Court of Appeal
Supreme Court

New South Wales

Case Name:	Vickery v The Owners – Strata Plan No 80412
Medium Neutral Citation:	[2020] NSWCA 284
Hearing Date(s):	18 June 2020
Decision Date:	11 November 2020
Before:	Basten JA at [1]; Leeming JA at [65]; White JA at [158].
Decision:	1. Grant the applicant leave to appeal from the decisions of the Appeal Panel given on 15 January and 17 March 2020. 2. Allow the appeal and set aside the following orders: (a) orders 1 and 2 made on 15 January 2020, and (b) orders 1, 2 and 3 made on 17 March 2020. 3. Remit the matter to the Appeal Panel to determine any outstanding issues raised by the notice of appeal filed in the Tribunal on 15 November 2019, including the costs of and incidental to the proceedings heard by the Appeal Panel on 19 December 2019. 4. Order that the respondent pay the applicant's costs in this Court.
Catchwords:	STRATA TITLES – obligation of owners corporation to maintain common property in good repair – owners corporation breached obligation, causing damage to lot owner – NCAT authorised to make orders to "settle" a complaint or dispute about strata scheme – whether NCAT authorised to award damages to lot owner – consideration of nature of lot owner's cause of action – consideration of conferral of jurisdiction and power upon NCAT – consideration of legislative history – consideration of interaction of jurisdiction of courts and NCAT – appeal allowed, NCAT authorised to award

damages.

TORT – breach of statutory duty – statute authorised lot owner to recover damages for breach of statutory duty – consideration of nature of lot owner's cause of action.

Legislation Cited:

Agricultural Tenancies Act 1990 (NSW), s 21
Animals Act 1971 (UK)
Animals Act 1977 (NSW), s 7
Anti-Discrimination Act 1977 (NSW), 108
Australian Consumer Law, ss 236, 237
Civil and Administrative Tribunal Act 2013 (NSW), ss 4, 7, 28, 29, 36, 38, 45, 50, 60, 80, 83; Sch 4, cll 3, 5
Civil Liability Act 2002 (NSW), ss 5B, 5D, 43, 45
Civil Procedure Act 2005 (NSW), ss 56, 98
Commercial Arbitration Act 2010 (NSW), s 30
Companion Animals Act 1998 (NSW), ss 25-28
Constitution, ss 51(xxxv), 92
Conveyancing (Strata Titles) Act 1961 (NSW), s 15
Courts of Petty Sessions (Civil Claims) Act 1970
Disability Discrimination Act 1995 (UK)
District Court Act 1973 (NSW), s 44
Fair Trading Act 1987 (NSW), s 79S
Home Building Act 1989 (NSW), s 48K
Industrial Relations Act 1996 (NSW), ss 86, 100E, 348(7)
Interpretation Act 1987 (NSW), s 35
Landlord and Tenant (Amendment) Act 1948 (NSW)
Justices Act 1902 (NSW)
Local Court Act 2007 (NSW), s 30
Motor Dealers and Repairers Act 2013 (NSW), s 112
Residential Tenancies Act 2010 (NSW), s 187
Residential Tenancies Regulation 2019, s 40
Retail Leases Act (NSW), ss 72 and 73
Strata Schemes Development Act 2015 (NSW), s 24
Strata Schemes Management Act 1996 (NSW), ss 62, 131, 138, 140-161, 207, 217-219, 229, 230
Strata Schemes Management Act 2015 (NSW) ss 4, 5, 9, 31-32, 60, 72, 77, 86, 89, 90, 104, 106, 132, 145, 147-148, 232-238
Strata Titles Act 1973 (NSW), ss 5(6), 68, 97, 98A, 100, 104, 105, 105(1A), 105(1B), 106-114, 116, 128, 130
Strata Titles (Amendment) Act 1984 (NSW)
Supreme Court Act 1970 (NSW), ss 48, 76

	Trade Practices Act 1974 (Cth), ss 52, 82, 87 Uniform Civil Procedure Rules 2005 (NSW), rr 36.16, 42.1
Cases Cited:	Advance Earthmovers Pty Ltd v Fubew Pty Ltd [2009] NSWCA 337 Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport (1955) 93 CLR 83; [1955] HCA 25 British American Tobacco Australia Ltd v Western Australia (2003) 217 CLR 30; [2003] HCA 47 Byrne v Australian Airlines Ltd (1995) 185 CLR 410; [1995] HCA 24 Cachia v Issacs [1985] 3 NSWLR 366 Cohen-Hallaleh v Cyril Rosenbaum Synagogue Pty Ltd [2003] NSWSC 395 Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503; [2012] HCA 55 Darling Island Stevedoring & Lighterage Co v Long (1957) 97 CLR 36; [1957] HCA 26 Gardiner v State of Victoria [1999] 2 VR 461; [1999] VSCA 100 Henville v Walker (2001) 206 CLR 459; [2001] HCA 52 Holland v Saskatchewan [2008] 2 SCR 551; 2008 SCC 42 I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd 2002) 210 CLR 109; [2002] HCA 41 Jonval Builders Pty Ltd v Commissioner for Fair Trading [2020] NSWCA 233 Kollas v Scurrah [2008] NSWCA 17 Lambidis v Commissioner of Police (1995) 37 NSWLR 320 Lochgelly Iron & Coal Co v M'Mullan [1934] AC 1 London Passenger Transport Board v Upson [1949] AC 155 Lubrano v Proprietors Strata Plan No 4038 (1993) 6 BPR 97,457 March v E & MH Stramare Pty Ltd (1991) 171 CLR 506; [1991] HCA 12 McElwaine v The Owners – Strata Plan 75975 [2017] NSWCA 239; 18 BPR 37,207 Miller v Miller (2011) 242 CLR 446; [2011] HCA 9 Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd (2005) 222 CLR 194; [2005] HCA 9

Moallem v Consumer, Trader and Tenancy Tribunal [2013] NSWSC 1700
Morris v Riverwild Management Pty Ltd [2011] 38 VR 103; [2011] VSCA 283
Nicita v Owners of Strata Plan 64837 [2010] NSWSC 68
O'Connor v SP Bray Ltd (1937) 56 CLR 464; [1937] HCA 18
Owners Corporation – SP 64807 v BCS Strata Management Pty Ltd [2020] NSWSC 1040
Owners of the Ship, "Shin Kobe Maru" v Empire Shipping Co Inc (1994) 181 CLR 404; [1994] HCA 54
Owners Strata Plan 50411 v Cameron North Sydney Investments Pty Ltd [2003] NSWCA 5
Proprietors of Strata Plan No 30234 v Margiz Pty Ltd (1993) 7 BPR 14,458
R v Saskatchewan Wheat Pool [1983] 1 SCR 205; 143 DLR (3d) 9
Seiwa Pty Ltd v Owners Strata Plan 35042 [2006] NSWSC 1157
Shih v The Owners - Strata Plan No 87879 [2019] NSWCATAP 263
Sovar v Henry Lane Pty Ltd (1967) 116 CLR 397; [1967] HCA 31
Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Ltd [2015] NSWSC 289; 18 BPR 35,471
Stryke Corporation Pty Ltd v Miskovic [2007] NSWCA 72
Stuart v Kirkland-Veenstra (2009) 237 CLR 215; [2009] HCA 15
Sutherland Shire Council v Heyman (1985) 157 CLR 424; [1985] HCA 41
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418; [1950] HCA 35
Symes v The Proprietors Strata Plan 31731 [2003] NSWCA 7
The Owners – Strata Plan No 74835 v Pullicin
The Owners – Strata Plan No 80412 v Vickery [2020] NSWCATAP 5
The Owners – Strata Plan No 80412 v Vickery [2019] NSWCATAP 71
The Owners Strata Plan 50276 v Thoo [2013] NSWCA 270; 17 BPR 33,789

	The Owners Strata Plan No 30621 v Shum [2018] NSWCATAP 15 The Owners Strata Plan No 57164 v Yau (2017) 96 NSWLR 587; [2017] NSWCA 341 Verryt v Schoupp [2015] NSWCA 128 Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12 Zavodnyik v Alex Constructions Pty Ltd (2005) 67 NSWLR 457; [2005] NSWCA 438
Texts Cited:	D Collins and L Robinson, Strata Title Units in New South Wales (Butterworths, 2nd ed 1982) J Fleming, The Law of Torts (9th ed 1998) C Forell, "Statutes and Torts: Comparing the United Statutes to Australia, Canada and England" 36 Willamette Law Review 865 (2000) N Foster, "The Merits of the Civil Action for Breach of Statutory Duty" (2011) 33 Sydney Law Review 67 A M Gleeson, "Judicial Legitimacy" (2000) 20 Aust Bar Rev 4 R Goode, Commercial Law (LexisNexis, 5th ed 2016) A Rath, P Grimes and J Moore, Strata Titles (The Law Book Company Ltd, 1966) A Samuels, "Is a Breach of Statutory Duty Actionable?" (1995) 16 Statute Law Review 25 C Sherry, Strata Title Property Rights (Routledge 2017) K Stanton et al, Statutory Torts (Sweet & Maxwell, 2014) J F Stephen, A History of the Criminal Law of England (Cambridge University Press, 1883, reprinted 2014) Vol 1 G Williams, "The Effect of Penal Legislation in the Law of Tort" (1960) 23 Modern Law Review 233
Category:	Principal judgment
Parties:	Graham John Vickery (Applicant) The Owners – Strata Plan No 80412 (Respondent)
Representation:	Counsel: R Cheney SC, D Jenkins (Applicant) D Feller SC, M Dawson (Respondent) Solicitors: Moray & Agnew (Applicant)

	Vardanega Roberts (Respondent)
File Number(s):	2020/45557
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Appeal Panel
Citation:	[2020] NSWCATAP 5
Date of Decision:	15 January 2020
Before:	Armstrong J (President), Hennessy ADCJ (Deputy President), T Simon (Principal Member)
File Number(s):	AP 19/51514

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

Mr Vickery was the owner of an apartment in a strata scheme, who claimed that the owners corporation breached its obligation to maintain the common property, resulting in his apartment leaking with water. Pursuant to s 106(1) of the *Strata Schemes Management Act 2015* (NSW) (the Act), the owners corporations was required to maintain common property of a strata scheme and keep it in a state of good and serviceable repair. Section 106(5) of that Act provides that a lot-owner 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 the section. Section 232 of the Act provides that the NSW Civil and Administrative Tribunal (NCAT) may "make an order to settle a complaint or dispute".

Mr Vickery commenced proceedings in NCAT, claiming damages for lost rent as a result of the leak. The owners corporation agreed that it had breached its obligation, that the breach had caused loss to Mr Vickery, and the amount of that loss. The sole issue in the appeal was whether the language of s 232 of the Act, providing that NCAT may "make an order to settle a complaint or dispute", included an order for payment of damages. An Appeal Panel of NCAT held that there was no power to order damages for breach of s 106. Mr Vickery appealed to the Court of Appeal.

Basten and White JJA, allowing the appeal:

Per Basten JA at [19], White JA at [168]-[169]:

(1) Section 106(5) of the Act creates a statutory right of recovery. It does not reflect a general law cause of action:

O'Connor v SP Bray Ltd (1937) 56 CLR 464; [1937] HCA 18; *Darling Island Stevedoring & Lighterage & Co v Long* (1957) 97 CLR 36; [197] HCA 26; *Henville v Walker* (2001) 206 CLR 459; [2001] HCA 52; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109; [2002] HCA 41 referred to.

Per Basten JA at [26]-[58], White JA at [160]-[166]:

(2) Section 232 of the Act confers jurisdiction and power upon NCAT to hear and determine a claim for damages under s 106(5). The language of s 232, to make "an order to settle" a complaint or dispute should not be read down to preclude an order to pay damages in circumstances where the legislative history demonstrates that the language in the chapeau to s 232 has been understood as sufficiently broad to encompass such an order, and in the absence of an express prohibition: at [28], [51], [164].

Leeming JA, dissenting:

(1) The right of the appellant to recover damages for breach of statutory duty pursuant to s 106(5) of the Act is a right at common law, commonly known as the tort of breach of statutory duty: at [80].

(2) Section 232 of the Act does not authorise NCAT to order damages for breach of statutory duty: at [141]. The language of "settle" a "complaint" or "dispute", and the breadth of the power, speaks of dispute resolution by means other than by payment of damages. This is supported by statutory precursors to s 232, which expressly provided a power to order damages, limited in monetary value, and by the lack of jurisdictional limit accompanying s 232: at [142], [144]-[145], [147].

Consideration by the Court of:

(a) the nature of statutory causes of action and tortious causes of action involving statutes: at [12]-[19]; [77]-[99]; [168]-[169]

(b) the legislative history of the statute: at [47]-[52], [124]-[140], [170]

(c) the significance of the statutory scheme: at [53]-[58], [161]-[167]

(d) the practical consequences of a construction which did not empower NCAT to order damages: at [56]-[58], [172]-[181], and

(e) the desirability of legislative reform: at [2], [66], [190].

JUDGMENT

1 **BASTEN JA**: Pursuant to the *Strata Schemes Management Act 2015* (NSW), the principal responsibility for management of a strata scheme is vested in the owners corporation, which has responsibility for maintaining and repairing the common property of the strata scheme.[1] The owners corporation is the owner of the common property.[2] More specifically, the owners corporation is required to maintain the common property and keep it in a state of good and serviceable repair.[3] Where a breach of that obligation causes loss to a lot owner, that person may bring an action for damages against the owners corporation.[4] The question raised in the present case is whether the lot owner can obtain an order for payment of damages in proceedings in the Civil and Administrative Tribunal (Tribunal).

2 The answer to that question is by no means as easy to determine as it should be. It depends on how one construes s 232 of the *Strata Schemes Management Act*, which has continued the use of terminology derived from earlier forms of the legislation without regard to the changing nature of the bodies upon which the functions are conferred, or indeed the changing nature of the functions. Leeming JA has concluded that jurisdiction to hear and determine a claim for damages under s 106(5) is not conferred on the Tribunal; in my view the Tribunal does have such jurisdiction. However, we are agreed that it is unsatisfactory that such an important question, potentially affecting the

[1] Strata Schemes Management Act, s 9(1) and (3)(c).
[2] Strata Schemes Development Act 2015 (NSW), s 24(2)(a).
[3] Strata Schemes Management Act, s 106(1).
[4] Strata Schemes Management Act, s 106(5).

procedural rights of millions of lot owners, must be resolved by reference to imprecise terminology and legislative history.

3 As fully explained by Leeming JA, the application in the Tribunal by Graham John Vickery against the respondent owners corporation was for payment of $97,000 for loss caused by water entering his apartment as a result of the owners corporation failing to maintain the common property. The Tribunal, constituted by Senior Member D Robertson, upheld the claim. However, on appeal, an Appeal Panel held that the Tribunal had no power to make orders under s 106(5) of the *Strata Schemes Management Act*.[5] Mr Vickery seeks leave to appeal from that decision and the consequent orders. In my view, the Appeal Panel was wrong to uphold the appeal before it and its orders should be set aside.

