**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. W59/2008

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## CATCHWORDS

Section 157(1) *Water Act 1989*; s 5 *Limitation of Actions Act 1958*; Preliminary questions relating to whether Applicant's cause of action is statute barred; meaning of 'continuing cause of action'; Applicants' claims for loss of income based upon land damaged by increased soil salinity prior to 5 May 2002, statute barred; Claims relating to pre-2002 affected land dismissed.

| | |
|---|---|
| **FIRST APPLICANT** | Michael Robert Pumpa |
| **SECOND APPLICANT** | Christine Elizabeth Pumpa |
| **THIRD APPLICANT** | Trevor John Pumpa |
| **SIXTH APPLICANT** | William Raymond George Hepburn |
| **SEVENTH APPLICANT** | Gloria Jean Gracie |
| **EIGHTH APPLICANT** | Merrian Joyce Hepburn-Thamm |
| **NINTH APPLICANT** | Robyn Gayle Hepburn-Gillard |
| **TENTH APPLICANT** | James Ross Hepburn |
| **ELEVENTH APPLICANT** | Stephen John Hepburn |
| **TWELFTH APPLICANT** | Rag Hepburn & Co Pty Ltd |
| **RESPONDENT** | Goulburn Murray Rural Water Corporation |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Vice President Judge Jenkins<br>Member G Sharpley |
| **HEARING TYPE** | Preliminary Hearing |
| **DATE OF HEARING** | 25 and 26 May 2015 |
| **DATE OF ORDER** | 22 July 2015 |
| **CITATION** | Pumpa v Goulburn Murray Rural Water Corporation (Building and Property) [2015] VCAT 1101 |

## ORDER

1. The Applicants' claims pursuant to s 157(1) of the *Water Act 1989*, for economic loss suffered after 5 May 2002 in relation to parts of their land that had become affected by salinity before 5 May 2002, are statute barred pursuant to s 5 of the *Limitation of Actions Act 1958*.
2. The Applicants' claims the subject of this Preliminary Hearing, relating to the pre -2002 affected land, are dismissed.

**Judge Jenkins**
**Vice President**

**Member G Sharpley**

**APPEARANCES**

| | |
|---|---|
| For Applicants | Mr J Pizer QC with Mr M Hosking of Counsel |
| For Respondent | Dr R J Sadler of Counsel |

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# REASONS

## NATURE OF APPLICATION

1 The Applicants have made a claim against the Respondent under s 157(1) of the *Water Act 1989* (the 'Water Act').

2 On 18 August 2014, the Tribunal ordered that there be a separate trial of two preliminary questions:

a. In this proceeding, each Applicant claims that a flow or flows of water - occurring as a result of the Respondent's conduct - caused them to suffer loss and damage. Assuming the Tribunal were to accept those claims, are they nevertheless statute barred in their entirety by reason of s 5 of the *Limitation of Actions Act 1958* (Vic)?

b. If not, what is the character of the loss and damage that is not statute barred?

3 By reason of the way in which the Applicants now construct their claim, the above questions have been modified in the manner set out below.

4 On 26 May 2015, the second day of the Preliminary Hearing, the Tribunal made the following Orders:

> For the purpose of considering the 'Separate Questions' as defined in the Orders dated 18 August 2014, by consent, the parties are as follows:
>
> (a) The Fourth and Fifth Applicants, Raymond Alan George Hepburn and Gloria June Hepburn, are removed as parties to this proceeding.
>
> (b) William Raymond George Hepburn of 1334 Winlaton Road, Fish Point VIC 3585, is joined as the 'Sixth Applicant'.
>
> (c) Gloria Jean Gracie of Unit 13, 23-25 Westminster Avenue, Dee Why NSW 2099 is joined as the 'Seventh Applicant'.
>
> (d) Merrian Joyce Hepburn-Thamm of 1887 Western Highway, Pimpinio VIC 3401 is joined as the 'Eighth Applicant'.
>
> (e) Robyn Gayle Hepburn-Gillard of 59 Windham Street, Narrawong VIC 3285 is joined as the 'Ninth Applicant'.
>
> (f) James Ross Hepburn of 321 Noorong Road, Murray Downs NSW 2734 is joined as the 'Tenth Applicant'.
>
> (g) Stephen John Hepburn of 101 Splatt Street, Swan Hill VIC 3585 is joined as the 'Eleventh Applicant'.
>
> (h) Rag Hepburn & Co Pty Ltd of 101 Splatt Street, Swan Hill VIC 3585 is joined as the 'Twelfth Applicant'.

## BACKGROUND

5 The parties prepared an Agreed Statement of Facts dated 22 May 2015 for the limited purpose of the Preliminary Hearing. Reference need be made only to parts of such Statement.

6 The Barr Creek Drainage Diversion Scheme (the 'Scheme') was constructed by the State Rivers and Water Supply Commission in 1968 and is now operated by the Goulburn Murray Rural Water Corporation (the Respondent). The purpose of the Scheme is to reduce the amount of saline water discharged into the Murray River. This purpose is achieved by collecting highly saline, irrigation drainage water discharged into the Barr Creek and pumping it into four lakes, which were intended to be used primarily as evaporation ponds.

7 The largest of the four lakes is Lake Tutchewop which is the northernmost discharge point for the Avoca River during pronounced wet seasons. Prior to the development of the Scheme, Lake Tutchewop was a freshwater lake which dried up during extended drought periods and rarely discharged.

8 The Applicants own or occupy (or owned or occupied) land which is in the vicinity of Lake Tutchewop, generally situated between Lake Tutchewop and the Murray River, which is further to the North.

9 Following the construction of the Scheme, Lake Tutchewop was regularly filled with saline water and over the ensuing years some lower portions of the Applicants' lands became affected by salinity.

10 By the 1980's the Applicants were unable to grow crops on the affected parts of their land. The Applicants also contend that further parts of their land became affected by salinity after the 1980's, including after 5 May 2002. The affected parts have remained salt affected to the present-day.

11 On 5 May 2008, the Applicants commenced a proceeding against the Respondent under s 157 of the Water Act. The Applicants claim that, as a result of the Respondent's conduct in relation to the operation of the Scheme, water flowed onto their land and that water caused damage to their property (salinization) and subsequent economic loss.

12 The Applicants claim for damages is in two parts:

a. economic loss suffered after 5 May 2002 in relation to parts of the land that had become affected by salinity before 5 May 2002 (**pre-2002 affected land**); and

b. damages to property and economic loss suffered after 5 May 2002 in relation to land that became affected by salinity after 5 May 2002 (**post-2002 affected land**).

13 The Applicants were aware, and the Respondent agrees, that by the 1980's there were areas of their land that had been salinized and degraded to the extent that they became economically unviable for cropping, although continued to be used for occasional grazing, for weed control. The

Applicants allege that further salinization occurred after the 1990's and also after 5 May 2002 (disputed by the Respondent), although the precise affected areas are yet to be identified. In particular, it is not yet clear what areas were not salinized and continued to be used for cropping up to 5 May 2002, which became salinized and unsuitable for cropping thereafter.

14 The Respondent concedes that the Applicants' claims are not statute barred to the extent that land first became salinized after 5 May 2002 and within a 6 year period prior to the issue of proceedings. Accordingly, the initial question for determination is now more confined. The Respondent notes that the Applicants' reliance upon 'salinity creep' occurring after May 2002 has been raised only recently and the precise areas allegedly affected have not been identified.

15 The parties agree that from the late 1980's it was no longer economically viable to crop the areas of the land which have been salinized and degraded.

16 The areas of the land that are salinized and degraded have not been remediated. At all relevant times it was physically possible to remediate the areas of the land that was salinized and degraded. However, the Applicants agreed that it was not economically viable to remediate their respective affected land because the likely cost of such remediation significantly exceeded the market value of that land; and they either did not or have no plan to remediate such land.

17 The precise nature and extent of the Applicants' claims underwent some significant changes and clarification over the course of the Preliminary Hearing. For the purpose of these Reasons, the Tribunal will deal with the final construction of the Applicants' claims, as presented at this Preliminary Hearing.

18 Accordingly, the only question addressed in the Preliminary Hearing is whether the Applicants or any of them, have a claim for economic loss incurred after 5 May 2002 in respect of land which was already salinized and degraded prior to that date.

## EXPERT EVIDENCE

19 Numerous expert reports have been filed. Particular reference was made to the reports of David McKenzie[1] and Ian Gibb,[2] both of whom also gave oral evidence. In addition, the Applicants' solicitors filed 'Notes on Calculation Methods' summarising the reports of Messrs McKenzie and Gibb.

20 Mr McKenzie was asked to determine the diminution in the value of each of the properties, as at 28 November 2013, attributable to the presence of the salt affected land. In making his valuations:

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1 Three reports each dated 13 December 2013, Exhibit A – T Pumpa property; Exhibit B – T&M Pumpa property; and Exhibit C – Hepburn property.

2 Reports dated 15 and 16 January 2014; 17 February 2014; 26 March 2014; and 4 April 2014.

a. Mr McKenzie assumed that, as at 28 November 2013, the low lying areas of the properties, identified by reference to the 'Land Subject to Inundation Overlay', were salt affected; and

b. Mr McKenzie was not asked to and did not consider whether the size of the areas of affected land changed over time.

21 Mr Gibb was asked to prepare a claim for damages for each of the properties, taking into account the reports of Mr McKenzie and certain other information. For the purposes of his reports:

a. Mr Gibb adopted Mr McKenzie's figures for the size of the areas of affected land, subject to one change in relation to the Hepburn property; and

b. Mr Gibb was not asked to and did not consider whether the size of the areas of affected land changed over time.

22 Mr Gibb identified two components of loss in relation to each of the properties:

a. Loss of past profits as a result of inability to farm the land during the period 2002 to 2008; and

b. Loss of capital value of the land that has been degraded, reflecting loss of future profits as a result of inability to farm the land.

23 The schedule of losses produced by the Applicants' solicitors, which relies upon the reports of Messrs McKenzie and Gibb, refer to both loss of profits and diminution of capital value. Applicants' Counsel confirmed that the claim, the subject of the Preliminary Hearing, is limited to loss of profits only.

24 The methodology employed by each of the above experts may be the subject of further analysis in a future hearing. For the purpose of the Preliminary Hearing, it is appropriate to note the following relevant evidence given under cross-examination:

25 Mr McKenzie agreed that:

a. He was asked to assess current values of the properties;

b. Farmland is valued as an economic value which reflects its capacity to produce profit in the future;

c. Assuming that external factors and inflation remain unchanged, if it is accepted that the properties became salinized and degraded in the 1980's and at least by the 1990's were no longer economically viable to crop, then the value of the properties would have remained unchanged between the 1980's and now;

d. If the areas of salinized and degraded land remained unchanged between the 1990's and now, then there would not have been any change in the value of the land;

e. Salinization is a significant issue in Murray Goulburn farms; and

f. If remediation were successful, the value of the land would increase, however, there may be a cost associated with maintaining desalinized land.

