



**IN THE SUPREME COURT OF VICTORIA
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST**

S ECI 2025 07766 Case: S ECI 2025 07766
Filed on: 23/06/2026 07:50 AM

BETWEEN

STANISLAW KORKLINIEWSKI

Plaintiff

AND

MELBOURNE WATER CORPORATION

First Defendant

AND

GHD PTY LTD (ACN 008 488 373)

First Third Party

(and others in accordance with the Schedule)

AMENDED DEFENCE

(Filed pursuant to Order 3 of the Orders dated 19 June 2026)

Date of Document: 23 June 2026
Filed on behalf of: The Defendant
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As to the allegations in the statement of claim indorsed on the writ filed 23 December 2025,
the First Defendant (**MWC**) says as follows:

1. As to paragraph 1, MWC:

- (a) admits that the Plaintiff brings the proceeding as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) on his own behalf and on behalf of persons described at paragraphs 1(a), (c) and (d);
- (b) admits that the Plaintiff brings the proceeding as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) on his own behalf and on

behalf of persons who the Plaintiff alleges have suffered loss or damage as pleaded at paragraph 1(b); and

- (c) otherwise denies paragraph 1(b), and says further that neither the Plaintiff nor the Group Members have suffered loss and damage because of MWC as alleged in the Statement of Claim.

2. As to paragraph 2, MWC:

- (a) admits that there are seven or more persons who the Plaintiff alleges are Group Members; and
- (b) otherwise denies paragraph 2, and refers to and repeats paragraph 1(c) above.

3. As to paragraph 3, MWC:

- (a) admits paragraphs 3(a);
- (b) does not admit paragraph 3(b); and
- (c) denies paragraph 3(c).

4. As to paragraph 4, MWC:

- (a) admits paragraph 4(a) and 4(b);
- (b) denies paragraphs 4(c) – (d); and
- (c) says further that Part 10, Division 4 of the Water Act imposes obligations on MWC with respect to floodplain management of MWC's waterway management district.

5. As to paragraph 5, MWC:

- (a) does not know and therefore does not admit paragraph 5(a);
- (b) admits paragraphs 5(b) – (c); and
- (c) as to paragraph 5(d), it:

- (i) admits that Part 10, Division 4 of the Water Act applies to the Land the subject of the RRV, which forms part of MWC's "waterway management district" as defined by s 3 of the Water Act; and
 - (ii) otherwise does not admit paragraph 5(d), as it does not know how the Plaintiff defines "Melbourne's classified flood plain region" or the "Melbourne Flood Plain".
- 6. MWC admits paragraph 6.
- 7. As to paragraph 7, MWC:
 - (a) denies paragraph 7(a), and says further that:
 - (i) in May 2003, requested that GHD produce within two weeks of GHD receiving survey information a HEC-RAS model to determine flood levels for the Maribyrnong River limited to the section from Plantation Street in the Maribyrnong Township to the Canning Street Ford crossing in Avondale Heights;
 - (ii) notwithstanding that MWC requested this modelling be performed in two weeks, GHD provided the modelling to MWC three months later, by report dated August 2003;
 - (b) denies paragraph 7(b), and says further that MWC requested that the model be calibrated to observed roughness values based on site visits to the area;
 - (c) denies paragraph 7(c), and says further that MWC provided GHD with a 1986 flood mitigation study by the Melbourne Metropolitan Board of Works, which study included data in relation to the 1974 Maribyrnong river flood event;
 - (d) admits paragraph 7(d); and
 - (e) denies that its instructions to GHD were deficient.

Particulars

- (i) As to 7(b), MWC relies upon the email from Adam Dunn of MWC to Gavin Hay of GHD dated 6 May 2003.

8. As to paragraph 8, MWC:

- (a) admits that, in 2003, GHD produced flood modelling and maps of the one-in-100 year Average Recurrence Interval flood extent of the following sections of the Maribyrnong River:
 - (i) the section from Footscray Road to the Maribyrnong Township;
 - (ii) the section from Plantation Street in the Maribyrnong Township to the Canning Street Ford crossing in Avondale Heights; and
 - (iii) the section from the Canning Street Ford and Stenson Street.
- (b) otherwise denies paragraph 8.