Jurisdiction conferring provisions

4 The ultimate source of the jurisdiction of the Tribunal is found in Pt 3 of the *Civil and Administrative Tribunal Act 2013* (NSW) (Tribunal Act). The relevant provisions are as follows:

> **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.
>
> …
>
> **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

[5] The Owners – Strata Plan No 74835 v Pullicin; The Owners – Strata Plan No 80412 v Vickery [2020] NSWCATAP 5 (Armstrong J, President; Hennessy ADCJ, Deputy President; T Simon, Principal Member.)

(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.

5 The functions of the Tribunal "in relation to" particular legislation, including the *Strata Schemes Management Act*, are allocated to the Consumer and Commercial Division of the Tribunal: Tribunal Act, Sch 4, cl 3(1). It will be necessary to refer to further provisions of Sch 4 in due course.

6 To the extent that s 29(1) of the Tribunal Act picks up the provisions of other legislation enabling the Tribunal to make decisions or exercise functions, the relevant source of jurisdiction for present purposes is s 232 of the *Strata Schemes Management Act*, which, so far as relevant, provides:

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,

…

(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.

…

7 The issue in the present case is whether the language of making "an order to settle a complaint or dispute" embraces a claim for damages resulting from a contravention of s 106(1), pursuant to s 106(5). Section 106 relevantly provides:

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

Nature of claim by lot owner

8 An issue which may affect the conferral of jurisdiction on the Tribunal under s 232 is the nature of the right conferred on the lot owner under s 106(5). Where a lot owner makes a claim for payment of a sum of money calculated as the loss suffered as a result of the owners corporation's failure to maintain the common property, the refusal of the claim could readily be described as giving rise to a "complaint or dispute" for the purposes of s 232(1). The result would not be a foregone conclusion, because the language is awkward, but the awkwardness is readily explained by reference to the statutory history, which will be discussed below.

9 However, s 106(5) characterises the loss recoverable as "damages for breach of statutory duty". On one view, those words are otiose: the right of the lot owner would have been equally clear without them. However, the characterisation is repeated in s 106(6), which precludes the lot owner from bringing "an action under this section for breach of a statutory duty", after the prescribed limitation period. It is arguable that this characterisation engages a

general law cause of action in tort, as explained by Leeming JA. If so, it provides a possible basis for concluding that the statute has created a cause of action only enforceable in a court and not in the Tribunal.

10 While content must be given to the characterisation of the cause of action conferred under s 106(5), the language used is explicable by reference to the legislative history and, in any event, does not have the significance which it appears to bear on its face.

11 The legislative history is straightforward. The predecessor to s 106, namely s 62 in the *Strata Schemes Management Act 1996* (NSW) (1996 Act) was limited, relevantly, to subss (1) and (2). In *The Owners – Strata Plan 50276 v Thoo*[6] this Court held that s 62 did not give rise to a right to recover losses caused by a breach of the obligation to maintain the common property. The statutory purpose of s 106(5) was undoubtedly to reverse the effect of that judgment.

12 It remains to consider whether a cause of action for "breach of statutory duty" is a cause of action in tort, under the general law. As a matter of principle, it should be understood as a cause of action conferred by statute, albeit as a matter of an implied right, derived as a matter of statutory construction. It is then odd to describe an expressly conferred right to recover damages by use of this label. However, the label does not determine the nature of the right which owes its existence entirely to the statute.

13 In *O'Connor v SP Bray Ltd*[7] the High Court considered whether an injury resulting from a breach of regulations under the *Scaffolding and Lifts Act 1912* (NSW) gave rise to a civil claim for damages. Dixon J stated:[8]

> "It is a question of some difficulty whether a civil remedy is given to a person injured in consequence of the breach of that clause. Such a person may, of course, maintain an action of negligence and rely upon the failure to comply with the statutory regulations as evidence of negligence. But it is a different question whether the enactment itself confers a distinct cause of action. The received doctrine is that when a statute prescribes in the interests of the safety of members of the public or a class of them a course of conduct and does no more than penalize a breach of its provisions, the question whether a private

[6] [2013] NSWCA 270; 17 BPR 33,789.
[7] (1937) 56 CLR 464; [1937] HCA 18.
[8] O'Connor at 477.

> right of action also arises must be determined as a matter of construction. The difficulty is that in such a case the legislature has in fact expressed no intention upon the subject, and an interpretation of the statute, according to ordinary canons of construction, will rarely yield a necessary implication positively giving a civil remedy."

14 Following the passage set out above, Dixon J noted that the case law with respect to such civil remedies "has more often than not been ascribed to the legislature as a result of presumptions or by reference to matters governing the policy of the provision rather than the meaning of the instrument."[9] He then noted that civil liability was likely to be upheld in circumstances where it "protects an interest recognised by the general principles of the common law." That included "where the person upon whom the duty is laid is, under the general law of negligence, bound to exercise due care". Dixon J concluded:

> "The effect of such a provision is to define specifically what must be done in furtherance of the general duty to protect the safety of those affected by the operations carried on."

15 I do not understand the explanation of the circumstances in which legislation is construed to give rise to an unexpressed civil liability to derogate from the proposition with which Dixon J commenced, namely that there is a distinction between an action in negligence relying upon a failure to comply with statutory regulations as evidence of negligence, and the "different question whether the enactment itself confers a distinct cause of action." The distinction is important because the statutory cause of action may not be restricted to cases involving a recognised duty of care, nor be based on a finding of negligence, as opposed to strict liability. In *Byrne v Australian Airlines Ltd*[10] the High Court affirmed that the existence of civil liability turned on the proper construction of the statute.

16 In circumstances where a statute makes express provision for recovery of damages by reason of a contravention of a statutory standard, it might be thought a misnomer to describe the cause of action as one for breach of statutory duty. Literally, s 106(1) creates a statutory duty and s 106(5) creates a cause of action for damages resulting from a contravention of s 106(1). There is some irony in applying the term "breach of statutory duty" only in

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[9] O'Connor at 478.

[10] (1995) 185 CLR 410, 424 (Brennan CJ, Dawson and Toohey JJ); [1995] HCA 24.

circumstances where there is no express right of recovery, and one has to be implied as a result of a process of statutory construction.

17 Where the statute expressly provides for a cause of action in damages, as, for example, s 236 of the *Australian Consumer Law* and its predecessor, s 82 of the *Trade Practices Act 1975* (Cth), the High Court has eschewed treating the remedial purpose of the statute as necessarily reflecting a cause of action, or requiring an assessment of damages, as if a common law cause of action. Thus, in *Henville v Walker*,[11] a case involving a contravention of s 52 of the former *Trade Practices Act*, Gleeson CJ stated:

> "[18] Section 82 of the Act is the statutory source of the appellants' entitlement to damages. The only express guidance given as to the measure of those damages is to be found in the concept of causation in the word 'by'. The task is to select a measure of damages which conforms to the remedial purpose of the statute and to the justice and equity of the case. …The principles of common law, relevant to assessing damages in contract or tort, are not directly in point. But they may provide useful guidance, for the reason that they have had to respond to problems of the same nature as the problems which arise in the application of the Act. They are not controlling, but they represent an accumulation of valuable insight and experience which may well be useful in applying the Act."

18 To similar effect, in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*,[12] Gaudron, Gummow and Hayne JJ stated:

> "[42] It is necessary to approach the principal issue in this case with some basic propositions well in mind. First, Pt VI of the Act, and, in particular, ss 82 and 87(1), have operation in many different kinds of case. Section 82 entitles a person who suffers loss or damage by conduct of another that was done in a contravention of any of a very large number of provisions — ranging from contravention of any of the restrictive trade practices provisions of Pt IV to the so-called consumer protection provisions of Pt V — to recover the amount of that loss and damage. Section 82 can, therefore, be engaged in cases in which the contravener's conduct is intentional or even directed at harming the person who suffers loss and damage.[13] It can be engaged in cases, like the present,[14] in which the contravener can be said to have fallen short of a standard of reasonable care as well as contravene the Act, and in cases in which there was neither want of care nor intention to harm,[15] but still a contravention of the Act."

19 In my view, s 106(5) creates a statutory right of recovery in the circumstances in which it is engaged. It is not dependent upon principles arising under the

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[11] (2001) 206 CLR 459; [2001] HCA 52.
[12] (2002) 210 CLR 109; [2002] HCA 41.
[13] See, eg, s 46 and misuse of market power.
[14] A contravention of s 52.
[15] See, eg, s 50 and acquisitions that would result in a substantial lessening of competition.

general law, nor does it reflect a general law cause of action. Indeed, it was enacted in circumstances where there was held to be no relevant cause of action under the general law. It is not clear that labelling a cause of action as a "breach of statutory duty" has any point of reference in the general law, other than indirectly through principles of statutory construction. Properly understood, a breach of a statutory duty is a statutory cause of action. That is a necessary conclusion where, as here, the civil remedy is expressly conferred.

Jurisdiction and powers – Tribunal Act

20 Before turning to the question of jurisdiction under s 232 of the *Strata Schemes Management Act*, it is convenient to identify the operation of the Tribunal Act. No doubt because of the broad scope of the functions conferred upon the Tribunal, there is no express statutory provision identifying the kind of decisions and orders which can be made. However, the term "decision" is frequently used in the Act, including as the subject matter of proceedings by way of appeal. Thus, there is an external appeal jurisdiction to the Tribunal (s 31), an internal appeal jurisdiction within the Tribunal, from its own decisions (s 32) and appeals from the Tribunal to the Supreme Court (s 83). All refer to decisions of the Tribunal; the term "decision" being defined in s 5(1) in the broadest terms. A decision includes making, or refusing to make an order or determination: s 5(1)(a).

21 The Tribunal Act deals with the composition and functions of the Divisions of the Tribunal in separate schedules. Schedule 4 applies to the Consumer and Commercial Division. Functions are conferred by reference to legislation, relevantly for present purposes in the following terms:

> **Part 3 Functions of Division**
>
> **3 Functions allocated to Division**
>
> (1) The functions of the Tribunal in relation to the following legislation are allocated to the Division—
>
> …
>
> *Strata Schemes Management Act 2015*
>
> …
>
> (2) Subclause (1) extends to—

(a) any functions conferred or imposed on the Tribunal by statutory rules made under legislation referred to in that subclause, and

(b) any functions conferred or imposed on the Tribunal by or under this Act or enabling legislation in connection with the conduct or resolution of proceedings for the exercise of functions allocated by that subclause (including the making of ancillary and interlocutory decisions of the Tribunal).

22 The reference in subcl 3(2)(b) to "enabling legislation" is a reference to legislation defined as follows:[16]

> ***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.

23 Part 5 of Sch 4 identifies what is described in the heading as "Special practice and procedure", in the following terms:

> **5 Relationship between Tribunal and courts and other bodies in connection with Division functions**
>
> (1) **Meaning of "court"** For the purposes of this clause, ***court*** means any court, tribunal, board or other body or person (other than one referred to in subclause (2)) that—
>
> (a) is empowered under any other Act, or
>
> (b) by consent of, or agreement between, 2 or more persons has authority,
>
> to decide or resolve any issue that is in dispute, whether through arbitration or conciliation or any other means.
>
> (2) However, ***court*** does not, for the purposes of this clause, include—
>
> (a) a court, tribunal, board or other body or person that, in relation to a particular matter, is empowered by law to impose a penalty, admonition or other sanction for a contravention of a law or for misconduct or breach of discipline proved to have been committed in connection with that matter but is not empowered to award or order compensation or damages in respect of that matter, or
>
> (b) (Repealed)
>
> (c) the Ombudsman, or
>
> (d) any person exercising the functions of an ombudsman under any law of the Commonwealth, or
>
> (e) any person authorised, under a law of the State or of the Commonwealth or of another State or a Territory, to make decisions or

[16] Tribunal Act, s 4(1).

orders, or give directions, that are binding only on one party to a dispute.

(3) **Effect of application to Tribunal or court** If, at the time when an application was made to the Tribunal for the exercise of a Division function, no issue arising under the application was the subject of a dispute in proceedings pending before a court, a court has no jurisdiction to hear or determine such an issue.

(4) Subclause (3) ceases to apply to the extent to which the application concerned is dismissed for want of jurisdiction or withdrawn.

(5) Subclause (3) does not prevent a court from hearing and determining any proceedings in which it is claimed that any order, determination or ruling of the Tribunal in exercise or purported exercise of a Division function is invalid for want of jurisdiction or from making any order as a consequence of that finding.

(6) For the purposes of subclause (3), an issue arises under an application made to the Tribunal for the exercise of a Division function only if the existence of the issue is shown in the applicant's claim or is recorded in the record made by the Tribunal in accordance with this Act.

(7) **Effect of pending court proceedings on Tribunal** If, at the time when an application is made to the Tribunal for the exercise of a Division function, an issue arising under the application was the subject of a dispute in proceedings pending before a court, the Tribunal, on becoming aware of those proceedings, ceases to have jurisdiction to hear or determine the issue.

(8) Subclause (7) ceases to apply to the extent to which the proceedings concerned are dismissed or quashed by the court, or by another court, for want of jurisdiction or without deciding the issue on its merits, or withdrawn.

(9) **Evidence from court proceedings** In proceedings on an application to the Tribunal for the exercise of a Division function, a finding or decision made by a court, tribunal, board, body or person referred to in subclause (2) is admissible as evidence of the finding or decision.

(10) **Clause prevails over other law** This clause has effect despite Part 3 of this Act or any other Act or law to the contrary.

24 Schedule 4, cl 3 assumes that functions have been conferred on the Tribunal with respect to the specified legislation. They are not necessarily conferred by the Tribunal Act, but by legislation which enables applications to be made to the Tribunal "with respect to a specified matter or class of matters" and otherwise enables the Tribunal to exercise functions with respect to such matters. The functions may be ancillary, in the sense that they are "in connection with" the conduct or resolution of proceedings for the exercise of functions under the specified legislation.

25 Not only are the functions broadly identified; there is no particular consistency in the language used with respect to either the operation of the Tribunal under cl 3(2)(b) ("the conduct or resolution of proceedings for the exercise of

functions") or the language used in defining the relationship between the Tribunal and courts and other bodies. That is understandable given that cl 5 uses the term "court" to mean "any court, tribunal, board or other body or person" with authority "to decide or resolve any issue that is in dispute, whether through arbitration or conciliation or any other means": cl 5(1). The preclusive effect on a court's jurisdiction where an application is first made to the Tribunal is identified in terms of "jurisdiction to hear or determine such an issue": cl 5(3). This language, which typically applies to a court in the ordinary meaning of the term, is used even though there may be a board, body or other person to whom disputes may be taken. The existence of "an issue" arising under an application to the Tribunal may be identified by reference to "the applicant's claim" or the record of the Tribunal: cl 5(6).

