Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No 62713 v Liberant
Medium Neutral Citation:	[2022] NSWCATAP 80
Hearing Date(s):	11 March 2021
Date of Orders:	24 March 2022
Decision Date:	24 March 2022
Jurisdiction:	Appeal Panel
Before:	M Harrowell, Deputy President G Curtin SC, Senior Member
Decision:	(1) The time to file the appeal is extended to 23 March 2020. (2) Leave is given to file the Further Amended Notice of Appeal dated 5 February 2021. (3) Appeal dismissed. (4) Subject to order 5, the appellant is to pay the respondent's costs of the appeal as agreed or assessed on an ordinary basis. (5) Liberty to apply in respect of whether a costs order different to order 4 should be made, any application and submissions to be filed and served within 14 days of the date of these orders.
Catchwords:	LAND LAW – Strata titles – Strata Schemes Management Act – breach of duty to repair and maintain common property – claim for damages – time to commence proceedings – first aware of the loss suffered – levy of owners in respect of damages award and costs payable to successful lot owner by an unsuccessful owners corporation – power of Tribunal to make an order to adjust levies to exclude successful lot owner from obligation to contribute

Legislation Cited:	Agricultural Tenancies Act 1990 (NSW) Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Limitation Act 1969 (NSW) Strata Schemes Management Act 2015 (NSW) Strata Schemes Management Act 1996 (NSW) (repealed)
Cases Cited:	Airey v Airey [1958] 2 QB 300 Australian Iron & Steel Ltd v Hoogland [1962] HCA 13; (1962) 108 CLR 471 Commonwealth Insurance v Hagias [2008] SADC 93 Maxwell v Murphy (1957) 96 CLR 261 Raftland Pty Ltd as Trustee for Raftland Trust v Commissioner of Taxation [2008] HCA 21; (2008) 238 CLR 516 Serrao v Noel (1885) LR 15 QBD 549 Shih v The Owners Strata Plan No. 87879 [2019] NSWCATAP 263 Shin Kobe Maru" v Empire Shipping Inc [1994] HCA 54; (1994) 181 CLR 404 Somander v Minister for Immigration [2000] FCA (2000) 178 ALR 677 Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Limited [2015 NSWSC 289 The Owners - Strata Plan No. 30621 v Shum [2018] NSWCATAP 15 The Owners Strata Plan 50276 v Thoo [2013] NSWCA 270 The Owners –Strata Plan 74835 v Pullicin; The Owners – Strata Plan No 80412 v Vickery [2020] NSWCATAP 5 Port of Melbourne v Anshun (1981) 147 CLR 589 Ramsay v Pigram (1968) 118 CLR 271 The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd [2018] NSWCATAP 256 The Owners – Strata Plan No 80412 v Vickery [2021] NSWCATAP 98 Trawl Industries of Australia Ply Limited (In liquidation) v Effem Foods Pty Limited (1992) 36 FCR 406 Vickery v The Owners – Strata Plan 80412 [2020] NSWCA 284
Texts Cited:	Nil

Category:	Principal judgment
Parties:	The Owners – Strata Plan No. 627136 (Appellant) Assaf Samuel Aaron Liberant (Respondent)
Representation:	Counsel: D Feller SC & M Dawson (Appellant) Solicitors: Vardenega Roberts Solicitors (Appellant Bannermans Lawyers (Respondent)
File Number(s):	2020/00370698 (AP 20/14063)
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	29 January 2020
Before:	G Burton, Senior Member
File Number(s):	SC 18/51777

REASONS FOR DECISION

1 This appeal relates to an application by the respondent, Mr Liberant, who commenced proceedings SC 18/51777 against the appellant, The Owners – Strata Plan No 62713.

2 The respondent sought various orders including:

(1) the appointment of a compulsory strata managing agent;

(2) orders that the respondent repair and maintain common property and renew and replace damage to common property fixtures and fittings; and

(3) an order that the appellant pay to the respondent damages pursuant to 106(5) of the *Strata Schemes Management Act 2015* (NSW) (the "SSMA").

3 On 29 January 2020 the Tribunal made the following orders (decision):

> "1. Order that the respondent owners corporation pay the applicant owner $55,510.12 on or before 27 March 2020.
>
> 2. Grant leave to the applicant to renew the proceedings in respect of appointment of a compulsory strata manager (a) if the respondent does not provide to the applicant on or before 28 February 2020 certification by the appropriate expert(s) that the remediation works to the common property affecting the applicant's lot are complete or a date by which such works will be complete and certified, or (b) if the applicant wishes to challenge on a proper basis the adequacy of certification of the said remediation works or the date of intended completion or certification.
>
> 3. Order that the respondent pay the applicant's costs of the proceedings on the ordinary basis as agreed or assessed.
>
> 4. Order that the respondent is to pay amounts it is liable to pay under these orders to the applicant, or its own costs of these proceedings, only out of contributions from levies on all lots in the strata scheme other than the applicant's lot, and is to adjust its accounts and pay refunds in respect of any payments to date of its costs of these proceedings that do not comply with this order."

4 The Tribunal published reasons for its decision (the "January Reasons").

5 The appellant filed a Notice of Appeal against the decision on 23 March 2020. The Notice of Appeal was filed out of time. An extension of time was sought.

6 On 18 December 2020, the appellant filed an Amended Notice of Appeal with leave.

7 On 5 February 2021 the appellant filed a Further Amended Notice of Appeal. Leave to rely on this further notice was sought at the hearing of the appeal.

Grounds of appeal

8 The appellant challenges orders 1, 3 and 4 of the orders made 29 January 2020.

9 The grounds of appeal in the Amended Notice of Appeal are as follows:

(1) The Tribunal erred on a question of law by finding that the respondent was entitled to bring and maintain a claim for damages under s 106(6) of the SSMA. The Tribunal should have found that, by operation of 106(6) of the SSMA the claim was incompetent as the respondent was aware of the loss more than 2 years prior to the commencement of the proceedings.

(2) The Tribunal erred on a question of law by finding it had power to make an order under s 90 of the SSMA in determining application SC18/51777.

10 The appellant sought the following orders:

(1) The appeal be allowed.

(2) An order that the claim under s 106(5) of the SSMA was not validly commenced pursuant to s 106(6) of the SSMA.

(3) An order the Tribunal does not have power to apply s 90 of the SSMA.

(4) An order that application SC 18/51777 be dismissed.

(5) The order made by the Tribunal on 19 January 2020 that the appellant pay the respondent the sum of $55,510.12 be set aside.

(6) The respondent is to pay the appellant the sum of $55,510.12 immediately.

(7) The Tribunal order made on 29 January 2020 that the appellant is to pay the costs of the proceedings at first instance on an ordinary basis as agreed or assessed be set aside. In substitution therefore an order should be made that the respondent is to pay the appellant's costs of the proceedings at first instance as agreed or assessed.

(8) An order that the respondent is to pay the appellant's costs of the appeal as agreed to assessed.

11 The Further Amended Notice of Appeal raise two additional grounds of appeal. They were:

(1) The Tribunal erred on a question of law by finding that it had power to order compensation under 232(1) of the SSMA in addition to or as an alternative to the remedy under s 106(5) for breach by the appellant of its duty under s 106(1) or (2).

(2) The Tribunal should have held that the respondent's claim for compensation under s 232(1) of the SSMA was incompetent as the claim was, in substance, a claim for loss under s 106(5) and the appellant was aware of the loss more than 2 years prior to the commencement of the proceedings.

12 Two additional orders were sought in the Further Amended Notice of Appeal. They were:

(1) An order that the Tribunal does not have power to award compensation under 232(1) of the SSMA in addition to or as an alternative to the remedy of damages provided by 106(5) for breach of duty by the appellant imposed by s 106(1) or (2) of the SSMA.

(2) An order that the claim for compensation under s 232(1) of the SSMA in application SC 18/51777 was not validly commenced pursuant to s 106(6) of the SSMA.

13 The appellant does not seek leave to appeal on any ground not raising a question of law, the grounds raised all being questions of law.

14 As the appeal was out of time, the appellant also sought an order that the time to file the appeal be extended.

15 Although no leave was granted to file the Further Amended Notice of Appeal, at the hearing of the appeal there was no objection by the respondent to granting leave. Accordingly, we will make an order permitting this.

The Tribunal's finding of fact and reasons for decision

16 It is convenient to briefly set out the reasons of the Tribunal in relation to matters relevant to the determination of this appeal.

