Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No 77559 v Touma; Touma v The Owners – Strata Plan No 77559
Medium Neutral Citation:	[2022] NSWCATAP 186
Hearing Date(s):	15 March 2021 (final submissions received 15 October 2021)
Date of Orders:	7 June 2022
Decision Date:	7 June 2022
Jurisdiction:	Appeal Panel
Before:	T Simon, Principal Member S Goodman, Senior Member
Decision:	(1) In relation to the Owners Corporation's appeal: (i) The appeal is allowed in part (ii) Leave to appeal is refused (2) In relation to the Lot Owner's appeal: (i) The time for the making of the appeal is extended until 30 November 2020 (ii) The appeal is allowed in part (iii) Leave to appeal is refused (3) Orders 1 - 7 of the orders made on 15 June 2020 [amended 3 December 2020] are set aside. (4) The proceedings are remitted to the Tribunal as originally constituted and in accordance with these reasons, to determine on the evidence that was before the Tribunal: (i) Whether the Lot Owner is entitled to damages

pursuant to s 106(5) of the Strata Schemes Management Act 2015.
(ii) What orders should be made, if any, in relation to damage to common property and consequential damage to lot property.

(5) If either party seeks a costs order in relation to the appeal, the following directions apply:

(a) The applicant for costs (costs applicant) must file and serve any application within 7 days after these orders.
(b) The respondent to the cost's application must file and serve evidence and submissions in reply 14 days from the date of these orders.
(c) The costs applicant must file and serve any submissions in response within 21 days from the date of these orders.
(d) Submissions must include submissions concerning whether an order should be made under s 50(2) of the Civil and Administrative Tribunal Act, 2013 dispensing with a hearing.

(6) The stay made by the Appeal Panel on 31 July 2020, varied on 21 August 2020 and further varied on 9 September 2020 is lifted.

Catchwords:

STRATA TITLE – awarding damages to a lot owner for breach of the statutory duty in s 106(1) of the Strata Schemes Management Act 2015 – duty to properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation -
- whether the Tribunal had power under s232 of the SSMA to order the owners corporation to rectify damage to lot owner's property - whether breach of s106(1) established - whether works to common property and repair to lot property can be order in the absence of an occupation certificate under the Environmental Planning and Assessment Act 1979 (NSW).

APPEAL – question of law – adequacy of reasons

Legislation Cited:	Civil and Administrative Tribunal Act 2013 Civil and Administrative Tribunal Rules 2014 Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Amendment Act Liquor Act 2007 Local Government Act 1919 Strata Schemes Management Act 2015 Strata Schemes Management Act 1996 The Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017
Cases Cited:	Fitzgerald v FJ Leonhardt Pty Ltd (1997) 189 CLR 215 Gnych v Polish Club Ltd [2015] HCA 23; 255 CLR 414 Karl Suleman Enterprises Pty Ltd (in liq) v Babanour [2004] NSWCA 214 John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Mastellone v The Owners-Strata Plan No 87110 [2021] NSWCATAP 188 New South Wales Land and Housing Corporation v Orr [2019] NSWCA 231 Reading Properties Ply Ltd v Auburn Council (2007) 158 LGERA 116 Shih v The Owners - Strata Plan No 87879 [2019] NSWCATAP 263 Strathfield Municipal Council v C & C Investment Trading Pty Ltd (No 3) [2018] NSWLEC 69 The Owners - Strata Plan No 37762 v Pham [2006] NSWSC 1287 The Owners - Strata Plan No 74835 v Pullicin; The Owners - Strata Plan No 80412 v Vickery [2020] NSWCATAP 5 The Owners Strata Plan No 30621 v Shum [2018] NSWCATAP 15 The Owners – Strata Plan No 80412 v Vickery [2021] NSWCATAP 98 Vickery v The Owners - Strata Plan No 80412 [2020] NSWCA 284 Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd [1978] HCA 42; 139 CLR 410
Category:	Principal judgment

Parties:	2020/00370912 (previously AP 20/30170) The Owners – Strata Plan No 77559 (Appellant) Mounir Touma (Respondent) 2020/00371165 (previously AP 20/48067) Mounir Touma (Appellant) The Owners – Strata Plan No 77559 (Respondent)
Representation:	2020/00370912: Counsel: D Knoll (Appellant)(P Barham (Respondent) Solicitors: Grace Lawyers (Appellant) Kerin Benson Lawyers (Respondent) 2020/00371165: Counsel: P Barham (Appellant) D Knoll (Respondent) Solicitors: Kerin Benson Lawyers (Appellant) Grace Lawyers (Respondent)
File Number(s):	2020/00370912 (previously AP 20/30170) 2020/00371165 (previously AP 20/48067)
Publication Restriction:	Unrestricted
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Unreported
Date of Decision:	15 June 2020
Before:	P Boyce, Senior Member
File Number(s):	SC18/09581

REASONS FOR DECISION

1 This matter involves an appeal by an Owners Corporation and a cross appeal by the owner of a lot, Mr Mounir Touma. Both parties appeal a decision made by the Tribunal on 15 June 2021 and which was amended on 3 December 2020 (the decision).

2 In this decision, we will refer to the initial appellant as "the Owners Corporation" and the cross appellant as "the Lot Owner", or "Mr Touma".

3 The application to the Tribunal was filed by the Lot Owner on 22 February 2018, primarily seeking rectification of water ingress. In summary, the Tribunal made orders for the following:

(1) The Owners Corporation to undertake certain rectification works as set out in the Conclave of Experts Joint Schedule dated 14 June 2019.

(2) The Lot Owner to allow access for those works.

(3) Dismissal of the Lot Owner's claim for damages under s 106(5) of the *Strata Schemes Management Act* 2015 (SSMA).

4 The Appeal Panel made an order for a stay of the first instance proceedings by consent on 31 July 2020. The order for the stay was varied on 21 August 2020 with the Appeal panel extending the stay except in respect of certain works contained in a conclave of experts' joint Scott schedule dated 14 June 2019. Further consent orders were made varying the stay on 9 September 2020. On 18 January 2021 a further application to lift the stay was dismissed because it was withdrawn.

5 It is noted that the parties have provided an 'Agreed Bundle' (AB) to the Appeal Panel including written submissions. The parties also provided extensive oral submissions at hearing. After the appeal hearing, the parties bought to the Appeal Panel's attention the decision of *Mastellone v The Owners-Strata Plan No 87110* [2021] NSWCATAP 188, which had been decided after the hearing of this appeal. The parties were provided with an opportunity to provide submissions in relation to the decision in Mastellone.

6 Those documents and submissions have been considered by us in determining this appeal.

Background

7 The strata scheme comprises 64 residential lots. The construction of the property was carried out by Statewide Developments Pty Ltd (Statewide). Mr Mounir Touma was appointed a director of Statewide on 26 October 2010. The works to build the property were contracted for in 2006 and an occupation certificate for the scheme, essentially excluding the penthouse, was issued on 7 February 2007. Mr Touma purchased the penthouse in the Strata Plan from Statewide on 16 March 2011. The penthouse extends over a number of levels which include bedrooms, a main living area, a raised swimming pool with a vergola and an open terrace containing landscaped gardens with planter boxes.

8 It is not in dispute that water penetrated the penthouse. In 2012 the Owners Corporation engaged RHM Consultants to inspect and report on the water ingress. A report identified 28 items related to water ingress from the level 6 terrace and included a scope of work to rectify the water entry. The report identified internal water damage within the penthouse at levels 6 and 7. Statewide carried out rectification work including external tiling to level 6.

9 In 2013 remedial building works were commissioned by the Owners Corporation to waterproof the level 6 terrace. The works involved the removal of the planter boxes, removal of tiles, waterproofing and re-tiling on level 6. The joint experts agreed that those works have not rectified that defect.

10 In January 2015 the Lot Owner observed damage to the garage doors servicing his garage spaces. The Owners Corporation carried out works to the garage doors. The works did not rectify the defective garage doors.

11 Water penetrations in the penthouse were reported by Mr Touma in April 2015 and January 2016. An electrical fire occurred on 16 March 2017 attributed to further water penetration rendering the penthouse's vergola, the C-bus system and other electrical equipment inoperable.

12 On 22 February 2018 Mr Touma made an application to the Tribunal. Mr Touma sought orders against the Owners Corporation for repairs to common property of the strata scheme, carrying out of works to his lot necessitated by water penetration through the common property roof, windows, doors, tiling

and waterproof membrane defects and repair of damage allegedly caused to his lot by the Owners Corporation tradespersons entering the lot to conduct works. In the alternative Mr Touma was seeking damages. By the time the matter came to hearing Mr Touma was also seeking orders under s106 of the SSMA regarding the Owners Corporation's failure to comply with the statutory obligations to maintain the common property, including ongoing water penetration in the applicant's lot, damage to the applicant's garage door and damage occasioned to other parts of his unit by previous repair attempts by the Owner's Corporation.

