Civil and Administrative Tribunal

New South Wales

Case Name:	Wang v MacDermott
Medium Neutral Citation:	[2021] NSWCATAP 75
Hearing Date(s):	29 September 2020
Date of Orders:	24 March 2021
Decision Date:	24 March 2021
Jurisdiction:	Appeal Panel
Before:	A Suthers, Principal Member M Gracie, Senior Member
Decision:	(1) Grant leave to appeal. (2) Orders 2 and 3 of the Tribunal's Reasons for Decision dated 10 June 2020 are quashed. (3) The appeal is dismissed. (4) Provisionally order that the costs of the appeal shall be the respondent's costs in the substantive proceedings. (5) The provisional costs order in order (4) above will become final 14 days after these Reasons are published, unless a party notifies the Registry and the other party in writing that some other costs order is sought and if so, whether that party consents to dispensing with a hearing on the question of costs, pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013.
Catchwords:	APPEAL — NCAT— leave to appeal from interlocutory decision of Consumer and Commercial Division - question of law - leave to appeal STRATA SCHEMES - interlocutory question - application under s 238 Strata Schemes Management Act 2015 - whether "interested person" under s 226

	Strata Schemes Management Act 2015 - meaning of "lawful occupier" - application by executor prior to grant of probate - whether an "estate or interest" in a lot PRACTICE AND PROCEDURE - orders outside scope of interlocutory question - final orders dismissing parts of Application - orders quashed
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Probate and Administration Act 1898 (NSW) Real Property Act 1900 (NSW)
Cases Cited:	Access Housing Pty Ltd ACN 065902936 v Rayfield [2017] NSWCATAP 4 Andrews v Hogan [1952] HCA 37; (1952) 86 CLR 223 AQO v Minister for Finance and Services [2016] NSWCA 248 Bone v Commissioner of Stamp Duties (NSW) [1974] HCA 29; [1974] 132 CLR 38 Bull v NSW Land and Housing Corporation [2016] NSWCATAP 266 Byers v Overton Investments Pty Ltd [2000] FCA 1761; 106 FCR 268 Byers v Overton Investments Pty Ltd [2001] FCAFC 760; 109 FCR 554 Carolyn Deigan as executrix for the estate of the late James Boyd Lockrey v Barnard James Fussell [2019] NSWCA 299 Commissioner of Stamp Duties (NSW) v Bone [1976] UKPCHCA 1; (1976) 135 CLR 223 Commissioner of Stamp Duties (Qld) v Livingstone (1964) 112 CLR 12 Darrington v Caldbeck (1990) 20 NSWLR 212 Ericon Buildings Pty Limited v The Owners Strata Plan No 96597 [2020] NSWCATAP 265 Ex parte Callan; Re Smith (1968) 1 NSWR 443 Federal Commission of Taxation v Trail Brothers Steel & Plastics Pty Ltd [2010] FCAFC 94; (2010) 186 FCR 410 In the matter of Pacific Springs Pty Ltd [2020] NSWSC 1240 J A Pye (Oxford) Ltd v Graham [2003] 1 AC 419; [2002] UKHL 30 Littledale v. Liverpool College [1900] 1 Ch 19

	Macatangay v State of New South Wales (No 2) [2009] NSWCA 272 Marshall v DG Sundin & Co Ltd (1989) 16 NSWLR 463 McFarland v Gertos [2018] NSWSC 1629 Meacham v Commissioner of Police [2020] NSWCATAP 107 Powell v McFarlane (1979) 38 P&CR 452 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Roberts v Swangrove Estates Ltd [2007] EWHC 513 (Ch) South Maitland Railways Pty Ltd v Satellite Centres Australia Pty Ltd [2009] NSWSC 716 The Sydney Building Company Limited v Sinac [2019] NSWCATAP 43 Turner v Noyes (1903) 20 WN (NSW) 266)
Texts Cited:	Concise Oxford English Dictionary 12th Ed. JD Heydon and MJ Leeming Jacobs' Law of Trusts in Australia (8th ed, 2016, LexisNexis Butterworths) Macquarie Concise Dictionary (2nd Edition) (1988)
Category:	Principal judgment
Parties:	Selina Wang (First Appellant) Oren Werker (Second Appellant) Richard Riswej (Third Appellant) Owners-Strata Plan 3740 (Fourth Appellant) Bruce MacDermott (Respondent)
Representation:	Solicitors: Strata Title Lawyers (Appellants) Respondent (Self-Represented)
File Number(s):	2020/00370897 (AP 20/29492)
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	10 June 2020

Before: N Vrabac, Senior Member

File Number(s): SC 20/04566

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REASONS FOR DECISION

Background

1 The appellants appeal from an interlocutory decision of the Consumer and Commercial Division of the Tribunal made on 10 June 2020.

2 The interlocutory hearing before the Tribunal was "on the papers." It concerned the determination of an "interlocutory question" following directions and orders made by a Senior Member of the Tribunal on 26 February 2020 (more fully set out at [13] of the Tribunal's reasons).

3 An Application filed by the respondent on 29 January 2020 sought 17 orders and declarations, 15 of which identified various claims against the appellants under ss 229, 232, 238 and 241 of the *Strata Schemes Management Act* 2015 (SSMA).

4 The interlocutory question was whether the respondent had "standing" with respect only to the first two orders sought in the Application. Those orders concerned claims for relief by the respondent under s 238 of the SSMA against two of the appellants, namely:

> 1. ORDER that the first and second respondent's are removed from their offices in the owners corporation as Secretary and Treasurer respectively. [s 238]
>
> 2. ORDER that the first and second respondents are removed from the strata committee. [s 238]

5 The directions and orders made by the Senior Member on 26 February 2020 made it clear that it was for the Tribunal Member who determined the interlocutory question to "thereafter, make directions for the proceedings if the Member finds the applicant has standing to ask for some or all of the orders sought".

6 The directions and orders of 26 February 2020 recorded the appellants' submission at that time that the Tribunal has no power to make declarations (being a reference to some of the types of relief sought in other parts of the Application), to which the Senior Member recorded in response:

> If the matter proceeds [ie to a final hearing] the applicant should consider this question before proceeding to seek declarations, as there may be cost implications arising.

Tribunal's Decision

7 The Tribunal found that the respondent had standing to bring that part of his Application seeking relief under s 238 of the SSMA. It directed the costs of the hearing be reserved until the determination of the substantive proceedings.

8 In reaching its decision that the respondent had standing to bring the Application under s 238 of the SSMA, the Tribunal made the following findings of fact, relevant to this appeal:

(1) the respondent occupies Lot 3 on SP 3470 (Lot 3). Lot 3 formed part of the estate of the respondent's late mother.

(2) The respondent's mother moved from Lot 3 into an aged care facility in 1987. The respondent moved permanently into Lot 3 in 1988. His mother died in 1996. The respondent continued in occupation of Lot 3 and, from at least 1996, commenced paying levies and other outgoings for the lot.

