Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners Strata Plan No 30621 v Shum
Medium Neutral Citation:	[2018] NSWCATAP 15
Hearing Date(s):	30 November 2017
Date of Orders:	8 January 2018
Decision Date:	8 January 2018
Jurisdiction:	Appeal Panel
Before:	M Harrowell, Principal Member R Seiden SC, Principal Member
Decision:	1. The appeal is allowed in part. 2. Order 1 made in application SC 17/07455 on 30 August 2017 is varied as follows: The Owners- Strata Plan SP30621 is to pay Albert Shum the sum of $28,034.11 within 7 days of the date of these orders. Subject to order 4, each party is to pay their own costs of the appeal. 3. In the event a party (costs applicant) contends that an order different to order 3 should be made, the following orders and directions are made: the costs applicant is to file any application for costs (cost application) within 14 days from the date these orders are published, such application to include any evidence and submissions, including submissions about whether an order can be made dispensing with a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act, 2013. The respondent to the costs application is to file and serve any evidence and submissions in reply within 21 days from the date of these orders, including submissions about whether an order can be made dispensing with a hearing pursuant to s 50(2) of the

	Civil and Administrative Tribunal Act, 2013. The costs applicant is to file any submissions in reply within 28 days from the date of these orders. Order 3 ceases to have effect if a cost application is filed in the time permitted by these orders. 4. Liberty to either party to apply to the Appeal Panel to adjust the amount in order 2 in accordance with the reasons above, such liberty to be exercised within 7 days of the date of these orders. 5. Any issue arising from the exercise of the liberty granted by order 5 may be dealt with by a single member of the Appeal Panel, differently constituted.
Catchwords:	Statutory interpretation- Strata Schemes Management Act- jurisdiction of the Tribunal to determine claim for damages for breach of statutory duty, meaning of "settle a dispute or complaint", meaning of "about" when defining disputes by reference to subject matter, retrospective operation of statutory cause of action, limitation on amount that may be awarded for damages. Damages- statutory duty to repair and maintain, continuing breach, causation, multiple breaches causing continuing loss.
Legislation Cited:	Agricultural Tenancies Act, 1990 Civil and Administrative Tribunal Act, 2013 Civil and Administrative Tribunal Rules, 2014 Commercial Arbitration Act, 2010 Interpretation Act, 1987 Strata Schemes Management Act, 1996 Strata Schemes Management Act, 2015
Cases Cited:	Al-Kateb v Godwin [2004] HCA 37; 219 CLR 562; 208 ALR 124; APX Projects Pty Limited v The Owners – Strata Plan No. 64025 [2015] NSWSC 1250 Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd [2012] HCA 55; 250 CLR 503 Coulton v Holcombe [1986] HCA 33; (1986) 162 CLR 1 Gibbs v McCorquodale (1950) 67 WN (NSW) 169 Jennifer Elizabeth James v The Owners Strata Plan No

	SP 11478 (No 4) [2012] NSWSC 590 Kingston Earthworks Pty Ltd v Isles (1997) 6 TASR 433 Larking v Great Western (Nepean) Gravel Ltd (in Liq) [1940] HCA 37; (1940) 64 CLR 221 L'Office Cherifien des Phosphates Unitramp SA v Yamashita Shinnihon Co Lt (the Boucraa) [1994] 1 AC 48 March v Stramare (E & MH) Pty Ltd [1991] HCA 12; (1991) 171 CLR 506 Maxwell v Murphy [1957] HCA 7; (1957) 96 CLR 261 McElwaine v The Owners – Strata Plan No. 75975 [2016] NSWSC 1589 McElwaine v The Owners – Strata Plan No. 75975 [2017] NSWCA 239 R v Kidman [1915] HCA 58; (1915) 20 CLR 425 Ridis v Strata Plan No 10308 [2005] NSWCA 246; (2005) 63 NSWLR 449 Rosenthal v The Owners SP 20211 [2017] NSWCATCD 80 "Shin Kobe Maru" v Empire Shipping Company Inc [1994] HCA 5; [1994] 181 CLR 404 Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Limited [2015] NSWSC 289 The Owners – Strata Plan No. 37762 v Dinh Phoung Dung Pham and anor [2006] NSWSC 1287 The Owners Strata Plan 50276 v Thoo [2013] NSWCA 270 The Queen v Khazal [2012] HCA 26 Worrall v Commercial Banking Company of Sydney Ltd [1917] HCA 67; (1917) 24 CLR 28;
Texts Cited:	Butterwoths Australian Legal Dictionary (1997)
Category:	Principal judgment
Parties:	Appellant: The Owners Strata Plan No 30621 Respondent: Albert Shum
Representation:	Appellant: S Williamson (Solicitor) Respondent: P Afshar (Counsel) Solicitors: Bannermans Lawyers (Appellant) Kerin Benson Lawyers (Respondent)

File Number(s):	AP 17/41232
Publication Restriction:	Unrestricted
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal of New South Wales
Jurisdiction:	Consumer and Commercial Division
Citation:	Not applicable
Date of Decision:	30 August 2017
Before:	P Thew, General Member
File Number(s):	SC 17/07455

REASONS FOR DECISION

Summary

1 This appeal raises the question of whether the Tribunal has jurisdiction to award damages to the owner of a lot in a strata scheme for breach by an owners corporation of a statutory duty to maintain and repair property in accordance with s 106 of the *Strata Schemes Management Act, 2015* (2015 Management Act).

2 The Appeal Panel has reached the following conclusions:

(1) An owners corporation has statutory duties:

(a) to properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation; and

(b) to renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.

(2) In respect of the duty to maintain and keep in a state of good and serviceable repair, there is a continuing obligation imposed on the owners corporation, breach of which may give rise to multiple causes of action.

(3) Pursuant to s 106(5) of the 2015 Management Act a lot owner is entitled to recover reasonably foreseeable loss suffered in consequence of each breach.

(4) The Tribunal has jurisdiction under s 232 of the 2015 Management Act to make an order in favour of a lot owner against an owners corporation for the payment of money by way of damages for each such breach.

(5) There is no monetary limit to the jurisdiction of the Tribunal in respect of an order for compensation.

(6) The 2015 Management Act is not retrospective in its operation and there is no power to make an order:

(a) in respect of a breach by an owners corporation of its obligation to comply with s 62 of the *Strata Schemes Management Act, 1996* (1996 Management Act);

(b) for damage suffered by a lot owner prior to the commencement of the 2015 Management Act on 30 November 2016.

Introduction

3 The respondent in this appeal (respondent) is the owner of a lot in strata scheme SP 30621 located at Cremorne.

4 On 15 February 2017, the respondent filed an application against the appellant, owners corporation, in the Consumer and Commercial Division of the Tribunal in the following terms:

> We are seeking orders under sections:
>
> -s106 Duty of owners corporation to maintain and repair property
>
> -s126 Orders relating to alterations and repairs to common property and other property
>
> -s232 Orders to settle disputes and rectify complaints.
>
> We are also seeking an order for loss of rent, $51,437.97 (as at 28 February 2017), due to the unnecessary extensive delay caused by the strata committee and strata managing agent in relation to these repairs and the costs required to bring the property's interior back to its original condition before it was damaged by these roof leaks.

5 The sections referenced by the respondent in his application were those in the 2015 Management Act.

6 The proceedings were heard by the Tribunal on 24 May 2017. The Tribunal reserved its decision and published a decision and reasons for decision on 30 August 2017. The Tribunal made the following order:

> 1. Order that the Owners Corporation SP 30621 … pay Albert Shum … The sum of $55,943.24 within 7 days of the date of this order.

7 As recorded by the Tribunal at [9], the amount awarded consisted of the following:

(1) Loss of rent for the period 1 September 2016 to 26 February 2017 in the sum of $46,893.85 (the Rent)(Item One).

(2) A percentage of water and council rates, as well as levies, in the sum of $6553.79, ordinarily paid by the lessee under the terms of the lease (the Contributions) (Item Two)

(3) Interest on the Rent and contributions in the sum of $2495.60 (the Interest) (Item Three)

8 In making this order, the Tribunal made the following findings at [51]:

(1) The common area roof suffered water penetration from about January 2016 by reason of a leak or leaks.

