



Civil and Administrative Tribunal
New South Wales

Case Name: Shih v The Owners - Strata Plan No 87879

Medium Neutral Citation: [2019] NSWCATAP 263

Hearing Date(s): 19 March, 3 June 2019; 11 June 2019 and 2 July 2019 (submissions)

Date of Orders: 31 October 2019

Decision Date: 31 October 2019

Jurisdiction: Appeal Panel

Before: The Hon F Marks Principal Member
K Ransome Senior Member

Decision: The proceedings are stood over for a period of 28 days with liberty to apply which must be exercised within that period.

Catchwords: Strata Title- appeal from order of Tribunal making an award of damages under sec 106(5) of the Strata Schemes Management Act 2015- held Tribunal lacked jurisdiction and power to make an award of damages

Strata Title – on appeal held Tribunal arguably may have power to make order for payment of compensation under section 232 of the Strata Schemes Management Act -
Proceedings stood over with liberty to apply

Legislation Cited: Strata Schemes Management Act 2015
Civil and Administrative Tribunal Act 2013
Strata Schemes Management Act 1996
Strata Schemes Management Regulation 2016
Interpretation Act 1987 No 15

Cases Cited: Shih & ors v The Owners - Strata Plan No 87879 [2018] NSWCATCD 74

The Owners Strata Plan No 30621 v Shum [2018]
NSWCATAP15
Mullen v Owners Corporation SP 15342 [2017]
NSWCATCD 97
O'Connor v SP Bray Limited [1937] HCA 18
Sovar v Henry Lane Pty Limited [1967] HCA 31
Wardley Australia limited and Another v The State of
Western Australia [1992] HCA 55
The Owners – Strata Plan 502 7 6 v Thoo [2013]
NSWCA 270
The Owners - Strata Plan No. 37762 v Dinh Phuong
Dung Pham and anor [2006] NSWSC 1287
Ridis v Strata Plan 10308 [2005] NSWCA 246
McElwaine v The Owners – Strata Plan number 75975
[2017] NSWCA 239

Texts Cited: None cited

Category: Principal judgment

Parties: Susan Shih (First Appellant)
Virginia Shih (Second Appellant)
Emiliano Shih (Third Appellant)
The Owners-Strata Plan No 87879 (Respondent)

Representation: Counsel:
T Liu (Appellants)
V F Kerr SC (Respondent)

Solicitors:
Kerin Benson Lawyers (Appellants)
Bannermans Lawyers (Respondent)

File Number(s): AP18/54301

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: [2018] NSWCATCD 74

Date of Decision: 28 November 2018

Before: P Boyce Senior Member

File Number(s): SC18/14261

REASONS FOR DECISION

Introduction

- 1 The appellants Susan Shih, Virginia Shih and Emiliano Shih filed a strata application in this Tribunal on 22 March 2018 claiming that water had entered their property being Lot 28 in a strata title building of which the respondent, The Owners- Strata Plan No 87879, was the owner of common property. They sought orders for the carrying out of rectification works and consequential orders, and for the payment of damages for compensation for loss of rent and cost of replacement of carpet. The proceedings came on for hearing before a Senior Member on 12 November 2018 who delivered detailed reasons on 28 November 2018 ordering that the respondent pay compensation of \$542.86 to the appellants for loss of rental income but otherwise dismissing the application. Subsequently, the Senior Member made an adverse costs order against the appellants. They have sought to appeal from both those decisions.
- 2 As will be seen, the basis of the application made by the appellants has significance for a consideration of the determination of these appeal proceedings. The appellants in essence sought the making of two principal orders and a third "catch-all" order.
- 3 The first order was based on section 232 of the *Strata Schemes Management Act 2015* ("the Act"). The appellants asked that pursuant to that provision the respondent be ordered at its own cost to "take all necessary steps and complete all necessary works in a proper and workmanlike manner to rectify water ingress into Lot 28" and then followed the recitation of certain work in greater particularity. The appellants asked that the respondent be ordered to complete that work within a period of 3 months.
- 4 The second order was based on section 106 (5) of the Act and sought the payment of damages to the appellants from 10 March 2017 until completion of

the works referred to above including, but not limited to loss of rent and carpet replacement.

- 5 A third catch-all order was sought in familiar terms expressed as seeking “such further orders as the Tribunal sees fit.”
- 6 In his decision the Senior Member dealt with the first order by stating that he was satisfied on the evidence that the respondent was taking action to rectify the defects in the common property and as such there was “no utility in making an order under s232 requiring the respondent to complete rectification works to the common property” which caused the water penetration to Lot 28. The Senior Member dealt with the second order by requiring the respondent to pay to the appellants compensation for loss of rent in the sum of \$542.86.
- 7 The subject of this appeal is confined to the amount awarded for loss of rent and the adverse costs orders made against the appellants.

The decision under appeal

- 8 In the primary decision under appeal *Shih & ors v The Owners - Strata Plan No 87879* [2018] NSWCATCD 74, the Senior Member found that;
 - (1) the appellants became aware of water penetration issues when notified by a tenant on about 29 April 2016. They lodged a complaint against the builder of the strata scheme on 2 May 2016 and a rectification order was made. The builder performed certain rectification works, apparently not to the appellants’ satisfaction. (There is evidence that two of the appellants were members of the strata committee of the respondent at the time, but the complaint appears to have been made by the appellants in their own right as owners of the strata unit.)
 - (2) the respondent engaged a building consultant on 9 March 2017
 - (3) on 10 March 2017 the tenant stopped paying rent and vacated the property. It has been vacant since.
 - (4) on 31 March 2017 the respondent lodged a complaint against the builder with NSW Fair Trading
 - (5) on 19 May 2017 a further rectification order was issued to the builder to be completed by 9 June 2017
 - (6) however, on 30 May 2017 the respondent commenced proceedings in this Tribunal against the builder.
 - (7) on 22 January 2018 the respondent resolved at an extraordinary general meeting to repair the defects causing water penetration issues affecting the appellants’ lot

- (8) experts retained, presumably by the builder and the respondent reached agreement on a scope of works to rectify the defects on 11 October 2018.

The factual background

9 The proceedings before the Senior Member were conducted against the background of a statement of agreed facts reached between the parties which we reproduce hereunder with anonymised modifications made for the purpose of the Decision;

- (1) The applicants are the owners of Lot 28 in Strata Plan 87879 ("Strata Scheme"). The applicants initially purchased Lot 28 "off the plan" in August 2015 and have continuously owned Lot 28 since then.
- (2) The respondent is the Owners Corporation for the Strata Scheme, constituted under the Act.
- (3) The Strata Scheme is a residential building comprised of 29 lots over 4 floors. The Strata Scheme is located at 70-72 *** Street, *****, NSW.
- (3) The parties have previously attempted mediation without success.
- (4) On about 29 April 2016, the applicants became aware of water penetration issues affecting Lot 28 when a tenant renting Lot 28 notified the applicants of the issue.
- (5) On 2 May 2016, the applicants lodged a complaint against the builder of the Strata Scheme with NSW Fair Trading.
- (6) On 5 July 2016, NSW Fair Trading made a rectification order requiring the builder to complete the rectification works affecting Lot 28 by 2 August 2016.
- (7) The builder attended Lot 28 to perform rectification works on:
 - (a) 13 July 2016;
 - (b) 19 October 2016;
 - (c) 17 November 2016.
- (8) On 9 March 2017 the respondent engaged Mark Kavanagh, building consultant to inspect Lot 28.
- (9) On 10 March 2017, the tenant of Lot 28 vacated the property and stopped paying rent. There has been no tenant occupying lot 28 since 10 March 2017.
- (10) On 20 April 2017, Mark Kavanagh provided a Preliminary Technical Report to the respondent ("The Report"). The Report identified all observable defects in the Strata Scheme, including defects in the common property causing the water penetration in Lot 28. The Report recommended the method for rectification of the defects.