(3) The respondent’s mother's Will gave all of her estate to her two children, the respondent and his sister. The respondent's sister died in 2005. The sister's Will gave all of her estate to the respondent. There has been no application for a grant of probate of either Will. The respondent and his sister were appointed co-executors of his mother's Will. The executors of the sister's will (her mother and father) are both deceased. The respondent's explanation for not seeking probate of his mother's Will is because of some complications with his mother having an interest in an estate of one of her siblings who predeceased her.

(4) The Tribunal described the issue for determination as a "legal argument" which if resolved in the appellants' favour, "would dispose of the proceedings in whole or part, thereby avoiding the need for a lengthy hearing and the determination of contentious findings of fact": at [60].

(5) The respondent contended that he was an "interested person" within the meaning of s 226 of the SSMA and entitled to bring an application under s 238 of the SSMA as an "occupier of a lot". He submitted that being in possession of the lot constituted "occupation" where there was no other person having a better right to possession.

(6) The Tribunal observed that the respondent did not submit that he had an "estate or interest" in Lot 3.

(7) The appellants' contended that, having regard to ss 4 and 226 of the SSMA, there was a distinction intended by the Parliament between being in occupation of a lot and being in "lawful" occupation of a lot.

(8) The Tribunal relevantly found at [72] to [74]:

> 72. I am not persuaded by the respondents that under the definition of an occupier in s 4 of the SSM Act which requires the applicant to be in lawful occupation of the lot, precludes the applicant from bringing an application under s 238
>
> 73. There may be circumstances where a person is in physical occupation of a Lot (without being the owner of the Lot or a person with a legal interest or estate in the Lot) does not have standing under s 226 of the SSM Act, such as where the occupation is temporary and has ceased; or the occupier is a squatter or trespasser.
>
> 74. In circumstances where the applicant has been in physical occupation [of] the Lot for a considerable period of time; has been paying strata levies; and there is no evidence that he is a squatter or trespasser; I am satisfied for the purpose of this interlocutory application that the applicant is an "occupier of a Lot" within the meaning of s 226 of the SSM Act and has standing to bring an application seeking orders under 238 of the SSM Act. I do not accept the respondents' submission that the applicant has the onus in this interlocutory application to prove a specific legal right to occupy the Lot.

9 The Tribunal also considered certain declaratory orders and ancillary/consequential orders sought by the respondent in his Application under various other provisions of the SSMA. These included the declarations referred to by the appellants before the Senior Member at the directions hearing on 26 February 2020.

10 By Orders 2 and 3 of the Tribunal's Reasons for Decision, the Tribunal dismissed those parts of the Application seeking declarations under s 229 of the SSMA and ancillary or consequential orders and declarations under ss 229, 232 and 241 of the SSMA.

Notice of Appeal

11 The appellant only challenges Orders 1 and, thereby, 5 of the Tribunal, as follows:

> 1. The applicant has standing to bring an application under s 238 of the SSM Act.

> ...
>
> 5. The matter is to be listed for further directions at a date to be fixed by the Registry and notified to the parties.

Whether Leave to Appeal is Required

12 The Notice of Appeal filed on 6 July 2020 noted that leave to appeal was required and would be sought.

13 However, in an "annexure" to the Notice of Appeal, the appellant contended that the Tribunal's Reasons at [72] to [74] (which we have set out above) constituted an error of law such that leave to appeal is not necessary. We agree that the issues raised by the appeal concern questions of law.

14 An ancillary decision of the Tribunal may be appealed as of right on a question of law, or otherwise with leave of the Appeal Panel: s 80(2)(b) *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act). However, an internal appeal from an interlocutory decision always requires the leave of the Appeal Panel: s 80(2)(a) NCAT Act.

15 The decision here was, *prima facie*, interlocutory in nature. It was made in the course of proceedings for the purpose of moving the matter toward a final hearing. The appellant argues, however, that the decision meets the definition of "ancillary decision" in section 4 of the NCAT Act as follows:

> **"ancillary decision"** of the Tribunal means a decision made by the Tribunal under legislation (other than an interlocutory decision of the Tribunal) that is preliminary to, or consequential on, a decision determining proceedings, including—
>
> > (a) a decision concerning whether the Tribunal has jurisdiction to deal with a matter, and
> >
> > (b) a decision concerning the awarding of costs in proceedings.

16 The respondent disagrees with the appellant’s characterisation of the decision and argues that the decision was an interlocutory decision.

17 While the determination of whether a decision meets the definition of being an ancillary decision is not straightforward, we would respectfully agree with the comments of Basten JA, made in *obiter*, in *AQO v Minister for Finance and Services* [2016] NSWCA 248 at [127]:

> It is true that there is a specific reference to a decision regarding the jurisdiction of the Tribunal in the definition of ancillary decision […] However, it appears from the chapeau to the definition of ancillary decision that one must determine that the decision is “other than an interlocutory decision” before coming to specific paragraphs which identify, non-exhaustively, what is meant by the term. If jurisdiction were determined as part of the final determination of a matter by the Tribunal, it might constitute an ancillary decision; however the refusal of a summary dismissal application, albeit based on an alleged absence of jurisdiction, is almost certainly an interlocutory issue, falling within either par (h) or par (i) of the definition of interlocutory decision.

18 We note the Appeal Panel has subsequently adopted that approach: see, for example, *The Sydney Building Company Limited v Sina*c [2019] NSWCATAP 43. In *Ericon Buildings Pty Limited v The Owners Strata Plan No 96597* [2020] NSWCATAP 265, at [10], the Appeal Panel decided that:

> To establish that there was an ancillary decision, the appellants need to identify a *decision determining proceedings* to which the Principal Member's orders are a preliminary decision. It is not sufficient for the appellants to refer to a decision that they say *should* have been made but was not made. That is not a decision of the kind which enlivens the definition.

19 We are satisfied that the decision was "interlocutory," as described above, and that leave to appeal is required.

20 We note that leave to appeal from an interlocutory decision under s 80(2)(a) is not constrained in the same way as leave to appeal from a final or ancillary decision made by the Consumer and Commercial Division, where by reason of s 80(2)(b) and cl 12(1) of Schedule 4 of the NCAT Act, there are prescribed limitations on the circumstances in which leave may be granted by the Appeal Panel.

21 A question of law arises where it involves consideration of whether a court or tribunal has identified or applied the relevant and correct legal test and whether the facts of a case "fall within a statute properly construed”: *Federal Commission of Taxation v Trail Brothers Steel & Plastics Pty Ltd* [2010] FCAFC 94; (2010) 186 FCR 410 at [13].

22 We are satisfied that the appeal raises a question of law as to whether the Tribunal applied the correct legal test and had proper regard to the matters

requiring its consideration and determination as to whether the respondent was "an interested" person within the meaning of s 226 of the SSMA.

