Civil and Administrative Tribunal

New South Wales

Case Name:	Tezel v The Owners - Strata Plan No 74232
Medium Neutral Citation:	[2022] NSWCATAP 149
Hearing Date(s):	24 March 2022
Date of Orders:	10 May 2022
Decision Date:	10 May 2022
Jurisdiction:	Appeal Panel
Before:	The Hon D A Cowdroy, AO QC, Principal Member G K Burton SC, Senior Member
Decision:	(1) The appeal is allowed. (2) The decisions of the Tribunal delivered on 2 November 2021 and on 10 December 2021 (the latter on costs) are set aside. (3) Owners SP 74232 is to pay Feride Tezel $447,200 on or before 30 June 2022. (4) The respondent is to pay the appellant's costs of the proceedings at first instance on and from 23 September 2021 and the costs of this appeal.
Catchwords:	STRATA MANAGEMENT – loss of lot owner as a result of failure of owners corporation to repair water leaks – whether lot owner's claim was statute barred – Strata Schemes Management Act 2015 (NSW) s 106(1), (2), (4), (5), (6).
Legislation Cited:	Strata Schemes Management Act 2015 (NSW) Trade Practices Act 1974 (Cth) Australian Consumer Law (Cth)
Cases Cited:	Baker Morrison v State of New South Wales [2009] NSWCA 35 Hawkins v Clayton (1988) 164 CLR 539 Kay v Sydney Airport Corporation Limited [2014]

	NSWSC 744 Latoudis v Casey (1990) 170 CLR 534 Oshlak v Richmond River Council [1998] HCA 11 Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm) [1983] 2 AC 1 Sent v Jet Corporation of Australia Pty Ltd (1996) 160 CLR 540 at 542 State of New South Wales v Gillett [2012] NSWCA 83 State of Western Australia v Wardley Australia Ltd [1991] FCA 314; (1991) 30 FCR 245 The Owners – Strata Plan No. 36613 v Doherty [2021] NSWCATAP 285 The Owners – Strata Plan No 80412 v Vickery [2021] NSWCATAP 98 The Owners Strata Plan No 30621 v Shum [2018] NSWCATAP 15 Vickery v The Owners Strata Plan No 80412 [2020] NSWCA 252, (2020) 103 NSWLR 352 Wardley Australia Ltd v State of Western Australia (1992) 175 CLR 514
Texts Cited:	Macquarie Dictionary
Category:	Principal judgment
Parties:	Feride Tezel (Appellant) The Owners – Strata Plan No 74232 (Respondent)
Representation:	Counsel: J Knackstredt (Appellant) T Davie (Respondent) Solicitors: Sachs Gerace Lawyers (Applicant) Chambers Russell Lawyers (Respondent)
File Number(s):	2021/00347082
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A

Date of Decision:	08 November 2021
Before:	G Ellis SC, Senior Member
File Number(s):	SC 20/46782

JUDGMENT

Outcome of appeal

1 By Notice of Appeal filed on 3 December 2021, the appellant appealed a decision of the Tribunal dated 8 November 2021. The appellant filed an amended notice of appeal on 21 December 2021.

2 The original claim brought by the appellant (SC 20/46782) comprised an action for damages arising from alleged loss of rental from a home unit being a lot in a strata scheme in Bondi Beach, NSW allegedly as a result of ingress of water into the lot. There is no issue on this appeal that the lot was affected adversely by leakage of rainwater into the lot following heavy rain, although the degree of the owners corporation (OC)'s liability and amount of lost rental caused by that liability was the subject of contest below. The Tribunal dismissed the application as out of time under s 106(6) of the *Strata Schemes Management Act 2015* (NSW) (SSMA) for reasons explored below.

3 The appeal raised only a challenge to the Tribunal's finding that the claim was time-barred. There was no further appeal against the Tribunal's findings that, if the proceedings were not time-barred, then the OC was liable to the appellant in the amount she claimed for a number of years of lost rental income.

4 We have decided that the appellant's claim is not time-barred. Since there is no challenge to the Tribunal's findings on liability and quantum, we have determined that there should be a money order against the respondent OC in the appellant's favour for the amount so found.

