Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No 80412 v Vickery
Medium Neutral Citation:	[2021] NSWCATAP 98
Hearing Date(s):	19 December 2019; on the papers after 24 December 2021
Date of Orders:	21 April 2021
Decision Date:	21 April 2021
Jurisdiction:	Appeal Panel
Before:	Armstrong J, President Hennessy, ADCJ and Deputy President T Simon, Principal Member
Decision:	1. A further hearing is dispensed with. 2. The appeal is dismissed. 3. The Appeal Panel makes the following directions: (1) By 21 May 2021, Mr Vickery is to file and serve any submission on costs in proceedings AP 20/50619; AP 19/51514; SC 18/16266 and AP 20/14327. (2) By 4 June 2021, The Owners - Strata Plan No 80412 is to file and serve any submission on costs in proceedings AP 20/50619; AP 19/51514; SC 18/16266 and AP 20/14327. (3) By 18 June 2021, Mr Vickery is to file and serve any submissions in reply.
Catchwords:	STRATA TITLE – appeal from order of Tribunal awarding damages to a lot owner for breach of the statutory duty in s 106(1) of the Strata Schemes Management Act 2015 – duty to properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation

	STATUTORY INTERPRETATION – meaning of 2 year limitation period in s 106(5) of the Strata Schemes Management Act 2015
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Limitation Act 1969 (NSW) Strata Schemes Management Act 1996 (NSW) (repealed) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Adams v Ascot Iron Foundry Pty Ltd (1968) 72 SR (NSW) 120 Argyropoulos v Layton [2002] NSWCA 183 Australian and New Zealand Banking Group ltd v Dzienciol [2001] WASC 305 Clutha v Millar [2002] NSWSC 362 Commonwealth of Australia v Cornwell (2007) Aust Torts Reports 81-885; [2007] HCA 16 Coulton v Holcombe (1986) 162 CLR 1 Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503 Hawkins v Clayton (1986) 5 NSWLR 109 Henville v Walker (2001) 206 CLR 459; [2001] HCA 52 Kingston Earthworks Pty Ltd v Iles (1997) 6 TASR 433 Larking v Great Western (Nepean) Gravel Ltd (in Liq) [1940] HCA 37; (1940) 64 CLR 22 Maxwell v Murphy (1957) 96 CLR 261 Nicole Stanton v The Owners of Strata Plan 60724 [2010] NSWSC 175 Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355 Pullar v Secretary for Education, [2007] NZCA 389 Scarcella v Lettice [2000] NSWCA 289; 51 NSWLR 302 SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 347 ALR 405 The Owners – Strata Plan No 30621 v Shum [2018] NSWCATAP 15 The Owners – Strata Plan No 80412 v Vickery [2020] NSWCATAP 5 The Owners Strata Plan 50276 v Thoo [2013] NSWCA 270 Vickery v The Owners – Strata Plan No 80412 [2020] NSWCA 284

	Weldon v Neal (1887) 19 QBD 394
Texts Cited:	Balkin & Davis, The Law of Torts, (5th ed, 2013, Lexis Nexis Butterworths) GE Dal Pont, Law of Limitation, (2nd ed, 2021, Lexis Nexis) Pearce and Geddes, Statutory Interpretation in Australia, (9th ed, 2019, LexisNexis Butterworths)
Category:	Principal judgment
Parties:	The Owners – Strata Plan No 80412 (Appellant) Graham John Vickery (Respondent)
Representation:	Counsel: D D Feller SC & M J Dawson (Appellant) D Jenkins (Respondent) Solicitors: Chambers Russell Lawyers (Appellant) Le Page Lawyers (Respondent)
File Number(s):	2020/00371211 (AP 20/50619)
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Unreported
Date of Decision:	18 October 2019
Before:	D Robertson, Senior Member
File Number(s):	SC18/16266

REASONS FOR DECISION

Overview

1 This appeal concerns the meaning and applicability of the limitation period for bringing an action for damages for breach of the statutory duty to maintain and repair common property: *Strata Schemes Management Act 2015* (NSW) (the

2015 Act), s 106. A lot owner has two years to commence proceedings in the Tribunal after first becoming aware of loss suffered as a result of a breach of the statutory duty: 2015 Act, s 106 (6). The provisions creating the cause of action and providing for the limitation period came into effect on the 30 November 2016 when the 2015 Act commenced.

2 Before the 2015 Act commenced, an owners corporation had a statutory duty to maintain and repair the common property under s 62(1) of the *Strata Schemes Management Act 1996* (NSW) (the 1996 Act). However, there was no equivalent to s 106(5) or 106(6). In 2013, the Court of Appeal held that a lot owner did not have a private right to claim damages for breach of the statutory duty to repair in the 1996 Act: *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270 (22 August 2013) at [222]. Subsections 106(5) and (6) reflect the Legislature's decision to overturn the result in *Thoo*. The 2015 Act gave a lot owner a new right to recover damages in the Tribunal but imposed a two-year limitation period.