Appeals

13 Decisions of the Tribunal are internally appealable decisions and an appeal can be made from them as of right where there is a question of law and with the leave of the Appeal Panel on specified grounds: see, s 80(1) and (2)(b) of *Civil and Administrative Tribunal Act* 2013 (NCAT Act).

14 The Owners Corporation's appeal was lodged within 28 days of the Tribunal decisions. The Lot Owner's 'Notice of Appeal' was not lodged within the 28-day time period specified in cl 25(4)(b) of the *Civil and Administrative Tribunal Rules 2014* (the Rules). The Appeal Panel has power to extend time under s 41 of the NCAT Act. There was no objection from the Owners Corporation to extend time pursuant to s 41 of the NCAT Act for the lodging of the appeal. On that basis we extend time for the lodging of the Lot Owner's appeal.

15 The proceedings were heard by the Tribunal on 17 June and 31 October 2019.

16 On 15 June 2020, the Tribunal made orders and delivered its Reasons for Decision.

The issues reframed

17 Both appellants' grounds of appeal raise common issues and we have determined the appeal by way of resolving those issues. They have been framed as follows:

(1) Does the Tribunal have power to award damages pursuant to s 106(5) of the SSMA?

(2) Did the Tribunal err in refusing to stay the application and in failing to transfer the proceedings?

(3) Does the Tribunal have the power to order works to be done by an owner's corporation on lot property?

(4) Does the Tribunal have power to order works be done in the absence of an occupation certificate?

(5) Were the Tribunal's reasons adequate?

(1) Does the Tribunal have power to award damages pursuant to s 106(5) of the SSMA?

18 This issue is raised by grounds 1 and 3 of the Lot Owner's appeal. In the primary proceedings, the lot owner sought relief against the Owners Corporation pursuant to ss 106, 122 and 232 of the SSMA. The relief was sought in relation to the Owners Corporation's alleged failure to comply with its statutory obligations to maintain the common property and the loss that occurred because of that alleged failure.

19 As noted above, the proceedings were heard by the Tribunal on 17 June and 31 October 2019.

20 The time of hearing and determination of the proceedings coincided with a series of other proceedings being heard by the Appeal Panel and subsequently the Court of Appeal in relation to s106(5) of the SSMA.

21 In *The Owners Strata Plan No 30621 v Shum* [2018] NSWCATAP 15, delivered on 8 January 2018, an Appeal Panel of the Tribunal found that it had jurisdiction to determine a claim for damages under s 106(5) of the SSMA. That case as it stood at the time of the making of the Lot Owner's application was favourable to the Lot Owner in respect of jurisdiction under s106(5), at least in so far as it related to awarding damages.

22 Subsequently in the matter of *Shih v The Owners - Strata Plan No 87879* [2019] NSWCATAP 263, a decision which was delivered on the second day of the hearing of this application before the Tribunal (i.e., 31 October 2019), an Appeal Panel decided that the Tribunal did not have jurisdiction or power to make an award of damages under section 106(5), a decision which was unfavourable to the Lot Owner's case.

23 On 15 January 2020, while the Tribunal's decision was reserved, an Appeal Panel in *The Owners - Strata Plan No 74835 v Pullicin; The Owners - Strata*

Plan No 80412 v Vickery [2020] NSWCATAP 5 (*Pullicin*), confirmed the decision in Shih that the Tribunal did not have jurisdiction to award damages under s106(5).

24 As noted above, on 15 June 2020, the Tribunal's Reasons for Decision were delivered. At [108] of the Reasons for Decision the Tribunal found:

> … it is without jurisdiction to hear and determine the applicant's damages claim under section 106(5) of the SSMA 2015. The decision of Pullicin removing the doubt about the Tribunal's lack of jurisdiction to make orders for damages under section 106(5)

25 On 18 June 2020, three days later, the New South Wales Court of Appeal decided *Vickery v The Owners - Strata Plan No 80412* [2020] NSWCA 284 (*Vickery*), effectively reversing the Appeal Panel's decision in Pullicin and finding that the Tribunal did have jurisdiction to award damages under s106(5) of the SSMA.

26 Both parties agree that the Court of Appeal decision in Vickery has now reversed the position described in [108] of the Reasons for Decision. The law as it presently stands (which was not the position at the time the decision was delivered), allows the Tribunal to award damages pursuant to s 106(5) of the SSMA.

27 However, the Owners Corporation contends that the decision in Vickery is not relevant to the Lot Owner's application because the evidence would not have entitled the Lot Owner to damages in this case. That was because the alleged loss claimed by the Lot Owner was incurred before and after 30 November 2016 and the evidence of causation, including as to what event caused what loss, was absent. The Owners Corporation submits that the Lot Owner was unable to discharge his onus of proving a loss that was caused by a statutory breach occurring after 30 November 2016.

28 The predecessor legislation to the SSMA, imposed on an owners corporation a statutory duty to maintain and repair the common property in much the same terms as s 106 of the present SSMA (see 62(1) of the *Strata Schemes Management Act* 1996 (SSMA 2016)). The SSMA 2016 had no equivalent provisions to 106(5) or 106(6) of the SSMA, which relevantly provide:

> (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.

29 The SSMA contains a general savings provision in Schedule 3, Part 2, clause 3 as follows:

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

30 The Appeal Panel in *Shum* dealt with the transitional provisions in clause 3(1) in determining whether Mr Shum was entitled to damages incurred before the SSMA came into effect. In *Shum* the Appeal Panel distinguished between the statutory duty in s 106(1) and any liability for breach of that duty. The effect of the savings provision was that if on the date the SSMA commenced, an owners corporation was in breach of the statutory duty in s 62(1) of the 1996 Act (that is the duty to maintain and repair), the breach is taken to have been a breach of s 106(1). The Appeal Panel held that in respect of the obligation on an owners corporation to maintain the common property, clause 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 (see *Shum* at [112] and [113])

31 However, the Appeal Panel in *Shum* found that s 106(5) does not operate retrospectively to give a lot owner an entitlement to claim damages for breach of statutory duty where the loss suffered arises from a breach of duty occurring prior to the commencement of the SSMA on 30 November 2016.

32 In *The Owners - Strata Plan No 80412 v Vickery* [2021] NSWCATAP 98 which were the proceedings remitted to the Tribunal from the Court of Appeal, the Appeal Panel confirmed the position in Shum:

> 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.

33 We are also of the view that the SSMA does not entitle a lot owner to recover damages for loss incurred before the SSMA came into effect.

34 In submissions made to the Tribunal after the proceedings were heard (and while the Tribunal was reserved) the Owners Corporation raised the issue in written submissions (AB pg. 1677):

> Mr Touma's evidence as to damages (including quantum) which comprises no more than a quotation, not only mixes together alleged loss that was incurred before and after 30 November 2016, it mixes together alleged damage to lot property with damage to common property. Evidence of causation including as to what event caused what loss and when is absent, and Mr Touma is unable to discharge his onus of proving a loss that was caused by a statutory breach occurring after 30 November 2016.
>
> In short, the evidence which he has adduced would not entitle him to an order for damages, whether the order was sought from a court or from this Tribunal. That alone is a factor against transferring the proceedings to the Supreme Court.

35 The quotation referred to is a quotation from Mardini Constructions dated 15 March 2018 which details costs remedial work to the penthouse.

36 The Owners Corporation submits that Mr Touma was aware of loss arising from water penetration prior to 30 November 2016 and more than two years before commencing the proceedings in February 2018.

37 In a Statutory Declaration dated 3 October 2018, Mr Touma states he observed damage to the garage doors servicing his car spaces in January 2015. Mr Touma states that extensive water penetration was noted in April 2015, but not investigated by the Owners Corporation and that in January 2016 he emailed the managing agent in relation to further water leaks [AB-139-140].

38 Further in the Statutory Declaration, Mr Touma states:

> 32. On 3 March 2017 I sent an email to John Russo advising of a new water leaks into my unit. The email forwarded several emails to Body Corporate services in relation to the water penetration, damage to my garage, incomplete

> works by Danrae waterproofing amongst other items dating from later October 2016….

39 The Lot Owner submits that the evidence demonstrates that the reference to "new water leaks" means that there was evidence before the Tribunal of breaches after the commencement of the SSMA which may give rise to foreseeable loss to be awarded to the Lot Owner.

40 The Owners Corporation submits that even if there were daily continuing breaches, the Lot Owner had to satisfy the Tribunal that breaches that occurred after 30 November 2016 caused the losses for which it made a claim under s106(5).

