure the water ingress is stopped. This would suggest that he considered that part of the water ingress problem was from the shower recess itself but he did not elaborate upon that in his evidence. He said that the bedroom and bathroom walls will then need to be dried out, repaired and repainted and he also recommended that all plumbing pipes in the unit be pressure tested to determine if they are contributing to the water damage.
66. As stated above, when questioned by Mr Mason he changed his evidence and ascribed the present moisture in the walls in the bathroom of the Applicant's Unit to the original water entry from the Respondent's Unit. When I suggested to him that the moisture that he detected in these walls could not be due to a water penetration that ceased more than five years earlier, he suggested that the ingress five years ago would have put "latent" water into the walls which may then have been added to from other sources. No such mechanism was suggested by Mr Newell, who found the bedroom and passage walls to be dry.
67. I suggested to him that the efflorescence on the lower section of the walls in the bedroom and passageway of the Applicant's Unit adjacent to the shower recess looked very like what we commonly see, in building cases before this tribunal, on walls adjacent to leaking showers and he acknowledged that they had that appearance. However he maintained his opinion that the efflorescence was caused by the original intrusion that occurred over five years earlier from the Respondent's shower. I asked him why, if that were the case and the water had come from above, there was no similar damage to either wall higher up. He then suggested that perhaps the water had descended to the bottom of the cavity

within the wall and then had risen up from the floor. He said that he believed that it was a double wall because it was structural. When I asked him whether I was correct in my understanding that a double structural wall would normally be core filled and so would have no cavity, he agreed that that would normally be the case.

68. The scope of works that he recommended was for the complete removal of all surfaces in the bathroom in the Applicant's Unit, re-tiling the floors and walls with a waterproof membrane provided behind the tiles in the shower recess and "dehumidifying" the bedroom walls. The total cost was \$25,653.50 plus 10% for contingencies, a 30% margin and GST. The final figure was \$40,351.50. Of this, the base figure allowed for drying the bedroom walls was \$8,400.00.

#### **What to make of all this evidence?**

69. The point of entry of the flows complained of is directly above the shower recess. Water passing through the slab at that point would land in the shower recess which is designed to receive water and direct it into a waste pipe. It is also designed to contain water that splashes onto the walls and directed into a waste pipe. It is therefore inherently unlikely that water flowing into such a place is going to migrate elsewhere into the unit.
70. From the expert evidence and my own observation, the bathroom in the Applicant's Unit is damp. It was somewhat cluttered during the inspection and had a musty smell. Mr Newell's tests showed that, unlike the other units, the shower recess in the Applicant's Unit was damp and there was also dampness on the floor outside the shower and dampness between the shower and the washing machine.
71. Mr Naughton's first recommendation was that the exact location of the water ingress needs to be determined and remedied before rectification takes place, indicating uncertainty on his part as to the source of the water.
72. As to his change of mind that the source of dampness in the walls was from the water penetration is from the respondent's unit over five years earlier, it is not credible that any dampness that is now present in the walls of the Applicant's Unit is due to a leaking that ceased 5 ½ years ago. The evidence that the Respondent ceased using her shower at that time is uncontradicted. It is consistent with the emails and what she told the experts and also consistent with the expert evidence, including the low moisture reading in the walls adjacent to her shower recess. A seems to me more likely that the dampness in the bathroom in the Applicant's Unit is due to lack of ventilation and the activities of the tenant.
73. The efflorescence complained about in the walls adjacent to the shower in the Applicant's Unit is similar to that on the equivalent walls in the Respondent's Unit. Yet the Respondent ceased using her shower 5 ½ years ago. Mr Naughton agreed that the efflorescence had a similar appearance to walls adjacent to a leaking shower recess. Mr Newell concluded that the condition of those walls in the Applicant's Unit was in fact due to a leaking shower recess. Even Mr

Naughton recommended in his report remediation of the shower base due to the mould and level of moisture detected in the wall behind. As previously stated, there is no membrane below the tiles in the shower recess in the Applicant's Unit or in any of the other units as originally constructed. This means that there is nothing to stop any water that bypasses the tiles from entering the walls or base surrounding the shower recess.