23 Here, we are also satisfied that the issues in this appeal are of general importance, in that they have not been previously determined by the Tribunal or the Appeal Panel, and go to the rights of occupiers of strata units, who are not the registered proprietors or tenants, to bring applications to the Tribunal under the SSMA.

24 Therefore, under s 80(2)(a) of the NCAT Act, we grant leave to appeal from the Tribunal's interlocutory decision.

Grounds of Appeal

25 The appellants advanced the following grounds of appeal in "Annexure A" to the Notice of Appeal:

(1) The Tribunal's interpretation of "interested person" and "occupier" does not accord with the prescribed meanings found in ss 4 and 226 of the SSMA. In particular, the Tribunal failed to adopt the language in s 4 of the SSMA to distinguish between an "occupier" and "a lawful occupier".

(2) The Tribunal erred in failing to apply the ordinary rules of statutory interpretation to construe the definition of "occupier" in s 4 of the SSMA and instead applied "subjective, discretionary and uncertain parameters to determine whether the applicant was in "lawful occupation of the lot"", including the period of time in which the respondent was in physical occupation of the lot, that the respondent had been paying strata levies and that there was no evidence that he was a squatter or trespasser.

(3) The Tribunal made findings in the absence of evidence in finding the respondent had been paying strata levies since 1996.

(4) The Tribunal failed to provide reasons for its finding that the respondent does not have "the onus to prove a specific legal right to occupy the lot".

(5) The Tribunal failed to have regard to the statutory intent of Parliament by failing to adopt the language in the SSMA to distinguish between an “occupier” and “a lawful occupier.”

(6) The Tribunal made a jurisdictional error in allowing the respondent to bring an application under section 238 of the SSMA.

Respondent's Reply to Appeal

26 The respondent filed a Reply to Appeal (Reply) dated 22 July 2020.

27 The respondent contended in the Reply:

(1) The Tribunal was correct in referring to the respondent's contention that at common law, possession is protected by law against anyone other than a person having a better right to possession and in that sense, possession equated to occupation. This was set out at [67] of the Tribunal's Reasons and followed a reference made by the respondent to the Macquarie Concise Dictionary (2nd Edition) (1988) that defined "occupation" as including "3. possession, as of a place" (at [66]).

(2) The evidence relied upon by the Tribunal to find that the respondent had been in physical occupation of the lot for a considerable period of time, being been paying strata levies and that he was not a squatter or trespasser was described by the Tribunal as "uncontroverted" (at [65]).

(3) The respondent contended that such findings were based on the evidence in his affidavit of 3 April 2020 which was before the Tribunal (and filed in the appeal). In that affidavit he said that although he could not recall when he commenced paying the levy contributions or other outgoings, "of course, I did so after my mother's death in 1996 ...". He also referred to Annexure "A" of that affidavit, being a letter from the appellants' solicitor to him dated 28 August 2019 which referred to the respondent residing in the lot "for the last several years" and "paying the Administrative fund and Capital fund levies for Lot 3 over the past several years".

(4) The respondent also contended: "[u]ntil grants [of probate] are made in respect of the Wills of my mother and sister, I do not claim an estate or interest in the ownership of Lot 3. But I do claim a right to be in occupation (i.e. possession and control) of Lot 3 from the common law which protects me against anyone other than a person having a better right to occupation. This common law right is not required to be notified under Section 22 or Section 258 of SSMA."

28 The respondent submitted to us that the hearing "on the papers" before the Tribunal only concerned the "interlocutory question" referred to above and which was set out by the respondent in the Reply as follows:

> Whether the applicant is an "occupier" of Lot 3 as defined in Section 4 of the *Strata Schemes Management Act 2015* ("SSMA") for the purpose of the substantive Application [being a reference to orders 1 and 2 in the Application] under section 238 of SSMA.

29 Although there was no formal appeal brought by the respondent with respect to the Tribunal's making of Orders 2 and 3, the respondent raised his "concern" about the Tribunal making those orders. In his oral submissions on the appeal, he described the making of those orders as "plainly wrong".

30 The appellants objected to the respondent seeking to widen the scope of the appeal and to in effect " re-draft" the appellants' grounds of appeal to raise this issue.

31 The respondent contended that he had raised this issue in his Reply in which he stated that he did "not support" Orders 2 and 3 but lacked the resources to appeal those orders and would "propose instead to amend the Application to seek relevant Orders at the final hearing". The appellants objected to us considering the respondent's submissions in relation to Orders 2 and 3 made by the Tribunal.

Strata Schemes Management Act 2015

32 Before dealing with the parties' submissions, it is convenient to set out some of the main provisions of the SSMA that require our consideration. Those provisions include the following definitions from s 4 of the SSMA:

> **4. Definitions**
>
> "owner of a lot in a strata scheme means:
>
> > (a) except as provided by paragraph (b) or (c), each person for the time being
> >
> > recorded in the Register as entitled to an estate in fee simple in the lot (in the
> >
> > case of a freehold strata scheme) or as entitled to a leasehold estate in the lot
> >
> > (in the case of a leasehold strata scheme), or
> >
> > (b) except as provided by paragraph (c), each person whose name is entered on the strata roll in accordance with section 178 as being entitled to an estate in fee simple in the lot (in the case of a freehold strata scheme) or as entitled to a leasehold estate in the lot (in the case of a leasehold strata scheme), or
> >
> > (c) each person who is taken by section 43 (1) of the Strata Schemes Development Act 2015 to be the owner of the lot";
>
> "interested person—see section 226";
>
> "occupier of a lot means a person in lawful occupation of the lot";
>
> "tenant of a lot means a lessee, sublessee or assignee of a lot, but does not include an owner of the lot".

33 Division 3 of the SSMA provides for "procedures for applications to the Tribunal", including section 226:

> **226. Interested Persons**
>
> (1) The following persons are interested persons for the purpose of making an

application to the Tribunal under this Act:

(a) the owners corporation,

(b) an officer of the owners corporation,

(c) a strata managing agent for the scheme,

(d) *an owner of a lot in the scheme, a person having an estate or interest in a lot or an occupier of a lot,*

(e) if the strata scheme is a leasehold strata scheme, the lessor of the scheme.

(2) The interested persons for the purpose of making an application to the Tribunal under this Act relating to a strata scheme for a part strata parcel also include the following:

(a) the owners corporation or a strata managing agent for, an owner of a lot in, a person having any other estate or interest in a lot in, or an occupier of a lot in, any other scheme affecting the building,

(b) any other person for the time being bound by any strata management statement for the building.

(emphasis added)

34 Division 4 of the SSMA concerns the making of orders by the Tribunal relating to strata committee and officers, including s 238:

238. Orders relating to strata committee and officers

(1) The Tribunal may, on its own motion or on application by an interested person, make any of the following orders:

(a) an order removing a person from a strata committee,

(b) an order prohibiting a strata committee from determining a specified matter and requiring the matter to be determined by resolution of the owners

corporation,

(c) an order removing one or more of the officers of an owners corporation from office and from the strata committee.