Summary of Tribunal findings

5 The Tribunal articulated a summary of the issues before it as follows:

> The primary issues which require determination are what impact, if any, does limitation imposed by s 106 (6) of the SSMA have on the applicant's claim for loss of rent and what amount, if any, is recoverable. Questions relating to

levies and costs also required consideration. After considering the evidence and submissions both written and oral, the Tribunal's decision may be summarised as follows:

> (1) By reason of the Tribunal's interpretation of s 106 (6) of the SSMA, for which the respondent contended, the applicant is unable to recover damages.
>
> (2) Under the alternative interpretation of that statutory provision, for which the applicant contended, the applicant would have been entitled to recover damages of $447,200.
>
> (3) the applicant is not entitled to be excluded from any levy imposed to cover the cost of investigation and/or repairs.
>
> (4) the question of what order should be made in relation to costs should be the subject of written submissions.

Challenged Orders

6 The orders challenged on appeal are stated as follows:

(1) Order 3 made by the Tribunal on 8 November 2021: "The application is otherwise dismissed".

(2) The following orders made by the Tribunal on 10 December 2021:

(a) Order 2: The applicant is to pay the costs of the respondent, on and after 23 September 2021, on the ordinary basis as agreed or as assessed.

(b) Order 3: Otherwise (i.e. in relation to costs incurred on or before 22 September 2021), each party is to bear their own costs.

Orders claimed on appeal and in reply

7 The appellant claims that the Appeal Panel should make the following orders in lieu of the orders made by the Tribunal:

(1) An order pursuant to SSMA s 106(5) for damages for loss of rental income from lot 10 at the rate of $3,000 per week between 6 November 2018 and 5 November 2019 (52 weeks) being $156,000.

(2) An order pursuant to SSMA s 106(5) for damages for loss of rental income from lot 10 at a rate of $2,800 per week between 6 November 2019 and 5 November 2020 (52 weeks) being $145,600.

(3) An order pursuant to SSMA s106(5) for damages for loss of rental income from lot 10 at a rate of $2,800 per week from 6 November 2020 until order 2 made by the Tribunal on 8 November 2021 has been complied with.

(4) An order that the payments referred to in the above three orders be made within 28 days.

(5) An order that the respondent pay the appellant's costs of the appeal (2021/00347082) and the proceedings at first instance (SC 20/46782) as agreed or assessed.

8 In a separate decision delivered on 10 December 2021 [*Tezel v The Owners – Strata Plan No 74232 (No 2)*] the Tribunal member made orders, inter alia:

(a) that the appellant (then applicant) was to pay the costs of the respondent on and after 23 September 2021, on the ordinary basis as agreed or assessed;

(b) otherwise (that is, in relation to costs incurred on or before 22 September 2021), each party is to bear its own costs;

(c) the Tribunal considers, for the purposes of SSMA s 104, that the applicant (lot owner) is to be regarded as a successful party.

9 The respondent replied to the appeal as follows:

(a) In response to ground 1 the respondent states that the appellant has provided insufficient details how the Tribunal is alleged to have erred in its construction of SSMA s 106.

(b) In response to grounds 2 to 4 the respondent submits that the Tribunal did not err in its construction of the words "the loss" in SSMA s 106(6) nor in its interpretation of s106 (6) and s 106 (5).

(c) The Tribunal was correct in dismissing this aspect of the claim.

(d) In respect of the appeal relating to the cost order, no question of law is raised and accordingly leave is required to appeal the orders for costs.

(e) In the event the appellant is successful, the issue of costs will require reconsideration.

Nature of appeal

10 This appeal is an internal appeal brought pursuant to s 80 (2)(b) of the *Civil and Administrative Tribunal Act 2013* (NCAT Act). Such section provides that an appeal (other than an interlocutory decision) may be brought as of right on any question of law, or with the leave of the Appeal Panel on any other grounds. The Appeal Panel accepts that the issue raised on this appeal is a question of law, other than the issue relating to costs which will be considered later in this decision.

Limitation provisions

11 SSMA s 106(1) and (2) imposes a duty on an owners corporation to maintain and repair the common property and any personal property vested in the

owners corporation. Provision is also made for a claim by a lot owner where the duty has not been fulfilled. If the duty is breached then provision for compensation is as follows:

> (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 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 statutory duty more than two years after the owner first becomes aware of the loss.

