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YSP Podcast Transcript: Episode 143. When are records privileged? Plus, a flooring case

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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 well. We are just a few days away from Christmas when this goes to air. How exciting.

Reena Van Aalst: I know, I just can't wait for it all to be over this year. The last month has been so frantic, I think everyone thinks that the world's coming to an end when it's Christmas time.

Amanda Farmer: Yes, we had a few disasters in the office yesterday to do with administrative things, and technical difficulties and I said to my staff, "This is Christmas guys, this is just how it goes." It's always crazy. How do you usually spend your Christmas day? Family stuff?

Reena Van Aalst: Yes, well we either do Christmas Eve or late Christmas day, because my siblings have other plans with their in-laws. Yes, this year I think we're probably going to do a picnic actually. I think I've decided that we might go to Milk Beach on Christmas Eve or Christmas afternoon, depending on just some finalisation between one of my sister, and in-laws, and things like that. So yes, it's all going to-

Amanda Farmer: Beautiful.

Reena Van Aalst: What about you, Amanda?

Amanda Farmer: We do the family thing. We have both sides of the family in Sydney, so we will be heading across to my sister-in-law's for lunch, and that's always fun, little kids around, and cousins and all going wild and enjoying their Christmas presents, and then-

Reena Van Aalst: You mean going crazy, not wild.

Amanda Farmer: Sending us crazy perhaps, the parents, so just throw them in the backyard, put them in the pool ... and then we'll head back and drop in to see my parents and my siblings. So yes, family stuff, and then I think at Boxing Day everybody sort of sits back and relaxes and chill out at home.

Reena Van Aalst: Yes, exactly. Get over all the Christmas eating as well the day before.

Amanda Farmer: Yes, indeed. Now, speaking of craziness, why don't we jump in and talk about our strata challenges for this week? Reena, do you want to kick us off?

Reena Van Aalst: Yes, so recently I had a general meeting where an owner turned up and on the strata roll, we actually had them as a company. When I asked him, I said, "Well, you know we don't have a company nominee form from you, which has to obviously be received and has to be on the roll prior to the meeting opening." He said to me, *"But I've never had to bring a company nominee form ever to a meeting, and I've always voted. Look at all the minutes, look at all those past minutes and the past agent. You should know that."*

Reena Van Aalst: I said, "Well, I'm sorry, but unfortunately you cannot vote, because the fact that the company is not a person,

and a company has to assign a person to be its representative or nominee, as such, to be able to vote at general meetings."

Reena Van Aalst: In this case, the manner I suppose, the person was put off and not happy. The problem is, I think, a lot of agents actually don't understand that a company is not actually a person, therefore someone turning up reporting to be a nominee or being a director, the agent can't really take that on face value. So, I actually did go back to the minutes, and of course, each company that wasn't on the strata roll had never had a nominee, and each person who had attended that meeting had just been named as a person.

Amanda Farmer: Goodness.

Reena Van Aalst: In this case, it was a contentious meeting, because there were some special resolutions, so this potential person's vote could have affected the outcome, but in this case, it was lucky that it didn't. I think it's just one of those challenges that as agents we face when all agents don't really understand how the Act works. Therefore, they don't really know that a person can't just turn up on unless they've given a company nominee form to state that they are authorised to represent that company at the meeting.

Amanda Farmer: And that they're listed on the strata roll as the company nominee.

Reena Van Aalst: Yes.

Amanda Farmer: Now the question that I think we've had before on the podcast, Reena, and it's interesting that you raised this because it was only last week that I had the same question asked to me by a client. When a company wants to appoint a proxy, how do they fill in the proxy form? My memory of our discussion about that was like any other document that's being signed by a company, a company needs to comply with Section 127 of the Corporations Act, and ensure that two directors or the director and secretary, if it is not a sole director secretary company, signing that proxy form in the same way a company executes any document.

Reena Van Aalst: Yes, that's right.

Amanda Farmer: I think that's often overlooked as well, that if it's not the company nominee turning up, it is a person with a proxy. Often the proxy form is not correctly completed by the company.