- (11) From about March 2017 to June 2017, the applicants informed the respondent that Lot 28 was affected by water penetration issues and that the applicants were unable to find a tenant for Lot 28 because of the defects affecting Lot 28.
- (12) On 19 May 2017 NSW Fair Trading issued a further rectification order to the builder to rectify defects affecting Lot 28 by 9 June 2017.
- (13) On 30 May 2017, the respondent commenced proceedings in the Tribunal (HB17/25899) against the builder.
- (14) On 22 January 2018 the respondent resolved at its extraordinary general meeting to proceed with repairs to the defects causing water penetration issues affecting Lot 28.
- (15) On 3 and 8 February 2018 the strata managing agent for the respondent and its contractors accessed Lot 28 to determine the scope of remedial works required to rectify the defects to Lot 28.
- (16) On 19 March 2018, the strata managing agent for the respondent requested further access to Lot 28 to undertake remediation works.
- (17) On 22 March 2018, the applicants commenced these proceedings.

10 In his decision the Senior Member made additional findings of fact as follows;

13 The respondent commenced proceedings against the builder on 30 May 2017. The proceedings were commenced before the date of compliance for the builder to undertake the rectification work under the Office of Fair Trading complaint, 9 June 2017.

14 The respondent and its remedial contractors inspected Lot 28 on 3 and 8 February 2018 for the purpose of arranging to undertake temporary rectification work.

15 On 19 March 2018 the strata managing agent sent an email to the applicants advising that the respondent was ready, willing and able to undertake rectification work to Lot 28 and requested access promptly to Lot 28 as wet weather was forecasted.

16 On 23 March 2018 Virginia Shih sent an email to the managing agent denying access and refusing to provide access unless the respondent entered into a deed with the applicant that it would undertake the full scope of work set out in Mr Kavanagh's report.

17 On 29 March 2018 the managing agent sent an email to Virginia Shih confirming that the respondent agreed to repair the water ingress into Lot 28, noting that Virginia Shih had refused to provide access to the premises to allow the works to be carried out.

18 In the proceedings against the builder in the Tribunal a conclave of expert witnesses facilitated by Senior Tribunal Member Briggs was undertaken on 10 October 2018 and on 11 October 2018 Building Experts Kavanagh and Frizell issued a joint report based on the conclave and setting out agreement on the scope of works required to rectify the defects in Lot 28.

The decision under appeal

11 The Senior Member noted that the parties had by agreement identified the following issues for determination by him:

- (1) Whether s 106(4) of the the Act excepts the respondents from liability under s 106(5)?
- (2) Whether any issue of failure to mitigate losses arises in this case and, if so, to what extent?
- (3) Whether the orders sought by the applicants under s 232 are appropriate?
- (4) Whether the claimed loss of rental income is a reasonably foreseeable loss?
- (5) Whether the applicants are estopped from bringing these proceedings?

Does this Tribunal have jurisdiction or power to award damages for statutory breach under section 106 (5) of the Act?

12 The decision of the Senior Member was based on his construction of the provisions of section 106 *of the Strata Schemes Management Act 2015* which is in the following terms;

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.

- 13 We note that section 106 (5) came into effect on 30 November 2016. It has been established that this subsection does not have retrospective effect. (See *The Owners Strata Plan No 30621 v Shum [2018] NSWCATAP15* at [97] and following hereafter referred to as “*Shum*”.)
- 14 The Senior Member proceeded on the basis that he had jurisdiction to deal with the application before him. Neither party had raised any question of jurisdiction or power. However, in the course of the appeal proceedings before us the respondent submitted that this Tribunal has neither jurisdiction nor power to deal with a claim for damages based on statutory breach created by section 106 (5). Although this had not been formally raised as an issue in the appeal proceedings, we formed the view that a matter of such primary significance would need to be addressed. It would be inappropriate for us to proceed if there was any doubt about jurisdiction or power, and it is well accepted that the parties cannot, by consent, bestow jurisdiction or power on a tribunal or a court where none exists. The parties were given an opportunity to make written submissions about this matter. The material which follows constitute our reasons for accepting the submissions of the respondent with respect to jurisdiction.
- 15 Whilst this matter has been considered in a number of proceedings before this Tribunal, there are two decisions only which have dealt with the relevant arguments in a detailed fashion. It is convenient to make reference initially to the decision of Senior Member A Bell SC in *Mullen v Owners Corporation SP 15342 [2017] NSWCATCD 97*. This is because the Senior Member commenced his decision by making some historical observations to the following effect;

Section 106(5) is a new provision in the Act which did not exist in any of the previous NSW statutes relating to strata management. There is no express indication in the Act that the Tribunal has jurisdiction to award damages under section 106(5). The Explanatory Note relating to the Strata Schemes Management Bill 2015 does not provide any guidance in relation to this issue. Nor does the Second Reading Speech relating to the Bill made on 14 October 2015 by the then Minister for Innovation and Better Regulation.

- 16 A contrary view was expressed in *Shum*, previously cited, where the Appeal Panel held that the Tribunal was empowered to make an award of damages for breach of statutory duty in accordance with s 106(5).

Relevant principles of statutory construction

- 17 The determination of this particular issue involves the application of principles of statutory construction to the provisions of the Act and in particular the provisions of section 106 (5). A convenient summary of the relevant principles is found in the decision of the Appeal Panel in *Shum*. The Appeal Panel said;

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.

- 18 We gratefully adopt the above summary. Of course, the greatest difficulty is in applying the principles to the particular circumstances of these proceedings.

The basis for jurisdiction and power – the Civil and Administrative Tribunal Act 2013.

- 19 This Tribunal is established by the *Civil and Administrative Tribunal Act 2013* (“the CAT Act”). It is a creation of statute and its jurisdiction and powers are circumscribed by those statutory provisions. Section 28 of the CAT Act describes the jurisdiction of this Tribunal as follows;

Part 3 Jurisdiction of Tribunal

28 Jurisdiction of Tribunal generally

- (1) The Tribunal has such jurisdiction and functions as may be conferred or imposed on it by or under this Act or any other legislation.
- (2) In particular, the jurisdiction of the Tribunal consists of the following kinds of jurisdiction:
 - (a) the general jurisdiction of the Tribunal,
 - (b) the administrative review jurisdiction of the Tribunal,
 - (c) the appeal jurisdiction of the Tribunal (comprising its external and internal appeal jurisdiction),
 - (d) the enforcement jurisdiction of the Tribunal.
- (3) Subject to this Act and enabling legislation, the Tribunal has jurisdiction in respect of matters arising before or after the establishment of the Tribunal.

Note. Section 35D of the Ombudsman Act 1974 enables the Ombudsman and the President to enter into arrangements with respect to the co-operative exercise of the respective functions of the Ombudsman and the Tribunal (including providing for the referral of matters between them).

- 20 We are concerned with the general jurisdiction of the Tribunal which is described in section 29 as follows;

29 General jurisdiction

- (1) The Tribunal has general jurisdiction over a matter if:
 - (a) legislation (other than this Act or the procedural rules) enables the Tribunal to make decisions or exercise other functions, whether on application or of its own motion, of a kind specified by the legislation in respect of that matter, and
 - (b) the matter does not otherwise fall within the administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction of the Tribunal.

Note. The general jurisdiction of the Tribunal includes (but is not limited to) functions conferred on the Tribunal by enabling legislation to review or otherwise re-examine decisions of persons or bodies other than in connection with the exercise of the Tribunal’s administrative review jurisdiction.

- (2) The Tribunal also has the following jurisdiction in proceedings for the exercise of its general jurisdiction:

- (a) the jurisdiction to make ancillary and interlocutory decisions of the Tribunal in the proceedings,
- (b) the jurisdiction to exercise such other functions as are conferred or imposed on the Tribunal by or under this Act or enabling legislation in connection with the conduct or resolution of such proceedings.
- (3) A general decision of the Tribunal is a decision of the Tribunal determining a matter over which it has general jurisdiction.
- (4) A general application is an application made to the Tribunal for a general decision.
- (5) Nothing in this section permits general jurisdiction to be conferred on the Tribunal by a statutory rule unless the conferral of jurisdiction by such means is expressly authorised by another Act.

21 The general jurisdiction is founded upon and subject to the provisions of enabling legislation. It is necessary to identify “jurisdiction and functions as may be conferred or imposed on (this Tribunal) by or under ...other legislation (Section 28(1)). This is reinforced in section 29(1)(a). Thus, it is necessary to find legislation which “enables the Tribunal to make decisions or exercise other functions, whether on application or of its own motion, of a kind specified by the legislation in respect of that matter”. We regard the provisions of section 29 (1) (a) as importing, for the purpose of a consideration of this particular issue, words of limitation. That is, in considering what decisions or functions may be made or exercised, they are limited to those of a kind specified by the legislation with respect to a particular matter. In general terms this is indicative of the necessity to identify in the enabling legislation the kind of decision or function being dealt with by the Tribunal. Accordingly, there would be a need to identify the ability to make an award of damages under section 106(5) of the Act as a decision of a kind specified by the Act. We shall return to this matter later, when considering the provisions of the Act.