Jurisdiction and powers – Strata Schemes Management Act

26 Section 232 of the *Strata Schemes Management Act*, relevantly set out at [6] above, confers functions on the Tribunal. It is expressed in broad terms. Leaving to one side the reference to "an order to settle", that which may be settled is a "complaint or dispute" about six categories of matter, of which only three are relevant for present purposes. Indeed, it is probably sufficient to focus on subs (1)(e), which identifies "an exercise of, or failure to exercise, a function conferred or imposed by or under this Act". No submission was put to this Court that the imposition of a duty to maintain common property pursuant to s 106(1) was not a function conferred or imposed on the owners corporation. A complaint by a lot owner that common property is in a state of disrepair would readily be characterised as a complaint of a failure to exercise the function of maintaining common property in good repair. If the owners corporation did not accept that there had been a breach of duty, or did not agree with a request in the lot owner's claim for remedial steps to be taken, there would be a "dispute" within the meaning of the chapeau to s 232(1). A claim for damages said to result from the contravention of the duty could form part of a complaint about the failure to maintain the common property and, if rejected, would constitute a dispute "about" the failure of the owners corporation to exercise its function under s 106(1).

27 Alternatively, s 106(5), by conferring a right on the owner of a lot to recover damages from the owners corporation necessarily imposes on the owners corporation a function of making good any reasonably foreseeable loss suffered by the lot owner as a result of its contravention of the duty to maintain the common property in a state of good repair. Its failure, or refusal, to take such a step would create a dispute.

28 If the reasoning in these respects is sound, the only basis for denying jurisdiction in the Tribunal to consider an application relating to a failure on the part of the owners corporation to pay damages with respect to a reasonably foreseeable loss suffered by the lot owner, is that an order to pay damages would not involve making "an order to settle" a complaint or dispute. However, it is difficult to understand why this language should be read down to that extent. The statutory scheme must be read as a whole. The terminology adopted in s 232 should be understood to cover claims and disputes with respect to any of the matters identified in subs (1), which are themselves in terms clearly intended to cover the full range of an owners corporation's functions in operating, administering and managing the strata scheme, and exercising or failing to exercise any function under the Act, or the by-laws of the strata scheme.

29 The respondent's primary submission as to why s 232(1) should be read down so as to exclude the particular dispute which had arisen under s 106 was that a claim for damages under s 106(5) required, for its successful resolution in favour of a lot owner, an order for payment of money. This was said to be an inappropriate form of order for the Tribunal to make, absent express provision to that effect. It was submitted that there were numerous money-ordering powers under the *Strata Schemes Management Act*, expressly conferring powers on the Tribunal, but none related to s 106(5).[17] However, the provisions relied on may be construed in one of two ways. On the respondent's case, they must be construed as necessary to confer power on the Tribunal to order payments of money, as opposed to such a power being vested solely in a court. An alternative approach is that each provision confers a stand-alone power to order payment of money in circumstances where no body would

[17] Reference was made to s 72(1)(b), s 86(1), s 60(3), s 89(1), s 132(1)(b) and s 148(4).

otherwise have such a power. On that approach, the sections involve the primary conferral of power, not a consequential allocation of power to the Tribunal, which would otherwise by default have vested in a court.

30 An example of such a provision is s 132, which provides as follows:

> **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 contributions.

31 It is significant that s 132 envisages that the Tribunal may need to consider an order that an owner or occupier perform particular work, or, in the alternative, pay the owners corporation for the cost of repairs. Where there is a need for a determination that particular work is required with respect to damage to common property or another lot, the common form of provisions like s 132 is to confer jurisdiction on the Tribunal. Given the provisions of the Tribunal Act which seek to avoid concurrent proceedings in the Tribunal and a court, it is to be expected that compensation or other money orders will be available in the Tribunal.

32 A second example, in a different context of an order revoking a by-law, is to be found in s 148:

> **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.

33 Section 148(4) expressly deals with the power of the Tribunal to direct payment of compensation to the owner of a lot. On the one hand, it may be said that this provision demonstrates the need for an express conferral on the Tribunal of a power to award compensation; on the other hand, such a provision is inconsistent with any general proposition that the Tribunal is not to have power to award compensation to lot owners.

34 Section 106 is in a different form. However, it is not in doubt that the Tribunal has jurisdiction to determine a dispute in relation to an alleged failure of the owners corporation to comply with its obligation under s 106(1). If it did not also have jurisdiction to determine a claim for compensation under s 106(5) for damage resulting from a breach of the obligation to maintain, that would create the need for dual jurisdiction conferred on separate bodies, namely the Tribunal and a court. That result would be inconsistent with the established legislative scheme designed to avoid such a result.

35 Finally, the respondent contended that identifying a power to award damages by the Tribunal would avoid the provision in s 90 of the *Strata Schemes Management Act* empowering a court, in proceedings brought by a lot owner against the owners corporation, to make an order exempting the successful lot owner from any levy required to cover the payment: s 90(2). No such power, it was submitted, is vested in the Tribunal.

36 This provision was in similar terms in the 1996 Act, s 229(2).[18] That Act also included a general provision in the following terms:

> **230 Restrictions on owners corporation levying contributions for expenses**
>
> (1) An owners corporation cannot, in respect of its costs and expenses in proceedings brought by or against it under Chapter 5, levy a contribution on another party who is successful in the proceedings.
>
> (2) An owners corporation that is unsuccessful in proceedings brought by or against it under Chapter 5 cannot pay any part of its costs and expenses in the proceedings from its administrative fund or sinking fund, but may make a levy for the purpose.
>
> (3) In this section, a reference to proceedings under Chapter 5 includes a reference to proceedings on appeal.

37 Section 230 was omitted from the 2015 Act. However, s 104 in the current Act provides as follows:

> **104 Restrictions on payment of expenses incurred in Tribunal proceedings**
>
> (1) An owners corporation cannot, in respect of its costs and expenses in proceedings brought by or against it for an order by the Tribunal, levy a contribution on another party who is successful in the proceedings.
>
> (2) An owners corporation that is unsuccessful in proceedings brought by or against it for an order by the Tribunal cannot pay any part of its costs and expenses in the proceedings from its administrative fund or capital works fund, but may make a levy for the purpose.
>
> (3) In this section, a reference to ***proceedings*** includes a reference to proceedings on appeal from the Tribunal.

38 Otherwise, there are a number of provisions in the current Act which permit the Tribunal to make orders as to the manner in which the burden of levies is to be effected. While it is clear that a court would not have such a power absent an express conferral, it is doubtful that the Tribunal would not have the power to make an order of the kind identified in s 90(2). Even if it does not, it is difficult to infer from the failure to include a specific provision in the terms of the former s 230, that Parliament did not intend that an order for damages could be made by the Tribunal under s 106(5). As already noted in considering the language of s 232, there is little doubt that the legislation has been amended from time to time, without attempting to ensure that any infelicity created in the language used elsewhere in the legislation has been considered and rectified. The better

[18] See, for example, Trevallyn-Jones v Owners Strata Plan No 50358 [2009] NSWSC 694 at [362], order 7 (Ward J).

course is to construe the operative provisions in their own terms and give effect to them accordingly.

39 It follows that the existence of specific money-ordering powers conferred on the Tribunal says nothing as to whether an undoubted power to award money under s 106(5) (by way of damages) is or is not conferred on the Tribunal. (As will be seen shortly, the legislative history supports this conclusion.[19])

40 Secondly, the respondent contended that the powers conferred under s 232(1) are not subject to a limitation period such as that imposed by s 106(6) with respect to a claim under s 106(5). With respect, the submission is self-defeating. Wherever the claim is brought, it is subject to the limitation period contained in s 106(6); the Local Court, for example, has no equivalent limitation provision.

41 Thirdly, the respondent identified an argument accepted by the Appeal Panel in the following terms:

> "'For the purpose of s 232, a failure to exercise that function is deemed to have occurred in the two circumstances set out in 232(2)' and '(t)here is no equivalent deeming provision in s 106 in relation to the private cause of action for breach of the statutory duty in s 106(1).'"

42 The written submissions continued as follows:

> "16. The failure posited for the purposes of s 106(1) requires a failure to do something which is required to maintain the common property in good and serviceable repair. However, such a failure is only actionable under s 106(5) if it causes a lot owner to suffer damages. Thus, s 106(5) is concerned with actual failure to maintain the common property and the resultant damage. This requirement is not necessarily satisfied by a deemed failure under s 232(2)(a) or (b), which may also refer to a prospective failure.
>
> 17. The deeming provisions in s 232(2) are directed at facilitating orders under s 232(1) requiring the owners corporation to exercise a function. Thus, an order can be sought using s 232(2)(a) in aid, even before the time to exercise the function has arisen. The Appeal Panel correctly points to the separate treatment of the duty under s 106(1) and the fact that the deeming provisions in s 232(2) do not have a direct correlation."

43 This argument is tenuous. True it is that the failure of the owners corporation to exercise a function within two months of a request to it may constitute a failure to exercise a function; no doubt an order could be made by the Tribunal at that point. It may also be accepted that, if no loss has been caused to the lot

[19] See [47]ff below.

owner's property at that point no damages will be recoverable under s 106(5). A claim for damages will be rejected on the basis that an essential criterion has not been satisfied. That says nothing about whether the Tribunal may award damages where the criterion is satisfied. On the other hand, the fact that the Local Court might have power to award damages if the criteria in s 106(5) were all satisfied, but would not have power to direct the owners corporation to exercise its function absent damage, does not provide any basis for concluding that only the Local Court (or some other court) has power to award damages.

44 Fourthly, the respondent contended that:

> "Breach of the statutory duty in s 106(1) requires that the loss suffered be 'reasonably foreseeable' before a lot owner may recover damages as a result of a contravention of 'this section.' Section 232 does not contain a provision relating to the foreseeability of any loss suffered."

45 The fundamental flaw in this argument is the same as that underlying the preceding argument. The criteria to be satisfied for payment of damages are found in s 106(5). If there were a dispute as to any matter arising under s 232(1), it would be necessary for an applicant to demonstrate that the function was engaged under whatever provision of the Act it arose.

46 None of the submissions raised by the respondent, primarily in reliance on the reasoning of the Appeal Panel, demonstrates that s 232(1) does not confer on the Tribunal power to award damages in order to settle a dispute between a lot owner and the owners corporation arising from the latter's contravention of its obligation to maintain the common property in a state of good repair.

Strata schemes – legislative history

47 There are two further matters to consider. The first is that, as explained by Leeming JA, the language of s 232(1) finds its origin in s 105 of the *Strata Titles Act 1973* (NSW) (1973 Act), conferring power on a Strata Titles Commissioner appointed under that Act to settle disputes and rectify complaints. However, it is significant that when in 1984, subs (1A) was added, permitting the Commissioner to make an order for payment of "damages not exceeding $500" no amendment was made to the language of settling a dispute or rectifying a complaint. If an order for payment of damages fell within the language of s 105(1), it is not easy to construe the same language in the

2015 Act as not adequate to include an order for payment of damages. The only substantive change has been to delete the reference to "rectifying complaints",[20] a change which is either neutral or supportive of the proposed construction, by removing language less easily seen (if standing alone) to include ordering payment of damages.

48 It is true that a different approach was taken in the 1996 Act, when a new institution was created for the settlement of disputes, namely a panel of adjudicators.[21] Section 138 of the 1996 Act relevantly read as follows:

> **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.
>
> …

[20] Except in the heading to s 232, which is not part of the Act: Interpretation Act 1987 (NSW), s 35(2).
[21] Strata Schemes Management Act 1996, Ch 6, Pt 2.

49 This provision is significant for three reasons. First, as demonstrated by the authorities referred to by Leeming JA,[22] it was established with respect to the first predecessor of s 106(1), namely s 68 of the 1973 Act, that a contravention gave rise to a civil claim for damages by a lot owner against a contravening owners corporation. Secondly, in those circumstances s 138(3)(d) should be understood to reflect a view that the language of s 138(1) was apt to include such a power to award damages, consistently with s 105 of the 1973 Act, which expressly allowed the Commissioner under that Act to award damages. Thirdly, and of more limited significance, reference to rectification of complaints was omitted from the operative provision.

50 It does not matter for present purposes why it was thought inappropriate for adjudicators under the 1996 Act to award damages; however, it is unsurprising that when the functions of the adjudicators were transferred to the Tribunal, the prohibition on ordering payment of damages was discontinued.

51 In short, the legislative history demonstrates that the language found in the chapeau to s 232(1) has at all stages been understood as sufficiently broad to encompass an order for the payment of damages. In the absence of an express prohibition in s 232 in relation to the powers of the Tribunal, it would be wrong in principle to construe the unchanged language as subject to an implied limitation which has not existed in its past emanations.

52 There is a further inference which may be drawn from the abandonment in s 232 of aspects of s 138 in the 1996 Act. As noted above, s 138(3) did not operate with respect to other provisions in Ch 5 of that Act providing for an adjudicator to make orders.[23] The absence of any equivalent provision in s 232 of the current Act diminishes the force of the argument relying on the existence of other sections in the Act which expressly empower the Tribunal to make orders for payment of money in specific circumstances, to read down the operation of s 232.

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[22] See below at [93] and [94]; referring to Seiwa Pty Ltd v Owners Strata Plan 35042 [2006] NSWSC 1157 at [6] (Brereton J) and Nicita v Owners of Strata Plan 64837 [2010] NSWSC 68 at [13] (Bryson AJ).

[23] See, eg, Strata Schemes Management 1996, s 131 and ss 140-161.

Jurisdiction and power – the legislative scheme

53 There are other features of the current legislative scheme which support the conclusion that the Tribunal has power to order payments by way of damages. These considerations take into account the fact that the *Strata Schemes Management Act 2015* was enacted after the Tribunal Act had come into force on 4 March 2013.[24]

54 First, consistently with the institutional change from a panel of adjudicators to the Tribunal, the jurisdiction and powers conferred by s 232 significantly expanded the powers conferred on the adjudicators under s 105 of the 1996 Act.

55 Secondly, s 232, for the first time, dealt with the direct challenge caused by potential overlap between the jurisdiction of the Tribunal under that section and other proceedings in connection with the settlement of the same dispute or complaint: s 232(3). That provision is significant in treating an application under s 232(1) as commencing "proceedings". Thus, it expressly addresses the possibility that proceedings dealing with the same subject matter could arise under another provision of the Act. The term "proceedings" is sufficiently broad to encompass proceedings in the Tribunal and proceedings in a court.

56 Thirdly, the purpose of cl 5 in Sch 4 of the Tribunal Act is to confer exclusive jurisdiction on the Tribunal in circumstances where, when an application is made to the Tribunal, "no issue arising under the application" is then before a court.[25] On the other hand, where an issue is before a court at the time of an application to the Tribunal, the Tribunal has no jurisdiction to determine the issue.[26]

57 It is, of course, possible that a contravention of s 106(1) could give rise to claims for relief (i) in the form of an order that the owners corporation take steps to repair a defect in the common property, and (ii) an order that it pay damages with respect to the loss suffered by the lot owner as a result of the defect. If a claim for (i) were made first in the Tribunal, it would not be possible

[24] The Tribunal did not start operating until the "establishment day", which was 1 January 2014: Tribunal Act, s 7.
[25] Tribunal Act, Sch 4, cl 5(3), set out at [23] above.
[26] Tribunal Act, Sch 4, cl 5(7).

for a lot owner to pursue proceedings in, say, the Local Court, for damages under s 106(5) whilst the proceedings were on foot in the Tribunal. Any lot owner who had suffered damage would have to commence proceedings in the Court (if the Tribunal did not have jurisdiction to consider them) within two years of suffering the loss, a possibility which is not precluded by Sch 4, cl 5 of the Tribunal Act. Yet the possibility of dual jurisdiction being exercised in one matter, and part of the jurisdiction being delayed despite the existence of a brief limitation period within which to seek damages, is not consistent with the apparent purpose of either s 232(3) of the *Strata Schemes Management Act*, or cl 5 of Sch 4 of the Tribunal Act. Nor is it consistent with the requirement that the Tribunal act expeditiously to determine the real issues in dispute, in accordance with the now commonplace statutory obligation, or "guiding principle", contained in s 36 of the Tribunal Act.