Relevant Tribunal findings

12 The Tribunal accepted the appellant's evidence that between 2013 and 2020, every time it rained heavily, the appellant observed water leaking into her unit. The Tribunal stated:

> 13. Given the extent of those matters, and the applicant's statement saying that (1) in 2013 she removed the carpet from the unit and stopped living there because of the water, smell and discomfort, (2) in 2016 she went to live in Roselands "*full-time*" because she could not live with the moisture and mould, (3) she then decided to rent her unit but could not do so because of the moisture and mould, and (4) the absence of any evidence of steps taken to rent the unit, it is understandable that the respondent's submission suggested there is no basis for a claim for loss of rent.

13 The Tribunal referred to the decisions of the Appeal Panel in *The Owners – Strata Plan No 80412 v Vickery* [2021] NSWCATAP 98 (which we refer to as *Vickery [2021]* given a decision with the same name in the Appeal Panel in a preceding year), with the relevant passage at [36], *The Owners - Strata Plan No 30621 v Shum* [2018] NSWCATAP 15 (the relevant passage being at [128]) and to a more recent decision of the Appeal Panel in *The Owners – Strata Plan No. 36613 v Doherty* [2021] NSWCATAP 285 at [93]–[94]. The appellant relied upon such decisions to submit that, where there was a duty to repair, it was "uncontroversial" (to use the description in *Vickery [2021]*) that such duty was continuous until the repair occurred and was not to be regarded as a breach of duty on a single occasion. To quote the words in *Vickery [2021]* at [36]:

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

14 The appellant contended that *Shum* and *Doherty* should be followed, with the consequence that the appellant was entitled to recover loss of rent for two years prior to the application being filed, that is, from 6 November 2018 to 6 November 2020.

15 The respondent relied upon the decision of the Appeal Panel on remission from the Court of Appeal in *Vickery [2021]* (in which the owner commenced proceedings in April 2018, less than 18 months after the SSMA came into operation on 30 November 2016) to contend that the owner was outside the limitation period since she first became aware of the loss in 2013.

16 The Tribunal found:

> 23. The Tribunal considers the applicant's claim for damages falls outside the limitation period, noting first that the consent work order reflects the fact that it is not in dispute that there was a breach by the respondent of the duty imposed by s 106(1) of the SSMA.
>
> 24. The reason for the Tribunal's decision is that, to the extent that *Vickery* and *Shum* conflict, the Tribunal considers preference should be accorded to *Vickery* which was a three-member panel with two judicial members, headed by the President, even though what was said at in *Vickery* at [63] was said to be a "non-binding observation". As there is no utility in repeating what was said in *Vickery*, it is only necessary to refer to some additional matters.
>
> 25. First, the Tribunal notes that the limitation set out in s 106(6) of the SSMA applies to s 106(5) and not s 106(1). The structure of s 106 is that s 106(1) imposes a duty on the owners corporation, s 106(5) provides a lot owner with a right of recovery for "any reasonably foreseeable loss" and s 106(6) requires the lot owner to commence proceedings not more than two years "after the owner first becomes aware of the loss".
>
> 26. As a result, the limitation period attaches to the loss and not the breach although it must be accepted that a loss can only be claimed under s 106(5) in respect of a breach of s 106(1). It is also observed that there is a difference in subject matter since s 106(1) is referring to the duty in relation to common property owned by an owners corporation while s106(5) refers to reasonably foreseeable loss suffered by a lot owner.
>
> 27. It is understandable that the limitation period for a lot owner would be expressed in terms of the loss rather than the breach since the breach is the cause and the loss is the effect. What might be termed 'the limitation clock' only starts to run under s 106(6) when the lot owner first becomes aware of the loss (ie the effect) rather than the more stringent alternative of the breach (ie the cause) and that is significant difference in the case of a latent cause, being a cause which a lot owner may not be expected to be able to discern.
>
> 28. Secondly, expressed in the context of this case, the construction of s 106(6) for which the applicant contends requires a view that the applicant first became aware of lost rent on 06 November 2018, 07 November 2018 ... 05 November 2020 and that appears to be an artificial construction. As such, that interpretation does not gives the words "first becomes aware of the loss' their

ordinary and everyday meaning which is the fundamental approach to statutory interpretation.