22 For completeness we note that section 4 of the CAT Act defines enabling legislation as:

enabling legislation means legislation (other than this Act or any statutory rules made under this Act) that:

- (a) provides for applications or appeals to be made to the Tribunal with respect to a specified matter or class of matters, or
- (b) otherwise enables the Tribunal to exercise functions with respect to a specified matter or class of matters.

We observe that this definition is concerned in (a) for relevant purposes with the ability to make applications to the Tribunal concerning particular matters. The reference in (b) prima facie appears to apply to the exercise of functions otherwise than by the making of applications. It is arguable that such functions may be a reference to powers to make orders of a particular kind which are contained in the enabling legislation. It is not necessary that we consider this further because the functions must nevertheless be enabled with respect to a specified matter or class of matters under the legislation. In this regard we note that “function” is defined in section 4 as follows:

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

- 23 Finally, we note that there is a definition of “decision” in section 5 of the CAT Act which is in the following terms;

Part 1 Section 5

5 Meaning of “decision”

(1) In this Act, decision includes any of the following:

- (a) making, suspending, revoking or refusing to make an order or determination,
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission,
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument,
- (d) imposing a condition or restriction,
- (e) making a declaration, demand or requirement,
- (f) retaining, or refusing to deliver up, an article,
- (g) doing or refusing to do any other act or thing.

(2) For the purposes of this Act:

- (a) a decision is made under enabling legislation or this Act if it is made in the exercise (or purported exercise) of a function conferred or imposed by or under the enabling legislation or this Act, and
- (b) a decision that purports to be made under enabling legislation or this Act is taken to be a decision made under the enabling legislation or this Act even if the decision was beyond the power of the decision-maker to make, and
- (c) a refusal of a decision-maker to make a decision under enabling legislation or this Act because the decision-maker considers that the decision concerned cannot lawfully be made under the enabling legislation or this Act is taken to be a decision made under the enabling legislation or this Act to refuse to make the decision requested, and

(d) a failure by a decision-maker to make a decision within the period specified by enabling legislation or this Act for making the decision is taken to be a decision by the decision-maker at the end of the period to refuse to make the decision.

24 We observe that the description of the circumstances in which a decision is made under enabling legislation contained within section 5(2)(a) above is consistent with the provisions of section 29(1)(a). There is again a reference to a function conferred or imposed by or under the enabling legislation. For present purposes this will require a consideration of whether a power to award damages under section 106(5) for breach of statutory duty is conferred on this Tribunal or imposed by the provisions of the Act.

The asserted basis for jurisdiction and power – section 106(5) as an enabling provision of the Act

25 It is clear that section 106(5) creates a private cause of action, entitling an owner of a lot to sue for damages. This is the effect of the creation of a statutory cause of action. See generally, Dixon J (as his Honour then was) in *O'Connor v SP Bray Limited* [1937] HCA 18 and observations to similar effect by members of the High Court of Australia in *Sovar v Henry Lane Pty Limited* [1967] HCA 31.

26 It was suggested by the respondent that the amendment made to section 106 by the insertion of subsection (5) was a response by the legislature to the decision of the NSW Court of Appeal in *The Owners – Strata Plan 502766 v Thoo* [2013] NSWCA 270 in which it had been held that the predecessor section 62 of the *Strata Schemes Management Act 1996* did not create a private cause of action sounding in damages. In the absence of any corroborative material, we accept that this suggestion may well have a logical basis but is not necessarily determinative of the outcome of these proceedings. As will be seen, however, we have found a comparison of the current provisions of section 106 of the Act with the provisions of section 62 of the former Act as being of assistance. We shall consider the decision in *Thoo* later in these reasons for decision.

27 We observe that the assessment of damages under section 106 (5) will need to be undertaken after a thorough analysis of the provisions of the Act, must be limited to “any reasonably foreseeable loss suffered by the owner as a result of

a contravention of this section by the owners corporation” and may otherwise be guided by the common law measure of damages (see *Wardley Australia Limited and Another v The State of Western Australia [1992] HCA 55* at [13]). Concepts of damages so qualified are ordinarily part and parcel of the principles applied by courts of law.

- 28 There are two other provisions of the Act which create a statutory right to claim damages. These are sections 26 and 140 which are in the following terms;

26 Restrictions on powers of owners corporation during initial period

(1) An owners corporation for a strata scheme must not, during the initial period, do any of the following things unless the owners corporation is authorised to do so by an order of the Tribunal under this Division:

- (a) alter any common property or erect any structure on the common property otherwise than in accordance with a strata development contract,
- (b) incur a debt for an amount that exceeds the amount then available for repayment of the debt from its administrative fund or its capital works fund,
- (c) appoint a strata managing agent or a building manager or other person to assist it in the management or control of use of the common property, or the maintenance or repair of the common property, for a period extending beyond the holding of the first annual general meeting of the owners corporation,
- (d) borrow money or give securities.

(2) An owners corporation may recover from the original owner:

- (a) as a debt, any amount for which the owners corporation is liable because of a contravention of subsection (1) (b), together with the expenses of the owners corporation incurred in recovering that amount, and
- (b) as damages for breach of statutory duty, any loss suffered by the owners corporation as a result of any other contravention of this section.

(3) An owner may recover, as damages for breach of statutory duty, any loss that has been suffered by the owner as a result of a contravention of this section (other than subsection (1) (b)).

(4) It is a defence to an action under this section in debt or for damages if it is proved that the original owner:

- (a) did not know of the contravention on which the action is based, or
- (b) was not in a position to influence the conduct of the owners corporation in relation to the contravention, or
- (c) used due diligence to prevent the contravention.

(5) A remedy available under this section does not affect any other remedy.

Note. Section 140 places restrictions on the making, amendment and repeal of by-laws during the initial period.

140 Restrictions on by-laws during initial period

- (1) An owners corporation for a strata scheme must not, during the initial period, change the by-laws so that a right is conferred or an obligation is imposed on one or more, but not all, owners or in respect of one or more, but not all, lots in the scheme.
- (2) An owners corporation may recover from the original owner of the strata scheme, as damages for breach of statutory duty, any loss suffered by the owners corporation as a result of a contravention of this section.
- (3) An owner of a lot in a strata scheme may recover, as damages for breach of statutory duty, any loss suffered by the owner as a result of a contravention of this section.
- (4) It is a defence to an action under this section for damages if it is proved that the original owner:
 - (a) did not know of the contravention on which the action is based, or
 - (b) was not in a position to influence the conduct of the owners corporation in relation to the contravention, or
 - (c) used due diligence to prevent the contravention.
- (5) A remedy available under this section does not affect any other remedy.

29 Section 26(2)(a) also creates a right to recover certain monies “as a debt”. Both sections refer to “other remedies”. Neither of these sections contains any hint about what may be the appropriate jurisdiction in which to pursue any claim for damages. Both sections deal with rights and obligations arising during the initial period. Both sections make reference to a “defence to an action for damages.” (We regard this language as being more appropriate to describe proceedings for the recovery of damages before a court than a description of an application brought before this Tribunal and we shall return to the use of the language in the Act later in these reasons.) Neither section makes any reference of any kind to this Tribunal.

30 We regard the lack of any reference in these provisions dealing with the creation of a right to claim damages for statutory breach in the absence of any reference to this Tribunal as being inconsistent with the creation of a function conferred or imposed by or under enabling legislation as required by section 29(1)(a). This is a powerful consideration in determining whether the Act did create in this Tribunal jurisdiction or power to award damages or grant other relief under either of these sections as enabling legislation. Nothing in these provisions confers or imposes powers on this Tribunal to do anything about awarding damages or ordering the recovery of monies as a debt. Prima facie the provisions of sections 28 and 29 of the CAT Act do not apply.

31 In *Shum* the Appeal Panel concluded that the basis for the power of the Tribunal to award damages under section 106(5) was the provisions of section 232 of the Act, which we next consider.

Section 232

32 As will be seen, an examination of the provisions of section 232 of the Act is fundamental to the determination of these proceedings. It is this section which the appellants assert, and the respondent denies, creates the basis for the power and jurisdiction to award damages under section 106 (5). Its provisions are 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.