Reena Van Aalst: Yes, exactly right, Amanda. I think a lot of people don't realise also, when you say about having 2 directors, most of the time, I mean not that we ever do a company search, but I have in some cases because it was necessary to do so-

Amanda Farmer: Contentious.

Reena Van Aalst: ... and contentious, and therefore, you know that there's only more than one person that's a director. Yes, so these things can become quite problematic, I think, when people aren't aware of what the requirements are in the Act, and people then turn up to meetings, and they're not permitted to vote, and of course people don't like being told they can't vote, and I can understand that I mean I would probably feel the same way if I was getting conflicting advice. I think there are some basic things that I think strata managers should be aware of, and this is one of them.

Amanda Farmer: Absolutely, and a trap for the inexperienced players, so good one to remember.

Reena Van Aalst: Yes.

Amanda Farmer: All right, well my challenge for this week relates to privileged correspondence, and it is a listener question. How should strata managers be storing privileged correspondence amongst the owners corporation's books and records? If we take that a step back, what is privileged correspondence? Well, it's communications that are prepared for the dominant purpose of legal advice.

Amanda Farmer: So that's the legal test. Is this prepared for the dominant purpose of legal advice? And we're thinking about things like letters to and from the owners corporation's lawyer, advice from the owners corporation's lawyer, questions that you might have sent, written material, records of file notes if you've had a meeting with the lawyer, and it crops up of course when the building is having a dispute, say with a lot owner or the lot owner with the building. It's a very common question, and I don't think we've gone into it before on the podcast, Reena.

Reena Van Aalst: No, actually, no Amanda, so I think ... I mean, obviously, you and I have dealt with privileged correspondence. When manual systems were being used before, you'd have a separate manual file where any emails or any advises, Amanda, were stored, and then we'd have a big sign saying "not for searching", so that when the staff came out to take the searches when we had the boxes and everything, they would not take that file.

I think electronically, it is a bit more difficult for people not to make a mistake, so what we try and do is we actually make a separate electronic file, only when we know there's a search, because I suppose there's no reason to move things unless they're being searched. When you know there's a search happening, then you basically create a privilege file in your directory of the building, and then you basically move all your emails into that section and all your correspondence.

But I think a lot of the time, Amanda, which I think you and I have dealt with previously, is that, how does a strata manager know what's privileged?

Amanda Farmer: Yes.

Reena Van Aalst: I think that's a very important question, because most managers don't really know what that means, and whether this advice or that email is privileged or not.

Amanda Farmer: Yes.

Reena Van Aalst: I think in the past, we've actually asked you to come and look at all the records, especially in certain contentious buildings where we know that any email that shouldn't be seen is seen, is going to cause a lot of problems.

Amanda Farmer: Yes, for sure. It is too easy, I think, for strata managers to say "Oh, well that's from the lawyer, it must be privileged." Now, that's not the case. If the lawyer is only sending to you a copy of what the lot owner, for example, has sent to the lawyer, well that's not privileged. The lot owner is privy to that correspondence because they wrote it, so it shouldn't be withheld from the file.

Amanda Farmer: However, things can get a little bit uncertain, wherefore example, there is a draft report that's being prepared by an expert. Now, that report ultimately is going to be finalised, and it might be sent on to the court or to the lot owner, but, when it's in draft, it is a document that is prepared for legal advice. It's a document for the lawyer to look at, for the owners corporation to have a look at and see if they're happy with, do any of the instructions need to change, be added, what needs to be amended? Now, that draft is going to be privileged, so that's the kind of thing that can creep into the files and be shown to a lot owner who is in dispute with the owner's corporation and cause some problems.

The other thing that's really important to cover off here, Reena, where you say that you're putting documents in a folder withholding them from a search, that would be only if it is the lot owner who is having the dispute with the owners corporation is the one doing the search.

Reena Van Aalst: Yes, we're not actually prohibiting it from any other lot owner or someone whose buying a property.

Amanda Farmer: Yes.

Reena Van Aalst: No, no. It's only for that person, so they can't see exactly what is being advised by the owner's corporation against them or in relation to them. No, that's correct.