41 The Lot Owner submits that the limitation issue had never been pleaded by way of defence by the Owners Corporation in the proceedings and it was not provided with an opportunity to deal with it before the Tribunal.

42 In written closing submissions to the Tribunal (AB 1449 - 1450) the Lot Owner relevantly submitted:

> 11. Insofar as the applicant is to be compensated in monetary terms rather than pursuant to a work order pursuant to s 232 of the SSMA, the applicant relies upon the costing of Mardini Constructions at CB 1/249, other than in respect of the planter boxes….
>
> 12 However, as raised with the Tribunal on the last day of hearing, in the case of *Shih v The Owners - Strata Plan No 87879* [2019] NSWCATAP 263, the Appeal Panel determined that the Tribunal did not have jurisdiction to make an order of, effectively, damages or compensation under s 106(5). That is precisely part of the relief that has been claimed in these proceedings in respect of consequential damage. It is also relief which has been claim pursuant to section 122 in respect of certain damage to Lot property caused by works undertaken by the OC….

43 The Lot Owner submitted that *Shih* may be further appealed and in the event that it was not, the Lot Owner foreshadowed that he would make an application to the Supreme Court to determine the question in relation to s 106(5) and sought that question of damages be deferred until such determination be made. That application was later made by the Lot Owner and dismissed by the Tribunal in the reasons for the decision. We shall deal with the dismissal of the stay and transfer applications in more detail below.

Consideration

44 We are of the view that Tribunal erred in finding that it did not have jurisdiction to make an order pursuant to s106(5) of the SSMA and because of that finding it did not determine whether the Lot Owner was entitled to damages for loss pursuant to s 106(5) SSMA and the Lot Owner's first ground raised in this appeal is upheld.

45 The Owners Corporation's written closing submissions to the Tribunal focused on whether the Tribunal had power to make orders pursuant to s 106(5) of the SSMA.

46 Even if the limitation issues were never pleaded by way of defence, whether the application for loss was bought within time would have been a matter that the Tribunal would have needed to consider in determining whether to award damages for loss. The time limitation issues and alleged lack of evidence on the point were raised by the Owners Corporation in submissions relating to the Lot Owner's transfer application, which came following the decision in *Pullicin* and after the proceedings were heard and evidence closed.

47 The Reasons for Decision at [13]-[14] characterise the Lot Owner's application as follows:

> 13 The applicant seeks compensation in monetary terms or, in the alternative, a work order pursuant to section 232 of the SSMA2015, being the costing of Mardini Constructions to carry out rectification works other than in respect of the planter boxes of $829,477.00. The costing for the rectification of the planter boxes is as quoted by FCG Landscaping in the amount of $55,027.50. The Mardini Constructions quote does not include the cost of rectifying the vergola, for which Expert O'Mara for the respondent allows $55,000.00. Expert O'Mara costs the rectification works at $638,000.
>
> 14 Consequential damages are claimed for works undertaken by Danrae Remedial Service Pty Ltd ("Danrae") in 2013 which involved demolition of planter boxes, plants and an irrigation system, taking up tiles, waterproofing Level 6 slab outside the perimeter of the structure and relaying tiles. At the time of the hearing the Tribunal, in Shih, said that the Appeal Panel had found that the Tribunal did not have jurisdiction to make an order for damages or compensation under section 106(5). This is the order the applicant seeks for

what he refers to as consequential damages.

48 Despite the Owners Corporation's assertions to the contrary, there was evidence before the Tribunal as to loss, being the Mardini Construction quote and there was also evidence of breaches alleged to have occurred after the commencement of the SSMA. We do not accept the Owners Corporation's submissions that regardless of the decision in *Vickery* the Lot Owner would not have had a claim, as that matter was not determined by the Tribunal because it found it did not have power to award damages. On that basis the proceedings are remitted to the Tribunal (as originally constituted) for the Tribunal to determine whether the Lot Owner is entitled to damages pursuant to s 106(5) of the SSMA application. The parties are to be given an opportunity to make submissions on the issue, however no further evidence will be allowed to be adduced in the matter.

49 Nothing we have said above should be taken to mean that the Lot Owner is in fact entitled to damages under s106(5), at this stage, that remains a matter for determination on remittal of the proceedings.

50 The Lot Owner also makes an application that we allow the appeal and transfer the proceedings to the Supreme Court, because of the limitation issue is being pressed by the Owners Corporation. Even though we are allowing this part of the appeal, we are not satisfied that the proceedings should be transferred. The law in relation to the power to award damages is well settled. The Tribunal is empowered to make orders under s106(5) and a lot owner is entitled to recover damages for loss incurred after the SSMA came into effect and as long as the application for such loss is within time. Those issues were never decided by the Tribunal and on that basis, we find no grounds to transfer these proceedings to the Supreme Court.

(2) Did the Tribunal err in refusing to stay the application and in failing to transfer the proceedings?

51 This issue is raised by appeal grounds 4 - 8 of the Lot Owner's appeal. On 10 December 2019, after the Tribunal's hearings and while the proceedings were reserved awaiting a final decision, the Lot Owner sought that the matter be transferred to the Supreme Court under s 54 of the NCAT Act.

52 The Lot Owner stated that the relevant issues in the proceedings were:

> 1. whether or not there was a breach of section 106 of the Strata Schemes Management Act 2015 (NSW) by the respondent owners corporation,
>
> 2. whether compensation is payable to the Applicant for damage to his lot property arising from the breach of section 106 of the Act pursuant to either section 106(5) or section 232 of the Act?

53 The Lot Owner also identified the two Appeal Panel decisions of Shih and *Shum* which had resulted in two different results on the issue of damages and 106(5).

54 As noted above, while the proceedings were reserved the Appeal Panel delivered the decision in *Pullicin* which had, like the decision in *Shih*, found that the Tribunal did not have power pursuant to s 106(5) of the SSMA to make an order for damages.

55 On 19 February 2020, the Lot Owner again wrote to the Tribunal and acknowledged that the issues it had raised in relation to the transfer on a question of law had been determined in the Appeal Panel case of Pullicin and they were withdrawing the application to refer the matter to the Supreme Court on a matter of law and instead sought have the matter transferred pursuant to clause 6 (1) (a) and (b) of Schedule 4 of the NCAT Act so that its claim for damages could be determined.

56 At [107] of the Reasons for Decision the Tribunal considered that application and refused the application to transfer the proceedings for the following 6 reasons:

(1) The Tribunal had the power to make all necessary orders except for the damages claim under section 106(5) and it is not in the interests of justice that the whole of the proceedings be transferred after the case has been heard and all procedures completed to allow a final determination to be made.

(2) A transfer at that stage of the Tribunal proceedings would result in delay and additional costs.

(3) The reasons referred to substantial agreement by the expert witnesses for the rectification work. If the whole application were transferred without a determination being made on the issue where there is substantial agreement an injustice would be served on the respondent.

(4) All issues apart from the damages issue could be determined by the Tribunal and should be to bring finality to that part of the proceedings.

(5) The Tribunal also considered the Lot Owner's submission that if the whole of the proceedings is not transferred, the applicant will be out of time to recommence his damages claim in the Supreme Court. The Owners Corporation submitted that could be resolved by the Tribunal making a determination of that claim on the facts and determine if the applicant would have been entitled to damages and then transfer to the Supreme Court for determination as to the quantum of damages. The Tribunal rejected that course of action as its decision may put the Supreme Court in a compromised position that it would be required to determine damages on a finding of the facts that it might not agree with.

(6) The Tribunal had no jurisdiction to make a determination under section 106(5).

Consideration

57 Clause 6 (1) (a) and (b) of Schedule 4 of the NCAT Act relevantly provides:

> 6 Transfer of proceedings to courts or to other tribunals
>
> (1) If the parties in any proceedings for the exercise of a Division function so agree, or if the Tribunal of its own motion or on the application of a party so directs, the proceedings are-
>
> (a) to be transferred to a court (in accordance with the rules of that court) that has jurisdiction in the matter, and
>
> (b) to continue before that court as if the proceedings had been instituted there.

58 The decision whether to transfer the proceedings to is a discretionary decision. This ground is raised by the Lot Owners as a question of law and in the alternative the Lot Owner seeks leave to appeal. This ground could only succeed based on a question of law if the Tribunal acted on a wrong principle, allowed extraneous or irrelevant matters to guide or affect it, mistook the facts, or did not take into account some material consideration. See *John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13].

59 We discern no error of law in Tribunal's decision. It was not unreasonable for the Tribunal to make the decision not to transfer the matter to the Supreme Court as the transfer application was made after the evidence had been adduced at final hearing and the Tribunal had reserved.