33 In *The Owners - Strata Plan No. 37762 v Dinh Phuong Dung Pham and anor [2006] NSWSC 1287* Rothman J in the Supreme Court of NSW had occasion to deal with the provisions of section 138(1)(a) of the former *Strata Schemes Management Act 1996* which, for present purposes are relevantly similar to section 232(1)(a) of the Act. His Honour said:

63 By s21 of the *Consumer Trader and Tenancy Tribunal Act 2001* the Tribunal only has such jurisdiction to decide matters and such powers to make orders as is conferred on it by that Act or any other Act. Section 138(1)(a) of the *Strata Schemes Management Act 1996* does not allow an Adjudicator, or, in this case the Tribunal, to make any order to settle any dispute or complaint. The words in paragraph (a) and (b) confine the subject matter of the dispute and complaint and are words of limitation.

34 The primary focus of attention in these proceedings are the provisions of section 232(1)(e) of the Act. The Senior Member was clearly dealing with a dispute and a complaint about the failure of the owners corporation to prevent water penetration into lot 28. This failure arose out of a failure to perform a

function (defined by section 4 of the Act to include a duty) created by section 106(1) of the Act. The orders sought firstly by the appellants in the application before the Senior Member are consistent with this approach. That is, they sought orders that the respondent should carry out particular described rectification works, carry out repair and reinstatement works, obtain compliance certifications from qualified engineering, waterproofing and other experts and complete the works within a specified time.

- 35 The justification for making orders under section 232 of the Act and the awarding of damages under section 106(5) both arise from a failure by the owners corporation to comply with the strict duties imposed upon it by section 106(1) and (2). Therefore a failure to comply with those duties may give rise concurrently to an entitlement to bring a claim under either provision.
- 36 The respondent sought to argue that by implication, if a matter fell within the provisions of section 232(1)(e) of the Act it fell outside the provisions of section 232(1)(a). We do not find it necessary to determine this question. It would seem, however, *prima facie* that given the broad powers of the owners corporation to administer strata schemes, a dispute about whether the owners corporation had taken appropriate steps to prevent water penetration to lot 28 is a matter concerning a complaint or dispute about the operation or management of the strata scheme.
- 37 The respondent also submitted that these proceedings are essentially concerned with an alleged failure by the respondent to comply with its duty under section 106(1) which thereby constituted a failure to exercise a function for the purpose of section 232(1)(e). When combined with the provisions of section 232(2) it was said that the jurisdiction and power to make an order to settle a complaint or dispute about such a failure was prospective only. This was said to exclude a power in the nature of a power to award damages which looked not only prospectively at future losses, but also at past losses. We shall return to this submission later in these reasons.
- 38 The provisions of section 232(3) support the approach to construction contended for by the respondent that there are concurrent rights to pursue complaints and disputes under section 232 and to claim damages under

section 106(5). Section 232(3) refers to the commencement of “other” proceedings “in connection with the settlement of a dispute or complaint.” This contemplates an order made in the settlement of a complaint or dispute about the matters referred to in section 232 (1) as contrasted with other proceedings “in connection with the settlement of a dispute or complaint” as described.

39 The appellants’ submissions focussed on two principal matters. The first relied on observations by the Appeal Panel in *Shum* dealing with the decision in *Thoo*.

40 *Thoo* dealt with a comparable provision of section 232(1) of the Act in the former *Strata Schemes Management Act 1996*. Section 138 of that Act was in the following terms:

138 General power of Adjudicator to make orders to settle disputes or rectify complaints

(1) An Adjudicator may make an order to settle a dispute or complaint about:

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

(b) the operation, administration or management of a strata scheme under this Act.

(2) For the purposes of subsection (1), an owners corporation or building management committee is taken to have failed to exercise 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) An Adjudicator may not make an order under subsection (1) for the settlement of a dispute or complaint:

(a) dealt with in another section of this Chapter, or

(b) referred to the Tribunal or only within the jurisdiction of the Tribunal, or

(c) relating to the exercise, or the failure to exercise, a function conferred on an owners corporation by this Act or the by-laws if that function may be exercised only in accordance with a unanimous resolution or a special resolution (other than a special resolution under section 62 (3), 65A or 65B), or

(d) that includes the payment by a person to another person of damages.

(4) If a dispute or complaint arises from or relates to the operation or application of a provision of a lease of a lot, or of the common property, in a leasehold strata scheme, the lessor of the strata scheme must not:

(a) commence other proceedings in connection with the settlement of the dispute or complaint after having made an application under this section for the settlement of the dispute or complaint, or

(b) make an application under this section for the settlement of the dispute or complaint after having commenced other proceedings in connection with the settlement of the dispute or complaint.

(5) An application for an order under this section may be made only by an interested person.

41 The power to deal with a comparable dispute or complaint was vested in an Adjudicator, but limited in the case of matters within the jurisdiction of the Tribunal. Significantly however section 138(3)(d) expressly denied the Adjudicator power to award damages.

42 In *Thoo* at [211] Tobias AJA (Barrett JA and Preston CJ of LEC agreeing) said:

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.

43 These observations formed the basis for the conclusion of the Court that there was no right to claim damages based on a breach of section 138.

44 The Members of the Appeal Panel in *Shum* prefaced their consideration of the decision in *Thoo* by making reference generally to section 106(5). At [80] and following they said:

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.

- 45 The Appeal Panel then commenced to consider the legislative scheme which applied at the time of the *Thoo* decision. The comparable duty to section 106 of the Act was section 62 of the Strata Schemes Management Act 1996 which was in the following terms;

62 What are the duties of an owners corporation to maintain and repair property?

(1) An owners corporation 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 clause 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.

Note.

The decision of an owners corporation under subsection (3) may be reviewed by an Adjudicator (see section 138).

- 46 The Members said:

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] HCA 31; (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] NSWStRp 13; (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)).

47 In effect, the Appeal Panel said that breach of the prior legislation did not give rise to a statutory cause of action creating an entitlement to claim damages. This was due in part to the fact that an Adjudicator, being the relevant decision-maker under that prior legislation, did not have power to award damages because such a power was specifically excluded. The Appeal Panel then reasoned that if the current legislation now makes provision for an award of damages for breach the legislature must have intended that the Tribunal would have the power to award damages. With respect, this conclusion does not necessarily follow. The decision to create a statutory cause of action giving rise to a claim for damages where none previously existed is not necessarily indicative that a current decision-maker who replaces a decision maker who previously did not have the power to award damages will be given that power when the right to claim damages is created. It is still necessary to identify a power given to this Tribunal explicitly or by necessary implication as envisaged by sections 28 and 29 of the CAT Act.

48 We would respectfully approach the matter by first agreeing with the appeal Panel in *Shum* that

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))

49 As we have observed above there are concurrent rights created within section 232 and section 106 (5) for affected parties to seek relief. As will be seen we conclude that it may be arguable that the Tribunal is empowered to make an award of compensation under section 232. However for reasons which we shall

now develop we disagree that this Tribunal is empowered to award damages under section 106(5).

Other provisions of the Act as enabling legislation

- 50 As noted at the beginning of these reasons, the Tribunal is only able to make decisions about matters where the enabling legislation specifically so provides. The Act contains a significant number of provisions which give the Tribunal jurisdiction to make specified orders. For example, the Tribunal can make orders invalidating resolutions of the owners corporation (section 24); it can make orders terminating managing agency agreements (section 72) or appointing a strata manager (section 237); orders can be made about by-laws (sections 148-150) and about the keeping of animals (sections 156-158); orders about property (sections 126-132) and orders can be made for the reallocation of unit entitlements (section 236). The Tribunal can make certain orders about money and these will be referred to below.
- 51 In some instances a provision in the Act provides for jurisdiction to be exercised by the Tribunal and by a court. So, for example under section 77 of the Act the Tribunal can make certain orders for the distribution of surplus monies from the administrative fund or capital works fund of the owners corporation. However, that section also provides that, where the matter involves a question as to title to land, it must be dealt with by the Supreme Court and not the Tribunal. Similarly, under section 86 the Tribunal can make an order for the recovery by an owners corporation of unpaid contributions and interest by a lot owner. That order can, however, only be made if there are other proceedings pending before the Tribunal. If there are no such proceedings before the tribunal, the order can only be made by a court of competent jurisdiction (section 86(2A)).
- 52 As also already noted, section 106, while it provides for the making of an award of damages, does not specify which body can make that order. The lack of specificity contained within section 106 is to be contrasted with a number of other provisions of the Act which do create specific powers in this Tribunal to make monetary orders.