Particulars

- (i) As to (i), in February 2003, GHD provided MWC with a report titled “Maribyrnong River Hydraulic Model”.
- (ii) As to (ii) and (iii), in August 2003 GHD provided MWC with a report titled “Flood Mapping of Maribyrnong River Stages A and B”.

9. MWC denies paragraph 9.

10. MWC denies paragraph 10.

11. MWC admits paragraph 11.

12. MWC admits paragraph 12.

13. MWC admits paragraph 13.

14. MWC denies paragraph 14, and says further that:

- (a) the planning permit did not define the “applicable flood level”, including by reference to the average total energy level; and
- (b) the planning permit provided that the estimated flood level for the property grades uniformly from 6.4 metres AHD at the western corner of the property

down to 6.0 metres AHD at the northern boundary (south side of Canning Street Bridge) (cl 46(c)).

15. Save that the estimated flood level at the Western Boundary was 6.4 metres (not 6.407) MWC otherwise admits paragraph 15.
16. Save that the effect of the Finished Floor Conditions was that the finished floor levels at the western corner of the Land were required to be 7 metres above the AHD (not 7.007), MWC otherwise admits paragraph 16.
17. Save that MWC denies that the Land lay “wholly” within the Original LSIO, MWC otherwise admits paragraph 17.
18. MWC denies paragraph 18, and says further that:
 - (a) by letter dated 25 March 2009, the Planning Group sought MWC’s consent to lower the FFLs for some of 34 dwellings by 0.22m; and
 - (b) by that letter, the Planning Group sought that consent “*under Condition 37 of Planning Permit MV/16866/2004 which specifies that “Finished floor levels must be a minimum of 600mm above the applicable flood level”*”.
19. As to paragraph 19, MWC:
 - (a) admits that, on 22 April 2009, it consented to the lowering of the finished floor levels of 33 dwellings and the clubhouse at the RRV;
 - (b) admits that the adjusted finished floor levels of 25 of those dwellings and the clubhouse were below the levels required by the Finished Floor Level Conditions, and were below 6.60 metres AHD; and
 - (c) otherwise denies paragraph 19.
20. MWC admits paragraph 20, and says further that such consent was provided on the basis that flood mitigation earthworks had been carried out at the RRV to MWC’s requirements.

Particulars

- (i) MWC Submission to Independent Panel with respect to Moonee Valley Planning Scheme Amendment C151, p 3.

- 21. As to paragraph 21, MWC:
 - (a) admits that the amended LSIO was gazetted in August 2016, but denies that it caused it to be gazetted;
 - (b) admits that the effect of the Amended LSIO was that properties at the RRV were permitted to be built on land that was no longer subject to the Original LSIO; and
 - (c) otherwise denies paragraph 21.
- 22. MWC does not admit paragraph 22, as it does not know the as-built Finished Floor Levels of the properties constructed on the Land.
- 23. MWC denies paragraph 23, and says further, with respect to paragraph 23(c), that the Amended LSIO could not have affected the alleged vulnerability of the RRV to flooding, because:
 - (a) the planning permit and amended planning permit issued with respect to the Land the subject of the RRV at all material times required the FFLs to be constructed more than 600mm above the applicable 1:100 year flood levels; and
 - (b) the Amended LSIO did not alter this requirement.
- 24. Subject to production of the Loan Agreement and Residence and Management Contract at trial, and to reference to its full terms and effect, MWC admits paragraph 24.
- 25. MWC does not admit paragraph 25.
- 26. MWC does not admit paragraph 26.
- 27. MWC denies paragraph 27.
- 28. MWC admits paragraph 28.