3 The appellant, the Owners Corporation, submitted that the respondent, a lot owner, Mr Vickery, was barred from commencing proceedings in April 2018 because he first became aware of the loss of rent from water damage as early as 2013. Even though Mr Vickery had no remedy for the loss he incurred before the 2015 Act came into effect, time began to run from the date he first became aware of the loss. A separate cause of action did not accrue on 30 November 2016 when the 2015 Act commenced. Mr Vickery's case is that the cause of action did not accrue, and time did not begin to run, until the commencement of the 2015 Act. That is also our view. It follows that Mr Vickery's application was lodged within time and the appeal is dismissed.

4 The brief procedural background to this appeal is that, in an earlier internal appeal decision, we set aside the Tribunal's finding that it had power to decide Mr Vickery's application: *The Owners – Strata Plan No 80412 v Vickery* [2020] NSWCATAP 5. The parties agreed that if we decided that the Tribunal did not have jurisdiction, we should not go on to determine the Owners Corporation's other grounds of appeal. Mr Vickery appealed from our decision.

5 The Court of Appeal (Basten and White JJA with Leeming JA dissenting) held that the 2015 Act confers jurisdiction on the Tribunal to hear and determine a claim for damages as a result of a breach of the statutory duty to maintain and repair common property: *Vickery v The Owners – Strata Plan No 80412* [2020] NSWCA 284 at [28], [51], [164]. Courts undoubtedly have that power, but there had been inconsistent decisions at the Appeal Panel level as to the extent of the Tribunal's power.

6 Section 232 of the 2015 Act provides, in part, that the Tribunal may "make an order to settle a complaint or dispute". The majority (Basten JA at [19] and White JA at [168]-[169]) held that that provision gives the Tribunal power to order an owners corporation to pay damages to an owner who suffers loss caused by a breach of the statutory duty. Section 106(5) creates a statutory cause of action. It does not reflect a general law cause of action. Leeming JA (dissenting) regarded s 106(5) as creating a common law tort of breach of statutory duty.

7 The Court of Appeal remitted the matter to the Appeal Panel to determine any outstanding issues raised by the original appeal, including the costs of the proceedings, heard by the Appeal Panel on 19 December 2019. These reasons address the remaining grounds of appeal and costs of various related proceedings.

Summary of relevant facts and statutory provisions

8 Mr Vickery is the owner of an apartment which is a lot in a strata scheme. The apartment is on the top level of the building, directly underneath the roof. On at least eight occasions between January 2013 and September 2018, Mr Vickery's apartment leaked when it rained. The leak was caused by defective common property, including the roof. Mr Vickery claimed that the Owners Corporation had breached its statutory duty to properly maintain and repair the common property. Section 106(1) of the 2015 Act provides that:

> 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.

9 We will call this duty the "statutory duty". Section 106(5) of the 2015 Act expressly provides that a person who suffers any reasonably foreseeable loss as a result of a breach of this statutory duty is entitled to recover damages:

> (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.

10 Section 106(6) imposes a two year limitation period:

> (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.

11 Mr Vickery brought an action for damages in the Tribunal on 6 April 2018, about 18 months after the 2015 Act came into force. The Owners Corporation admitted that it had breached the statutory duty and that, as a result of that breach, Mr Vickery had lost rental income of $97,000 during the period from 30 November 2016, when the 2015 Act commenced, and 22 November 2018, when the roof was repaired.

12 Despite these admissions, the Owners Corporation made a series of formal submissions to the contrary including that:

(1) there was no power to order damages;

(2) that the duty of the Owners Corporation under s 106 is not a continuing obligation breach of which occurs on each day that the duty is not performed, nor does each such breach give rise to a separate cause of action pursuant to s 106(5); and

(3) that Mr Vickery first became aware of the loss more than two years prior to the commencement of the proceedings, so that the application is barred by the operation of s 106(6) of the 2015 Act.

13 The first issue has been resolved in Mr Vickery's favour by the Court of Appeal in *Vickery v The Owners – Strata Plan No 80412* [2020] NSWCA 284. The second and third issues summarised above, which relate to the meaning and applicability of the limitation period, remain for the Appeal Panel to determine.