29. In other words, considered in isolation, if it be asked when the applicant first became aware of the rent loss, the answer is 2016, when she ceased to reside in her lot, and not 06 November 2018 which is, in fact, doing no more than working backwards from when the proceedings were commenced. The construction for which the applicants contend could have been achieved by s 106(6) simply stating that a lot owner may not recover loss for a period of more than two years prior to commencing proceedings.

30. Thirdly, as was noted in the respondent's submissions, if the applicant's view of the words "first becomes aware of the loss" is correct then those words have no work to do, which would be contrary to the principle expressed in *Plaintiff M70/2011 v Minister of Immigration and Citizenship* [2011] HCA 32 at [97]. For example, a lot owner who first becomes aware of loss in 2017 but does not commence proceedings until 2020 can still recover loss for the two year period prior to the commencement of the proceedings. It is difficult to see how the limitation suggested by s 106(6) could ever apply.

31. Fourthly, as a result, given the clear intent of s 106(6) to impose a two-year limitation period, when faced with the alternative constructions for which the applicant and the respondent contend in this case the interpretation for which the respondent contends is to be preferred as it promotes the purpose or object of the SSMA: s 33 *Interpretation Act 1987*.

32. Simply stated, under both interpretations, the 'limitation clock' starts when the lot owner first becomes aware of the loss but *Shum* suggests that clock restarts with every new part of the loss while *Vickery [No 2]* suggests it does not reset if a continuing breach causes a continuation of the same form of loss.

Grounds of Appeal

17 The grounds of appeal are stated as follows:

The Tribunal erred in law in its construction of section 106 of *the Strata Schemes Management Act 2015* (NSW) (SSMA).

(a) The Tribunal erred in law in adopting a construction of the words 'the loss' in section 106(6) of the SSMA as comprising the type of loss or the category of loss, as opposed to the actual loss claimed.

(b) The Tribunal erred in law in determining that the appellant's claim for damages under section 106(5) was entirely out of time because she had first become aware of the loss more than 2 years prior to the commencement of the proceedings in the Tribunal below.

(c) The Tribunal erred in failing to find that the appellant's claim for damages under section 106(5) of the SSMA was within time because that claim:

(i) involved fresh losses arising on a daily basis, and

(ii) did not extend to losses arising during any period of more than 2 years prior to the commencement of the proceedings in the Tribunal below.

(d) The Tribunal erred in failing to enter judgment for the appellant on her claim for damages under section 106(5) of the SSMA in the sum of $447,200, plus a further $2,800 for each week after 6 November 2021 until Order 2 made by the Tribunal on 8 November 2021 has been complied with by the respondent.

Submissions

18 The Appeal Panel has received extensive oral and written submissions from each party, together with three lever arch folders of documents.

Consideration

19 The pivotal issue in this appeal is the construction of each component of the words “first becomes aware of the loss”, and the intent of Parliament in selecting such words, when applying them to the statutory limitation contained in SSMA s 106(6).

Nature of the remedy provided by the SSMA

20 The Appeal Panel considers that, on this issue, guidance may be obtained from the decision in *State of Western Australia v Wardley Australia Ltd* [1991] FCAFC 314; (1991) 30 FCR 245 (Spender, Gummow, Lee JJ). In that decision, the Full Court was required to determine the application of a limitation contained in the *Trade Practices Act 1974* (Cth) (“TPA”) which provision is now incorporated into the *Australian Consumer Law*. An appeal from the decision was dismissed by the High Court of Australia: see *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514.

21 TPA s 82 gave the right to bring a cause of action for damages at any time within three years after the date on which the cause of action for breach of the TPA accrued. The judge at first instance found that a loss was sustained by the State of Western Australia (WA) from the moment it signed a Deed of Indemnity. The indemnity indemnified a bank if the customer was not able to satisfy its liability under the terms of a particular bills facility granted by the bank. Default occurred and a claim was made under the indemnity. WA contended that the damage was not suffered until it suffered loss or damage within s 82 (1) of the TPA.

22 The respondent in *Wardley* contended that "the date on which the cause of action accrued" was to be understood in the same sense given to that phrase in English decisions applying statutes of limitations to causes of action in negligence and in particular to actions to recover economic loss. The trial judge accepted the respondent's contentions.