Reena Van Aalst: I think another good practice for managers is to actually, there are obviously things that you know that are privileged because sometimes it even says on the document that it's privileged, so that's an easy one to pick up. And there are certain things when a lawyer is giving advice about the lot owner or the matter in question, but I think anything else that you're not sure of, Amanda, I think what should happen is that I think those documents should be sent, perhaps to the lawyer via a Google link or something if there's many documents, so that nothing is actually inadvertently kept in the file.

Because many years ago, in my previous role, there was a manager who actually accidentally left some things in a file, and that owner was coming to do a search. Unfortunately, there was a lot of problems that resulted as a result because of the fact that inadvertently, some correspondence that shouldn't have been in that file was actually left in there, and that lot owner got to see quite a bit of information.

Amanda Farmer: Yes, it's definitely an area to be careful of. There is a little bit of case law on this. We do have a court of appeal authority in New South Wales that deals with privileged documents in strata schemes, so I'll put the link to that case in the show notes. There's also an article that was written by my practice lawyer's chambers, which summarises this stuff a little bit more helpfully perhaps than the court of appeal does, so I'll put a link to that case in the show notes as well.

But a really good question, a great topic. It's not often we come across general strata topics we haven't yet touched on in the podcast, Reena, but I think that's one of them.

Reena Van Aalst: Well, there's always something new, Amanda. I must say, sometimes you think you've sort of come across everything, but lo and behold you just never know what crops up.

Amanda Farmer: That is right, that's why we love it. All right, let's switch over to wins for the week, Reena. What is your win?

Reena Van Aalst: Well, I've just taken over a new scheme, and it was fortunate that an owner had agreed when we took over to actually allow us ... he actually had completed some major property renovations, no by-law, and unfortunately there's been a lot of issues in the building because of this, and the previous manager obviously wasn't able to impart the importance of actually making sure that the by-law was put in place.

Even though it was retrospective, as a common property rights by-law, I think the owners corporation should take whatever steps are necessary, because in the future when that owner sells, or the people that are on the committee aren't there anymore, or no one recalls that this person actually did the work, then the owners corporation will become responsible for the repair and maintenance of that property.

I think sometimes people think, "Uh." I find sometimes in some buildings people don't ... "Oh, but he's a nice bloke and he didn't really know what he was doing. He didn't understand." I'm thinking, "Well, be that as it may, people, I think, sometimes ... there's that saying where it's easier to ask for forgiveness than to seek permission."

Some of the people may think, "Oh, well, if you do it, then, later on, it's hard to undo," versus actually doing it correctly in the first place. I think owners, corporations, and committees should really make sure that any person who does alterations that are not covered under the standard line of works with general meeting approval, do have a common property rights by-laws so that the future maintenance and repair is actually undertaken by that future lot owner and the current lot owner.

Amanda Farmer: Yes, absolutely. That would be my recommendation, and it is something that the Tribunal does do. In my experience, if an owner who has carried out work without approval is causing trouble, or it comes to the attention of the strata committee that this work has happened, and if the owners corporation decides to file an application with the tribunal to have the common property reinstated, the Tribunal often tries to resolve the matter by ordering the owners corporation to convene a meeting and consider a common property rights by-law, and that essentially cures the breach, if you like, and shifts that responsibility for the affected common property over to the lot owner. The way the Tribunal sees it, "Well, that should make you happy, owner's corporation, because we're now protecting your position," which is fair enough.

Amanda Farmer: I always tell clients who come to me on either side, a lot owner or a building with this kind of a problem, I say, "Look, if that's what the Tribunal is going to do, then we should take that step ourselves. First, either put the by-law forward or if you're the owners corporation, request that the by-law be put forward and try and resolve it that way before you go off to litigation."

Reena Van Aalst: Yes, I think it's a win-win when the owner gets to keep their renovation and the owner's corporation has the by-law protecting it. I think sometimes where that may sort of become unstuck, Amanda, is when an owner has installed an aesthetically displeasing thing or something that's really not in keeping with the building. It doesn't matter what by-law you're going to pass, they don't want it there and it's an eyesore, or whatever.