26 Mr Gibb agreed that:

a. The cost of remediation cannot be economically justified given that the Applicants were growing low value crops. The outcome may be different in the case of high value crops;

b. In this instance, a prudent farmer would not remediate land in the short to medium term. Improved technology theoretically could make remediation of the land viable in the longer term;

c. He understood that the land had not been cropped since the 1990's because of the salinization. Furthermore he agreed it was prudent not to crop and therefore avoid loss;

d. The land value fell in the 1990's as a result of the salinization when crops could no longer be produced;

e. His method of land valuation, based upon a capitalisation of future profits, differed from the method used by Mr McKenzie;

f. The loss of land value which occurred in the 1990's would incorporate an amount for loss of profits. Accordingly if there had been a claim for diminution of land value in the 1990's then there would be no further claim for loss of profits;

g. His reports note periods of limited water allocation and drought years which may affect normal productivity;

h. The Fish Point Farm had never cropped barley between 2009 and 2014;

i. His reports identify areas which are salinized; and

j. His methodology for calculating losses changed between reports.

27 Although there are aspects of the above expert evidence which may become relevant in a future hearing, for the purpose of the Preliminary Hearing the Tribunal is satisfied that the expert evidence supports the following propositions:

a. The cost of remediating the salinized land is uneconomic and therefore unviable at least in the short to medium term. In the longer term the economic viability would depend upon improved technology and even then may entail an ongoing cost; and

b. Once the land has been rendered salinized and degraded for productive farming, the consequent reduction in capital value of the land will incorporate an adjustment for loss of future earning capacity.

## RELEVANT LEGISLATION

28 Section 16 of the Water Act deals with the liability of persons arising out of the flow of water. Section 157 deals with the liability of Authorities arising out of the flow of water. Relevant parts of both provisions appear below. Significantly, s 16(1)(c) and s 157(1)(b) are in identical terms. Accordingly, authorities dealing with s 16 applications are relevant to issues raised in this application and are referred to below.

29 Although its Amended Statement of Claim dated 9 August 2013 relies only upon causes of action provided by s 157 of the Water Act,[3] the Applicants have previously asserted that they were entitled to make claims under both s 157 and s 16.[4]

30 In an earlier appeal from VCAT against the strike out of all the Applicants' claims, Justice Cavanough summarised the differences in pursuing claims under either section:[5]

> There are substantial differences between the respective conditions of liability under those sections. For example, under s 157, although the Tribunal needs to be satisfied that the flow of water has occurred as a result of "intentional or negligent conduct" on the part of an Authority, claimants have the benefit of a reverse burden of proof in that regard. Moreover, claimants under s 157 do not need to be concerned about whether or not the flow of water was "reasonable", whereas a condition of liability under s 16 is that "the flow is not reasonable": s 16(1)(b). Perhaps influenced by considerations of that kind, counsel for the plaintiffs indicated in their oral submissions before VCAT and again before me that the plaintiffs relied principally on s 157 rather than s 16. In any event, it has not been suggested that, by reason of context or otherwise, the particular provisions of s 16 that were ultimately in question in this appeal might require an interpretation different from that of the corresponding provisions of s 157. Hence, although the claim under s 16 in respect of the BCDDS has not been abandoned and will remain alive before VCAT on remittal, I will hereafter refer principally to s 157 rather than s 16 in explaining why I have reached my abovementioned conclusions.

31 Justice Cavanough also clarified that the damage caused by the water, referred to in s 157(1)(b)(ii), is damage caused by water constituted by a flow as distinct from, the 'movement' of water causing the damage.

32 Section 157(1) of the Water Act, so far as relevant to the current preliminary proceeding, provides:

> 157 **Liability of Authorities arising out of flow of water**
>
> (1) If—

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3 Paragraph 11 of the Amended Statement of Claim.
4 *Pumpa & Ors v GMRWC* [2010] VSC 169 at [15] per Cavanough J.
5 *Pumpa & Ors v GMRWC* [2010] VSC 169 at [15].

(a) as a result of intentional or negligent conduct on the part of an Authority in the exercise of a function under Part 8, Part 9, Division 2, 3 or 5 of Part 10, or Part 11 or any corresponding previous enactment, a flow of water occurs from its works onto any land; and

(b) 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 Authority is liable to pay damages to that other person in respect of that injury, damage or loss.

(2) If it is proved in a proceeding brought under subsection (1) that water has flowed from the works of an Authority onto any land, it must be presumed that the flow occurred as a result of intentional or negligent conduct on the part of the Authority unless the Authority proves on the balance of probabilities that it did not so occur.

…

(4) The following provisions apply with respect to a proceeding brought under subsection (1)—

(b) the proportion (if any) of the responsibility of the Authority for the injury, damage or loss must be assessed and only that proportion of the assessed damages must be awarded against the Authority;

(c) in assessing damages in respect of damage to property or economic loss the measure of damages is the direct pecuniary injury to the person bringing the proceeding by the loss of something of substantial benefit accrued or accruing and does not include remote, indirect or speculative damage;

(d) if damages are assessed in the proceeding in respect of any continuing cause of action, they may, in addition to being assessed down to the time of assessment, be assessed in respect of all future injury, damage or loss and, if so, the Authority is not liable to pay any further damages in respect of that injury, damage or loss.

33 Other provisions of the Water Act to which the Tribunal was referred are set out as follows:

**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.

(3) If the person who caused, or interfered with, the flow (as the case requires)—

(a) is the servant of another person and acted in the course of the servant's employment; or

(b) is the agent of another person and acted within the scope of the agent's authority—

that other person is liable to pay damages in respect of the injury, damage or loss.

(4) The existence of a liability under subsection (3) does not extinguish the liability of the servant or agent under subsection (1) or (2), as the case requires.

(5) If the causing of, or the interference with, the flow (as the case requires) was given rise to by works constructed or any other act done or omitted to be done on any land at a time before the current occupier became the occupier of the land, the current occupier is liable to pay damages in respect of the injury, damage or loss if the current occupier has failed to take any steps reasonably available to prevent the causing of, or the interference with, the flow (as the case requires) being so given rise to.

(6) The existence of a liability under subsection (5) extinguishes the liability under subsection (1) of the person who caused the flow

or the liability under subsection (2) of the person who interfered with the flow (as the case requires).

**17 Protection from liability**

(1) A person does not incur any civil liability in respect of any injury, damage or loss caused by water to which section 16 or 157 of this Act or section 74 of the **Water Industry Act 1994** applies except to the extent provided by this Act.

**19 Jurisdiction of Tribunal**

(1) The Tribunal has jurisdiction in relation to all causes of action (other than any claim for damages for personal injury) arising under sections 15(1), 16, 17(1) and 157(1) of this Act or at common law in respect of the escape of water from a private dam.

…

(3) In exercising jurisdiction conferred by subsection (1), the Tribunal—

(a) may by order, whether interim or final, grant an injunction (including one to prevent an act that has not yet taken place) if it is just and convenient to do so; or

(ab) may make an order for payment of a sum of money awarding damages in the nature of interest; or

(b) may make an order that is merely declaratory.

(3A) Nothing in subsection (3) takes away from or affects the Tribunal's powers under section 123 or 124 of the **Victorian Civil and Administrative Tribunal Act 1998**.

…

(5) The Tribunal may in respect of any works that give rise to a cause of action of a kind referred to in subsection (1) make any order with respect to—

(a) compensation for damage to land; or

(b) the continuation, removal or modification of works; or

(c) payment of the costs of the removal or modification of works—

that it considers appropriate.

…

(9) In determining a cause of action arising under section 15(1), 16, 17(1) or 157(1) of this Act the Tribunal must apply to the questions of causation and remoteness of damage the same tests as a court would apply to those questions in an action based on negligence.

## APPLICANTS' CLAIM

### Post-2002 affected land:

34 The Applicants submit that their claim for damage to property and economic loss suffered after 5 May 2002 is based on a cause of action that accrued after 5 May 2002. The Respondent admits that this claim is not statute barred, at least in relation to the First, Second and Third Applicants.

35 In relation to the remaining Applicants (who either own, farm or farmed the Hepburn land), the Applicants say that, due to a mis-description, the wrong Hepburn family members were named as Applicants. Thus, the Fourth and Fifth Applicants should be removed as parties, and the Sixth to Twelfth Applicants should be joined. The Respondent raised concerns about their joinder. As a consequence, by consent and for the purpose of the Preliminary Hearing, Orders were made for the removal and joinder of parties, as set out above, but without prejudice to the Respondent's right to later submit that those Applicants should either be removed as parties or that the applicable limitation period commences in 2009 rather than 2002.

36 The Applicants submit that they are entitled to recover damages for the following kinds of loss and damage in relation to the post-2002 affected land:

<u>First and Second Applicants</u>

a. loss of profits in relation to their post-2002 affected land between 5 May 2002 and late 2008; and
b. diminution in value of their post-2002 affected land when the land was sold in 2008, reflecting loss of future profits in relation to that land;

<u>Third Applicant</u>

c. loss of profits in relation to his post-2002 affected land between 5 May 2002 and 2009; and
d. diminution in value of his post-2002 affected land when the land was sold in 2009, reflecting loss of future profits in relation to that land;

<u>Sixth, Seventh, Eighth and Ninth Applicants</u>

e. diminution in value of their post-2002 affected land as at the date of assessment, reflecting loss of future profits in relation to that land;

<u>Sixth, Tenth and Eleventh Applicants</u>

f. loss of profits in relation to the post-2002 affected land they farmed between 5 May 2002 and 26 October 2005;

Twelfth Applicant

g. loss of profits in relation to the post-2002 affected land it farmed between 26 October 2005 and the date of assessment.

## Pre-2002 affected land

37 The Applicants submit that their claim for economic loss suffered after 5 May 2002 in relation to the pre-2002 affected land is based on causes of action that accrued after 5 May 2002. The Applicants make this submission on the basis that:

a. The Applicants' claim is based on a continuing cause of action, so a fresh cause of action accrues each time the Applicants suffer economic loss; and
b. The Applicants suffered economic loss in relation to the pre-2002 affected land after 5 May 2002.

Continuing cause of action

38 Applicants' Counsel characterised a continuing cause of action, for the purpose of the preliminary questions, as a cause of action that relates to a continuing wrong (such as a continuing trespass or continuing false imprisonment) or a continuing state of affairs that causes damage (such as a continuing nuisance). It is different to a cause of action that relates to a single wrong ('a single cause of action').

39 Accordingly, it was submitted that where damage is an element of a continuing cause of action, a fresh cause of action will accrue each time that damage is suffered.[6] By contrast, where damage is an element of a single cause of action (such as a single negligent act causing damage), the cause of action accrues only once, when the damage occurs.