- 53 In addition to sections 77 and 86 mentioned above, the following provisions give the Tribunal the power to make monetary orders. Section 60 (3) creates a power to order payment of undisclosed commissions by a managing agent to the owners corporation:

60 Disclosure of commissions and training services

(1) A strata managing agent for a strata scheme must report the following at the annual general meeting of the owners corporation for the scheme:

(a) whether any commissions or training services have been provided to or paid for the agent (other than by the owners corporation) in connection with the exercise by the agent of functions for the scheme during the preceding 12 months and particulars of any such commissions or training services,

(b) any such commissions or training services and the estimated amount or value of any such commissions or training services that the agent believes are likely to be provided to or paid for the agent in the following 12 months.

Maximum penalty: 20 penalty units.

Note. It will be an offence for an agent to receive commissions or training services that are not of a kind permitted by the agent's terms of appointment or approved by the owners corporation (see section 57).

(2) A strata managing agent must, as soon as practicable after becoming aware that commissions or training services provided to or paid for the agent (other than by the owners corporation) differ from the commissions or training services or any estimate of them disclosed at the annual general meeting, disclose to the strata committee the variation and give an explanation for the variation.

Maximum penalty: 20 penalty units.

(3) The Tribunal may, on application by an owners corporation, order a strata managing agent to pay to the owners corporation:

(a) the whole or part of the amount or value of any commissions or training services provided to or paid for the agent and not disclosed in accordance with this section, or

(b) the whole or part of the amount or value of any commissions or training services provided to or paid for the agent that are not of a kind or an amount disclosed by the agent under this section, if the Tribunal is satisfied that the disclosure of those things at the previous annual general meeting was not made in good faith.

(4) In this section:

training service means a training course or service (including attendance at industry events such as conferences).

- 54 Section 72 creates the power to make a range of orders including an order requiring the payment of compensation in appropriate circumstances:

72 Strata managing agent and building manager agreements may be terminated or varied by Tribunal

(1) The Tribunal may, on application by an owners corporation for a strata scheme, make any of the following orders in respect of an agreement for the appointment of a strata managing agent or building manager for the scheme:

- (a) an order terminating the agreement,
- (b) an order requiring the payment of compensation to a party to the agreement,
- (c) an order varying the term, or varying or declaring void any of the conditions, of the agreement,
- (d) an order that a party to the agreement take any action or not take any action under the agreement,
- (e) an order dismissing the application.

(2) If the Tribunal makes an order terminating the agreement, the Tribunal may also order the strata managing agent or building manager to return to the owners corporation, within the period specified in the order, any documents or other records relating to the strata scheme that are in the possession of the agent or manager.

(3) The Tribunal may make an order under this section on any of the following grounds:

- (a) that the strata managing agent or building manager has refused or failed to perform the agreement or has performed it unsatisfactorily,
- (b) that charges payable by the owners corporation under the agreement are unfair,
- (c) that the strata managing agent has contravened section 58 (2),
- (d) that the strata managing agent has failed to disclose commissions or training services (including estimated commissions or value of training services or variations and explanations for variations) in accordance with section 60 or has failed to make the disclosures in good faith,
- (e) that the strata managing agent or building manager has failed to disclose an interest under section 71,
- (f) that the agreement is, in the circumstances of the case, otherwise harsh, oppressive, unconscionable or unreasonable.

55 Section 89 empowers the Tribunal to order the original owner to pay compensation to the owners corporation if the estimates and levies determined during the initial period are found to be inadequate to meet actual or expected expenditure:

89 Order requiring original owner to pay compensation for inadequate estimates and levies

(1) The Tribunal may, on application by the owners corporation for or an owner of a lot in the strata scheme, order the original owner of the strata scheme to pay compensation to the owners corporation if the Tribunal determines that the estimates and levies determined during the initial period for the purposes of determining and meeting expenditures relating to the

scheme were inadequate to meet the actual or expected expenditures of the owners corporation.

(2) The Tribunal must not make an order under this section if the original owner satisfies the Tribunal that the original owner used due care and diligence in determining the estimates and levies.

(3) An application under this section must be made not later than 3 years after the end of the initial period.

56 By Regulation 34(5) of the Strata Schemes Management Regulation 2016 the Tribunal is given jurisdiction under section 125 to make orders concerning the payment of the cost of disposing of abandoned motor vehicles:

125 Disposal of abandoned goods on common property

The regulations may make provision for or with respect to the following matters:

(a) conferring power on an owners corporation to store or dispose of, or authorise the disposal of, goods left on common property,

(b) notices to owners and other persons as to disposal or proposed disposal of goods by an owners corporation,

(c) the passing of title to any goods on disposal by an owners corporation,

(d) the payment of the proceeds of disposal of goods by an owners corporation,

(e) conferring jurisdiction on the Tribunal to make directions and orders relating to the disposal of goods, including orders for the payment of compensation and as to the payment of the costs of disposing of goods.

57 By section 132 the Tribunal may order an owner or occupier to pay for the cost of repairs of damage to common property in the circumstances set out:

132 Rectification where work done by owner

(1) The Tribunal may, on application by an owners corporation for a strata scheme, make either of the following orders if the Tribunal is satisfied that work carried out by or for an owner or occupier on any part of the parcel of the scheme has caused damage to common property or another lot:

(a) an order that the owner or occupier performs the work or takes other steps as specified in the order to repair the damage,

(b) an order that the owner or occupier pay to the owners corporation or the owner of the lot a specified amount for the cost of repairs of the damage and any associated costs, including insurance and legal costs.

(2) An amount payable by an owner or occupier to an owners corporation under this section is payable, and may be recovered, under this Act as if it were an amount of unpaid contributions.

Note. Section 86 provides for the recovery of unpaid contribution

- 58 By section 147 the Tribunal may order the payment of a monetary civil penalty for contravention of a by-law:

147 Civil penalty for breach of by-laws

(1) The Tribunal may, on application by an owners corporation, order a person to pay a monetary penalty of up to 10 penalty units if the Tribunal is satisfied that:

(a) the owners corporation gave a notice under this Division to the person requiring the person to comply with a by-law, and

(b) the person has since contravened the by-law.

(2) The Tribunal may, on application by an owners corporation, order a person to pay a monetary penalty of up to 20 penalty units if the Tribunal is satisfied that the person has contravened a by-law within 12 months after the Tribunal had imposed a monetary penalty on the person for a previous breach of the by-law.

(3) Despite subsections (1) and (2), the Tribunal may, in dealing with a contravention of a by-law made under section 137, impose a monetary penalty of up to 50 penalty units under subsection (1) and a monetary penalty of up to 100 penalty units under subsection (2).

(4) An application for an order under subsection (1) must be made not later than 12 months after the notice was given.

(5) An owners corporation is not required to give notice under this Division before applying for an order under subsection (2).

(6) A monetary penalty is payable to the owners corporation, unless the Tribunal otherwise orders.

Note. The penalty may be registered as a judgment debt and will be enforceable accordingly (see section 78 of the Civil and Administrative Tribunal Act 2013).

- 59 By section 148 the Tribunal may order the payment of compensation where rights to use of common property have been affected:

148 Order revoking amendment of by-law or reviving repealed by-law

(1) The Tribunal may, on application by a person entitled to vote on the amendment or repeal of a by-law or addition of a new by-law or the lessor of a leasehold strata scheme, make one of the following orders:

(a) an order that the amendment be revoked,

(b) an order that the repealed by-law be revived,

(c) an order that the additional by-law be repealed.

(2) The Tribunal may make an order only if the Tribunal considers that, having regard to the interest of all owners of lots in a strata scheme in the use and enjoyment of their lots or the common property, the change to the by-laws should not have been made by the owners corporation.

(3) An order under this section, when recorded under section 246, has effect as if its terms were a by-law (but subject to any relevant order made by a superior court).

(4) When making an order under this section in relation to a common property rights by-law, the Tribunal may direct the payment by the owners corporation of compensation to the owner of the lot, or owners of the lots, referred to in the by-law.

Note. Section 78 of the Civil and Administrative Tribunal Act 2013 provides for the recovery as a judgment debt of amounts ordered to be paid by the Tribunal.