There are some circumstances where having a by-law just to confirm the rights of repairs and maintenance in the future is not sufficient to quell the concerns when there are aesthetic issues in place where a building ... where someone can see this ... I had someone call something a monstrosity on someone's balcony, or whatever it was.

Amanda Farmer: Yes, and then I suppose the by-law that's proposed or put up by either the lot owner or the owners corporation doesn't get resolved, because you don't get your special resolution, and then it's a matter of which party is being unreasonable. Is the owners corporation being unreasonable and refusing? That's a different fight in the Tribunal.

Reena Van Aalst: Exactly, that's another topic for another day, I think.

Amanda Farmer: Indeed, indeed. All right, well, good win there. Good that that was able to go through, and that work has now been covered off in that building. The win I have on my list for today is a case, and I do have a habit of listing cases as wins.

I have to say, that's not necessarily because I agree with the outcome or I think it's a good outcome, I list them as wins because I think the more cases we have, particularly as our Act is only a couple of years old, the more certainty we have in New South Wales when it comes to some issues which I think, as a lawyer, have been a little bit unclear in the drafting of our legislation.

This one is a particularly interesting one because it relates to Section 110, which is our section that provides minor works to be approved by the owner's corporation or to be delegated for approval to the strata committee. This particular case related to hard flooring and hard flooring is listed in Section 110 as a type of minor work that if an owner wants to install hard flooring, they can apply to the owners corporation and an ordinary resolution at a general meeting will be sufficient to permit that hard flooring.

Now, in this case, it's called Gurram, G-U double R A-M, and I will put a link to it in the show notes. It's a Tribunal case decided by a single member. The building in question had a by-law that essentially banned hard flooring; no hard flooring allowed. The lot owner had installed hard flooring and the owners corporation had pursued that owner.

Reena Van Aalst: So Amanda, just to interrupt you, was this filed or registered before the new Act came in or since the new Act came in?

Amanda Farmer: The by-law was registered before the new act, and when the lot owner came to challenge the by-law, and I'll get into what the grounds of that challenge was, the owners corporation did make the submission that the by-law, even though it was passed before the new Act, it continued to have effect, because there are transitional provisions in the new act that brought old by-laws across.

But the lot owner didn't challenge the by-law on that basis, they challenged the by-law on the basis that it conflicted with Section 110, because Section 110 says you can have hard flooring if you have an ordinary resolution of the owners corporation. The by-law, however, said that no hard flooring was allowed at all in this building. There was a blanket prohibition on hard flooring.

And perhaps a little bit surprisingly, I think, the member agreed with that, and the member said "Well, if hard flooring is permitted under 110, then an owners corporation cannot have a by-law that says anything contrary to 110. They cannot have a blanket prohibition on any of these minor works that are listed in 110."

Amanda Farmer: This is something when I first read the new Act, I pointed this out as being confusing, and I've asked the question of myself to some of my colleagues, if there is work that's listed in 110 as minor work, that is permitted with an ordinary resolution of the owners corporation, and then an owners corporation can make by-laws about matters affecting common property, lots, as long as they're not harsh, unconscionable, or unreasonable, then how does one sit with the other? Which prevails? If you have a by-laws that, for example, says you can't have hard flooring, how does that sit together with 110? And that question has now been answered by this member of the Tribunal in this Gurram case. They've said Section 110 prevails, and you can't outlaw things like hard flooring.

Reena Van Aalst: Amanda, can I ask you another question? I mean, just because something is deemed to be a minor work under the Act, so therefore, it doesn't require any other type of approval apart from general meeting approval, but where does it say that you have to approve every single thing that's ever been put before you because it's in the Act?

I mean what if someone wants to install a floor with no underlay, no insulation, I mean how can someone approve that? Now, there doesn't seem to be any conditions in terms of an application, so therefore, people can submit anything, and just because it's under that Section as a minor work, I don't understand how it means you have to approve it just because it's included as something that's permitted.