58 These problems would not arise if the Tribunal were understood to have jurisdiction and power to award damages for a contravention of s 106(1). Though by no means determinative, these last considerations demonstrate that coherence within the statutory schemes is achieved, if the construction of s 232 preferred above is accepted.

Notice of contention

59 The respondent filed a notice of contention raising three issues not addressed by the Appeal Panel. Each was a ground identified in the owners corporation's notice of appeal to the Appeal Panel filed on 15 November 2019. It appears that they were not pressed,[27] and that this Court might not be able to entertain them on an appeal under s 83 of the Tribunal Act on a question of law from a decision of the Tribunal. The parties accepted, however, that there are outstanding issues the owners corporation may still seek to pursue if the Tribunal has jurisdiction to make the orders which were sought by the applicant.

Conclusions

60 On 15 January 2020 an Appeal Panel of the Tribunal set aside an order made by the Tribunal on 18 October 2019, requiring the respondent to pay

[27] Tcpt (CA), 18 June 2020, p11(35).

Mr Vickery the sum of $97,000 by way of damages for loss resulting from a contravention of the duty to maintain the common property.[28]

61 On 17 March 2020 the Appeal Panel further ordered that Mr Vickery repay the respondent owners corporation the amount of $97,000 immediately, and pay its costs of the proceedings before the Appeal Panel and before the Senior Member constituting the Tribunal at first instance.

62 The basis for these orders by the Appeal Panel was that the Tribunal lacked jurisdiction to entertain Mr Vickery's claim for damages under s 106(5). As that issue of law was wrongly determined according to the reasoning set out above, each of the relevant orders of the Appeal Panel should be set aside and the matter remitted to the Appeal Panel for the owners corporation's appeal to be dealt with according to law.

63 It would appear that Mr Vickery is entitled to his costs of the proceedings to date, but that is an issue which may be covered by the remittal. It is not clear whether the other issues raised by the owners corporation were litigated below, but not addressed by the Appeal Panel. This may be a case where costs should be apportioned according to issues, if the owners corporation were to succeed on a different ground. Mr Vickery should have his costs of the proceedings in this Court.

Orders

64 I propose the following orders:

(1) Grant the applicant leave to appeal from the decisions of the Appeal Panel given on 15 January and 17 March 2020.

(2) Allow the appeal and set aside the following orders:

(a) orders 1 and 2 made on 15 January 2020, and

(b) orders 1, 2 and 3 made on 17 March 2020.

(3) Remit the matter to the Appeal Panel to determine any outstanding issues raised by the notice of appeal filed in the Tribunal on 15 November 2019, including the costs of and incidental to the proceedings heard by the Appeal Panel on 19 December 2019.

(4) Order that the respondent pay the applicant's costs in this Court.

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[28] The Owners – Strata Plan No 74835 v Pullicin; The Owners – Strata Plan No 80412 v Vickery [2020] NSWCATAP 5.

65 **LEEMING JA:** The questions of law raised in this appeal concern NCAT's power to order damages against the owners corporation in a strata scheme for the tort of breach of statutory duty for failing to maintain the common property. At present there is a divergence of decisions by differently constituted Appeal Panels of NCAT. One, delivered in 2018, held that damages are available. A second, delivered in 2019, held that they are not, but suggested that an order for compensation might be possible. A third, delivered in 2020 and from which this appeal has been brought, held that neither damages nor orders for compensation are available.

66 Unfortunately, it is not possible within the constraints of this appeal to resolve all the uncertain aspects in this area of the law, which probably affect hundreds or thousands of lot owners dealing with owners corporations. It would be far better for this uncertainty to be resolved by legislative amendment, rather than leaving the courts to do so, which will inevitably take time and involve cost, not to mention exacerbating the scope for dispute within strata schemes in the meantime. It is clear that courts have power to order an owners corporation to pay damages to an owner who suffers loss caused by a breach of the owners corporation's duty to maintain common property. The policy choice is whether NCAT should also have power to do so. If yes, should that be subject to any maximum amount? If no, then what orders can be made to "settle a complaint or dispute" between a lot owner and the owners corporation concerning a failure to maintain common property, and in particular do those orders extend to orders involving payments of money?

67 I have concluded that the appeal should be dismissed, because the 2019 and 2020 decisions correctly held that there was no power to hear and determine Mr Vickery's action for breach of statutory duty. The question is not merely one of an absence of power to order damages; NCAT lacked authority to decide the lot owner's claim. However, NCAT did have power to make orders resolving a complaint about failure to maintain the common property, and consistently with the 2019 decision, but contrary to the 2020 decision, I favour the conclusion that NCAT is able to make orders which include monetary payments for compensation. That view is expressed tentatively because this point was not

argued and does not arise on the appeal, and should not be regarded as finally determined by this judgment.

Background

68 The facts are both unremarkable and uncontested. Mr Vickery's apartment leaks from water penetrating through the building's common property. He said that the owners corporation had breached its obligation to maintain the common property, and claimed damages of $97,000 in lost rent. He commenced proceedings in NCAT. The owners corporation applied for summary dismissal, which was refused at first instance and by the Appeal Panel: *The Owners – Strata Plan No. 80412 v Vickery* [2019] NSWCATAP 71. When the matter was listed for hearing before Senior Member Robertson, the Tribunal was told that the parties had agreed that the owners corporation had breached its duty, and that its breach had caused loss to Mr Vickery in the agreed amount of $97,000. The owners corporation made a series of formal submissions including that there was no power to order damages.

69 NCAT ordered the owners corporation to pay Mr Vickery "the sum of $97000.00 immediately" and that it pay his costs as agreed or assessed. The form of the substantive order accorded with the 2018 decision of the Appeal Panel, the 2019 decision not having been delivered. The costs order reflected the fact that the general prohibition upon ordering costs in the absence of special circumstances in s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) is inapplicable in proceedings in the Consumer and Commercial Division where the amount in issue exceeds $30,000: Civil and Administrative Tribunal Rules 2014, r 38.

70 The owners corporation appealed to the Appeal Panel, which allowed its appeal on the basis that there was no power: *The Owners – Strata Plan No 74835 v Pullicin; The Owners – Strata Plan No 80412 v Vickery* [2020] NSWCATAP 5. The Appeal Panel did not address any of the other answers to Mr Vickery's claim which had been preserved by the owners corporation's formal submission.

71 Mr Vickery appealed to this Court, pursuant to s 83 of the *Civil and Administrative Tribunal Act*, on a question of law. His appeal is assigned to the

Court of Appeal pursuant to s 48(1)(a)(vi) of the *Supreme Court Act 1970* (NSW). The right of appeal is subject to a grant of leave, but there was a concurrent hearing of the leave application and the appeal. The owners corporation filed a notice of contention, dealing with three other objections to Mr Vickery's claim, but both sides confirmed during the hearing that neither wished to have those points addressed, despite at least some being pure questions of law and despite s 56 of the *Civil Procedure Act 2005* (NSW).

Overview of the issue

72 It is clear that an owners corporation is subject to the duties in s 106(1) and (2) of the *Strata Schemes Management Act 2015* (NSW) to "properly maintain and keep in a state of good and serviceable repair", and to "renew or replace any fixtures or fittings comprised in" the common property. It is clear that breach of that duty entitles an owner to recover damages from the owners corporation. It is clear that the damages extend to any reasonably foreseeable loss suffered by the owner as a result of the failure to comply with the duty imposed by s 106(1) and (2).

73 The predecessor provision to s 106 of the 2015 statute, namely, s 62 of the *Strata Schemes Management Act 1996* (NSW), was controversially said *not* to give rise to an action for breach of statutory duty sounding in damages in *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270; 17 BPR 33,789, for reasons given at [198]-[222] by Tobias AJA, with whom Barrett JA and Preston CJ of LEC agreed. The conclusion was contrary to an almost consistent body of decisions over some two decades, and no doubt affected many incipient and pending disputes (one example may be seen in the facts giving rise to *The Owners Strata Plan No 57164 v Yau* (2017) 96 NSWLR 587; [2017] NSWCA 341: see at [13]-[40]). Although the explanatory memorandum and parliamentary debates are silent, it is clear that s 106(5) of the *Strata Schemes Management Act 2015* (which is reproduced below) overturns this aspect of *Thoo.* It is now clear that an owner of a lot in a strata scheme may bring an action for damages against the owners corporation for breach of statutory duty *in a court*, as had occurred for many years prior to *Thoo*.

74 But it is entirely unclear whether the owner may, instead, bring an action for damages against the owners corporation for breach of statutory duty *in NCAT*. In *The Owners Strata Plan No 30621 v Shum* [2018] NSWCATAP 15, an Appeal Panel considered that it could make an order for damages for breach of statutory duty. In *Shih v The Owners - Strata Plan No 87879* [2019] NSWCATAP 263, a differently constituted Appeal Panel held that there was no power to order damages for breach of statutory duty, but left open the possibility of making an order for compensation for losses caused by a breach of statutory duty. Most recently, in the decision from which this appeal has been brought, a third Appeal Panel held that there was no power to order either damages or compensation for a failure to comply with s 106(1). At the level of precedent, the Appeal Panel said at [9] that:

> "There are now three partially inconsistent Appeal Panel decisions about the same issue. None takes precedence."

75 It is not necessary to pause to consider the precedential status of the most recent decision of the Appeal Panel. Nor is it necessary to summarise the reasons of any of the Appeal Panels which have considered the issue to date and reached such divergent conclusions. I do not mean the slightest disrespect, but the question is a pure question of law, and this Court's reasons would be unnecessarily lengthened by summarising the inconsistent reasons of three different Appeal Panels, of 150, 103 and 82 paragraphs respectively, all of which are readily available on Caselaw. As will be clear from these reasons, the question of law posed by the statutes is not an easy one, and it is not surprising that differently constituted Appeal Panels hearing different counsel presenting different submissions have reached divergent conclusions.

76 There are at least two sources of complexity and potential confusion in this appeal. One is the detail of the legislation, in its current and previous forms. Another is the precise dispute which arises. It is common ground that NCAT can make orders resolving a dispute under s 106(1), and it is clear that Mr Vickery contends, and the owners corporation denies, that those orders can include damages. But there is an important distinction between a dispute concerning the owners corporation's failure to maintain common property, and a cause of action sounding in damages for breach of statutory duty. This is

central to the analysis, but was not clearly articulated in the parties' submissions.

The cause of action for breach of statutory duty

77 The starting point is statute. Statute creates a new legal person, now called an "owners corporation", and vests in it legal ownership of all common property in the scheme upon registration: *Strata Schemes Development Act 2015* (NSW), s 24. By dint of the *Strata Schemes Management Act*, the owners corporation has important powers (notably, powers to make by-laws and raise levies) and is subject to important duties to the lot owners in the strata scheme. This appeal concerns the duty imposed by s 106(1), which is to be read with subsections (5) and (6):

> "**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.
>
> …
>
> (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."

78 The duty imposed on the owners corporation by s 106(1) has a long history. It may be seen in the first strata title legislation, in s 15(1)(f) of the *Conveyancing (Strata Titles) Act 1961* (NSW), and was thereafter repeated in similar terms in s 68(1)(b) of the *Strata Titles Act 1973* (NSW) and s 62(1) of the *Strata Schemes Management Act 1996* (NSW) before being enacted in its current form. For many years, it was held to give rise to a tort sounding in damages, as will be explained in more detail below, until the contrary was held in *Thoo.*

79 There was no equivalent in the earlier legislation (subject perhaps to s 105(1A) added to the 1973 Act in 1984, the effect of which was reversed in the 1996 statute, which will be described below). In any event, there was no equivalent provision in the regime considered in *Thoo*. Subsections 106(5) and (6) reflect the Legislature's decision to overturn the result in *Thoo*.

80 It is important to be precise about the nature of the right sought to be vindicated by Mr Vickery. On the view I favour, it is a right at common law, a tort, commonly known as the tort of breach of statutory duty. The name is well chosen. One element of that tort is a statute imposing a *duty* on the defendant; if there is no duty imposed by statute, the tort cannot exist: *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215; [2009] HCA 15 at [50] and [110]. But nonetheless the cause of action is a creature of the common law.

The different ways in which statute interacts with tort

81 It may seem so obvious that it goes without saying, but duties imposed by statute and duties imposed by judge-made law regularly overlap. The duties owed by a driver of a motor vehicle to obey the road rules and to take reasonable care lest the driver cause injury are an example. But a contravention of the road rules is not *per se* a breach of the common law duty, although it may well be a factor pointing to that conclusion: *Kollas v Scurrah* [2008] NSWCA 17 at [76]; *Verryt v Schoupp* [2015] NSWCA 128 at [4].

82 Statute can also of course modify or abrogate a common law duty. It may do so expressly (consider for example the broad immunity conferred on roads authorities by s 45 of the *Civil Liability Act 2002* (NSW)) or, more indirectly, through notions of coherence: *Miller v Miller* (2011) 242 CLR 446; [2011] HCA 9. Similarly, statute can modify the circumstances in which a duty will be found to have been breached (s 5B of the *Civil Liability Act* modifies the law as stated in *Wyong Shire Council v Shirt* (1980) 146 CLR 40; [1980] HCA 12) and statute can modify the test of causation (s 5D alters the test stated in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506; [1991] HCA 12). Statute can also modify the assessment of damages for tort (notably, in cases of personal injury), and statute has abrogated many deep-seated rules of the common law (such as the defence of contributory negligence and the immunity of one spouse from an action by the other).

83 The notion of a common law cause of action having as an essential element a contravention of a statute is distinct from all of the above. It may be seen in the claim for moneys had and received for charges levied under State laws which contravened s 92 of the Constitution, considered by Fullagar J in *Antill Ranger*

& Co Pty Ltd v Commissioner for Motor Transport (1955) 93 CLR 83 at 102-103; [1955] HCA 25, endorsed by McHugh, Gummow and Hayne JJ in *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30; [2003] HCA 47 at [42]:

> "The right asserted is a common law right, but an essential element in the cause of action is that the moneys in question were unlawfully exacted from it. If the unlawfulness of the exaction depended upon State law, the State could, of course, by statute make the exaction retrospectively lawful, or abolish the common law remedy in respect of the exaction. But the unlawfulness of the exaction does not depend upon State law. It depends on the Constitution."