(2) Without limiting the grounds on which the Tribunal may order the removal from office of a person, the Tribunal may remove a person if it is satisfied that the person has:

(a) failed to comply with this Act or the regulations or the by-laws of the strata

scheme, or

(b) failed to exercise due care and diligence, or engaged in serious misconduct, while holding the office.

Orders on Appeal

35 Section 81 of the NCAT Act sets out the orders we are empowered to make on an appeal:

> **81. Determination of internal appeals**
>
> (1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following--
>
> > (a) the appeal to be allowed or dismissed,
> >
> > (b) the decision under appeal to be confirmed, affirmed or varied,
> >
> > (c) the decision under appeal to be quashed or set aside,
> >
> > (d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,
> >
> > (e) the whole or any part of the case to be reconsidered by the Tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.
>
> (2) The Appeal Panel may exercise all the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance when confirming, affirming or varying, or making a decision in substitution for, the decision under appeal and
> may exercise such functions on grounds other than those relied upon at first instance.

Consideration of the Appeal and the Parties' Submissions

36 Various directions were made for the filing of evidence, submissions and for the conduct of the hearing.

37 The appellants filed written submissions on 6 August 2020, including copies of the submissions and evidence by both parties before the Tribunal. The respondent filed written submissions 21 August 2020. The appellants filed submissions in reply on 16 September 2020. The respondent filed further short submissions on 22 September 2020 and 1 October 2020 (without leave) and in the case of the latter submission, after the hearing of the appeal. Nothing turns on this. We have considered the parties' written and oral submissions made at the hearing of the appeal and are satisfied that both parties have had a full opportunity to advance all matters necessary for us to consider and determine

the real issues raised by this appeal. We will have no regard to the submissions made after the hearing by the respondent.

38 Although the appellants' written submissions adopt a different order to the 6 grounds of appeal set out above by us from the Notice of Appeal, the issues themselves remain the same. For convenience, we have retained the order and numbering of the grounds in the Notice of Appeal for the purpose of our following consideration of those grounds of appeal.

Grounds 1, 2, 3 and 5: the "lawful occupation" finding

39 We deal with these grounds identified in the Notice of Appeal together, as those issues largely overlap. They may be conveniently described as the "lawful occupation" issue. For the reasons that follow, we reject these grounds of appeal concerning the Tribunal's finding that the respondent was in "lawful occupation" of Lot 3.

The defined terms of "occupier" and "lawful occupation"

40 The appellants contend that the Tribunal erred in its interpretation of "interested person" and "occupier" in s 226 of the SSMA and failed to apply the ordinary rules of statutory interpretation and properly consider the statutory intent of Parliament. The appellants submitted that the Tribunal did not have sufficient regard to Parliament's use of the word "lawful" when qualifying the definition of "occupier" in s 4 of the SSMA as we have set out above. Instead, it was contended by the appellants that the Tribunal applied "subjective, discretionary and uncertain parameters" to determine whether the respondent was in "lawful occupation" of the lot. One of those purportedly subjective, uncertain and discretionary factors was the finding that the respondent had been paying strata levies since 1996, and about which the appellants contended there was no evidence to support that finding in any event.

41 The first thing that we should record regarding this issue, is that we reject the specific allegation by the appellants that the Tribunal failed to adopt the language in s 4 of the SSMA to distinguish between an "occupier" and "a lawful occupier". A fair reading of the reasons as a whole makes it plain that the Tribunal was aware of the interplay between ss 4 and 226 of the SSMA, and that standing based on occupation of a lot required the Tribunal to be satisfied

that the occupation is lawful. It is readily apparent that the Tribunal was aware that this issue was central to determining whether the respondent's application in respect of the first two orders sought by him should be summarily dismissed.

42 The Tribunal at [41] referred to the definition of 'lawful' in the Concise Oxford English Dictionary 12th Ed. as meaning "conforming to, permitted by or recognised by laws or rules". That meaning was promoted by the appellants, and is, in our view, appropriate, albeit not particularly illuminating.

43 The appellants did not challenge the finding by the Tribunal that the respondent was neither a squatter nor trespasser. The appellants contended that the SSMA is founded on an ownership system by registration of interests. Without the appellants articulating this in further detail, this would seem to be a reference to the situation in which upon the death of a proprietor, an executor, administrator or a person claiming consequent upon the death or a will is entitled to be registered under s 93(1) of the *Real Property Act* 1900 (NSW) (RPA) by applying to the Registrar-General in the approved form.

44 It appears that the respondent has not applied for such registration as it was common ground that he was not permitted to vote at meetings of the Body Corporate in respect of the Lot pending a grant of probate.

45 However, s 226 of the SSMA is broadly expressed and is not limited to only those persons with their name registered as proprietors or recorded as an owner on the strata roll. An "interested person" for the purpose of s 226 additionally includes persons having "an estate or interest" and "an occupier" of a lot.

46 The respondent is an occupier by virtue of living in Lot 3 for several years.

47 We have not been taken to any indicia or authorities to suggest that the respondent is occupying the lot unlawfully. In our view, there are several indicia - consistent with the authorities that we discuss below - to establish to our satisfaction that the Tribunal did not err in determining the lawfulness of the respondent's occupancy of Lot 3.

48 The appellants did not submit that the respondent was in unlawful possession or occupation of the Lot, to make good their contention that the respondent did not establish that he is a "lawful occupier".

49 The respondent has openly conveyed his positive intention to be in possession of the lot as an occupant to the exclusion of all others since about 1988. He has personally paid levies and contributions in respect of the lot. The evidence before the Tribunal was also sufficient to indicate that the Owners Corporation has accepted those payments from him since at least 1996. That evidence, together with the uncontroverted findings of the Tribunal which we referred to at [8(1)] to [8(3)] above was sufficient for the Tribunal to be satisfied that no person has a better claim to ownership or to a right to occupation of Lot 3 (except in the limited sense by the Public Trustee as we explain below) since the death of his sister in 2005. His occupation of the premises is, as a result, permitted by law. In those circumstances, we are satisfied that the Tribunal was correct to find that the respondent's occupation was lawful.

50 Although Darke J in *McFarland v Gertos* [2018] NSWSC 1629 (*Gertos*) was dealing with a claim for adverse possession, in his Honour's judgment at [54], his Honour set out the following discussion concerning the general principles of law pertaining to the concept of "possession" by Slade J in *Powell v McFarlane* (1979) 38 P&CR 452, at 470-472:

> It will be convenient to begin by restating a few basic principles relating to the concept of possession under English law:
>
> (1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner *or to persons who can establish a title as claiming through the paper owner.*
>
> (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("*animus possidendi*").
>
> (3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. *The question what acts constitute a sufficient degree of*

exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed.

…

Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.