40 Section 157(4)(d) of the Water Act expressly contemplates that a cause of action under s 157 may be a 'continuing cause of action'. A cause of action under s 157 will be a single cause of action where it relates to a 'flow of water' that occurs once (as in the case of a flood), or to water that causes damage once and for all (as in the case of fast-moving water destroying a building). By contrast, a cause of action under s 157 will be a continuing cause of action where it relates to a 'flow of water' that occurs continuously (as in the case of continuing seepage), or to water that causes recurrent damage over time (as in the case of standing water weakening a retaining wall).

41 The Applicants submit that their claim in relation to the pre-2002 affected land involves a continuing cause of action because it relates to damage - in the form of economic loss - that continues to occur over time, and not to damage that was caused once and for all before 5 May 2002.

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[6] See *Earl of Harrington v Corporation of Derby* [1905] 1 Ch 205 at 227. See also *D'Aquino v Trovatello* [2015] VSCA 78 at [55].

42 In determining whether a claim in relation to a continuing nuisance was statute barred in *D'Aquino v Trovatello*,[7] McLeish JA (with whom the other members of the Court of Appeal agreed) said:[8]

> [I]t is important to observe that, quite apart from the conduct pleaded to have been engaged in after July 2006, including after June 2007, it would be possible for a fresh cause of action in nuisance to accrue as a result of damage (or aggravation of damage), occurring after that time but attributable to a continuing state of affairs which commenced outside the limitation period.

43 The Tribunal will deal with the D'Aquino case in more detail below, but note at this point that the claim in that case was in nuisance.

44 The Applicants submit that a fresh cause of action under s 157 of the Water Act can accrue in similar circumstances. There is nothing in the text of s 157(1) to suggest that the 'flow of water' described in s 157(1)(a) must occur at the same time as the damage described in s 157(1)(b). As long as the two are causally connected, a cause of action will accrue when the damage is suffered. So, if a flow of water gives rise to a continuing state of affairs, with the result that the water later causes damage to property, or causes a person to suffer economic loss, then a cause of action will accrue at the time the damage is suffered. The Applicants submit that this is precisely what happened in their case.

Comment

45 In simple terms, the Applicants' reliance upon a continuing cause of action appears to be predicated upon the following assumptions:

a. The damage to property, occasioned by the flow of water, gave rise to a cause of action which could have been acted upon prior to 2002, but failure to do so did not prejudice future causes of action;

b. The salinized and degraded property, while economically unviable was theoretically capable of being remediated and therefore could not be described as permanently and irrevocably damaged; and

c. The Applicants suffered economic loss from 5 May 2002 by reason of the continuing state of affairs created by the salinization of the Applicants' land, which gave rise to a separate cause of action for each day that the economic loss was incurred.

46 The Applicants further submitted that this is not a case where a flow of water caused damage once and for all, as might happen if a piece of farming machinery was submerged, or a building was knocked over by fast-moving water. If the Applicants' land had been permanently damaged, then the cause of action would have been a single cause of action. Here, because the water created a state of affairs that is continuing and remediable, the Applicants' claim is based on a continuing cause of action.

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7 [2015] VSCA 78.
8 [2015] VSCA 78 at [55].

47 In the Tribunal's view, for reasons further developed below, the Applicants' analysis of a continuing cause of action in the circumstances is fundamentally flawed. In particular:

a. The Applicants provided no authority in support of their submission that the potential for remediation, even where it is accepted to be uneconomic, is a basis for a continuing cause of action; and

b. There is a fatal disconnect between the primary damaging event, namely the increased salinization caused by the flow of water (in fact quite a complex mechanism, in the circumstances); and the 'damage' said to be constituted by the future loss of profits occasioned by the degraded land.

The Applicants suffered economic loss after 5 May 2002

48 The Applicants submit that once it is established that the Applicants' claim in relation to the pre-2002 affected land is based on a continuing cause of action, it follows that a fresh cause of action will accrue each time the Applicants suffer loss or damage. The Applicants submit that they have suffered - and continue to suffer - economic loss in relation to the pre-2002 affected land since 5 May 2002.

49 In general, a cause of action in relation to economic loss will accrue when it can be shown that the plaintiff has suffered actual damage, rather than damage that is merely prospective. The Applicants relied upon the following observations made by the High Court in *Wardley v Western Australia*:[9]

> Economic loss may take a variety of forms and, as Gaudron J noted in Hawkins v Clayton [(1988) 164 CLR 539 at 600-601], the answer to the question when a cause of action for negligence causing economic loss accrues may require consideration of the precise interest infringed by the negligent act or omission. The kind of economic loss which is sustained and the time when it is first sustained depend on the nature of the right infringed and, perhaps, the nature of the interference to which it is subjected. With economic loss, as with other forms of damage, there has to be some actual damage. Prospective loss is not enough. (Citations omitted; emphasis added)

50 The Applicants submit that the above underlined proposition is particularly true in relation to continuing causes of action. At common law, where there is a continuing cause of action, a plaintiff can recover damages only for losses incurred to the date of assessment, and must bring a new claim (on a fresh cause of action) for losses incurred after that date.[10] By contrast, for a single cause of action, damages are assessed once and for all - a plaintiff

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9 (1992) 175 CLR 514 at 527, Mason CJ, Dawson, Gaudron and McHugh JJ.

10 See *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245 at 262.

can recover damages for losses incurred to the date of assessment, and for prospective losses.[11]

Comment

51 The case of *Hawkins v Clayton* is considered in more detail below. In the Tribunal's view, it is readily distinguishable from the current case.

Applicants' Analysis of s 157(4)(d) of the Water Act

52 Section 157(4)(d) of the Water Act alters the common law position in relation to the recovery of damages for continuing causes of action under s 157, by allowing a plaintiff to recover damages in respect of future loss. Recognising that this would leave defendants vulnerable to future claims on fresh causes of action, s 157(4)(d) also provides that, where damages are assessed once and for all in respect of a continuing cause of action, the defendant is not liable to pay further damages in respect of the relevant loss or damage.

53 The Applicants submit that there are three reasons why, in the context of a continuing cause of action under s 157 of the Water Act, the Applicants suffered economic loss in relation to the pre-2002 affected land after 5 May 2002, and not when the land became saline.

54 First, s 157(4)(b)(iii) of the Water Act specifically uses the words 'causes … [a] person to *suffer* economic loss'. A person does not 'suffer' a loss of profits in respect of a given period until that period has passed. Or, to put it another way, a person does not 'suffer' economic loss until the time when the person would otherwise have obtained the corresponding economic gain, has passed. On the words of s 157(1)(b)(iii), no cause of action in respect of economic loss can accrue until the economic loss is 'suffer[ed]'.

55 Secondly, in the context of a continuing cause of action, no cause of action in respect of economic loss can accrue until the economic loss is suffered because, until that time, there remains a possibility that the state of affairs giving rise to the continuing cause of action will stop. If the Applicants' land were rehabilitated, then the economic loss would cease. Until the economic loss is suffered, it is merely a prospective or contingent loss, not yet sufficient to give rise to a cause of action.

56 Thirdly, s 157(4)(d) of the Water Act contemplates that, where there is a continuing cause of action, no cause of action will accrue until loss is actually suffered. Section 157(4)(d) allows a plaintiff to recover damages once and for all in respect of future loss, and protects a defendant from liability in relation to future causes of action that might accrue in respect of that loss. If a cause of action in respect of economic loss under s 157 accrued before that loss was actually suffered, there would be no need for s 157(4)(d) to do either of these things, and an important part of s 157(4)(d)

[11] See *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 at 132.

would have no work to do. It is an established principle of statutory interpretation that such a result is to be avoided.

57 Applicants' Counsel further submitted that the economic losses claimed by the Applicants flow directly from the continuing state of affairs and are not within the terms of s 157(4)(c) 'remote, indirect or speculative damage'.

58 The Tribunal will respond to the above analysis below.

## Recoverable damages

59 The following revised schedule of losses was provided by the Applicants following the Hearing. Significantly, the Applicants have now abandoned any claim for diminution in value of their pre-2002 affected land, as previously claimed.

### The M Pumpa Property

60 The First and Second Applicants claim damages for loss of profits incurred between 5 May 2002 and 4 December 2008 in relation to the pre-2002 affected areas of the M Pumpa Property. This claim is currently calculated in the amount of $85,975 (in 2014 dollars) (being the sum of the amounts for 2003 to 2008, as set out in Appendix II to the report of Ian Gibb dated 4 April 2014).

61 The First and Second Applicants also claim damages for loss of profits incurred between 5 May 2002 and 4 December 2008 in relation to the post-2002 affected areas of the M Pumpa Property. The precise value of this claim has not yet been assessed.

62 The First and Second Applicants no longer claim damages for loss of profits incurred after 4 December 2008.

### The T Pumpa Property

63 The Third Applicant claims damages for loss of profits incurred between 5 May 2002 and 27 August 2009 in relation to the pre-2002 affected areas of the T Pumpa Property. This claim is currently calculated in the amount of $109,714 (in 2014 dollars) (being the sum of the amounts for 2003 to 2008, as set out in Appendix I to the report of Ian Gibb dated 4 April 2014).

64 The Third Applicant also claims damages for loss of profits incurred between 5 May 2002 and 27 August 2009 in relation to the post-2002 affected areas of the T Pumpa Property. The precise value of this claim has not yet been assessed.

65 The Third Applicant no longer claims damages for loss of profits incurred after 27 August 2009.

### The Hepburn Property

*Loss of profits from 5 May 2002 until 26 October 2005*

66 The Sixth, Tenth and Eleventh Applicants claim damages for loss of profits incurred between 5 May 2002 and 26 October 2005 in relation to the pre-2002 affected areas of the Hepburn Property. This claim is currently calculated in the amount of $57,944 (in 2014 dollars) (being the sum of the amounts for 2003, 2004 and 2005, as set out at page 3 of the report of Ian Gibb dated 17 February 2015).

67 The Sixth, Tenth and Eleventh Applicants also claim damages for loss of profits incurred between 5 May 2002 and 26 October 2005 in relation to the post-2002 affected areas of the Hepburn Property. The precise value of this claim has not yet been assessed.

*Loss of profits from 26 October 2005 until the date of assessment*

68 The Twelfth Applicant claims damages for loss of profits incurred between 26 October 2005 and the date of assessment in relation to the pre-2002 affected areas of the Hepburn Property. This claim is currently calculated in the amount of $143,881 (in 2014 dollars) (being the sum of the amounts for 2006 to 2014, as set out at page 3 of the report of Ian Gibb dated 17 February 2015).

69 The Twelfth Applicant also claims damages for loss of profits incurred between 26 October 2005 and the date of assessment in relation to the post-2002 affected areas of the Hepburn Property. The precise value of this claim has not yet been assessed.

