05/08; [2007] VSC 423

SUPREME COURT OF VICTORIA

SPAGNOLO & ANOR v BODY CORPORATE STRATA PLAN 418979Q & ANOR

Robson J

18, 31 October 2007

CIVIL PROCEEDINGS – PROPERTY DAMAGE CAUSED AS A RESULT OF WATER FLOWING FROM SPA IN A ROOM – GUEST OF ROOM AND PERSON TURNING ON TAP SUED FOR DAMAGE CAUSED BY OVERFLOW – CLAIM BY DEFENDANTS THAT COURT HAD NO JURISDICTION TO ENTERTAIN CLAIM – VCAT HAS JURISDICTION UNDER *WATER ACT* 1989 – FINDING BY MAGISTRATE THAT FLOW OF WATER WAS NOT FROM LAND OF A PERSON ONTO OTHER LAND – FINDING THAT THE RELEVANT PROVISION OF THE *WATER ACT* 1989 DID NOT APPLY TO THE COMPLAINT – FINDING THAT THE STATUTORY DEFENCE DID NOT APPLY TO THE DAMAGE CAUSED – COSTS – WRITTEN OFFER MADE TO SETTLE CLAIM – NOT ACCEPTED – FINDING BY MAGISTRATE THAT THE OFFER DID NOT REBUT THE USUAL ORDER AS TO COSTS – WHETHER MAGISTRATE IN ERROR: *WATER ACT* 1989, PART 2, DIVISION 2.

S. registered as the guest of a room in a property of apartments owned by the Body Corporate. Whilst there, a friend who was staying with S. made use of the spa bath in the room. The friend failed to turn off the tap. As the drainage point in the room was blocked, water overflowed thereby causing damage to the room, a common area and other apartments in the building. Both S. and his friend were sued in negligence and S. sued in contract on the agreement when he registered. At the hearing, S. and his friend raised the defence that the actions were statute-barred by operation of ss16, 17 and 19 of the *Water Act* 1989 ('Act'). The Magistrate found that the provisions of the Act did not apply and made an order on the claim. In relation to the question of costs, the Magistrate made the usual order for costs despite the fact that an offer of compromise had been served prior to the hearing. Upon appeal—

HELD: Appeal dismissed.

1. The action or failure to act about which the Magistrate had to form a view in characterising the flow of water as reasonable or unreasonable was either turning on the tap in the room or failing to turn off the tap to prevent flooding in the room or failing to ensure the drainage point functioned properly. Thus, the relevant "flow of water" which was alleged to be "not reasonable" was not "from the land of a person onto any other land" but the flow commenced within the room. The relevant flow of the water for the purpose of s16 of the Act did not begin on land outside the room where the water pipe may have come from. The relevant flow began in the room. Accordingly, the Magistrate was therefore correct in finding that the *Water Act* 1989 did not apply to the complaint in respect of the damage to the room.

2. In relation to the question of costs, the Magistrate considered and gave weight to the letters containing the offer of compromise. The offer had been withdrawn some months before the proceedings were commenced in the Magistrates' Court. In those circumstances, it was open to the Magistrate in his discretion to find that the *Calderbank* offer in the circumstances did not rebut the usual order as to costs.

ROBSON J:

Appeal

1. I have before me an appeal under s109 of the *Magistrates' Court Act* 1989 against the decision of the Magistrates' Court of Victoria made on 13 December 2006, and in particular the order that there be judgment for the second plaintiff against the first and second defendants in the sum of $2,797.61 together with costs and interest.

2. On the appeal, Mr Mark Irving of counsel appeared for the appellants (the defendants below). Mr Michael Simon of counsel appeared for the respondents (the plaintiffs below).

The matters in issue before the Magistrate

3. The first respondent, Body Corporate Strata Plan 418979Q ("Body Corporate") is a body corporate pursuant to the provisions of the Sub-division Act 1988. It is the body corporate for the property situated at 151-163 Bourke Street, Melbourne and comprising 63 strata title lots in the

form of rooms or apartments with the appertaining common area.

4. The second respondent, QOB Pty Ltd (ACN 980 978 897) (trading as Quest on Bourke) ("Quest on Bourke"), carries on business essentially as an hotelier. It leases the property concerned and lets out each of the 63 rooms or apartments on either a short or long-term basis. Quest on Bourke leases the common areas from Body Corporate and, by way of separate leases, each of the individual 63 rooms or apartments from the proprietors of those strata title units.

5. On 23 March 2005, the first appellant, Alan Spagnolo ("Mr Spagnolo"), registered as a guest of room 609 of the property in question from 23 March 2005 to 30 March 2005. Upon so registering, he signed a guest registration form and executed a terms and conditions agreement, the relevant part of which is as follows:

> "The person(s) registering as the guest(s) shall be liable for any loss or damage to the appliances, furniture, keys/passes, fixtures and all fittings in the apartment. Fair wear and tear excluded."

