

Publication Date: September 19, 2017
YSP Podcast Transcript: Episode 079. In Conversation: resolving a retaining wall dispute and dealing with asbestos confusion

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Amanda Farmer: Hello, and welcome. I'm Amanda Farmer, and I have with me today Reena Van Aalst. Hi, Reena.

Reena Van Aalst: Hi Amanda, how are you?

Amanda Farmer: I'm doing very well, lovely to have you with us on the show. How have you been?

Reena Van Aalst: Yes, pretty good actually, yes. I'm actually booked a holiday to go to Tasmania for a week, so I'm looking forward to that.

Amanda Farmer: Ah, fabulous. I love Tasmania. I was there two or three years ago, I think. We did a little trip, and I've always said I would love to go back. So, good on you.

Reena Van Aalst: Yes, I haven't been there before, so it's my first time.

Amanda Farmer: Oh, wow. Really? Awesome.

Reena Van Aalst: Yes.

Amanda Farmer: Well, enjoy. You'll have to tell us all about it when you get back.

Reena Van Aalst: Yes.

Amanda Farmer: All right, let's jump straight in. What's your challenge for this week, Reena?

Reena Van Aalst: Well, actually, this is an interesting one Amanda, this is actually a retaining wall dispute between a luxury homeowner and a 6 slot scheme where the retaining wall is actually starting to bulge forward from the home side, where the home is actually located, the house, and it's actually building forward towards the driveway and garden of the strata scheme.

And, what's happened is that, over the many years, the previous owner of the house have actually done renovations, and they've actually filled up the garden beds with extra soil, and what's happened is ... In the Eastern suburbs, many of these retaining walls are built on sand. It's sandstone walls built on sand, so obviously they can't withstand the pressure, and at the time they were originally built, they didn't have structural reinforcement undertaken. And, the owner of the house has now said to the strata scheme, well you're up for 50%, even though the majority of the retaining wall is actually on the boundary of the house, and not the owner's corporation. And, they referred the scheme to a case called Yared versus Glenhurst Gardens in 2002, where it says that 'Even though the retaining wall may be owned by the adjoining property, that if it needs repairing, that the owner of the retaining wall can seek a contribution from the adjoining property, who receives a benefit from the repair'. But, what the issue is in terms of the argument, well what is fair and reasonable? What's the fair and reasonable contribution in this case? Obviously, the courts haven't said it was 50%, but the adjoining owner has asked 50% contribution ...

So, at the moment, the owner's corporation's engaged and engineered to look at the calculation upon which that amount was derived, and obviously, the owner's corporation is engaging its own lawyer to have a look at that as well, in terms of that case ...

Amanda Farmer: Yes.



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Reena Van Aalst: Yes, and so it's going to be quite an interesting case, Amanda because the costs are quite high ...

And so, in terms of what is fair and reasonable ... If it went to court, it would actually probably cost more than the amount that we're talking about.

Amanda Farmer: Yes, yes.

Reena Van Aalst: It's one of those things that I think both sides have to come ... When you are neighbours, it's hard to have an acrimonious relationship moving forward. We're trying to work with them, and see what we can do that's obviously fair to both parties.

Amanda Farmer: Yes, and the policymakers have recognized that when you do have these kinds of disputes between neighbors, it is in every bodies neighbour to try resolve them without getting to the stage of a court, and I'm thinking of things like deciding fences, and there is a trees disputes between neighbors act as well, and they set out, quite helpfully, clear guidelines for how to deal with those kinds of disputes, including serving notices, going to a community justice center for mediation, and the whole process tries very hard to keep you out of that stage of going to court. Because, as you said, Reena, it can be very expensive, and the legal costs often outweighing the costs of what a new wall, or a new retaining wall, or whatever it is that you're having a dispute about would cost. Now, in your situation that you've just outlined ... You say a retaining wall, and is it earth that is causing the damage to the wall, or are there plantings that are on the other side?

Reena Van Aalst: There are planting that have caused it.

Amanda Farmer: Okay.

Reena Van Aalst: There's actually a tree that's been there for many years whose roots have obviously caused it to start rupturing in certain parts, but I think the fact that people may think, 'Well, that retaining wall's not in our boundary, we don't actually have to pay for it', I think this is a very rude awakening from anyone thinking that just because it's not on your boundary, that you don't have to contribute.

Amanda Farmer: Yes.