Tribunal's decision on the meaning and applicability of the limitation period

14 The Tribunal rejected the Owners Corporation's submission that Mr Vickery first became aware of the loss more than two years before commencing proceedings. The Tribunal made the following relevant findings at [15] and [16]:

(1) the obligation of the Owners Corporation pursuant to s 106 of the 2015 Act is a continuing obligation which is breached on each day that the obligation is not performed and each breach gives rise to a separate cause of action pursuant to s 106(5); and

(2) the Applicant is not barred from recovering compensation for losses sustained since 30 November 2016 by s 106(6) of the 2015 Act.

15 The Tribunal held that the Owners Corporation was liable to pay Mr Vickery $97,000 in damages for lost rent from 30 November 2016 to 22 November 2018.

16 The Tribunal considered itself bound by a decision of the Appeal Panel in *The Owners Strata Plan No 30621 v Shum* [2018] NSWCATAP 15. One issue in that case was whether the right to recover damages for breach of the statutory duty operates retrospectively, so that an owners corporation is liable for losses that were incurred before the commencement of the 2015 Act: *Shum* at [46]. The Appeal Panel concluded that the legislation did not operate retrospectively, reasoning at [128], that "the obligation of an owners corporation to maintain and keep in a good and serviceable state of repair is a continuing obligation, breach of which occurs on each and every day the duty is not performed." The Appeal Panel went on to conclude that, where there are multiple breaches of the statutory duty, each breach constitutes a separate cause of action.

17 The Tribunal at first instance considered itself bound by the Appeal Panel's reasoning, to make the two findings we have set out at [14] above.

Grounds of appeal and list of issues

Grounds of appeal

18 The outstanding grounds of appeal are grounds 2 and 3 of the Notice of Appeal filed on 15 November 2019. Appeal ground 2 was that the statutory duty under s 106(1) does not give rise to separate causes of action under s 106(5). The proper construction of s 106(5) is that it provides for a single cause of action that accrues when the duty under s 106(1) is breached and measurable damage first occurs. The "loss" in respect of which damages are recoverable under s 106(5) is not confined to past loss that is reasonably foreseeable, but encompasses all the damages sustained by the lot owner. This includes not only past loss but also all other reasonably foreseeable loss. If it were otherwise, a lot owner would be entitled to plague the owners corporation with

potentially an endless succession of claims with respect to each incremental measurable element of damage as it occurs.

19 Appeal ground 3 is that Mr Vickery is prevented by the two-year limit in s 106(6) from maintaining his action for breach of s 106(1). The "loss" is the "reasonably foreseeable loss suffered by the owner", not limited by reference only to past loss. The decision in *Shum* would have the nonsensical consequence that a lot owner first becomes aware of loss on a daily basis, an interpretation that could not have been intended.

20 The Owners Corporation is entitled to appeal on a question of law: *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act), s 80(2)(b). Each of the outstanding grounds of appeal raises a question of law.

List of issues

21 After the Court of Appeal remitted these outstanding appeal grounds to the Appeal Panel, the parties filed the following list of issues:

> "1. Whether the duty of the Owners Corporation under Section 106(1) of the SSMA is a continuing duty breached on each day the duty is not performed giving rise to a separate cause of action for damages under Section 106(5) of the SSMA.
>
> 2. Whether the "loss" in respect of which damages are recoverable under Section 106(5) as a result of a breach of the Owners Corporation's duty under Section 106(1) is confined to past loss that was reasonably foreseeable or encompasses all loss including future loss that is reasonably foreseeable.
>
> 3. If the answer to 2 above is all loss including future loss that is reasonably foreseeable, whether a Lot Owner may bring an action more than two years after the Lot Owner first became aware of any loss arising from the Owners Corporation's breach of duty under Section 106(1) of the SSMA.
>
> 4. If the answer to 2 above is all loss including future loss that is reasonably foreseeable, whether under s 106(6) of the SSMA the Respondent was barred from commencing the present proceedings by reason of his first having become aware of his loss more than two years before their commencement."

The issues re-framed

22 We understand the issue, at the most general level, to be whether Mr Vickery is prevented by the two year limitation period from bringing the proceedings. The Owners Corporation submitted that Mr Vickery is out of time because the

cause of action arises or accrues only once. It does not accrue each day Mr Vickery loses rental income, and it did not accrue when the 2015 Act commenced. As Mr Vickery first became aware of the loss more than two years before he commenced the proceedings, he is barred from commencing the proceedings.

Principles of statutory interpretation

23 To determine whether Mr Vickery is prevented by the limitation period from bringing these proceedings, we must interpret the text of s 106 of the 2015 Act and, in particular, the limitation period in s 106(6). We must give that text its natural or ordinary meaning, taking into account the context and purpose of the legislation. In *Statutory Interpretation in Australia*, Pearce and Geddes (9th ed, 2019, LexisNexis Butterworths at 33) regard the following passage from the High Court's decision in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 347 ALR 405; (per Kiefel CJ, Nettle and Gordon JJ) at [14], as summarising the contemporary approach to statutory construction:

> "The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."