6. It was common ground that "the apartment" as stated in the terms and conditions referred to room 609.

7. The second appellant, Simon Vasarelli ("Mr Vasarelli"), spent the evening/night of 28/29 March at the apartment as a guest of Mr Spagnolo. On that night, Mr Vasarelli had been out socialising with Mr Spagnolo and had returned to the apartment in the early hours of the morning of 29 March 2005. Mr Spagnolo having retired for the night, Mr Vasarelli decided to make use of the spa bath. He turned on the tap of the spa bath which was apparently of a fairly large capacity and, while waiting for the spa bath to fill, he fell asleep on the couch. Some hours later he was awoken by the management, who had been alerted to the fact that a considerable amount of water had apparently flowed from the apartment into common areas and other apartments of the building damaging room 609, various common areas and six other rooms in the building.

8. Unbeknown to anyone, the drainage point in the bathroom of room 609 had become blocked and water therefore was allowed to overflow and cause considerable damage. The learned Magistrate found that the drainage facility would ordinarily have removed any water overflowing. There was no pleading by the defendants of contributory negligence or even as far as I am aware that the cause of any damage was the blocked drain rather than the acts of the defendants.

9. Mr Vasarelli admitted that he had been drinking on the evening in question, but denied being inebriated to such an extent that he was unable to properly direct his actions. He also denied that Mr Spagnolo had any idea of his intention to use the spa bath.

10. Quest on Bourke sued Mr Spagnolo in contract on the agreement in the Quest registration form and sued both Mr Spagnolo and Mr Vasarelli in negligence. Body Corporate sued both Mr Spagnolo and Mr Vasarelli in negligence.

The defence

11. Mr Spagnolo and Mr Vasarelli raised only one defence to all those claims and that is that the actions of Body Corporate and Quest on Bourke were statute barred by operation of sections 16, 17 and 19 of the *Water Act* 1989.

Magistrate's findings

12. The learned Magistrate dismissed the claims of Body Corporate against both Mr Spagnolo and Mr Vasarelli in negligence.

13. The learned Magistrate held that the actions by Body Corporate and Quest on Bourke against Mr Spagnolo and Mr Vasarelli in respect of the common areas and the rooms other than rooms 609 were barred by operation of the relevant provisions of the *Water Act* 1989. The learned Magistrate held further that such a defence did not apply to the damage caused to room 609.

14. The learned Magistrate found on the claims by Quest on Bourke in relation to the damage to room 609 that Mr Spagnolo was liable in contract alone and Mr Vasarelli was liable to Quest on Bourke in negligence.

15. The learned Magistrate found the relevant damage to room 609 amounted to $2,797.61 and,

after argument on costs, ordered that there be judgment for Quest on Bourke against Mr Spagnolo and Mr Vasarelli in the sum of $2,797.61 together with costs and interest.

The appeal

16. The appeal is made on two grounds. First, that the Magistrates' Court did not have jurisdiction to hear the proceeding or to make the orders that it made as Quest on Bourke's claim in respect to the damage to room 609 was a claim to which s16 of the *Water Act* 1989 applied and as such, by reason of s19 of the *Water Act* 1989, the claim could only be heard by VCAT. Further, the appellants say the learned Magistrate, in ordering costs against the appellants, erred in failing to give any weight to certain letters from the defendants' solicitors to the plaintiffs' solicitors as Calderbank letters.

17. The orders sought by the appellants in place of the orders made by the Magistrates' Court are:

(1) That the claim be dismissed.

(2) That the plaintiffs pay the defendants' costs of the proceeding on an indemnity basis.

The *Water Act* 1989

18. The relevant provisions of that Act are 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."
"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."
"18. Liability for damage caused by escape of water from private dam
Nothing in section 17 extinguishes the liability at common law of the owner of a private dam for any damage caused by the escape of water from that dam."
"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.
(10) Subject to sub-section (8), a proceeding based on a cause of action of a kind referred to in sub-section (1) must not be brought otherwise than before the Tribunal."
"20. Matters to be taken into account in determining whether flow is reasonable or not reasonable
(1) In determining whether a flow of water is reasonable or not reasonable, account must be taken of all the circumstances including the following matters—
(a) whether or not the flow, or the act or works that caused the flow, was or were authorised;
(b) the extent to which any conditions or requirements imposed under this Act in relation to an authorisation were complied with;
(c) whether or not the flow conforms with any guidelines or principles published by the Minister with respect to the drainage of the area;
(d) whether or not account was taken at the relevant time of the likely impact of the flow on drainage in the area having regard to the information then reasonably available about the cumulative effects on drainage of works and activities in the area;
(e) the uses to which the lands concerned and any other lands in the vicinity are put;

(f) the contours of the land concerned;
(g) whether the water which flowed was—
(i) brought onto the land from which it flowed; or
(ii) collected, stored or concentrated on that land; or
(iii) extracted from the ground on that land—
and if so, for what purpose and with what degree of care this was done;
(h) whether or not the flow was affected by any works restricting the flow of water along a waterway;
(i) whether or not the flow is likely to damage any waterway, wetland or aquifer.

(2) In taking account of the matters specified in sub-section (1), greater weight must be attached to the matters specified in paragraphs (a), (b), (c) and (d) than to the other specified matters."

The History of the *Water Act* 1989

19. The *Water Act* 1989 is the product of an overhaul of all water legislation then current in Victoria and replaced some 15 Acts[1]. The Minister, in his Second Reading Speech in the House, said that the new legislation was needed even if no changes of substance were intended.[2] The Minister said nothing of relevance about Division 2 of Part 2 which contains the relevant sections 16, 17 and 19.[3]

20. Amongst other Acts, the *Water Act* 1989 repealed the *Drainage of Land Act* 1975. The *Drainage of Land Act* 1975 included provisions giving exclusive jurisdiction to the Drainage Tribunal, which was established under that Act, in respect of civil actions arising out of the flow of water from one property to another.