(2) The (appellant owners corporation) had a strict duty to repair the common area roof pursuant to section 106(1) by rectifying the leak that was allowing order penetration.

(3) The (appellant owners corporation), between January 2016 and May 2017, failed to rectify the common area roof in breach of the statutory duty imposed by section 106(1).

9 The appellant appeals this decision.

Notice of Appeal and submissions

10 The appellant filed a Notice of Appeal dated 25 September 2017. The appeal was filed in time, namely within 28 days from the date of the Tribunal's decision.

11 The grounds of appeal were as follows:

(1) The Tribunal had no jurisdiction under s 232 of the 2015 Management Act to make an order for compensation and incorrectly interpreted the order making powers so as to extend them beyond the intended scope provided in the statute.

(2) The Tribunal incorrectly interpreted the savings and transitional provisions found in Sch 3 cl 3 of the 2015 Management Act and erroneously concluded that this clause gave retrospective effect to the

entitlement to claim damages under s106(5) of the 2015 Management Act.

12 Consequently, the appellant says that the orders made by the Tribunal were invalid and should be set aside. Alternatively, any award for damages should be limited to a period from when the 2015 Management Act commenced until 26 February 2017.

13 The appellant provided written submissions and made oral submissions at the hearing of the appeal.

Ground 1

14 The appellant's written submissions were to the following effect.

15 Section 232 of the 2015 Management Act did not empower the Tribunal to make an award for damages under s 106(5).

16 The effect of the Tribunal's interpretation is to give the Tribunal an unfettered jurisdiction to determine claims for damages pursuant to s 106(5). This was not the intention of the legislation and, if there is any question of intention, the Tribunal "*is not permitted to err on the side of promulgating jurisdiction to itself*".

17 In oral submissions, the appellant referred to s 28 of the *Civil and Administrative Tribunal Act, 2013* (NCAT Act) and to the provisions of the 1996 Management Act. The appellant submitted that s 106 of the 2015 Management Act did not create a different regime to s 62 of the 1996 Management Act and that s 232 of the 2015 Management Act did not operate to provide jurisdiction for the Tribunal to determine a claim for damages under s 106(5). The reasons were as follows:

(1) The power granted under s 232(e) was to make orders concerning the exercise of or failure to exercise a function conferred or imposed on an owners corporation under the 2015 Management Act or by-laws.

(2) The expression "*settle a complaint or dispute*" used in s 232 did not include the determination of a claim for damages.

(3) Section 232(1) of the 2015 Management Act "*operates under an entirely different regime*" to adjudication: Appellant's written submissions at [22(c)]. While s 232 does not include a similar provision to s 138(3)(d) of the 1996 Management Act (which prevented an adjudicator making an award for damages), there is no express power given to the Tribunal under s 232. Rather, the Tribunal's role in settling disputes was limited to disputes concerning management of the scheme not consequential

claims for loss and damage. In short, the Tribunal was able to resolve an issue about whether an owners corporation had breached a duty imposed on it under the 2015 Management Act and make orders about that matter, but not determine whether a party was entitled to damages in consequence of that breach and make orders for the payment of any monetary compensation.

(4) Contrary to the Tribunal's conclusion at [30], the Tribunal is not "*required*" to make orders for the award for damages under s 106(5) of the 2015 Management Act.

(5) In was not intended the Tribunal resolve complicated disputes, such construction being inconsistent with the overall regime established by the NCAT Act.

(6) The fact other sections of the 2015 Management Act gave specific order making powers to the Tribunal meant that s 232 should be interpreted in a manner that limited its operation so as to exclude an order making power in connection with an award for damages. In this regard the appellant identified ss 72 (strata managing agent and building manager agreements), 86 (recovery of unpaid contributions and interest), 89 (compensation by an original owner for inadequate estimate of levies) and 148 (an order revoking amendment of a by-law or reviving a repealed by-law) as providing power to make specific orders including for the payment of money and other matters. The appellant said these specific provisions indicate an intention of the legislature to limit the general power in s 232. Further, the appellant submitted that s 106, in which the right of action is found, does not provide the Tribunal may make an order for the payment of damages.

(7) The second reading speech does not suggest the Tribunal is to be given power to make orders in respect of a claim for damages for breach of duty.

(8) Lastly, the appellant made reference to concurrent jurisdiction and the comments of the Court of Appeal of the Supreme Court of New South Wales in *The Owners – Strata Plan No 50276 v Thoo* [2013] NSWCA 270 at [220] and following. The appellant submitted that the test of "*reasonable foreseeability*" was a test applied by the courts in claims made for breach of statutory duty under the *Civil Liability Act 2002* (CL Act. The appellant submitted that NCAT does not have jurisdiction under the CL Act and to avoid concurrent liability "*has avoided giving NCAT the function to determine claims for damages by not specifying such a power in the enabling legislation*". Accordingly, the appellant submits that claims for damages must be determined by a court with competent jurisdiction.

Ground 2

18 In relation to the issue of retrospective operation of s 106(5), the appellant referred to the Australian Parliament's Legislation Handbook, s 30 of the *Interpretation Act, 1987* (Interpretation Act) and the decisions of the High Court

in *Maxwell v Murphy* [1957] HCA 7; (1957) 96 CLR 261 and *Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562; 208 ALR 124.

19 The appellant submitted that the Tribunal was incorrect at [23] to conclude that the provisions in Sch 3 cl 3 of the 2015 Management Act is "intended to provide for continuity" and to infer that it "*indicates a prima facie intention by the legislature that the 2015 Act is applicable*" to events occurring before it came into effect.

20 The appellant said that there was no right to recover damages for breach of s 62 of the 1996 Management Act. The appellant referred to the decision of the Court of Appeal in *Thoo*.

21 The appellant submitted that there was no clear, unambiguous language In the 2015 Management Act to indicate any intention by the legislature that the obligation or liability upon an owners corporation imposed by s 106(5) should operate retrospectively.

22 The appellant submitted that the approach of the Tribunal "*incorrectly expanded the application of clause 3 and this has resulted in NCAT overturning established precedent*" being the decision of the Court of Appeal in the *Thoo*.

23 Further, the appellant submitted that the interpretation of clause 3 by the Tribunal erroneously imposed a legal right or obligation upon the appellant which did not exist prior to the commencement of the 2015 Management Act. The appellant submitted that clause 3 was intended to apply to acts or omissions so as to ensure that any resolution validly made under the 1996 Management Act continued to have effect under the equivalent provisions of the 2015 Management Act.

24 In making this last submission, the appellant accepted *that there were "acts or omissions resulting in loss of rent to the respondent which occurred prior to 30 November 2016 and that the same acts or omissions, continued after 30 November 2016*". However, the appellant said cl 3 did not operate to give the respondent a right to recover damages for loss of rent sustained prior to 30 November 2016: written submission at [41].

25 Otherwise, the appellant says there is no transitional provision of the 2015 Management Act to support the Tribunal's conclusion that s 106(5) operated retrospectively to render the appellant liable for breach of a statutory duty which did not exist prior to the commencement of the 2015 Management Act.

26 Consequently, the appellant submits that the award made by the Tribunal should be reduced from $55,943.24 to $24,175.57, a total reduction of $31,767.67 made up as follows:

(1) $29,986.11 being loss of rent prior to 30 November 2016; and

(2) $1,781.56 being interest payable under the lease prior to 30 November 2016.

27 We should record that in making oral submissions about these matters the appellant also asserted that there had been no accounting for water ingress through various fans for which the lot owner was responsible by reason of special by-laws. Following the appellant's concession that this issue was not raised at first instance, this matter was not pressed on appeal: see *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1 at [10].

28 The respondent filed a Reply to Appeal dated 5 October 2017. In addition, the respondent provided written and oral submissions in respect of the 2 grounds of appeal.

Ground 1

29 In his Reply, the respondent adopted the reasoning of Senior Member Smith in *Rosenthal v The Owners SP 20211* [2017] NSWCATCD 80 and [111]-[114] and said the expression "*settle a complaint or dispute*" includes that part of the dispute which involves a claim for the recovery of damages for a breach of statutory duty as provided in s 106(5) of the 2015 Management Act.