84 That reasoning illustrates how a free-standing cause of action at common law can be created by, in the sense of having as one of its elements, a statute. (It also illustrates the potential jurisdictional consequences of the distinction; for there was a matter arising under the Constitution with federal jurisdiction.)

85 Related to but separate from the above is the tort of breach of statutory duty. This is a separate cause of action at common law. That is to say, the statute not only imposes a duty, but also gives rise to a cause of action in tort, sounding in damages. The distinction matters. It may best be seen by contrasting a claim for damages for breach of statutory duty from, say, a claim for damages for a contravention of the Australian Consumer Law conferred by s 236. In both cases, statute imposes a duty. But the right to damages for losses caused by the breach of statutory duty is derived from the common law; in the case of the Australian Consumer Law, it is derived from statute. There are many other instances of regimes which directly impose norms of conduct and entitle persons to bring proceedings recovering damages. Sometimes those statutory regimes supplement, modify or replace an earlier right at common law (for example, the liability of dog-owners now found in ss 25-28 of the *Companion Animals Act 1998* (NSW), read with the express abrogation of the previous common law rules by s 7 of the *Animals Act 1977* (NSW)). Sometimes those statutory regimes create causes of action which have no close counterpart at general law (for example, the right to damages not exceeding $100,000 for substantiated complaints under the *Anti-Discrimination Act 1977* (NSW)). These regimes might all be described as instances of "breach of statutory duty", but it is not usual in Anglo-Australian law to do so. It is more usual to refer to an action to enforce a statutory right as a statutory

cause of action: see *Stryke Corporation Pty Ltd v Miskovic* [2007] NSWCA 72 at [5].

The distinction between the torts of negligence and breach of statutory duty

86 As Mason J noted in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 459; [1985] HCA 41, "In England and Australia the separate and concurrent character of causes of action arising from breach of statutory duty and common law negligence have been repeatedly emphasized." It is thus a rare instance where the imperial march of negligence has been arrested. Not so in North America. Mason J noted that the prevailing view in the United States was that there was no separate tort of breach of statutory duty, and that that view had been embraced in Canada in *R v Saskatchewan Wheat Pool* [1983] 1 SCR 205; 143 DLR (3d) 9; see now *Holland v Saskatchewan* [2008] 2 SCR 551; 2008 SCC 42 at [9]. Indeed, there is a distinguished line of English and Australian academic criticism of the action for breach of statutory duty, including Glanville Williams and John Fleming: G Williams, "The Effect of Penal Legislation in the Law of Tort" (1960) 23 *Modern Law Review* 233; J Fleming, *The Law of Torts* (9th ed 1998), pp 137-148, to which may be added the article by Professor Davis mentioned below by Phillips JA in *Gardiner v State of Victoria* [1999] 2 VR 461; [1999] VSCA 100 at [21]:

> "The question of an individual's right to sue for breach of some statutory duty imposed generally upon another has proved troublesome for a long time now, to such an extent that one learned writer has called upon the High Court to abolish the cause of action altogether - which if I may say so seems rather extreme. (I refer to Prof JLR Davis, 'Farewell to the Action for Breach of Statutory Duty?', published as ch 5 of Mullany & Linden, *Torts Tomorrow* to which I have been referred by Callaway JA.)"

87 Yet a distinct tort of breach of statutory duty is established in this country by binding High Court authority, including the joint judgment of a majority of the High Court in *Byrne and Frew v Australian Airlines Ltd* (1995) 185 CLR 410 at 424; [1995] HCA 24:

> "A cause of action for damages for breach of statutory duty arises where a statute which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of the obligation causes injury or damage."

88 The question whether a statute imposing a duty gives rise to a tortious cause of action for breach of statutory duty is often highly contestable: *O'Connor v S P*

Bray Ltd (1937) 56 CLR 464; [1937] HCA 18, *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397; [1967] HCA 31 and *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215; [2009] HCA 15 at [142]-[144], as was emphasised in the opening sentence of A Samuels, "Is a Breach of Statutory Duty Actionable?" (1995) 16 *Statute Law Review* 25, "Whether a breach of statutory duty confers a private right of action upon the plaintiff alleging injury and damage is a perennial, time-consuming, expensive and essentially unnecessary, forensic question." No such controversy attends s 106. Subsections 106(5) and (6) resolve the process of statutory construction firmly in favour of the existence of an actionable private right.

89 No different from any other tort, a cause of action for breach of statutory duty may be modified by statute. Indeed, s 43 of the *Civil Liability Act* does precisely that. In a certain class of case (allegations of breach of statutory duty against public or other authorities), s 43 provides that there will be no breach of statutory duty unless the act or omission was so unreasonable that no authority having the functions of the authority in question could consider it to be a reasonable exercise of its functions, Thus just as s 5B alters what is needed, inter alia for the tort of negligence, to establish breach of a duty to take reasonable care, s 43 alters what is needed, inter alia for the tort of breach of statutory duty, to establish breach of a statutory duty.

The different meanings of "breach of statutory duty"

90 I have taken the trouble to elaborate on the variety of ways in which statute may interact with tortious liability because there is great need for careful use of language in this area. Sir Roy Goode observed that "those whose business it is to work with words soon acquire an appreciation of the limitations of language": R Goode, *Commercial Law* (LexisNexis, 5th ed 2016), p 23. This is especially true when speaking of breach of statutory duty. One leading English text states that "[t]he term breach of statutory duty causes particular difficulties in this context because it is used by English lawyers to describe a number of different, but related species of civil liability": K Stanton et al, *Statutory Torts* (Sweet & Maxwell, 2014), p 7. The authors criticise the loose use of that term to describe a wide range of statutory liability, some of which is closely related to liability at common law (such as the *Animals Act 1971* (UK)) and some of which is sui

generis (for example, the right under s 25 of the *Disability Discrimination Act 1995* (UK) which provides that a claim may be made the subject of civil proceedings "in the same way as any other claim in tort ... for breach of statutory duty"). The authors also refer to a "second, and more normal, meaning", namely, "the tort of breach of statutory duty denotes a common law liability inferred by the courts in order to allow an individual to claim compensation for damages suffered as a result of another breaking the provisions of a statute which do not expressly provide a remedy in tort" (p 9).

91 This matters because there is a question of construction on the meaning to be given to subsections 106(5) and (6) which explicitly refer to an "action under this section for breach of [a] statutory duty". Those words are capable of referring to two distinct legal concepts.

(1) On the one hand, perhaps the section gives rise to a statutory cause of action. That is supported by the reference to the action being "under this section", and perhaps also by the indefinite article: "breach of *a* statutory duty". Both seem to be conscious departures from the ordinary language to describe the tort.

(2) On the other hand, the section may merely overturn the result reached in *Thoo*, and confirm that the section does give rise to a tortious cause of action, by using the language of "action" and "breach of statutory duty" and as a response to what was held in *Thoo*.

92 I favour the second alternative. Both approaches are available as a matter of language. However, the context favours the second, especially insofar as s 106(5) and (6) reflect the Legislature's desire to overturn this Court's judgment in *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270.

The legislative overturning of Thoo

93 *Thoo* concerned the *Strata Schemes Management Act 1996* (NSW). The leading judgment of Tobias JA, with whom Barrett JA and Preston CJ of LEC agreed, resolved a divergence of views as to whether s 62 gave rise to an action for damages for breach of statutory duty. At that time, s 62 contained only three subsections, and they were materially identical to s 106(1), (2) and (3). There was nothing expressly authorising the recovery of damages (cf s 106(5)) nor imposing a two year limitation period (cf s 106(6)). In *Ridis v Strata Plan 10308* (2005) 63 NSWLR 449; [2005] NSWCA 246 at [115], McColl JA had said, obiter, that a breach of the section did not sound in damages. The

other members of the Court did not express a view. However, there had been a series of judgments at first instance stating or holding that damages were available, although in some cases this was common ground between the parties. The position was summarised by Brereton J in *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157 at [6]:

> "The duty of an owners corporation under s 62 is owed to each lot owner, and its breach gives rise to a private cause of action under which damages may be awarded to a lot owner for breach of statutory duty. This conclusion was reached by Young J, as his Honour the Chief Judge then was, in respect of the predecessor of s 62, namely *Strata Titles Act 1973*, s 68, in *Lubrano v Proprietors Strata Plan No 4038* (1993) 6 BPR 97,457, at 13,310-13,311, upon a thorough consideration of earlier authorities to like effect [*Jaklyn v Proprietors Strata Plan No 2795* [1975] 1 NSWLR 15, 24 (Holland J); *Proprietors Strata 464 v Oborn* (1975) 1 BPR 9623, 9624 (Holland J); *Proprietors Strata Plan 159 v Blake*, 50,654 (Yeldham J); *Proprietors Strata Plan 30234 v Margiz Pty Ltd* (NSWSC, Brownie J, 30 June 1993). Gzell J has since followed it in the context of the 1996 Act [*Lyn v Owners Strata Plan No 50276* [2004] NSWSC 88, [90]]."

94 Later, Bryson AJ said in *Nicita v Owners of Strata Plan 64837* [2010] NSWSC 68 at [13] that it was "well established" that the duty created by s 62 was owed to each lot owner, and its breach gave rise to a private cause of action for damages.

95 Overturning this line of authority by *Thoo* is, par excellence, an example of the phenomenon described that "Courts may differ at varying times as to whether Parliament intended a statute to be actionable": N Foster, "The Merits of the Civil Action for Breach of Statutory Duty" (2011) 33 *Sydney Law Review* 67 at 68, an article which seeks to counter the attacks made on the tort, and which has assisted me, as has a work of comparative law cited within it, C Forell, "Statutes and Torts: Comparing the United Statutes to Australia, Canada and England" 36 *Willamette Law Review* 865 (2000).

96 The insertion of s 106(5) in the 2015 statute means that the construction given to the 1996 statute in *Thoo* cannot be maintained. The most natural way of construing s 106(5) and (6) is to reverse the construction given to the predecessor provision in *Thoo* and restore the established position that there is a private cause of action for breach of statutory duty to maintain common property. Two decisions recently preceding *Thoo* stated in terms that "a breach of s 62(1) give rise to a private cause of action" (*Seiwa Pty Ltd* at [7], cited in

Nicita at [13]), and as much was implicit in earlier decisions, not least by reference to the reasons of Dixon J in *O'Connor v S P Bray Ltd* at 477-478 (see *Proprietors of Strata Plan No 30234 v Margiz Pty Ltd* (1993) 7 BPR 14,458 at 14,460, cited in *Lubrano* at 13,310-13,311). Most significantly, that is the natural effect of the words "as damages for breach of statutory duty" in s 106(5), and it is difficult to see what work those words do if they are not regarded as identifying the character of the right as a private law cause of action. It is true that the words "breach of a statutory duty" are used in s 106(6). The indefinite article may merely be a glitch (for it is difficult to see why this aspect of the wording of the two subsections differs). Even if that is not so, it does not much detract from the inference that the new provisions reinstated the private cause of action. The question is one of statutory construction, and where statute explicitly uses the label "breach of statutory duty", as it does in s 106 as well as elsewhere (in ss 26 and 140), it is natural to regard those words as referring to the cause of action known by that name.

97 However, even if s 106(5) and (6) are construed as giving rise to a statutory cause of action, which stands outside the tort of breach of statutory duty, much the same considerations are in play – although, to be sure, one of the considerations relied on below (concerning the ability of NCAT to hear and determine actions for nuisance) is not available. The ultimate question remains the same: is NCAT authorised to order damages for breach of that cause of action?

The fundamental distinctions in this appeal

98 The point of the foregoing analysis is to expose the fundamental distinctions in this appeal. It is one thing for a lot owner to have a dispute about the owners corporation's failure to maintain common property. It is another thing for a lot owner to have a cause of action for breach of statutory duty. Both turn on the obligation imposed by s 106(1). But the former is a complaint, which may lead to an application in NCAT, and may be resolved by an order of that Tribunal (it will be seen below that the order-making power is wide, and subject to a discretion). The latter is a cause of action yielding an order for damages, as to which there is no discretion – the lot owner is *entitled* so long as he or she sues

in the two year period specified in s 106(6) to damages for any reasonably foreseeable loss.

99 Test the matter this way. It may be expected that the wide powers to make orders resolving a lot owner's complaint which are central to Mr Vickery's submissions in this appeal will be informed by whether the lot owner brings proceedings in NCAT immediately after the disrepair of the common property manifests itself, as opposed to waiting for 22 months, or 25 months. Delay may not be determinative, but it is certainly relevant. But the lot owner who sues for damages for the same disrepair of the common property will be in the same position if he or she acts immediately, or waits 22 months – damages are available as of right. The lot owner who waits 25 months after the damage has been sustained before suing for breach of statutory duty will need to establish that he or she did not learn of the damage immediately after it occurred, failing which no damages will be ordered.

Jurisdiction of NCAT

100 In order to vindicate any cause of action, it is necessary for there to be a body with jurisdiction to adjudicate the plaintiff's claim, to whose jurisdiction the defendant is amenable. The body must also have power to grant the remedies sought by the plaintiff.

101 Section 106 gives rise to a cause of action sounding in damages. Irrespective of whether the cause of action is tortious or statutory, s 106 is silent as to the body which has authority to decide whether the defendant has breached the duty and caused loss to the plaintiff, thereby entitling the plaintiff to damages.

102 NCAT has in personam authority over an owner's corporation. The latter is a legal person, created by New South Wales statute, in which the common property of New South Wales real estate is vested, and an incident of the strata titles legislation which creates the owners corporation is its amenability to orders by the Tribunal. Subject matter jurisdiction is another matter.

103 NCAT's subject matter jurisdiction has some peculiarities. Clause 5 of Schedule 4 of the *Civil and Administrative Tribunal Act* deals in terms with NCAT's jurisdiction in the Consumer and Commercial Division. Since cl 5(10) provides that "[t]his clause has effect despite Part 3 of this Act or any other Act

or law to the contrary", it is an appropriate starting point. "Court" is defined to mean any court, tribunal, board or other body or person that is empowered "to decide or resolve any issue that is in dispute", and excludes bodies authorised to impose penalties and other sanctions that are "not empowered to award or order compensation or damages". Subclauses (3) and (7) provide the basic rules when a court and NCAT may both have jurisdiction:

> "(3) **Effect of application to Tribunal or court**
>
> If, at the time when an application was made to the Tribunal for the exercise of a Division function, no issue arising under the application was the subject of a dispute in proceedings pending before a court, a court has no jurisdiction to hear or determine such an issue.
>
> (7) **Effect of pending court proceedings on Tribunal**
>
> If, at the time when an application is made to the Tribunal for the exercise of a Division function, an issue arising under the application was the subject of a dispute in proceedings pending before a court, the Tribunal, on becoming aware of those proceedings, ceases to have jurisdiction to hear or determine the issue."

104 The provisions proceed on the basis that the jurisdiction of the Consumer and Commercial Division of NCAT overlaps with that of a court, and provides that where there is an issue in one, the jurisdiction to hear and determine that issue is withdrawn in the other. (I have mentioned the Local Court and the District Court above; different considerations obtain in relation to a law which purports to deny the Supreme Court of jurisdiction, which need not be elaborated for present purposes.)