24 Considerations of context and purpose include the consequences of adopting the ordinary or grammatical meaning: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 384; 153 ALR 490 at [78]:

> "The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."

25 In *SZTAL*, at [37]–[39], Gageler J emphasised that context, in the broad sense, is only useful to the extent that it assists in understanding the meaning of the text:

> "… The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility '*if, and in so far as, it assists in fixing the meaning of the statutory text*'." (Citations deleted and emphasis added.)

26 The italicised quote comes from *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 [39]. If an understanding of context does not assist in fixing the meaning of the statutory text, it is not useful.

27 In *Statutory Interpretation in Australia*, Pearce and Geddes go on, at 33, to state that the application of the contemporary approach to statutory construction "will in most cases lead a court to having to make what is commonly referred to as a 'constructional choice'." The authors then explain that the constructional choice is sometimes between "one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised."

28 General law principles may provide useful guidance when interpreting statutory provisions. At [17], of *Vickery v The Owners – Strata Plan No 80412* [2020] NSWCA 284, Basten JA quoted a passage from Gleeson CJ's judgment in *Henville v Walker* (2001) 206 CLR 459; [2001] HCA 52 at [18]. Gleeson CJ was considering the relationship between another statutory cause of action (s 52 of the former *Trade Practices Act 1975* (Cth)) and common law principles relevant to the assessment of damages:

> "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."

29 Below we discuss cases where "problems of the same nature", or an analogous nature, have arisen.

Purpose of limitation periods

30 In *Law of Limitation*, (2nd ed, 2021, Lexis Nexis) GE Dal Pont discusses the history of the policies behind limitation periods, and offers the following summary at 11:

> "The foregoing brief historical excursus reveals that for hundreds of years it has been the policy of the law to fix time limits for prosecuting civil claims. This represents, a New South Wales judge explained, one of the many 'attempts of legislators to provide for … a reasonable balance between the competing desiderata of certainty in rule and the attaining of what is felt to be a just result in particular cases'. Others, in the specific context of time bars, have spoken in terms of Parliament's attempt to 'strike a balance between these irreconcilable interests, both legitimate'. The balance, having been struck by Parliament, makes it 'emphatically not the function of the judges to try to strike their own balance, whether as a response to the apparent merits of a particular case or otherwise'. It involves a 'practical compromise' between the interests of plaintiffs in securing relief and defendants in being shielded from what are often termed 'stale' claims. When using the term 'stale' in this context, it evinces an explicitly temporal dimension; it does not directly probative of the validity of the claim." (Footnotes deleted)

The cause of action

31 Basten JA held at [16] of *Vickery* that, read 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). The statutory right of recovery in s 106(5) does not depend on common law principles. At [19], Basten JA expanded on the nature of that statutory right:

> "It is not dependent upon principles arising under the 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."

32 Since 30 November 2016, an owner has had the right to commence proceedings in the Tribunal claiming damages for breach of the s 106(1) statutory duty.

Accrual of the cause of action

The constructional choice

33 An owner may not bring an action under s 106(1) for breach of a statutory duty more than two years after the owner first becomes aware of the loss. It is the meaning and applicability of the words "the loss" that is critical. The "constructional choice" is whether "the loss" is "the loss" incurred before a lot owner had any remedy for that loss, or whether "the loss" is confined to the loss incurred when a remedy is available and the cause of action is complete.

Accrual of cause of action under the general law

34 Under the general law, the point at which time begins to run for the purpose of limitation period is when the cause of action has "accrued" to the plaintiff. For example, the *Limitation Act 1969* (NSW), s 14(1), fixes the limitation period for various causes of action as "the date on which the cause of action first accrues to the plaintiff". In *Commonwealth of Australia v Cornwell* (2007) Aust Torts Reports 81-885; [2007] HCA 16 at [5], the High Court stated the position as follows:

> ". . . to show the existence of a completely constituted cause of action in negligence, a plaintiff must be able to show duty, breach, and damage caused by the breach; accordingly, in the ordinary case, it is at the time when that damage is sustained that the cause of action 'first accrues' for the purposes of a provision such as s 100 of the Limitation Act."

Accrual of cause of action under s 106(5)

35 As Basten JA held in *Vickery v The Owners – Strata Plan No 80412* [2020] NSWCA 284 at [16], s 106(5) creates a cause of action for damages resulting from a contravention of s 106(1). The elements of that cause of action are the existence of the statutory duty, the breach of that duty and any reasonably foreseeable loss having been suffered as a result of that breach. We will discuss each of these elements in more detail below.