30 The respondent referred to the previous process of adjudication, its abolition and the jurisdiction given to the Tribunal by s 232(1) of the 2015 Management Act which was in similar terms to s 138(1) of the 1996 Management Act. The respondent submitted that there is no limitation of the type found in s 138(3)(d) (erroneously referred to as s 139(3)(d)) of the 1996 Management Act that prevented an adjudicator from making an award for damages and that the order making power conferred by s 232 should be interpreted broadly,

consistent with the decision in *Jennifer Elizabeth James v The Owners Strata Plan No SP 11478 (No 4)* [2012] NSWSC 590 per Ball J at [34].

31 As to the appellant's attempt to narrow the operation of s 232, the respondent said there was no analysis provided by the appellant to justify such an approach in construction of the statute. There is no need to refer to extrinsic material and there is no basis to conclude that the Tribunal lacks power to make an award for damages or that its jurisdiction is confined in the manner asserted by the appellant.

32 The respondent says that the appellant is incorrect in its submission that s232 is only concerned with management of the strata scheme. In this regard the respondent says:

(1) a "*function*" includes "*a power, authority or duty*" and "*exercise a function included perform a duty*": see definition s 4 of 2015 Management Act,

(2) the Tribunal is authorised to determine whether an owners corporation has breached its duties under s 106,

(3) such determination includes whether there has been a breach of duty to which s 106(5) might operate to entitle a lot owner to claim damages.

33 The respondent then says that having regard to s 232(3), which prevents the commencement of proceedings "*in connection with the settlement of a dispute or complaint the subject of a current application by the person for an order under this section*", there is no reason to limit the particular disputes that may be resolved by order under s232(1) so as to exclude that part of the dispute between a lot owner and owners corporation under s 106 that relate to a claim for damages.

34 Further, the respondent refers to s 232(1)(a)-(f) and says that the range of disputes to which s 232 applies are not limited to the exercise or failure to exercise a function under the 2015 Management Act. There is no provision which seeks to hive off some of these disputes to a court and no basis to interpret the legislation in such a limited fashion.

35 While there are other order making powers which relate to specific types of dispute, the existence of these powers does not provide a reason to limit the order making power under s 232.

36 In relation to the appellant's submission concerning concurrent jurisdiction, the respondent made the following submissions:

(1) The decision in *Thoo* was that there was no private cause of action entitling a lot owner to claim damages for breach of statutory duty.

(2) The position in *Thoo* has been altered by s 106(5) of the 2015 Management Act.

(3) While the principle of "reasonable foreseeability" may be relevant in the context of establishing a breach of duty of care under the CL Act, the entitlement under s 106 arises from breach of statutory duty imposed by the 2015 Management Act. Therefore any determination is being made by the Tribunal exercising a power under the 2015 Management Act, not under the CL Act.

Ground 2

37 The respondent accepts that there is a presumption against retrospectivity and that the legislation will not be construed as operating retrospectively "*unless the intention to the contrary appears with reasonable certainty*". In this regard the respondent referred to *Maxwell* and s 30 of the Interpretation Act.

38 However, the respondent referred to the decision of Adam J in *Doro v Victorian Railways Commissioners* [1960] VR 84 where His Honour said:

> This, of course, is only a rule of construction. The duty of the court in construing legislation is to give effect to the legislative intention as sufficiently expressed. The ruling question expresses no rigid or absolute rule. It is founded on the presumption of common sense that in a well-ordered and civilised society the Legislature would not intend what is unjust.

39 The respondent also referred to the decision of Lord Mustill in *L'Office Cherifien des Phosphates Unitramp SA v Yamashita Shinnihon Co Lt (the Boucraa)* [1994] 1 AC 48 and said that whether a statute is intended to act retrospectively should not be determined by the application of rigid criteria, but rather by a consideration of all the circumstances in each case. In this regard the factors in the relevant common-law tests include:

(1) are existing rights affected in the sense that they have been changed with effect prior to the commencement of the amendment: *Worrall v Commercial Banking Company of Sydney Ltd* [1917] HCA 67; (1917) 24 CLR 28;

(2) is there a direct statement in the legislation rebutting the presumption against retrospectivity: *R v Kidman* [1915] HCA 58; (1915) 20 CLR 425;

(3) is there a necessary intention from the language of the legislation that weighs more towards retrospectivity: *Worrall;*

(4) is the nature and degree of the injustice which would result from retrospectivity such that the presumption should be applied: *Doro*.

40 As to whether existing rights were affected, the respondent says that there was no right to claim damages under the 1996 Management Act due to s138(3)(b) of that Act. The right to claim damages "*was brought in by the* (2015 Management Act)*. As such "existing rights" were not changed*".

41 The respondent accepts there is no direct statement to rebut the presumption against retrospectivity. However, the respondent relies on Sch 3 cl 3 and says that the omission to repair the leak until February 2017 was an omission which occurred before and continued after the commencement of the 2015 Management Act. The respondent also relies on the decision in *Rosenthal* where the Tribunal said at [104]:

> The clause, simply put and in the context of this dispute, means that to the extent of any breach of duty under section 62 of the old legislation it is to be treated as a breach of duty under s 106 of the new legislation.

42 The respondent says it was "*the legislature's clear intention to overturn the decision in Thoo by the introduction of section 106(5)*". Further, the introduction of a two-year limit to bring such a claim found in s 106(6) when read in light of Sch 3 cl 3 demonstrates the legislature's intention that a lot owner may, after commencement of the 2015 Management Act, recover damages against an owners corporation for breach of statutory duty and recover all loss suffered in consequence of contravening conduct whenever occurring provided the claim is brought within 2 years of the lot owner becoming aware of the loss.

43 Finally, the respondent said that "*if s 106(5) … was to apply retrospectively it would render the appellant liable to pay damages in the current matter*". However, the respondent noted that a legal defence fund policy of insurance may be available upon which a claim could be made in the event of such an application and that any injustice caused to an owners corporation is limited to a period of 2 years having regard to s 106(6). On the other hand, the respondent said that the retrospective application of s 106(5) would remedy an injustice to lot owners who have suffered loss and damage caused by an owners corporation's failure to repair and maintain common property,

particularly where the legislature has expressed a clear intention to reverse the decision in *Thoo*.

44 Consequently, any injustice to an owners corporation is outweighed by the injustice to the lot owner.

45 Finally, the respondent submitted that if s 106(5) had no retrospective application, he was still entitled to recover rent, outgoings and interest for the period from 30 November 2016 until 26 February 2017. In this regard the respondent says he was entitled to an order of $28,034.11 being rent of $23,327.36, outgoings of $3682.31 and interest of $1024.44.

Consideration

46 There are two grounds of appeal. The issues to be resolved are:

(1) Does the Tribunal have power under s 232 of the 2015 Management Act to make an order that an owners corporation pay a sum of money to a lot owner by way of an award damages under s 106(5) for loss suffered by a lot owner as a result of a contravention of s 106 by an owners corporation?

(2) Does s 106(5) operate retrospectively to make an owners corporation liable to a lot owner for damages suffered in respect of a breach of statutory duty that occurred prior to the commencement of the 2015 Management Act

47 The grounds of appeal raise questions of law involving the proper construction of the 2015 Management Act. Consequently, there is an appeal as of right on a question of law: s 80(2)(b) NCAT Act.

Ground 1- Does the Tribunal have power under s 232 of the 2015 Management Act to make an order that an owners corporation pay a sum of money to a lot owner by way of an award damages under s 106(5) for loss suffered by a lot owner as a result of a contravention of s 106 by an owners corporation?

48 The 2015 Management Act provides for the management of strata schemes registered pursuant to the Strata Schemes Development Act, 2015 and its predecessors. It replaces the 1996 Management Act, which previously regulated management of strata schemes.

49 A significant difference between the 1996 Management Act and the 2015 Management Act is that the former contained a process of adjudications by persons called “adjudicators” appointed under the 1996 Management Act. It was removed and replaced with Part 12 of the 2015 Management Act which

gives power to the Tribunal to make orders to settle disputes. The jurisdiction conferred on the Tribunal under the 2015 Management Act is part of the Tribunal's general jurisdiction conferred on the Consumer and Commercial Division pursuant to s 29 and Sch 4 of the NCAT Act, the 2015 Management Act being the relevant enabling legislation. Section 232, to which the present appeal relates, is found in Division 4- Orders that may be made by Tribunal.