74. The condition of the hard plastered wall of the service duct is similar in appearance in both units, suggesting a common cause. The plaster in question in the bathroom of the Applicant's Unit is also some distance from the point of ingress of the flows complained of. The bathroom is long and narrow, it has no exhaust fan to take steam away from either the shower or the washing machine, so that water vapour must either condense on the walls and other internal surfaces or reach the window at the far end of the room.
75. Consequently, of the opinions of the two experts I prefer that of Mr Newell, which is similar to the general thrust of Mr Naughton's written report. That is, that the original water intrusion that occurred five years ago caused damage to the ceiling and walls above the shower recess. I do not accept that any of the moisture that was detected by the experts at the time of their respective inspections, or that is now present in the walls, is related to something that happened over five years ago.
76. I am satisfied on the evidence that the water passing through the slab and penetrating the ceiling above the shower recess in the Applicant's Unit was caused by the Respondent, because she turned on the taps from which the water emanated. It then passed through her leaking shower base and the crack in the slab and then dropped into the shower recess in the Applicant's Unit.

**Is the cause of action statute barred?**

77. The first complaint about the water penetration occurred in July 2008 is more than six years before the commencement of this proceeding.
78. Section 5 of the *Limitation of Actions Act* 1958 provides (where relevant) as follows:

“5. (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued—

.....

(d) Actions to recover any sum recoverable by virtue of enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.”
79. Mr Mason submitted that the damage sustained by the Applicant's Unit continued until around the mid-2010. Mr Mason said that since the suffering of damage was the gist of the action, the entire claim falls within the limitation period. The Applicant said in paragraph 12 of her witness statement that she inspected her unit on 8 February 2010 “...and that the water damage was continuing and was now becoming severe.” She did not say that she witnessed

any water penetrating the unit on that occasion. Rather, it appears as though she was commenting upon the condition of the unit.

80. It is established on the evidence that there was leaking into the apartment in July 2008. The further complaints would suggest that there were further water flows but when they occurred is not known, nor is there any evidence at all as to how much water entered the Applicant's Unit on each occasion. More significantly, precisely when the damage to the ceiling and the walls above the shower recess occurred is also unknown.
81. Mr Mason submitted that the cause of action did not crystallise until the damage or loss was sustained in full. Otherwise, he said, an applicant would be estopped from bringing further claims for subsequent losses.
82. Liability under the Water Act arises when damage to property is suffered from an unreasonable flow of water. Each unreasonable flow that causes damage gives rise to a separate cause of action. The only source of water established by the evidence is the shower base in the Respondent's Unit. Although there is no precise evidence as to the flows that may have caused the damage, it seems likely that they occurred whenever the shower was used. That this is likely to be the case is confirmed by the fact that the flows ceased when the Respondent ceased using her shower.
83. I think therefore that any proceeding with respect to damage to property caused by an unreasonable flow of water that occurred more than six years before the commencement of this proceeding is statute barred. I am satisfied on the evidence that the damaged ceiling and the upper walls of the shower recess were caused by a succession of unreasonable flows of water from the Respondent's Unit but I do not know to what extent the damage was caused by flows that occurred before or after the commencement of the limitation period. By the time of the later flows, the damage now complained of might already have been sustained.
84. Nevertheless the Applicant has alleged that the condition of the unit continued to deteriorate after the commencement of the limitation period, due to successive flows of water that continued until the Respondent ceased to use shower. She was not challenged on that assertion and although I have doubts as to how she could have known that was the case, that is her evidence.
85. I must therefore find that the present condition of the ceiling and walls above the shower recess are to some degree the result of flows of water that occurred less than six years before the commencement of this proceeding. To that extent the proceeding is not statute barred.

### **Injunctive relief**

86. The Applicant seeks an order that the cause of the water ingress in the Respondent's Unit be repaired and certified. That goes beyond what she is entitled to but I propose to make an order restraining the Respondent from allowing any water to enter her shower recess until such time as it has been properly repaired to ensure no leakage into the Applicant's Unit.