36 It is uncontroversial that the statutory duty in s 106(1) (and in s 62(1) of the 1996 Act) is a continuing one. An owners corporation has a continuing obligation to properly maintain and keep in a state of good and serviceable repair the common property. The statutory duty may be breached continuously or intermittently over a period of time.

37 The damages to which an owner is entitled is any reasonably foreseeable loss suffered by the owner as a result of a contravention of the statutory duty. For the general law tort of negligence, a cause of action arises, and time begins to run, when measurable damage is first suffered, even though further damage continues to accrue: *Scarcella v Lettice* [2000] NSWCA 289; 51 NSWLR 302 at [11]-[15]; *Argyropoulos v Layton* [2002] NSWCA 183 at [64]. Citing *Australian and New Zealand Banking Group Ltd v Dzienciol* [2001] WASC 305 at [440] per McLure J, Dal Pont makes the same point in *Law of Limitation* at 125:

> "Applied to causes of action in tort, once a tortious cause of action has accrued, 'it covers all subsequent loss and damage which is attributable to the same cause, even if that loss and damage only manifests itself later on by stages'.
>
> The logic for this approach derives from the core notion that time begins to run, for limitation purposes, on the 'accrual' of the relevant 'cause of action'. As a 'cause of action' is premised on the occurrence of all the facts that the plaintiff must prove to sustain the action, once those facts have occurred, time is triggered. It makes sense, then, that merely because events subsequent to that moment may impact on the damage caused by the tort that substantiated the cause of action, they play no role in deferring or restarting the running of time."

38 The text and context of s 106 persuades us that this general principle applies to the statutory provisions in s 106. The cause of action arises, and time begins to run, when a lot owner first becomes aware of the loss. Further damage may continue to accrue after that time.

39 The agreed issues speak of "future loss" that is reasonably foreseeable. If the parties were referring to loss that a lot owner may suffer after the proceedings have been initiated, that issue does not arise on appeal. In the Tribunal proceedings at first instance, the Owners Corporation agreed that "the reasonably foreseeable losses sustained by the Applicant since November 2016 by reason of the owners corporation's breach of duty were $97,000": Decision at [18]. As the issue of future loss was not raised at first instance, it cannot be raised on appeal: *Coulton v Holcombe* (1986) 162 CLR 1 at [7]-[8].

Retrospective operation of the s 106 of the 2015 Act

40 The 2015 Act contains a general savings provision in Schedule 3, Part 2, clause 3. The effect of this provision is that if on the date the 2015 Act

commenced, an owners corporation was in breach of the statutory duty in s 62(1) of the 1996 Act, the breach is taken to have been a breach of s 106(1).

> General savings(1)
>
> Any act, matter or thing done or omitted to be done under a provision of the former Act and having any force or effect immediately before the commencement of a provision of this Act that replaces that provision is, on that commencement, taken to have been done or omitted to be done under the provision of this Act.
>
> (2)
>
> This clause does not apply—
>
> > (a) to the extent that its application is inconsistent with any other provision of this Schedule or a provision of a regulation made under this Schedule, or
> >
> > (b) to the extent that its application would be inappropriate in a particular case.

41 It follows that, as the Owners Corporation had failed to properly maintain and keep in a state of good and serviceable repair the common property before the commencement of the 2015 Act, that breach, or those failures, are taken to have been done under the statutory duty in s 106(1). However, for the reasons we give below, time did not begin to run from the date of any breach before the commencement of the 2015 Act.

Consideration

42 Under the general law, in the absence of some clear indication to the contrary the 2015 Act is presumed not to have retrospective operation. That means that it is presumed not to apply "to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events": *Maxwell v Murphy* (1957) 96 CLR 261 at [267].

43 The Appeal Panel in *Shum* addressed the meaning of the transitional provision in cl 3(1) when determining whether Mr Shum was entitled to damages incurred before the 2015 Act came into effect. The Appeal Panel distinguished between the statutory duty in s 106(1) and any liability for breach of that duty. At [112] and [113], the Appeal Panel held that in respect of the obligation on an owners corporation to maintain the common property, cl 3(1) allows a lot owner to apply for orders to repair and maintain common property, even where the

breach occurred before the commencement of the 2015 Act. The Appeal Panel added that:

> "In this way, any pre-existing defect which an owners corporation was liable to rectify under the 1996 Management Act, may be the subject of an order for its rectification under the 2015 Management Act."