29. MWC does not admit paragraph 29, as it does not know the flood levels at the RRV as at the time of the Flood Event.
30. MWC does not admit paragraph 30.
31. MWC does not admit paragraph 31, and says further that the Plaintiff and Group Members did not own real property at the RRV.
32. MWC does not admit paragraph 32.
33. MWC denies paragraph 33, and refers to and repeat 23 above.
34. MWC admits paragraph 34, and says further that MWC's revised modelling was not prepared by reason of the Flood Event; rather, the modelling revised by MWC was part of MWC's Greater Melbourne Flood Modelling program which commenced in 2021, before the Flood Event.
35. MWC denies paragraph 35.
36. MWC denies paragraph 36, and refers to and repeats paragraph 23 above.
37. MWC denies paragraph 37.
38. MWC denies paragraph 38, and refers to and repeats paragraph 23 above.
39. MWC denies paragraph 39, and refers to and repeats paragraph 23 above.
40. As to paragraph 40:
 - (a) MWC admits that it has statutory functions and powers prescribed by ss 202 and 203 of the *Water Act 1989* (Vic); and
 - (b) MWC otherwise denies paragraph 40.
41. MWC denies paragraph 41, and refers to and repeats paragraph 23 above.
42. MWC denies paragraph 42, and refers to and repeats paragraph 23 above.
43. MWC denies paragraph 43.
44. MWC denies paragraph 44.

- 45. MWC denies paragraph 45.
- 46. MWC denies paragraph 46.
- 47. MWC denies paragraph 47.
- 48. MWC denies paragraph 48.
- 49. MWC denies that Plaintiff and Group Members are entitled to the relief claimed at paragraph 49.

Proportionate liability defence

- 50. The Plaintiff's and Group Members' claim against MWC is:
 - (a) a claim for economic loss or damage to property in an action for damages arising from a failure to take reasonable care; and
 - (b) an apportionable claim within the meaning of Part IVAA of the *Wrongs Act 1958* (Vic) (**Wrongs Act**).

GHD

- 51. The First Third Party (**GHD**):
 - (a) is and at all material times was a corporation incorporated pursuant to the *Corporations Act 2001* (Cth); and
 - (b) engaged in the business of, inter alia, conducting hydraulic modelling.
- 52. If, which is denied, MWC is liable to the Plaintiff, then:
 - (a) in the premises of the following paragraphs, GHD is a concurrent wrongdoer within the meaning of s 24AH of the *Wrongs Act*; and
 - (b) pursuant to s 24AI of the *Wrongs Act*:
 - (i) the liability of MWC in relation to the Plaintiff's and Group Members' claim is limited to an amount reflecting that proportion of the loss and

damage claimed that the Court considers just having regard to the extent of the responsibility of MWC for that loss or damage; and

- (ii) judgment must not be given against MWC for more than that amount in relation to that claim.

Misleading or deceptive conduct

- 53. In around May 2003, MWC entered into a contract with GHD by which GHD agreed to determine and map the 1:100 year Average Recurrence Interval flood levels (**ARI Flood Levels**) of the Maribyrnong River from Footscray Road to the Canning Street Ford (**Stage A**).

Particulars

The Contract is in writing, and comprises:

- (i) the email from Adam Dunn of MWC to Gavin Hay dated 6 May 2003;
 - (ii) the letter from George Mallory of GHD to Mike Brown of MWC dated 14 May 2003 setting out a scope of works and fee estimate; and
 - (iii) the terms contained in the document “Conditions of Purchase Order Minor Services”.
- 54. In around June 2003, MWC and GHD agreed to amend the scope of the above contract such that GHD would also determine and map the ARI Levels of the Maribyrnong River from the Canning Street Ford to Stenson road (**Stage B**).

Particulars

- (i) The contract is, in part of in whole, in writing, comprising the documents particularised to paragraph 53 above.
- (ii) The document titled “GHD Monthly Progress Report” dated 30 June 2003 states “The scope of the project has changed to included (sic) HEC-RAS modelling and flood mapping from Canning Street Ford to Stenson Street (Stage B)”. MWC does not presently know whether that agreed amendment to scope was in writing or oral.

55. In August 2003, GHD provided MWC with a report by which it provided the modelled ARI Flood Levels at cross-sections of the area of the Maribyrnong River the subject of Stage A and Stage B (**GHD August Report**).
56. By the GHD August Report, and by a facsimile from GHD to MWC dated 7 August 2023, GHD represented to MWC that:
- (a) The ARI Flood Levels mapped in the August Report (**GHD Modelled Flood Levels**) were correct, accurate and reliable, and should be adopted by MWC; and
 - (b) further or in the alternative, that it had a reasonable basis for its opinion that the GHD Modelled Flood Levels were correct, accurate and reliable, and should be adopted by MWC (**GHD Representations**).