23 On appeal, the Full Court observed at [29] :

> Section 82 is one of the provisions of the Act [TPA] which creates both right and remedy; see *Arnott's Limited v Trade Practices Commission (No.1)* [1989] FCA 135; (1989) 21 FCR 297 at 303 – 304. It is an example of what has been called "double function" legislation; see Aitken, "Jurisdiction, Liability and "Double Function" Legislation", (1990) 19 Fed L Rev 31. The section postulates a person who (i) suffers loss or damage, by conduct of another person, (ii) which Is done in contravention of a provision of Part IV or Part V of the act. It confers a right to recover "the amount of the loss or damage".

24 The Full Court said in its deliberation at [20] :

> Although s 82 provides a right of recovery by action for a person who suffers loss or damage "by, rather than "as a result of" (being the text of s 73 which is not relevant for present purposes) conduct of another, it is, as in s 73, a right of recovery tied to the amount of the loss or damage suffered." [emphasis in original].

25 The Full Court at [26] said:

> "… in our view it is unsafe in the process of statutory construction of s 82 to turn first to, or to rely too heavily upon, analogies drawn from the interpretation by other courts of statutes of limitation controlling causes of action arising under the general law or other statutes."

Their Honours also observed of the section:

> It confers a right to recover "the amount of the loss or damage". The right is exercisable by action not only against the person whose conduct contravened the Act, but against any person involved in the contravention… Thus, any particular contravention of a provision of Parts IV or V may give rise to causes of action vested in various persons to recover from various defendants "the amount of the loss or damage" the plaintiff suffered "by" the conduct in contravention of the legislation.

26 The Full Court then considered the nature of the right created by s 82(2) and stated that in a general sense it "may be described as the prescription of a time limitation: *Sent v Jet Corporation of Australia Proprietary Limited* (1996) 160 CLR 540 at 542": see [40]. The Full Court then observed:

> But there is a distinction between the operation of a statute of limitations, properly so called, which prevents the enforcement of rights of action

> independently existing, and a time limitation imposing a condition which is the essence of a new right: *R v McNeil* (1922) 31 CLR 76 at 96, 100–101.

27 The Full Court considered the nature of the limitation contained in s 82 (2) and stated at [26]:

> The substantive element of s 82 contains concepts which, at common law, would be encompassed by the terms "causation", remoteness" and "measure of damages". Sub-section 82(2) directs attention to concepts of "causation" by fixing the period within which an action may be commenced by reference to "the date on which the cause of action accrued" and thus to the suffering of the loss or damage "by" conduct contravened the statute. The use of the preposition "by" indicates the requirement for some sufficient cause or reason which links the conduct with the suffering of loss or damage, the amount of which is recoverable as a measure of damages."

28 The Full Court then referred to s 82(1) which provided a right and a remedy and stated at [43]:

> In our view, in stating that an action under sub-s (1) may be commenced at any time within the three year time limit specified in sub-s 82(2), that latter provision is to be regarded as having a procedural character. That is to say, sub--s 82(2) is a condition of the remedy rather than an element in the right and a pre-requisite to jurisdiction which cannot be waived. It follows that it is for a defendant to assert non-compliance, rather than for a plaintiff to assert compliance within sub- s 82(2) as an element of the cause of action.

29 Significantly, the Full Court said at [43]:

> The cause of action referred to in sub-s 82(2) is constituted by every fact it would be necessary for the plaintiff to prove in order to support its right to recover the amount of its loss or damage and the relevant question is at what time did all those facts exist; cf. *Van Win Pty Ltd v Eleventh Mirotron Pty Ltd* [1986) VR 484 at 488. Where the conduct complained of contravened s 52, the cause of action under s 82 will accrue upon the occurrence of the misleading or deceptive conduct and by the suffering by the injured party of loss or damage "by" that conduct. The remedy is given to recover "the amount" of damage from the person whose conduct contravened s 52, or from any person involved in that contravention.

Applying Wardley to the SSMA

30 The Appeal Panel respectfully adopts the reasoning in the approach of the Full Federal Court in *Wardley* and applies it in the analysis of the present statutory provisions.