17 At [75] of the January Reasons the Tribunal recorded its findings concerning what had occurred in respect of the breach of duty under s 106(1) of the SSMA. There the Tribunal said ("OC" being a reference to the appellant Owners Corporation and "SC" to the strata committee):

> "75 Turning to the history of the remediation works by the OC, the documentary trail in evidence showed the following:
>
> (a) earlier investigations of water entry problems in common property adjacent to the lot and another lot since 2012 that continued with investigations and some attempted remediation work in 2015 and early 2016;
>
> (b) evidence of some mould in 2015;
>
> (c) initial prompt attempts on complaint of water entry in June 2016 to investigate and remediate the lot, with involvement of the building's insurer;
>
> (d) the initially-engaged contractor in June 2016 reporting that his works showed a potential source of water entry (the slabs of adjacent lot and balcony) that ought to be investigated and if necessary remediated before further internal remediation occurred;
>
> (e) defeat at the AGM on 6 August 2016 of a motion to engage an engineer to investigate and scope the required works;
>
> (f) provision on 10 October 2016 to the OC strata manager of the insurer's consulting engineer's report identifying the source (as confirmed by later engineering investigations) of the water penetration;
>
> (g) authorisation in December 2016 by the owner's mother of access for a dye test by a specified contractor despite the mother's pointing out that the findings of the insurer's consulting engineer in respect of the lot rendered it unnecessary;
>
> (h) delay in carrying out the dye test until mid-2017 while the OC sought access for an alternative contractor not accepted by the mother (due to alleged absence of previous satisfactory work in the lot), with the OC eventually agreeing to the mother's specified contractor;

(i) acceptance at an EGM on 24 June 2017 of the recommended deferral of internal works until the source of water penetration was remediated;

(j) provision to the SC shortly thereafter of a comprehensive and detailed engineer's report, commissioned by the lot owner whose lot was on one of the adjacent slabs, that essentially reported the source of water penetration in substantially similar terms to the insurer's engineer and who recommended forms of remediation (the strata engineer's report);

(k) issue on 31 August 2017 by the strata manager of a work order to the author of the strata engineer's report to obtain tenders in accord with his findings;

(l) an absence of work orders to carry out the remediation works consistent with the strata engineer's report until about mid-2018, despite acceptance of a quotation from a builder following an EGM on 17 November 2017 - that builder was the one put forward by the author of the strata engineer's report and was supported by the meeting over the opposition of the owner (due to alleged unsatisfactory record as a contractor to the scheme);

(m) the need for an EGM on 4 April 2018 to approve a form of funding of part of the works approved at the EGM of 17 November 2017, such form of funding for that part having been defeated at the November EGM (a levy had been approved on 17 November 2017 for the other part of the works);

(n) a placement before the EGM of 4 April 2018 of a proposal to rescind the 2017 approval and approve an overall cheaper but shorter-lasting alternative for re-waterproofing all balconies in the scheme, as a further expert report indicated that the useful life of the initial waterproofing method used in the building in 2000 had passed (a less enduring waterproofing method having been used in the initial construction of the building);

(o) an absence of explanation for the delays between events in the above time line, other than explanations that, for reasons already given, do not constitute justification."

18 The above facts were not in contest in the appeal.

19 At [76] the Tribunal rejected a contention by the appellant that it should be relieved from any breach of duty and found that the respondent's lot remained unlettable from 5 July 2016 to 26 July 2019.

20 In consequence of the above the Tribunal made an award in favour of the respondent in the sum of $55,510.12. This award was for lost rental income for the period 30 November 2016 to 26 July 2019. This amount included interest: January Reasons at [99]-[100].

21 Otherwise, the Tribunal rejected the respondent's claims for work in the sum of $2,979 including costs said to be incurred for repairs of carpet and other matters: January Reasons at [101].

22 In respect of these findings we should note the following relevant matters:

(1) Application SC18/5177, dated 28 Nov 2018, was filed on 29 Nov 2018.

(2) The date from which the Tribunal assessed loss of rental income was 30 November 2016. This was the date the SSMA commenced.

(3) The award made included interest on the lost rental income. No challenge was made to the award of interest.

23 In relation to the question of whether the application for compensation was out of time, the Tribunal dealt with this issue at [92] – [98] of its January Reasons.

24 The appellant submitted that the claim was out of time because a former tenant of the respondent had vacated the lot in July 2016, the respondent was aware of water penetration issues from at least 2015 and the proceedings were not commenced until 29 November 2016.

25 In rejecting this submission the Tribunal said at [94]:

> "94 The owner correctly responded that the duty on the OC is a continuing duty as is the breach of it and the complainant becomes aware of such breach on a continuing basis. The owner is accordingly entitled under SSMA s 106(6) to damages for two years before date of lodgement of proceedings (29 November 2018), which is what the owner claimed, being from 30 November 2016 to when the property was re-tenanted in late July 2019."

26 Relevant to note at this point is that the Tribunal found it unnecessary to decide the respondent's submission concerning whether or not s 106(6) applied to an action for compensation under s 232 of the SSMA, being a claim of the type contemplated by the Appeal Panel in *Shih v The Owners Strata Plan No. 87879* [2019] NSWCATAP 263. The Tribunal also concluded at [96] that there was "no need to exercise the clearly available power to extend time under [the *Civil and Administrative Tribunal Act 2013* (NSW) (the "NCAT ACT")] which expressly refers to power in the Tribunal to 'extend the period of time for the doing of anything under any legislation in respect of which the Tribunal has jurisdiction despite anything to the contrary under that legislation.'"

27 In summary, the Tribunal concluded that the respondent had a right to claim damages in consequence of a continuing breach by the appellant of its duty to repair and maintain the common property: January Reasons at [97].

28 In reaching these conclusions, the Tribunal addressed the differences between Appeal Panel decisions in *Shih* and *The Owners - Strata Plan No 30621 v Shum* [2018] NSWCATAP 15. Ultimately, the Tribunal preferred the ratio in *Shum* to that in *Shih*.

29 In relation to costs, and the order preventing levying by the Owners Corporation of the respondent in respect of the appellants' obligation to pay damages and costs awarded in favour of respondent, this was dealt with in the Tribunal's January Reasons at [120] – [133].

30 The Tribunal determined that Rule 38 of the Civil and Administrative Tribunal Rules 2014 (NSW) (the "Rules") applied because the amount claimed or in dispute in the proceedings was greater than $30,000. Having examined the principles applicable to the making of an order for costs under Rule 38, the Tribunal determined that respondent was successful in the proceedings and the appellant should pay respondent's costs: January Reasons at [130].

31 The Tribunal determined that the appellant should not levy the respondent to meet the financial obligations which it owed to him in consequence of the Tribunal's orders and in respect of its own costs. At [131] the Tribunal said:

> "The owner is entitled to protection under SSMA ss 90(2) and 104 against having to share in contributions (already raised or to be raised) to pay the OC's costs of the proceedings including satisfaction of this costs order and of the money order in favour of the owner. That of course does not prevent the OC levying the owner for the cost of remediation works other than for the amounts which are the subject of these money and costs orders."

32 After the January Reasons were published, further applications were made to the Tribunal concerning amendments to order 2 and/or its correction under the slip rule - s 63 of the NCAT Act. The Tribunal amended order 2 by consent on 17 February 2021. This change is not the subject of this appeal.

33 In making the amendment, the Tribunal published reasons dealing with that application (the "February Reasons").

34 In doing so, the Tribunal offered further views concerning *Shum* and *Shih* from those expressed in its January Reasons. It did so on the basis that it had become aware of the decision of the Appeal Panel in *The Owners –Strata Plan 74835 v Pullicin; The Owners – Strata Plan No 80412 v Vickery* [2020] NSWCATAP 5 (*Pullicin and Vickery*): February Reasons at [11]-[12].

35 Further reasons were published by the Tribunal on about 6 June 2020 (the "June Reasons"). This was in consequence of a request for written reasons made by the appellant in respect of events that occurred in February. The June Reasons provided the Tribunal's analysis of the *Pullicin and Vickery* decision in the context of the earlier January Reasons.