60 The Lot Owner in ground 6 of its appeal also states that the Tribunal failed to provide adequate reasons in relation to the refusal to transfer the "part-heard" proceedings. The proceedings were not part heard. The evidence was closed,

and the proceedings was reserved awaiting an outcome. The Lot Owner had been on notice since the decision had been made in *Shih* (and the evidence had not yet closed) that it would need to make an application in relation to s 106(5) elsewhere. In the circumstances, the Tribunal's reasons in relation to the transfer application were adequate and we find nothing in the reasoning of the Tribunal which would give rise to a question of law on this point.

61 The Lot Owner also submits that if the Tribunal had the benefit of the Court of Appeal decision in *Vickery*, the Tribunal would have found that it had jurisdiction to make orders for damages pursuant to s 106. The Lot Owner contends that on that basis a proper exercise of discretion after the Appeal Panel decision in Pullicin, would have been to defer the decision by granting a stay.

62 The Lot Owner submits that the Tribunal placed too much emphasis on the "quick" aspect of section 36 of the NCAT Act, at the expense of "just".

63 At [100] to [103] of the Reasons for Decision the Tribunal considered the application made by the Lot Owner for a stay of the proceedings. That application was also made on the basis that the decision in *Pullicin* had been appealed by Vickery to the Court of Appeal and the matter was due to be heard on 18 June 2020. The Tribunal found:

> 102 The guiding principle of the Tribunal is to facilitate the just, quick and cheap resolution of the real issues in the proceedings. The applicant does not expand on his assertion that delay is warranted in the interests of section 36 beyond a mere statement to that effect. As the law is at the time of making this determination the Tribunal is satisfied it does not have jurisdiction to hear and determine the claim for damages under section 106(5). It can make a determination on the remaining issues and the application to transfer the proceedings to the Supreme Court. It can dispose of those issues justly, quickly and cheaply by not delaying the determination further. It is not just in the interests of the applicant that decision should be made but also the interests of the respondent.
>
> 103 The Tribunal refuses to stay its making of its determination.

64 In many ways the issues raised by this ground have been overtaken by events. However, we are not satisfied that the reasoning of the Tribunal in relation to a

stay gives rise a question of law. We do not agree with the Lot Owner that the Tribunal discretion miscarried, or the Tribunal reasons placed too much emphasis on the "quick" at the expense of "just". It had been the case throughout the proceedings that the ground had shifted in relation to the position relating to s106(5) of the SSMA and it was always open to the Lot Owner to have commenced the proceedings in another jurisdiction. The hearing had been finalised and decision was reserved. It is an unfortunate coincidence for the Lot Owner that the Court of Appeal decision in Vickery was delivered only 3 days after the delivery of the Tribunal's decision, but there is nothing to suggest that the Tribunal was on notice as to when the finalisation of the Vickery would occur.

65 The Lot Owner has also sought leave to appeal in relation to these grounds. Given that a decision has since been made in relation to s 106(5) of the SSMA in the Court of Appeal decision in Vickery and we have remitted the matter to be determined in relation to the s 106(5) application, we are not satisfied that we should grant leave to appeal as there would be no substantial miscarriage of justice to the Lot Owner.

(3) Does the Tribunal have the power to order works to be done by an owner's corporation on lot property?

66 This issue is raised by grounds 6 and 7 of the Owners Corporation's appeal and grounds 2 and 11 of the Lot Owner's appeal.

67 Order 1 of the orders made by the Tribunal required the Owners Corporation to comply with its duty under subsection 106(1) of the SSMA to maintain and repair the common property "by doing the Agreed Rectification Works set out in the Conclave of Experts Joint Schedule dated 14 June 2019." While neither party disputes that the Owners Corporation can be ordered to do work on common property, it is in dispute as to whether an owners corporation can be ordered to do work on lot property for damage that has occurred because of the Owners Corporation failure to comply with the obligation to maintain and repair common property.

68 The Owners Corporation submits that ordering an owners corporation to do work on lot property does not fall within the scope of s 232 of the SSMA.

69 The Owners Corporation relies on the reasoning in *The Owners - Strata Plan No 37762 v Pham* [2006] NSWSC 1287 and submits that the Tribunal does not have a general supervisory function or ancillary jurisdiction in relation to an owners corporation and that s 232 of the SSMA limits *'the power of the Tribunal, confining the subject matter of the dispute or complaint about which the Tribunal may make orders*': see [62] - [70] of *Pham*.

70 The Owners Corporation submits that the Court of Appeal in *Vickery* did not settle the scope of s 232 and the decision in Vickery only stands only for the proposition that s 232 of the SSMA includes a power to order the damages provided for in SSMA s106(5) and on that basis *Pham* remains good law as to that point. That is, any power to make an order must come from the wording of the legislation and there is no power to order an owners corporation to do work on lot property.

71 On that basis the Owners Corporation submits that there is no power to order an owners corporation to do work on lot property and there is no relevant ancillary or consequential matter in respect of which the Tribunal empowered to order an owners corporation to do work on lot property either.

72 The facts in *Mastellone* are not identical to this matter. However, *Mastellone* also dealt with water ingress to an apartment of the lot owner. The water ingress was as a result of the Owners Corporation's failure to repair or maintain the common property and resulted in damage to the lot property, being the paintwork in the ceiling.

73 In *Mastellone,* it was contended by the Owners Corporation that although the Tribunal could order the respondent to carry out repair work to common property it could not make such an order in respect of the internal ceiling which was the property of the lot owner.

74 In *Mastellone* at [35] - [36] the Appeal Panel stated:

> We do not agree with the respondent's contention that the Court of Appeal's decision in Vickery, or any part of the judgements in that case, makes it clear that the Tribunal has no jurisdiction or power under s 232 of the SSMA to make the work order sought by the appellant in this case. It is clear that the judgements in Vickery were concerned with the particular issue of whether the Tribunal had jurisdiction to make an order for damages for a breach of s 106(1). They did not address the issue as to the jurisdiction of the Tribunal to

> make an order for the OC to carry out repair work to the property of a lot owner pursuant to s 232 of the SSMA. We have examined the particular paragraphs from the judgements relied upon by Mr Bacon but we fail to see how these assist his argument in any way.
>
> On the contrary, the breadth of the meaning of the language "make an order to settle a complaint or dispute" in s 232 adopted by Justices Basten and White supports, rather than detracts from, the position that the Tribunal does have the jurisdiction to make the orders sought by the appellant.

75 Accordingly, in *Mastellone* a work order was made for the Owners Corporation to repair the lot property. The Lot Owner submits that we should follow the reasoning in *Mastellone*.

76 The Owners Corporation submits that nothing in the reasoning of the majority in *Vickery* supports the proposition that there is jurisdiction to make an order about a matter which does not fall within SSMA. It submits that s 232(1), relates to the *"operation, administration or management of a strata scheme" or "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"* or *"an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act"* and they are the only relevant heads of power. It also submits that doing work on lot property does not fall within any of those heads of power.

77 The Owners Corporation further submits that the decision in *Vickery* was concerned with the issue of whether the Tribunal had jurisdiction to make an order for damages for a breach of s 106(1) and that *Vickery* did not address the issue as to the jurisdiction of the Tribunal to make an order for the Owners Corporation to carry out repair work to the property of a lot owner pursuant to s 232 of the SSMA. The Owners Corporation also submits that the Appeal Panel in *Mastellone* pointed to no function or duty of an owners corporation to repair or maintain lot property to bring the claim within s 232(1) of the SSMA.

Consideration

78 While we accept that we are not bound to follow the decision of *Mastellone*, we are of the view that the decision in *Mastellone* is correct.

79 In the judgment of Basten JA in *Vickery*, at [28] his Honour said in relation to s 232:

> It is difficult to understand why this language should be read down to that extent. The statutory scheme must be read as a whole. The terminology adopted in s 232 should be understood to cover claims and disputes with respect to any of the matters identified in subs (1), which are themselves in terms clearly intended to cover the full range of an owners corporation's functions in operating, administering and managing the strata scheme, and exercising or failing to exercise any function under the Act, or the by-laws of the strata scheme

80 White JA at [166] also stated:

> I see no reason to read down the amplitude of the authority conferred on the Tribunal by s 232(1).

81 Section 232 of the SSMA, relevantly, 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.
>
> (2) Failure to exercise a function For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if-
>
> (a) it decides not to exercise the function, or
>
> (b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.
>
> ……

82 The proceedings in this matter related to an application for orders under s106, 122 and 232 of the SSMA and the Owners Corporation's failure to comply with the statutory obligations to maintain common property. The Lot Owner was seeking damages by way of a money order or in the alternative work orders to repair common property.

83 We are satisfied that this raises a dispute between the parties falling within the terms of s 232(1) in respect of which the Tribunal is empowered to make an order "to settle". In our view, following the principles set out by the majority in *Vickery*, there is a discretion under s 232 to make an order repairing lot property that has been damaged because of an Owners Corporation's failure to comply with its obligations to maintain and repair.