44 The Owners Corporation in these proceedings submitted that, by parity of reasoning, any awareness of loss suffered because of a breach, which occurred before the commencement of the 2015 Act, is a relevant loss for the purposes of s 106(5) and (6). Regardless of the fact that Mr Vickery had no remedy for the loss he incurred before the 2015 Act came into effect, the loss first occurred as a result of a breach by the Owners Corporation of s 62(1) of the 1996 Act. Mr Vickery first became aware of that loss more than two years before he commenced proceedings, so the application is out of time.

45 That interpretation was said to be consistent with the statutory purposes and policy goals of the 2015 Act. According to the Owners Corporation, if Mr Vickery's interpretation were correct, the introduction of s 106(5) would result in each owners corporation becoming immediately liable in damages to individual lot owners for historical breaches of the statutory duty.

46 Mr Vickery's case is not that the Owners Corporation is liable in damages for historical statutory breaches. Rather, it is liable for the breach which occurred the day the 2015 Act commenced, and for continuing breaches after that date until the common property was repaired. No issue arises in this case as to the retrospective operation of s 106 because the cause of action does not relate to facts or events occurring before 30 November 2016.

47 Because the statutory duty imposes a continuing obligation on the Owners Corporation, it was in breach of the statutory duty when the 2015 Act commenced. However, no cause of action existed or was available before that date. Time cannot begin to run (or the cause of action cannot accrue or be complete) under s 106 of the 2015 Act, until the cause of action exists or is available. Mr Vickery first became aware of the loss on the commencement of the 2015 Act. The Owners Corporation was in breach of the statutory duty on that day and that is the day when Mr Vickery first became aware that he had

suffered recoverable loss as a result of that breach. It follows that Mr Vickery's claim is not barred by the limitation period.

48 We agree with the Appeal Panel's decision in *Shum* that the 2015 Act does not entitle a lot owner to recover damages for loss incurred before the legislation came into effect.

49 Our conclusion makes it unnecessary to determine whether, because s 106(1) is a continuing statutory duty, a lot owner has a separate cause of action for damages on each day it is breached. However, below we set out our non-binding observations on that issue.

Does a continuing breach of statutory duty give rise to separate causes of action day by day?

50 The source of this issue is the following finding by the Appeal Panel in *Shum* at [2]:

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

51 In *Shum*, the Appeal Panel referred to *Larking v Great Western (Nepean) Gravel Ltd (in Liq)* [1940] HCA 37; (1940) 64 CLR 22 and *Kingston Earthworks Pty Ltd v Iles* (1997) 6 TASR 433 in support of the finding that there is a continuing obligation imposed on the Owners Corporation, breach of which may give rise to multiple causes of action. The Appeal Panel stated at [126] to [128]:

> "In *Larking v Great Western (Nepean) Gravel Ltd (in Liq)* [1940] HCA 37; (1940) 64 CLR 22, at 236, Dixon J (as he then was) said of covenants generally:
>
> > If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. His duty is not considered as persisting and, so to speak, being for ever renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a state or condition of affairs, as, for instance, maintaining a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, then a further breach arises in every

> > > successive moment of time during which the state or condition is not as promised, during which, to pursue the examples, the building is out of repair, the life uninsured, or the particular support unprovided.
> >
> > He then said at 238:
> >
> > > The distinction between a covenant to do a definite act capable only of a breach once for all and a continuing covenant has consequences not only in relation to waiver but also in the measure of damage, in the effect of lapse of time under statutes of limitation, and, where the covenant runs with the land, in the liability of an assignee to sue or be sued for further breaches.
> >
> > By analogy, the obligation of an owners corporation to maintain and keep in a good and serviceable state of repair is a continuing obligation, breach of which occurs on each and every day the duty is not performed. As such, where there are multiple breaches of a statutory duty, each breach constitutes a separate cause of action: *Kingston Earthworks Pty Ltd v Isles* (1997) 6 TASR 433 at 438 per Zeman J at (with whom Cox CJ and Crawford J agreed)."

52 *Larking* was a case about the continuing breach of a covenant which is a type of contract, not the breach of a statutory duty where damages is the gist of the action. The breach of the statutory duty is analogous to the breach of covenant in that they are both continuing obligations. A further breach occurs in every successive moment of time during which the owners corporation fails to repair. However, *Larking* does not stand for the proposition that the continuing obligation results in multiple breaches of a statutory duty each of which gives rise to a separate cause of action on each day. The consequence of that interpretation is that a lot owner may bring an action each and every day after first becoming aware of the loss for that day, for as long as the breach and loss continue. If that is correct, an owner could bring a claim more than two years after he or she first became aware of the loss, as long as the owners corporation continued to breach the statutory duty and the owner continued to lose rent. That interpretation is not consistent with the plain and ordinary meaning of s 106(6) which requires an owner to bring a claim within two years of first becoming aware of the loss.