50 In addition, the Tribunal is given power to make orders on application by a relevant person in connection with specific subject matter: see e.g. ss127-132 of the 2015 Management Act.

51 The question is whether, on its proper construction, s 232 grants jurisdiction to the Tribunal to determine a claim by a lot owner against an owners corporation and make an order in favour of that person for compensation under s106(5) arising from a breach by an owners corporation of the duty imposed by s 106.

52 Section 232 is in the following terms:

> **232 Orders to settle disputes or rectify complaints**
>
> (1) **Orders relating to complaints and disputes** The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following:
>
> (a) the operation, administration or management of a strata scheme under this Act,
>
> (b) an agreement authorised or required to be entered into under this Act,
>
> (c) an agreement appointing a strata managing agent or a building manager,
>
> (d) an agreement between the owners corporation and an owner, mortgagee or covenant chargee of a lot in a strata scheme that relates to the scheme or a matter arising under the scheme,

(e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme,

(f) an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act.

(2) **Failure to exercise a function** For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if:

(a) it decides not to exercise the function, or

(b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.

(3) **Other proceedings and remedies** A person is not entitled:

(a) to commence other proceedings in connection with the settlement of a dispute or complaint the subject of a current application by the person for an order under this section, or

(b) to make an application for an order under this section if the person has commenced, and not discontinued, proceedings in connection with the settlement of a dispute or complaint the subject of the application.

(4) **Disputes involving management of part strata parcels** The Tribunal must not make an order relating to a dispute involving the management of a strata scheme for a part strata parcel or the management of the building concerned or its site if:

(a) any applicable strata management statement prohibits the determination of disputes by the Tribunal under this Act, or

> (b) any of the parties to the dispute fail to consent to its determination by the Tribunal.
>
> (5) The Tribunal must not make an order relating to a dispute involving a matter to which a strata management statement applies that is inconsistent with the strata management statement.
>
> (6) **Disputes relating to consent to development applications** The Tribunal must consider the interests of all the owners of lots in a strata scheme in the use and enjoyment of their lots and the common property in determining whether to make an order relating to a dispute concerning the failure of an owners corporation for a strata scheme to consent to the making of a development application under the Environmental Planning and Assessment Act 1979 relating to common property of the scheme.
>
> (7) **Excluded complaints and disputes** This section does not apply to a complaint or dispute relating to an agreement that is not an agreement entered into under this Act, or the exercise of, or failure to exercise, a function conferred or imposed by or under any other Act, if another Act confers jurisdiction on another court or tribunal with respect to the subject-matter of the complaint or dispute and the Tribunal has no jurisdiction under a law (other than this Act) with respect to that subject-matter.

53 It is, in terms, different to s 138 of the 1996 Management Act which gave adjudicators power to determine adjudication applications under the previous regime. This is a matter to which we will return below.

54 In construing s 232, a number of principles are applicable.

55 In *Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503, the High Court said at [39] (p519]:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text" (citation omitted). So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and insofar as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself."

56 Secondly, the High Court said in *Owners of "Shin Kobe Maru" v Empire Shipping Company Inc* [1994] HCA 5; [1994] 181 CLR 404 at 421:

> It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words.

57 Thirdly, s33 of the *Interpretation Act, 1987* provides:

> **33 Regard to be had to purposes or objects of Acts and statutory rules**
>
> In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object

58 Section 232(1) confers powers upon the Tribunal to make orders in relating to complaints and disputes specified therein.

59 The power conferred is not unlimited. There must be a "*complaint or dispute about*" matters specified in (a)-(f) of s 232(1): see eg *The Owners – Strata Plan No. 37762 v Dinh Phoung Dung Pham and anor* [2006] NSWSC 1287 per Rothman J at [63] and *APX Projects Pty Limited v The Owners – Strata Plan No. 64025* [2015] NSWSC 1250 per Slattery J at [58]. We will return to this matter below.

60 However, first we should deal with the nature of the jurisdiction conferred on the Tribunal.

61 As explained by Rothman J in *Pham* at [58], the term "*settle a dispute or complaint*" is the term used to grant jurisdiction to the Tribunal under s 232.

62 At [68] Rothman J then said of the expression "*settle a dispute or complaint*":

> Interesting, but for present purposes irrelevant, questions arise as to whether the use of the terms "settle a dispute or compliant" are limiting words which require consensus and mediation rather than determination. My preliminary, but uninformed view, is that it does not and one needs only to refer to those cases dealing with the prevention and settlement of industrial disputes which make clear that the settlement of an industrial dispute may involve the determination contrary to the interests or desires of any one or more parties: R v Kirby; ex parte Boilermakers' (1956) 94 CLR 254 at 342 – 343

63 In our respectful view, His Honour's observations are correct. That is, contrary to the appellant's oral submission, "settle" in s 232 includes a power to make a determination contrary to the interests or desires of a party and to make an order that is enforceable and binds that party. In this way the dispute is quelled.

64 There is no reason why the expression should be construed in a way that otherwise prevents determination of a claim for damages by the Tribunal. This construction is contrary to the plain meaning of s 232(1) and contrary to the object in s 3(b) of the 2015 Management Act which is:

> to provide for the resolution of disputes arising from the strata schemes.

65 As is clear from s 232(3) and Sch 4 cl 5, subject to any appeal or judicial review proceedings, parties are bound by any determination made by the Tribunal within its jurisdiction and the jurisdiction of a court is excluded. Section 232(3)(a), prevents other proceedings from being commenced if an application has been made to the Tribunal under s232(1). Conversely, s232(3)(b) prevents an application to the Tribunal under s 232(1) if a person has commenced and not discontinued proceedings in connection with the settlement of a dispute or complaint the subject of the application. Sch 4 cl 5 operates in a different manner in that it prevents a court from determining an issue already raised in proceedings before the Tribunal: see cl 5(3) and *Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Limited* [2015] NSWSC 289 per White J (as he then was) at [92] and following

66 The statement of Herron J in *Gibbs v McCorquodale* (1950) 67 WN (NSW) 169 is also relevant when considering the power being exercised. At 170-171, in the context of the applicability of the principles of res judicata, His Honour said:

> To constitute a res judicata, there must be a judicial decision pronounced by a judicial Tribunal. It must emanate from a judicial Tribunal in the exercise of a judicial function. A judicial Tribunal is one which exercises judicial functions by force of, inter-alia, the common law or statute. It may be invested with permanent jurisdiction to determine all causes of a certain class as and when submitted, or it may be clothed by the State (and/or even by the disputants in some cases) with merely temporary authority to adjudicate upon a particular dispute or disputes. It is now well-settled that it is immaterial whether the Tribunal is a court of record or not, or even whether it is known by the name of a Court at all. The test is really not one of court, but jurisdiction:... Statutory tribunals, that is to say, tribunals which owe their existence and jurisdiction entirely to an act of Parliament, are well-known.

67 Our construction is also consistent with the definition of "*settle*" in *Butterworths Australian Legal Dictionary* (1997), which is:

> Resolve a dispute or proceedings

68 Lastly, it is an expression used in the *Commercial Arbitration Act, 2010*, to describe the powers of an arbitrator to make binding awards on parties in domestic arbitrations: see s 1(3)(b). Again, in this context, it is used to describe a process by which an award may be made over the objection or disagreement of a party which is nonetheless binding on that party.

69 The next question is whether the power to make an order extends to making an order for compensation for breach of statutory duty. As stated above, the jurisdiction granted under s 232(1) is not unlimited. While a general jurisdiction is conferred upon the Tribunal to determine applications by interested persons, the complaint or dispute must be "*about*" the subject matter set out in subsections (a)-(f).

70 Relevant to the present appeal, subs 232(1)(a) and (e) provide power to settle disputes or complaints about:

> (a) the operation, administration or management of a strata scheme under this Act,
>
> ….
>
> (e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme.

71 There is no dispute in this appeal that an application by a lot owner for orders that an owners corporation carry out rectification work arising from the failure of an owners corporation to comply with its obligations under s 106 to maintain and repair common property and personal property vested in the owners corporation is an application in which the Tribunal may make orders under s 232(1).