Amanda Farmer: Yes, so the thing with this case is that the validity of the by-law itself was challenged. So, the lot owner said, "This by-law is invalid because it conflicts with 110," and the member said, "Yes, I agree with you." So what remains is 110, and 110 says, "You make an application, and for approval to do minor work, minor work includes hard flooring, and the owners corporation may or may not approve that hard flooring by ordinary resolution and may or may not impose conditions."

You still have that application process available to you, and that is the process to be followed, and you still have that opportunity to impose conditions. For hard flooring, you would definitely be saying things like "We must have underlay. It must be 5 mil Regupol, or whatever it is that everyone's using these days, contractors insured license, all that kind of stuff." So, you are still protected in that way, and the Tribunal certainly didn't say, "If it's minor work it must be approved," they said, "If it's minor work that is listed in 110, you can't outlaw it via by-law and you must follow the 110 process."

Reena Van Aalst: Yes, so what you're saying is that you can still ... their terms and conditions still will prevail, but the fact that you have a blanket prohibition on flooring or any other minor work that's listed in 110 cannot occur.

Amanda Farmer: Yes, yes. I think I have just mentioned there harsh, unconscionable, or oppressive being one of the limits in our by-laws, and the member did touch on that in the case to say that even if I found that this by-law wasn't invalid because of a conflict with 110, I would probably find that it was harsh, unconscionable, or oppressive.

So really important. A different member in a different situation may have made a different decision, but important for our buildings to be aware of, especially those who do have hard flooring bans, and I can tell you, gosh, in my time as a strata lawyer, I've drafted lots of by-laws that ban hard flooring.

Reena Van Aalst: I mean, I suppose it's one of those very interesting issues that arises in communal living where you want people to have nice apartments, and have wooden flooring, and it's more aesthetically pleasing and it's more modern, and people are buying more expensive apartments, and want to be able to renovate them and make them quite appealing. The issue, I think, sometimes is communal living and then the impact of noise. Just even last night I had an owner at a meeting who said to me, "Oh, Reena, there's a unit above me and they just got hard flooring, and just walking with high heels, click, click, click."

Sometimes people don't realise when you're actually walking on flooring that the person below you can hear it, and it can be quite annoying, especially in the very early morning or late at night when it's not much background noise. I think these are the concerns that have to be addressed through proper insulation and other measures, and some buildings even have the acoustic engineers is required to actually give a report, Amanda, before and after, and go to the adjoining apartments to see.

Some buildings are really strict on giving approval and making sure owners have to go through quite lengthy compliance

requirements with acoustic engineers, and Regupol, and apart from the usual licenses, et cetera. I think it's one of those things where I think we'll be seeing more about it. Perhaps by-laws becoming more onerous in terms of having more conditions to comply with.

Amanda Farmer: Yes, definitely. And if not by-laws, then conditions attached to minor works approval.

Reena Van Aalst: Yes, minor works. That's what I meant, sorry. Once a by-law has conferred that to the committee to give it approval, granted conditions are included for that approval process to occur.

Amanda Farmer: You're right, and a lot of the heartache I find with hard flooring and noise, again, like a lot of disputes in strata comes down to a lack of communication. So that example of, "She's wearing her high heels and she's click-clacking around," that's a knock on the door to say "Hey, would you mind taking your shoes off when you walk in the door?" That's something we've got hard flooring in our strata apartment where we live, and we certainly do that. We're very conscious that we don't have shoes on in the house. If I happen to have to run back in, I've got my high heels and I have to run back in and grab something, then I'm tip-toeing around because of I just ... I'm very conscious.

Reena Van Aalst: Me too, I do the same thing. I don't make any noise, I'm just like ...

Amanda Farmer: Yes, and that's not hard to be mindful of your neighbours.

Reena Van Aalst: Right. No, no.

Amanda Farmer: All right, well, I want to wish everybody Merry Christmas, Happy Hanukkah, Happy Holidays, however, it is you celebrate. Enjoy, and I'm looking forward to seeing you all, catching up with you Reena, chatting you in the New Year.

Reena Van Aalst: Right, Amanda. Merry Christmas everyone. Bye.

Amanda Farmer: Bye.

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