Particulars

- (i) The August Report, at page 10, states “*The modelled flood levels at each cross section, presented in Appendix A, are reliable and should be adopted...*”.
 - (ii) By facsimile from George Mallory of GHD to Mike Brown and Adam Dunn of MWC dated 7 August 2023, GHD stated “*The modelled flood levels reported at each cross section are correct and accurate and should be adopted at all times...*”.
 - (iii) The representation pleaded at paragraph 56(b) was implied in circumstances where the representation pleaded at paragraph 56(a) above was a statement of opinion.
57. The GHD Representations were made in trade or commerce within the meaning of s 18 of the Australian Consumer Law (Vic) (**ACL (Vic)**).
58. The GHD Modelled Flood Levels at the Land (or any of them) were below the true ARI Flood Levels.

Particulars

- (i) The Plaintiff alleges at paragraph 9 of its Statement of Claim that the “GHD Modelled Flood Levels significantly underestimated the 1% annual exceedance probability levels at the RRV”.

59. In the premises of paragraph 58 above, the GHD Representations, or either of them, was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the ACL (Vic) (**GHD Contravention**).

MWC’s reliance on GHD’s contraventions

- 60. In around 2004, Retirement Services Australia and Metricon Homes lodged with the Moonee Valley City Council a planning permit for the development of the Land into an aged care or retirement village facility.
- 61. In reliance upon the GHD Contravention, on 22 December 2005 MWC informed the Moonee Valley City Council that it did not object to the above application on the condition that, amongst other things, the Finished Floor Levels were above the GHD Modelled Flood Levels (**MWC Condition**).

Particulars

MWC relies upon the following parts of its letter to the Moonee Valley City Council dated 22 December 2005:

- (i) At paragraph 3, MWC stated: “Finished floor levels must be a minimum of 600mm above the applicable flood level”.
- (ii) MWC stated the GHD Modelled Levels under the headings titled “Footnote(s) to be placed on Permit” and “Advice to Council / Applicant”: “*The estimated flood level at the property grades uniformly from 6.4 metres to Australian Height Datum at the western corner of the property down to 6.0 metres to Australian Height Datum at the northern side of the property (south side of the Canning Street Bridge)*”.

62. In June 2006:

- (a) VCAT granted the above development application, subject to, amongst other things, the MWC Condition; and
- (b) the Moonee Valley City Council issued planning permit MV/16866/2004 with respect to the development.

Particulars

- (i) *Retirement Services Australia & Metricon Homes v VicRoads & Others* [2006] VCAT 1172.
 - (ii) Planning permit MV/16866/2004 issued 28 June 2006. The MWC Condition is at cl 37 of the planning permit.
63. The Amended Planning permit issued on 15 August 2011 also contained the MWC Condition.

Particulars

- (i) Amended Planning Permit dated 15 August 2011, cl 37.

Causation of loss

64. On or about 14 October 2022, heavy rain caused swelling of the Maribyrnong River, including where it runs beside the RRV (**Flood Event**).
65. If, at the time of the Flood Event, the as-constructed finished floor levels (**FFLs**) at the RRV (or any of them) were above the GHD Modelled Flood levels (or any of them), but at or below the Flood Event flood levels at the RRV (or any of them), then the GHD Contravention caused:
- (a) part or all of the inundation at the RRV as alleged by the Plaintiff; and
 - (b) the alleged loss or damage to the Plaintiff and / or Group Members (which loss or damage is denied by MWC).
66. Further or in the alternative, if, which is denied, the GHD Modelled Floor Levels caused the RRV to be Flood Prone, then the GHD Contravention caused the RRV (or part of it) to be Flood Prone.

67. In the premises, the GHD Contravention caused loss or damage of the Plaintiff and Group Members within the meaning of s 236 of the ACL (Vic).