105 If there is a dispute between lot owner and owners corporation alleging a contravention of s 106 pending in NCAT, then insofar as there might be a cause of action for damages for breach of the duty created by s 106, the jurisdiction of the Local Court and the District Court to hear and determine that allegation of breach is withdrawn. That is so even if the lot owner merely seeks an order for rectification, and does not seek damages or compensation. The withdrawal of jurisdiction turns on the identification of an "issue" arising under the application made to the Tribunal, in which case jurisdiction to hear or determine that issue is withdrawn from courts.

106 Clearly enough, if a lot owner commenced proceedings in a court against the owners corporation, seeking damages for breach of s 106, and no proceedings

are pending in NCAT involving those issues, then NCAT would have no jurisdiction to hear or determine any issue as to breach of the section or the loss caused to the lot owner as soon as it became aware of those proceedings.

107 Let it be assumed, then, that the lot owner has not commenced proceedings in a court. How might NCAT, as opposed to the Local Court, the District Court and the Supreme Court, be given authority to decide a lot owner's claim for damages for breach of s 106?

108 There is no general conferral of jurisdiction upon NCAT. Contrast, say, s 30 of the *Local Court Act 2007* (NSW) ("the Court sitting in its General Division has jurisdiction to hear and determine ... proceedings on any money claim" not exceeding $100,000). "Money claim" is defined to mean "a claim for recovery of any debt, demand or damages (whether liquidated or unliquidated)". Likewise, s 44 of the *District Court Act 1973* (NSW) confers jurisdiction to "hear and dispose of" a broad class of "actions". Both of those formulations are apt to pick up Mr Vickery's claim for damages, which is obviously a "claim for damages" and an "action". But Mr Vickery chose to commence proceedings in NCAT, as opposed to a court.

The parties' submissions concerning NCAT being able to order damages for breach of statutory duty

109 Mr Vickery maintained that s 232 of the *Strata Schemes Management Act* provided the answer. That section most relevantly provides as follows:

> "**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,
>
> ...
>
> (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."

110 Mr Vickery relied on paragraphs (a), (e) and (f) of subsection (1). He submitted that the power to "make an order" was broadly expressed, the expression "to

settle a complaint or dispute" was broad enough to extend to resolving a dispute by the award of damages, and that a breach of s 106 fell within any or all of paragraphs (a), (e) and (f). He invoked the principle of construction in *Owners of the ship 'Shin Kobe Maru' v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421; [1994] HCA 54 to the effect that provisions conferring jurisdiction and powers should be construed broadly. The proposition is undoubted, and there is certainly a basis to regard it (or an analogue) as applicable to the conferral of powers upon a tribunal which acts judicially, but it nonetheless confronts an obstacle in the unusual language of s 232. Recognising as he did that "settle" was a somewhat awkward word to use to authorise the adjudication of an action for damages for breach of statutory duty, he nonetheless submitted that:

> "the use of the term 'settle' in 232 with consistently the language of the objects provision, because it speaks of the objects of the Act, s 3, being to provide for the resolution of disputes, and resolution in that context would bring to an end by whatever orders that are necessary including the orders for payment of damages. So ... one rationale for it may be the fact that the objects are set out the way they are: that is, providing for the resolution of disputes."

111 The objects of the Act in s 3 are expressed to be "to provide for the management of strata schemes", and "to provide for the resolution of disputes arising from strata schemes". Mr Vickery's submission was attractively put, but must be recognised for what it is: the rewriting of s 232 by replacing the problematic "settle" with "resolve" taken from s 3, "resolve" being less inapt than "settle" to authorise the Tribunal to order damages for breach of statutory duty. But that replaces the specific word chosen by the Legislature to confer power with the general word used in the purpose clause. Statutes are to be construed so as to promote their purpose, but that would not ordinarily permit the rewriting suggested by Mr Vickery.

112 As a matter of first impression, "settle" is an unlikely word to describe the determination of an action. It contrasts with the more familiar "hear and determine" in the *Local Court Act*, and "hear and dispose of" in the *District Court Act* (which formulations trace back many centuries to commissions of "oyer and terminer" of whose abuses in the 14th century James Fitzjames Stephen wrote: *A History of the Criminal Law of England* (Cambridge University Press, 1883, reprinted 2014) Vol 1 pp 106-109).

113 “Settle” might seem to be an unusual word to describe the quelling of a dispute by the exercise of judicial power. Commonly it is used for the consensual resolution of disputes. Settlement is the object of every mediation. It is the word used to describe the conciliation required to be attempted by the Industrial Relations Commission (“The Commission must endeavour, by all means it considers proper and necessary, to settle the matter by conciliation”: *Industrial Relations Act 1996* (NSW), s 86; see also ss 100E and 348(7)). Similarly the obligation upon the Commissioner for Fair Trading concerning a dispute arising under the *Motor Dealers and Repairers Act 2013* (NSW), s 112. It is the word used to describe the consensual resolution of arbitral proceedings under the *Commercial Arbitration Act 2010* (NSW), s 30.

114 There is also a long-standing use of the words “settle” and “settlement” to describe the process of making an award, reflected in the head of power in s 51(xxxv) of the Constitution to make laws with respect to “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State”. It may be seen in much industrial legislation and decisions of industrial courts and tribunals. By way of example, the joint judgment in *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 222 CLR 194; [2005] HCA 9 at [16] explained that “the legislative solution adopted to the problem revealed by the *Whybrow* cases was to fasten upon the relevant industrial dispute. The succession provisions now found in s 149 (and their legislative predecessors) extended the binding effect of awards made in settlement of an industrial dispute”. The idea of an award effecting a settlement of a dispute is not dissimilar from an order settling a dispute between owners corporation and lot owners, all of whom have an interest in the operation of the scheme.

115 Another peculiarity in s 232 is the reference in the heading to “rectify complaints”, which is absent from the text.

116 Rather more persuasive than contrasting s 232 with differently worded provisions in the Act which do not apply is an examination of the source of these textual peculiarities of s 232, on which Mr Vickery relies, in order to assess whether on their proper construction they yield the result that NCAT

has power to determine his action for damages. As it turns out, s 232 has a long history, which sheds light on these issues, and ultimately yields the answer to this appeal. However, that was not the focus of the submissions advanced by the owners corporation.

Contrast with other provisions in the statute

117 The owners corporation contrasted ss 106 and 232 with a number of other provisions within the *Strata Schemes Management Act*, which speak in terms of the jurisdiction and power of NCAT. Following the order adopted by Mr Feller SC in his oral submissions, these were as follows.

(1) Section 77(4) authorises the Tribunal to make an order as to the payment of money to a lot owner, and such application may exclusively be "made to and determined by the Supreme Court (and not the Tribunal)". Similarly, s 86 empowers the Tribunal to order a lot owner to pay a contribution, but also provides that an owners corporation may, without obtaining an order from the Tribunal, recover a contribution "as a debt in a court of a competent jurisdiction": s 86(2A).

(2) Section 145 empowers an owners corporation to recover, as a debt in "a court of competent jurisdiction", liabilities arising under a common property rights by-law.

(3) Section 60 empowers the Tribunal, on application by an owners corporation, to order a strata managing agent to pay to the owners corporation the value of certain commissions or training services which have not been disclosed as required by the section. Section 72 authorises the Tribunal, on application by an owners corporation, to make various orders concerning agreements for the appointment of a strata managing agent or building manager, including an order requiring the payment of compensation to a party to the agreement (s 72(1)(b)).

(4) Section 89 empowers the Tribunal, on application by an owners corporation, to order an original owner of the strata scheme to pay compensation if it considers the estimates and levies for scheme expenditures were inadequate to meet the actual or expected expenditures. Section 132(1)(b) empowers the Tribunal, on application by an owners corporation, to order an owner or occupier who has caused damage to common property or another lot, to pay the cost of repairs and any associated costs.

(5) Section 147 empowers the Tribunal, on application by an owners corporation, to order a person to pay a monetary penalty if the Tribunal is satisfied that notice has been given requiring the person to comply with a by-law, and the person has subsequently contravened the by-law.

118 The owners corporation's analysis amply demonstrates that a variety of drafting techniques has been employed in the legislation where remedies

involving the payment of money have been created. Sometimes, the legislation makes it plain that a court, and only a court, can order the remedy. Sometimes the legislation explicitly presupposes that the court will have jurisdiction conferred upon it by some other statute, by use of the term "court of competent jurisdiction". Sometimes the legislation makes it plain that the Tribunal can order a monetary remedy.

119 The owners corporation sought to draw from these examples an inference that one would not conclude that s 232 authorises NCAT to order damages:

> "[T]here does appear to be a template in the Act, and that is that where there is a specific money ordering power, it is identified and described as such, and otherwise, where there are obligations for the payment of money by way of debt or damages, they are so described."

120 To my mind, little assistance is to be obtained in determining the answer to the question posed by this appeal by the different drafting techniques employed in other sections of the Act. The argument is in substance based on the *expressio unius* maxim, which is seldom a safe guide. In legislation which has been added to and subtracted from in the 1973 and 1996 and 2015 variants, only as a last resort would I regard these considerations as decisive.

Contrast with ss 90 and 104

121 The owners corporation also developed an elaborate argument which had not hitherto been raised. There is no harm except perhaps as to costs in that; the question arising on this appeal is a pure question of law, and one which should definitively be resolved one way or the other here and now: *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; [1950] HCA 35.

122 The new argument turned upon the fact that any monetary obligation to be borne by the owners corporation is ultimately funded from contributions levied upon individual owners. In a dispute between a lot owner and the owners corporation, success by the lot owner in obtaining a monetary amount will, absent some other provision being made, result in the successful lot owner bearing a proportionate share of the levies rendered by the owners corporation to meet the successful lot owner's liability. (Of course, this is no different from many disputes between partners, or between executor and residuary legatee.) Sections 90 and 104 are directed to this. Those sections draw a distinction

between orders *by a court* that might involve an owners corporation paying money to an owner, and orders made *by the Tribunal* for the payment of the costs and expenses of an owners corporation in proceedings brought by or against it in the Tribunal. Pursuant to s 90(2) the court is empowered to order that any money (including costs) payable by an owners corporation against one or more owners of lots "must be paid from contributions levied only in relation to the lots and in the proportions that are specified in the order". Thus s 90(2) empowers a court to craft an order so as to exclude from the burden of the money to be paid to a lot owner, that owner from contributions to be levied from the owners corporation. In contrast, the comparable power conferred in s 104 is confined to orders made by the Tribunal for the payment of costs and expenses. It was submitted that this was an indication that the Tribunal lacked power to make orders of damages in favour of a lot owner against the owners corporation.

123 Certainly, ss 90 and 104 reflect a policy decision that the court and NCAT will have different powers when adjudicating similar disputes arising under the Act. However, once again, I doubt that much turns upon this. Ultimately, the question remains whether a power "to make an order to settle a complaint or dispute" extends to determining a claim in tort. It seems likely, as Mr Feller acknowledged, that the differentiation between ss 90 and 104 reflected a hangover of the earlier regime of adjudicators who lacked power to make orders for the payment of damages.

Text and context of s 232

124 One aspect of the approach to statutory construction beginning and ending with the statutory text (*Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39]) is that it is preferable to commence with the language of the provision which Mr Vickery contended authorised NCAT to order damages in his favour, rather than differently worded provisions elsewhere in the statute. The answer to the question posed by this appeal turns upon the ways in which jurisdiction and power have been conferred upon the Tribunal.

125 The *Strata Schemes Management Act 2015* is the fourth major rewrite of innovative legislation, first introduced in New South Wales. The *Conveyancing (Strata Titles) Act 1961* (NSW) was drafted in the remarkable circumstances summarised in C Sherry, *Strata Title Property Rights* (Routledge 2017), pp 20-21. It was enacted at the instigation of the private sector, which paid for its drafting as well as a lengthy consultation process. The Act created for each strata scheme a body corporate which owned common property and which could make enforceable by-laws. As noted above, the statute imposed a duty on the body corporate to keep the common property in repair, but was silent on how that duty might be enforced. Indeed some of those most closely associated with its drafting wrote that "it may be that the statutory duties of the body corporate are not directly enforceable by a proprietor at all": A Rath, P Grimes and J Moore, *Strata Titles* (The Law Book Company Ltd, 1966), p 41. In any event, prior to 1974, disputes arising under the schemes created pursuant to the statute could only be brought in the Supreme Court.

126 This changed from 1 July 1974. The *Strata Titles Act 1973* (NSW) created the Strata Titles Commissioner (s 97) and provided that every "Fair Rents Board" constituted under the *Landlord and Tenant (Amendment) Act 1948* (NSW) was also a Strata Titles Board (s 5(6)) (subsequently, Strata Titles Boards were constituted by Magistrates: see s 98A, inserted in 1987). The Commissioner could refer an application to a Strata Title Board if it raised matters of legal complexity or was of public importance: s 100(2). Neither the Commissioner nor a Board was able to make any order for the payment of costs: ss 104(5), 116. An appeal lay from the Commissioner to a Board (s 128), and a further appeal lay from orders made by a Board, on a question of law, in the same way as occurred under the *Justices Act 1902* (NSW): s 130(1).

127 Sections 106-114 empowered the Commissioner to make a variety of specific orders (to give consent to proposals (s 106), to lodge plans with the Registrar-General (s 107), to sell or prevent the purchase of personal property (s 108), to acquire personal property (s 109), to impose a different rate of interest for late contributions (s 110), to provide information (s 111), to remove animals in contravention of the by-laws (ss 112 and 113) and to enter information in the strata roll (s 114)). Those specific powers to make orders were preceded by

the general power conferred by s 105, which was titled “General powers of Commissioner to make orders”. The section relevantly conferred power on the Commissioner to:

> “make an order for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed by this Act or the by-laws in connection with that strata scheme”.

128 The textual similarity with s 232 of the 2015 statute is plain. The power conferred by s 105(1) of the 1973 Act was subject to three limiting provisions, as follows:

> “(3) Nothing in subsection (1) empowers the Commissioner to make an order under that subsection for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed on the body corporate by this Act or the by-laws where that power, authority, duty or function may, in accordance with any provision of this Act or the by-laws, only be exercised or performed pursuant to a unanimous resolution or a special resolution.
>
> (4) Nothing in this Division authorises the Commissioner to make an order of the kind that may be made by the Supreme Court under section 32, 50, 51 or 67.
>
> (5) Nothing in this Division affects the generality of subsection (1), but an order in respect of any matter dealt with in any other section of this Division shall not be made under this section.”

129 Subsection (3) emphasised the subject matter limitations upon the order-making power, and subsection (4) recognised the limits on the sorts of orders that may be made. The powers conferred on the Supreme Court included powers to readjust strata schemes for the purposes of resumption and to vary or terminate a scheme. Subsection (5) illustrated that s 105 was to be regarded as a general source of power, only available when the specific powers conferred in the (presumably common) circumstances in the subsequent sections were not involved.