(5) An order under this section operates on and from the date on which it is so recorded or from an earlier date specified in the order.

60 We note that there is a particular reference to the power to order the payment of compensation, and that the Tribunal is specifically given that power. We contrast this with the lack of any mention of any such power within the provisions of section 106 of the Act, or the other provisions of the Act creating a right to claim damages for breach of statutory duty. We now deal with those provisions.

Other provisions of the Act do not create jurisdiction or power in the Tribunal to make monetary orders or orders for the payment of compensation or damages

61 In contrast to the provisions of the Act as enabling legislation set out above, there are a number of provisions which do not expressly empower the Tribunal to make orders requiring the payment of monies or payment by way of compensation or damages. The respondent submitted that by implication the omission to create such power and jurisdiction would justify a conclusion the legislature did not intend that this Tribunal be given such powers. A ready example is section 26 which entitles an owners' corporation to recover certain moneys from an original owner "as a debt". There is an omission to specifically empower the Tribunal to make any relevant orders referable to such debt, and it may be assumed that in the circumstances the legislature intended that the Tribunal be deprived of any such power. In the circumstances it may be implied that any such debt may be recovered in a court in the usual manner. As section 26 also creates a right of recovery of damages for statutory breach, it may be assumed that the same approach applies and that this Tribunal lacks jurisdiction and power to award damages for such statutory breach. By analogy, the same approach should be adopted in the circumstances applying

to damages for statutory breach pursuant to section 106 (5) of the Act. Section 26 is in the following terms:

26 Restrictions on powers of owners corporation during initial period

- (1) An owners corporation for a strata scheme must not, during the initial period, do any of the following things unless the owners corporation is authorised to do so by an order of the Tribunal under this Division:
 - (a) alter any common property or erect any structure on the common property otherwise than in accordance with a strata development contract,
 - (b) incur a debt for an amount that exceeds the amount then available for repayment of the debt from its administrative fund or its capital works fund,
 - (c) appoint a strata managing agent or a building manager or other person to assist it in the management or control of use of the common property, or the maintenance or repair of the common property, for a period extending beyond the holding of the first annual general meeting of the owners corporation,
 - (d) borrow money or give securities.
- (2) An owners corporation may recover from the original owner:
 - (a) as a debt, any amount for which the owners corporation is liable because of a contravention of subsection (1) (b), together with the expenses of the owners corporation incurred in recovering that amount, and
 - (b) as damages for breach of statutory duty, any loss suffered by the owners corporation as a result of any other contravention of this section.
- (3) An owner may recover, as damages for breach of statutory duty, any loss that has been suffered by the owner as a result of a contravention of this section (other than subsection (1) (b)).
- (4) It is a defence to an action under this section in debt or for damages if it is proved that the original owner:
 - (a) did not know of the contravention on which the action is based, or
 - (b) was not in a position to influence the conduct of the owners corporation in relation to the contravention, or
 - (c) used due diligence to prevent the contravention.
- (5) A remedy available under this section does not affect any other remedy.

Note. Section 140 places restrictions on the making, amendment and repeal of by-laws during the initial period.

62 We have already referred to section 86 which empowers the Tribunal to order the payment of unpaid contributions together with interest and expenses in certain circumstances. However, if there are no pending proceedings between the parties in the Tribunal the owners corporation may recover any amounts owing together with interest and expenses “as a debt in a court of competent jurisdiction.”

63 Section 120 provides for recovery of certain moneys by the owners corporation expended in carrying out certain work required by a public authority as a debt. Again, there is no reference to any jurisdiction or power concerning these matters which is vested in the Tribunal, and the reference to the recovery of a debt must by implication refer to recovery before a court of competent jurisdiction.

120 Owners corporation may carry out work required to be carried out by others

(1) Work required by public authority If an owner of a lot in a strata scheme fails to carry out work that is required to be carried out under a notice given to the owner by a public authority, the owners corporation may carry out the work and recover the cost of carrying out the work from the owner or any person who, after the work is carried out, becomes the owner.

(2) Work required to be carried out under term or condition of by-law If a person who is the owner, mortgagee or covenant chargee in possession, tenant or occupier of a lot in the strata scheme fails to carry out work that is required to be carried out by the person under a term or condition of a by-law of the scheme, the owners corporation may carry out the work and recover the cost of carrying out the work from that person, the owner of the lot (if the person is not the owner) or any person who, after the work is carried out, becomes the owner of that lot.

(3) Work that is duty of owner or occupier to carry out If a person who is the owner, mortgagee or covenant chargee in possession, tenant or occupier of a lot in the strata scheme fails to carry out work in order to remedy a breach of a duty imposed by Part 8, the owners corporation may carry out the work and recover the cost of the work from that person.

(4) Work required to be carried out under order If a person fails to carry out work required to be carried out under an order made under this Act, the owners corporation may carry out the work and recover the cost of carrying out the work from the person against whom the order was made.

(5) Recovery of costs as a debt

The costs incurred by an owners corporation in carrying out any work referred to in this section may be recovered by the owners corporation as a debt.

64 Section 145 is to be contrasted with other provisions of the Act in that it makes provision for monies payable by an owner to the owners corporation in certain circumstances to be recovered as a debt in a court of competent jurisdiction. It is suggested, however, that such a specific provision does not justify the raising of any inference that a failure to make such a provision would necessarily justify a finding that this Tribunal has the necessary jurisdiction or power to make an order dealing with a matter. Section 145 is in the following terms:

145 Common property rights by-law binding on owners for time being

(1) A common property rights by-law, while it remains in force, continues to operate for the benefit of, and is binding on, the owner or owners for the time being of the lot or lots specified in the by-law.

(2) If a person becomes the owner of a lot when, under a by-law or under this subsection, a former owner is liable to pay money to the owners corporation, the person who becomes the owner is jointly and severally liable with the former owner to pay the money to the owners corporation.

(3) Any money payable by an owner to the owners corporation under a common property rights by-law or under subsection (2) may be recovered, as a debt in a court of competent jurisdiction, by the owners corporation.

The right to claim damages for statutory breach

65 As can be seen from an examination of the provisions of the Act, in general, the drafters of the legislation have been very careful in conferring jurisdiction upon the Tribunal to make certain orders or decisions. The three provisions in the Act which give a person a right to bring an action for damages for breach of statutory duty do not specifically confer that power upon the Tribunal.

66 The respondent submitted and we agree that it would be unusual to empower this Tribunal with the right to determine whether and to what extent damages for statutory breach should be ordered in the absence of any specific provision creating such empowerment. It was said that the determination of a common law claim for damages, albeit based on a statutory cause of action is in general terms the province of courts. The Supreme Court of NSW has a common law jurisdiction and power to award such damages. The District Court of NSW and the Local Court have such a jurisdiction and power created by statute. No such general jurisdiction or power is contained either within the CAT Act or within any enabling legislation.

67 As the respondent submitted, "... legislation conferring jurisdiction on a Tribunal, which exercises defined and confined powers and uses different rules of procedure and evidence to courts, should not, in the absence of the clearest language, be construed so as to confer power to determine claims at common law." In addition, the respondent contrasted the use by courts of established practice and procedure and the "important and fundamental rules of evidence" in dealing with claims for damages. It was submitted that this Tribunal "should be hesitant in deciding that the legislation intended to remove those rights from

the determination of common law claims in the absence of clear language.”

Again, we agree.