The Planning Group, Metricon and Casey Developments

68. ACN 006 788 692 Pty Ltd (Deregistered) (**Metricon**):
- (a) was at all material times was a company incorporated pursuant to the *Corporations Act 2001* (Cth);
 - (b) was, together with Casey Developments (R/V) Pty Ltd (ACN 121 853 558), the registered proprietor of the Land between 8 January 2009 – 10 November 2015.
 - (c) became deregistered on 12 September 2024.
69. Casey Developments (R/V) Pty Ltd (ACN 121 853 558) (Deregistered) (**Casey Developments**):
- (a) was at all material times was a company incorporated pursuant to the *Corporations Act 2001* (Cth);
 - (b) was, together with Metricon, the registered proprietor of the Land between 8 January 2009 – 10 November 2015; and
 - (c) became deregistered on 19 October 2024.
70. Capaho Pty Ltd (ACN 009 428 371) (Deregistered) (**The Planning Group**):
- (a) was at all material times a company incorporated pursuant to the *Corporations Act 2001* (Cth); and
 - (b) was at all material times a town planning consultant to Casey Developments and Metricon with respect to the property at 9 Canning Street, Avondale Heights, 3034; and
 - (c) became deregistered on 12 September 2024.
71. If, which is denied, MWC is liable to the Plaintiff, then:

- (a) in the premises of the following paragraphs, The Planning Group, Metricon and Casey Developments are concurrent wrongdoers within the meaning of s 24AH of the Wrongs Act; and
- (b) pursuant to s 24AI of the Wrongs Act:
 - (i) the liability of MWC in relation to the Plaintiff's and Group Members' claim is limited to an amount reflecting that proportion of the loss and damage claimed that the Court considers just having regard to the extent of the responsibility of MWC for that loss or damage; and
 - (ii) judgment must not be given against MWC for more than that amount in relation to that claim.

MWC's requirement that development must be subject to the Freeboard Condition

- 72. By letter to Metricon dated 11 September 2002, MWC provided Casey Developments with information that it said it should consider when developing sites that are subject to flooding, including:
 - (a) that a hydraulic engineer should be engaged to consider the feasibility of filling on the site (and the associated excavation) to ensure that there is no detrimental impact on surrounding properties (from flooding); and
 - (b) that finished floor levels must be a minimum of 600 mm above the applicable flood level.
- 73. Subsequent to the above letter, either or both of Metricon and Casey Developments engaged Neil M Craigie, a hydraulic engineer, to provide recommendations for the modification of floodplain characteristics on the left overbank of the Maribyrnong River upstream from the Canning Street bridge, and with respect to surface water management issues arising from the development of a proposed retirement complex at the property.

Particulars

- (i) This is inferred from the fact that:

(A) by letter dated 11 September 2002, MWC requested Casey Developments to engage a hydraulic engineer to consider feasibility; and

(B) on 28 August 2003, Neil M Craigie Pty Ltd provided MWC with a report addressing MWC's above request.

74. By email from David Cox of MWC to Neil M Craigie dated 5 August 2003, MWC informed Mr Craigie that:

- (a) the floor level should be 600mm above the applicable flood level;
- (b) for the Maribyrnong, the flood level is based on the Total Energy Line; and
- (c) therefore, the floor level should be 600mm above the Total Energy Line.

75. On or around 29 August 2003, Neil M Craigie provided to MWC a report, by which he recorded that:

- (a) advice has been received from officers of MWC that, for the purposes of floor level determination, energy levels are to be used; and
- (b) freeboard allowance to floor levels is set at 600 mm by MWC.

76. The planning permits and amended planning permit issued with respect to the Land contained a condition that the finished floor levels must be a minimum of 600mm above the applicable flood level (cl 37 of the planning permit and amended planning permit).

Misleading or Deceptive Conduct

77. By letter dated 25 March 2009, The Planning Group requested MWC's consent to lower the finished floor level of 33 dwellings and the clubhouse (**Revised Floor Levels**).

78. By that letter, The Planning Group represented to MWC that the finished floor levels of the dwellings set out in Schedule A would be 600 mm above the Total Energy Line (**Representation**).