21. A comparison of the provisions in Part 1 of the *Drainage of Land Act* 1975 with those in Division 2 of Part 2 of the *Water Act* 1989 indicate that the *Water Act* has essentially re-enacted the scheme established under the *Drainage of Land Act* but with some variations.

22. The *Drainage of Land Act* 1975 was stated to be an Act to make, *inter alia*, provision concerning the drainage of land. Under Part 1 headed "Rights and Duties of Occupiers of Land", a scheme was set up similar to that now appearing in Division 2 of Part 2 of the *Water Act* 1989.

23. Sub-section 4(1) of Part 1 of the *Drainage of Land Act* 1975 provided that the Drainage Tribunal was to have jurisdiction in relation to all civil causes of action arising out of:

"(a) the flowing of waters from the lands of one person in such a way as to damage the lands of any other person; or

(b) any interference with the flow of waters from the lands of any person in such a way as to damage the lands of that person or any other person."

24. Sub-section (2) provided that "any action, suit or proceeding based upon a cause of action of the kind referred to in sub-section (1) shall not be brought otherwise than before the Drainage Tribunal."

25. The *Drainage of Land Act* 1975 referred to "the flowing of waters from lands of one person in such a way as to damage the lands of any other person", whereas the *Water Act* 1989 refers to "a flow of water from the land of a person onto any other land".

26. Although differently expressed, the substance appears similar if not the same.

27. Unlike the *Water Act* 1989, the *Drainage Act* 1975 envisaged the plaintiff bringing an otherwise existing cause of action. The *Water Act* 1989, on the other hand, creates a new statutory cause of action and otherwise extinguishes any civil liability in respect of any injury, damage or loss caused by water to which, *inter alia*, s16 applies.

28. Under the *Drainage Act* 1975, actions in nuisance, negligence or the principle in *Rylands v Fletcher*[4] that involved the flow of waters from the lands of one person onto the lands of another in such a way as to damage the lands of any other person were to be brought before the Drainage Tribunal.

29. In *Oberin v Shire of Deakin*[5], Murphy J said that "without attempting to enumerate all such possible causes of action [referring to s4(1)] they would in my opinion necessarily encompass claims

founded on public nuisance, claims founded on private nuisance and claims found on negligence, including therein actions for misfeasance"[6].

Reasonable

30. A further similarity in the schemes in the *Drainage of Land Act* 1975 and the *Water Act* 1989 involves the concept of "reasonable". As indicated above, s16 of the *Water Act* 1989 requires that the flow of water from the land of a person onto any other land to be "not reasonable" in order to make out the statutory cause of action. Sub-section 16(2) of the Act refers to a "reasonable flow of water". The Act contemplates that a flow of water from one property to another is either reasonable or is not reasonable. It is the flow of water which has to be characterised as reasonable or unreasonable and not the conduct of the person sought to be held liable.

31. Section 7 of the *Drainage Act* 1975 provided for a defence to the civil causes of action to be brought before the Tribunal: "no civil action suit or proceeding shall lie against any person in respect of the causing or permitting by that person of any waters to flow onto the lands of any other person in a reasonable manner."

32. In summary, the *Drainage Act* 1975 required an existing civil action such as negligence, nuisance or a claim under *Rylands v Fletcher* to be brought before the Drainage Tribunal where there was a relevant water flow. However, in any such action no liability would be established for causing or permitting water to flow onto the land of any other person in a reasonable manner. Under the *Water Act* 1989, however, the statutory cause of action is only made out if the relevant flow of water is not reasonable or a reasonable flow of water is interfered with and the other statutory elements are satisfied.

33. On the Second Reading Speech on the *Drainage of Land Bill (No. 2)*[7] the Minister threw considerable light on the genesis of the reasonable test. He said:

> "I now turn to Part 1, which relates to the rights and duties of occupiers of land and codifies certain aspects of the common law of private drainage rights with emphasis on the 'free flow' doctrine. The Joint Select Committee heard considerable evidence proposing that the principle whereby a landowner may 'resist' the inflow of drainage waters should be superseded by new provisions aimed at securing the free flow of such water. In the course of its investigations into this evidence the committee inspected many areas to see for itself the situation cited in evidence. It concluded that in the majority of cases lower land owners had adopted measures precluding the free flow of water, and in so doing had acted unreasonably in the circumstances. The Committee therefore recommended in paragraph 9.19, that the drainage rights of landowners as fixed by common law should be superseded by statutory provisions providing for the unobstructed flow of drainage.
>
> The Committee, however, qualified this new right of 'free flow' by making its exercise subject to a number of factors. These factors, set down in paragraph 9.20 of the report, include the reasonable development and use of the upper land from whence water is to be discharged. In doing this the Committee offered a degree of protection to the lower landowner by reserving to him the right to resist the discharge of water into his land if such discharge is not reasonable. In giving effect to the Committee's recommendation, and qualification, this part of the Bill codifies certain aspects of the common law with an emphasis on the free flow principle and places in the hands of the Drainage Tribunal the responsibility to determine disputes having regard for the tests of reasonableness envisaged by the Committee and to develop an informed and consistent interpretation of the new law.
>
> The criteria which go towards the consideration of reasonableness are contained in Clause 9 and include such factors as land use, past ownership and occupation, the source of the drainage water, the contours of the land concerned and the availability of lawful points of discharge. Such factors include those proposed by the Joint Select Committee and while the Bill requires the Drainage Tribunal to have regard to such criteria it leaves it to the tribunal to decide on relevance in each particular case".[8]

34. This explanation is illuminating and under s35 of the *Interpretation of Legislation Act* 1984 I am entitled to consider, *inter alia*, reports of proceedings in any House of the Parliament and explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament.