(4) The *animus possidendi*, which is also necessary to constitute possession, was defined by Lindley M.R., in *Littledale v. Liverpool College* (a case involving an alleged adverse possession) as "the intention of excluding the owner as well as other people." This concept is to some extent an artificial one, because in the ordinary case the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.

An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite *animus possidendi* and consequently as not having dispossessed the owner.

(emphasis added and omitting citations)

51 We have set out the above to emphasise that the matters considered by the Tribunal with respect to the respondent's occupation of Lot 3 were properly and relevantly taken into account in making its finding that the respondent was not a squatter or trespasser and that there was no evidence that he was occupying Lot 3 unlawfully.

52 These are not, as the appellants contended, subjective, discretionary and uncertain parameters to determine whether the applicant was in "lawful occupation" of the lot. We see no reason why they would not be of equal relevance in determining the lawfulness of occupation in the circumstances under consideration by the Tribunal and in this appeal.

53 For those reasons, we are not satisfied that the Tribunal fell into error in determining that the respondent was in lawful occupation of Lot 3. It was open to the Tribunal to find that:

(1) the respondent is in lawful occupation of Lot 3 within the meaning of s 4 of the SSMA, because he has the best claim to ownership of the property and has, in addition, openly conveyed his positive intention to occupy the lot to the exclusion of all others for some time; and

(2) as a (lawful) "occupier", the respondent is an "interested person" within the meaning of s 226 of the SSMA.

54 That is sufficient to dispose of this aspect of the appeal. However, there may, in any event, have been another basis for the respondent to have been entitled to bring the Application under s 238 SSMA, which we add for completeness given that the Court of Appeal has had occasion to consider a relevant matter since the hearing of this appeal.

Whether the respondent may have "an estate or interest" in Lot 3

55 The Tribunal observed that the respondent expressly eschewed any claim as "a person having an estate or interest in a lot*"* under s 226 of the SSMA. The respondent re-iterated that position at the hearing of the appeal.

56 The issues raised by his disclaimer are not only a question of some legal complexity; they are issues which have exercised the minds of many distinguished judges and learned jurists for many years.

57 In light of our following consideration of the operation of the *Probate and Administration Act 1898* (NSW), and the principles of law discussed below, our view is different to that which the respondent declared.

58 In our view, the respondent is not only in lawful possession of Lot 3 as an occupier for the purposes of s 226 of the SSMA; as the executor of his mother's estate, the respondent is the beneficial owner of the real and personal

estate which he holds for the purpose of carrying out his functions and duties of administration. He is in that sense, a trustee.

Sections 44 and 61 of the Probate and Administration Act 1898 (NSW)

59 Upon the death of the respondent's mother in 1996, her legal interest in Lot 3 became part of her estate. By the operation of s 61 of the *Probate and Administration Act*, the mother's estate was deemed to vest in the Public Trustee.

60 Section 61 of that Act provides:

> **61. Property of deceased to vest in NSW Trustee**
>
> From and after the decease of any person dying testate or intestate, and until probate, or administration, or an order to collect is granted in respect of the deceased person’s estate, the real and personal estate of such deceased person shall be deemed to be vested in the NSW Trustee in the same manner and to the same extent as aforetime the personal estate and effects vested in the Ordinary in England.

61 This was also explained by Darke J in *Gertos* at [51], in some circumstances similar to the present case, where his Honour commented:

> That state of affairs has continued as no grant of probate or administration has been made in respect of the estate. There has not been any passing and vesting of the estate to and in any legal personal representative of the estate (see *Probate and Administration Act 1898* (NSW), s 44).

62 Section 44 of *Probate and Administration Act* provides:

> **44. Real and personal estate to vest in executor or administrator**
>
> (1) Upon the grant of probate of the will or administration of the estate of any person dying after the passing of this Act, all real and personal estate which any such person dies seised or possessed of or entitled to in New South Wales, shall as from the death of such person pass to and become vested in the executor to whom probate has been granted or administrator for all the person's estate and interest therein in the manner following, that is to say:
>
>> (a) On testacy in the executor or administrator with the will annexed.
>>
>> (b) On intestacy in the administrator.
>>
>> (c) On partial intestacy in the executor or administrator with the will annexed.

> (2) Upon the grant, to the NSW Trustee or a trustee company, of probate of the will or administration of the estate of a person dying after the commencement of the *Wills, Probate and Administration (Trustee Companies) Amendment Act* 1985 , the NSW Trustee or the trustee company, as the case may be, shall be:
>
> > (a) the executor, by representation, of any will of which the person had been granted probate, and
> >
> > (b) the administrator, by representation, of any estate of which the person had been granted administration.

63 Therefore where, as in this case, the respondent is the sole surviving co-executor to his mother's will and fails to apply for probate, then the property comprising Lot 3 vests in the NSW Trustee.

64 As we now discuss, that does not displace the lawfulness of the respondent's occupation of the Lot with which we are primarily concerned for the purpose of determining whether he has standing to bring his Application under s 226 of the SSMA. However, recent developments in the law suggest that the position is now even more in favour of upholding the respondent's right to bring his Application. The Decision in *Deigan v Fussell*

65 After the hearing of this appeal, the NSW Court of Appeal delivered its decision in *Carolyn Deigan as executrix for the estate of the late James Boyd Lockrey v Barnard James Fussell* [2019] NSWCA 299 (*Deigan v Fussell*) in which the Court had occasion to review the law on whether acts by an executor before a grant of probate are valid.

66 White JA provided an extensive analysis of the law concerning ss 44 and 61 of the *Probate and Administration Act* (set out above), the nature of the Public Trustee's legal title thereunder and the powers and duties of an executor before a grant of probate. In summary, as we now discuss, his Honour held that an executor before a grant of probate is the beneficial owner of the assets of the estate and is entitled to possession of the trust assets before probate: at [79]-[95], [168] and [174]-[176].

67 The decision of White JA was contrary to an earlier decision of Emmett J (as his Honour then was) in the Federal Court of Australia in *Byers v Overton Investments Pty Ltd* [2000] FCA 1761; 106 FCR 268 and which was upheld by the Full Court of the Federal Court in *Byers v Overton Investments Pty Ltd*

[2001] FCAFC 760; 109 FCR 554. Noting the complexity of the issues involved, Bathurst CJ in *Deigan v Fussell* decided that it was not appropriate to decide whether the Federal Court was wrong as it was unnecessary to do so, while recognising however that "there is great force in the reasoning of White JA" (at [5]). The Chief Justice agreed with the decision of White JA to allow the appeal and all (except one) of the orders proposed by White JA. The other member of the Court, Macfarlan JA, declined to express a concluded view on the issues raised by White JA but expressed agreement with the judgment of White JA.

68 Given the extensive and considered analysis of the law given by White JA in *Deigan v Fussell*, before setting out his Honour's conclusions, it is convenient to summarise the state of the law then under consideration by his Honour.