84 In so far as the grounds raise this issue, it was not incorrect for the Tribunal to make a work order for repair of lot property if it was found that the lot property was damaged because of the Owners Corporation's failure to maintain and repair. It is unclear from the Tribunal reasons whether the Tribunal was of the view that it could make such orders. At [115] of the Reasons for Decision the Tribunal stated

> The Tribunal will order that the rectification works and the method of rectification identified in the Joint Scott Schedule is to be carried out so far as it affects the common property.

85 Despite that, it appears that the Tribunal did makes orders which affected lot property, such as the kitchen ceiling, which in the reasons the Tribunal found was lot property and the Owners Corporation did not have the obligation to repair (see [127], but which was captured by the orders to be repaired (it was not excluded from the orders).

86 Accordingly, in so far as this issue was raised by grounds 6 and 7 of the Owners Corporation, it must fail. However, in so far as it is raised by ground 2 and 11 of the Lot Owner's appeal it is upheld. The proceedings must be remitted to the Tribunal to properly determine whether to make orders affecting lot property. On that basis the proceedings are remitted to the Tribunal (as originally constituted) for the Tribunal to determine whether the Lot Owner is entitled to rectification of work on the lot property in accordance with these reasons. The parties are to be given an opportunity to make submissions on the issue, however no further evidence will be allowed to be adduced in the matter.

87 We are also mindful that the Lot Owner had been seeking compensation in monetary terms or, in the alternative, a work order in relation to this aspect of

his claim. Given we have also remitted the matter in relation to the award of damages, it will remain for submissions to be made to the Tribunal, and the Tribunal to decide, as to what type of order should be made, if any at all.

88 Ground 10 is raised by the Owners Corporation seeking leave to appeal in relation to ground 7b. Given our findings in relation to the powers of the Tribunal to make orders relating to lot property we are not satisfied that we should grant leave to appeal as there would be no substantial miscarriage of justice to the Lot Owner.

89 Ground 13 of the Lot Owner's appeal raises that the Tribunal erred in failing to make the work orders sought by the respondent. While this ground was not elaborated on by the lot owner, in so far as it relates to the failure to make orders to repair lot property, it is allowed.

(4) Does the Tribunal have power to order works be done in the absence of an occupation certificate?

90 This issue relates to grounds 3, 4 and 5 of the Owners Corporation's appeal and the grounds are only pressed in the event the Appeal Panel finds that the Tribunal had power to make work orders on lot property. Given we have found that the Tribunal is empowered to make such a work order we shall deal with this issue.

91 The Owners Corporation submits that under the *Environmental Planning and Assessment Act* 1979 (EPA Act) approvals regime, an occupation certificate is the final step and certifies that the building is fit to occupy. It submits that lot property in the penthouse was installed, and the lot was occupied, prior to the issue of an occupation certificate under the EPA Act, and that it was the Lot Owner's obligation to obtain that certificate, which he never obtained.

92 The Owners Corporation also submits that in the absence of a valid occupation certificate, the Lot Owner was, and is, at risk that he will be ordered to cease occupation and use of Lot 51; *Strathfield Municipal Council v C & C Investment Trading Pty Ltd (No 3)* [2018] NSWLEC 69 at [12] and [109(3)] per Sheahan J.

93 The Owners Corporation does not contend that it is relieved of an obligation to repair common property by reason of any illegal occupation, rather, that if the primary submissions relating to it having no obligation to repair lot property is

rejected, then it is relieved of any obligation to repair lot property if that lot property ought not to have been there in the first place.

94 The Owners Corporation submits that the Tribunal erred in relation to this ground for the following reasons:

(1) The Tribunal failed to determine an essential issue which it acknowledged that it needed to determine. That essential issue was to determine whether the Owners Corporation could be ordered to repair lot property installed as part of the act of occupation of the penthouse lot when such occupation was in breach of the EPA Act by reason of the Lot Owner not having an occupation certificate for those lots, and such occupation was illegal.

(2) The Tribunal erred in ordering the Owners Corporation to repair lot property installed as part of the act of occupation of the penthouse lot, when such occupation was in breach of the EPA Act by reason of the Lot Owner not having an occupation certificate for those lots.

(3) There was failure to give reasons for not determining the illegality issue, despite acknowledging at [88] - [95] of the Reasons for Decision that the Owners Corporation had submitted that it cannot be required to repair lot property installed as part of the act of occupation of the penthouse lot when such occupation was in breach of the EPA Act.

95 The Lot Owner submits that whilst the decision is unclear as to the findings in relation to the Owners Corporation's claim that the Lot Owner's occupation was illegal, however the making of the orders would suggest that the Tribunal did not accept the Owners Corporation's submissions on the point.

Consideration

96 The Tribunal dealt briefly with the issue under the heading of 'habitable space' and at [109] of the Reasons for Decision stated:

> 109 The Tribunal is satisfied that the issue of whether a space is habitable or not as planned and approved or later installed with the owners corporation consent does not relieve it from ensuring that water penetration is prevented via defects in the common property but, of course, is limited by when it was installed and whether or not the owners corporation consented to it becoming common property after the registration date.

97 However, at [126] of the decision the Tribunal goes on to make an order not allowing repair of the kitchen ceiling as it does not constitute lot property and there is no obligation to repair and in relation to the ensuite on level 7 (which was item 3 of the Conclave Report) the Tribunal stated at [127]:

> As already found, the "Top Gun" waterproofing certificate does not provide evidence of waterproofing being applied to Level 7 above the en suite before the Strata Plan registration date. In the absence of evidence establishing that installation before that date the damage to the en suite is not attributed to a failure of the owners corporation to maintain or repair common property. The claim for repair must fail.

98 Reading paras [109] together with [126] - [127] of the reasons for the decision, it is difficult to conclude whether the Tribunal was of the view that the absence of an occupation certificate prevented the Tribunal from making an order for the repair of lot property damaged because of the failure of the Owners Corporation to comply with the obligation to maintain and repair. We find that the Tribunal erred in failing to resolve the issue in relation to "illegal" occupation and give adequate reasons and in that regard grounds 3 and 5 of the Owners Corporation's appeal are upheld.

99 We have proceeded to determine the issue ourselves.

100 It is not in dispute between the parties that the relevant Strata Plan No. 77559 was registered on 13 February 2007 and that the Lot Owner moved into the property in about 2007.

101 At page 16 (para 6.1.4) of the expert report of Greg O'Mara, prepared for the Owners Corporation (AB pgs. 1130 - 1210) Mr O'Mara notes as an assumed fact:

> That an Occupation Certificate No: OCO7-011 dated 7 February 2007 was issued by Blackett Maguire & Associates as an interim certificate excluding:
>
> "Any works associate (sic) with the level 4-7 penthouse for Building B, Common area storeroom at level 4 and the ground floor communal pool and ancillary use area"

102 That certificate is annexed to a statement of Shareena Jahdav dated 19 December 2018 (AB pgs. 1212- 1294). Ms Jadhav states that on 30 August 2018, Grace Lawyers (for the Owners Corporation) sent a letter to Blackett Maguire & Associates requesting a copy of the file and on 10 September 2018, Grace Lawyers received a USB together with a note from Blackett Maguire & Associates. Further on 12 December 2018 Grace lawyers received an email from David Blackett of Blackett Maguire & Associates stating the following:

> I don't believe there were any OC's issued for the penthouse (levels 4-7). Instead I recall we issued a Notice and the matter was referred to council.

103 Ms Jadhav's statement also details enquiries made with Canada Bay Council (including a summons). Those did not reveal any further occupation certificate was issued.

104 The Lot Owner's evidence before the Tribunal does not reveal that any occupation certificate was issued in relation to the penthouse (despite the issue clearly being raised by the Owners Corporation). On that basis we are satisfied that no occupation certificate has ever been issued in relation to the penthouse and any lot property installed in the penthouse was absent an occupation certificate.

105 Section 109H of the EPA Act as in force immediately prior to its repeal on 1 March 2018 restricted the issuing of any occupation certificate.

106 Section 109H(l)(b) of the EPA Act as it stood from 3 March 2011 relevantly defined an occupation certificate as:

> a final occupation certificate that authorises a person to commence occupation or use of a new building;

107 Subsection 109(5)(c) provided as follows:

> (5) A final occupation certificate must not be issued to authorise a person to commence occupation or use of a new building unless:
>
> …
>
> the building is suitable for occupation or use in accordance with its classification under the Building Code of Australia…

108 Section 109M(1) relevantly provided that:

> A person must not commence occupation or use of the whole or any part of a new building (within the meaning of section 109H) unless an occupation certificate has been issued in relation to the building or part.
>
> Maximum penalty:
>
> (a) in the case of a class 1a or class 10 building, as referred to in the Building Code of Australia-5 penalty units, or
>
> (b) in the case of any other building-1,000 penalty units.

