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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 just great, thank you very much. Been busy, busy, as we are around this time of the year, things really start picking up, and we're looking forward to an Easter long weekend at some stage.

Reena Van Aalst: Yes, exactly, end of March, so it's not long to go, actually.

Amanda Farmer: Yes, how have you been?

Reena Van Aalst: Yes just busy as usual, so nothing new there, but it's doing pretty good actually. I'm actually going to the tribunal today, which I'll talk about in another episode.

Amanda Farmer: Oh, okay.

Reena Van Aalst: It's a Dividing Fences application.

Amanda Farmer: Ah, and that's in NCAT?

Reena Van Aalst: Yes.

Amanda Farmer: Interesting, like to hear about that.

Reena Van Aalst: Yes.

Amanda Farmer: Let's jump straight into it, what's been your challenge for this week, Reena?

Reena Van Aalst: This is something that actually I'm not personally involved in, but has come to me through a friend of mine. It's a 4 lot scheme, and 2 lots are owned by the family, and the remaining 2 lots are owned by separate owners. Then one lot has renovated and has done some extensions into common property with consent, and then the other remaining separately owned lot also wants to undertake similar renovations. But the chairperson's actually also from the family lot, and each lot owner is also a strata committee member, so there's basically four lots and all the owners are on the committee.

So informally the remaining lot owner said, okay well I want to do the same thing as the other owner. They put the plans forward, initially, everybody agreed, since then there was a falling out and the family lot had second thoughts about it. Now they all refuse to affix the common seal to the DA, and now they're actually opposed to it. The other lot owner supports the DA but in this case Amanda, they all have equal unit entitlements and also they all have equal votes on the Strata committees. So it's a bit of an impasse and I was wondering if you've had any experience with ... I know that owners can't unreasonably refuse consent for a DA, the owner's corporation but obviously, in such a small apartment block it's making it troublesome. So I was wondering if you've had any experience with people having to bypass the owner's corporation or the Strata committee and go straight to the Tribunal or any other jurisdiction, to try and get the DA, the common seal affixed to the development application?

Amanda Farmer: Yes, I've certainly been involved in situations for lot owners who are trying to do work and cannot get their development application lodged with the council because the owner's corporation won't affix the seal. Then on the other side been involved with owner's corporation who don't want the work to proceed and determine that they will not affix the seal because that'll be their way of stopping the work from proceeding.

Reena Van Aalst: I mean the thing to note is that normally an Abidal has to be passed if it's affecting common property before the DA can be lodged because there's been many examples where people have lodged the DA and never sought the owner's corporation approval via a by-law. But I'm talking about something where they won't even consider it, there's only 4 lots and they're saying, well we're not going to approve it anyway. With the four lot scheme it only needs one person to be against it, or sorry more than one person in this case, if it's more than 25%, have to be against it. But these persons not even getting any assistance in any form because they can knock it back through the Abidal process if they submit a special privileges by-law, which also means that they won't allow the DA, the common seal to be affixed to the development application. So it's a bit of a two-edged sword in this case.

Amanda Farmer: Yes, on that point about by-laws, there is a case and it is the owners Strata Plan number 37762 and Pham, P.H.A.M. It's a New South Wales Supreme Court case from 2006, there'll be a link to that one in the show notes, also check out the more recent case of the owners Strata Plan number 50246 and Kumar, that's a Tribunal case that's from 2013 and in that case the Tribunal applied the Supreme Courts decision in a Pham. So links to both of those cases in the show notes over at yourstrataproperty.com.au/podcasts and you'll see episode 102.

On that point, the Tribunal found the by-law needed to be in place first and then it was for the lot owner to seek that the common seal be affixed, but the obligation was on the lot owner to put the by-law forward first and get that by-law passed and then have the seal affixed, because all the ducks were in a row and ready to go. But I've certainly in practice seen development applications go in with a common seal affixed and then the council comes back with a condition of consent that the lot owner before they commence their development must obtain all required necessary consents from the owner's corporation, and all approvals under the Strata Schemes Management Act. To the extent a by-law is required they must obtain a by-law, because I was involved in a case recently where one of those conditional approvals was given by a council, often called a differed commencement consent. You cannot start your work until you comply with the following conditions and the condition was, get the approval of the owner's corporation, the lot owner didn't do that, they went ahead with their work, and we were successful in the Tribunal at having that lot owner ordered to reinstate the common property.

So I think the advice here is certainly for lot owners to go ahead and obtain the consent of the owner's corporation first, if that's by way of by-law, get your by-law in place and then approach the council. If you're in a hurry and you need to get to the council quickly, for whatever reason, to get that development approved then you're likely to get a differed commencement consent, which requires you to get that approval from the council anyway. But going back to your question there Reena about this tricky situation, because it's such a small scheme that is difficult and you are going to have a deadlock there. It might be educating the owners about what their obligations are, and what a potential outcome could be if the matter went to the Tribunal. Might be a good way to try and break that deadlock if we can't reach agreement on this, then we're going to end up in the Tribunal and we're going to be ordered to do something. Whether it's the lot owner who's ordered to get consent or the owner's corporation who's ordered to affix the seal. That's going to take time and money for everyone, do we really want to go down that path?