Reena Van Aalst: So, if you're to benefit from it, according to these previous cases, and the sections in the Conveyancing Act also that are referenced, that you do have to make a contribution, I think what is at stake here, and what the issue relating to a potential dispute is, is the house owner has asked 50%, and therefore for the owner's corporation to offer a lesser amount, obviously, they have to put a position paper, so to speak, to say, 'Well, this is why we don't', and hopefully there can be some sort of consensus upon where the two payers will meet. But, all parties benefit from a wall that doesn't collapse, but one of the issues that we've taken to council is that what councils approved, this number of DA's, where this works have been done on a property in the backfield, and made a new garden bed, and that obviously has put pressure, so in a sense, where's councils responsibility in all of this where they just approve DA's, and we actually wrote to them, and they just pretty much, as we expected, just ignored us and said, well ... And, it's actually, sorry, I should've mentioned earlier that this is actually ... Council has imposed an order that the wall be fixed as well, so there's a council order asking that the wall be fixed, so we don't ...

Amanda Farmer: Oh, okay.

Reena Van Aalst: Yes, so it's a council order and it has to be complied with.

Amanda Farmer: Yes. This is why I love the world of strata, because it seems like a narrow niche area, and then here we are dealing with councils, and fence disputes, and retaining walls and engineers, and dirt, and I just, I think it's part of the beauty of what we do that you never know what hat you're going to have on at any given day. I deal with a lot of dividing fence disputes.

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Reena Van Aalst: Yes, I don't think that ... This is actually not a dividing [crosstalk 00:06:10].

Amanda Farmer: No, that's right, yes.

Reena Van Aalst: Yes, because it's a retaining wall, which is another thing that I suppose initially they thought 50/50, but ...

Amanda Farmer: Yes, complicating factor.

Reena Van Aalst: But, it's not.

Amanda Farmer: Yes, and again, not always between Strata Schemes, if there's a Strata Scheme involved, then that's how I get involved, but then you're often dealing with a private, single land holder next door, which is a different kettle of fish as well, isn't it?

Reena Van Aalst: Exactly, yes.

Amanda Farmer: All right, well keep up updated on that one Reena. I am interested, absolutely, from a legal perspective as to where that fair and reasonable assessment comes down.

Reena Van Aalst: Yes.

Amanda Farmer: And, I hope that the building you're working with there can reduce that 50%, and [crosstalk 00:06:47].

Reena Van Aalst: Yes, well the offer has already been put in, and it won't be 50%, so let's see how far off, and what will happen if they don't accept that percentage that's less than 50%, whatever that may turn out to be.

Amanda Farmer: Yes, let us know. All right, well, my challenge for this week ... This has actually come through a question from a listener, and it arises from one of our earlier discussions Reena, I'm not sure if you remember. We had a chat about the power to convene an extraordinary general meeting, and we talked about the distinction between convening an annual general meeting and convening an extraordinary general meeting, and those who have the power to convene an extraordinary general meeting are actually quite narrow. And extraordinary general meeting can be convened through a requisition from a lot owner, and that requisition must be of qualified request, so they need to have at least 25 of the union entitlement backing them for that request. Or, the AGM is convened by the secretary, and the listener who was hearing our discussion that topic wrote in and said, 'Well, can't the strata manager convene the AGM as well if they have the delegated authority to act in that position as secretary?', and my answer was yes, absolutely. And, I just wanted to bring that up again Reena, so that if anyone else out there had that question arising from that discussing that, absolutely, if your strata manager is delegated certain function under the agency agreement, then they are well within their rights to exercise those functions, and the strata manager could certainly convene an extraordinary general meeting in their capacity as secretary.

Reena Van Aalst: Yes, that's correct. And also, obviously there's a manager that's been in point as a compulsory manager under Section 337, obviously, they can convene an AGM at any time also, because they have full delegative authority under the act to act as the owner's corporation in all circumstances. Yes, I agree with that advice Amanda, that if your owners' agreement is full delegation as opposed to partial delegation, then that full delegation includes all functions of secretary, including calling a meeting not just restricted to certain things, and definitely, the agent has done that. But, I know agents that don't even have a full delegated authority, and they still call the meetings anyway, so. As I said to you, they were calling, I think one of our previous podcasts, I mentioned that they were just calling AGM's to re-appoint themselves at meetings without having an authority to do so.

Amanda Farmer: That's right, yes, I think that was the episode where this question came up. And, of course in the case of Annual General Meetings?

Reena Van Aalst: Well, again, it depends on your delegated authority I would say, because, under your agency agreement, it

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'If you have full delegation or partial delegation', and I think the STA Agency agreement is an example where you can tick the various boxes, where they have full delegation, or as per instructions from the Strata Committee, so.

Amanda Farmer: Yes. I hope that clarifies things for any listeners who had some questions arising from that earlier discussion, and of course, if you've got more questions or anything else you would like Reena and I to confer off, or to explain in more detail, do shoot me an email, amanda@yourstrataproperty.com.au. Let us know what you want to hear, and we shall deliver. All right, your win for the week, Reena. Shoot.