109 By reason of the *Environmental Planning and Assessment Amendment Act* 2017 (Amendment Act), which commenced on 1 March 2018, the statutory

regime in relation to occupation certificates has changed since the building was completed.

110 However, the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions)* Regulation 2017 contains provisions consequent on the enactment of the Amendment Act and because of those provisions, the former certification provisions continue to apply to this matter as the development consent for the works was prior to 1 December 2019 (see ss 18 and 18A of the transitional provisions).

111 In closing submissions before the Tribunal, the Lot Owner had relied on s109M(2)(b) as a reason why the provision did not apply. Section 109M(2)(b) relevantly provided that:

> This section does not apply to:
>
> …
>
> the occupation or use of a new building at any time after the expiration of 12 months after the date on which the building was first occupied or used.

112 In *Reading Properties Ply Ltd v Auburn Council* (2007) 158 LGERA 116 at 132 Biscoe J construed the subsection as follows:

> Subsection (2)(b) provides that the section does not apply to "the occupation or use of a new building at any time after the expiration of 12 months after the date on which the building was first occupied or used' The meaning of that provision is unclear. The Respondent submitted, as I understood it, that it meant that as the subject building was occupied and in use by September 2000, no occupation certificate was required because it was occupied or used 12 months thereafter. I do not accept that construction. I construe it to mean, in substance, that an occupation certificate is only required once, before the first occupation or use, and not annually. That is not relevant to the present case.

113 We adopt the reasons of Biscoe J and are also of the view that subsection would not be relevant in this case. In any case, for the reasons outlined below, we are not of the view that the occupation of the premises or the undertaking of lot property works in the absence of an occupation certificate, prevents the Tribunal from making an order for repair of lot property damaged as a consequence of an owners corporation failure to maintain and repair.

114 The Owners Corporation submits that the Lot Owner should not be allowed to rely on his illegal act of occupation to allow the claim. It relies on *Knowles v Fuller* (1947) 48 SR (NSW) 243, cited with approval by McHugh and Gummow

JJ in *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 221. In *Knowles* a cool room was constructed without the required approval of the council under the *Local Government Act* 1919. Jordan CJ observed at 244-45:

> In the present case, there was nothing illegal in the contract to construct the cool room; and the contract was capable of being legally performed. If, however, it was performed in a way forbidden by statute, nothing can be recovered by the party who illegally performed it. Prima facie, therefore, if illegality had been pleaded as a defence and it was proved that the plaintiff builder had neglected to obtain the approval of the Council before proceeding to construct the cool room or to see that such consent had in fact been obtained he could recover nothing in respect of its construction. It was just as much his responsibility as it was that of the building owner to see that the necessary consent had been obtained before he began operations.

115 In *Knowles,* Davidson J relevantly said at 246:

> If a contract is ... prohibited by statute it cannot form the basis of an action in law. The same prohibition also attaches where a person is debarred from carrying on a business without holding unspecified type of licence.

116 In our view the reasoning in *Knowles* is not relevant to the present case. Even if it was the case that the Lot Owner had occupied the lot without the issuing of an occupation certificate, the relevant provisions of the EPA Act do not prevent lot works on the property and the very act of occupying the premises does not result in the Tribunal being unable to make the orders.

117 In *Karl Suleman Enterprises Pty Ltd (in liq) v Babanour* [2004] NSWCA 214, Beazley JA at [46] – [47] cited various authorities and related to unlawful agreements as follows:

> 46 …. In Nelson v. Nelson McHugh said at 604:
>
> "[C]ourt that finds that an agreement is unlawful or has an unlawful purpose has merely set the stage for a further inquiry: are the circumstances surrounding the agreement such that the court should deny a relevant remedy to the party seeking the assistance of the court?"
>
> His Honour said further:
>
> "… courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless: (a) the statute discloses an intention that those rights should be unenforceable in all circumstances; or (b)(i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct; (ii) the imposition of the sanctions is necessary, having regard to the terms of the statute, to protect its objects or policies, and (iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies."
>
> 47 In Fitzgerald v. Leonhardt McHugh and Gummow JJ said at 576-579:

> "[T]he question then becomes whether, as a matter of public policy, the court should decline to enforce the contract because of its association with the illegal activity of the owner … The refusal of the courts in such a case to regard the contract as enforceable stems not from express or implied legislative prohibition but from the policy of the law, commonly called public policy [(Yango Pastoral Co. Pty. Ltd. v. First Chicago Australia Ltd (1978) 139 CLR 410 at 429-30, 432-3; 21 ALR 585; Nelson v. Nelson (1995) 184 CLR 538 at 551-2, 593, 611; 132 ALR 133)]. Regard is to be had primarily to the scope and purpose of the statute to consider whether the legislative purpose will be fulfilled without regarding the contract as void and unenforceable (Yango Pastoral Co. Pty.Ltd. v. First Chicago Australia Ltd (1978) 139 CLR 410 at 434; 21 ALR 585).
>
> Their Honours continued:
>
> "… the courts should not refuse to enforce contractual rights arising under a contract, merely because the contract is associated with or in furtherance of an illegal purpose, where the contract was not made in breach of a statutory prohibition upon its formation or upon the doing of a particular act essential to the performance of the contract or otherwise making unlawful the manner in which the contract is performed."
>
> Their Honours then cited with approval McHugh J's statement in Nelson referred to above.

118 In *Gnych v Polish Club Ltd* [2015] HCA 23; 255 CLR 414 the High Court held that a lease granted in contravention of s 92(1)(d) of the *Liquor Act 2007* was not void and unenforceable. In that case the High Court (French CJ, Kiefel, Keane & Nettle JJ, Gageler J agreeing) held that s 92(1)(d) of the Liquor Act 2007 is directed to the conduct of the licensee, rather than the relationship between the licensee and a third party: see [43]. The High Court found that although the Polish Club breached s92(1)(d) when it gave the lessee possession of the restaurant area of the premises, that did not affect the lease.

119 Like s 109M(1) of the EPA Act, s 92(1)(d) of the *Liquor Act* 2007 provides for a statutory penalty for breach of the provision. In *Gnych* the Court found that the statute in that context did not prevent the lease and at [37] - [40] provided a helpful summary of the legal principles:

> In this regard, in Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd , Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ cited with approval the observation by Mason J in Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd that:
>
> "the question whether a contract prohibited by statute is void is, like the associated question whether the statute prohibits the contract, a question of statutory construction".
>
> Their Honours went on to state that whether a statute which:

> "contains a unilateral prohibition on entry into a contract … is void … depends upon the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party, and any other relevant considerations. Ultimately, the question is one of statutory construction."
>
> That statement was, in turn, cited with approval by Gummow ACJ, Kirby, Hayne, Crennan and Kiefel JJ in Master Education Services Pty Ltd v Ketchell.
>
> Accordingly, the scope of the prohibition in s 92(1)(d) of the Liquor Act and the consequences of a contravention of the prohibition are to be determined by the language of s 92(1)(d) of the Liquor Act construed in the context of the Liquor Act as a whole.

120 The Court also examined the consequences of a breach of s 92(1)(d) of the Liquor Act, citing *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* [1978] HCA 42, 139 CLR 410. The Court relevantly stated at [47] - [48]:

> …. In Yango , Mason J said
>
> "There is much to be said for the view that once a statutory penalty has been provided for an offence the rule of the common law in determining the legal consequences of commission of the offence is thereby diminished".
>
> This observation was cited with approval by Brennan CJ, Dawson and Toohey JJ in Byrne v Australian Airlines Ltd [37] in the course of their Honours' expression of support for the proposition that a statute which prohibits the doing of an act under a penalty does not necessarily sterilise a legal relationship associated with that act.

121 In the present case, the alleged illegality is said to have arisen out of the Lot Owner's occupation of the lot without an occupation certificate having been issued. Having considered the legislative framework of the EPA Act and in particular s 109M(1) we do not find that there is anything , express or implied, to support a construction that non-compliance s 109M(1) would result in the Lot Owner being precluded from bringing the claim of the kind sought in these proceedings

122 The scope of the prohibition in s 109M (1) of the EPA Act is concerned with the occupation or use of the whole or any part of a new building. The section does not proscribe the performance of obligations between a lot owner and an owners corporation in a strata scheme.

123 The Owners Corporation is pressing for a wider view of the scope s 109M(1)), in which the rights and obligation of lot owners and an Owners Corporation are sterilised. However, the prohibition in relation to occupation of a lot does not extend to preventing a lot owner from undertaking works on a lot. Work will

always need to be completed on a lot before an occupation certificate can be issued.