Reena Van Aalst: I think sometimes in some developments Amanda there is like, you know especially in certain parts of Sydney there's a lot of people who pretty much don't understand what community living really means and they sort of think it's like either my way or the highway. So yes I think the owner has gone and obtained the special privilege's by-law, but basically they said well it doesn't really matter, you can put it, we're not going to pass it, we're not going to affix the common seal. So basically I think they'll have to go to the Tribunal and try and get an order.

Amanda Farmer: Yes, and I think the way that it should go to the Tribunal would be by the lot owner saying that their by-law has been unreasonably refused and they're basically stopped from proceeding any further until they've got this by-law in place. So, that would be the first stop.

Reena Van Aalst: But the other thing also is yes, it's always a good practice for managing agents to tell the owner to obviously get the by-law first, because a lot of people think oh well what if I don't get council approval. But the point is, as you said, it's the horse before the cart, a lot of people once they get council approval they just start the work and you can't get them to go back and then get the by-law. Sometimes they may have council approval but the owner's corporation says no, so that's another thing that people have to think about. Council approval doesn't necessarily mean that the owner's corporation is going to approve the subject works.

Amanda Farmer: Yes, definitely. Thank you for sharing that one Reena. Jumping into my challenge for this week, I wanted to talk a little bit about the election of the Strata committee, this is something that I know Reena, both you and I get asked about a lot. Not just by listeners, but by colleagues and by clients. Specific questions on who is eligible to nominate, who, how the election process works in practice? It is complicated, particularly under the new law and I'm often ringing you saying, Reena is this right? You're ringing me saying, oh this happened, have we missed something here? I wanted to talk a little bit about it, it's going to be hard to get into too much detail but just to alert listeners to the relevant sections of the Strata Schemes Management Act and to the regulation. Where you might look if you've got some of these questions.

Reena, you're there on the ground attending meetings, do you find that this is a point where people get stuck and mistakes are made?

Reena Van Aalst: Yes well I think that it's been quite common for many agents to make this mistake when it came to the election of the Strata committee, because it's actually quite a complicated process, even in the previous legislation where there is a big difference between lot owners who are sole owners of a lot and then the co-owners. The main that confused people is the co-owners, the other thing also is a sole owner nominating someone who's not an owner. So it could be their tenant, their friend, their family, but they also then lose the right to be on the committee once they do that.

Amanda Farmer: That's right.

Reena Van Aalst: Also previously a sole owner could nominate as many people as they wanted, but the minute they nominated someone who wasn't an owner that's when they lost that right. So it's quite complicated and I think that I was actually involved in a case, it was to do with Community Land Management Act election procedure, which is a bit different again. What happened, there was a community association where there were Strata plans and there were individual house lots, and the outcome of the election, we went to a ballot and one of the owners who obviously didn't agree with the whole process of how the election was conducted. They went to the Tribunal and basically, the Tribunal went through the act and said, these persons off, these persons off, they weren't validly elected so there was actually a new committee that was formed as a result of the Tribunal order. So it's not that easy actually, and I think people should read it and we have a lot of training sessions in our company about it, just to make sure that everyone has their head around the whole process.

Amanda Farmer: Yes, good idea. Now the section to start finding out some more information about strata committee elections is Section 31 in the Strata Schemes Management Act, and I'll put a link to this in the show notes. That's where a lot of those things that Reena is talking about there, about nomination procedures, who is eligible for appointment to the strata committee, that's where that information is set out. That's where there are the rules about co-owners, how co-owners can get themselves onto the strata committee and the rule about individuals who are not owners getting themselves onto the Strata committee. They can be nominated for election by an owner, if that owner nominates them, then that owner cannot themselves then seek election as a member of the Strata committee. So that's what Reena was referring to there, and then you also want to be looking at Regulation nine in the Strata Schemes Management Regulation, which sets out how the election is to be conducted. So nominations in writing to be received before the meeting and then a call for any oral nominations at the meeting.

Reena Van Aalst: Another area that people get confused Amanda about, is also the order by which the election occurs. So basically it's nominations first, closed nominations then set the number, it's not the other way around. A lot of agents when I've sort of interviewed potential managers and asked them how they can update the election process, they all start with the number first and then fill the vacancies based on the number that is being determined. It's actually the other way around, and always has been actually.

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Amanda Farmer: Yes, you're exactly right, and that is in Regulation 9 after the Chairperson declares that nominations have closed, the owner's corporation is to decide the number of members of the Strata committee. So that's quite clear in subclause 3 of Regulation 9 if you need to refer to that. So if you do have particular questions about Strata committee elections, nominations for the strata committee, how to conduct those elections and receive those nominations feel free to send them through to us and Reena and I will cover those off in specific detail in a future episode. You're always welcome to email me amanda@yourstrataproperty.com.au and as you know we like to deliver content that you want to hear, and that's helpful to you. So let us know your particular questions on strata committee elections.