*Loss of future profits*

70 Either the Sixth, Seventh, Eighth and Ninth Applicants or the Twelfth Applicant claims damages for loss of future profits in relation to the pre-2002 affected areas of the Hepburn Property from the date of assessment, assessed once and for all in accordance with s 157(4)(d) of the Water Act. This claim is currently calculated in the amount of $220,500 (in 2015 dollars) (using the figure of $210,857 as set out on page 10 of the report of Ian Gibb dated 16 January 2014, rounded down to $210,000, and then converted to 2015 dollars as set out on page 3 of the report of Ian Gibb dated 17 February 2015).

71 Either the Sixth, Seventh, Eighth and Ninth Applicants or the Twelfth Applicant claims damages for loss of future profits in relation to the post-2002 affected areas of the Hepburn Property from the date of assessment, assessed once and for all in accordance with s 157(4)(d) of the Water Act. The precise value of this claim has not yet been assessed.

72 Whether the Sixth, Seventh, Eighth and Ninth Applicants or the Twelfth Applicant is the proper claimant in relation to the item of economic loss identified above is a question to be determined on the application for their continued joinder. The answer to this question turns on the factual issue of

whether the Twelfth Applicant is likely to be farming the land for the duration of the period the subject of the claim.

## RESPONDENT'S RESPONSE

73 The Respondent's response to the Applicants' submissions may be stated concisely as follows:

a. Any claim in relation to pre-2002 affected land is barred by s 5 of the *Limitation of Actions Act 1958* (Vic);

b. The potential for remediation of salt affected land, in the circumstances of this case, is irrelevant. Indeed, given adequate funding, it is possible to remediate or replace almost any asset;

c. The land was damaged by the water causing the salinity in the 1970's and 80's which rendered it economically unviable for agricultural use. As a result, there is no continuing cause of damage or action after that date. The salinization was a single cause of action and damages can only be assessed once and for all;

d. The Applicants' claim could have been brought and concluded in the 1990's. The then Applicants would have been 'within time' and if successful may have recovered loss of profit until such time as the assessment, and also a sum for diminution in value to land (which would be based upon a capitalisation of future profits). At that time they would have been fully compensated for lost land value and loss of profits which they had actually suffered within the limitation period.

74 In the Tribunal's view, for reasons further developed below, each of these propositions are consistent with relevant legislation and authorities.

## ANALYSIS

75 In summary, the Applicants concede that they could have made a claim in the 1990's for either, loss of capital value to their land; or loss of future profits, relying on s 157(4)(d). However, having not made a claim until May 2008, they concede that their claim for loss of capital value is statute barred but not their claim for loss of future profits, because it relies upon a continuing cause of action.

76 The primary issue to be determined, consistent with the way in which the Applicants have argued their case, is whether the intentional or negligent conduct of the Respondent gave rise to a continuing cause of action in the way characterised by the Applicants.

77 It was initially unclear whether the Applicants relied upon an interpretation of s 157(4)(d) predicated upon paragraph (d) creating a new or separate cause of action. The cause of action is clearly created by s 157(1) and Applicants' Counsel confirmed as much. The matters otherwise addressed

under subs (4) are in the nature of machinery provisions which are only concerned with the assessment of damages.

### Remediation of Salinized Land

78 The Applicants' case appears to place critical reliance upon the notion that the salinized land is not permanently damaged or irretrievable because it is simply a matter of cost.

79 In the Tribunal's view, largely for the reasons articulated by the Respondent, this proposition is misconceived. Indeed, if the Applicants' analysis were correct, it would create an entirely speculative and unrealistic timeframe for the finalisation of the Applicants' claims.

80 While there does not appear to be any issue that it is physically possible to remediate the salt affected land, equally, there is no reasonable prospect of such remediation being undertaken in this case. It has never been attempted by any of the Applicants; and the parties have agreed that to date and for the foreseeable future, it is not economically viable.

81 Expert opinion also confirms that the cost of remediating the salinized land was and continues to be uneconomic and therefore unviable at least in the short to medium term. The Applicants have provided no evidence as to the possible or likely improvement in the economic prospects for remediation in future. It remains therefore purely speculative and cannot reasonably justify the Applicants' claim of a continuing cause of action.

82 Accordingly, the Tribunal accepts the Respondent's submission that the theoretical potential for remediation is irrelevant to whether the cause of action is continuing. Remediation should be regarded as relevant only if there is a reasonable prospect of remediation occurring. The examples given by the Applicants serve to confirm such principle. A piece of farm machinery which has been submerged or a building knocked over by fast moving water are also, theoretically, capable of being restored or rebuilt. However, in each case it is uneconomic and unrealistic to do so. Like the salinized land in this case, they are a 'once and for all loss' because they are properly regarded as 'dead and beyond redemption'.

### Statutory Limitation Period

83 Under s 157(1), and having regard to the 6 year limit imposed by s 5 of *Limitation of Actions Act*, a person has 6 years to commence proceedings for damage which 'the water causes'. Here the water flow occurred in the late 1980's, when the process of increased soil salinity commenced. The damage to the property caused by that water occurred in the late 1980's. The 'water' must cause economic loss to be 'suffered'. The 'economic loss' must be a 'direct pecuniary injury' to the Applicant and it must be something 'accrued or accruing' and not 'indirect, remote or speculative' (see s 157(4)(c)).

84 The only damage was suffered when the land value fell in the late 1980's. Agricultural land is an economic asset which derives its value from its use to produce profits. Once the ability to produce that profit is destroyed, the value of the land value falls. The land value is based on a capitalisation of future profits.

85 The claim for future economic loss is calculated on a capital loss and is the same loss (in real terms) as would have been recoverable if the proceeding had been brought in the 1990's.

### What is the 'Damage' and when did it accrue

86 Cases to which the Tribunal were referred include: claims relying upon the tort of nuisance, which is actionable when the wrongful act is done, but without proof of damage; and claims relying upon the tort of negligence, which is actionable only upon proof of damage. Section 157(1) creates a statutory cause of action which is actionable only upon proof of damage, from which time the cause of action accrues. In this context, damage is often referred to as the 'gist of the action'. Accordingly, new and identifiable damage is required to support each cause of action under s 157(1).[12]

87 It should be noted that at this point that there is no suggestion in this case that the Scheme was of itself unlawful or beyond the power of the Respondent or its predecessor to construct. Equally, there is no question that a cause of action accrued upon the construction of the Scheme. The flow of water of itself was not an actionable event as in the case of water escaping from a dam thus creating a nuisance upon entering a neighbour's property.

88 Section 157(1)(b) contemplates that damage may take the form of personal injury, property damage or economic loss. However, there must be a nexus between the causes of the damage, in this case the flow of water which was highly saline, and the consequential damage, which was the salinized and degraded land. In the Tribunal's view, this is the 'missing link' in the Applicants' case.

89 Although the process of salinization to the Applicants' land, which occurred following construction of the Scheme, is likely to have taken some years, the Applicants have not sought to identify delineated or progressive stages of damage. Rather, the Applicants have merely claimed, and the Respondent concedes, that affected parts of their land were unable to sustain cropping by the 1980's. The Applicants further claim (not conceded by the Respondent) that further parts of their land became similarly affected after the 1980's and after 5 May 2002. Without evidence, it is pure speculation as to what stages of salinization in fact occurred.

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[12] *Body Corporate 18236 v Body Corporate* 25805 [2003] VCAT 1342 at [27 per Macnamara DP.

90 For the purpose of illustrating how s 157(1) could have applied to a properly constructed 'continuing cause of action' the following scenario is posed, selecting entirely arbitrary dates.

91 In 1986, a landowner issues proceedings relying upon s 157(1), claiming loss of productive capacity and capital value to saline affected parts of his land. The landowner proves:

a. no material increase in the soil salinity and a normal average cropping pattern up to say 1980;

b. an ongoing process of flow of highly saline water into the underlying water table;

c. a progressive increase in soil salinity and consequential reduction in cropping capacity for each year from 1981 until 1986; and

d. by 1986, the level of salinization in affected soil is now sufficient to render those parts of the land permanently damaged for any future cropping.

92 In this circumstance, the landowner would be entitled to recover loss of profits after 1980 up to when cropping effectively ceased; and a further amount reflecting the loss in capital value of the affected land. This is the category of damages to which s 157(4)(d) is directed. The landowner's loss of future profits and productive capacity of the land is compensated by the damages which equate to the capital loss. The Tribunal makes no determination at this stage as to the appropriate methodology for making such calculation.

93 In the artificial example given above, if the landowner had instead issued proceedings in say 1983, when the salinization was still progressing, but there was still some residual cropping capacity; then the landowner could have recovered lost profits up to the date of issuing proceedings, being within the limitation period, together with damages representing any diminution in the value of the land for loss of future profits. If subsequently, there was further increased soil salinity causing additional damage, reduction in crop capacity and/or loss of land value, a new cause of action would arise.

94 By contrast, what the Applicants are seeking to do in this case is claim for loss of profits in respect of saline affected land which had long lost its crop productive capacity. The claimed loss of profits from and after 5 May 2002 does not arise from any further additional damage from a flow of water. Rather the loss of profits purports to be a measure of the damage suffered and concluded many years before. A further mischief implicit in such claim is the temporal disconnect between the occurrence of the damage to land which rendered it unproductive from some time in the 1980's and a claim for loss of profits from 2002 onwards, predicated upon the assumption that the relevant Applicant would have in fact undertaken such crop production.

The claim is fundamentally speculative and remote and, in the Tribunal's view, precisely the kind of claim which s 157(4)(d) seeks to preclude.

95 The damage caused by the water (constituted by the flow) was complete sometime in the 1980's when the damaged land proved unproductive for cropping and remediation was not and has never been considered an option. The loss of profit for a future period (here claimed from 2002 and ongoing) was not additional or separate damage suffered as a consequence of any further or additional flow of water.

96 The Tribunal concurs with the Respondent's analysis to the effect that the question of whether there is a continuing cause of action is circular. The Applicants assert it is a continuing cause of action because they suffered new economic loss each year from 2002 in the form of a loss of profits. In reality, there was no additional or ongoing loss of profit because that loss was subsumed within the depreciated land value in the late 1980's, when the physical damage to the land was concluded, in the sense of rendering the land non-productive. There is no continuing cause of action without a continuing loss.

### Relevant Authorities

97 The Tribunal will deal briefly with the authorities which each party principally relied upon and which, in the Tribunal's view, do not support the Applicants' construction of their claim.

98 There is no issue that a cause of action accrues upon the occurrence of damage. It will become apparent upon examining a number of relevant cases that the real issue becomes, what is the relevant 'damage'.