124 Further, there was nothing raised by the parties and nor can we find anything within the SSMA , express or implied, to support a construction that that the non-compliance EPA Act should have the effect of precluding a lot owner from being entitled to repairs to lot property that has resulted contravention of the s 106(1) of the SSMA by the Owners Corporation. The Owners Corporation has a strict duty under s 106(1) to maintain and repair common property

125 The fact that a lot owner may have occupied a lot prior to an occupation certificate being issued does not, in our view, prevent a lot owner from bring a claim for breach of 106(1) of the SSMA or excuse an owners corporation from its obligation to maintain and repair common property.

126 However, we accept that there remains a discretion as to whether to make the orders for repair on lot property. It may be the actions of the Lot Owner and Owners Corporation in relation to the occupation certificate are relevant factors in consideration of whether to make the orders. It will be for the Tribunal to weigh up the factors relevant to that discretion on remittal of the proceedings and as part of the determination as to whether the Lot Owner is entitled to lot property repairs or damages. Parties should be provided with an opportunity to make submissions in that regard on the evidence that was before the Tribunal.

(5) Were the Tribunal's reasons adequate?

127 This issue has been raised by each of the appeals in relation different aspects of the decision. Both parties contend that the reasons given below were inadequate.

128 The Court of Appeal in *New South Wales Land and Housing Corporation v Orr* [2019] NSWCA 231 considered what constituted adequate reasoning on the part of a Tribunal and referred to relevant at [76] to [77] (per Bell P, with Ward JA agreeing)

> (i) "Decision-makers commonly express their reasons sequentially; but that does not mean that they decide each factual issue in isolation from the others. Ordinarily they review the whole of the evidence, and consider all issues of fact, before they write anything. Expression of conclusions in a certain sequence does not indicate a failure to consider the evidence as a whole": Re

> Minister for Immigration and Multicultural Affairs, Re; Ex parte Applicant S20/2002; Appellant S106/2002 v Minister for Immigration and Multicultural Affairs [2003] HCA 30; 77 ALJR 1165 per Gleeson CJ at [14] (Ex parte Applicant);
>
> (ii) the court should not read passages from the reasons for decision in isolation from others to which they may be related: Re Maria Politis v Commissioner of Taxation [1988] FCA 739 at [14]; 20 ATR 108 at 111;
>
> (iii) the reasons must be read fairly and as a whole: Ex parte Applicant at [147] per Kirby J; Wu Shan Liang at 291; Bisley at 251;
>
> (iv) the reasons recorded ought not to be inspected with a fine tooth-comb attuned to identifying error: Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280 at 287; [1993] FCA 456 (Pozzolanic) at 287; Wu Shan Liang at 272, 291;
>
> (v) there should be a degree of tolerance for looseness in the language of the tribunal, unhappy phrasing of the tribunal's thoughts or verbal slips: Pozzolanic at 287, Wu Shu Liang at 272 and 291.

129 It is with the principles in mind that we consider whether the Tribunal erred in the conclusions in relation to the waterproofing of levels 6 and 7.

In relation to the waterproofing of levels 6 and 7

130 This issue is raised by grounds 9 and 12 of the Lot Owner's appeal and is framed as a failure of the Tribunal to provide adequate reasoning in relation to waterproofing of levels 6 and 7 and orders for repair of the ensuite.

131 Ground 9 of the Lot Owner's amended grounds of appeal is that the Tribunal erred in failing to find or provide adequate reasoning for its finding, that the waterproofing to level 7 was not installed before registration of the strata plan.

132 It is helpful to firstly examine the Tribunals reasoning in relation to repairs.

133 In the initial orders made by the Tribunal on 15 June 2020 the Tribunal made the following order:

> 1. The respondent, The Owners-Strata Plan 77559, is to comply with its duty under subsection 106(1) of the Strata Schemes Management Act 2015 to maintain and repair the common property by doing the Agreed Rectification Works set out in the Conclave of Experts Joint Schedule dated 14 June 2019 in these proceedings excluding Item 1, except for the study repairs, (the work)

134 Following an application by the Owners Corporation, on 3 December 2020 the Tribunal amended the decision pursuant to section 63 of the NCAT Act to relevantly read as follows:

> The Tribunal orders:

> (1) The respondent, The Owners-Strata Plan 77559, is to comply with its duty under subsection 106(1) of the Strata Schemes Management Act 2015 to maintain and repair the common property by doing the Agreed Rectification Works set out in the Conclave of Experts Joint Schedule dated 14 June 2019 in these proceedings excluding Item 1, except for the study repairs,
>
> (a) Item 1 except for repairs to then study,
>
> (b) Item 3(a),
>
> (the "Work");
>
> (2) The respondent, The Owners-Strata Plan 77559, is to replace the planters and planter box irrigation system on level 6 damaged and not replaced by the Owner's Corporation contractor, Danrae.

135 In the reasons for decision the Tribunal noted that the Owners Corporation submitted to undertake repairs to common property in accordance with its obligations to maintain and repair pursuant to s 106(1) of the SSMA. The Tribunal also noted there was an issue as to what constituted common property and what constituted lot property.

136 At [112] of the reasons for decision, the Tribunal stated that it was satisfied that property installed after registration of the Strata Plan did not comprise common property and was instead the Lot Owner's property.

137 At [115] of the Reasons for Decision the Tribunal stated that it would order the rectification works and the method of rectification identified in the Joint Scott Schedule in so far as it affects the common property.

138 At [117] to [124] of the Reasons for Decision the Tribunal dealt with the waterproofing and tiles to the level 7 balcony as follows:

> 117. The respondent contends that the applicant has failed to establish that the waterproofing to Level 7 was installed before registration of the Strata Plan. The applicant relies on the evidence of Mr Araujo. Mr Araujo is the building manager of the owners corporation building in these proceedings. Mr Araujo worked for Statewide before and during construction of the buildings. He worked on site during the construction of the buildings. His evidence is that he observed that waterproof membranes "had been applied to the floors of the penthouse of the Building (the penthouse)…" in about late 2006.
>
> 118 The occupation certificate issued on 7 February 2007, before the registration of the Strata Plan on 13 February 2001, excluded the penthouse. There is no contention that the penthouse was other than a "shell" when the plan was registered.
>
> 119 The respondent says that apart from Mr Araujo's evidence, which offers no proof of waterproofing the Level 7 slab, and a waterproofing certificate

> issued by "Top Gun" on 21 March 2006 referring to membrane to the "roof", the applicant has adduced no evidence that Level 6 and 7 slabs were waterproofed. Indeed, at an extraordinary general meeting held on 13 July 2010, a resolution included a proposal by Statewide through their nominee, the applicant, proposed a method of rectification for water penetration through the roof slab to units below.
>
> 120 The Experts were unable to determine whether the waterproof membrane was part of the "shell" when the applicant purchased the penthouse in 2010 or added later by him. No waterproofing certificate has been provided in evidence referring to the Level 7 eastern balcony.
>
> 121 Expert Kavanagh and Expert O'Mara found that the floor tiles were installed after the date of registration of the Strata Plan.
>
> 122 When considering subsection 5(2)(a)(ii) the Strata Schemes (Freehold Development) Act (SSFD 1973), Tobias JA in *Siewa* at [38] found that if at the date of registration of a strata plan a floor comprised only a concrete floor slab then its upper surface will constitute the lower level boundary of a strata lot and therefore anything placed on the surface is lot property and not common property. *Siewa* is the leading case in regard to statutory definitions in SSFD 1973 and subsequent legislation.
>
> 123 It is for the applicant to prove its case to the civil standard. On the evidence that is before the Tribunal it is not satisfied that the waterproofing to level 7 or the floor tiles were in place at the date of registration of the Strata Plan.
>
> 124 In the absence of evidence adduced by the applicant to the contrary, the upper surface of the Level 7 slab constitutes the lower horizontal boundary of lot property and, therefore, the waterproof membrane and tiles on top of that slab are lot property.

139 The Lot Owner submits that there was in fact two separate issues in relation to waterproofing, the first in respect of level 6 and the other in respect of level 7, but that they have resulted in one order, being the exclusion of waterproof membrane and tiles on top of the level 7 slab from the works and the exclusion of item 3a in the experts' combined schedule. In the joint expert report Item 3a is described as the level 7 ensuite (AB pg. 1298).

140 The Lot Owner submits that level 6 concerned the surface underneath the extensive external floor tiling to the floor slab on that level and level 7 concerned waterproofing to the top of the roof of that ensuite. He submits that the Tribunal confused them and combined the findings in respect of them but nonetheless ordered that the work on the level 6 slab be done.

141 The Lot Owner also submits that in relation to the membrane on the floor slab on level 6, that the evidence of Mr Araujo (for the Owners Corporation) established that he was present during the original construction and that the waterproofing on level 7 was done during the original construction and therefore prior to the registration of the strata plan, there for making it part of the common property once the Strata Plan was registered.