72 This is because s 106 imposes a duty on the owners corporation to maintain and keep in a state all good and serviceable repair the common property: per French CJ in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 at [11]. Section 4 of the 2015 Management Act defines function as follows:

> **function** includes a power, authority or duty and **exercise** a function includes perform a duty.

73 That is, the failure to perform the duty imposed by s 106 of the 2015 Management Act is the failure to exercise a function conferred or imposed by or under that Act within the meaning of s 232(1)(e).

74 The question that remains is whether a claim for compensation under s 106(5) is a claim "*about*" the failure of the owners corporation to perform its duty under s 106(1) or (2).

75 The Tribunal concluded:

(1) As with s 138 of the 1996 Management Act, s 232(1) confers a broad power to settle disputes or rectify complaints in relation to the operation, and ministration or management of the strata scheme: at [27].

(2) There is no factual matter of the type referred to in subs 232(3)-(7) and subs 106(7) that would limit the general powers of the Tribunal: at [34].

(3) The application was brought within a 2 year time limitation provided by s 106(6): at [35]; and

(4) the Tribunal has jurisdiction to make the orders sought, there being no jurisdictional limit on the quantum of damages that can be awarded: at [36].

76 The Tribunal also decided that s106(5) had the effect "*to remove the obstacles faced by lot owners as a result of the decisions in … Thoo and…. McElwaine v The Owners – Strata Plan No. 75975 [2016] NSWSC 1589*": at [40] and [42].

77 It should be noted at this point that the decision in *McElwaine* to which the Tribunal referred was recently overturned by the Court of Appeal of the Supreme Court of New South Wales in *McElwaine v The Owners – Strata Plan No. 75975* [2017] NSWCA 239. While the Court of Appeal upheld the decision of *Thoo*, the Court concluded that the decision in *Thoo* did not preclude other claims in tort, for example nuisance, a matter not presently relevant to this appeal.

78 The word "*about*" is a relational term which requires a connection between the complaint and the subject matter of which the Tribunal has jurisdiction. In relation to the construction of such terms, French CJ in *The Queen v Khazal* [2012] HCA 26 at [31] (citations omitted):

> Relational terms such as "connected with" appear in a variety of statutory settings. Other examples are: "in relation to"; "in respect of"; "in connection with"; and "in". They may refer to a relationship between two subjects which may be the same or different and may encompass activities, events, persons or things. They may denote relationships which are causal or temporal or relationships of similarity or difference. The task of construing such terms does not involve the resolution of ambiguity. They are ambulatory words and may be designed to cover a variety of subjects and a variety of relationships between those subjects. The nature and breadth of the relationships they cover will depend upon their statutory context and purpose. Generally speaking it is not desirable, in construing relational terms, to go further than is necessary to determine their application in a particular case or class of cases. A more comprehensive approach may be confounded by subsequent cases.

79 Of s 138(1)(a) of the former 1996 Management Act which relates to the exercise or failure to exercise a function, the equivalent of s 232(1)(e) of the 2015 Management Act, Rothman J in *Pham* accepted that jurisdiction is "*enlivened* (if) *one can point to a function conferred by the Act or under the by-laws for the strata scheme*: at [65]. Similarly, His Honour said of s 138(1)(b), the equivalent of s 232(1)(a), at [74]:

> The purpose of the provisions in s138(1)(b) is to ensure that those matters with which the Act deals and with which the Act requires the Corporation to deal, either directly or indirectly, may be the subject of resolution by the Tribunal. But the operation, administration or management must be "of a strata scheme". Here the Owners' Corporation is not involved in a dispute about the operation, administration or management of the strata scheme. Those matters which may be the subject of settlement pursuant to the powers granted to the Tribunal under s138(1)(b) are those tasks undertaken by the Owners' Corporation *qua* its status as an Owners' Corporation. Thus, if a lot owner also coincidentally owned property adjacent to the land upon which a strata scheme was built, a dispute between the Lot owner and the strata scheme about the adjoining fence would not be a dispute about the operation, administration or management of the strata scheme. It would be a dispute between the owners of adjacent land and the duties and/or rights of the Owners' Corporation under general law.

80 Section 106(5) creates a right of action that enables the owner of a lot in a strata scheme to recover "*from the owners corporation, as damages* ***for breach of statutory duty****, any reasonably foreseeable loss suffered by the owner as a result of* ***a contravention of this section by the owners corporation***" (emphasis added).

81 A necessary component of making an award for damages is the determination of whether or not the owners corporation has breached its statutory duty. Put another way, the claim for damages is about whether the owners corporation has failed to exercise a function conferred or imposed by or under the 2015

Management Act or has improperly operated, administered or managed the common property as required by the 2015 Management Act in consequence of which a lot owner suffers damage.

82 Seen in this light, there is no basis to confine the word "*about*" to exclude consideration of a claim for damages under s 106(5) under the Act.

83 Our interpretation is supported by the fact that claims for damages under s 106(5) are not excluded complaints and disputes under the provisions in ss 232(4) and (7) or otherwise.

84 In *Thoo*, the Court of Appeal determined that s 62 of the 1996 Management Act (the predecessor to s 106) did not create a cause of action in favour of a lot owner for breach of statutory duty by an owners corporation. In doing so, the Court of Appeal examined the statutory regime that then applied, including the process of adjudications for the settlement of disputes. Having accepted that the owners corporation had a statutory duty, Tobias AJA (with whom Barrett JA and Preston CJ in LEC agreed) said at [207]:

> It was common ground that whether a breach of a statutory duty gives rise to a civil remedy is a question of ascertaining the legislature's intention as a matter of construction of the relevant legislative language. In *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, which involved an action for damages for personal injuries brought by the plaintiff for breach of a provision of the *Factories, Shops and Industries Act* 1962 (NSW) relating to the fencing of dangerous machinery, Kitto J said, relevantly (at 404-405):
>
> > In the case of an enactment ... prescribing conduct to be observed by described persons in the interests of others who, whether described or not, are indicated by the nature of a peril against which the prescribed conduct is calculated to protect them, the prima facie inference is generally considered to be that every person whose individual interests are thus protected is intended to have a personal right to the due observance of the conduct, and consequently a personal right to sue for damages if he be injured by a contravention : see *Whittaker v. Rozelle Wood Products Ltd* (1936) 36 SR (NSW) 204; 53 WN 71. ... But at the outset of every inquiry in this field it is important, in my opinion, to recognize ... that the question whether a contravention of a statutory requirement ... is actionable at the suit of a person injured thereby is one of statutory interpretation. ... The legitimate endeavour of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question

> of statutory interpretation ... It is not a question of the actual intention of the legislators, but of the proper inference to be perceived upon a consideration of the document in the light of all its surrounding circumstances. ...

This passage was referred to with approval in *Byrne v Australian Airlines Ltd* [1995] HCA 24; (1995) 185 CLR 410 at 460-461; *Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446 at [29]; *Field v Dettman* [2013] NSWCA 147 at [39].

85 His Honour rejected the proposition that a right of action in favour of a lot owner was created in respect of a breach of the duty imposed on an owners corporation under s 62. Ultimately, he accepted at [221] the analysis of McColl JA in *Ridis v Strata Plan No 10308* [2005] NSWCA 246; (2005) 63 NSWLR 449 at [115]. In doing so, Tobias AJA said at [211]:

> Section 207 in Part 7 of Chapter 5 provides, relevantly, that an order under s 138 in which an Adjudicator declares that the order is to have effect as a decision of the owners corporation, is to take effect as a resolution of the owners corporation to do what is needed to comply with any requirement imported by that order. In other words, an order made by an Adjudicator under s 138 that the owners corporation perform its duty under s 62(2) to renew or replace a particular part of the common property takes effect as a resolution of the owners corporation with which it is bound to comply. If it fails to do so, the obvious remedy would be a mandatory injunction. However, it is to be noted that by operation of s 138(3)(d) an Adjudicator cannot make an order under subs (1) for the settlement of a dispute or complaint that includes the payment by a person to another person of damages. In my opinion, that provision is some indication of an intention on the part of the legislature that disputes relating to the owners corporation's duties under the 1996 Act, as well as disputes as to the strata scheme generally, are to be resolved in a manner which does not involve the payment of damages.