53 The Appeal Panel in *Shum* also relied on the decision in *Kingston Earthworks Pty Ltd v Iles* (1997) 6 TASR 433 to support the conclusion that each breach of the statutory duty constitutes a separate cause of action. The issue in that case was whether a proposed amendment to a statement of claim raised a new

cause of action which was statute barred. The statement of claim pleaded a breach of several statutory duties concerning the giving of notice. The amendment sought was that the collapse of a trench was caused by the respondent's failure "to carry out or cause or permit the excavation of the trench in accordance with the requirements prescribed by regs 50(5) and (6) of the Scaffolding Regulations 1963".

54 The Full Court of the Supreme Court of Tasmania (Zeeman J, Cox CJ and Crawford J agreeing) held that this alleged breach, which related to a statutory duty to carry out particular physical acts by way of precautions against the risk of the trench collapsing, is incapable of constituting a further particular of the other pleaded breaches of statutory duty. The Court observed at [10], "Each breach of a particular statutory duty constitutes a separate cause of action for the purposes of the rule in *Weldon v Neal*."

55 The facts of *Kingston Earthworks Pty Ltd v Iles* can readily be distinguished from the facts in this case. That case involved breaches of several separate statutory duties, not an ongoing or continuing breach of the same statutory duty.

56 The proposition that a continuing breach of a statutory duty gives rise to multiple separate causes of action was argued, but not resolved, in *Nicole Stanton v The Owners of Strata Plan 60724* [2010] NSWSC 175. The plaintiffs brought proceedings by way of a cross claim in the Local Court against the Owners Corporation under the 1996 Act. The plaintiffs claimed $58,000 in damages for water damage and loss of rent. The Local Court held that the *Limitation Act 1969* (NSW) barred the plaintiff from bringing the cross claim. The plaintiff submitted that under the corresponding provision to s 106(1) of the 2015 Act, the Owners Corporation owed them a continuing statutory duty to properly maintain and keep in a state of good and serviceable repair the common property. A fresh cause of action was said to arise where a fresh breach causes loss going beyond the loss resulting from the barred cause of action.

57 Harrison AsJ did not need to decide this issue because her Honour concluded at [28], that the cross claim had been brought within the six year limitation

period allowed: *Limitation Act*, s 74(1). Nevertheless, at [32]-[37], Harrison AsJ outlined the legal principles on which the plaintiff relied commencing with a passage from Balkin & Davis, *The Law of Torts* (2nd ed, 1996, Butterworths) at 807-808. That passage is identical with the following passage from p 807 of the 5th edition:

> **"Continuing torts** A continuing wrong is one in which the defendant's act or omission causes injury or damage recurrently to the plaintiff, day by day until the wrong is remedied or rendered irremediable. It differs from the notion of aggravation of damage, in that a continuing wrong does not necessarily increase the harm suffered by the plaintiff; it differs from the idea of successive occurrences of damage in that the defendant who commits a continuing wrong is guilty of more than one isolated wrongful act."

58 The authors were distinguishing between the kinds of damages available for a continuing wrong on the one hand, and aggravated damages and successive occurrences of damage on the other. A continuing wrong is one in which the defendant's act or omission causes injury or damage recurrently to the plaintiff, day by day until the wrong is remedied or rendered irremediable. A person who commits a continuing wrong is guilty of more than one isolated wrongful act, but those wrongful acts do not necessarily increase the harm suffered by the plaintiff. A continuing wrong is not the same as the idea of successive occurrences of damage.

59 Significantly, even if there is a continuing duty of care (or a continuing wrong) "a fresh cause of action will only arise if a fresh breach causes loss *going beyond* the loss resulting from the barred cause of action" (emphasis added): *Hawkins v Clayton* (1986) 5 NSWLR 109 at [124] per Glass JA. By "going beyond the loss", Glass JA was referring to cases of aggravated injury either from two separate acts of negligence or the latent effects of a disease: *Adams v Ascot Iron Foundry Pty Ltd* (1968) 72 SR (NSW) 120; Balkin & Davis, *The Law of Torts* (5th ed, 2013. Butterworths) at 806-807. Glass JA went on to explain at [125]:

> ". . . if it be assumed in favour of the argument that there was a continuing breach of a continuing duty there is an insurmountable obstacle with respect to proving an aggravation of the damage otherwise suffered. The loss of income flowing from the putative breach of duty within the six year period viz after November 1976 was not

> different from the loss of income which would have been recoverable in an action for the earlier breach of duty had it not been statute barred."