130 The general power was frequently invoked and frequently exercised. One contemporary work stated that “[a] check revealed that over 3000 applications for orders had been made under s 105 at the time of publication. Of interest is the fact that 57 per cent have been successful”: D Collins and L Robinson, *Strata Title Units in New South Wales* (Butterworths, 2nd ed 1982), p 126.

131 Although s 232 does not have a title “General power to make orders ...” like its predecessor, it remains as an early section in a Division of the statute concerning orders, and precedes a series of separate specific order-making provisions (ss 233-238 confer power to make orders for settlement of disputes between strata schemes, enforcing a positive covenant, enforcing restrictions on uses of utility lots, reallocating unit entitlements, appointing a strata managing agent and removing persons from strata committees).

132 The *Strata Titles (Amendment) Act 1984* (NSW) added s 105(1A) and (1B). New s 105(1A) provided that an order made by the Commissioner under s 105(1) “may be an order for, or an order that includes provision for, the payment by a person to another person of damages not exceeding $500”. New s 105(1B) provided that the order operated and could be “entered up” as a judgment for the amount of damages under (what was then known as) the *Courts of Petty Sessions (Civil Claims) Act 1970*. According to the Minister introducing the amending bill, the amendments resulted from the recommendations of the Strata Titles Act review committee: *Parliamentary Debates* (Hansard, LA, 1 March 1984, p 4937), a document I have been unable to locate.

133 The *Strata Schemes Management Act 1996* adopted a different model, placing adjudicators in a dispute resolving role, and conferring in s 138 power upon adjudicators to settle disputes. In contrast with s 105(1A), it precluded the adjudicator from making orders involving the payment of damages. Section 138 relevantly provided, immediately before its repeal:

> “**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.
>
> ...
>
> (3) An Adjudicator may not make an order under subsection (1) for the settlement of a dispute or complaint:
>
> ...

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

134 The following matters may be noted. First, the title also includes the words "rectify complaints", like s 232, although the provision makes no reference to rectifying complaints. Secondly, the structure of the legislation was quite different, with an adjudicator having power to make orders to settle a complaint or a dispute. Section 207 provided that an order under s 138 which the adjudicator declared to have effect as a decision of the owners corporation was taken to have effect as a resolution of the owners corporation to do what was needed to comply with a requirement imposed by the order. Thirdly, the section also used the verb "settle" to describe the scope of the order-making power. Fourthly, s 138(3)(d) provided that the order could not include the payment by a person to another person of damages.

135 Consistently with s 138(3)(d), lot owners seeking damages for contravention of s 62 were obliged to apply to courts.

136 The significance of the changes effected by s 232 of the *Strata Schemes Management Act 2015* (NSW) is twofold. First, decision making was by the Tribunal, rather than an adjudicator whose determination had status (if so declared) of a resolution of the owners corporation and could be enforced as such. Secondly, the prohibition upon making orders for the payment by a person to another person of damages was removed.

137 The significance of the latter is limited. As the submissions made clear, a variety of provisions in the Act expressly authorise the Tribunal to make orders for the payment of money by one person to another. A necessary consequence of that alteration in the legislative scheme was the omission of the prohibition which had formerly applied to adjudicators. That does not have any special significance in determining whether NCAT had power to order damages for a breach of the duty owed by the owners corporation.

138 It is to be recalled that adjudicators need not have been legally qualified, and decided disputes on the papers. On the other hand, NCAT may conduct a hearing, although it need not do so in certain circumstances: *Civil and Administrative Tribunal Act*, s 50. More importantly, as Mr Vickery emphasised,

there are many provisions which confer power on NCAT to order damages. His submissions annexed a table including reference to:

(1) s 21 of the *Agricultural Tenancies Act 1990* (NSW) (power to pay amounts up to $500,000);

(2) s 79S of the *Fair Trading Act 1987* (NSW) (power to make orders not exceeding $40,000);

(3) s 48K of the *Home Building Act 1989* (NSW) (jurisdiction to hear and determine any building claim not exceeding $500,000);

(4) s 187 *Residential Tenancies Act 2010* (NSW) and s 40 of the *Residential Tenancies Regulation 2019* (power to make orders for the payment of money not exceeding $15,000, or $30,000 in the case of a rental bond), and

(5) ss 72 and 73 of the *Retail Leases Act* (NSW) (jurisdictional limit of $750,000).

139 To these may be added the *Anti-Discrimination Act 1977* (NSW), s 108(2) to order damages not exceeding $100,000 for loss or damage suffered by reason of substantiated complaints.

140 The undoubted fact that NCAT had power in many cases to order damages, and the policy decision to overturn the result reached in *Thoo* make the issue that has arisen in this appeal live and novel. Was the undoubted right of a lot owner to obtain damages for breach of the statutory duty imposed by s 106, which had been available in courts for decades save in the period between *Thoo* and its legislative abrogation, confined to the courts or did it extend to the newly created Tribunal?

Section 232 does not authorise NCAT to order damages for breach of statutory duty

141 My reasons for concluding that NCAT lacks authority to determine Mr Vickery's action for breach of statutory duty sounding in damages are as follows.

142 First, it is common ground that the source of authority and power is, if there is a source, s 232 of the Act. But the language of s 232 is foreign to the sort of open-ended conferral of jurisdiction over claims upon which Mr Vickery's submission depends. The language of "settle" a "complaint" or "dispute", not to mention the breadth of the power, speaks of dispute resolution by means other

than the principal remedy known to the common law, namely, payment of damages.

143 Secondly, the language of s 232 derives from an informal mechanism created in 1974 to resolve a wide range of complaints and disputes, by a Commissioner or, if sufficiently legal or important, by a board constituted by a stipendiary magistrate.

144 True it is that between 1984 and 1996, the Strata Titles Commissioner and the Strata Title Boards were expressly given power to order damages not exceeding $500. I do not think that undercuts what follows from the use of words “settle” and “complaint” and “dispute”. Rather, the need to make express provision in s 105(1A) emphasises that, without express power, the Commissioner and the Boards would not have had power to order damages.

145 Indeed, there are powerful reasons to think that the Strata Titles Commissioner, at any time between 1974 and 1996, lacked authority to adjudicate a claim that the body corporate was liable in a substantial amount of damages, whether for the tort of breach of statutory duty or for a statutory action. The *Strata Titles Act 1973* established the Commissioner as an efficient, accessible arbiter of a large volume of disputes. The fact that legally complicated questions could be referred to a Board, constituted by a stipendiary magistrate, and the fact that a power to order damages was limited to $500, suggests that the power to “make an order for the settlement of a dispute, or the rectification of a complaint” did not give the Commissioner authority to determine an action for breach of statutory duty. Nor did the Board have such power. Why then would the same words in the modern version of the legislation have a different operation?

146 It is also true that the authority conferred by other statutes upon NCAT include authority to decide very significant disputes, involving orders of hundreds of thousands of dollars, quite differently from the Strata Titles Commissioner (whether in 1974 or in 1984). But I remain unpersuaded that significant assistance in the construction of s 232 of the *Strata Title Management Act 2015* is derived from other conferrals of jurisdiction and power in other statutes.

147 Thirdly, the Legislature is understandably concerned about jurisdictional limits for causes of action sounding in damages. Section 232, if it authorises NCAT's ordering damages for loss suffered by Mr Vickery caused by the owners corporation's breach of statutory duty, is unaccompanied by any jurisdictional limit. That contrasts with the examples in the table annexed to Mr Vickery's submissions which are reproduced above, and with the pecuniary limits on jurisdiction in the Local Court and the District Court. Further, Mr Vickery's construction gives rise to a series of anomalies when the resolution of the same dispute by the District Court and NCAT are considered.

(1) A lot owner who sues an owners corporation for breach of statutory duty and claims losses exceeding $100,000 in the District Court is entitled to a formal hearing, with the rules of evidence applying, a right of cross-examination, and with an appeal by way of rehearing as of right to this Court.

(2) The parties to the same dispute in NCAT are not entitled to be represented without obtaining leave (*Civil and Administrative Tribunal Act*, s 45). The rules of evidence do not apply: s 38. NCAT is required to act "with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms": s 38(4). An appeal lies to the Appeal Panel, as of right on any question of law, but only with leave on other grounds: s 80(2), with a further appeal confined to questions of law to the Supreme Court: s 83(1).

148 The fact that the processes are so different is a further consideration causing me to doubt that NCAT can order damages for breach of statutory duty.

149 Fourthly, I think that the breach of statutory duty of which Mr Vickery complains is a tort. If s 232 confers jurisdiction on NCAT to determine Mr Vickery's claim, it must also confer jurisdiction to hear and determine a claim for nuisance against an owner's corporation brought by a lot owner based on a failure to take reasonable care to maintain the common property. This Court's decision in *McElwaine v The Owners – Strata Plan 75975* [2017] NSWCA 239; 18 BPR 37,207 confirmed that even after *Thoo* and before the introduction of s 106(5) such an action was available. If Mr Vickery is right, a lot owner must also be able to obtain an order from NCAT for damages for nuisance, so long as the nuisance arises out of a function conferred or imposed under the strata titles legislation. That is to say, if Mr Vickery's construction is correct, s 232 authorises NCAT to hear and determine tortious claims apart from breach of

statutory duty. To that extent, the considerations mentioned above have added force. Concededly, if contrary to my view the right created by s 106(5) and (6) is not the tort of breach of statutory duty, but a statutory cause of action, this aspect is unavailable.

Conclusion and orders

150 It may be unduly optimistic to think that anything like a coherent purpose may be discerned from the statute, given its history. However, the construction supported by the reasoning above is at least consistent with one conception of the functions of NCAT and courts. Disputes concerning the operation, administration or management of a strata scheme are legion. They are an inevitable consequence of (literally) millions of Australians living in close proximity in buildings which share common property. Many and perhaps most of those disputes are not primarily about money. Many concern disputed rights and privileges and immunities which directly affect residents' lives: parking, privacy, noise, garbage disposal and so on. It makes sense for there to be a body with ample powers to settle all such disputes, speedily and relatively informally, and without the cost consequences of adversarial litigation.

151 Some disputes will more or less directly involve claims of demonstrable pecuniary loss. Such disputes, where the central feature is money, are best determined by courts, with the procedural disciplines and ordinary costs sanctions attendant upon civil litigation. But most will be best resolved by a less formal process, which NCAT is well placed to achieve.

152 It follows that the two most recent Appeal Panels were correct to conclude that the damages, which are available when a lot owner suffers loss caused by the owners corporation's breach of s 106, are available only in courts. Section 232 does not implicitly authorise NCAT to hear and determine such claims.

Power to make other pecuniary orders?

153 The Appeal Panel addressed the suggestion in *Shih* that the power conferred by s 232 permitted orders for compensation. It concluded at [72]-[73]:

> "The 2015 Management Act does not, either expressly or impliedly, confer or impose power on the Tribunal to make orders by way of compensation for failure to comply with the duty in s 106(1).

> While it is not necessary for us to determine comprehensively the scope of the order making power in s 232, our view is that the Tribunal is limited to making orders which it otherwise has power to make under specific or general order making powers in the 2015 Management Act, or the NCAT Act. The word 'settle', like the word 'resolve' or 'resolution', does not confer order making powers."

154 This was not argued on appeal. However, I respectfully disagree. First, and contrary to the last sentence of [73], the word "settle" can include power to make a binding determination, such as settling an industrial award. Secondly, the issue does not turn directly on the meaning of the word "settle" (or "resolve" or "resolution"). Rather, the issue is the meaning of an undoubted power to make orders, limited by the words "to settle a complaint or dispute" about a list of subject matters. To take a simple case, a complaint about failure to maintain the gutters causing water damage to a lot owner could be settled by an order requiring the owners corporation to repair the leaking gutter and also pay the lot owner for the cost of cleaning his or her carpet following inundation. As presently advised, I see no reason impliedly to circumscribe the orders which the Tribunal may make to settle a dispute by the fact that it does not have authority to determine the owner's claim for breach of statutory duty. I respectfully agree with what was said in *Shih* in this respect at [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."

155 An order for the payment of damages, available as of right for demonstrated breach, causation and loss, the effect of which will replace the statutory cause of action by an enforceable order, is quite distinct conceptually from an order settling a dispute, one aspect of which involves the payment of money. There is some analogy with the distinct remedies available pursuant to ss 236 and 237 of the Australian Consumer Law, and their antecedents in ss 82 and 87 of the *Trade Practices Act 1974* (Cth), which were described as "damages" and "other orders". The latter extended to a wide range of orders, including monetary compensation, available not as of right but as a matter of discretion, on the basis that they would compensate for, or prevent or reduce, the plaintiff's loss from the contravention of the statutory norm: see *Jonval Builders Pty Ltd v Commissioner for Fair Trading* [2020] NSWCA 233 at [40]-[42]. There

is nothing especially novel with a plaintiff having alternative remedies, one compensatory and available as of right, the other discretionary but potentially much broader.

156 No doubt if there is power to make orders involving the payment of money but no power to award damages, there will be contestable penumbral cases. That ought not in itself tell against the construction of s 232, just as the existence of twilight does not invalidate the distinction between night and day: A M Gleeson, "Judicial Legitimacy" (2000) 20 *Aust Bar Rev* 4 at 11. A more powerful consideration telling against a power to make orders involving the payment of money is that the legislation fails to specify a maximum pecuniary amount. But these questions do not arise in this appeal. In the present case, NCAT made an order which reflected the (agreed) damages caused by the (agreed) breach of duty. This was something it lacked authority to do. It follows that the Appeal Panel was correct to set it aside.

157 I propose that the appeal be dismissed. As presently advised I see no reason to displace the usual order in UCPR r 42.1, but if either side seeks a different order, he or it is free to make application within the period specified by UCPR r 36.16.

158 **WHITE JA:** The difference of opinion in this court, and the difference of opinion between Appeal Panels of the Tribunal, as to whether the Tribunal has power to award damages for breach of statutory duty as provided by s 106(5) of the *Strata Schemes Management Act 2015* ("the Act"), demonstrates that the answer to the question raised by this appeal is debatable. Nonetheless, I think the answer is tolerably clear.

159 For the reasons which follow I agree with the conclusions of Basten JA and would allow the appeal.

160 The issue may be stated simply. Does s 232(1) of the Act (which confers upon the Tribunal power to "make an order to settle a complaint or dispute" about any of the matters referred to in s 232(1)), extend to the making of an order for the payment of damages by an owners corporation for breach of its statutory duty under s 106(1) or (2).

161 Since the Act came into force, reversing this court's decision in *The Owners – Strata Plan 50276 v Thoo* [2013] NSWCA 270; 17 BPR 33,789, a complaint giving rise to a dispute that the owners corporation has not properly maintained and kept the common property in a state of good and serviceable repair would typically raise both a claim that the owners corporation should carry out repairs to the common property to prevent further damage to the lot and a claim for compensation for the damage suffered to the lot as a result of an alleged failure to repair the common property. Such a claim might include a claim for economic loss, such as the loss of rent as a result of damage to the lot. The causes of action for such damages could lie in nuisance or negligence (*McElwaine v The Owners – SP 75975* [2017] NSWCA 239; 18 BPR 37,207 at [67]-[71]) and for the breach of statutory duty, as now provided for by s 106(5).