86 However, it is clear that the effect of *Thoo* has been overturned by the legislature which has expressly granted a right of action to a lot owner to claim damages by s 106(5) of the 2015 Management Act. Neither party suggested otherwise.

87 In doing so, unlike the circumstances which applied in *Thoo*, various restrictions which previously limited the power of an adjudicator to make orders under s 138 of the 1996 Management Act have been removed and do not apply to the Tribunal when determining an application under s 232 of the 2015 Management Act. In this regard there is no limitation under s 232:

(1) preventing the Tribunal making of an order for "*the payment by a person to another person of damages*" (cf s 138(3)(d));

(2) the preventing the Tribunal from making orders under s 232 to settle a dispute or complaint dealt with in another section of the 2015 Management Act (cf s 138(3)(a))

88 The appellant submitted that the power to make an order under s 232(1) did not extend to making an order for the payment of damages. In our view, such a construction is inappropriate for the reasons expressed in *Shin Kobe Maru* above.

89 In *Steak Plains,* White J was required to interpret a similar order making power in the *Agricultural Tenancies Act, 1990*, which was in the following terms:

> **21 Orders that may be made by Tribunal**
>
> (1) The Tribunal may, on application by an owner or tenant under this Act, or in any proceedings under this Act, make one or more of the following orders:
>
> (a) an order giving effect to a determination that may be made by the Tribunal under this Act,

90 In that case, and despite there being other, more specific order making powers found within the legislation, His Honour said at [79]- [80]:

> 79 However, I agree with the conclusion of the Principal Member that ss 20(1) and 21(1)(a) of the Agricultural Tenancies Act confer power on the Tribunal to make orders to give effect to a determination of a dispute as to whether a party to an agricultural tenancy should be relieved against forfeiture. Such a dispute would be a dispute falling within s 20(1)(b), being a dispute arising from or relating to a tenancy or an agreement creating a tenancy. Section 21(1)(a) provides that the Tribunal may make an order "giving effect to a determination that may be made by the Tribunal under this Act". Thus, if the Tribunal determines that a tenant under an agricultural tenancy should be relieved from forfeiture of the agricultural tenancy, it has power under s 21(1)(a) to give effect to that determination. That power would include refusing to make an order for possession, notwithstanding that it was found that the owner had terminated the tenancy, restraining the owner from itself taking possession, ordering the owner to take necessary steps to grant a new tenancy to give effect to a determination that the tenant was entitled to relief against forfeiture, and imposing any necessary conditions on the grant of such relief, such as that the tenant remedy the breach by reason of which the tenancy was determined. That appears to me to follow from the express terms of s 20(1)(b) and 21(1)(a). Such a construction is consistent with the object in s 3(c) that the Act provides a mechanism for settling disputes between the parties to agricultural tenancies through applications to the Tribunal.

> 80 I agree with the view of the Principal Member that s 21(1) is not to be read as if the only power to make an order to give effect to a determination that may be made by the Tribunal under the Act is by making one or more of the orders described in paras 21(1)(b)-(j). It may well be the case that each of the more specific orders of the kind set out in s 21(1)(b)-(j) could in any event be made under s 21(1)(a). But it does not follow that the general power in s 21(a) should be read down because more specific orders are also provided for. Thus, the fact that s 21(1)(c) confers an express power to make an order restraining action but the power under s21(1)(c) is confined to an order restraining action that is in breach of a term of a tenancy does not mean that an order restraining other action could not be made under s 21(1)(a) to give effect to a determination of a dispute arising from or relating to a tenancy. There is no indication in s 21 that the particular orders described in s 21(b)-(j) form some genus to which the general words in s 21(1)(a) are to be limited.

91 In the present case, the wording of s 232 is not such to lend itself to any limitations of the type for which the appellant contends. It is a power to make an order to settle a dispute, the form of order not being confined to requiring a party to perform or refrain from performing a duty, carrying out an action or undertaking some defined task. Consistent with the objects of the 2015 Management Act, there is no reason to conclude that the order making power excludes a money order for the award of damages or that the jurisdiction of the Tribunal is confined to a particular monetary limit.

92 This view as to any monetary limit is also consistent with the fact an order made by the Tribunal for an owners corporation to carry out repair or maintenance works to common property itself may require the expenditure of millions of dollars by an owners corporation in large Strata schemes.

93 Similarly, there is no reason why the order making power should be interpreted in a manner which limits the Tribunal's jurisdiction to settling disputes or complaints which are simple in nature.

94 As to the CL Act and concurrent jurisdiction, the authorities referred to in *Thoo* and the reasons of Tobias AJA at [219] and following do not suggest concurrent jurisdiction is excluded. To the contrary, the Court accepted such was expressly recognised in s 226 of the 1996 Management Act, now s 253 of the 2015 Management Act, subject to cost sanctions that apply to proceedings brought by a plaintiff in court where alternative rights were available through the adjudication process (now by application to the Tribunal). Otherwise, there

is nothing in the CL Act that prevents the Tribunal from dealing with a claim for damages arising from breach of statutory duty.

95 Lastly, having regard to the historical context being:

(1) the repeal of the 1996 Management Act and the process of adjudication;

(2) the removal of provisions of the type found in s 138(3)(a) and (d) which limited the order making powers under that section;

(3) the introduction of the 2015 Management Act granting jurisdiction to the Tribunal and thereby enabling it to exercise general jurisdiction under the NCAT Act,

(4) the power of the Tribunal to issue a certificate under s 78 for the purpose of "*recovery of any amount ordered to be paid by the Tribunal*"

there is no reason to construe the jurisdiction of the Tribunal or the order making power in s 232 in a manner that would prevent an order for the payment of damages consequent upon the determination of a claim by a lot owner for damages arising from an owners corporation breach of statutory duty.

96 It follows that the Tribunal had jurisdiction to determine a claim for damages under s 106(5) of the 2015 Management Act and that ground 1 of the appeal fails.

Ground 2- Does s 106(5) operate retrospectively to make an owners corporation liable to a lot owner for damages in respect of a breach of statutory duty prior to the commencement of the 2015 Management Act?

97 The Tribunal made an award for compensation for economic loss for the period from 1 September 2016 to 27 February 2017. The period spanned the commencement date of the 2015 Management Act.

98 There is no challenge in this appeal that the damage claimed was reasonably foreseeable or that it was caused by the appellant's breach of duty under s 106 (1) or (2) of the 2015 Management Act. Rather, the appellant says the s106(5) is not retrospective in operation and therefore the Tribunal was in error in awarding damages. Alternatively, the appellant says that damages could only be awarded for the period after the 2015 Management Act commenced.

99 Disposition of this aspect of the appeal requires a consideration of both the retrospective operation of s 106(6) and whether the respondent is entitled to damages for the period after the 2015 Management Act commenced?

100 In relation to the second issue, the parties initially agreed at the hearing of the appeal that the breach of duty occurred prior to commencement of the 2015 Management Act. However, during the course of submissions, the respondent contended his claim arose in relation to continuing breaches of duty by the appellant. Also, as referred to above, in making written submissions concerning the effect of cl 3 of schedule 3 of the 2015 Management Act, the appellant accepted there were acts or omissions resulting in loss of rent to the respondent which occurred prior to 30 November 2016 and that the same acts and omissions continued after 30 November 2016

101 As accepted by the parties, the primary question is whether the intention of the legislature was to impose on an owners corporation a liability to pay damages to a lot owner for reasonably foreseeable loss suffered by the owner as a result of a contravention by the owners corporation of its duties under s106 which occurred prior to the commencement of the 2015 Management Act.

102 Both parties accept the principles in *Maxwell*, as relevantly reflected in the Interpretation Act, are applicable.

103 In *Maxwell*, Dixon CJ said at [7]:

> 7. The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed. The basis of the distinction was stated by Mellish L.J. in Republic of Costa Rica v. Erlanger (1876) 3 Ch D 62 "No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done" (1876) 3 Ch D, at p 69 (at p267)

104 His Honour then said at [12]

> 12. To say that notionally the right to damages continued to exist and only the manner of enforcing the right had been destroyed appears to me to ignore the fact that the right to damages could not be separated from the right to recover them. There are rights in English law which have an existence and a purpose although the remedy be suspended or wanting. But the right here in question is not one of them. If the amending statute received the operation for which the appellant contends, it would impose a new a liability that had ceased to exist. The presumptive interpretation is against such an operation. (at p269)

105 The other Justices in *Maxwell* expressed views to similar effect.

106 Secondly, regards should be had to the decision of the High Court in *Worrall.* In that case, the Court said of legislative intention that an Act operate retrospectively:

> If, doing this, we find that though no express words are found, yet the necessary intendment of the language is retrospectivity, the task is at an end. Necessary intendment only means that the force of the language in its surroundings carries such strength of impression in one direction, that to entertain the opposite view appears wholly unreasonable. (See per Lord Eldon in Wilkinson v. Adam (citation omitted).)