35. The jurisdiction of the Drainage Tribunal over relevant water flow claims was replaced by the Planning Appeals Board, then by the Administrative Appeals Tribunal and finally by the Victorian Civil and Administrative Tribunal.[9]

The Application of the *Water Act* 1989

36. The complaint before the Magistrate involved reticulated domestic water for domestic consumption and use. The water flow into the spa and onto the floor was arguably not a drainage flow of water although the failure of the drainage point to properly operate may have converted the overflow from the spa into drainage water.

37. In *Coles-Myer Limited v City West Water Ltd*[10], a decision of Gillard J, his Honour considered a common law negligence claim and in doing so held that s16(1) of the *Water Act* 1989 applied in circumstances where an underground water supply main pipe owned by the defendant ruptured and flooded the basement property and ground floor levels of the plaintiffs' premises known as the Myer City Store in Lonsdale Street. In other words, his Honour held that s16 applied to water escaping from a water main pipe that had been ruptured where there does not appear to be any issue of drainage.

38. The matters referred to in s20 of the *Water Act* 1989, being matters to be taken into account in determining whether a flow of water is reasonable or not reasonable, arguably do not by their terms expressly relate to the flow of water through reticulated domestic water pipes. The matters arguably relate to drainage water.

39. If the act complained of was turning on the spa tap or allowing the spa to overflow, then the matters specified in the paragraphs of s20 arguably may not be used to judge whether the relevant flow of water was reasonable or not reasonable where the flow was caused by turning or not turning of the spa tap. On the other hand, the paragraphs may have relevance to the flow of water caused by the failure of the drainage point to safely drain the overflow water.

40. Turning to the specific paragraphs of s20, it arguably is not appropriate to ascertain whether that act of turning on the spa tap or failing to turn it off was authorised within the meaning of para (a) of s20 of the *Water Act* 1989.

41. It arguably is not appropriate to ascertain the extent to which any conditions or requirements imposed under the *Water Act* 1989 in relation to an authorisation were complied with in turning on or failing to turn off the spa tap as referred to in para (b).

42. It arguably is not appropriate to ascertain with respect to the flow of water into or out of the spa whether or not the flow conforms with any guidelines or principles published by the Minister with respect to the drainage of the area as referred to in para (c).

43. It arguably is not appropriate to ascertain whether or not account was taken at the relevant time of the likely impact of the flow on drainage in the area having regard to the information then reasonably available about the cumulative effects on drainage of works and activities in the area in turning on or failing to turn off the spa tap as referred to in para (d).

44. It arguably is not appropriate in respect of turning on or off the spa tap to ascertain the uses to which the lands concerned and any other lands in the vicinity are put as required by para (e).

45. It arguably is irrelevant to have regard to the contours of the lands concerned as required by sub-paragraph (f) in assessing the reasonableness of the flow of water into and out of the spa. The same observations arguably might be made about sub-paras (g), (h) and (i).

46. On the other hand, some of these matters may have relevance to the flow of water caused by the faulty drainage point.

47. Under sub-s 20(2) it is provided that:

> "In taking account of the matters specified in sub-section (1), greater weight must be attached to the matters specified in paragraphs (a), (b), (c) and (d) than to the other specified matters."

48. His Honour Magistrate Smith said in referring to Gillard J's decision in *Coles Myer Ltd v City West Water Ltd*[11]

> "...there is no doubt that His Honour's reasoning and findings in that case must apply to the situation here. I say this with some reluctance. Quite apart from the unfortunate failure to define

> what is precisely meant by "land", perusal of the Act and a consideration of its general intentions and purposes persuade me that the particular provisions here under consideration were not intended by the legislature to apply to what might be called domestic or commercial mishaps between adjoining properties such as occasioned by circumstances here under consideration or where water might be ordinarily stored for some domestic or commercial purpose.
>
> I am encouraged in this view by a comparison of s16(b) and the criteria set out in s20 "Matters to be taken into account in determining whether the flow is reasonable or not reasonable." The criteria there set out, to my mind, have little or no apparent nexus with or relevance to the situation with which we are here concerned, but rather appear more concerned with agriculture, mining, and irrigation activities. Furthermore, unless "reasonable" is somehow related to the conduct of the contractor or tortfeasor, it is difficult to see how as a matter of logic a flow of water causing damage to, for example, adjacent domestic properties through the agency of an overflowing bathtub could in any circumstances be described as "reasonable."
>
> As indicated above, none of the matters that are required to be taken account of under para 20 are apposite to the complaint in this case. In those circumstances, in my opinion, the statute provides little or no guidance as to what is meant by "reasonable" when applied to the flow of water caused by turning on a domestic tap to fill a bath. In my view, s20 provides further support for the argument that s16 is, as it was originally, directed to drainage water and is not intended to apply to the use of reticulated domestic water. If, contrary to my view, s16 could apply to the flow of water from a tap into or out of a spa, then there is little practical guidance, if any, in the Act of what is or is not a reasonable flow of water in or out of the spa.
>
> Be that as it may, the Act itself draws no such distinctions, and a perusal of the second reading speech of the Bill provides no assistance whatsoever."