- 68 Finally, in this respect the respondent focussed attention on the potential rights of lot holders and others to maintain concurrent claims for damages against an owners corporation based on nuisance or breach of a common law duty of care arising out of the same factual circumstances. It instanced decided cases such as *Ridis v Strata Plan 10308 [2005] NSWCA 246* and *McElwaine v The Owners – Strata Plan number 75975 [2017] NSWCA 239* at [49] – [64] per White JA. It was submitted that the legislature would not have intended to create the ability to pursue damages before different decision-makers based on different causes of action, in circumstances where arguably, Anshun estoppel or res judicata may not apply. In this regard it is noted that even though section 232(3) may preclude concurrent proceedings, it would not preclude proceedings being taken sequentially before this Tribunal and before a court. We agree.
- 69 We observe also that the language used in section 106(6) which refers to the bringing of an “action” for damages is more pertinent to and consistent with an intention on the part of the legislature that a claim for damages under section 106(5) should be brought before a court. This is language normally associated with the jurisdiction and powers of courts to deal with such matters. It is not language normally used when describing the powers of this Tribunal where, as we have observed, the legislature makes particular provision for the remedies available to be ordered by this Tribunal.
- 70 We conclude that the use of this language when combined with the lack of relevant and appropriate specificity to bestow enabling jurisdiction and power as required by section 29(1)(a) of the CAT Act is indicative that the legislature did not intend to give this Tribunal jurisdiction or power to make an award of damages under section 106(5) of the Act.
- 71 In *Shum* the Appeal Panel held that the jurisdiction of the Tribunal to make an order for damages under section 106(5) arising from a breach by an owners corporation of the duty imposed by section 106 is granted by the general order making power in section 232. In our view, given the structure of the Act and the

order making powers contained within it, it is impermissible to import into the general power in section 232 a specific power such as that exercisable under section 106(5). An action under s 106(5) for damages for breach of statutory duty must, in our view, be maintained in a court of competent jurisdiction.

Scope of orders under s 232

72 In order to consider the appropriate manner in which this appeal should be disposed of, we return to the nature and extent of the orders which might be made under section 232(1). Such a determination also has implications for the operation of section 232(3), as we shall shortly discuss. The matters which we discuss hereunder were not argued before us. As will be clear we should not be taken to have expressed any concluded view about them. To do so would be inappropriate without permitting the parties to advance arguments concerning them, and in any event it is unnecessary that we do so. While we have concluded that the Tribunal below was not empowered to make an award of damages under section 106 (5) of the Act, our preliminary view is that the Tribunal's order making power in s 232 is sufficiently wide to enable a money order to be made in the nature of compensation for reasonably foreseeable loss in order to settle a dispute or rectify a complaint. Arguably the appellants may wish to make an application to the Tribunal that they are entitled to an award of compensation under section 232 of the Act for the loss of rent which is at the heart of these proceedings. Such an application would be comprehended within the "any other order" which the appellants sought at first instance.

73 The opening words of section 232 (1) empower this Tribunal to make an order to settle a complaint or dispute about particular matters. The approach to the construction of section 232 must be considered in the context in which that section appears in the Act. It occurs within Division 4 of Part 12. Part 12 contains provisions dealing with the resolution of disputes about particular matters which relate to the manner in which strata schemes are managed or operate. There is provision for internal dispute resolution procedures, alternative dispute resolution procedures including mediation and, significantly within Division 4 a description of the orders that may be made by this Tribunal. Section 232 is one of those provisions. Sections 232 and 233 are the only

provisions within Part 12 which do not specify the types of orders which may be made other than by reference to the fact that they should be directed to the settlement of a complaint or dispute about any of the described matters.

(Section 233 deals with disputes between different strata schemes.) Other provisions describe specific orders which may be made such as enforcing the benefit of a positive covenant by an authority (section 234), enforcing restrictions on users of utility lots (section 235), re-allocation of unit entitlements (section 236), appointment of strata managing agents (section 237) and relating to strata committees and officers (section 238).

74 There is an introductory note to Part 12 which states that;

This Part gives power to the Tribunal to make orders to settle disputes about certain matters relating to the operation and management of a strata scheme. It also contains general provisions about the powers of the Tribunal and some other order-making powers of the Tribunal.

75 There then follows a table which describes the types of orders that may be made by this Tribunal, who may apply for such orders and includes a reference to the section of the Act which creates the power to make those orders. The Table describes the type of order which may be made under section 232 of the Act as "To resolve dispute or complaint."

76 The introductory words and the Table which follows may be referred to as extrinsic material by reference to the provisions of section 34 of the *Interpretation Act 1987 No 15* which is in the following terms;

Section 34

34 Use of extrinsic material in the interpretation of Acts and statutory rules

(1) In the interpretation of a provision of an Act or statutory rule, if any material not forming part of the Act or statutory rule is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), or

(b) to determine the meaning of the provision:

(i) if the provision is ambiguous or obscure, or

(ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made) leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the effect of subsection (1), the material that may be considered in the interpretation of a provision of an Act, or a statutory rule made under the Act, includes:

(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer,

(remainder not reproduced)

77 We would conclude by reference to the context in which section 232 occurs in the Act and by reference also to the extrinsic material referred to above that it is arguable that the legislature intended to vest in this Tribunal a broad dispute resolution power to deal with disputes and complaints of the kind referred to in sections 232 and also 233. This is notwithstanding that the types of orders which may be made by the Tribunal are not described with any particularity in those sections or indeed elsewhere in the Act. On one view, it would be strange if they were circumscribed in any particular manner because this would arguably have the effect of curtailing the ability of the Tribunal to deal comprehensively and effectively with the resolution of those disputes and complaints.

78 Thus, there is no indication whether expressly or by implication that the legislature intended to restrict the power of the Tribunal to make appropriate orders pursuant to the wide manner in which that power is described in section 232.

79 We return to consider the power conferred by section 232. It is a power to “make an order” and such an order is one which is directed to the settlement of a complaint or dispute about any of the described matters. Such a power allows an order to be made which has the effect of resolving the subject matter of the complaint or dispute. Any such order would ipso facto constitute a decision made under enabling legislation because it would be made in the exercise (or purported exercise) of a function conferred or imposed by or under the enabling legislation (see section 5(2) of the CAT Act previously discussed). Prima facie it is arguable that the Tribunal is empowered to make such order

which is appropriate to be made in order to settle the dispute. There are no other limitations on that power.

- 80 One of those matters which may be the subject of an order is clearly a complaint or dispute about a failure to perform a duty under section 106(1) and (2). (We discussed this earlier at [33] and following.) In the circumstances of these proceedings the complaint or dispute brought by the appellants arises out of the asserted failure by the owners corporation to have complied with its statutory duty under section 106(1). An order which could clearly be made under section 232 in order to settle such a dispute would be an order that the owners perform that duty and, for example, rectify defective works. There would also, in our view, be available to the Tribunal a power to make an order that the owners pay a lot owner a sum of money to enable the lot owner to carry out those works. Orders which might also be made to settle such a dispute in the circumstances of these proceedings could include directive orders requiring specific work to be undertaken in particular circumstances, and orders in the nature of injunctive relief requiring a person or entity to refrain from doing something (see section 241 of the Act).
- 81 In these proceedings, having originally sought orders for the repair of the defective work, that claim was not pursued before the Tribunal as the owners corporation agreed to carry out the works. The complaint and the dispute, however, were not confined to the failure to repair and maintain, but extended to consequential loss suffered by the appellants to the extent that the premises became untenable because of that failure.
- 82 At issue is whether compensation for that consequential loss can be the subject of an order under s 232. In our opinion it would be artificial and inappropriate to confine the dispute and complaint to the rectification of the work. A dispute or complaint about the failure of the owners to perform its duty to maintain and repair common property, may well encompass consequential losses brought about by that failure. The cost of removal and storage of furniture and furnishings while work is being carried out is a ready example of what may be so comprehended, as is the cost to repair or replace any property of a unit holder damaged by the failure to repair the common property. These

are matters which might arguably be comprehended within a dispute between a unit owner and an owners corporation arising out of an alleged failure to maintain and keep the common property in a state of good and serviceable repair.

- 83 In our view it is arguable that orders under s 232 to settle a complaint or a dispute, which may include an order to carry out work or for the payment of money, may also encompass monetary compensation for reasonable and reasonably foreseeable loss consequent upon a failure to comply with a statutory duty. Such an order might arguably be within power and jurisdiction. Seen in this way, the range of orders that may be made by the Tribunal in settlement of a complaint or dispute will extend to areas which might otherwise be the province of the powers of a court including prescriptive orders, relief in the nature of an injunctive order and the awarding of compensation.
- 84 We have previously referred to the respondent's submission that the powers provided in section 232(1)(e) could only be utilised prospectively to remedy a past failure. It was said that prospective consideration would be beyond power. This argument was used to support a contention that no order could be made by way of awarding damages to compensate for past losses. Whilst we agree that this Tribunal is not empowered to award damages under section 106(5), we are of the opinion that the Tribunal might arguably have power to award compensation for past losses by reason of its wide powers to make orders under section 232. We therefore reject this submission.
- 85 Our overall conclusion is reinforced when a comparison is made between the provisions of section 232(1) of the Act with what is the most comparable provision of the former *Strata Schemes Management Act 1996*, section 138 which we have previously considered above.
- 86 We are of the opinion that the failure to include any provision in the nature of section 138(3)(d) of the former Act within the provisions of section 232 of the Act is a powerful indication that this Tribunal is arguably empowered within its dispute resolution powers provided by section 232 to make a money order which may include an order an order for compensation for loss, provided that such award is an appropriate and reasonable means of resolving the dispute.