107 In the present case, the 2015 Management Act commenced on 30 November 2016, being the date proclaimed in accordance with s 2.

108 The introduction of s 106(5) created a new cause of action that did not previously exist. That is, a new liability was imposed upon an owners corporation and a new right was created in favour of a lot owner to claim damages for the statutory cause of action. The full text of s 106 is as follows:

> **106 Duty of owners corporation to maintain and repair property**
>
> (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.

(3) This section does not apply to a particular item of property if the owners corporation determines by special resolution that:

(a) it is inappropriate to maintain, renew, replace or repair the property, and

(b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

(4) If an owners corporation has taken action against an owner or other person in respect of damage to the common property, it may defer compliance with subsection (1) or (2) in relation to the damage to the property until the completion of the action if the failure to comply will not affect the safety of any building, structure or common property in the strata scheme.

(5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.

(6) An owner may not bring an action under this section for breach of a statutory duty more than 2 years after the owner first becomes aware of the loss.

(7) This section is subject to the provisions of any common property memorandum adopted by the by-laws for the strata scheme under this Division, any common property rights by-law or any by-law made under section 108.

(8) This section does not affect any duty or right of the owners corporation under any other law.

109 The section does not expressly state it is retrospective in operation.

110 In support of his submission that s 106(5) is retrospective in operation, the respondent relied upon cl 3 of Sch 3- Savings, Transitional and other provisions. That clause is found in Part 2-Provisions consequent on enactment of this Act. That clause relevantly provides:

3 General savings

(1) Any act, matter or thing done or omitted to be done under a provision of the former Act and having any force or effect immediately before the commencement of a provision of this Act that replaces that provision is, on that commencement, taken to have been done or omitted to be done under the provision of this Act.

(2) This clause does not apply:

(a) to the extent that its application is inconsistent with any other provision of this Schedule or a provision of a regulation made under this Schedule, or

(b) to the extent that its application would be inappropriate in a particular case.

111 The respondent said that the effect of cl 3(1) is to make any action done or omitted to be done by the owners corporation under the 1996 Management Act an act or omission done or omitted to be done under 2015 Management Act. Because any breach of duty which occurred under s 62 of the 1996 Management Act is taken to have been a breach of the corresponding duty now found in s106 of the 2015 Management there is a cause of action for damages suffered by a lot owner in consequence of such breach under s106(5).

112 The problem with this submission is that it conflates two separate liabilities or obligations found in s 106. One is an obligation upon the owners Corporation to maintain the common property in accordance with the duties imposed by s106. The second is a liability for breach of duty to pay damages to a lot owner for breach of the duty to repair and maintain.

113 In respect of the first obligation, the effect of cl 3(1) is to permit a person to seek orders against the owners corporation to repair and maintain common property, even where the breach relied upon occurred prior to commencement of the 2015 Management Act. In this way, any pre-existing defect which an owners corporation was liable to rectify under the 1996 Management Act, may

be the subject of a an order for its rectification under the 2015 Management Act.

114 However, the language of cl 3(1) does not express an intention to create a liability to pay damages to a lot owner under the 2015 Management Act for events occurring prior to its commencement where such right did not previously exist. In our view it could not be said "*that the force of the language* (of cl 3(1)) *in its surroundings carries such strength of impression*" that the liability imposed by s 106(5) was to operate retrospectively.

115 The respondent also relies on cl 3(2)(b) and the decision of the Tribunal in *Rosenthal*. In that decision the Tribunal examined cl 3 and said at [101] and following:

> 101 The respondent relied on Schedule 3, Part 2 clause 3 of the transitional provisions to the *Strata Schemes Management Act 2015* to argue that it would be "*inappropriate*" for the Tribunal to impose an order under the new Act for a breach that occurred under the old Act and of which the applicants were fully aware. The argument was that the effect of making an order now under s 106(5) would be *inappropriate* because of the retrospectivity of such an order.
>
> 102 Clause 3 provides:
>
> ….
>
> 103 I reject the respondent's argument on this point. The use of the word *"inappropriate*" in clause 3(2)(b) indicates that the Tribunal is to determine, by the judicial exercise of its discretion, whether or not to apply clause 3(1), which is designed to provide continuity and certainty in transition from the old Act to the new one.
>
> 104 The clause, simply put and in the context of this dispute, means that to the extent of any breach of duty under s 62 of the old legislation it is to be treated as a breach of duty under s 106 of the new legislation. It is noted that the legislature considered the effect of earlier actions and how they are to be dealt with under the new Act by inclusion at s 106(6) of a limitation period of two years from the lot owner becoming aware of the breach to bringing an action under the section.
>
> 105 I am satisfied that the legislature, if it considered that s 106(5) should not apply to those breaches of s 106(1) (or of s 62 under the 1996 Act) that had occurred in the two year period prior to the filing of the application it would

> have said so in clear terms. I am satisfied therefore that it is not "inappropriate" that s 106(5) should apply to a breach of the duty to repair and maintain the common property in circumstances where the breach commenced as a breach of the 1996 Act s 62 and, pursuant to clause 3, became a breach under the 2015 Act and continued after the passage of the 2015 Act as a breach under the 2015 Act.

116 In our view the Tribunal in *Rosenthal* was incorrect in concluding s 106(5) operates retrospectively.

117 First, the imposition of a limitation period in which a lot owner is to bring a claim for damages for a new cause of action is not an indicator that the legislature intended to retrospectively impose liability on an owners corporation for loss and damage suffered by a lot owner prior to commencement of the new provision.

118 Secondly, the Tribunal's reasoning in *Rosenthal* at [104]-[105] presupposes that the fact of alteration, by the introduction of the 2015 Management Act, of the position that existed under the 1996 Management Act and the decision in *Thoo*, was intended to operate retrospectively. This approach is contrary to the reasoning in *Maxwell*. In this regard there is no presumption that a change to existing legal rights or obligations or legislation enacted to ameliorate an earlier decision of the courts is to operate retrospectively and alter rights and or create remedies in respect of conduct occurring prior in time. To the contrary, there must be a clear legislative intention to do so

119 Thirdly, the application of cl 3(1) in a manner which retrospectively imposes a liability on the owners corporation to pay damages to a lot owner in respect of events occurring at a time where no such liability previously existed is, in our view, inappropriate. Consequently, cl 3(1) could not apply because of cl 3(2)(b). Further, s 3(2)(b) is an indicator that the legislature did not intend to impose any new obligations on a party for acts done prior to the commencement of the 2015 Management Act where it would be unjust to do so.

120 It follows that, in our view, s 106(5) does not operate retrospectively so as to give a lot owner an entitlement to claim damages for breach of statutory duty

where the loss suffered arises from a breach of duty occurring prior to the commencement of the 2015 Management Act on 30 November 2016.

121 This conclusion is not an end of the present appeal.

122 As noted above, the award made by the Tribunal was for damage suffered both before and after the 2015 Management Act commenced.

123 In respect of damage suffered prior to commencement of the 2015 Management Act, such damage cannot be recovered for the reasons outlined above. However, for damage suffered in this case on and after the commencement of the 2015 Management Act, the position is different. The reasons for this are as follows.

124 The duties imposed on the owners corporation are to "*properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation*" (s 106(1)) or to "*renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation*" (s106(2)).

125 In respect of the obligation to "*properly maintain and keep in a state of good and serviceable repair*", such an obligation is akin to a covenant imposed in a lease.