60 The Supreme Court also referred to Glass JA's statements in *Clutha v Millar* [2002] NSWSC 362. In that case, the cause of action against the applicants was in negligence. The applicants claimed that the proceedings were statute barred under the *Limitation Act 1969* (NSW), s 14. Austin J found at [20] that the cause of action "only accrues when damage is suffered". At [32] Austin J followed Glass JA in *Hawkins v Clayton* (1986) 5 NSWLR 109 at [124] on the question of whether a fresh cause of action arises:

> "… [N]o fresh cause of action accrued to the beneficiary when he suffered further loss of income during the six-year period of limitation. Assuming a continuing duty of care, a fresh cause of action will only arise if a fresh breach causes loss going beyond the loss resulting from the barred cause of action."

61 At 127 of *Law of Limitation*, Dal Pont concludes that:

> "Ultimately, in each case it is a question of fact and degree whether damage is sufficiently distinct to result in a separate cause of action."

62 The author then cites the New Zealand case of *Pullar v Secretary for Education* [2007] NZCA 389 as falling "on one side of the line". That case involved "a building plagued with leaks, defects first identified some eight years before proceedings for their rectification were commenced."

> ". . . the New Zealand Court of Appeal declared the claim out of time, as the damage first identified (within time), which it described as 'readily apparent' and 'obvious', was no different in substance from the subject matter of the suit. The case thus involved continuous damage of the same kind, and so was incapable of substantiating a separate action to accrue at a later time."

63 On that analysis our non-binding observation is that a lot owner is not entitled to bring proceedings for damages under s 106(5) on each day the statutory duty is breached and the owner incurs the loss.

Costs

64 In the Court of Appeal proceedings (*Vickery v The Owners – Strata Plan No 80412* [2020] NSWCA 284 at [61]-[63]) Basten JA made the following observations about the costs of these proceedings:

> "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."

65 The general rule in Tribunal proceedings, which includes proceedings before the Appeal Panel, is that each party pays their own legal costs of the proceedings unless there are "special circumstances" justifying an award of costs: NCAT Act, s 60. However, in proceedings in the Consumer and Commercial Division of the Tribunal, where the amount in dispute is more than $30,000, that rule does not apply: *Civil and Administrative Tribunal Rules 2014* (NSW) rr 38(1) and 38(2)(b). Instead, the Tribunal, and the Appeal Panel on appeal, have a discretion to award costs even in the absence of special circumstances:

> 38 Costs in Consumer and Commercial Division of the Tribunal
>
> (1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.
>
> (2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if—
>
> > (a) the amount claimed or in dispute in the proceedings is more than $10,000 but not more than $30,000 and the Tribunal has made an order under clause 10(2) of Schedule 4 to the Act in relation to the proceedings, or
> >
> > (b) the amount claimed or in dispute in the proceedings is more than $30,000.

66 The outstanding issues relate to costs in the following proceedings:

(1) the remitted Appeal Panel proceedings – AP 20/50619;

(2) the Appeal Panel proceedings heard on 19 December 2019 – AP 19/51514; and

(3) the Tribunal proceedings at first instance – SC 18/16266.

67 This Appeal Panel is also constituted to determine the appeal from the Tribunal's decision that each party pay their own costs in the preliminary application by the Owners Corporation to dismiss the proceedings for want of jurisdiction: Appeal AP 20/14327.

68 It may be that the parties can reach agreement on the issue of costs in all four proceedings. If no agreement is reached in one or more of these proceedings, we make the following directions:

(1) By 14 May 2021, Mr Vickery is to file and serve any submission on costs in proceedings AP 20/50619; AP 19/51514; SC 18/16266 or AP 20/14327.

(2) By 28 May 2021, The Owners Strata Plan No 80412 is to file and serve any submission on costs in proceedings AP 20/50619; AP 19/51514; SC 18/16266 or AP 20/14327.

(3) By 11 June 2021, Mr Vickery is to file and serve any submissions in reply.

Order dispensing with hearing

69 Following consultation with both parties, we have dispensed with a further hearing pursuant to s 50(2) of the NCAT Act. We invite submissions on the issue of whether we should also dispense with a hearing on costs.

Orders

1. A further hearing is dispensed with.

2. The appeal is dismissed.

3. The Appeal Panel makes the following directions:

(1) By 21 May 2021, Mr Vickery is to file and serve any submission on costs in proceedings AP 20/50619; AP 19/51514; SC 18/16266 and AP 20/14327.

(2) By 4 June 2021, The Owners - Strata Plan No 80412 is to file and serve any submission on costs in proceedings AP 20/50619; AP 19/51514; SC 18/16266 and AP 20/14327.

(3) By 18 June 2021, Mr Vickery is to file and serve any submissions in reply.

****

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

Registrar

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