36 The Tribunal maintained its position that the ratio in *Shum* should be preferred to that in *Shih*.

Consideration

37 We should first note that there was originally a broader challenge to the decision of the Tribunal, namely that there was no power to award damages at all, not that the claim by the respondent was out of time. This challenge was, in part, based on the decision of the Appeal Panel in *Pullicin and Vickery* which determined that *Shum* and *Shih* were wrongly decided and that the Tribunal had no jurisdiction to determine a claim for damages arising under s 106(5) of the SSMA. The *Pullicin and Vickery* decision was appealed to the Supreme Court of New South Wales, the Court of Appeal determining by majority that the Tribunal did have power under s 232 of the SSMA to make an order for compensation in accordance with s 106(5) of the SSMA: *Vickery v The Owners – Strata Plan 80412* [2020] NSWCA 284 (*Vickery*).

38 Following the decision of the Court of Appeal in *Vickery*, the challenge in this appeal was limited to the question of whether the claim for damages was out of time by reason of s 106(6) of the SSMA, the question of costs and the question whether the Tribunal had power to make orders concerning who could be levied in respect of amounts payable by the appellant.

39 It is convenient to deal with this appeal under four headings:

(1) the extension of time to appeal;

(2) the contention that the claim for damages was out of time (Grounds 1-3 of the Further Amended Notice of Appeal);

(3) the power to make an order quarantining who should be levied (Ground 4 of the Further Amended Notice of Appeal); and

(4) costs.

Extension of time to appeal

Submissions

40 In support of its application to extend the time to file the appeal the appellant said in its Notice of Appeal that it had been denied cover under its insurance policy and was otherwise unable to finance any appeal by reason of significant expense that had been incurred in defending the proceedings at first instance. Following a dispute with its insurance company, which was resolved on 10 March 2020 when indemnity was granted, a Notice of Appeal was filed. This was on terms that insurance company reserved its rights by reason of the potential prejudice in the event that leave to appeal the proceedings was refused.

41 The appellant said it faced "incurring a significant financial penalty by way of the current award and orders made against it by the Tribunal at first instance should it not be granted an extension of time to lodge this appeal".

42 The appellant also said that the points of law raised in the appeal concerned issues of public importance including the administration of s 106 of the SSMA, and these issues affected the rights of all lot owners and owners corporations in New South Wales.

43 The appellant submitted:

(1) that the order for payment of damages was ultra vires and that it had strong prospects of success in relation to this ground on the appeal;

(2) the delay in bringing the appeal was relatively short, being approximately 3 weeks;

(3) the appellant would suffer prejudice, being the possible loss of the benefit of its insurance policy if time was not extended, and that the strata scheme is a small scheme for which "a special levy of lot owners would be required and would be burdensome"; and

(4) there was no relevant prejudice to the respondent in circumstances where he was not entitled to the orders made.

44 The extension of time was opposed by the respondent on several bases.

45 In submissions filed on 18 February 2021 the respondent said:

(1) in essence, the appeal was filed on 18 December 2020 when the Amended Notice of Appeal was provided, and since the decision in *Vickery* the appellant has effectively recast its appeal and the respondent is now "forced to defend these now clearly baseless legal proceedings";

(2) granting an extension of time would reward abhorrent conduct of the appellant in failing to carry out repairs and failing to comply with the Tribunal's orders dated 29 January 2020;

(3) the appeal was not brought within the required time and the appellant should not simply be permitted to do so "at the behest of its insurer";

(4) there was various inappropriate conduct by the appellant in relation to various proceedings at first instance.

46 In oral submissions, the solicitor for the respondent, Mr Bannerman, accepted there was no great prejudice as the period of delay was only three weeks.

Consideration

47 In our view an extension of time should be granted. Our reasons are as follows:

(1) As properly conceded by the respondent's solicitor, there is no real prejudice to the respondent who we understand has been paid the amount of the original award.

(2) The delay is relatively short and is explained by a dispute between the appellant and its insurer and the financial capacity of the appellant to otherwise bring the appeal proceedings.

(3) The issue of the proper construction of s 106(6) of the SSMA and the limitation thereby imposed (if any) raises a matter of general principle and some importance. Also of importance is whether the Tribunal is a court for the purpose of s 90 of the SSMA or otherwise has power to make an order as to who can be levied where a lot owner successfully brings a claim for damages or seeks costs in respect of proceedings brought against an owners corporation.

(4) The grounds of appeal raise questions of law.

(5) Leave to appeal is not sought and there is no challenge to the factual findings made by the Tribunal or the amount of the award in question.

Claim for damages out of time (Grounds 1-3 of the Further Amended Notice of Appeal)

Submissions

48 The appellant submits that the claim for damages is out of time by reason of s 106(6) of the SSMA because it was brought more than 2 years after the respondent first became aware of his loss.

49 In written submissions of the appellant dated 5 February 2021 the appellant said that s 106(2) is "in the nature of limitation annexed by a statute to a right which it creates, the limitation period being a condition which is of the essence of the new right". Reliance was placed on the decision of the High Court in *Australian Iron & Steel Ltd v Hoogland* [1962] HCA 13; (1962) 108 CLR 471 at 488. There, Windeyer J said:

> "5. Statutory provisions imposing time limits on actions take various forms and have different purposes. Some are for preventing stale claims, some for establishing possessory titles, some for the protection of public authorities, some in aid of executors and administrators. Some are incidents of rights created by statutes. Some prevent actions being brought after, some before, a lapse of time. It may be that there is a distinction between Statutes of Limitation, properly so called, which operate to prevent the enforcement of rights of action independently existing, and limitation provisions annexed by a statute to a right newly created by it. In the latter case the limitation does not bar an existing cause of action. It imposes a condition which is of the essence of a new right. The distinction was adverted to in *The Crown v. McNeil* [1922] HCA 33; (1922) 31 CLR 76, at pp 96, 100 ; and in *Maxwell v. Murphy* [1957] HCA 7; (1957) 96 CLR 261 ; and see *Gregory v. Torquay Corporation* [1911] UKLawRpKQB 112; (1911) 2 KB 556, at p 559 (affirmed [1911] UKLawRpKQB 196; (1912) 1 KB 442) and *Erskine v. Adea*ne (1873) LR 8 Ch 756, at p 760 . It seems that, under the common law system of pleading, when a limitation is annexed by a particular statute to a right it creates, the plaintiff should allege in his declaration that the action was brought within time. On the other hand it is for the defendant to plead the Statute of Limitations as a defence to an action on a common law cause of action, as if he does not it is assumed that he intends to waive it : see *Chapple v. Durston* (1830) 1 C & J 1, at p 9 [1830] EngR 40; (148 ER 1311, at p 1314). However, when issue is joined on a plea of the Statute, the burden or proving that the action is within time is on the plaintiff : see cases referred to by Dixon J., as he then was, in *Cohen v. Cohen* [1929] HCA 15; (1929) 42 CLR 91, at p 97 . And, even when a time limit is imposed by the statute that creates a new cause of action or right, it may be so expressed that it is regarded as having a purely procedural character, as a condition of the remedy rather than an element in the right ; and in such cases it can, it seems, be waived, either expressly or in some cases by estoppel: *Wright v. John Bagnall & Sons Ltd* [1900] UKLawRpKQB 68; (1900) 2 QB 240; *Lubovsky v Snelling* (1944) KB 44."

50 The right under s 106(5) was said by the appellant to be "conditioned on the knowledge of the lot owner of the existence loss (sic) when first obtained, it

operates as "an ambulatory condition precedent, introduced by Parliament to prevent 'old' claims been pursued". Reference was made to the decision in *Airey v Airey* [1958] 2 QB 300 at 310 referred to in *Commonwealth Insurance v Hagias* [2008] SADC 93 at [82].

51 Having said the loss referred to in s 106(5) was "the 'reasonably foreseeable loss suffered by the owner', not limited by reference only to past loss", the appellant said that the "temporal restraint is from when the lot owner first becomes aware of that 'loss'". Of the decision in *Shum* the appellant then submitted:

> "47. … The decision in *Shum* would have the nonsensical consequence that a lot owner first becomes aware of a loss on a daily basis; an interpretation that could not have been intended.
>
> 48. Put another way, the limitation provided by s 106(6) serves as a limitation on the exercise of the right conferred by s 106(5). The "action under this section or breach of statutory duty" which is limited by the two-year period "after the owner first becomes aware of the loss" referred to in s 106(5) is a singular cause of action. Section 106(6) is tied back to section 106(5) by reference to the lot owner first becoming aware of "the loss", which is necessarily a reference to "any foreseeable loss suffered by the lot owner" as a result of a contravention of s 106(1). If contrary to this construction, s 106(6) refers to a singular cause of action, but s 106(5) permits multiple and serial causes of action, they are indeed strange and incompatible bedfellows."