49. The learned Magistrate held that in those circumstances he felt constrained to follow the decision in *Coles Myer*. In my view the Magistrate made some important points that may well be relevant in deciding whether the *Water Act* 1989 applies to a domestic bath overflowing.

50. Section 9 of the *Drainage of Land Act* 1975 contained similar provisions to those in s20 of the *Water Act* 1989 in determining whether any waters were caused or permitted to flow onto any lands in a reasonable manner, which were arguably limited to drainage water.[12]

51. An issue therefore remains in my opinion, of the extent, if any, the consolidation of the *Drainage of Land Act* 1975 into the *Water Act* 1989 with some amendment was intended to extend the scope of the relevant provisions of the *Drainage of Land Act* 1975.

52. I should add that no argument was put to me that the flow of water into the spa or out of the spa onto the floor only became drainage water after it left the spa and sought unsuccessfully to enter the drainage point.

53. The issue of whether or not s16 applies to waters other than drainage water arguably was not articulated before Gillard J in *Coles-Myer Ltd v City West Water Ltd*.[13]

54. In my opinion, there is still an unresolved issue as to whether or not sections 16, 17 and 19 apply to water flow other than drainage water. It is unnecessary for me on this appeal, however, to express any view on this issue one way or the other as the appeal was argued solely on the issue of whether the relevant flow of water was from the land of a person onto other land as referred to in paragraph 16(1)(a) of the *Water Act* 1989.

Appellants' submissions

55. The appellants submitted that s17 of the *Water Act* 1989 ("the Act") extinguishes liability based on contract and tort "wherever the facts establishing the injury, damage or loss by water *prima facie* established the statutory cause of action".

56. For this proposition the appellants relied on the decision of Gillard J in *Coles Myer Ltd v City West Water Limited*[14]. They further submit that s19 of the Act vests exclusive jurisdiction in VCAT to determine claims based on the statutory cause of action; relying on *Montana Hotels Pty Ltd v Fasson Pty Ltd*[15].

57. The appellants submit that in order to establish a cause of action pursuant to s16(1) of the Act, the plaintiff has to prove:

(a) that water flowed from the land of a person onto other land;

(b) that the flow was not reasonable;

(c) that the flow was caused by the defendant; and

(d) that the plaintiff suffered damage or loss.

58. The proposition in (a) is not quite consistent with the requirements of s16(1). Section 16(1) requires that "there is a flow of water from the land of a person onto any other land". It is that flow which is required to be not reasonable.

59. "Flow" is defined in Part 1 of the Act: "in relation to water, includes discharge, release, escape, percolation, seepage and passage, and includes both surface and underground flow". It is relevant to note that the definition is not exhaustive but the reference to surface and underground flow seems applicable to drainage water rather than tap water.

60. The appellants submit that the flow of water through the water pipe into the spa bath was from the land of another person into room 609. The appellants submitted that the water that flowed into the spa had come through water pipes and that space occupied by the water pipes was land. They refer, for this proposition, to *Gas & Fuel Corporation of Victoria v City of Williamstown*[16] and also to *Commissioner of Main Roads v North Shore Gas Company Limited*[17]. They further submit that water flowing through water pipes onto land is the flow of water from the land of another for the purpose of s16 of the Act. They rely on *Turner v Bayside City Council*[18].

The respondents' submissions

61. The respondents submit that the words included in paragraph 16(1)(a) "land of a person onto any other land" was intended to limit the jurisdiction to a proceeding that involved the flow from one person's land to another. The respondents point to the purposes of the Act set out in paragraph 1(b) of the Act which include "the terrestrial phase of the water cycle". Reference to those purposes suggests that the Act may be directed to the conservation and management of water resources, rather than to domestic plumbing issues.

62. As indicated above, the appellants argue that the water flowing into the spa bath in room 609 flowed through pipes which were on the land of a person other than the proprietor of room 609.

63. On that analysis, the respondents submitted that the flow of water would begin at the reservoir and pass through and over many lands of people before it reached the spa in room 609, and it could be argued just as validly on this basis that Melbourne Water caused the flow of water from the reservoir all the way to the spa in room 609.

64. In my opinion, the relevant flow of water as referred to in s16 is identified by other words referred to in that section. In particular, that flow must not be reasonable and, importantly, that flow must be caused by a person who, under the section, is liable to pay damages to the other person in respect of injury, damage or loss.

65. In those circumstances it appears to me that the person who caused the flow is the person who turned on the tap to allow water to flow into the spa or failed to turn off the tap to allow the spa to overflow or failed to ensure the drainage point properly functioned. The flow in that sense then becomes the flow of the water out of the tap into the spa or out of the spa onto the floor or the flow away from the blocked drainage point. The issue would then be whether that flow is not reasonable.