126 In *Larking v Great Western (Nepean) Gravel Ltd (in Liq)* [1940] HCA 37; (1940) 64 CLR 22, at 236, Dixon J (as he then was) said of covenants generally:

> If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. His duty is not considered as persisting and, so to speak, being for ever renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a state or condition of affairs, as, for instance, maintaining a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, then a further breach arises in every successive moment of time during which the state or condition is not as promised, during which, to pursue the examples, the building is out of repair, the life uninsured, or the particular support unprovided.

127 He then said at 238:

> The distinction between a covenant to do a definite act capable only of a breach once for all and a continuing covenant has consequences not only in relation to waiver but also in the measure of damage, in the effect of lapse of

> time under statutes of limitation, and, where the covenant runs with the land, in the liability of an assignee to sue or be sued for further breaches.

128 By analogy, the obligation of an owners corporation to maintain and keep in a good and serviceable state of repair is a continuing obligation, breach of which occurs on each and every day the duty is not performed. As such, where there are multiple breaches of a statutory duty, each breach constitutes a separate cause of action: *Kingston Earthworks Pty Ltd v Isles* (1997) 6 TASR 433 at 438 per Zeman J at (with whom Cox CJ and Crawford J agreed).

129 Consequently, as the appellant accepts that there was a continuing failure to maintain and keep in a good and serviceable state of repair on and after 30 November 2016 until 26 February 2017, upon commencement of the 2015 Management Act the respondent was entitled to claim damages suffered in consequence of any breach of duty occurring on and after this date.

130 The issue then becomes whether there was any loss suffered by the respondent which was "*any reasonably foreseeable loss suffered by the* (respondent) *as a result of*" these continuing breaches. That is, did the continuing breach cause the loss claimed by the respondent.

131 In this regard, the following principles are applicable.

132 First, causation is a question of fact to be answered by common sense and experience: *March v Stramare (E & MH) Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506 per Mason CJ at [17].

133 Secondly, as long as a cause of the loss is the breach about which complaint is made, the fact there are multiple causes for the loss will not prevent a claimant recovering damage.

134 In *Simonius Vischer & Co v Holt and Thompson* [1979] 2 NSWLR 322 the Court said:

> It was, of course sufficient for the plaintiffs to establish that the defendants' breaches were a cause of the loss notwithstanding that there may have been other concurrent causes. Hence, the defendants' argument must show that the plaintiffs' lack of care was the sole cause of the loss, to the exclusion of any causative influence exerted by the defendants' breaches. I take the correct principle to be that stated in *Chitty on Contracts*, General Principles, 23rd ed.; p. 670, par. 1448:

> "If a breach of contract is one of two causes, both cooperating and both of equal efficacy in causing loss to the plaintiff, the party responsible for the breach is liable to the plaintiff for that loss."

> This statement is supported by the authority of Devlin J., as he then was, in Heskell v Continental Express Ltd [1950] 1 All ER 1033 at 1046-1048, and the cases there cited. In particular, I refer to what was said by Lord Wright with whom Lord Atkin agreed, in Smith Hogg & Co Ltd v Black Sea and Baltic General Insurance Co. Ltd [1940] AC 997 at 1007. His Lordship's remarks, although delivered in a context different from that which obtains here, are of undoubted application. Lord Wright said:

> "The sole question apart from express exception, must then be: 'Was that breach of contract "a" cause of damage."

135 In the present case, there was a failure to repair and maintain the common property so as to prevent water penetration to the respondent's lot: decision at [30]. As is evident from the orders made by the Tribunal, the water penetration commenced to affect the property and continued to do so from (at the latest) 1 September 2016 until 26 February 2017, being the period for which damages was awarded.

136 The Tribunal found at [59]:

> Based on the evidence above, which the Tribunal accepts in the absence of any evidence to the contrary, the Tribunal finds that a causal nexus existed between the damage in the form of mould, bubbling paint and pools of water caused by the water penetration through the common area roof on the one hand, and the economic loss suffered by the Applicant as a result of the Applicant's Lessee refusing to pay Rent and contributions, and the loss in the form of the Interest, during the period under the Lease

137 The evidence which was accepted by the Tribunal was recorded in the decision at [54]. This evidence included the following:

> (2) By letter dated 30 November 2016 from the Applicant's agent to Strata Choice, the Applicant stated: 'Due to the unreasonable delay in approving the repairs to the roof, this has not only resulted in ongoing further damage to the ceiling and property's condition, it has also resulted in a loss of rent to ourselves … and a loss of profit to the Tenant. As a result of the lengthy delay, the tenant has ceased paying rent from 31 August 2016 as they are unable to trade due to the health and safety concerns…"

138 As is apparent from this evidence and the findings of the Tribunal, the respondent's loss and damage was caused not only by the initial failure to carry out repairs in consequence of the water penetration that occurred on or

before 1 September 2016, but also by the continuing failure to affect the repairs. These findings of fact were not challenged on appeal.

139 It follows that the damage suffered by the respondent on an after 30 November 2016 was caused, at least in part, by the ongoing breaches of duty by the owners corporation to maintain and keep in a good state of affairs the common property. Consequently, the respondent is entitled to damages arising from breach of the statutory duties occurring on and after 30 November 2016.

140 While the situation may be different if all damage suffered is properly attributable to a single breach, that is not the present factual situation

141 Finally, for the reasons outlined above, no issue of contribution arises in this appeal in connection with the conduct of the respondent in relation to mitigating any loss or damage he may have suffered or in respect of any contributory negligence.

142 It follows that the orders made by the Tribunal should be varied and an award made for loss and damage suffered on and after 30 November 2016 only.

143 The parties provided different amounts as to what sum should be allowed for this period. The appellant says $24,175.57. The respondent says the amount should be $28,034.11.

144 It is not possible for us to recalculate the amount based on the reasons for decision. Neither party has provided information as to this original calculation. As to the amount each party suggests is the damages attributable to the period from 30 November 2016, neither party provided relevant calculations save that the appellant's calculations:

(1) show an adjustment for rent prior to 1 September 2017 for which no allowance was made in the original award; and

(2) no allowance is made for loss of water charges and rates.

145 Clearly the appellant's calculations cannot be correct, particularly having regard to the rent adjustment it proposes for a period prior to 1 September 2016 and the failure to make any adjustment to water charges and rates.

146 In these circumstances we propose to adjust the amount of the award to that as calculated by the respondent.

147 If either party says this amount is incorrect, either party may apply to relist the matter to resolve any discrepancy. In this regard the parties representatives must first meet and provide a joint calculation of the amount they assert is due and a reconciliation of any differences in their respective calculations.

Costs

148 In relation to costs, each party has had some success. The amount in issue was more than $30,000.00. Prima facie, Rules 38 and 38A would apply in the Tribunal and therefore the Appeal Panel has a general discretion as to costs.

149 Our preliminary view is that each party should pay their own costs as neither has been wholly successful. We will make an order to this effect, subject to any application either party may wish to make.

Orders

150 The Appeal Panel makes the following orders:

(1) The appeal is allowed in part.

(2) Order 1 made in application SC 17/07455 on 30 August 2017 is varied as follows:

> The Owners- Strata Plan SP30621 is to pay Albert Shum the sum of $28,034.11 within 7 days of the date of these orders.

(3) Subject to order 4, each party is to pay their own costs of the appeal.

(4) In the event a party (costs applicant) contends that an order different to order 3 should be made, the following orders and directions are made:

(a) the costs applicant is to file any application for costs (cost application) within 14 days from the date these orders are published, such application to include any evidence and submissions, including submissions about whether an order can be made dispensing with a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act, 2013.

(b) The respondent to the costs application is to file and serve any evidence and submissions in reply within 21 days from the date of these orders, including submissions about whether an order can be made dispensing with a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act, 2013.

(c) The costs applicant is to file any submissions in reply within 28 days from the date of these orders.

(d) Order 3 ceases to have effect if a cost application is filed in the time permitted by these orders.

(5) Liberty to either party to apply to the Appeal Panel to adjust the amount in order 2 in accordance with the reasons above, such liberty to be exercised within 7 days of the date of these orders.

(6) Any issue arising from the exercise of the liberty granted by order 5 may be dealt with by a single member of the Appeal Panel, differently constituted.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

Amendments

11 January 2018 - Pursuant to CAT Act s63: Correction of name of Appellant from SP30521 to SP30621