99 By way of background, the following description of a continuing wrong is a useful starting point.

> A continuing wrong is one in which the defendant's act or omission causes injury or damage recurrently to the plaintiff, day by day until the wrong is remedied or rendered irremediable. It differs from the notion of aggravation of damage, in that a continuing wrong does not necessarily increase the harm suffered by the plaintiff; it differs from the idea of successive occurrences of damage in that the defendant who commits a continuing wrong is guilty of more than one isolated wrongful act.
>
> In the tort of nuisance, an example of a continuing wrong is the creation of a state of affairs on the defendant's land which unreasonably interferes with the plaintiff's amenities; the plaintiff would be able to recover for all the harm suffered during the relevant limitation period preceding the commencement of the action.
>
> In the tort of negligence, a continuous wrong is committed by the defendant's failure to take reasonable action - by nonfeasance as opposed to misfeasance. An example is a solicitor who negligently fails to advise the executor named in a will of the death of the testator; the limitation period runs from the time that the omission is remedied

> and the executor informed. In other cases of nonfeasance giving rise to an action in negligence where the defendant's failure to act is subsequently rendered incapable of being remedied, time begins to run from the date on which the nonfeasance becomes irremediable. At any time prior thereto the defendant, by fulfilling the relevant duty, would have prevented the plaintiff from suffering any harm, and it is therefore only when the omission can no longer be remedied that the plaintiff can be said to have incurred a loss.[13]

100 It is necessary to approach with some caution cases which rely upon a cause of action in nuisance by reason that the cause of action arises upon the occurrence of the nuisance or trespass and not upon proof of damage.

101 Both parties referred the Tribunal to a number of cases concerning a 'continuing cause of action'.

102 The Applicants cited *Earl of Harrington v Corporation of Derby*[14] as authority for the proposition that, where damage is an element of a continuing cause of action, a fresh cause of action will accrue each time that damage is suffered. Further statements made by Buckley J in that case place this proposition in better context and also highlight the necessity to examine the factual circumstances of each case:

> It cannot be disputed that for one cause of action all damages incident to it must be recovered once, and once only: so that, for instance, if by the removal of the soil the defendant causes the walls of the plaintiff's house to crack, the plaintiffs cause of action is one, and one only and that none the less because the house does not at once shew all the damage done to it, but manifests subsequently by degrees that the damage had been done… If the result of the act is that one damage is done today and another subsequently, there is nothing to prevent a fresh action toties quoties fresh damage is inflicted… It is the result of an act done today damage results a year later, the cause of action arises, not at the date of the act, but a year later when damage results. No cause of action arises from the act if it, at that date, created no damage. The right of action arises, not from the act, but from the resulting of damage from the act… There is however a further case with which this section is particularly concerned, namely a continuing act which produces subsequently from day-to-day a recurrent damage. There is thus created within the principal which I have stated a fresh cause of action every day and this, I can see is what is referred to in this section by the words "in case of a continuance of injury or damage". The words do not mean or refer to a damage inflicted once and for all which continues unrepaired, but a new damage recurring day by day in respect of an act done, it may be, once and for all at some prior time, or repeated, it may be, from day-to-day. In such a case there is… a continuing cause of action.[15]

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13 Law of Torts, fourth edition Balkin and Davis LEXIS-NEXIS Butterworths 2009 at [28.20].
14 [1905] 1 Ch 205 at 227.
15 At 226-227.

103 In the Tribunal's view, there is nothing in the reasoning of Buckley J which gives any support to the Applicants' claim for economic loss. The facts in *Harrington's* case were somewhat complex and concerned various sources of pollutants being fed into a river which found their way downstream onto various parts of the plaintiff's property. There was limited recovery against the defendant, by reason of the legitimate interest acquired by third parties, but the reference to a continuing cause of action arose in the context of a continuing state of affairs created by acts done by the defendant, which caused a continuing flow of pollutants onto the plaintiff's land. Notably, *Harrington's* case does not consider the issue of remediation.

104 *Harrington's* case was cited with approval in *Jackson v Redcliffe CC & Anor*[16] in which the appellant's claim against the local council was based in alleged nuisance, negligence and breach of statutory duty. The appellant suffered recurrent damage occurring every time it rained. Her property was allegedly inundated as a result of action by neighbours. While the appellant had to re-plead her case the court noted:

> While recovery would appear to be barred in respect of the period prior to December 2001 [being more than the period of limitation prior to proceedings having been issued] a claim could be mounted in respect of losses thereafter, up to December 2007 when the proceeding was commenced.[17]

105 The South Australian case of *Glasson v Fuller and Ors*[18] is the only case to which the Tribunal was referred which also deals with land degraded by salinity. This case concerned adjoining landowners. In 1902, the defendant Fuller erected a dam across a creek which ran through his land, making irrigation channels on either side. No system of drainage was provided for returning water to the creek in time of flood. The defendants Ragless purchased Fuller's land in 1913 and continued to maintain the dam and channels. When flooding occurred, large quantities of water discharged onto the defendant's land via the channels. On two occasions, in 1909 and 1918, this flood water extended onto the plaintiff's land, which was lower and further downstream of the creek. The effect was to cause the water table to rise and underground saline waters to come to the surface of the plaintiff's land. As a consequence, on each occasion, the area of the plaintiff's land affected by salinity increased and the fertility of his land was seriously diminished.

106 The plaintiff issued proceedings on 27 May 1920. The evidence showed that all damage done by Fuller's diversion had occurred prior to 24 May 1914. Poole J held in part that:

a. The plaintiff's claim against Fuller was statute barred in respect of the escape of water prior to February 1913; but the damage accruing since 27 May 1914 could be recovered against the defendants Ragless;

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16 [2009] QCA 38.
17 At [20].
18 [1922] SASR 148 at 160.

b. In 1917, the dam was washed away and reconstructed by Ragless, there being no evidence that Fuller authorised such reconstruction;

c. Fuller was not liable for any damage which occurred after the reconstruction; and

d. The construction of the dam was not a wrongful act and as there was no evidence that Fuller had authorised its use in a manner to cause harm, the plaintiff could not recover anything from Fuller for damage caused in the period prior to 1917.

107 In the course of his judgment, Poole J observed:

> The defendants Ragless committed no wrong by the mere correction of the dam and the making of the channel. The wrong consisted not in making the dam or extracting the water, nor in allowing it to escape underground to the underground water flow below the plaintiff's land, but in doing these things and causing damage by so doing.
>
> … The plaintiff cannot succeed against the defendant Fuller in respect of any damage which may have been caused to his land by what the defendants Ragless did, and though the greater portion… of the damage done to the plaintiff's land was done as the result of Fuller's act prior to 1913, the plaintiff cannot recover anything from him owing to the operation of the Statute of Limitations, which bars the right which the plaintiff would have had if he had sued at an earlier date.

Comment

108 In the Tribunal's view, although *Glasson's* case was not a claim under s157 of the Water Act, as submitted by Respondent's Counsel, the same logic should apply, namely once land has suffered physical damage and consequent loss of value the cause of action crystallises, once and for all, and does not become a continuing cause of action.

109 In *Dermer v The Minister for Water Supply, Sewerage & Drainage*[19] the defendant statutory authority was responsible for the construction and maintenance of certain drainage works. The relevant enabling Act contained provisions for compensation to interested persons for damage actually sustained through the exercise of such statutory powers. Legal proceedings had to commence within six months of the happening of the cause of action. In 1932, the defendant had constructed a drain through the plaintiff's land which it maintained until 1939, when the plaintiff claimed damages for loss of moisture and productivity to its land. The loss of productivity was alleged to have been caused by a continuous process of extraction of soil solids and moisture, having the effect of permanently reducing its productivity. At first instance, it was held that the plaintiff was precluded by the limitation period; and furthermore that successive claims could not be brought in relation to the drain as originally constructed.

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[19] 1941 WALR 85.

110 On appeal, by way of special case stated, the Court addressed relevant questions of law. For the purpose of this case, the following extract is instructive:[20]

> The further point for decision is as to whether fresh causes of compensation from time to time arise so long as the drain is maintained in use, it being argued that the plaintiff's claim is for damage actually suffered, and for that alone; that a claim arises whenever that occurs, however small the change, and however frequent the claim, and that a fresh period of limitation commences on each such occurrence…
>
> The plaintiff does not assert a legal claim to subsoil moisture, the loss of which is the cause of the damage of which he complains. His claim amounts to a claim for *damnum sine injuria* [damage without injury]. I know of no reason why a drainage authority should be responsible for such a claim. It is true that the compensatory clause speaks of compensation for damage actually sustained, but in my opinion that means *damnum* plus *injuria, damnum sine injuria* and *injuria sine damno* being alike insufficient…
>
> … Assuming that the construction of the drain had caused compensable damage, I think a claim arose when the defendant excavated the drain. The object of the work was to take away surface and sub soil water at certain times and places and to furnish it at other times and generally to regulate soil moisture. The result of the work was that the plaintiff's land was immediately affected and has since been and in future will be continuously affected. His claim must be based on the defendant's excavation in 1932, which lowered the water level: neither that, nor the continued use of the drain since, was a wrongful act, much less a repetition and continuance of a wrongful act. It was an isolated act, legalised on a condition of compensation; and in my view that compensation, once assessed, must be in satisfaction of all loss, whether past or future, actual or contingent. Surface substance cases such as West Leigh Colliery v Tunnicliffe, 1908 AC 27, differ from the present case because there is no injuria arising from underground workings, but only when the surface subsides. They really illustrate the principle of the necessity of injuria being present. Here the damnum arises at once, and if other conditions were present they would justify an immediate claim in which future affect would be a matter for estimation and any assessment made would be final… Any other view would, in my opinion, be equivalent to granting an annuity to the plaintiff and is not at all the same as continuing to award damages for each repetition of a wrongful act as it arose.
>
> In my opinion, therefore, the maintenance of the drain, in the form in which it was originally constructed, is not a matter for which successive claims can be brought. There must be such a substantial change in its physical condition as to amount to a new work or a real reconstruction.

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[20] At 102-103.

Comment

111 The Respondent submits that the *Dermer case* presents a strong parallel with the current case. The Tribunal agrees. While the source of the damage might continue, in that case the continued presence of the drain, once consequential damage or injury had occurred, the claimant's cause of action was complete.