142 Mr Araujo, underneath the subheading "Around late 2006" referred to potential damage to the membrane during the original construction. The Owners Corporation did not read that statement, however the Lot Owner tendered part of it as exhibit A4.

Consideration

143 In his statement dated 19 December 2018 Mr Araujo states that he "saw the Building being built from scratch." (AB pgs. 1114-16) Under the heading "Around 2006', Mr Araujo relevantly states that

> 11. I remember when waterproof membranes had been applied to the floors of the penthouse of the building (the penthouse), in particular, I remember it was bare (with no coverings) and,
>
> (a) contractors were manoeuvring pallet jacks on top of the bare membrane,
>
> (b) stacking pallets of tiles and pallets of sand on top of the bare membrane
>
> (c) dragging pallets across the bare membrane, and
>
> (d) sand was on several parts of the membrane
>
> I also recall hearing a representative of the builder Baseline Constructions Pty Ltd (Baseline) say to the workers/contractors something along the lines of, "… we [Baseline] will not be liable for failure of the waterproof membrane on the penthouse floors as you guys are dragging pallets, building materials and sand, everywhere … you'll damage the waterproof membrane may be damaged…"
>
> At this time, I remember seeing that there were no floor coverings or tiles over the waterproof membrane.

144 Mr Araujo's evidence suggests that the waterproof membrane was being laid on the penthouse floors in late 2006.

145 At 4.3.2 of his expert report Mr O'Mara (the expert for the Owners Corporation), describes the work he has considered as being work which had been undertaken after the strata plan was registered. [AB-1137]. Relevantly that was:

- The roof atop the Level 7 main bedroom ensuite bathroom
- The roof atop the Level 7 to the western elevation, northern elevation enclosed terrace and the eastern return to the lift shaft wall extension
- Level 7 eastern balcony adjacent study (including the balcony waterproofing and tiling)
- Level 6 original terrace waterproofing including undercover northern and southern terraces.

146 The transcript of the first day of hearing reveals that this issue was dealt with in cross examination of the experts (by way of the experts giving concurrent evidence) (AB pgs. 1557 - 1558 T p45/41-46/20). Both parties' experts agreed that there was no certificate of water proofing referring to the level 7 eastern balcony either prior to or after the registration date.

147 The following exchange occurred with Counsel for the Owners Corporation and the experts:

> Knoll: And would you agree with me therefore that, and you've also said the floor tiles were installed following the Strata registration date, that's on the second page?
>
> O'Mara: Yes
>
> Knoll: Would you agree with me that if the waterproofing and floor tiling were installed, both, after the Strata registration date then the items of work you're identifying here are to correct and repair matters installed after the registration date?
>
> Kavanagh: Yes
>
> O'Mara: Yes

148 It is clear both experts had agreed that no waterproofing certificate had been provided in relation to the waterproofing of the balcony. While it is accepted that Mr O'Mara believed that the waterproofing had not occurred prior to the strata registration date, the only basis for which hit can be inferred he came to that conclusion is because there was no waterproofing certificate.

149 The Lot Owner also relied on assumptions from a "Top Gun" waterproofing certificate dated 21 March 2006 referring to the membrane for the "roof". The Tribunal appears to have inferred that this was not determinative of the balcony at issue. The Owners Corporation had also contended before the Tribunal that the Lot Owner failed to establish what waterproofing membrane existed as part of the shell or whether it was installed before registration.

150 While the Tribunal was correct that it is for the applicant to prove its case to the civil standard, there was no reasoning by the Tribunal for the rejection of the evidence of Mr Araujo.

151 On consideration of the evidence, we are of the view that the waterproofing to the penthouse floors was done prior to the registration of the strata plan and on that basis the waterproofing to the floors of the penthouse did form part of the common property. Mr Araujo's evidence was that the waterproofing to the penthouse floors was in place at the date of registration of the Strata Plan. While the Owners Corporation did not tender the statement and Mr Araujo was not cross examined, the statement was tendered as part of the Lot Owner's evidence. The lack of a waterproofing certificate is not, in our view conclusive of whether the waterproofing was there at the date of the registration of the strata plan. On that basis, the unchallenged evidence of Mr Araujo should be accepted, and it should be found that the waterproofing to the penthouse floors was there prior to the date of the registration of the strata plan and formed common property. For those reasons the Tribunal was wrong to reject the evidence of Mr Araujo and did not give adequate reasons for rejecting the evidence and on that basis grounds 9 and 12 of the Lot Owner's appeal must be upheld.

152 The matter is remitted for the parties make submissions and the Tribunal to consider what relevant order should be made because of that finding.

Failure to determine what was lot property and what was common property

153 This issue is raised by ground 8 of the Owners Corporation appeal. It raises as a question of law that the Tribunal erred in failing to rule on a central controversy which it needed to determine, which was what items in the conclave report were common property and what was lot property. In so far as this ground has been raised in relation to the inability to make orders relating to lot property that matter has been dealt with by issue (3) above and in that regard the appeal ground must fail. In so far as the appeal ground is raised in relation to the waterproofing, given our findings in relation to ground 9 and 12 of the Lot Owner's appeal, the ground is upheld in part in so far as the Tribunal

failed to give reasons as to what constituted common property and what constituted lot property in relation to the waterproofing.

154 Related to ground 8 of the Owners Corporation's appeal is ground 10 of the Lot Owners appeal. The lot owner initially raised that the Tribunal found that the kitchen ceiling was lot property, which the Lot Owner does not contest. However, the Tribunal also found there was no obligation to repair lot property. Despite making that finding, the Tribunal ordered that the work be done because it was not one of the 2 items excluded from the orders. For that reason, the ground was not pressed by the Lot Owners. However, given the conclusions we have come to, in particular in relation to issue (3) and because we are setting the work order made by the Tribunal aside, it will remain a matter for parties to make submissions on the remitted proceedings as to whether orders should be made to the repair the ceiling because it is damage that has resulted from a failure of the Owners Corporation to comply with its obligation to maintain and repair common property

155 For certainty, all other findings by the Tribunal insofar as they relate to the issue of what was common property and what was lot property, unless they have been addressed above remain unchanged as no error has been found in that regard.

Conclusion

156 Our conclusions are as follows.

157 In relation to the Owners Corporation's appeal:

(1) In relation to grounds 3, 4, 5, 6 (a) - (c), 7 (a) - (b) and 9 in so far as they raise a question of law fail.

(2) In relation to ground 8, it is allowed in part for the reason given at [153] above.

(3) Leave to appeal is refused.

158 In relation to the Lot Owner's appeal:

(1) Grounds 1, 2, and 3, 9, 11, 12 and 13 are allowed.

(2) In relation to grounds 4 - 8 we find no question of law and leave to appeal in so far as it is sought is refused.

(3) Appeal ground 10 was not pressed.

159 We are also of the view that the matter should be remitted to the Senior Member who initially heard the matter, for determination of the following issues on the evidence that was before the Tribunal:

(1) Whether the Lot Owner is entitled to damages pursuant to s 106(5) of the Strata Schemes Management Act 2015.

(2) What orders should be made, if any, in relation to damage to common property and consequential damage to lot property.

160 The Tribunal is to make the necessary directions for submissions in that regard.

Orders

161 Accordingly, the following orders are made

(1) In relation to the Owners Corporation's appeal:

(i) The appeal is allowed in part

(ii) Leave to appeal is refused

(2) In relation to the Lot Owner's appeal:

(i) The time for the making of the appeal is extended until 30 November 2020

(ii) The appeal is allowed in part

(iii) Leave to appeal is refused

(3) Orders 1 - 7 of the orders made on 15 June 2020 [amended 3 December 2020] are set aside.

(4) The proceedings are remitted to the Tribunal as originally constituted and in accordance with these reasons, to determine on the evidence that was before the Tribunal:

(i) Whether the Lot Owner is entitled to damages pursuant to s 106(5) of the Strata Schemes Management Act 2015.

(ii) What orders should be made, if any, in relation to damage to common property and consequential damage to lot property.

(5) If either party seeks a costs order in relation to the appeal, the following directions apply:

(a) The applicant for costs (costs applicant) must file and serve any application within 7 days after these orders.

(b) The respondent to the cost's application must file and serve evidence and submissions in reply 14 days from the date of these orders.

(c) The costs applicant must file and serve any submissions in response within 21 days from the date of these orders.

(d) Submissions must include submissions concerning whether an order should be made under s 50(2) of the Civil and Administrative Tribunal Act, 2013 dispensing with a hearing.

(6) The stay made by the Appeal Panel on 31 July 2020, varied on 21 August 2020 and further varied on 9 September 2020 is lifted.

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