Particulars

- (i) The Planning Group stated in the 25 March 2009 letter that “consent is sought under Condition 37 of Planning Permit MV/16866/2004 which specified that “*Finished Floor levels must be a minimum of 600mm above the applicable flood level*” and “*The table below provide the proposed floor levels for the applicable dwellings and we understand there floor levels are a minimum of 600mm above the applicable flood (sic)...*”
- (ii) The reference to the “*applicable flood (sic)*” was a reference to the Total Energy Line in the context of the communications and documents pleaded at paragraphs 72 - 75 above.

- 79. The Representation was made in trade or commerce within the meaning of s 18 of the ACL (Vic).
- 80. Contrary to the Representation, the Revised Floor Levels of 25 of those dwellings and the clubhouse, being all of the ground floor lots the subject of The Planning Group’s 25 March 2009 letter (**2009 Dwellings**), were below the level which was 600 mm above the Total Energy Line.
- 81. In the premises, the Representation was misleading or deceptive or likely to mislead or deceive within the meaning of s 18 of the ACL (Vic) (**Contravention**).
- 82. Metricon and / or Casey Developments were involved in the Contravention within the meaning of s 236 of the ACL (Vic).

Particulars

- (i) Metricon and / or Casey Developments Pty Ltd were knowingly concerned in the Contravention, because both or either of them knew of and authorised The Planning Group to send the letter of 25 March 2009, alternatively, to seek MWC’s consent to the lowering of the FFLs as per that letter. That is inferred from the following matters:

- (A) Metricon and Casey Developments were, as at the time of the above letter, joint registered proprietors and developers of the Land;
- (B) The Planning Group applied for the planning permit on behalf of Metricon and Casey Developments;
- (C) the letter of 25 March 2009 states “as a result of design investigations into the road gradings, we will be requesting Council to consider the lowering of the floor levels of some of the dwellings...”; and
- (D) it is presumed that Metricon and Casey Developments – as owners of the Land – caused those design investigations into those road gradings to be carried out.

MWC’s reliance on the contravention

- 83. In reliance upon the Contravention, by letter dated 22 April 2009, MWC informed The Planning Group that it had no objection to the Revised Floor Levels.
- 84. On 2 June 2009, the Moonee Valley City Council amended permit MV/16866/2004 to allow for the Revised Floor Levels, by reason of, inter alia, MWC’s non-objection.

Causation of loss

- 85. On or about 14 October 2022, heavy rain caused swelling of the Maribyrnong River, including where it runs beside the RRB (**Flood Event**).
- 86. If, at the time of the Flood Event:
 - (a) the FFLs of the 2009 Dwellings were built to the Revised Floor Levels; and
 - (b) the Revised Floor Levels of the 2009 Dwellings (or any of them) were at or below the Flood Event flood levels at the RRV (or any of them),
 then the Metricon and / or Casey Developments and / or The Planning Group’s Contravention caused:

- (c) part of all of the inundation at the 2009 Dwellings (or any of them) as alleged by the Plaintiff; and
 - (d) the alleged loss or damage to the Plaintiff and / or Group Members (which loss or damage is denied by MWC).
87. Further or in the alternative, if, which is denied, MWC's consent to the lower FFLs of the 2009 Dwellings caused the RRV to be Flood Prone, then Metricon and / or Casey Developments' and / or The Planning Group's Contravention caused the RRV (or part of it) to be Flood Prone.
88. In the premises, Metricon and / or Casey Developments and / or The Planning Group's Contravention caused any loss or damage of the Plaintiff and Group Members within the meaning of s 236 of the ACL (Vic).

Moonee Valley City Council

89. The Second Defendant ~~Third Party~~ (MVCC) is, and at all material times was, a responsible authority within the meaning of the *Planning and Environment Act 1987* (Vic) (**P&E Act**).
90. If, which is denied, MWC is liable to the Plaintiff, then:
- (a) in the premises of the following paragraphs, MVCC is a concurrent wrongdoers within the meaning of s 24AH of the Wrongs Act; and
 - (b) pursuant to s 24AI of the Wrongs Act:
 - (i) the liability of MWC in relation to the Plaintiff's and Group Members' claim is limited to an amount reflecting that proportion of the loss and damage claimed that the Court considers just having regard to the extent of the responsibility of MWC for that loss or damage; and
 - (ii) judgment must not be given against MWC for more than that amount in relation to that claim.