66. I have already noted that none of the matters referred to in s20 which must be taken into account in determining whether a flow is reasonable or not reasonable, would appear to apply to turning on or off a tap to fill a spa, although they may have some relevance to the failure to ensure the drainage point functioned properly.

67. In any event, if such an action as turning on a tap to fill a spa or failing to turn off a tap or failing to ensure the drainage point functioned properly could characterise the flow of water as not reasonable, then the relevant flow of water caught by s16 is the flow of water from the tap into the spa or the flow of water out of the spa onto the floor of room 609 or the flow caused by the failure of the drainage point to operate properly.

68. Assuming that the relevant sections of the *Water Act* 1989 do apply to the flows I have identified, the history of the legislation and its purpose in seeking to codify the common law supports my view that the reasonableness of the flow is characterised by actions or things failed to be done on the land from which the water flows onto other land where it causes injury.

69. In the case before the learned Magistrate, the action or failure to act about which the Magistrate would have to form a view in characterising the flow of water as reasonable or unreasonable was either turning on the tap in room 609 or failing to turn off the tap to prevent flooding in room 609 or failing to ensure the drainage point functioned properly. Thus, the relevant "flow of water" which is alleged to be "not reasonable" was not "from the land of a person onto any other land". On the contrary, the flow alleged to be not reasonable commenced within room 609.

70. I find therefore that the relevant flow of the water for the purpose of s16 did not begin on land outside room 609 where the water pipe may have come from. I find that the relevant flow began in room 609. The learned Magistrate was therefore correct in finding that the *Water Act* 1989 did not apply to the complaint in respect of the damage to room 609.

71. The learned Magistrate was entitled to embark upon and decide the claim in contract and in tort in respect of the damage to room 609. I have not been asked to decide whether or not the learned Magistrate correctly decided the claims nor do I express any view one way or the other about his decision.

72. I therefore dismiss the appellants' appeal against the decision of the learned Magistrate that the statutory defence did not apply to the damage caused to room 609.

Contract claim

73. It was assumed during the appeal that the causes of action caught by Part 2 and limited to the jurisdiction of Tribunal included the claim in contract. I do not need to decide that issue. It was not argued before me and I have decided in any event that the appeal should be dismissed on the sole ground that was argued.

74. I should mention in passing, however, that I have reservations as to whether or not the combination of sections 16, 17 and 19 apply to a claim in contract. Contractual claims do not require proof of injury, damage or loss: they are maintainable through breach alone. Accordingly, s17 may not apply to deny civil liability in contract.

75. Further, the purpose of the initial legislation in the *Drainage of Land Act* 1975 was not directed to committing claims in contract to the Drainage Tribunal and now VCAT. It would seem unreasonable that a contractual obligation could be avoided by the sections which sought to codify tortious claims relating to water flowing from land to other land.

76. In *Hocking v Western Australia Bank*[19] Griffith CJ said:

> "It is a sound rule to be applied in the construction of all Acts altering the common law, that they are to be taken to alter it only so far as is necessary to give effect to the express provisions of the Act".

77. There are arguable grounds for the view that there is no need to give effect to the express provisions of the Act to extend it to contractual claims. As indicated above, however, there is no need for me to express a view on this point.

Defence concession

78. The learned Magistrate's decision refers to the defendants conceding that the defence that they ran under the *Water Act* 1989 did not apply to the damage caused to room 609.

79. Paragraph 6 of the questions of law upon which the appeal is brought asks "Did the learned Magistrate err in law in finding that the defendants conceded that the provisions of the *Water Act* 1989 do not apply to the damage caused to room 609?".

80. On the appeal the respondents made no issue of this supposed concession.

81. The appellants disputed the concession was made. Further, the appellants submitted that, for four reasons, the concession should be ignored. First, that the Magistrate did not base any part

of his judgment on the concession. This is in fact correct. Second, that if the concession was made (which is denied), it was made after the conclusion of the evidence. At that stage it is said that all the facts necessary for the defence were already adduced. Third, it is said a fatal objection in law may be taken on appeal even if conceded at first instance. Reference was made to *Adams v Chas. Watson Pty Ltd*[20] and *Hollis v Vabu Pty Ltd.*[21]

82. Finally, it is said by the appellants that the defendants cannot waive or consent to a court exercising jurisdiction in the matter where a statute prohibits the court exercising that jurisdiction. Reference was made to *Commonwealth v Verwayen*[22] and *Norwich Corporation v Norwich Electric Tramways Company Ltd.*[23]

83. I accept these submissions, which were not disputed, and have therefore embarked on the appeal despite the observation by the Magistrate referred to above.

Costs

84. I now turn to the issue of costs. The proceedings in the Magistrates' Court commenced on 2 February 2006. Prior to the proceedings being instituted in the Magistrates' Court, proceedings had been instituted in VCAT by Body Corporate against Mr Vasarelli alone, presumably making a claim in relation to the water damage caused by the spa overflow.

85. By a letter dated 30 September 2005, Mr Vasarelli's solicitors, Mahons, wrote to LFS Legal identifying Mahons' client as Simon Vasarelli and LFS Legal's client as Body Corporate Strata Plan 418979Q trading as Quest on Bourke.

86. The letter said that Mahons were instructed to offer the sum of $6,500 "'all in' in full and final settlement of the proceeding and on the basis that your client provides both our abovenamed client and Mr Spagnolo with complete releases in respect of the matter the subject of the proceedings."