112 In *Hole v Chard-Union*[21] the plaintiff homeowner sought to restrain the defendant (a Municipal Sanitary Authority) from allowing sewage and other refuse to pollute a stream which ran through the plaintiff's land thus causing a nuisance to the plaintiff. An injunction restraining the defendant was granted. Despite rectification works the defendant did not completely stem the flow of pollutants. The matter eventually returned to the Court to determine the correct calculation for assessment of damages and in this context, the Court considered the meaning of a 'continuing cause of action' within the Rules of the Court. The relevant Rule provided:

> Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the date of the assessment.[22]

113 In applying this Rule Lindley LJ found as follows:

> The question is whether [the Chief Clerk] was justified in taking account of damage sustained by the plaintiff's since the date of the grant of the injunction… It is contended on behalf the defendants that it was not right in principle to do this; because any nuisance committed after the date when the injunction came into operation gave rise to a fresh cause of action, and was not a continuing cause of action in respect of which the damage could be assessed down to the date of assessment under [the Rules].
>
> What is a continuing cause of action? Strictly speaking, there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought. In my opinion, that is a continuing cause of action within the meaning of the rule. The cause of action complained of and existing in the present case appears to me precisely the kind of mischief at which rule 58 was aimed, its object being to prevent the necessity of bringing repeated actions in respect of repeated nuisances of the same kind. To adopt the argument of the defendants would be to render the rule altogether a nullity. I feel no doubt that the present case is a continuing cause of action within the rule. It is a repetition of acts of the same kind as those which had been investigated at the trial and had been decided to constitute a nuisance.[23] [Emphasis added].

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21 [1984] 1 Ch 293.
22 At 294.
23 At 295 per Lindley LJ.

Comment

114 In the Tribunal's view, the principle enunciated in *Hole's* case is still relevant to the circumstances of the current case. The precise extent of recovery available in a given case will depend upon applicable law. For instance, the extent to which damages may be recovered under s 157(4)(d) is different to the current Supreme Court Rule 51.06.[24] Hence, under para (4)(d), if a water authority constructed a drainage channel which leaked causing a flow of water over land used for cropping, in the short-term there may be no adverse consequence; however in the longer term, the crop may be compromised. An assessment of damages claimed by the affected land owner may include:

a. damage to the land;

b. damage to the subject crop; and

c. loss of profits by reference to the profits which could have been realized by an unaffected crop.

115 However, damages would not extend to loss of profits occasioned by any subsequent crop plantings because the diminished productivity would have already been compensated by the recovery of damages for diminution of value to the land.

116 The Applicants cite the judgment of Thomas J in *Barbagallo & Anor v J&F Catelan Pty Ltd & Ors*[25] as authority for the proposition that, at common law, where there is a continuing cause of action, a plaintiff can recover damages only for losses incurred to the date of assessment, and must bring a new claim (on a fresh cause of action) for losses incurred after that date. Thomas J was in fact dealing with an entirely different fact scenario and seeking to draw a distinction between the approaches taken at common law and in equity. It is appropriate to refer briefly to the relevant extract from *Barbagallo's* case, which, in the Tribunal's view, provides no support to the Applicants' case.

117 The parties were adjoining landowners. The appellants had excavated their land near its boundary with the respondents' land. While the excavation did not encroach on the respondents' land it was not in dispute that it would do so in the future. At first instance, the respondents recovered damages on the basis that erosion of their land would in the future result from the excavation. On appeal to the Full Court of the Supreme Court, Thomas J considered whether such an award of damages could be sustained at common law:[26]

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24 The Supreme Court (General Civil Procedure) Rules 2005 S.R. No. 148/2005 contains Rule 51.06 [Continuing cause of action] which provides: 'Where damages are assessed, whether under this Order or otherwise, in respect of any continuing cause of action, they shall be assessed down to the time of assessment.'

25 [1984] 1 QD R 245.

26 At 262-264.

The learned trial judge, recognising that no physical damage had yet occurred to the plaintiffs' land, assessed damages on the footing that they should cover the cost of remedial action which would prevent the threatened damage to the plaintiffs' land. While such an approach may have been appropriate in assessing the equitable damages in lieu of an injunction, it was not that approach that was open at common law. The difficulty arises from the fact that the plaintiffs' cause of action is in nuisance, which in the present circumstances, is a continuing wrong. The making of the excavation was (subject to the production of some damage or sufficient inconvenience to the plaintiff) a wrong, and the continued existence of such excavation made it a continuing wrong. The fact that the defendants, by selling the land may have put it out of their power to abate the wrong, did not make the tort any less a continuing wrong.

It is well established that damages for prospective loss are not recoverable in the case of continuing wrongs. The basis of the piecemeal assessment of damages in such cases is the fact that a fresh cause of action arises every day. It was recognised as inconsistent and absurd that there should be any allowance for prospective loss while a plaintiff retained (as he undoubtedly did) the right to bring further actions if the nuisance continued… The theory of the common law was that successive awards would persuade the defendant to cause the nuisance to be abated and that in any event the plaintiff (or his successor) would be able to recover his actual damage up to any given time… It is obvious that such a system was (and still is) cumbersome and inconvenient, and that the remedies developed by equity in such situations were superior. In some cases an injunction could require the abatement of the nuisance, and in others where it was inappropriate to issue an injunction, the power to award damages under *Lord Cairns Act* was used. This enabled assessments of damages to be made which were, for practical purposes, once and for all assessments…

So far as I am aware the distinction remains between the respective approaches of common law and the equity in this area. The common law rule is a well-recognised exception to the general rule that for one cause of action you must recover all damages incident to it by law "once and forever"… His Lordship then went on to hold that no cause of action based on loss of support would lie for an excavation until the plaintiff suffered damage and that every new subsistence, although proceeding from the original act of the defendant, would create a new cause of action for which damages might be recovered. In the present case the trial judge considered that the plaintiff's claim for damages for loss of support failed as no subsistence had occurred by the time of the trial. His honour then turned his attention to the claim based in nuisance and assessed substantial damages…

In the present case, the only damages to which the plaintiffs were entitled at common law were damages resulting from the inhibitions and inconveniences which they had so far suffered as the direct result

of the defendants' excavation… The trial Judge's award cannot be sustained at common law.

118 In *The Council of the Shire of Sutherland v Heyman & Anor*[27] the respondents purchased a house in 1975. During 1976 structural defects appeared which were caused by the subsidence of inadequate footings. The Municipal Council had approved plans and issued a building permit in 1968 and had caused its officers to inspect the house when it was under construction. There was no evidence that the footings had been inspected. The respondents did not obtain a certificate of compliance under s 317A of the *Local Government Act 1919* (NSW) or make any other inquiry of the Council about the house. They claimed that the Council owed them a duty of care and was liable to them in damages upon the basis that the structural defects had flowed from negligent inspection by the Council. The High Court found in favour of the Municipal Council. The Respondent submitted that the following observations made by Brennan J have application to the current case:

> When land or buildings which are part of land are damaged, those who have an interest in the land are entitled to recover damages for the damage done to their respective interests: [citations omitted]. The wrongdoer is liable to be sued by each plaintiff whose interest is adversely affected by the physical damage done, but the physical damage does not give rise to successive causes of action as each new manifestation of the original damage appears. In *Darley Main Colliery Co. v. Mitchell* Lord Halsbury said:
>
> > No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever. A house that has received a shock may not at once shew all the damage done to it, but it is damaged none the less then to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage is there; and so of the more complex mechanism of the human frame, the damage is done in a railway accident, the whole machinery is injured, though it may escape the eye or even the consciousness of the sufferer at the time; the later stages of suffering are but the manifestations of the original damage done, and consequent upon the injury originally sustained.
>
> There was a suggestion made by Stable J. in *Maberley v. Peabody & Co*. that, when a wall is damaged and gradually disintegrates, it may be that a fresh cause of action arises as each brick topples down and that there is a continuing cause of action until the root of the trouble is eradicated. His Lordship was, as his language reveals, referring to the possibility of a continuing cause of action in nuisance, distinguishing that cause of action from other causes of action where fresh damage is required to support successive actions. But Stable J.'s dictum led Cooke J. to observe in *Bowen v. Paramount Builders*, that

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[27] 157 [1984-1985] CLR 424.

"[p]resumably … it is a question of fact and degree whether damage is sufficiently distinct to result in a separate cause of action". That view is implicit in Lord Wilberforce's speech in *Anns* (where his Lordship acknowledges the assistance derived from *Bowen v. Paramount Builders*) and in *Pirelli v. Oscar Faber & Partners*. With great respect, that view seems to me to be inconsistent with the principle in *Darley Main Colliery Co. v. Mitchell* — the "once-for-all" rule — that is fundamental not only to the theory but to the practical operation of the law of negligence. If the "later stages of suffering" when they become much different in degree from the initial injury are to be treated as fresh damage, the once-for-all rule is of uncertain operation and the assessment of damages for initial injury must stop short of compensation for its gravest consequences. In the field of personal injury, much has been written in favour of a system that is not based on the once-for-all rule, and I do not enter that debate. But in the field of damage to real property, the notion that some degrees of damage manifested at a later stage than the initial damage constitute fresh damage is at odds with principle.

It is equally at odds with practicality. If a building is said to suffer fresh damage when, without any external cause, the initial damage reaches a certain stage of severity, successive causes of action will arise and, as the owners of the property may have changed, the causes of action may be vested in different persons. What are the implications? I shall assume that the measure of damages for this kind of damage may be either diminution in value of the property or the cost of making the damage good, dependent upon the circumstances. Then let it be assumed that vendor and purchaser both know of the original damage and its potential consequences. The first owner would be entitled to damages for the diminution in value of the property on sale, a value which might be expected to reflect the potential for further deterioration. A subsequent owner, having bought at a depressed price, acquires a new cause of action when the degree of deterioration reaches the critical stage which is seen to be fresh damage. He would be entitled to the cost of repairs. If Lord Wilberforce's view in *Anns* were adopted, the measure of damages to which he would be entitled is "the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly (depending on the circumstances) expenses arising from necessary displacement". So the first purchaser may effect only partial repairs — sufficient to eliminate the risk to health and safety. If the underlying defect is not repaired, a new cause of action would arise with each further deterioration. Next, let it be assumed that the first owner recovers the cost of repairs for damage before it reaches the critical stage, but sells for full value without disclosing that damage or making the repairs, presumably the second owner would be entitled to recover for the total loss of value in the premises once the damage reaches the critical

> stage. He would recover for damage for which the first owner could have recovered if he had known of the damage.[28]
>
> If negligence in the construction of a building can properly be seen to be the cause of physical damage to that building — a proposition to which I give no assent for the moment — the better view is that only those with an interest in the property at the beginning, when the initial damage is done, can recover. Subsequent purchasers in the position of the respondents have no cause of action. The cause of action, if it existed, is vested in the original owners unless they assign it to their purchasers (a question not raised in this case).[29]

Comment

119 In the Tribunal's view, and consistent with the Respondent's submissions, the above extract is instructive in the context of the present application in three important respects:

a. First, whether or not an initial cause of action may give rise to subsequent or continuing causes of action must be determined from a close analysis of the factual circumstances and causative events;

b. Secondly, the critical event which gave rise to a cause of action in *Sutherland's* case was the construction of inadequate footings. To the extent that there was a direct causative link between the inadequate footings and the subsequent further damage, in the form of subsidence of soil, did not give rise to a separate cause of action upon the occurrence of such further subsidence; and

c. Thirdly, in the context of circumstances equivalent to the Sutherland case, only those parties with an interest in land at the time when the initial damage was done, can recover, that is the cause of action is vested in the original owner/s.