The Amended Permit

91. On 15 August 2011, MVCC granted an amended planning permit with respect to permit MV/16866/2004 (**Amended Permit**).
92. The Amended Permit contained the following conditions:
 - (a) The layout of the site and the size, design and location of the buildings and works permitted must be carried out in accordance with the endorsed plans and must not be altered or modified without the further written consent of the Responsible Authority (cl 3) (**Secondary Consent**); and
 - (b) Freeboard. Finished floor levels must be a minimum of 600mm above the applicable flood level. Unless otherwise agreed in writing by Melbourne Water, finished floor levels of any outbuildings, storage sheds etc must be a minimum of 300mm above the applicable flood level (cl 37) (**Freeboard Condition**).

Application by Rivervue

93. Rivervue Residential Developments Pty Ltd (**Rivervue**) is and has been, since 11 November 2015, the registered proprietor of the Land.
94. On a date presently unknown to MWC, Rivervue applied to MVCC for consent to the lowering of finished floor levels by 0.08m of the dwellings at 2, 4, 6, 8, 10 and 12 Blueridge Close (**2016 Dwellings**).

Particulars

- (i) This is inferred from the MVCC document titled “Amending Plans Report by Secondary Consent of Condition 3 of Permit MV/16866/2004 – Approval” dated 6 January 2016, which states:
 - (A) under the heading Approved Architectural Plans (July 2014): “Western row...FFL 6.40 under”; and
 - (B) under the heading Proposed Architectural Plans (November 2015): “Western row...FFL 6.32 under”.

95. The proposed finished floor levels of the above dwellings were below the level the subject of the Freeboard Condition.

Particulars

- (i) The FFLs of the 2016 Dwellings were below the Water Surface Elevation Level the subject of the GHD Report plus 0.6m for freeboard.
96. On or around 6 January 2016, MVCC consented to Rivervue’s application by way of Secondary Consent.

Particulars

- (i) Letter from MVCC to BDMA Development Advisory dated 6 January 2016.
97. In circumstances where:
- (a) the proposed FFLs of the 2016 Dwellings were below the Freeboard Condition; and
 - (b) the Freeboard Condition was a condition of the Amended Permit,
- the proposed FFLs of the 2016 Dwellings could only be approved by MVCC by way of an amended permit, and not by way of Secondary Consent.

Particulars

- (i) MWC relies on the decision of *Westpoint Corporation Pty Ltd v Moreland CC* [2005] VCAT 1059 (**Westpoint**).
- (ii) MVCC referred to the decision in *Westpoint* in providing Secondary Consent. In the document titled “Amending Plans Report by Secondary Consent of Condition 3 of Permit MV/16866/2004 – Approval” dated 6 January 2016, MVCC states:

In Westpoint Corporation Pty Ltd v Moreland City Council, the Tribunal determined that a change to a permit can be approved

by way of secondary consent only if...It is not contrary to a specific requirement (as distinct from authorisation) within the permit, which cannot be altered by consent.

Duty of care

98. MVCC was required by the P&E Act to consider the following matters before deciding on an application for an amendment to a planning permit:
- (a) the relevant planning scheme; and
 - (b) any decisions and comments of a referral authority which it has received **(Mandatory Considerations)**.

Particulars

- (i) P&E Act, ss 60 and 73(1).
99. The Freeboard Condition comprised part of the relevant planning scheme and comprised a decision or comment of a referral authority (the referral authority being MWC) within the meaning of s 60 of the P&E Act.
100. In the premises of paragraph 98 above:
- (a) Rivervue was required to make an application for an amendment to the planning permit pursuant to s 72 of the P&E Act; and
 - (b) were such an application made by Rivervue, MVCC would, by reason of ss 73(1) and 60 of the P&E Act, be required to take into account the Mandatory Considerations, including the Freeboard Condition.
101. It was reasonably foreseeable and MVCC knew or ought to have known that, if MVCC failed to take into account the Mandatory Considerations in relation to the proposed FFLs of the 2016 Dwellings, then there was a risk of property damage and economic loss to the Plaintiff and Group Members.