52 The appellant referred to policy reasons why the time restraint may have been introduced in the SSMA rather than "falling back on the limitation period under the *Limitation Act 1969* (NSW)". The appellant said at [50] of its written submissions:

> "To construe the provision in any other way would render the temporal limit under s106(6) meaningless and abrogate the intention of Parliament to impose a filter against 'old claims'. The provision would instead serve merely as a cap on damages not a true condition precedent. Parliament could not reasonably have intended that consequence."

53 In relation to the transitional provisions and the fact that a duty to repair in similar terms was found in s 62(1) of the *Strata Schemes Management Act 1996* (NSW) (repealed) (the "1996 Management Act"), the appellant noted that Sch 3 Part 1 cl 3(1) of the SSMA provided that:

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

54 Consequently, the breach of duty which had occurred prior to commencement of the SSMA, under the former 1996 Management Act, is taken to be a breach of s 106(1) of the SSMA. The appellant then said at [54]:

> "54. … The loss was one that was reasonably foreseeable and first occurred more than 2 years before the commencement of the current proceedings. If Schedule 3, Part 1, s 3 is to be given any effect, the Respondent's claim is not maintainable."

55 As to the suggestion in *Shih* that the Tribunal had a broader order making power to award damages under s 232(1) the appellant said at [63]:

> "Section 232(1) of the SSMA does not operate in a vacuum but empowers the Tribunal to make an order to settle a complaint or dispute "about" various matters. One of the matters in respect of which the Tribunal may settle a complaint or dispute is the failure of the owners corporation to comply with the duty under s 106(1) or (2). However, s 106 which creates the duty also confers the remedy, namely, the right to claim damages for the loss thereby incurred. That remedy is conditioned on compliance with the time limit imposed by s 106(6). Since s 106 provides the matter in respect of which the Tribunal may exercise its dispute settling power under s 232 and without which such power could not exist, the power must be exercised in accordance with the terms and restrictions inherent in s 106, including the time limit under s 106(6)."

56 Having referred to the comments of Leeming JA in *Vickery* at [156], the appellant submitted that it would be a "triumph of form over substance" if the limitation imposed by s 106(6) could be avoided by framing a claim as one of compensation under s 232 rather than a claim for damages under s 106(5). Having referred to *Raftland Pty Ltd as Trustee for Raftland Trust v Commissioner of Taxation* [2008] HCA 21; (2008) 238 CLR 516 at [129] (which related to statutory construction principles), the appellant said at [67] of its written submissions:

> "These considerations provide a substantial reason for concluding that s 106)(5) provides the compensatory remedy for financial loss resulting from a breach by an owners corporation of its duty under s 106(1) or (2). Any supplementary remedy must now be regarded as otiose or contradictory."

57 In oral submissions, the appellant said that s 106(5) is unique and falls to be interpreted under its own terms. It creates a distinct right of recovery and is not dependent upon principles applicable under general law.

58 In making these submissions the appellant accepted that there is a breach of duty each and every day that an owners corporation fails to maintain and repair common property as required by s 106(1) of the SSMA.

59 When asked by the Appeal Panel what is the "loss" referred to in s 106(6) of the SSMA and when a person might have knowledge of that loss, the appellant's counsel submitted that the loss is that sustained by reason of the contravention. The loss is that which is reasonably foreseeable. In short, once there is an awareness of loss, time runs.

Events subsequent to the hearing of this appeal

60 Subsequent to the hearing of the present appeal and in consequence of the order for remittal made by the Court of Appeal in *Vickery*, the Appeal Panel as constituted in *Pullicin and Vickery* dealt with the question of whether the proceedings before it were maintainable and/or whether those proceedings were out of time by reason of s 106(6) of the SSMA.

61 On remittal, the Appeal Panel determined the proceedings were brought within time. Consequently, the Appeal Panel dismissed the appeal against the order in favour of Mr Vickery that the owners corporation pay him damages under s 106(5) being the loss of rent claimed by Mr Vickery for the period 30 November 2016 (when the SSMA commenced) until the Appeal Panel published its reasons for decision: *The Owners – Strata Plan No 80412 v Vickery* [2021] NSWCATAP 98 (the "Vickery Remittal Reasons").

62 At [8]-[13] of the Vickery Remittal Reasons the Appeal Panel summarised the issues it was required to determine as follows:

> "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."

63 The Appeal Panel concluded that the entitlement to claim damages under s 106(5) of the SSMA was not retrospective and (following The Owners - Strata Plan 50276 v Thoo [2013] NSWCA 270) that damage suffered prior to commencement of the SSMA on 30 November 2016 by reason of an owners corporation contravening s 62 of the former 1996 Management Act could not be recovered by a lot owner because a lot owner did not have a private right to claim damages for breach of the statutory duty to repair in the 1996 Act: Thoo at [222]. However, the Appeal Panel concluded damages suffered on and after the commencement of the SSMA could be recovered under s 106 of the SSMA, the claim in that case being brought within 2 years from commencement of that Act. At [42]-[49] the Appeal Panel said:

"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."

64 In light of the decision in the *Vickery Remittal Reasons*, the parties were invited to make submissions concerning its relevance to the present appeal.

65 Initially, the appellant made the following submissions:

> "2. [The Vickery Remittal Reasons] is authority or confirms the following propositions:
>
> (a) The duty is a continuing one [36];
>
> (b) The cause of action arises, and time begins to run, when a lot owner first becomes aware of the loss even though further damage may continue to accrue after that time [36];
>
> (c) A cause of action for damages for breach of statutory duty under SSMA 2015 section 106(1) did not exist and could not accrue before that section came into effect on 30 November 2016 [47];
>
> (d) A lot owners knowledge of a breach of duty under s 62 of the SSMA 1996 (repealed) is not knowledge of a loss for the purpose of s106(6) is a cause of action did not previously exist [47];
>
> (e) 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 a loss [63] (by way of obiter dicta)
>
> 3. Here, the Tribunal therefore erred in agreeing with the Owner's submission that "the duty on the OC is a continuing duty as is the breach of it and the complainant becomes aware of such breach on a continuing basis" [reasons at [94]."

66 In response, the respondent said his claim was brought within time. In this regard the respondent relied on both the decision in *Shum* and the reasoning of the Appeal Panel at [47] in the *Vickery Remittal Proceedings*.

67 In submissions in reply the appellant submitted that the Appeal Panel was in error in respect of its decision at [47] of the *Vickery Remittal Reasons* and otherwise adopted the obiter comments in the *Vickery Remittal Reasons* in which the Appeal Panel rejected the analysis in *Shum* concerning the nature of the duty and the right granted to claim damages. It is convenient to set out the Appellant's submissions on this aspect contained in paragraphs 2-12 of its submissions in reply:

> "2. The Appellant contends that *Vickery* [at [47] was wrongly decided; namely, that time does not begin to run against an aggrieved lot owner (here the Respondent) under 2015 SSMA s.106(6) until 30 November 2016 when s.106 was introduced.

3. The legislative background to s.106 is relevant to its construction and application

a) s.62 of the 1996 SSMA contained almost identical provisions to s.106(1), (2) and (3) — but not subsections (5) and (6);

b) the right to damages under s. 106(5) and limitation period 106(6) were introduced to overcome the decision in *Owners Corporation v Thoo* [2013] NSWCA 270, where it was found that a remedy sounding in damages did not exist for a contravention of s.62 of the SSMA 1996;

c) that prior to the introduction of s. 106, an aggrieved lot owner had a right under s.62 to compel the Owners Corporation to maintain and repair the common property.

[see Vickery v The Owners — Strata Plan No 80412 [2020] NSWCA 284, 103 NSWLR 352]

The Appeal Panel *in Vickery fell* into error by conflating cause of action' with 'remedy'. Whilst a remedy *in* damages came into existence on 30 November 2016, a cause of action already existed under s.62. An aggrieved lot owner enjoyed a remedy akin to a right to compel specific performance of the statutory duty to repair and maintain the common property. It does not mean that there was no loss - there was, however, no available remedy to recover damages for that loss.