Reena Van Aalst: Well, this is actually quite a recent event that occurred Amanda, I had a scheme that I'm managing where one owner just moved in new, and she wanted to do some renovations, and she asked me what the procedure was and I advised her about the by-laws, etcetera, and I gave her an example of one that another owner had done just to give her an idea of what sort of parameters and conditions were necessary for inclusion in the by-law that should be drafted by a lawyer, et cetera, and she said she had a lawyer she knew. The same thing she asked me was, was there any asbestos in the building because she wanted to change the locks, and apparently, a local locksmith had told her that there was asbestos in the building.

Anyway, because it's a new scheme that I've just taken on board, I went through the records and I found an asbestos report that's been completed by one of the two major companies that have been doing them. So, I provided that report to her that said that there wasn't any asbestos, and low and behold I get all these emails and calls saying that notices have been put up around the building saying that they're coming to remove asbestos in the next week. And, it was at the instigation of this lot owner and so I've written to her, she hasn't responded anyway, and then I just rang the contractor and said, basically ... He was referring to the ceiling, that he was going to remove some asbestos from the ceiling.

Apparently, it was a vermiculite ceiling, and I just rang him and said that that's common property, and you really can't be touching that without the consent of the owner's corporation, and he just said, "Okay, Reena, I understand. You're right. I shouldn't be doing this, it's between the owner's corporation and the lot owner now. Thank you very much". I thought, 'Wow'. Thank you for being so obliging so quickly.

Amanda Farmer: Yes. I like him.

Reena Van Aalst: Yes, exactly, so I thought, well I'll be using you again then, because, you know ... Even though I've never met him before, or never heard of his company, but I thought he's obviously onboard our concerns, and of course you can imagine that that obviously included the fact that there'll be dust around, and you need to make sure that you don't ... And people are just getting so scared.

Amanda Farmer: Yes, of course.

Reena Van Aalst: Anyway, so we're obviously going to undertake some testing ourselves, the owner's corporation will engage him or someone else, but the point is, I wonder if these reports that people have been obtaining now for some time ... Are they worth the paper they're written on? If a person's coming to do work on the ceiling, and they're told there was no asbestos, and now someone else is saying that there is, well, how do contractors know when they're ... And we need to make sure that the workplace is safe and free from hazards. I think that's maybe something that we need to look into, I think owner's corporation generally, and these companies that are providing these asbestos reports Amanda, I'm not sure if testing has been adequately conducted.

Amanda Farmer: Yes, that's right. It's one of those tricky areas. You say the word asbestos in the same way that you say fire safety, and general panic ensues, and often, at least in my experience it's not always warranted, and we do have this difficulty now where our legislation requires us to provide a safe workplace, and then, of course, the Strata legislation, which requires us to have work health and safety reports prepared, and even your capital works fund plan. Dealing with, looking into and dealing with these issues, there are a lot of contractors out there who are providing stock standard service, if you like, for a flat fee, and they ... Well, I don't know how, they can comprehensively and accurately cover all areas, and so you are getting some conflicting advice sometimes, that, yes, there's a problem in this area, whether it's to do with asbestos or some other building defect, or fire safety

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item. And, another so-called expert might tell you in the same situation that there isn't a problem. So, what does the owner's corporation do? Any lawyers going to tell you to act conservatively, and protect the interest of your owners and do the work that recommended, but I know that it's frustrating for owners who suspected there probably isn't a real risk, and they're embarking on an expensive exercise of, for example, removing vermiculite ceilings.

Reena Van Aalst: Well, yes, on the matter you were mentioning before, Amanda, about these sinking fund, or capital fund forecasts, I used to manage an award-winning building previously, and they received one of these template proposals, and the report even contained items that I didn't even have in the building, because obviously when you're using a template, you might forget to amend it.

Amanda Farmer: Oh, dear.

Reena Van Aalst: It just shows really, I think that owners corporations, I think, there's an inherent requirement for them not to spend a lot of money, and they don't want to spend money on getting a decent report, but on the other hand, they're not getting any value for the money that they're spending, whether it's a lot of money, or a little bit of money, because if it's not a report that has any value or any information that's pertaining to the building and is accurate in some form. I look at those plans as a guideline, and not sort of a ...

Amanda Farmer: Yes.

Reena Van Aalst: Unless you spend a lot of money where each piece of paint and equipment been looked at, and therefore the rest of its useful life has been calculated Amanda, based on when it was installed, et cetera, then really ... I just think that, in this case, when you're dealing with asbestos, it's a bit different. It's people's lives that are involved, and safety and ... I would hate that someone was doing work on a ceiling, and then the next minute they are disturbing the asbestos actually inhaled it or anything like that. It's quite a concern, I think when this happens.

Amanda Farmer: Yes, and it is the risk of regulating to the extent that we do, our Strata buildings, and where you require all buildings to have a certain report prepared each year, or take certain steps to ensure safety. You do end up with this, sort of, box-ticking process.