31 The remedy provided by SSMA s 106 (5) is a statutory right provided to an owner of a lot in the strata scheme irrespective of whether there is a claim for a work order in respect of the strict liability of the owners corporation under

SSMA s 106(1) and (2), although proof of the facts justifying a work order is required as an element of the statutory right under s 106(5).

32 Under SSMA s 106(5), where a lot owner suffers damage “for breach of statutory duty” (being the duty of strict liability in s 106(1) and/or (2)) the lot owner can recover the amount of the reasonably foreseeable loss suffered by the owner against the owners corporation. The use of the term “reasonably foreseeable loss” is to be construed as a loss which is reasonably foreseeable as a result of the breach by the owners corporation of its obligation, which would necessarily include losses during a defined and ordered period for remediation if the claim was combined with a work order. It is not to be construed as a projection of future loss which would arise as a result of any further breaches of obligation (distinct from non-compliance with an associated work order) which may or may not occur.

33 Since the appellant’s lot suffered continuous and serious water ingress, it became uninhabitable for occupation. It was reasonably foreseeable that a loss would result if the owners corporation did not maintain the building in such a manner as to avoid such consequence.

34 SSMA s 106 (5) provides the statutory right in the lot owner to recover “any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation”. The contravention is of the strict duty in s 106(1) and/or (2).

35 The elements constituting (and required to be satisfied in respect of) the statutory right to compensation from breach of duty are, as the Full Court in *Wardley* found, distinct from the time limitation in s 106(6). The time limitation in s 106(6) must operate on a cause of action which has crystallised in its elements under s 106(5).

36 That crystallised cause of action may not be bought more than two years after the owner “first becomes aware of the loss”. To be “aware” of something means no more than the person has knowledge: the *Macquarie Dictionary* defines “knowledge” as including “the state of being cognizant or aware, as of a fact or circumstance”. The awareness is of “the loss” that is one element of the crystallised cause of action.

37 “The loss” may be economic loss, rather than loss to a specific physical asset. Where a loss is economic loss, it has been held that the loss is not sustained until it is detected: see *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 2 AC 1; *Hawkins v Clayton* (1988) 164 CLR 539 at 599–601 per Gaudon J. In this respect the statutory time limit in SSMA s106(6) is consistent with general principle.

38 However, the time limit itself must operate on a crystallised right, in this case the right in SSMA s 106(5).

39 The Full Court in *Wardley* found that the cause of action crystallised when a demand was made under the indemnity, not when the indemnity was signed. It then considered whether the proceedings had been brought within time under s 82 and, reversing the primary judge’s finding, found that the proceedings had been instituted within the time provided by TPA s 82(2).

40 As already said, in the present appeal the appellant’s loss is economic loss and the cause of action requires loss as a result of a breach of the strict liability duty in SSMA s 106(1) and/or (2). That strict liability duty is ongoing until the relevant strict liability obligation of repair or maintenance is fulfilled, although it may for a period be interrupted (or delayed in its commencement) under SSMA s 106(4). As already said, the relevant loss is actual loss that is reasonably foreseeable rather than future loss.

41 With actual economic loss as a result of this ongoing breach of strict statutory obligation, the crystallisation of the complete actual loss occurs and the cause of action is constituted only when the ongoing breach ceases. However, at any point there is a breach of the ongoing duty for which the loss arising from that breach is distinct *so as to constitute the two elements required to bring an action under SSMA s 106(5)*. That action, by reason of the statutory pre-requisites for its being brought, is necessarily distinct from any other claim that could be brought under s 106(5) as constituted by factual elements of breach of duty and loss.

42 SSMA s 106(6) operates on the completely-constituted claim under s 106(5), which means that the owner’s first awareness must be of “the loss” that

constitutes an element of *that* claim, not of any other loss even if it is of the same character or is of a continuing nature with the relevant loss for the claim.

43 The foregoing analysis recognises that the limitation in SSMA s 106(6) is a time limitation on the bringing of a claim for relief that is crystallised. It is *not* a limitation on the measure of loss that is but one element in the claim as specified in s 106(5). If it were otherwise, then the time limit itself would be an ingredient within the right of claim in s 106(5). A limitation on the measure of loss is the effect of the alternative characterisation endorsed by the Tribunal in the primary decision under review.