5. What is meant by the term *cause of action was* examined by Brennan J in *Port of Melbourne v Anshun (1981) 147* CLR 589:

'There is an imprecision in the meaning of the term cause of action, which is sometimes used to mean the facts which support a right to judgment (see per *Williams J. in Carter v, Egg and Egg Pulp Marketing Board (Vict.) (1942) 66* CLR *557,* at pp 600, 601); sometimes to mean a right which has been infringed (see *Serrao v* Noel (1885) LR 15 QBD 549), and sometimes to mean the substance of an action as distinct from its form (see *Krishna Behari Roy v. Brojeswari Chowdranee* (1875) LR 2 md App 283).

If cause of action is taken to mean a right, the rule is stated in terms of the passing of the right into judgment, and the rule precludes a party bound by the judgment from maintaining against another party bound by it any subsequent proceeding to recover a judgment giving a remedy to enforce or to compensate for an infringement of that right. The rule does not preclude litigation seeking a remedy to which a party is entitled in virtue of a different right from that which was first put in suit provided that the facts which support the right sued upon in the second action are not the same facts as those supporting the right which passed into the first judgment

If cause of action is taken to mean the facts which support a right to judgment, the rule of res judicata bars an action for relief founded upon the same facts as those upon which an earlier judgment was recovered, though the right sued upon in the second action is different from the right which passed into or was negated by the earlier judgment.....

When the same facts support rights to different remedies against the same defendant, the plaintiff cannot recover a judgment giving a remedy in respect of more than one right (United Australia Ltd v.

Barclays Bank Ltd [1941] AC 1]; Mahesan v. Malaysia Housing Society [1979] AC 374]. He may pursue his remedies concurrently in the same action, but he is put to his election before judgment as to which remedy he shall have. And when judgment is entered, all of the rights which he might have claimed in that litigation are merged in the judgment."

6. In *Trawl Industries of Australia Ply Limited (In liquidation) v Effem Foods Pty Limited* (1992) 36 FCR 406 (affirmed (1993) 43 FCR 510) Gummow J stated at 418:

> … the phrase 'cause of action' is used imprecisely and in several senses. These include:
>
> (i) the series of facts which the plaintiff must allege and prove to substantiate a right to judgment;
>
> (ii) the legal right which has been infringed; and
>
> (iii) the substance of the action as distinct from its form.
>
> However, as indicated above, for the law of Australia it is most suitable to focus upon the substance of the two proceedings as distinct from their form."

7. In *Somander v Minister for Immigration* [2000] FCA (2000) 178 ALR 677 at 687, Merkel J stated:

> "49. While some cases define cause of action" to mean the fact or combination of facts which gives rise to right to sue *(Carter v Egg and Egg Pulp Marketing Board (V/ct.)* (1942) 66 CLR *557* at 600; *Do Carmo v Ford Excavations Proprietary Limited* (1984) 154 CLR 234 at 245; *Go/ski v Kirk* (1987) 14 FCR 143 at 145) other cases strongly support the view that 'cause of action" in this area of the law means the right, rather than the facts which *support the right (Boles v Esanda Finance Corporation Ltd* (1989) 18 NSWLR *666* at *672-673; Macquarie Bank Ltd v National Mutual Life Association* of *Australia Ltd* (1996) 40 NSWLR 543 ("Macquarie") at *559).*
>
> 50. In *Macquarie* (at 559) Clarke JA noted that what is necessary:
>
> > "...is an examination of the factual circumstances relied upon to establish the right to relief in each case in order to determine whether there is a sufficient identity between them to found the conclusion that the same cause of action was in question in both cases."
>
> 52. It is clear from the above authorities that the identity of the causes of action in question is to be determined by matters of substance rather than by the form of the particular proceeding or the way in which it is pleaded."

8. There is a distinction between a cause of action and the remedies available to enforce it. Justice Handley writing extra-judicially *[Res Judicata: General Principles and Recent Developments (1999)* 18 ABR 214, observed:

> "In *Serrao v Noel24* the Court of Appeal held that a plaintiff, who in the first action obtained a final injunction for delivery up of share certificates, could not maintain a second action to recover damages for their detention. The decision has been applied in New Zealand to bar

actions for damages following earlier proceedings for specific performance, successful or otherwise. 25

Serrao v Noel was followed by Clarke J during the 80s in an unreported decision where a plaintiff obtained a final injunction by consent in summons proceedings in the Equity Division and then sued for damages in the Common Law Division. In such cases there is only one cause of action and a plaintiff must claim all remedies for that cause of action in the one proceeding. The common law principle is reinforced by $ 63 of the Supreme Court Act and s 23 of the Federal Court of Australia Act, which require the court to grant all such remedies as any party may appear to be entitled to in respect of any legal or equitable claim brought forward in the proceedings, so that as far as possible all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings avoided"

9. The distinction between a cause of action and an available remedy is recognised in various areas of law, including:

a) In the law of limitation of actions, the cause of action is not time barred but the remedy can be;

b) In the law of set-off, a time barred action may be raised by way of defence set-off against;

c) In the law of waiver and election, a particular remedy may be estopped or otherwise prevented from being enforced.

10. Here, whether seen as a fact or combination of facts which give rise to a right or a right to sue, the Respondent's cause of action involves the enforcement of his rights arising from the Appellant's breach of its duty to maintain and repair the common property under s62 of the 1996 SSMA but now under s106 of the 2015 SSMA. The point of difference is not the cause of action, but the remedy sought and available.

10.1. Section 106(6) provides that: *"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".* The temporal condition imposed by s.106(6) prevents an action being brought under s 106 for breach of statutory duty more than two years after the owner first becomes aware of the 'loss'. The time two-year time constraint is a necessary condition to any claim in damages and is jurisdictional in nature [see *Australian iron & Steel v Hoogland (1962)* 108 CLR 471 at 488]. A time limit to a new right operates *to impose 'an ambulatory condition precedent, introduced by Parliament to prevent '"old" claims being pursued* [see *Airey v Airey* [1958] 2 QB 300 at 310; *Commonwealth Insurance v Hagias* 12008] SADC 93 At [82].

10.2. To construe the provision in any other way would render the temporal limit under s.106(6) meaningless and abrogate the intention of Parliament to impose a filter against 'old claims'. The provision would instead serve merely as a cap on damages not a true condition precedent. The Legislature could not have intended that consequence, Additionally, all lot owners in NSW would inherit a cause of action sounding in damages for historical breaches. Not only would that result not be intended but an owners corporation may not be insured for such historical breaches of its duty.

11. When seen this way, the saving and transition provisions have their intended application. The contravention giving rise to the breach of s.106(1) commenced whilst the 1996 SSMA was operative and was a contravention of s.62(1) of the *1996* SSMA. The effect of that contravention was saved and transposed to have effect under the 2015 SSMA by Schedule 3, Part 1 s 3 under the 2015 SSMA, which provides:

> **3 General savings**
>
> (1) Any act, matter or thing done or omitted to be done under a provision of the former Act and having any force or effect immediately before the commencement of a provision of this Act that replaces that provision is, on that commencement, taken to have been done or omitted to be done under the provision of this Act.

12 It follows that the breach of statutory duty that preceded the commencement of the 2015 SSMA is taken to be a breach under the 2015 SSMA. The loss was one that was reasonably foreseeable and first occurred more than two years before the filing of the current application, If Schedule 3, Part 1, s 3 is to be given any meaning and effect, the Respondent's claim is not maintainable by operation of s106(6)."

Consideration

68 Section 106 relevantly provides:

> **106 Duty of owners corporation to maintain and repair property**
>
> (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.
>
> …
>
> (4) If an owners corporation has taken action against an owner or other person in respect of damage to the common property, it may defer compliance with subsection (1) or (2) in relation to the damage to the property until the completion of the action if the failure to comply will not affect the safety of any building, structure or common property in the strata scheme.
>
> (5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.
>
> (6) An owner may not bring an action under this section for breach of a statutory duty more than 2 years after the owner first becomes aware of the loss.

69 In *Vickery* the Court of Appeal determined by majority:

(1) Section 106(5) created a statutory right of recovery for loss occasioned by an owners corporation breaching its statutory duty imposed by s 106(1) of the SSMA: Basten JA at [26]-[58] and White JA at [160]-[166]; Leeming JA dissenting at [80].

(2) Section 232 of the SSMA conferred jurisdiction and power on the Tribunal to hear and determine a claim for damages and make an order for the payment of damages: Basten JA at [28] and [51] and White JA at [164] and following; Leeming JA dissenting at [141] and following.

70 The right under s 106(5) is to recover "any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation", the words "contravention of this section" being a reference to the duties in subs 106(1) and (2).