Reena Van Aalst: Yes, yes.

Amanda Farmer: Which then results in businesses doing very well assisting you to tick the boxes when that's all they're doing, and as you say, it can really reduce the value of what you're getting and leave the owner's corporation thinking, 'Would we have been better off to regulate ourselves and be wise to what needs to be done in the building, rather than going and paying \$500 for a report that then tells us we've got planting equipment that we don't even have, simply because we had to tick that box in the legislation'.

Reena Van Aalst: And it wasn't \$500.

Amanda Farmer: Yes, sure.

Reena Van Aalst: I wish it was.

Amanda Farmer: Yes, not sure we have the solution for that one yet, Reena, but of course, yes, as I said, when you're dealing with asbestos, always best to act conservatively. Especially if you're the strata manager giving advice.

Reena Van Aalst: Yes, I think we'll be ringing to the company on Monday now, and asking them to please explain and maybe do some retesting if necessary.

Amanda Farmer: Yes. Fair enough. Okay, so something I wanted to bring to the attention of listeners is that the New South Wales

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government has produced an options paper on short-term letting. Now, I noticed this when I was overseas, and I'm not sure about you Reena, but it seems to have flown a little under the radar, and I think we've got a job to do here to bring this to the attention of our listeners, and those in strata communities. This is essentially a booklet that New South Whales fair trading has put together, they call it officially an 'Options Paper'. It, I think, came out at the end of July, and what they do in this booklet is set out some possible ways of dealing with short-term letting.

Not only in strata buildings, but generally in New South Whales the practice of Airbnb, and stays and the like, and they make some suggestions, and they're calling for comments on those suggestions. Comments from owners, residents, communities, stakeholders like lawyers, AirBnB themselves, and comments are due in by the 31st of October this year. So, hopefully, by the time this goes to air, you've still got some time if you want to have your say. Interestingly, a short summary of some of the potential options that the government putting forward for dealing with short-term letting is to say, 'We can have industry self-regulation', so people can act according to a code of conduct. There can be some kind of monitoring and recording, there can be an education program involved.

Another option is for strata buildings to regulate the process through the strata law, so to have by-laws that are specific to short-term letting. By-Laws were there's compensation that can be paid if there are adverse effects from short-term letting. Another option, they say, is for it to be regulated through the planning system, so through the councils, through consent, having to obtain development consent to have short-term letting, having councils limit the length of stays and things like that. And, another option is to have a registration system, where if you are conduction short term letting, then you have to register that somewhere. And, that helps to manage safety and amenity issue.

That is just a broad brush that I am really just drawing from the executive summary, but it is a fairly detailed paper. I'll put a link to it in the show notes, and you'll get that from the website yourstrataproductivity.com.au, and just find this weeks episode. You'll have a link there, but anybody who has something to say about Short term letting in New South Whales should absolutely read this options paper, and get your feedback into fair trading by the 31st of October. Now, am I right Reena, nobodies really talking about this?

Reena Van Aalst: No, I haven't really heard much about it actually, Amanda.

That doesn't mean that it hasn't been, but maybe it perhaps just hasn't come across my radar recently, but there's been so much talk about AirBnB, and the government making various positions, and then the outcome of the council, and then you see Sydney in particular, and then changing their mind, and ...

So, it seems to be becoming an item that's taking far more time to be decided in terms of what is acceptable, and what is not acceptable, and how the regulations should be formulated in the future, so hopefully, if there's sufficient advice from various stakeholders, providing their thoughts and their positions. I think also, the insurance industry probably needs to be involved because there's obviously insurance implications.

Amanda Farmer: Yes.

Reena Van Aalst: Buildings are used for purposes for which they're not actually regulated or allowed to have.

Amanda Farmer: That's a big issue. The way I see it is that the government is taking this seriously. This paper, essentially, is the fallout from the parliamentary assembly committee that was held in October 2016, and there was what was essentially a public inquiry into the adequacy of the regulation of short-term letting, and a lot of recommendations were made, a lot of stakeholders were consulted. I know bodies like SCA and OCN were involved with that, and this paper is designed to bring all of those recommendations together and put it out to the public and call for some written submissions. I think that's great, I think it's a good step in addressing a serious issue. Not jumping to making legislation, which is what we thought towards the end of last year might happen, that we just have the short term letting bill, but taking the time to get input from all affected parties. Yes, jump in.

Reena Van Aalst: Yes.



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Amanda Farmer: Don't forget to have your say.

Reena Van Aalst: It's a great positive step.

Amanda Farmer: Yes. All right, thank you so much as always Reena, and I shall look forward to chatting with you next time.

Reena Van Aalst: Okay, take care, Amanda, bye.

Amanda Farmer: I will, bye.

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