44 In contrast, the right in SSMA s 106(5) *is* limited by two matters. The first operates on the element of duty through the moratorium period offered to the owners corporation by s 106(4). The second is the restriction imposed by the commencement date of the statutory right of claim under s 106(5) of the present Act in contrast to the preceding law. The latter was recognised in *Shum* at [97]-[140] and was expressly endorsed by the decision of the Appeal Panel in *Vickery [2021]* esp at [3], [44]-[49].

45 The foregoing interpretation of SSMA s 106(6) recognises, contrary to the observation of the Tribunal in the primary reasons set out earlier with which we respectfully disagree, that s 106(6) has important and distinctive work to do. It prevents (like all time limit provisions) a claimant sitting on its rights beyond a limited period. The consequence of sitting on rights is that a claim based on earlier breach of the strict obligation causing loss is out of time, a consequence which has limited this appellant's rights of claim.

46 It is also important to recognise that the principle applied in *Wardley* that we seek to apply here will have different outcomes depending on the nature of the obligation the subject of breach and the prescribed right of relief. In *Wardley*, the obligation giving rise to a claim for economic loss was, as the Full Court found, crystallised when demand was made under the indemnity because of the nature of the obligation of indemnity. That obligation was to pay whatever the loss already accrued and continuing to accrue was found to be. In contrast, here the obligation is to compensate for the actual economic loss as a result of the particular breach of statutory obligation.

47 The foregoing analysis appears to us to be congruent with the remedial purpose of introducing s 106(5) into the current SSMA in contrast to the preceding law, while still sanctioning an owner who sits on pursing earlier breaches. The provision, as we have said, focuses on reasonably foreseeable loss actually suffered from the relevant breach of duty, not a projection of future loss from that relevant breach. If the breach of duty under SSMA s 106(1) and/or (2) continues, there will be a further right to claim for reasonably foreseeable loss as a result of that relevant breach, which may or may not be of the same character. We note the concession during the hearing of this appeal that the defects still exist although they are being addressed.

48 In contrast, the interpretation in the primary decision appears to require a "once for all" claim which could disadvantage a lot owner where the owners corporation continues in breach. Future loss cannot be quantified from historical breach because the length and consequences of the further breaches may differ. The problem cannot be fixed by calling in aid a right of renewal of proceedings under Sch 4 rule 8 to the NCAT Act because there would not be a non-compliance with the existing order (assuming the compensation ordered for the historical breach was satisfied but no more was offered).

49 An alternative interpretation of s 106(5) to forestall the difficulty just described would give a more generous remedy. It would characterise "the loss" giving rise to the claim being the loss resulting from the complete ongoing contravention of s 106(1) and/or (2) as "a contravention of this section". The time limit in s 106(6) would not then start to run until the breach of strict obligation had been finally remedied. That has not arisen on the parties' conduct of the present proceedings.

50 We note that in *Wardley* a submission was made that "although the action might be commenced forthwith, the assessment of the quantum of damages would be adjourned to await 'precise' assessment as events unfolded and the indemnity was called in accordance with its terms." The Full Court observed, even in the indemnity context, at [45]:

> *It would be an odd statutory construction which required the taking of such steps.*

The point applies even more strongly to the nature of the present statutory obligation, consistent with our characterisation of the loss as excluding projections of future loss.

51 The Appeal Panel in *Vickery [2021]* made what could be characterised as similar observations, obiter, at [63]:

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

52 However, the Appeal Panel in *Vickery [2021]* at [52] came to such conclusion on the basis, again as a non-binding observation, that the authority on continuing breach of covenant relied on in *Shum* could not lead to the conclusion that an owner was entitled to bring "an action each and every day after first becoming aware of the loss for that day, for as long as the breach and loss continue." The reason given was that such a claim would be "not consistent with the plain and ordinary meaning of s 106(6) which requires an owner to bring a claim within two years of first becoming aware of the loss".