71 Section 106(1) and (2) could only be breached after commencement of the SSMA on 30 November 2016.

72 For the reasons expressed in *Shum* and the *Vickery Remittal Reasons,* s 106 of the SSMA does not operate retrospectively. That is, loss or damage suffered prior to the commencement of the SSMA on 30 November 2016 cannot be recovered.

73 In the present case, there was a breach of statutory duty under s 62 the 1996 Management Act. This breach was continuing at the time the SSMA commenced.

74 Schedule 3 Part 2 Provisions consequent on enactment of this Act cl 3(1) of the SSMA provides:

> 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.

75 Consequently, a failure to perform a duty under s 62 of the 1996 Management Act is, on commencement of the SSMA, taken to have been "done or omitted to be done" under s 106 of the SSMA, s 106 being the section that "replaces" s 62. That is, the breach of duty under s 62 of the former Act is, on commencement of the SSMA on 30 November 2016, taken to be a breach of duty of s 106 of the SSMA on that date. As determined in *Shum* and the

Vickery Remittal Reasons, a duty under s 106(1) or (2) is a continuing duty and there is nothing inconsistent with treating a breach of the duty in s 62 of the 1996 Management Act continuing at the date the SSMA commenced as a breach of s 106 of the SSMA.

76 Section 106(5) entitles an owner to recover "any reasonably foreseeable loss suffered by the owner as a result of a contravention of [s 106] by the owners corporation". As a breach of the duties under s 106 could only have occurred on or after the date of commencement of the SSMA, loss could only be suffered in consequence of a breach of s 106 on or after the commencement of that section, s 106(5) not otherwise having retrospective effect.

77 In the present case, as stated above, the proceedings were commenced within 2 years of the commencement of the SSMA. The loss claimed was in respect of loss suffered from the commencement of the SSMA and not before. No "action" as that term is used in s 106(6) of the SSMA could be brought before s 106 commenced. That is because there was no statutory cause of action existing under s 106(5) until the SSMA commenced on 30 November 2016 and there was otherwise no right to claim damages for breach of the statutory duty found in s 62 of the 1996 Management Act: The Owners Strata Plan 50276 v Thoo [2013] NSWCA 270.

78 Further, the respondent in the present case could not have been aware of any loss recoverable under s 106(5) by reason of a breach of s 106(1) or (2) until those sections had commenced. Consequently, s 106(6) could not operate in the circumstances of this case to prevent the proceedings being brought.

79 As to the appellant's submissions concerning the *Vickery Remittal Reasons* set out above, there are a number of reasons why these submissions should not be accepted.

80 We are of the opinion that the holding on the limitation point in the *Vickery Remittal Reasons* was correct. In our view, s 106(5) does more than provide a mere remedy, but provides a new cause of action. If there is a breach of duty under s 106(1) or (2), the right of action under s 106(5) only arises, in terms, on the suffering of relevant loss to which that section applies. That is, to any foreseeable loss suffered by the owner as a result of a "contravention of this

section". In contrast, a breach of s 62 of the 1996 Management Act by an owners corporation did not give rise to an action for damages for breach of statutory duty.

81 As to the cases referred to, they do not affect these conclusions:

(1) The case of *Serrao v Noel* (1885) LR 15 QBD 549 concerned relief arising from the wrongful detention of shares. Orders were previously made by consent in the Chancery Division of the Court for redelivery of the shares (first proceedings). Subsequently proceedings were commenced in the Queen's Bench Division of the Court for damages arising from the wrongful detention (second proceedings). Both Divisions were empowered to grant all remedies in connection with the wrongful detention of the shares. Overturning the decision to award damages in the second proceedings, the Court of Appeal determined that the claim for damages was a remedy available in the first proceedings in respect of the wrongful detention in addition to the order for return of the shares and should have been sought at that time. Consequently the additional remedy could not be claimed for the same cause of action: per Brett MR at 557, Baggallay LJ at 559 and Bowen LJ at 560.

(2) *Trawl Industries of Australia Ply Limited (In liquidation) v Effem Foods Pty Limited* (1992) 36 FCR 406, involved a claim for damages in negligence in circumstances where an earlier claim for damages in the Supreme Court of New South Wales arising from breaches of contract and of Trade Practices Act 1974 (Cwth) (repealed) had been dismissed. Gummow J determined that the claim for damages for negligence was in substance the same claim as brought in the earlier proceedings. In this regard at 351 line 15 his Honour said:

> "But each set of claims in this court is particularised by reference to statements that were in evidence in the Supreme Court. Thus, this is a case where it can be said that the same evidence would be led to prove the case Trawl propounded in its pleadings in both actions. The one factual matrix has generated the controversy which is given form in the two pleadings. As a matter of substance, in this court Trawl seeks to attach Effem again on a corresponding cause of action."

Consequently, his Honour found "cause of action estoppel" or res judicata was made out.

(3) In doing so, at 347, his Honour referred to the decision of the High Court in *Ramsay v Pigram* (1968) 118 CLR 271 at 280, noting the comments of Brennan J in *Port of Melbourne v Anshun (1981) 147* CLR 589 (*Anshun*) at 610-13 that the phrase "cause of action" is used imprecisely and in several senses.

(4) Alternatively, his Honour also found Anshun estoppel was made out as the claim for negligence should have been brought in the earlier proceedings.

(5) In relation to *Somander v Minister for Immigration* [2000] FCA (2000) 178 ALR 677, Merkel J was considering whether the principles of res judicata or issue estoppel meant that the proceedings before him were precluded by reason of earlier judicial review proceedings that had been dismissed by consent. While his Honour found that the Tribunal had committed error, the proceedings before him on remittal from the High Court, being an application for relief under s 75(v) of the Constitution, were not maintainable as they relied on the same substantive right, the Constitution providing the particular remedy.

82 As is evident from the above, each of these cases concerned what is meant by the expression "cause of action" in the context of determining whether the determination of earlier proceedings prevented subsequent proceedings by reason of the principles of res judicata, issue estoppel and Anshun estoppel.

83 In so far as these authorities are instructive we make the following observations. In *Trawl,* Gummow J held that one should focus on substance rather than form. In *Somander,* Merkel J said there was strong support for the view that "cause of action" meant the right rather than the facts which supported the right, and (as with Gummow J), the proper focus was on substance rather than form. In *Serrao*, as Handley J observed writing extra-judicially, there was no dispute that both proceedings relied upon the same cause of action, the sole relevant difference being the remedy sought.

84 In our opinion, as a matter of substance, s 106(5) is a new cause of action not provided by s 62 of the 1996 Management Act. It contains a remedy not previously available, to recover loss suffered by the owner by reason of a "contravention of" s 106, it has its own limitation period. In addition, the obligations imposed by s 106(1) and (2) and the right to recover damages may be affected by subsections 106(4) and (7). The owners corporation may now defer compliance with its duty under s 106(1) or (2) under certain circumstances (s 106(4) - which did not previously exist and which may affect any entitlement to damages), and the duty under s 106(1) and (2) is subject to the provisions of any common property memorandum adopted by the by-laws for the strata scheme, any common property rights by-law or any by-law made under section 108 (see s 106(7)).

85 It follows that the proceedings were brought within time and this aspect of the appeal should be dismissed.

86 In reaching this conclusion we note that it is unnecessary to express any view concerning the additional observations of the Appeal Panel in the *Vickery Remittal Proceedings* at [50] and following.

Power to make order quarantining who should be levied (Ground 4 of the Further Amended Notice of Appeal)

87 Ground 4 relates to order 4 made 29 January 2020 (quarantining order). This order prevented the appellant from levying the respondent for the purpose of the appellant paying the respondent damages and costs as required by orders 1 and 3 made 29 January 2020.

Submissions

88 The appellant made the following submissions concerning the power of the Tribunal to make an order that a successful owner could not be levied in respect of amounts payable by an owners corporation to the successful owner, whether by way of damages or costs.

89 First the appellant submitted that s 90 of the SSMA does not authorise the Tribunal to make an order of the type contemplated in that section and what the Tribunal did, as disclosed in the January reasons at [134], was impermissible. In this regard, the expression "court" used in s 90 does not include Tribunal.

90 Reliance was placed on the decision of the appeal panel in *The Owners – Strata Plan No. 8041 v Vickery (No 2)* [2019] NSWCATAP 97 (*Vickery No* 2) at [25].