162 The first aspect of such a complaint could be resolved under s 232 by the Tribunal's making an order against the owners corporation to carry out repairs to the common property, for example such repairs as might be necessary to prevent water ingress to the lot. In *The Owners – Strata Plan 50276 v Thoo* this Court held that s 62 of the *Strata Schemes Management Act 1996*, which was the predecessor to s 106 of the current Act, did not confer on a lot owner a right to sue for damages for breach of the statutory duty imposed by s 62. Central to the reasoning in *Thoo* was that the 1996 Act provided the exclusive means for enforcing the duty imposed by s 62, including, relevantly, the power then conferred on an adjudicator under s 138 of the 1996 Act to make an order to settle a dispute or complaint about an exercise of, or a failure to exercise, a function conferred or imposed by the Act in relation to a strata scheme, or the operation, administration or management of a strata scheme under the Act (*Strata Schemes Management Act 1996* s 138(1)). An adjudicator could not order the payment of damages (s 138(3)(d)). It was the combination of the statutory power conferred on an adjudicator under s 138(1) to make an order to settle (that is, resolve) a dispute or complaint about an owners corporation's exercise, or failure to exercise, a function imposed by or under the Act and the absence of a power by an adjudicator to order the payment of damages, that persuaded this court in *Thoo* that a lot owner was not entitled to damages for

breach of the duty formerly imposed by s 62(1) of the 1996 Act and now imposed by s 106(1) of the Act.

163 It was critical to the decision in *Thoo* that a lot owner was not entitled to sue (in a court) for damages for breach of statutory duty, that an adjudicator could not award damages. This was because it was only the statutory remedies provided for by the 1996 Act that were available to enforce the duty imposed by s 62 of that Act (*Thoo* at [208]-[221]; *McElwaine* at [11]).

164 The current Act removes adjudicators as a level of decision-making. By s 106(5) it reverses *Thoo* by providing that a lot owner can recover damages from an owner's corporation for breach of statutory duty. The current Act does not contain any express restriction, as was formerly applicable to an adjudicator, against the Tribunal's making an order for the payment of damages. These considerations, when combined with the width of the words in s 232 (which should be understood as conferring a power on the Tribunal to resolve a complaint or dispute), indicate that the Tribunal's authority under s 232(1) extends to making an order that the owners corporation pay damages for breach of its statutory duty under s 106(1) and (2).

165 I accept, as Leeming JA says (at [149]), that it would also follow that the Tribunal would have jurisdiction to hear and determine a claim for nuisance brought by a lot owner based on an owners corporation's failure to take reasonable care to maintain the common property. That would follow if resolution of such a claim were necessary to resolve the complaint or dispute.

166 In other words, I see no reason to read down the amplitude of the authority conferred on the Tribunal by s 232(1).

167 It is true that if full amplitude is given to the words of s 232(1), then the provision would cover some of the more specific powers conferred on the Tribunal by other sections of the Act. But the Act is not structured in such a way that the conferral of specific powers on the Tribunal should be seen as limiting the conferral of the general power under s 232(1). The specific powers conferred on the Tribunal do not form a class or a genus by reference to which the general power under s 232(1) is to be read down. I agree with what Leeming JA has said in this respect (at [119] and [120]). I agree with what

Basten JA has said at [28]. That construction is consistent with the principle in *Owners of the Ship, "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; [1994] HCA 54. I do not think that the principle in *Shin Kobe Maru* faces an obstacle in the language of s 232 once it is acknowledged that that language extends to a power to make orders to resolve a complaint or dispute and not merely to bring about a consensual resolution of a complaint or dispute. In the absence of consensus, the way to resolve a dispute is to decide all aspects of the dispute and make appropriate orders to give effect to such a decision.

168 I respectfully doubt that the construction of s 232 is advanced by the debate as to the jurisprudential nature of the tort of damages for breach of statutory duty. In *Lochgelly Iron & Coal Co v M'Mullan* [1934] AC 1 at 22 and in *London Passenger Transport Board v Upson* [1949] AC 155 at 168 Lord Wright stated "the common law gives a cause of action" sounding in damages for breach of a statutory duty intended to protect a particular class of persons and that it was a "specific common law right". But that right was nonetheless founded on and subject to statute. The cause of action depended upon the statute being for the protection of an individual, or a particular class of individuals, and not the public generally, and would not arise if the statute expressly or impliedly provided an exclusive means for the enforcement of the duty imposed. In *Darling Island Stevedoring & Lighterage Co v Long* (1957) 97 CLR 36; [1957] HCA 26 Williams J said that the statute created the civil right of action for the class of persons for whose protection the statute was passed so that any one of that class who was injured by the breach of the statute could sue the employer in an action for damages at common law (at 49 (citing Dixon J in *O'Connor v SP Bray Ltd* (1937) 56 CLR 464 at 478; [1937] HCA 18).

169 I do not find it useful to ask which comes first: the statute or the common law? Rather, the question is whether the undoubted right of a lot owner to recover from an owners corporation damages for breach of the statutory duty imposed by s 106(1) and (2) can be enforced in the Tribunal. That depends upon the width of the Tribunal's power to "settle", that is, to resolve, a complaint or dispute about the owners corporation's exercise of, or failure to exercise, a function conferred or imposed on it by the Act.

170 I also agree with Basten JA's reasons (at [47]) that the legislative history supports the Tribunal's having the power to order the payment of damages.

171 That the Tribunal does have such power is indicated by s 232(3) of the Act and cl 5 of Sch 4 of the *Civil and Administrative Tribunal Act 2013*. Section 232(3) is set out in the annexure to Leeming JA's reasons. Clause 5 of Sch 4 is set out at [23] of the reasons of Basten JA.

172 Section 232(3) provides that "a person" is not entitled 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".

173 If the Tribunal did not have jurisdiction to order the payment of damages for breach of statutory duty payable under s 106, it would be necessary for an applicant, who sought both a work order requiring repair of common property and damages for breach of the statutory duty to keep the common property in good and serviceable repair, to commence separate proceedings in the Tribunal (seeking a work order) and in a court (seeking damages). Both applications would be for orders to settle the complaint or dispute about an alleged failure by the Owners Corporation to comply with its duty under s 106(1). But s 232(3) would preclude the applicant from commencing other proceedings for damages until the proceeding in the Tribunal was no longer the subject of a "current application", that is, until proceedings in the Tribunal were finally resolved. I see no reason that the applicant would not be "a person" within the meaning of s 232(3).

174 It might be possible for such an applicant to proceed only in a court having the requisite powers by seeking a mandatory injunction requiring the owners corporation to carry out repairs and damages. But such an application would face the difficulty that the injunction might require ongoing supervision by the court. In any event, a construction of s 232(1) that had the practical effect of impairing an applicant's exercise of other rights (viz. to seek a work order in the Tribunal) is not to be preferred.

175 Similarly, if the applicant first commenced proceedings in a court seeking damages, the applicant would not be entitled to apply under s 232(1)(e) for a

work order requiring the owner's corporation to carry out repairs to the common property.

176 It cannot be assumed that a contested application under s 232(1)(e) for a work order would be resolved within the two years provided for by s 106(6) for the commencement of proceedings for damages for breach of statutory duty, particularly when regard is had to the possibility of an appeal to the Appeal Panel and a further possible appeal to the Supreme Court on a question of law.

177 A similar issue would in any event arise under cl 5 of Sch 4 to the *Civil and Administrative Tribunal Act*. The purpose of the provision is to avoid the risk of concurrent findings by the Tribunal and a court with respect to a particular issue (*Cohen-Hallaleh v Cyril Rosenbaum Synagogue Pty Ltd* [2003] NSWSC 395 per Barrett J at [38]; *Advance Earthmovers Pty Ltd v Fubew Pty Ltd* [2009] NSWCA 337 at [108] (Sackville AJA)).

178 In *Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Ltd* [2015] NSWSC 289; 18 BPR 35,471, I said that the identification of the relevant issue for the purpose of cl 5 should be informed by that statutory purpose (at [104]-[105]). This was followed by Williams J in *Owners Corporation – SP 64807 v BCS Strata Management Pty Ltd* [2020] NSWSC 1040 at [45].

179 If the Tribunal lacks jurisdiction to order the payment of damages, then, at one level, it can be said that an application made to a court for damages for breach of statutory duty imposed by s 106(1) would not raise the same issue as an application to the Tribunal for a work order under s 232(1)(e) for alleged failure of an owner's corporation to keep the common property in good and serviceable repair. It could be said that the issue in the proceedings before the court was whether the owner's corporation was liable to pay damages, but the issue before the Tribunal would be whether the owner's corporation should be required to carry out repairs. But another construction, consistent with the purpose of the provision, would be to say that the same issue arises in both proceedings, namely, whether the owner's corporation was in breach of its duty under s 106(1). If that is correct, there is every reason not to construe s 232(1) narrowly so as to compel an applicant who seeks both forms of relief to bring a separate proceeding in a court and before the Tribunal.

180 It may seem strange that Parliament would confer on the Tribunal jurisdiction to order the payment of damages with no jurisdictional limit as to the amount of damages that could be awarded, where the rules of evidence do not apply, where an appeal to the Appeal Panel requires a grant of leave, unless the appeal is confined to a question of law, and where the only further avenue of appeal lies only by leave and only on a question of law. But even if the Tribunal does not have jurisdiction to award damages, it has jurisdiction to make a finding as to whether an owner's corporation was or was not in breach of its duty under s 106(1) in deciding whether or not to make a work order. If such a determination were essential to the Tribunal's decision whether or not to make a work order, its decision would create an issue estoppel in subsequent court proceedings for damages (*Cachia v Issacs* [1985] 3 NSWLR 366 at 368 (Kirby P), 383 (Hope JA); *Lambidis v Commissioner of Police* (1995) 37 NSWLR 320 at 323-324 (Kirby P), 332, 333 (Priestley JA); *Zavodnyik v Alex Constructions Pty Ltd* (2005) 67 NSWLR 457; [2005] NSWCA 438 at [25] (Handley JA); *Morris v Riverwild Management Pty Ltd* [2011] 38 VR 103; [2011] VSCA 283 at [84]-[85] (Weinberg JA)).

181 In other words, the problem identified by Leeming JA, if it be a problem, will exist in substantial measure in any event, even if the Tribunal does not have authority to award damages. Clause 5 of Sch 4 is aimed at avoiding such issues. It is reinforced by s 233(3).

182 Basten JA ([35]-[39]) and Leeming JA ([121]-[123]) describe the respondent's submission based on the different provisions in s 90(2) and s 104(1) of the Act as to what orders can be made either by a court or the Tribunal as to how the owners corporation's liability to pay costs is to be borne by lot owners (s 90(2) applicable to courts) or how levies for the owners corporation's own costs are to be borne (s 104(1) applicable to the Tribunal).

183 There is no express provision for the Tribunal to order that costs payable by an owners corporation be paid from contributions levied only in relation to specified lots in a proportion specified in the order (compare s 90(2)). There is no express provision that an owners corporation cannot levy a contribution for

its own costs against a party who is successful in court proceedings against it (compare s 104(1)).

184 I do not think this has any relevance to the issue of a Tribunal's powers under s 232(1) except as raising the possibility that the power to resolve all aspects of a dispute should extend to all aspects as to how and by whom the costs of the dispute should be borne in so far as that is not dealt with by other specific provisions.

185 The equivalent provision to s 90(2) of the Act in the 1996 Act was s 229(2).

186 In *Owners Strata Plan 50411 v Cameron North Sydney Investments Pty Ltd* [2003] NSWCA 5 at [170]-[172] and *Symes v The Proprietors Strata Plan 31731* [2003] NSWCA 7 at [82]-[84] this court held that s 76 of the *Supreme Court Act 1970* (NSW) (that was in materially the same terms as s 98 of the *Civil Procedure Act 2005* (NSW)) conferred power on the court to make similar orders as to how the burden of an owners corporation's own costs should be borne, as s 229(2) provided in respect of costs payable by the owners corporation.

187 It has been argued, but not so far as I am aware in this court, that this overlooked that the power to order costs under the former s 76 of the *Supreme Court Act* and now s 98 of the *Civil Procedure Act* was expressed to be "subject to any other Act" (*Moallem v Consumer, Trader and Tenancy Tribunal* [2013] NSWSC 1700 at [95]-[98]).

188 This appeal is not the occasion to determine the extent of the powers of a court under s 98 of the *Civil Procedure Act* to determine how the burden of an owners corporation's own costs should be borne between lot owners when a lot owner has successfully sued the owners corporation. Nor is it appropriate to consider the extent of the Tribunal's power as to costs under the *Civil and Administrative Tribunal Act* or the Act.

189 It suffices to say that ss 90 and 104 merely perpetuate a long-standing distinction between courts and the Tribunal (or its predecessors) and a piecemeal approach to addressing how the burden of costs which an owners

corporation incurs, or for which it is liable, should be borne, that have no bearing on the present issue.

190 If Parliament were to consider clarifying the Tribunal's powers to order damages against an owners corporation, whether for breach of statutory duty or negligence or nuisance, it would be unfortunate if it did not also take the opportunity to clarify the powers of both the Tribunal and a court, when ordering costs, to decide how the burden of costs ordered against an owners corporation, and the burden of an owner corporation's own costs, should be borne by lot owners.

191 For these reasons I agree with the orders proposed by Basten JA.

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ANNEXURE – relevant provisions of current and former legislation

Current provisions:

Strata Schemes Management Act 2015, ss 106 and 232

> "**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."

"**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."

Repealed provisions:

Strata Titles Act 1973, s 105 (as originally enacted)

"**105.** (1) Except in the case of a dispute or complaint to be settled or rectified by an order under Division 4, the Commissioner may, pursuant to an application of a body corporate, a managing agent, a proprietor, any person having an estate or interest in a lot or an occupier of a lot in respect of a strata scheme, make an order for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed by this Act or the by-laws in connection with that strata scheme on any person entitled to make an application under this subsection or on the chairman, secretary or treasurer of the body corporate or the council.

(2) For the purposes of this Division where a body corporate has a discretion as to whether or not it exercises or performs a power, authority, duty or function conferred or imposed on it by this Act or the by-laws, it shall be deemed to have refused or failed to exercise or perform that power, authority, duty or function only if it has decided not to exercise or perform that power, authority, duty or function.

(3) Nothing in subsection (1) empowers the Commissioner to make an order under that subsection for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed on the body corporate by this Act or the by-laws where that power, authority, duty or function may, in accordance with any provision of this Act or the by-laws, only be exercised or performed pursuant to a unanimous resolution or a special resolution.

(4) Nothing in this Division authorises the Commissioner to make an order of the kind that may be made by the Supreme Court under section 32, 50, 51 or 67.

(5) Nothing in this Division affects the generality of subsection (1), but an order in respect of any matter dealt with in any other section of this Division shall not be made under this section."

Strata Titles Management Act 1996, s 138

"**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.”