Particulars

- (i) MVCC was a party to (in its capacity as “Responsible Authority”) and appeared (by its lawyers) in the permit application proceeding before the Tribunal (*Retirement Services Australia & Metricon Homes v VicRoads & Others* [2006] VCAT 1172).
- (ii) In that proceeding, the Tribunal granted the permit subject to the Freeboard Condition. The Tribunal reasoned as follows:

[57] Would the proposal protect life and property from flood hazard, protect the natural carrying capacity of the floodway and protect the flood storage function of the floodplain?

[58] This issue is of sensitivity to residents in the Maribyrnong River corridor particularly given the number of properties that are below the 1:100 year flood level and experience inundation... any increase in flood level would be minimised or negated by the additional capacity provided by the proposed wetlands and risk to people would be minimised by habitable buildings being 600mm above the flood level and outbuildings/garages being 300mm above the same level.

102. The Plaintiff and Group Members were vulnerable, in the sense that they were unable to protect themselves from the consequences of MVCC’s want of reasonable care.

Particulars

- (i) At the time they entered into the Loan Agreements and Residence and Management Contracts with respect to the RRV, the Plaintiff and Group Members did not know and could not reasonably have known that the FFLs of the 2016 Dwellings were non-compliant with the Freeboard Condition and therefore non-compliant with the permit.
- (ii) Even if the Plaintiff and Group Members had they known that the FFLs of the 2016 Dwellings were non-compliant with the Freeboard Condition, there was nothing which they could have reasonably done in order to prevent or reduce the risk of water ingress.

103. In the premises, MVCC owed the Plaintiff and Group Members a duty to take reasonable care in applying the Mandatory Considerations so as to avoid the possibility that the Plaintiff and Group Members suffer property damage and / or economic loss by reason of the height of the FFLs of the 2016 Dwellings (**MVCC Duty of Care**).
104. In breach of the MVCC Duty of Care, MVCC did not take into account the Mandatory Considerations when it provided Secondary Consent to the proposed FFLs of the 2016 Dwellings (**MVCC Breach**).

Particulars

MVCC's failure to take into account the Mandatory Considerations is inferred from the following matters:

- (i) In the document "Amending Plans Report by Secondary Consent of Condition 3 of Permit MV/16866/2004 – Approval" dated 6 January 2016, MVCC recommended that Secondary Consent be provided to the 2016 FFLs. The document does not contain any reference to the Freeboard Condition; and
- (ii) had MVCC taken into account the Freeboard Condition, it would have considered that the FFLs of the 2016 Dwellings were non-compliant with the Freeboard Condition.

Causation of Loss

105. By reason of the MVCC Breach, the FFLs of the 2016 Dwellings were constructed below the FFLs required by the Amended Permit.
106. On or about 14 October 2022, heavy rain caused swelling of the Maribyrnong River, including where it runs beside the RRB (**Flood Event**).
107. The FFLs of the 2016 Dwellings were below the levels required by the Amended Permit, because they were less than 600mm above both the water surface elevation level and total energy level.

108. If the as-constructed FFLs of the 2016 Dwellings were at or below the Flood Event flood levels (or any of them), then MVCC's breach of its duty of care to the Plaintiff and Group Members caused:
- (a) part of all of the inundation at the RRV as alleged by the Plaintiff; and
 - (b) the loss or damage alleged by the Plaintiff (which loss or damage is denied by MWC).
109. Further or in the alternative, if which is denied, RRV is Flood Prone, MVCC's Breach of Duty caused the RRV (or part of it) to be Flood Prone, which in turn caused the loss or damage alleged by the Plaintiff and Group Members (which loss or damage is denied by MWC).

J J Gleeson

J Lipinski

Wotton Kearney

Wotton Kearney

Solicitors for the Defendant

Schedule of Parties

Stanislaw Korkliniewski	Plaintiff
Melbourne Water Corporation	First Defendant
Moonee Valley City Council	Second Defendant
GHD Pty Ltd (ACN 008 488 373)	First Third Party