91 Secondly, having referred to the comments of Basten JA at [38], Leeming JA at [123] and White JA at [184] in *Vickery*, the appellant said:

> "It involves a quantum leap from the above incidental observations in *Vickery* to the respondent's submission in paragraph [23] that the Tribunal has an inherent power to make orders in the nature of s 90 pursuant to s 232."

92 Of these matters, the respondent submitted that:

(1) at first instance he sought an order under s 232 of the SSMA;

(2) referring to what the Court of Appeal said in *Vickery*, the power granted by s 232 is expressed in broad terms; and

(3) "(t)he Tribunal has inherit (sic) power to make orders of the nature of section 90 of the SSMA pursuant to section 232".

93 In oral submissions the appellant restated its position that s 90 was not a source of power, the Tribunal not being a court for the purpose of that section. There was also discussion concerning s 104, which was in the nature of a prohibition on the owners corporation and not a source of power for the Tribunal to make orders.

Consideration

94 The appellant's first submission is that, contrary to the Tribunal's conclusion in the January reasons, s 90(2) did not permit the Tribunal to make an order under that section.

95 At [131] the Tribunal said:

> "The owner is entitled to protection under SSMA ss 90(2) and 104 against having to share in contributions (already raised or to be raised) to pay the OC's costs of the proceedings including satisfaction of this costs order and of the money order in favour of the owner. That of course does not prevent the OC levying the owner for the cost of remediation works other than for the amounts which are the subject of these money and costs orders."

96 No reasons were provided for this conclusion either in respect of the operation of s 90 or s 104. Neither the February Reasons nor the June Reasons dealt with this matter, those later reasons relevantly dealing with the decision of the Appeal Panel in *Pullicin and Vickery*.

97 Section 90 of the SSMA provides:

> 90 **Contributions for legal costs awarded in proceedings between owners and owners corporation**
>
> (1) This section applies to proceedings brought by one or more owners of lots against an owners corporation or by an owners corporation against one or more owners of lots (including one or more owners joined in third party proceedings).
>
> (2) The court may order in the proceedings that any money (including costs) payable by an owners corporation under an order made in the proceedings must be paid from contributions levied only in relation to the lots and in the proportions that are specified in the order.
>
> (3) The owners corporation must, for the purpose of paying the money ordered to be paid by it, levy contributions in accordance with the terms of the order and must pay the money out of the contributions paid in accordance with that levy.
>
> (4) This Division (other than provisions relating to the amount of contributions) applies to and in respect of contributions levied under this section in the same way as it applies to other contributions levied under this Division.

98 Section 104 of the SSMA provides:

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

99 The power in s 90 enables a court to make orders in respect of which lots may be levied for contributions in respect of "any money (including costs) payable by the owners corporation under an order made in the proceedings".

100 It is properly to be seen as a remedy available to the "court" in determining proceedings between an owners corporation and one or more lot owners. This is because it is an order consequential upon a finding that an owners corporation is liable to pay money "under an order", including costs.

101 It is not a right given to a court to adjust contributions between lot owners generally.

102 It is an order making power which a court would not otherwise have to prevent a lot owner to whom money is to be paid (whether by way of damages, costs or for some other reason) from having to contribute to that payment by way of levies as would be the situation that would otherwise operate by reason of s 83(2) of the SSMA: *Vickery* per Basten JA at [38]:

103 The appellant submitted that the Tribunal is not a "court" for the purpose of this section and therefore cannot exercise the power conferred.

104 We agree.

105 Part 5 of the SSMA, headed "Financial Management", in which s 90 is found, separately refers to a court and the Tribunal.

106 For example, s 77(4) and (5) of the SSMA draws a distinction between the Tribunal and the Supreme Court in relation to applications concerning the

distribution of surplus money in the administrative fund or capital works fund of an owners corporation. Similarly, in connection with orders concerning interest in respect of contributions, s 85(8) draws a distinction between “the Tribunal or a court”.

107 Sections 104 deals with an owners corporations costs in proceedings in which a lot owner has been successful in the Tribunal. That section prevents an owners corporation levying the successful lot owner in respect of payment by the owners corporation of its own costs.

108 These distinctions support the view that, in context, the word “court” in s 90 should be construed in a manner that does not include the Tribunal.

109 Our interpretation is also supported by the observations concerning the operation of s 90 in *Vickery*: per Basten JA at [35]-[39], Leeming JA at [121]-[123] and White JA at [183].

110 In these circumstances, there is no reason to construe the word “court” more widely so as to include the Tribunal.

111 As to s 104, this section only operates in respect of proceedings in the Tribunal. So much is clear from the language of the section.

112 It is not a section conferring an order making power on the Tribunal. Rather, it is a prohibition on an owners corporation levying a successful lot owner in respect of the owners corporation own costs. Section 104 says nothing in respect of levying a successful lot owner in connection with monies payable by an owners corporation to that lot owner.

113 While the Tribunal may, as permitted by s 232(1) of the SSMA, make orders in connection with any dispute arising in the event an owners corporation contravenes this section, section 104 does not provide an independent order making power in connection with proceedings before the Tribunal.

114 It follows that, insofar as the Tribunal made the quarantining order relying on ss 90 and 104 it was in error to do so.

115 Notwithstanding this conclusion, in our view the Tribunal has a power equivalent to that found in s 90(2) of the SSMA to make the quarantining order. That power is found in s 232(1) of the SSMA.

116 Section 232(1) provides:

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

117 The section grants jurisdiction and provides an order making power to the Tribunal about matters within its scope: *Vickery* above. The form of orders that might be made is not specified and the language used is in wide terms, namely the Tribunal "may … make an order to settle a complaint or dispute".

118 It is inappropriate to make implications or impose limitations upon the grant of jurisdiction and powers which are not found in the express words: *"Shin Kobe Maru" v Empire Shipping Inc* [1994] HCA 54; (1994) 181 CLR 404 at 421. A similar approach was taken by White J (as his Honour then was) in *Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Limited* [2015] NSWSC 289 at [79] and following when considering the powers of the Tribunal under the *Agricultural Tenancies Act 1990* (NSW).

119 The power to make a quarantining order is properly seen as a remedy to give effect to a determination that an owners corporation is liable to pay to a successful lot owner as compensation:

(1) damages for breach of its statutory duty under s 106 of the SSMA;

(2) costs of proceedings before the Tribunal.

120 Without this order making power, each of these orders for compensation payable to a successful lot owner (damages and costs) will be reduced by the amount which the successful lot owner might be levied by the owners corporation to meet its obligations. This is because the SSMA otherwise requires all lot owners, including the successful lot owner, to be levied "in shares proportional to the unit entitlements of their respective lots": s 83(3).

121 There is no reason to interpret the orders that can be made under s 232(1) as excluding such a remedy.

122 Support for this interpretation of s 232(1) is found in the reasons of the majority in *Vickery*. There, Basten JA said at [38]:

> "Otherwise, there are a number of provisions in the current Act which permit the Tribunal to make orders as to the manner in which the burden of levies is to be effected. While it is clear that a court would not have such a power absent an express conferral, it is doubtful that the Tribunal would not have the power to make an order of the kind identified in s 90(2)."

123 Similarly, but in the context of whether the Tribunal had power to award damages under s 106(5), White JA said:

> "[166] In other words, I see no reason to read down the amplitude of the authority conferred on the Tribunal by s 232(1).
>
> [167] It is true that if full amplitude is given to the words of s 232(1), then the provision would cover some of the more specific powers conferred on the Tribunal by other sections of the Act. But the Act is not structured in such a way that the conferral of specific powers on the Tribunal should be seen as limiting the conferral of the general power under s 232(1). The specific powers conferred on the Tribunal do not form a class or a genus by reference to which the general power under s 232(1) is to be read down. I agree with what Leeming JA has said in this respect (at [119] and [120]). I agree with what Basten JA has said at [28]. That construction is consistent with the principle in Owners of the Ship, "Shin Kobe Maru" v Empire Shipping Co Inc (1994) 181 CLR 404 at 421; [1994] HCA 54. I do not think that the principle in Shin Kobe Maru faces an obstacle in the language of s 232 once it is acknowledged that that language extends to a power to make orders to resolve a complaint or dispute and not merely to bring about a consensual resolution of a complaint or dispute. In the absence of consensus, the way to resolve a dispute is to decide all aspects of the dispute and make appropriate orders to give effect to such a decision."