69 Historically, an executor could not commence legal proceedings before a grant of probate. It is not practical or necessary for us to refer to all of the authorities referred to in the decision of White JA which founded that proposition, except to say that there were several first instance decisions of the NSW Supreme Court to that effect including that of Yeldham J in *Marshall v DG Sundin & Co Ltd* (1989) 16 NSWLR 463 (*Marshall*), Young J (as his Honour then was) in *Darrington v Caldbeck* (1990) 20 NSWLR 212 (*Darrington*) as well as the two decisions referred to above in *Byers v Overton Investments* by the Federal Court and Full Federal Court of Australia.

70 There is also long standing authority that an executor could not issue a notice to quit on behalf of a deceased landlord before a grant of probate: *Ex parte Callan; Re Smith* (1968) 1 NSWR 443 per Isaacs J at 448.

71 Of some significance in the analysis of White JA was the decision of the Privy Council (on appeal from the High Court of Australia) in *Commissioner of Stamp Duties (NSW) v Bone* [1976] UKPCHCA 1; (1976) 135 CLR 223 which his Honour (at [157]) described as suggesting "that in their Lordships' view an executor before grant could sue for debts owed to the estate". His Honour also said that the High Court's decision which was under appeal to the Privy Council in *Bone v Commissioner of Stamp Duties (NSW)* [1974] HCA 29; [1974] 132 CLR 38 "does not support the proposition that by reason of ss 44 and 61 an executor could not sue for debts owed to the estate, let alone the Public

Trustee could do so" (at [157]). His Honour noted it was "surprising" that an important statement in the decision of the Judicial Committee (set out at [155] and discussed at [156] of his Honour's judgment) was not considered in the decisions of Yeldham J in *Marshall*, in Young J's decision in *Darrington* or in *Byers v Overton Investments* (at [158]).

72 Having analysed the authorities, in conclusion, White JA held (omitting citations) at [173-178] and [186]:

> 173. In my view, the nettle should be grasped. Is it the case that before a grant of probate a bank cannot transfer monies standing to the credit of a deceased's account into an estate account in the name of the executor? Can an executor, before or without the grant of probate, not use those monies to pay debts, funeral or testamentary expenses? Can an executor, before or without the grant of probate, not transfer chattels to those entitled under the will? In my view on a purposive construction of ss 44 and 61 of the *Probate and Administration Act*, considering the background of those provisions, the executor does have such powers.
>
> 174. First, the title of the NSW Trustee under s 61 is a bare legal title carrying no active duties and no powers of management or administration because the Ordinary in England in 1858 had no such duties or powers. This is so notwithstanding that in *Andrews v Hogan* Fullagar J contemplated that the Public Trustee had the capacity to surrender a lease vested in him. That statement was obiter and unsupported by reference to the position of the Ordinary.
>
> 175. Secondly, as by definition the estate is unadministered, the executor will be the beneficial owner of the real and personal estate on the principles of *Commissioner of Stamp Duties (Qld) v Livingstone* (1964) 112 CLR 12 at 17-18 (applied by analogy to the position between death and grant). As such, the executor is entitled to possession of the trust assets and their indicia of title (JD Heydon and MJ Leeming *Jacobs' Law of Trusts* in Australia (8th ed, 2016, LexisNexis Butterworths at [23-02]; *Turner v Noyes* (1903) 20 WN (NSW) 266).
>
> 176. Thirdly, an executor has authority derived from the will to collect assets, pay debts, manage the estate for the benefit of the beneficiaries, and make distributions. That authority is removed only to the extent that such removal is necessarily implied by the provisions of ss 44 and 61. Section 61 is concerned only with the vesting of legal title in the NSW Trustee for the limited purpose of preventing a possible gap in legal ownership of the estate. Section 44 provides for the estate of the deceased to pass to and become vested in the executor or administrator upon the grant of probate or administration, but that vesting operates as from death. In the interim there is no restriction on the executor's authority to deal with the assets, except as arises by necessary implication from the fact that legal title is outstanding in the NSW Trustee. The NSW Trustee could not assert title against a person

> acquiring assets from the executor before grant, even if no grant was ever forthcoming.
>
> 177. Fourthly, the retrospective vesting of title under s 44 is not limited by the limitations that at general law were applicable to the relation back of the title of an administrator. Nor is s 44 limited by implication from s 61 having regard to the limited role of s 61.
>
> 178. These conclusions are not inconsistent with the decision in *Andrews v Hogan*. If correct, they indicate the need for reconsideration of the rule that in New South Wales neither an executor nor an administrator can bring proceedings to enforce a debt or other liability owed to the deceased prior to the grant of probate or administration.
>
> ...
>
> 186. A grant of probate in common form does not conclusively establish an executor's title. A grant of probate in common form may be revoked. An executor, or person dealing with an executor, may wish to obtain a grant to obtain the benefit of s 40D(3) of the *Probate and Administration Act* but that does not affect the power of an executor to deal with the estate assets before grant".

73 Recently*,* Rees J *In the matter of Pacific Springs Pty Ltd* [2020] NSWSC 1240, in light of the decision of White JA in *Deigan v Fussell*, said that "as to whether acts done by an executor before a grant of probate are valid, the law may presently be said to be unclear." (at [163]). No doubt that is a reference to the nature of the longstanding authorities discussed by White JA and the different state of the law as found by the Federal and Full Federal Courts. However, her Honour did not suggest any disagreement with the view taken by White JA while noting that it departed from "much authority" (at [163]). Her Honour set out at some length the conclusions reached by White JA even though as her Honour observed, that "issue was not argued before me" (at [167]) and the answer to the matters for her Honour's determination were decided on a different (factual) basis (at [168]).

74 In our preliminary view, as a statutory tribunal constituted under the NCAT Act passed by the Parliament of NSW, the Tribunal may be inclined to follow the most recent decision of White JA of the NSW Court of Appeal (mindful also of the comments of the Chief Justice referred to above that there is "great force" in the reasoning of White JA and the decision of Rees J which appeared to endorse his Honour's decision) in preference to the earlier single instance decisions in the NSW Supreme Court to the contrary and also the contrary

decisions of the Federal and Full Federal Courts in *Byers v Overton investments.*

75 The appellants did not contend that the respondent did not have standing outside of the confines of the questions raised by this appeal, and there was no reason for them to do so. The appellants did, however, make a submission that upon the death of a person, if probate has not been sought or granted within 6 months of the issuing of the death certificate, "the Public Trustee should step in and administer the estate". Upon our inquiring as to the legal source of that submission, it was quite appropriately withdrawn. As we have referred to above, White JA held that the NSW Trustee under s 61 has a bare legal title carrying no active duties and no powers of management or administration.