87. On the same date, LFS Legal replied to Mahons by letter saying they were instructed to reject the offer. They said further that if it was Mahons' intention to come back with an offer of $8,500, that was also rejected.

88. By a further letter dated 30 September 2005 from Mahons to LFS Legal, Mahons informed LFS Legal:

> "Please note your client's offer to accept $13,500 'all in' is rejected.
>
> We are instructed to make a final offer of $10,000 'all in' on the same basis set forth in the first paragraph of our transmission to you earlier today."

89. The offer remained open for acceptance until 4.00 p.m. that day.

90. The letter concluded with the following:

> "This offer is made so as to avoid incurring further legal costs. In these circumstances, should this offer be rejected or not accepted within the timeframe indicated and the plaintiff obtains no greater on judgment, we will raise this letter on the question of costs at which time we will seek an order that your client pay our client's costs on a solicitor/client basis. Please note we rely on the principles applied in *Calderbank v Calderbank* [1995] EWCA Civ 48; [1995] Fam 239; (1995) 3 All ER 333; [1995] Fam Law 469; [1995] 3 WLR 40 and *Cutts v Head* [1983] EWCA Civ 8; [1984] 1 All ER 597; [1984] 2 WLR 349."

Ground of appeal

91. The second ground of appeal is that the learned Magistrate erred in law in failing to give any weight to the letters dated 30 September 2005 from the defendants' solicitor to the plaintiffs' solicitor as Calderbank letters.

92. The transcript of the learned Magistrate's decision that was tendered in evidence before me merely notes that the Magistrate would hear counsel on the question of costs.

93. Mr Vasarelli, in his affidavit of 24 January 2007, said as follows about the costs issue:

> "17. Upon delivering his decision, Magistrate Smith asked for submissions about legal costs. The

> plaintiff replied [sic] with an order for costs. The defendants' council (sic) argued that order for costs ought to be made in favour of the defendant.
>
> 18. The defendants' counsel produced three letters related to offers of settlement made by the defendant prior to the issue of the proceedings. [The exhibited letters].
>
> 19. In discussion with the defendants' council (sic), Magistrate Smith said that there was no offer of compromise containing the said offers, he would not have regard to the letters before the action.
>
> 20. It is respectfully submitted that the Magistrate failed to exercise his discretion in accordance with the law by refusing to have regard to the letters containing offers of settlement before the issue of legal proceedings. As a matter of law, the Defendants are entitled to rely upon the offer of $10,000 made prior to the commencement of proceedings in support of an order for costs in their favour."

94. David Charles Wilson, solicitor for the respondents, deposed in his affidavit of 15 May 2007 as follows:

> "9. That I humbly refer to paragraph 17 of Vasarelli's affidavit. I attended the hearing on 13 December 2006 and am able to say Mr Vasarelli did not attend the hearing on 13 December 2006. Further, the respondents' counsel initially sought an order for costs which counsel for the appellants opposed.
>
> 10. That I humbly refer to paragraph 18 of Vasarelli's affidavit. The learned Magistrate inquired of the plaintiffs' counsel as to whether the Magistrates' Court proceeding was on foot at that stage. The learned Magistrate was advised that the Magistrates' Court proceedings only issued on 2 February 2006 and was not on foot at that time.
>
> 11. I humbly refer to paragraph 19 of Vasarelli's affidavit. The learned Magistrate did not indicate that there was no offer of compromise. The learned Magistrate indicated that as the letters were written at a time when the Magistrates' Court proceedings were not on foot, the letters were offers and part of a process of negotiation rather than an offer of compromise.
>
> 12. That I humbly refer to paragraph 20 of Vasarelli's affidavit. The learned Magistrate did not refuse to have regard to the letters as stated in paragraph 11 of this my affidavit. Further the letters were specifically related to a proceeding issued by the respondents at the Victorian Civil and Administrative Tribunal against the second named appellant."

95. Mr Vasarelli does not say in his affidavit that he attended the hearing at which the costs questions were ventilated. I therefore accept the version of the events given by Mr Wilson in his affidavit. Contrary to the submissions of the appellants, it appears that the Magistrate did have regard to the letters, but noted that they were made before the Magistrates' Court proceedings were on foot and related to VCAT proceedings. It must have also been apparent to the Magistrate that the offer of 30 September 2005 had lapsed before the proceedings were issued on 2 February 2006.

96. In *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority*[24] Warren CJ, Maxwell P and Harper AJA held that there is "no presumption that the party rejecting a Calderbank offer should pay the offeror's costs on an indemnity basis if the offeree received a less favourable result. The correct approach [is] to treat the rejection of a Calderbank offer as a matter to which the Court should have regard when considering whether to order indemnity costs."[25]

97. The Court went on to say the correct test for determining whether to make such an order is to consider whether "the rejection of the offer was unreasonable in the circumstances".[26]

98. The Court held that considerations one should ordinarily have regard to when determining whether the rejection was unreasonable should include 'at least the following matters:

> the stage of the proceeding at which the offer was received;
>
> the time allowed to the offeree to consider the offer;
>
> the extent of the compromise offered;
>
> the offeree's prospects of success, assessed as at the date of the offer;
>
> the clarity with which the terms of the offer were expressed;

whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it.'[27]

99. The respondents raised the issue of whether a Calderbank offer could be made prior to proceedings being commenced. In my opinion, there does not appear to be any reason in principle why such an offer could not be made prior to proceedings being commenced but the circumstances of the offer may lead to the conclusion that its rejection was not unreasonable in considering the costs in subsequent proceedings.