124 His Honour, when considering the powers of the Tribunal and the operation of ss 90 and 104, then continued:

> "[183] There is no express provision for the Tribunal to order that costs payable by an owners corporation be paid from contributions levied only in relation to specified lots in a proportion specified in the order (compare s 90(2)). There is no express provision that an owners corporation cannot levy a contribution for its own costs against a party who is successful in court proceedings against it (compare s 104(1)).
>
> [184] I do not think this has any relevance to the issue of a Tribunal's powers under s 232(1) except as raising the possibility that the power to resolve all aspects of a dispute should extend to all aspects as to how and by whom the costs of the dispute should be borne in so far as that is not dealt with by other specific provisions."

125 At [121]-[123], Leeming JA contrasted the powers of a court and the Tribunal in the context of ss 90 and 104 in considering whether the Tribunal had power to award damages. In doing so, his Honour recognised the consequences of the levying regime upon a successful claimant and the nature of the power granted to a court under s 90(2) of the SSMA in respect of such an award. At [123] his Honour said:

> "The new argument turned upon the fact that any monetary obligation to be borne by the owners corporation is ultimately funded from contributions levied upon individual owners. **In a dispute between a lot owner and the owners corporation, success by the lot owner in obtaining a monetary amount will, absent some other provision being made, result in the successful lot owner bearing a proportionate share of the levies rendered by the owners corporation to meet the successful lot owner's liability**. (Of course, this is no different from many disputes between partners, or between executor and residuary legatee.) Sections 90 and 104 are directed to this. Those sections draw a distinction between orders by a court that might involve an owners corporation paying money to an owner, and orders made by the Tribunal for the payment of the costs and expenses of an owners corporation in proceedings brought by or against it in the Tribunal. Pursuant to s 90(2) the court is empowered to order that any money (including costs) payable by an owners corporation against one or more owners of lots "must be paid from contributions levied only in relation to the lots and in the proportions that are specified in the order". **Thus s 90(2) empowers a court to craft an order so as to exclude from the burden of the money to be paid to a lot owner, that owner from contributions to be levied from the owners corporation.** In contrast, the comparable power conferred in s 104 is confined to orders made by the Tribunal for the payment of costs and expenses. It was submitted that this was an indication that the Tribunal lacked power to make orders of damages in favour of a lot owner against the owners corporation."
>
> (Our emphasis)

126 His Honour found there was no power to award damages and said that his Honour doubted much turned upon the differences in these sections in determining whether the Tribunal had power to award damages. However, his Honour recognised that a matter relevant to the grant of any remedy (at least

by a court) may involve considering whether the successful lot owner should be required to contribute to levies raised for the purpose of an owners corporation paying an award for damages or costs to that successful lot owner.

127 Once it is accepted that s 232(1) confers a broad power as to what orders the Tribunal can make by way of remedy in settling a dispute to which that section applies, it seems to us that this power would include a power to make an order equivalent to that given to a court by s 90(2) of the SSMA. To reach a different conclusion would result in an interpretation of s 232(1) which limited the powers of the Tribunal to grant an appropriate remedy in respect of a dispute for which the Tribunal has jurisdiction to resolve with the result that any order for compensation or costs might be consequentially reduced when levies are raised.

128 It might be thought by reason of Leeming JA's comments at [123] concerning s 104 that there was some inconsistency with such analysis. However, once it is recognised that s 104 operates as a prohibition on an owners corporation in respect of levying for its own costs only and not in respect of amounts payable by an owners corporation to a successful lot owner, in our view there is no inconsistency and no reason to confine the operation of s 232(1) to exclude the power to make an order of a type contemplated by s 90(2).

129 Finally we should deal with the appellant's contention that the Tribunal was wrong in light of the Appeal Panel decision in *Vickery No* 2. In that case the Tribunal declined to make a quarantining order.

130 In that case the Appeal Panel said at [21]- [27]:

> "21 Finally, an order is sought under s 90 of the Management Act that costs payable by the appellant to the respondent must be from contributions levied on all lots accept the respondent's Lot 74.
>
> 22 Section 90 provides:
>
> > 90 Contributions for legal costs awarded in proceedings between owners and owners corporation
> >
> > (1) This section applies to proceedings brought by one or more owners of lots against an owners corporation or by an owners corporation against one or more owners of lots (including one or more owners joined in third party proceedings).
> >
> > (2) The court may order in the proceedings that any money (including costs) payable by an owners corporation under an order

made in the proceedings must be paid from contributions levied only in relation to the lots and in the proportions that are specified in the order.

(3) The owners corporation must, for the purpose of paying the money ordered to be paid by it, levy contributions in accordance with the terms of the order and must pay the money out of the contributions paid in accordance with that levy.

(4) This Division (other than provisions relating to the amount of contributions) applies to and in respect of contributions levied under this section in the same way as it applies to other contributions levied under this Division.

23 Subsection (2) provides a power to "the court" to make such an order. No reference is made to the Tribunal in the section. Otherwise, there is no power given to the Tribunal elsewhere in the Management Act to make such an order.

24 On the other hand, s 104 of the Management Act provides:

104 Restrictions on payment of expenses incurred in Tribunal proceedings

(1) An owners corporation cannot, in respect of its costs and expenses in proceedings brought by or against it for an order by the Tribunal, levy a contribution on another party who is successful in the proceedings.

(2) An owners corporation that is unsuccessful in proceedings brought by or against it for an order by the Tribunal cannot pay any part of its costs and expenses in the proceedings from its administrative fund or capital works fund, but may make a levy for the purpose.

(3) In this section, a reference to *proceedings* includes a reference to proceedings on appeal from the Tribunal.

25 There is no basis to conclude that s 90 was intended to apply to proceedings in the Tribunal and no reason to construe the reference to "the court" as including the Tribunal. To the contrary, s 104 expressly regulates the position of proceedings in the Tribunal.

26 Further, s 104 operates according to its own terms and does not provide power to the Tribunal to make an order.

27 Accordingly, there is no power for the Tribunal to make the order sought and we decline to do so.

131 In *Vickery No 2* the application was made under s 90 of the SSMA. After setting out the power granted to a court in s 90(2) of the SSMA the Appeal Panel said at [23] that there was no power given in the SSMA to make an order of the type in s 90(2).

132 In light of the decision of the Court of Appeal in *Vickery* and the observations of the Court to which we have referred, insofar as the statement in *Vickery No 2* suggests that s 232(1) does not confer an order making power on the Tribunal

like that available to a court under s 90(2) of the SSMA, we disagree. More correctly, while there is no express power in terms of s 90(2), the general power in s 232(1) is sufficiently broad to permit the Tribunal to make an order of the type set out in s 90(2).

133 Consequently, ground 4 of the appeal fails.

134 In reaching this conclusion we should make one final observation concerning the operation of s 104 and Order 4 made on 29 January 2020.

135 Order 4 included in the quarantining order the words “or its own costs of these proceedings”. On one view, s 104 operates as a mandate on the owners corporation in proceedings in the Tribunal in which it is unsuccessful concerning the levying of lot owners in respect of its costs. As such, s 104 may limit what orders the Tribunal can make under s 232(1) concerning the owners corporation’s own costs where a lot owner is successful. For present purposes this question is unnecessary to resolve. This is because even if the Tribunal should not have included the above words in order 4, s 104 would prevent the appellant levying the successful lot owner in respect of its own costs and would operate in the same manner as order 4.

Conclusion

136 The appellant has been unsuccessful in its appeal. Consequently, the appeal should be dismissed.

137 The proceedings at first instance concerned an amount claimed or in dispute in excess of $30,000: see *The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256. Rule 38 of the *Civil and Administrative Tribunal Rules 2014 (NSW)* applied to the proceedings at first instance. Consequently, by reason of r 38A, r 38 applies to this appeal.

138 The appellant has been unsuccessful and therefore costs should follow the event.

139 If a party contends for a different or other order, they have liberty to apply within 14 days.

Orders

140 The Appeal Panel makes the following orders:

(1) The time to file the appeal is extended to 23 March 2020.

(2) Leave is given to file the Further Amended Notice of Appeal dated 5 February 2021.

(3) Appeal dismissed.

(4) Subject to order 5, the appellant is to pay the respondent's costs of the appeal as agreed or assessed on an ordinary basis.

(5) Liberty to apply in respect of whether a costs order different to order 4 should be made, any application and submissions to be filed and served within 14 days of the date of these orders.

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