76 While the status of the respondent as executor and what rights flowed from that as discussed by White JA in the authorities which pre-dated *Deigan v Fussell* were not raised by the parties on this appeal, we have set out the above in recognition of the fact that this appeal was heard before the decision in *Deigan v Fussell* was published. Therefore the authorities and the state of the law before *Deigan v Fussell* may have raised the question of the respondent's standing to bring his Application in the Tribunal before the grant of probate and independently of the matters specifically raised by the appellants under s 226 of the SSMA. We do not need to determine that now in light of the decision of White JA.

77 Therefore, for completeness in dealing with this appeal, and while we need not make any final determination in this regard, considering the above and the decision of White JA in the NSW Court of Appeal in *Deigan v Fussell,* it would appear that*:*

(1) the respondent as the executor of his mother's estate is the beneficial owner of the assets of that estate, including Lot 3 and is in lawful possession of the trust assets, including Lot 3;

(2) the respondent is an "interested person" within the meaning of s 226 of the SSMA having an "estate or interest" in Lot 3; and

(3) the respondent has authority, derived from his mother's will, to deal with the trust assets (including Lot 3) before the grant of probate, which includes the bringing of his Application under s 226 of the SSMA for

relief and orders in so far as such relief and orders concern that part of the trust assets comprising Lot 3.

78 We dismiss grounds 1, 2, 3 and 5 of the appeal.

Ground 4: reasons regarding the onus of proof

79 The appellants contended that the Tribunal failed to provide reasons for finding that the respondent does not have "the onus to prove a specific legal right to occupy the lot." The effect of this comment, the appellant argues, is that the Tribunal reversed a fundamental obligation on the respondent to prove his right to bring a claim. We describe this as the "onus" ground of appeal.

80 We do not fully understand the Tribunal's comment. It may have been made because it was the appellants who sought to challenge the respondent's standing. It may have been a comment to suggest a lower threshold to establish standing to bring a claim under s 238 of the SSMA at an interlocutory level as opposed to a final hearing, or it may refer to comments to that effect by the Appeal Panel in *Access Housing Pty Ltd ACN 065902936 v Rayfield* [2017] NSWCATAP 4, at [21]. We note that the issue of whether there is a formal legal onus in the Tribunal has been considered elsewhere, and that the nature of the power being exercised is relevant to that determination: see, for example *Bull v NSW Land and Housing Corporation* [2016] NSWCATAP 266 and *Meacham v Commissioner of Police* [2020] NSWCATAP 107.

81 In any event, we are satisfied that the Tribunal went about making its findings and its determination with respect to standing on an interlocutory basis in an entirely orthodox and proper manner. It received and considered evidence from the respondent on affidavit and had due regard to the matters on which the respondent relied (and which we have discussed above) to establish possession and lawful occupancy. Irrespective of what the Tribunal stated as to whether there was an onus, and accepting for present purposes that there was such an onus on the respondent, we are of the view that it was clearly discharged by the respondent. We also accept the correctness of the Tribunal's finding at [65] of its Reasons that the evidence adduced by the respondent to establish possession and lawful occupancy was effectively "uncontroverted" by the appellants. In those circumstances, while the Tribunal may have misapprehended the respondent’s evidential obligation or provided insufficient

reasons for its comment, it is not apparent that it was an issue central to the determination of the interlocutory issues concerning the Application, or that any injustice to the appellants flowed from that aspect of the reasoning. We would not allow the appeal on this ground.

Ground 6: jurisdictional error

82 The appellants contended that the Tribunal made a "jurisdictional error" in allowing the respondent to bring an application under section 238 of the SSMA. They did not clarify that allegation of error further, except to note that "[t]here are no case law precedents in relation to any application brought by an occupier who is not an owner or tenant in a Strata Scheme under section 238 of the SSM Act."

83 If, by this ground of appeal, the appellants are contending a purported jurisdictional error because of the matters raised by Ground 4 above to do with "onus", then we have not allowed the appeal on that ground and it follows that any purported "jurisdictional error" by not making a finding on the balance of probabilities has not been made out.

84 If this ground is contending a jurisdictional error by the making of procedural directions on 26 February 2020 for an interlocutory hearing to deal with the standing of the respondent to bring his two claims in his Application with respect to s 238 SSMA, then we also reject that submission. There was no appeal or other challenge by the appellants when those orders and directions were made on 26 February 2020 and the appellants participated in the proceedings before the Tribunal.

85 Similarly, the Tribunal's finding that the respondent had standing is not a jurisdictional error. It is, at most, an error made in the course of determining the Tribunal's jurisdiction by making findings on a jurisdictional fact, but for the reasons we have set out, we do not accept that such an error was made.

86 There was no "jurisdictional error" made by the Tribunal in that sense and we reject that ground of appeal.

Tribunal's Orders 2 and 3

87 We do propose to deal with Orders 2 and 3 made by the Tribunal.

88 Division 4 of the SSMA provides for the orders that may be made by Tribunal, including:

> **229. General order-making power of Tribunal**
>
> The Tribunal may, in any proceedings before it under this Act, make any one or more of the following orders or other decisions:
>
> > (a) an order or decision that provides for any ancillary or consequential matter the Tribunal thinks appropriate,
> >
> > (b) an interlocutory decision within the meaning of the *Civil and Administrative Tribunal Act* 2013.

89 The NCAT Act provides in s 29(2)(a):

> (2) The Tribunal also has the following jurisdiction in proceedings for the exercise of its general jurisdiction—
>
> > (a) the jurisdiction to make ancillary and interlocutory decisions of the Tribunal in the proceedings ...

90 While Orders 2 and 3 are interlocutory orders (*Macatangay v State of New South Wales (No 2)* [2009] NSWCA 272), they provide for the final (and not a conditional) dismissal of specific parts of the respondent's Application which had nothing to do with his two claims under s 238 of the SSMA. On that basis, these were not the subject of the "interlocutory question". At the hearing of the appeal, we refused the respondent's attempt to widen the scope of the appeal to include his "concerns" with respect to the making of Orders 2 and 3 by the Tribunal. In part, we did so because we did not at that time regard that matter as coming before us on the appeal and because the appellants objected on the basis that they did not have any opportunity to respond to the respondent's contentions.

91 We have now had occasion to more fully consider this issue. In our view, it is manifestly apparent that on their face, those two orders are a nullity. In making the findings that follow, we have not found it necessary to have regard to any submissions on this matter. As we explain, this a not a question of affording the parties the opportunity to put submissions to us as a matter of procedural fairness before we make any decision affecting Orders 2 and 3. The failure (if any) to accord procedural fairness was the failure by the Tribunal and the parties to follow the procedural directions and orders made on 26 February 2020.

92 The Tribunal purported to make orders in Orders 2 and 3 dismissing parts of the respondent's Application following what was only to be an interlocutory hearing set down for the determination of a single interlocutory question; his standing to bring a claim under under s 238 of the SSMA. The Tribunal's orders should only have been concerned with the respondent's standing to bring his two claims sought in paragraphs 1 and 2 of his Application and nothing more.