120 In *Hawkins v Clayton*[30] the respondents were solicitors who prepared Mrs Brasier's will and held it for safe keeping. She appointed Hawkins as sole executor and left to him the balance of her estate, including a house. Hawkins was unaware that he was a beneficiary, and had ceased to have contact with her before she died in January 1975. The respondents were aware of her death and took some steps in the estate, but did not try to locate Hawkins until March 1981, although at all times he was listed in the telephone book. He obtained probate in October 1981, and in November 1982 commenced proceedings in the Supreme Court of New South Wales against the respondents, claiming damages suffered by the estate from the house having fallen into disrepair and been left vacant and from a fine imposed for late payment of duty. His action failed at first instance and in the Court of Appeal, but succeeded on appeal by majority of the High Court. The factual circumstances are clearly very different to the current

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28 At 491-492.
29 At 493.
30 (1988) 164 CLR 539 at 600-601; 78 ALR 69.

case and there were other legal factors which also determined the timing of when a cause of action first arose. In summary, the Court found that:

a. The respondents had custody of the testatrix's original will at the time of her death;

b. The respondents were in breach of a common law duty owed to Hawkins in his capacity as executor: per Brennan, Deane and Gaudron JJ (Mason CJ and Wilson J dissenting);

c. Hawkins' action was not barred by s 14(1) of the *Limitation Act 1969* (NSW): per Brennan, Deane and Gaudron JJ; since:

   i. The reference in s 14(1) to the cause of action first accruing should be construed as excluding any period during which the wrongful act itself effectively precluded the institution of proceedings. In the present case, the negligent failure of the respondents to notify Hawkins of the existence or contents of the testatrix's will effectively precluded the institution of the present proceedings until he was finally informed of his appointment as executor: per Deane J; and

   ii. Hawkins' cause of action was not complete until his assumption of the office of executor: per Brennan J.

d. Hawkins suffered loss only when the assets of the estate came under his actual control, which occurred at the earliest when he was informed of the existence of the will: per Gaudron J.

121 The judgment of Gaudron J contains a comprehensive analysis of various circumstances in which a cause of action will crystallize, where damage is the essence of such entitlement. Is the critical time when the damage actually occurs or when it is discovered or could reasonably have been discovered? Various English authorities are considered in the context of the question of accrual of a cause of action for economic loss sustained otherwise than in consequence of or in conjunction with physical damage to property. Gaudron J suggests that there may be other considerations relevant to the answer as to when a cause of action for negligence causing economic loss accrues. It may, for example, be relevant to consider the precise interest infringed by the negligent act or omission:[31]

> In actions in negligence for economic loss it will almost always be necessary to identify the interest said to have been infringed to determine whether the risk of loss or injury to that interest was reasonably foreseeable and whether a sufficient relationship of proximity referable to that interest was present so as to establish a duty of care. If the interest infringed is the value of property, it may be appropriate to speak of a cause of action in negligence for economic loss sustained by reason of latent defect as accruing when the resultant physical damage is known or manifest, for as was

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[31] 78 ALR 69 at 114.

> explained by Deane J in *Heyman* (CLR at 505) it is only then that the actual diminution in market value occurs. If, on the other hand, the interest infringed is the physical integrity of property then there is a certain logic in looking at the time when physical damage occurs, as was done in *Pirelli*. So too, if the interest infringed is an interest in recouping moneys advanced it may be appropriate to fix the time of accrual of the cause of action when recoupment becomes impossible rather than at the time when the antecedent right to recoup should have come into existence, for the actual loss is sustained only when recoupment becomes impossible. The discoverability test adopted in *Central Trust Co* seems to have been premised on the assumption that the interest infringed was the possession of a right to recoupment rather than recoupment itself. [Citations omitted] [Emphasis added].

122 The Tribunal intercedes at this point to note that the above underlined comments appear apposite to the Applicant's case. Gaudron J continued to make the following pertinent comments in relation to the nature of economic loss generally:

> In *Heyman*, Deane J pointed out (CLR at 502) that "the distinction between mere economic loss and ordinary physical loss or injury remains important in determining whether the requisite proximity of relationship exists in a particular case or category of case". It is a distinction which is equally important in determining when loss has occurred. Physical loss imports damage sustained by a physical object whether it be property or person. Economic loss, on the other hand, imports loss sustained by a juristic entity in relation to the assets or liabilities of that entity. The various and complex economic relationships which are a feature of present day economic organisation suggest that loss may manifest itself in various forms, and it is for this reason that there may be occasions when it is necessary to identify precisely the interest which has been infringed. [Emphasis added].

123 In the Tribunal's view, applying the above analysis to the current circumstances, the economic loss sought to be relied upon by the Applicants is not the damage sustained to the land which gives rise to a cause of action. Economic loss causally related to the damage sustained would have been recoverable within and up to the limit of the period allowed by the *Limitation of Actions Act 1958* together with compensation reflecting the diminution of capital land value, reflecting loss of future productive capacity. This is to be contrasted with the logic applicable in the Hawkins case:[32]

> It would be too simplistic to restrict analysis of economic loss merely to a consideration of reduced value or increased liability. However, a consideration of reduced value suffices in the present case, for the loss sustained by Mr Hawkins was the difference between the value of the assets of the estate when they came under his control as executor and the value they would then have enjoyed had he then held them in the

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[32] At 114-115.

same capacity and had they been properly managed from the time of the death of the testatrix.

Until the assets came under the actual control of Mr Hawkins they had sustained damage by deterioration and had been subject to waste, including that the real estate had not been put to income-producing use. But that was not the loss sustained by Mr Hawkins. The property was not then vested in him, notwithstanding that by s 44 of the Wills, Probate and Administration Act the grant of probate effected a vesting with retrospective effect. Nor had he suffered a loss of income. Indeed it may have been that had the real estate been under his control it would have been used for his personal occupation rather than for the production of income. What he suffered was a loss in the value of the assets referable to their not having been properly managed in the period prior to coming under his control. That loss was suffered by the executor only when the assets came under his actual control. At the earliest, that occurred when he was informed of the existence of the will in March 1981. Action was commenced within six years of that date.

124 In *Body Corporate 18236 v Body Corporate 25805*[33] the Tribunal considered an application under s 16 of the Water Act. The parties were adjoining Body Corporate property owners. The applicant claimed that in about 1996 the respondent had connected an illegal inlet pipe from its property into a pit located on the applicant's property as a result of which intermittent flooding occurred on the applicant's concrete car park, approximately 2-3 times per year, depending on heavy rainfall. The flooding caused damage by cracking. The applicant commenced proceedings under the Water Act in July 2003. The respondent alleged that the cause of action was statute barred having accrued more than six years before the date of commencement of the proceedings. The applicant claimed that its cause of action was a continuous cause of action arising from an unreasonable flow of water and consequent damage.

125 In dismissing the strikeout application Deputy President Macnamara, as His Honour then was, made the following observations and findings, after analysing amendments to the *Limitation of Actions Act 1958*:

a. Section 16(1) of the Water Act is a statutory codification of the common law tort of nuisance in so far as it relates to unreasonable flows of water;

b. A Water Act claim would be affected either by s 5(1)(a) or s 5(1)(d) of the *Limitation of Actions Act 1958*;[34]

c. The terms of s 16(1) make damage the gist of the action. In this respect, Macnamara DP distinguished *Arbuckle v President of the*

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33 [2003] VCAT 1342.

34 Refer also *Hough v Shire of Mitchell* (1996) VAR 47 in which Macnamara DP made similar findings.

*Shire of Boroondara*[35] in which Hood J identified a wrongful diversion of the watercourse as the cause of action, so that once that wrongful act had been done the cause of action was complete and the plaintiff could recover for any proven damage;

d. Each separate unreasonable flow of water constitutes a separate statutory tort contrary to the Water Act if it is demonstrated that it has caused damage.[36] While noting that the damage alleged would be the subject of evidence at the hearing, each separate statutory tort would create a separate time for the running of the six year limitation period.[37]

Comment

126 The above case clearly demonstrates a circumstance where a separate course of action accrues upon actual damage, although the action of the respondent, in that case a wrongful act, occurred at an earlier date.

127 There is no evidence that the Applicants who owned or farmed land affected by the salinization were ignorant of any material facts prior to 2002 which would have prevented them from issuing proceedings at an earlier time.[38]

128 *Seiwa Australia Pty Ltd v Owners Strata Plan 35042*[39] concerned a dispute between a unit owner in a strata plan and the Owners Corporation of that Strata plan. The plaintiff claimed damages and injunctive relief in respect of alleged breaches by the Owners Corporation of its duty under relevant legislation. In the course of His Honour's judgment Brereton J said:

> The breach of duty and its consequences in this case are closely analogous to the tort of nuisance, from which guidance can be derived for the measure of damages. Ordinarily the proper basis for assessing damages for nuisance is the diminution in value of the plaintiff's land occasioned by the breach… Reasonably foreseeable consequential losses are also recoverable, including for example loss of custom in the case of interruption to a business conducted from the premises… Or cost of relocation… Although the cost of restoring the plaintiff's property to its former condition may be recoverable… unless there is no prospect of the plaintiff performing the works… Or such costs are entirely disproportionate to the diminution in value… That does not extend to performance of works on the land from which the nuisance

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35 (1896) 22 VLR 513.

36 Reference was also made to *Glasson v Fuller* [1922] SASR 148 where the plaintiff complained of two floods caused by a dam initially constructed by the first defendant and reconstructed by the second defendant. The plaintiff was not statute barred in respect of the second flood even though the proceeding was issued beyond the limitation period for the first flood.

37 At para [36].

38 Refer also *Harris v Gas and Fuel Corporation of Victoria* [1975] VR 619 where the Full Court held that, for the purpose of an application under s 23A of the *Limitation of Actions Act 1958*, ignorance of legal rights or legal principles or the legal quality of acts or omissions is not ignorance of a 'material fact' within the ordinary meaning of that expression as used in s 23A(2) or s 23A(3)(a) to (h).

39 [2006] NSWSC 1157.

> emanates. To remove the cause of a nuisance from another party's land is an act of abatement, to remedy the nuisance. While a person affected by a nuisance is entitled to abate it, including by entering onto the land from which the nuisance arises and removing its cause… The costs of abatement are not recoverable… Unless as reasonable costs of litigation, and even then probably not if they involve going onto the land of the other party… [Citations omitted] [Emphasis added].[40]

Comment

129 In the Tribunal's view, the above comments of Brereton J confirm a principle which sensibly has broader application, namely that certain losses are only available if there is a reasonable prospect of work being performed so as to give the applicant the opportunity not to have suffered the loss.