## **Damages**

87. The substantive part of the claim is for damages. The Applicant must show that she has suffered damage within the meaning of s.15(1)(c) of the Water Act from the flow of water the Respondent caused.
88. I find that the damage to the ceiling and walls above the shower recess were caused by the successive flows referred to, some of which occurred more than six years before the commencement of this proceeding. The difficulty that I have is assessing the amount it will reasonably cost to reinstate the ceiling and repaint the walls above the shower recess. That is the extent of the damage caused. The repair of the crack in the slab is not included because that was clearly not caused by any of the flows.
89. There is no clear evidence of what that small scope of work will cost. Essentially, it is a job for a painter and the area in question is small but there is also the 40 year old vermiculite to repair. It must also be borne in mind that it will be necessary in any case to replace the ceiling in order to repair the crack in the jointly owned slab which was not caused by any flow of water. In the absence of any specific evidence, and subject to the question of double recovery, I will assess damages at \$1,000.00.

## **The loss of rent claim**

90. The Applicant also claims that, because of the condition of the Applicant's Unit the rental that she received for it was reduced.
91. It was let to Mr Paul Velasco on 6 February 2010 for 12 months at a rental of \$340 per week. At the time that he took possession of the Applicant's Unit the water flows had occurred since July 2008 and were continuing, although probably only when the shower was used. It does not appear whether he was aware of the water flows at the time that he agreed to the amount of rent to be paid although he had been living in the unit for some time before entering into the tenancy agreement so if and to the extent any flows of water impacted upon the rental value of the unit, one would expect that he would have been aware of them. He was not called to give evidence and it is not established that he paid a lesser rent because of the damage the flows of water caused to the ceiling and upper wall of the shower recess as distinct from the general condition of the bathroom and the unit as a whole.
92. The Applicant said in her witness statement that she did not increase the rent to the previous tenants because she was afraid of losing them and that she only marginally increased the rent when Mr Velasco signed the tenancy agreement because of the water damage to the unit. There is no complaint in any of the emails to the Owners Corporation that the rental value of the unit was affected by the matters complained of until 19 December 2012. It would seem from the context of these assertions in her witness statement that what she is talking about is the overall condition of the bathroom and bedroom the unit, not simply the ceiling and walls above the shower recess

93. The period of Mr Velasco's first tenancy ceased on 5 February 2011. By that time the flows had ceased and it was open to the Applicant to repair the small amount of consequential damage they caused. It appears from the material that the reason she did not do so was that she wanted the insurance company to pay for it and the insurance company would not pay until satisfied that remedial work had been done to the Respondent's Unit to ensure that no future flow of water would occur.
94. However the Respondent was not legally obliged to repair her shower base. Instead she elected to cease using the shower altogether and to decommission it. It is an election that many people perhaps would not have made but she was entitled to make it. The decision to delay repairs in order to have them paid for by an insurer was that of the Applicant and cannot be sheeted home to the Respondent. The Respondent's legal obligation was not to cause a flow of water into the Applicant's Unit and how she did that was up to her.
95. Given the small amount of damage caused by the flows I am not persuaded that there has been any consequential loss of rent arising from it.

#### **Double recovery**

96. Since I have assessed damages at only \$1,000.00 and it appears that the Applicant has already received an amount of \$12,500 by way of compensation for the same alleged losses, the question arises whether any further award of damages should be made for the amount that I have assessed.
97. In the case of *Boncristiano & anor v. Lohmann & ors* [1998] 4 VR 82, the Court of Appeal adopted and applied the following passage from the judgement of Oliver L.J. in *Townsend v. Stone Toms & Partners* (1984) 27 B.L.R. 26 (at p.38):

“The starting point, and one on which there is a good deal of clear authority, is that where a plaintiff with concurrent claims against two persons has actually recovered all or part of his loss from another, that recovery goes in diminution of the damages which will be awarded against the defendant.

A plaintiff can never, as I understand the law, merely because his claim may lie against more than one person, recover more than the total sum due.”
98. Although I alluded to the amount recovered from the Owners Corporation in the course of argument I am and not satisfied that I gave Mr Mason an adequate opportunity to direct submissions on this point.
99. I will therefore direct that any such submissions be filed and served by 18 December 2015. Any such submissions should include any application for costs or other orders.
100. Following receipt of submissions, final orders will then be made.

**SENIOR MEMBER R. WALKER**