93 As we explain below, Orders 2 and 3 contravene the obligations on both members and parties with respect to compliance with procedural directions. That of itself is a fundamental obligation of procedural fairness. A party cannot be seen to complain of a denial of procedural fairness if by doing so it is seeking to give effect to an outcome which has been reached or has come about contrary to the Tribunal's procedural directions, irrespective of how that has been caused.

94 In our view, Orders 2 and 3 should be quashed under s 81(1)(d) of the NCAT Act for the following reasons:

(1) The decision of the Tribunal with respect to the matters in paragraphs [75] to [80] and giving rise to Orders 2 and 3 do not accord with the directions and orders made on 26 February 2020.

(2) Section 26 (4) of the NCAT provides, in relation to any procedural directions made by the Tribunal:

> Each member, and the parties to proceedings and their representatives, must comply with any applicable procedural directions.

(3) This is reinforced by s 36(2) of the NCAT Act:

> **36. Guiding principle to be applied to practice and procedure**
>
> (1) The guiding principle for this Act and the procedural rules, in their application to proceedings in the Tribunal, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
>
> (2) The Tribunal must seek to give effect to the guiding principle when it:
>
> > (a) exercises any power given to it by this Act or the procedural rules, or
> >
> > (b) interprets any provision of this Act or the procedural rules.
>
> (3) Each of the following persons is under a duty to co-operate with the Tribunal to give effect to the guiding principle and, for that purpose, to participate in the processes of the Tribunal and to comply with directions and orders of the Tribunal:

(a) a party to proceedings in the Tribunal...

(emphasis added)

(4) Those parts of the Tribunal's decision at [75] to [80] and the consequential orders made in Orders 2 and 3 cannot be regarded as coming within the scope of the single "interlocutory question" with respect to "standing" in the context of s 238 as it was framed by the Senior Member on 26 February 2020.

(5) The Senior Member made it clear that "if the matter proceeds" to a substantive hearing then any declarations which may be sought by the respondent should then be considered by him. This was clearly a reference to the matters that were then later dismissed by the Tribunal in Orders 2 and 3.

(6) The Tribunal does not refer in its Reasons to submissions of either party causing it to deal with this issue. The respondent's written submissions to the Tribunal at [49] to [53] however did raise the issue of declarations being sought in his Application but at paragraph [48], he had prefaced those submissions with the following statement:

There are two matters arising from the Directions Hearing on 26 February 2020 which I do not understand. These matters seem not to relate to the interlocutory question. ....

(emphasis in the original)

(7) The appellants' written submissions to the Tribunal in response, describe this aspect of the Application as "misconceived" but do not directly address the issue of declaratory relief. The submissions are more focused on the other type of relief sought by the respondent, which it described as being in the nature of injunctive orders and therefore impermissible.

(8) Whether or not these matters are within the Tribunal's jurisdiction, misconceived or otherwise impermissible as a matter of law, it was not a matter within the remit of the Tribunal's interlocutory hearing for it to deal with, particularly on a summary basis. We are reinforced in that view by the express statement made by the respondent, who has at all times been self represented, that he did not understand the matters referable to the declaratory orders in his Application but was nonetheless of the opinion that they were outside the scope of the interlocutory question. Therefore he submitted: "But if the Application proceeds to a final hearing, I would want to understand those matters..."

(9) If we allow Orders 2 and 3 to stand, the respondent is deprived of that opportunity which was expressly left open by the Senior Member on 26 February 2020.

(10) The respondent also stated in his Reply that, in relation to Orders 2 and 3, he proposes to amend his Application. He therefore seeks to amend the grounds of his Application in relation to those matters concerning ss 229, 232 and 241 that are to be heard together with that part of the substantive proceedings concerning s 238 of the SSMA. The "summary

dismissal" of them by the Tribunal was premature and outside the ambit of the procedural directions and orders binding on the Tribunal and the parties for the interlocutory hearing.

(11) Orders 2 and 3 have therefore deprived the respondent of the opportunity which he was expressly allowed before the interlocutory hearing and which he foreshadowed before the Tribunal as needing to understand before the final hearing of his Application.

(12) If left on the record, the appellants may later seek to claim a form of estoppel against the respondent or the costs of him seeking to agitate the claims under those other sections of the SSMA, whether under his present Application or any future amended application.

95 The appropriate order is therefore to quash Orders 2 and 3. In accordance with the directions and orders made on 26 February 2020, the matters the subject of Orders 2 and 3 of the Tribunal's Reasons are only to be dealt with by the making of directions after the determination of the interlocutory question (and now this appeal).

Disposition of the appeal

96 We allow leave to appeal, quash orders 2 and 3 made by the Tribunal and otherwise dismiss the appeal.

Costs

97 We have not heard fully from the parties with respect to the costs of the appeal. There have been some submissions on costs exchanged, both in writing and orally.

98 The respondent has been successful on the appeal.

99 The respondent primarily seeks an outcome to ensure that the members of the Executive Committee and not the Owner's Corporation would be liable to pay his costs (if any) of the appeal.

100 The interlocutory hearing and this appeal was only concerned with the respondent's entitlement to bring a claim under s 238 SSMA. We are mindful that the respondent has foreshadowed making an amendment to his Application before the substantive proceedings dealing with those matters which were the subject of Orders 2 and 3, that we have quashed.

101 We note that the costs of the hearing before the Tribunal have been reserved pending the outcome of the substantive proceedings.

102 We are presently of the view that the costs of the appeal should be the respondent's costs in the substantive proceedings.

103 The intent of that order is that if the respondent succeeds in the later substantive proceedings on his claim under s 238 of the SSMA, then he should be entitled to claim his costs of this appeal (subject of course to establishing an entitlement and coming within the provisions of s 60 of the NCAT Act). If he is unsuccessful in his s 238 claim in the substantive proceedings, then there is to be no order made with respect to the costs of this appeal.

104 These costs orders are therefore separate to any other orders for costs that may follow from the outcome of the substantive proceedings.

105 This provisional costs order will become final 14 days after these Reasons are published, unless a party notifies the Registry and the other party in writing that some other order is sought and if so, whether that party consents to dispensing with a hearing on the question of costs, pursuant to s 50(2) of the NCAT Act.

106 In that event, directions will be made by the Registry for the filing and service of any submissions and evidence to resolve the issue of costs and whether the matter will be determined on the papers.

Orders

107 We make the following orders:

(1) Grant leave to appeal.

(2) Orders 2 and 3 of the Tribunal's Reasons for Decision dated 10 June 2020 are quashed.

(3) The appeal is dismissed.

(4) Provisionally order that the costs of the appeal shall be the respondent's costs in the substantive proceedings.

(5) The provisional costs order in order (4) above will become final 14 days after these Reasons are published, unless a party notifies the Registry and the other party in writing that some other costs order is sought and if so, whether that party consents to dispensing with a hearing on the question of costs, pursuant to s 50(2) of the *Civil and Administrative Tribunal Act 2013*.

****

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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.