130 In this case, the Applicants base their continuing cause of action upon the proposition that:

> … the pre-2002 affected areas have not been rendered permanently sterile, and are not dead or beyond redemption.[41] The parties agree that, at all relevant times, it was physically possible to remediate the pre-2002 affected areas. This is not a case where a flow of water caused damage once and for all, as might happen if a piece of farming machinery was submerged, or a building was knocked over by fast-moving water. If the Applicants' land had been permanently damaged, then the cause of action would have been a single cause of action. Here, because the water created a state of affairs that is continuing and remediable, the Applicants' claim is based on a continuing cause of action.

131 As indicated above, in the Tribunal's view, the distinction sought to be made by the Applicants between real estate and personal estate is misconceived. Even in the case of an item of equipment or a building, its remediation is a question of cost and economic viability. While an object can be theoretically rebuilt or repaired the cost may far exceed the value of the final product.

132 *Tom Patsuris v Gippsland and Southern Rural Water Corporation*[42] concerned an appeal from the Tribunal which had dismissed an application by the appellant pursuant to s 157(1) of the Water Act. In dismissing the appeal McDonald J had occasion to analyse s 157 and confirmed to the effect that there is no independent cause of action created by a 157(4)(d):[43]

> … the elements of the cause of action under s 157 are prescribed by that section. There is no independent duty of care in accordance with common law principles that arise under the tort of negligence. The cause of action under s 157 is a freestanding statutory cause of action.

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40 At [27].
41 Applicants' Outline of Submissions dated 27 May 2015, para 18.
42 [2014] VSC 621.
43 At [52].

> Section 157(4)(b) only operates in circumstances where there has been a finding under s 157(1)(b) that injury, damage or loss has been caused by a flow of water from an Authority's works.[44]

133 A cause of action against a solicitor for negligently failing to institute proceedings on behalf of his client within the limitation period is complete when the limitation period for bringing the client's cause of action expires.[45]

134 *D'Aquino & Ors v Trovatello & Ors*[46] also concerned adjoining landowners. In about May 2002, the defendants caused a concrete slab to be cast on their land which encroached over the boundary of the adjoining land. The plaintiffs commenced proceedings in the County Court on 21 June 2013 claiming damages by reason of trespass, nuisance and negligence. The claim was dismissed by operation of the *Limitation of Actions Act 1958.*

135 On appeal, applicants' Counsel abandoned the claims in negligence and trespass and proposed to seek leave to file and serve an amended pleading confined to a claim in nuisance for damage arising since 21 June 2007. The following further factual background is recorded.

136 Following construction of the concrete slab, a number of large concrete log bunkers were erected in which the defendants stored building and gardening material. In late 2003, the plaintiffs noticed signs of cracking in their factory floor slab. They engaged an engineer to investigate and report. On 6 July 2006, the encroaching slab was cut along the common boundary, except for part of the slab at the southern end of the properties. The remaining slab was not cut until mid-2013. The portion of the slab which was cut remained in position, sitting above the footings of the factory. The cut portion of the slab was not removed until the slab at the southern end of the property was also cut. The concrete bunkers were moved about 1 m westward, away from the plaintiff's land, in May 2006. In May 2013, rectification works commenced to repair the walls, slab, drains and offices of the factory, concluding in about October 2013. Expert evidence was set out in some detail. The leading judgment was presented by McLeish JA who noted as follows:[47]

> … The applicants seek to rely on events occurring after July 2006 and 21 June 2007 to sustain their claim in nuisance. The applicants rely on the continued presence of the concrete slab on the respondents' land and the presence and use of the bunkers on that slab, as acts causing damage to their factory.
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> … The primary judge concentrated on the question whether damage could be shown to have been caused after July 2006. Strictly speaking, the question was not whether damage continued to be

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44 At [58].
45 *Doundoulakis v Anthony Sdrinis & Co* [1989] VR 781.
46 [2015] VSCA 78.
47 At [55]-[60].

caused, so much as whether a fresh cause of action accrued after that time. In that regard, it is important to observe that, quite apart from the conduct pleaded to have been engaged in after July 2006, including after June 2007, it would be possible for a fresh cause of action in nuisance to accrue as a result of damage (or aggravation of damage), occurring after that time but attributable to a continuing state of affairs which commenced outside the limitation period.

In my opinion, *Darley Main Colliery Co v Mitchell*[48] stands for that proposition. That case involved damage to buildings on land as a result of two incidents of subsidence which were both attributable to the defendants' mining operations which had occurred more than six years before the second incident. The House of Lords held that the second cause of action did not arise until the second subsidence occurred, even though this was more than six years since the last mining operations of the defendants…

I am unable to accept that Lord Halsbury's observations are to be confined to cases pleading a cause of action for subsidence, and do not apply to actions in nuisance. In the first place, as senior counsel for the applicants pointed out, counsel for the respondent (plaintiff) in the House of Lords framed his argument in terms of nuisance. Moreover, a leading Australian text treats the case as an authority governing the question of successive occurrence of damages in nuisance.[49] Finally, there is no reason in principle why claims for subsidence of land should be treated any differently from claims in nuisance in this respect.

The position was, with respect, correctly explained by Thomas J, with whom McPherson J and de Jersey J relevantly agreed, in the context of a claim for damages for the cost of preventing damage anticipated to arise from the excavation of neighbouring land, in *Barbagallo v J & F Catelan Pty Ltd*[50]…

Contrary to the submissions of the respondents, I do not read Brennan J as having said anything to the contrary in *Sutherland Shire Council v Heyman*.[51] His Honour there set out the general principle articulated by Lord Halsbury, and after reference to *Maberley v Peabody & Co* stated that 'in the field of damage to real property, the notion that some degrees of damage manifested at a later stage than the initial damage constitute fresh damage is at odds with principle'. However, Brennan J was expressly applying the 'once and for all' rule in relation to claims in negligence. Further, his Honour distinguished *Maberley v Peabody & Co* on the basis that Stable J was in that case referring to the possibility of a continuing cause of action in nuisance, as distinct from other causes of action where fresh damage is required to support successive actions.

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48 (1886) 11 App Cas 127.

49 R P Balkin and J L R Davis, *Law of Torts* (5th ed, 2013), 807 [28.21].

50 [1986] 1 Qd R 245. I have quoted from the relevant extract from this case above.

51 (1985) 157 CLR 424, 490–491.

> For these reasons, it was legally open to the present applicants to plead a claim in nuisance and to seek to recover damages in respect of such damage as occurred after 21 June 2007.

Comment

137 In the Tribunal's view, *D'Aquino's* case does not assist in the analysis of the current case. It was a case entirely reliant upon the tort of nuisance. It also involved a complex fact scenario where, following the initial act of nuisance created by the construction of a slab partly extending onto the applicant's land, there were multiple subsequent acts performed by the defendant which arguably additionally impacted upon the plaintiff's land and buildings.

138 Finally, Respondent's Counsel posed the following scenario which, in the Tribunal's view, crystallises the basic flaw in the Applicants' claim, namely: on the Applicants' case, a claim could be made indefinitely into the future for loss of profits incurred by a current landowner if:

a. that landowner or any subsequent landowner, in full knowledge of the circumstances, purchased land which was priced below market value by reason that its economic viability has been reduced or partly destroyed by salinization which occurred; and

b. the land was purchased outside of the limitation period from the date when the salinization rendered the land, or parts thereof, unviable for normal agricultural use.

139 The Tribunal accepts the Respondent's submission to the effect that the question whether damaged property is remediable is a question relating to its economic viability. For the purpose of the current case the question becomes, has the damage sustained by salinization rendered the land or relevant parts not economically viable to remediate, that is, is this a reasonable and economically viable option [*Seiwa's* case].

## CONCLUSION

140 The Applicants claim that certain land was affected by salinity prior to 2002; and that additional parts of land were further affected by salinity post-5 May 2002. In each case and in the case of each Applicant, the precise areas affected have not been identified with any precision.

141 Respondent's Counsel referred to the areas of affected salinized land identified in the Gibb reports and upon which his valuations were based and submitted that the Applicants should now be bound by such delineations.

142 Strictly, this should be the case. Indeed, to this point there is a serious lack of precision in the Applicants' claims, both in respect of identifying relevant parties and the dates and manner in which they acquired a relevant interest in affected land; and the precise areas of claimed affected land pre- and post-2002. All of these matters may, to varying degrees, impact upon the relevance and reliability of various expert opinions.

143 Applicants' Counsel sought a further indulgence to enable the Applicants to rectify these deficits. While such indulgence will be extended at this stage, the Applicants should be on notice that they may risk incurring a successful application for costs by the Respondent to the extent that the Respondent is hereafter put to additional cost, which would have been unnecessary, had the Applicants clearly articulated the basis for their claims, in the first instance.

144 The Respondent referred to further issues which cannot be determined owing to a 'gap in factual material before the Tribunal'. These issues are not specifically addressed at this time and the Tribunal makes mention of them only for future reference:

a. The circumstances in which the First and Second Applicants and the Third Applicant became registered proprietors of their respective properties; and in particular whether the purchase price may have been below market value and thus compensated for the degree of salinization;

b. The circumstances in which the Sixth to Twelfth Applicants inclusive, acquired an interest in relevant property, which acquisition in some cases appears to have been by way of gift; and

c. The nature and timing of the interest acquired by the Sixth to Twelfth Applicants inclusive, where parts of land may have been leased from a third party.

145 Consistent with the reasons given above, the Tribunal finds that:

a. Where land was owned or occupied by any Applicant prior to 5 May 2002 and the land or any part thereof was subject to increased soil salinity as a result of the Scheme, then any claims by the Applicants pursuant to s 157(1) of the Water Act are statute barred pursuant to s 5 of the *Limitation of Actions Act 1958*, including a claim for damages in the nature of profits, past present or future, or diminution of capital value of the land affected;

b. In relation to any part of the land of the Applicants which was salinized and degraded prior to 5 May 2002, a cause of action arose under s 157(1) of the Water Act and was concluded once the damage to the land occurred, as reflected in reduced productive capacity and/or reduced market value, compared to its pre-salinized state;

c. No separate claim for damages for economic loss, based upon a cause of action in the nature of a continuing cause of action, arises in the current proceeding, in relation to land affected by increased soil salinity caused by the Scheme prior to 2002; and

d. The current proceeding does not preclude a claim by the Applicants pursuant to s 157(1), to the extent that any Applicants own or occupy land which has or part of which has been salinized and damaged subsequent to 5 May 2002.

146 The Applicants' claims, the subject of this Preliminary Hearing are statute barred and accordingly, the claims are dismissed.

**Member G Sharpley**

**Vice President**
**Judge Jenkins**