The removal of the prohibition in section 138(3)(d) of the former Act is a strong indication that the Tribunal's order making powers under s 232 are very broad indeed.

- 87 The conclusion which we have reached is consistent with the provisions of section 232(3) of the Act. This refers to "other proceedings in connection with the settlement of a dispute or complaint the subject of a current application." We read this subsection as an indication that the legislature has contemplated that an award of compensation may be made by the Tribunal as part of the array of orders available to it to settle a complaint or dispute under section 232(1) and that an award of damages may concurrently be available through the court system to the appellants under section 106(5). Of course "other proceedings" will also include claims based on nuisance and the other matters identified above.
- 88 Of course, it might be said that this approach to the construction of section 232 is inconsistent with the approaches we have adopted in determining that this Tribunal does not have the power to award damages under section 106 (5) of the Act. We do not consider that there is any such inconsistency. The creation of a right to bring an action for damages is a matter relevantly separate from and distinguishable from a broad power to settle a dispute or a complaint. Such a right is, as we have observed, more consistent with the jurisdiction and power as exercised by courts. Furthermore, as a matter of statutory construction, it is apparent that the Tribunal has not been given this power in this Act. We see no inconsistency between denying this Tribunal the right to award damages under section 106 (5) and a power to make a monetary order by way of compensation when dealing with a complaint or dispute under section 232. (We add for completeness that there is no reference in the Table forming part of the introductory note to Part 12 to any order that might be made under section 106(5)).
- 89 The context in which section 232 appears is one creating broad powers to resolve disputes and claims brought by lot owners and others arising out of the management and operation of strata schemes. By contrast the context in which section 106(5) appears is one in which there is created a private statutory right

to claim damages for breach of specified statutory duties. This differential context underlies our contrasting conclusions.

- 90 We conclude that it is arguable that this Tribunal was empowered in dealing with the proceedings before it to require the respondent to pay monies by way of compensation to the applicant in the course of making orders to settle the complaint and dispute with which it was dealing. We emphasise, however, that the Tribunal is so empowered by reason of the provisions of section 232(1) of the Act. A right to order the payment of compensation under section 232 is independent of and concurrent with an entitlement to seek damages under section 106(5).

Conclusion as to jurisdiction and power to award damages under section 106 (5) of the Act

- 91 Our review of the relevant provisions of the Act considered in the context of the CAT Act which we have set out in detail above and the underlying principles applying to statutory construction leads us to conclude that this Tribunal does not have jurisdiction or power to make an award of damages under section 106(5) of the Act because:

- (1) any such jurisdiction or power is not of a kind specified by the CAT Act in sections 28 or 29. There is no enabling provision in the Act either express or implied which would found such a power;
- (2) the Act when read as a whole is not to be construed as bestowing on this Tribunal such jurisdiction or power. Again, there is no enabling provision in the Act either express or implied which would found such a power.

- 92 The right to bring an action seeking damages based on a breach of a statutory duty is generally within the jurisdiction and power of courts, is subject to assessment in accordance with well-known principles of the common law aided in specific instances by legislation, and it would be unusual for a tribunal such as this Tribunal to be given jurisdiction and power without specific reference to it in enabling legislation. Nor can the Tribunal exercise the power to award damages under section 105(6) by “importing” that power into the general order making power contained in section 232.

- 93 In so concluding we are conscious that we have differed from the decision of the Appeal Panel in *Shum*, and that as a matter of comity we should follow that

decision unless persuaded that it is inappropriate that we do so. In coming to our decision, we have had the benefit of a comprehensive and exhaustive examination of the provisions of the Act undertaken by counsel for the respondent and the appellant. We have also undertaken that examination for ourselves, and we have had the advantage of considering a number of authorities. We are persuaded accordingly that it is appropriate to have reached the conclusion which we have notwithstanding the decision in *Shum*.

Disposal of the appeal

- 94 The conclusion which we have reached is that the Senior Member was not entitled to purport to make an order for the payment of damages under section 106(5). However, the Tribunal may have been entitled to make an order for the payment of compensation as sought by the appellants when they brought their application under section 232 and the Tribunal has not considered this.
- 95 Arguably, the formulation of an appropriate order for compensation under section 232(1) of the Act may involve different considerations to those applying to an award of damages under section 106(5). In the circumstances of these proceedings the respondent arguably deferred compliance with its duty under subsection (1) of section 106 on 31 March 2017 when it lodged a complaint with NSW Fair Trading against the builder. From that date compliance with the duty under section 106 was deferred under section 106(4) until, presumably, the completion of that action. Whether that action is confined to that which is involved in the making of the complaint to Fair Trading or whether that action extends to include any other action or proceedings taken by the respondent against the builder is not clear from the provisions of section 106(4).
- 96 Arguably, also, difficulties may arise in the assessment of appropriate damages by reference to the period of any deferral of the duty under section 106(1). Presumably any such duty is “resurrected” when the deferral under section 106(4) ceases.
- 97 These possible difficulties may also be further complicated by the two-year time bar created by section 106(6) which does not apply to relief under section 232. The avoidance of a time bar may also facilitate the assessment of appropriate compensation in circumstances where, at the time of making an

order any rectification work has not been completed and it may be necessary to determine when that is likely to occur.

- 98 It is then necessary to consider what orders should be made in disposing of the appeal proceedings. The available orders are set out in section 81 of the CAT Act:

81 Determination of internal appeals

(1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following:

- (a) the appeal to be allowed or dismissed,
- (b) the decision under appeal to be confirmed, affirmed or varied,
- (c) the decision under appeal to be quashed or set aside,
- (d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,
- (e) the whole or any part of the case to be reconsidered by the Tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.

(2) The Appeal Panel may exercise all the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance when confirming, affirming or varying, or making a decision in substitution for, the decision under appeal and may exercise such functions on grounds other than those relied upon at first instance.

- 99 We have concluded that the Senior Member lacked jurisdiction and power to make an award of damages under section 106(5) of the Act. However, we have concluded that the Tribunal may have possessed jurisdiction and power to make an award of compensation in favour of the appellants under section 232. To the extent that this is a matter which has not been considered by the Tribunal it may be appropriate in all the circumstances that the appellants be given an opportunity to do so.
- 100 We are conscious that the conclusion which we have reached concerning the existence of the concurrent power to make an order for the payment of compensation under section 232 of the Act was not argued before us by the parties. We are also conscious that the amount in issue in these proceedings is of very small compass and that the legal costs on both sides have far exceeded that amount.

- 101 In a technical sense the appeal must be allowed, but not for the reasons advanced by the appellants, and with consequences adverse to their interests in a direct sense, but which are not necessarily fatal to a claim for compensation. Furthermore, an appropriate order in disposing of this appeal may be that it be remitted back to the Tribunal for the purpose of considering the appellants' claim for compensation under the concurrent power created by section 232. The final complicating matter is the outstanding question of the costs order made by the Senior Member below and any costs order that might be sought by either party arising out of these appeal proceedings.
- 102 In all the circumstances we shall refrain from making any formal orders consequent upon the reasons for decision which we have set out above to enable the parties to consider these reasons, confer and advise us concerning any further steps which they may wish to take in connection with the proceedings. If the parties are able to reach agreement about a preferred way forward, they may file short minutes of order. Otherwise, we shall stand the proceedings over for a period of 28 days and grant liberty to apply which may be exercised by either party within that period. If no such step is taken by any party within this period, we shall make formal orders disposing of the appeal by formally allowing the appeal and remitting the proceedings to the Senior Member to allow consideration to be given to the making of any claim for compensation by the appellants.
- 103 The parties asked that we reserve the costs of these appeal proceedings. Given that questions of jurisdiction and power were not raised in the initial proceedings, we propose to reserve the outstanding issue concerning the costs below, and any application relating to the costs of these appeal proceedings and we shall grant liberty to apply, which must be exercised within 28 days of this date.

Order

- (1) The proceedings are stood over for a period of 28 days with liberty to apply which must be exercised within that period.

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

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