Okay Reena, your win for this week?

Reena Van Aalst: I think we've got a joint win, Amanda.

Amanda Farmer: Yes.

Reena Van Aalst: Yes, which is a Strata plan that you and I currently have been working on, so I might let you sort of start the way in terms of the success that has been obtained with the particular scheme.

Amanda Farmer: Yes, indeed, thank you for reminding me of that. We have yes, a building that we have both been working with, Reena manages this building and I have been involved for some years giving legal advice to this building. They have just had a win in the Tribunal, I don't think the case has been reported, so I just have to be careful about the details that I give out on the podcast. But it was a case where the building needed to do some work to the common property, in particular, the windows at the property needed to be repaired and they had some difficulty gaining access to the property. The lot owner actually didn't agree that the work that was being proposed to be done was the right work, didn't agree that it was the right contractors, that the method of work was going to fix the problem, which of course was a water leak. On that basis refused access to the owner's corporation.

We applied to the Tribunal under Section 124 of the Strata Schemes Management Act, an application for an order requiring the owner of the lot to allow access to the owner's corporation for the purpose of repairing and maintaining the common property. This was kind of a hard fought application, it was listed before Christmas and was then adjourned for a further hearing that happened in the new year. A lot of material filed by either side, a lot of back and forth about the scope of work and whether it was appropriate. At the end of the day, the Tribunal in their written reasons made it quite clear that the fact the lot owner did not agree that the scope of work was going to fix the problem, was not a reason to refuse access. The Tribunal said that the lot owner must permit the access because the owners corporations duty to repair and maintain the common property is a strict one, and the owner's corporation must comply with that duty. If it happened in the process that what the owner's corporation was doing on the lot was not fixing the problem, or down the track, it was discovered that it did not fix the problem then the lot owner could return to the Tribunal and seek appropriate orders at that stage.

Now, I've seen the Tribunal do that on a few occasions now, say that the work must be done and if the lot owner has a problem with it they can deal with that after the event. I think it's important for both buildings and lot owners to understand that the fact that you don't think it's the right methodology is not a good enough reason to prevent access or to hold up work. Because when that work is held up there can be further loss and damage suffered by other owners in the building, for example, if there's a leak. Or the common property gets further degraded because it's not being repaired. So the Tribunals quite keen these days to make sure owner's corporations can fulfill their duties and in our experience is generally not siding with lot owners when they're trying to prevent that kind of work being carried out.

Reena Van Aalst: But in this case also Amanda, the owner's corporation had sought expert advice, so knowing that the owner was going to use this argument in the Tribunal, and had been using it for quite some time, the owner's corporation had gone to the extent of engaging an expert to outline the methodology and why the proposed rectification would work. I think there was also council involvement as well in this particular case, which is quite an unusual event.

Amanda Farmer: Yes, that's a really important point Reena, we did have a council order and that is a relevant factor when the Tribunal is considering whether or not to make an order for access. If there is a council order requiring work to be done then the

owner's corporation is armed with yet another reason why access should be provided and Section 124 specifically refers to that. If the owner's corporation has been ordered by public authority to carry out work then that's another reason for access to be provided. I think in our case that weighed heavily on the Tribunal when they made that decision to order the access.

Reena Van Aalst: Yes, that's correct.

Amanda Farmer: So happy building in that situation and the work is being carried out, and almost complete. We await a decision from the Tribunal as to costs because the building has been put to quite an expense going through this process, of course, involving lawyers, involving experts and the Tribunal is going to make a decision shortly about who should bear those costs.

Reena Van Aalst: Yes, it's an interesting one, I mean and I hope that this will result in a favourable outcome for the owner's corporation and perhaps any other scheme that has had to go to a lot of extents in terms of costs and experts to try and get access. I think, one thing I've noticed too with some people is that they think that the window or the door, or whatever it is, they think it's their property. They don't realise they actually only have a proportional interest in that as common property. So it's actually not their window, it's not their property, people I think have this notion that when it's your own apartment everything within in it is your own, and that's not the case.

Amanda Farmer: Yes, that definitely true, it's sort of that mindset shift isn't it? To know that if there's a problem with your window, or maybe if you don't like the type of window that the owner's corporation is proposing, well, unfortunately, you don't get too much say in that. If everybody else in your building has the new windows or wants the new windows, the democratic process prevails and that's part of the compromise I suppose we make with community living.

Reena Van Aalst: Exactly.

Amanda Farmer: Alright, well it has been lovely to share that win with you, Reena, thank you very much.

Reena Van Aalst: Yes, hopefully, it all works out well in the end.

Amanda Farmer: I think that's it for this week, have you got anything else you want to add?

Reena Van Aalst: No, all good Amanda.

Amanda Farmer: Okay, well I shall catch you next time.

Reena Van Aalst: Okay Amanda, see you next time.

Amanda Farmer: Bye.

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