100. In *Brymount Pty Ltd v Cummins (No 2)*, Beazley JA of the New South Wales Court of Appeal held that one of the considerations for not exercising his discretion to consider earlier Calderbank offers made at trial was that the offers 'substantially pre-dated proceedings in [the] Court.'[28]

101. In *Trustee for the Salvation Army (NSW) Property Trust v Becker (No 2)* Ipp JA of the New South Wales Court of Appeal opined: "As the offer had so lapsed (prior to the conclusion of the trial), it was not possible for the appellants to accept it thereafter. In particular, it could not have been accepted on the launching of the appeal or thereafter. On that basis alone, it seems to me, the offer could play no part in the exercise of the discretion to order indemnity costs in regard to the appeal.'[29] His Honour also noted[30] the rule that a Calderbank offer made prior to judgment at the trial remains relevant to costs orders on appeal, citing *Ettingshausen v Australian Consolidated Press Ltd.*[31]

102. As indicated above, in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority* Warren CJ, Maxwell P and Harper AJA held that in determining the unreasonableness of the rejection of a Calderbank letter the court should contemplate 'the stage of the proceeding at which the offer was received.'[32]

103. The ground of appeal is that the Magistrate failed to give any weight to the letters dated 30 September 2005. It is apparent from the affidavit of Mr Wilson that the Magistrate did consider them and did give them weight. The offer related to other earlier proceedings. The offer had been withdrawn some months before the proceedings were commenced in the Magistrates' Court. The authorities referred to above confirm it was open to the learned Magistrate in his discretion to find that the Calderbank offer in the circumstances did not rebut the usual order as to costs.

104. I therefore reject this ground of the appeal.

Conclusion

105. I therefore dismiss the appellants' appeal with costs.

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[1] See Second Reading Speech of The Minister for Water Resources of 26 May 1989, *Hansard*, 2227.
[2] Ibid., 2228.
[3] Ibid.
[4] [1868] UKHL 1; [1861-73] All ER 1; (1868) LR 3 HL 330
[5] (1981) 45 LGRA 31.
[6] Ibid., 35.
[7] Minister of Public Works 22 November 1975, *Hansard*, 9045.
[8] Ibid., 9046.
[9] See the *Drainage of Land (Amendment) Act* 1984 (No. 10064 of 1984) that substituted the Planning Appeals Tribunal; the *Water Act* 1989 (No. 809 of 1989) that substituted the Administrative Appeals Tribunal; and the *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act* 1998 (No. 52 of 1998); s311 (Sch 1, item 105).
[10] [1998] VSC 63; (1998) 14 VAR 37.
[11] [1998] VSC 63; (1998) 14 VAR 37.
[12] Each of paragraphs (a) to (h) of section 9 are essentially repeated in some form or other in section 20 of the *Water Act* 1989.
[13] (1998) VSC 63; (1998) 14 VAR 37.
[14] [1998] VSC 63; (1998) 14 VAR 37 at [47] to [54].
[15] [1987] VicRp 11; [1987] VR 147 at 149; 62 LGRA 33, affirmed (1986) 69 ALR 258; (1986) 61 ALJR 282; (1986) 62 LGRA 46; [1987] Aust Torts Reports 80-109.
[16] [1978] VicRp 64; [1978] VR 677 at 680.25, 681.25; (1978) 40 LGRA 390.
[17] [1967] HCA 41; (1967) 120 CLR 118 at 131-2; [1968] ALR 111; (1967) 14 LGRA 413; (1967) 41 ALJR 183.
[18] Unreported, VCAT, DP McNamara, 29 November 1999 at paragraph [14].
[19] [1909] HCA 68; (1909) 9 CLR 738 per Griffith CJ at 746.
[20] [1938] HCA 37; (1938) 60 CLR 545 at 547-8.
[21] [2001] HCA 44; (2001) 207 CLR 21 at 31 and 36; (2001) 181 ALR 263; (2001) 47 ATR 559; (2001) 75

ALJR 1356; (2001) 106 IR 80.
[22] [1990] HCA 39; (1990) 170 CLR 394 at 425.
[23] [1906] 2 KB 119 at 125-6.
[24] [2005] VSCA 298; (2005) 13 VR 435.
[25] Ibid., [20].
[26] Ibid., [23].
[27] Ibid., [25].
[28] *Brymount Pty Ltd v Cummins (No 2)* [2005] NSWCA 69 at [29] per Beazley JA.
[29] *Trustee for the Salvation Army (NSW) Property Trust and Anor v Becker and Anor* (No 2) [2007] NSWCA 194 at 9 per Ipp JA.
[30] Ibid., [6].
[31] (1995) 38 NSWLR 404.
[32] *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority* [2005] VSCA 298; (2005) 13 VR 435 at [25].

APPEARANCES: For the appellants Spagnolo & Anor: Mr M Irving, counsel. McDonald Murholme, solicitors. For the respondents Body Corporate Strata Plan: Mr M Simon, counsel. LFS Legal, solicitors.