53 The observations of Appeal Panels in decisions referred to in the Tribunal's determination under review, namely, *Shum* and *Dougherty*, clearly are consistent with the ongoing statutory obligation on the owners corporation. In *Shum* the Appeal Panel found that there was a continuing failure to maintain the building and that the owner was entitled to claim damages suffered in consequence of any breach of that duty. The Appeal Panel in *Dougherty* similarly found:

> "[93] The duty to repair common property, with which rights of access and associated liability to remediate damage to lot property were connected, was continuous and until repair occurred, with the dispute being over the scope of that duty. The duty to remediate damage to lot property was also continuous in its own right, in that any work order for compensation was remedial for breach of that continuous duty, not a breach of the duty on a single occasion as occurs with some breaches of duty of care causing loss or damage."

54 The Appeal Panel in *Vickery [2021]* endorsed the continuing character of the obligation in SSMA s 106(1) and (2) as we have already said.

55 The respondent has referred the Appeal Panel to decisions of courts relating to the application of limitations under various limitation statutes, such as *Baker Morrison v State of New South Wales* [2009] NSWCA 35; *State of New South*

Wales v Gillett [2012] NSWCA 83; *Kay v Sydney Airport Corporation Limited* [2014] NSWSC 744. The Appeal Panel does not find such decisions directly relevant to the issues arising in this appeal. As has been emphasised in *Wardley,* it may lead to error to adopt the principles in such matters which deal with limitation principles rather than a specific statutory remedy, other than as useful guidance subject to the primary interpretation of the statutory text and taking into account legislative context and purpose, as explained in *Vickery [2021]* at [23]-[34] and by the Court of Appeal in *Vickery v The Owners Strata Plan No 80412* [2020] NSWCA 284, (2020) 103 NSWLR 352 at [12], [15], [17]-[19].

Outcome of appeal

56 The result of the foregoing is that the Tribunal erred in its characterisation of SSMA s 106(6) as precluding the appellant's rights entirely as out of time.

57 Accordingly, the appeal is allowed.

Consequences of allowing the appeal

58 The Tribunal found that it would have awarded damages in the amount of $447,200 as representing the appellant's loss had the proceedings been brought within time. Since the Appeal Panel finds that the proceedings were brought within time, and as there is no challenge to the quantum assessed by the Tribunal, the Appeal Panel will award this amount.

Costs

59 At first instance the Tribunal, in its separate decision, ordered the applicant:

(a) to pay the costs of the respondent, on or after 23 September 2021 on the ordinary basis as agreed or as assessed;

(b) otherwise (i.e. in relation to costs incurred before 22 September 2021), each party was to bear their own costs. (Since "on or" was repeated in each time period, we have taken from the costs reasons at [11]-[12] the intent to be as we have just expressed it.)

60 The reasons for such orders were explained in the Tribunal's costs decision: see [11]–[15]. The Tribunal noted that up to and including 22 September 2021 both parties were incurring costs in relation to a work order and the claim for

loss of rent. However, on and from 23 September 2021 the essential claim was for loss of rent plus a minor aspect relating to levies.

61 The Appeal Panel notes that, since this is a matter in which there is in dispute concerning more than $30,000, rule 38 of the *Civil and Administrative Tribunal Rules 2014* (NSW) applies in lieu of s 60 of the NCAT ACt and accordingly it is not necessary to show special circumstances before the Tribunal may exercise its discretion to award costs.

62 The Appeal Panel has found that the appellant was entitled to succeed on her money claim. In these circumstances, the Appeal Panel considers that the usual rule should apply that the successful party is entitled be compensated by an award of costs: see *Latoudis v Casey* (1990) 170 CLR 534; *Oshlak v Richmond River Council* [1998] HCA 11.

63 Accordingly, the Appeal Panel will set aside the order for costs made by the Tribunal and in substitution order that the respondent pay the costs of the appellant in respect of proceedings which essentially relate to the rental claim, namely, on and from 23 September 2021.

64 The Appeal Panel will also order that the respondent pay the appellant's costs of the appeal.

Orders

65 The Appeal Panel orders as follows:

(1) The appeal is allowed.

(2) The decisions of the Tribunal delivered on 2 November 2021 and on 10 December 2021 (the latter on costs) are set aside.

(3) Owners SP 74232 is to pay Feride Tezel $447,200 on or before 30 June 2022.

(4) The respondent is to pay the appellant's costs of the proceedings at first instance on and from 23 September 2021 and the costs of this appeal.

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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