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YSP Podcast Transcript: Episode 147. Making lot owners responsible for common property in small schemes

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

**Reena Van Aalst:** Hi Amanda, how are you?

**Amanda Farmer:** I'm doing very well, thank you very much. How has your week in strata been?

**Reena Van Aalst:** Yes, busy actually, it's been quite busy for the beginning of the year which is probably good in some ways but gets you back into the swing of things. On the other hand, I hope it's not a sign of what's to come though.

**Amanda Farmer:** Yes, we generally find that January is a little bit cruisy but yes it doesn't take long to ramp up, does it?

**Reena Van Aalst:** Traffic's actually wonderful, that's all I can say!

**Amanda Farmer:** Yes, getting around in January before school goes back.

**Reena Van Aalst:** Exactly.

**Amanda Farmer:** Let's jump straight into our wins and challenges for the week. What is the challenge you'd like to share, Reena?

**Reena Van Aalst:** This is an interesting one. It's actually relating to legal fees that remained outstanding to a legal firm that had been engaged by the owners corporation prior to our appointment. And basically there was litigation between the owners corporation and one of the lot owners, and it actually not being a supreme court matter, which we obviously then just took over. And the committee then decided that the fees were actually quite high for what had been charged in terms of the owners corporation's legal fees. And we tried to negotiate with the lawyers by asking if they want to have their costs assessed, and even offering to pay 80% just so they would get paid, and the whole matter would just be concluded. Anyway, so they refused to have the costs assessed and we said, okay, we'll arrange the assessment. And between that happening, this is before Christmas, we would send over the statement of claim. And that was served by e-mail and registered post. And we had some investigation, I think, Amanda, I think I conferred with you about this. Basically, you can't serve a statement of claim by e-mail, this implies consent and therefore, I think postage is assumed to be on the 7th working day after being posted. So that's not an issue within itself, when you think about most companies are closing on the Friday before Christmas.

So then when we got back to the office after our closure, we e-mailed the committee the statement of claim and they said, can you send it to a lawyer, which I did. And then after I get another call and this time, the committee said, "*Oh no, we want you to use this other lawyer,*" so I have to then retract the instructions. But anyway, they were off to legal firms so it really didn't make any difference. But the legal fund that they're actually instructing me to liaise with, Amanda was actually the lawyer that was acting for the owner against the owners corporation, so I don't know. The lawyer is saying that they don't really have a conflict of interest. Now, I sent an e-mail asking them to confirm that, because I just don't really understand, it doesn't seem right to me because I don't know in terms of- if they're going to arrange the assessment they said, I don't know if that means they'll be able to access the specific client-

**Amanda Farmer:** Yes.

**Reena Van Aalst:** Or respondent. So have you ever had that experience, Amanda, where someone was acting against an owners

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corporation says, oh they can now, there's no conflict, they can now act for the owners corporation for a cost matter?

**Amanda Farmer:** Not for a cost matter. Conflict is something that comes up regularly in the work that we do, simply because strata law being a pretty niche area of the law, and if you're in a place like Sydney where you just have a handful of experienced strata lawyers, very often we are approached by lot owners or by buildings we have in the past acted against, and we have to really assess whether we think we have a conflict in acting in a new matter, and the way that you assess that, is to think about, well, do I have, or am I likely to have possession of information, documents that might be used against the other party, and put me in a position of conflict where I can't properly advise my client, whether that conflict exists now or might have the potential to exist in the future. Now your situation, this is the same matter, isn't it?

**Reena Van Aalst:** It's the cost aspect of the same matter.

**Amanda Farmer:** So they're being asked to advise in respect of costs that their opponent has charged in this matter in which they were involved.

**Reena Van Aalst:** Yes, exactly.

**Amanda Farmer:** And I can't see how they wouldn't have a conflict-

**Reena Van Aalst:** Yes, that's what I thought. But as a managing agent, it's certainly my-I know a bit more about this than perhaps most people do. But I don't really think, Amanda, it's really my role as a managing agent, acting in the best interest of the owners corporation to ask, well, you're saying you haven't got one. But how do I- I mean, I suppose I'll just ask them to confirm it in writing and I'll go from there.

**Amanda Farmer:** Yes, because I would think, surely, they being the other side to the proceedings, having received correspondence from the lawyer, having been intimately involved in the proceedings-

**Reena Van Aalst:** Yes.

**Amanda Farmer:** How would they not be in possession of information that could be to the detriment of their new client, being the owners corporation, and how are they- are the proceedings finished with the-

**Reena Van Aalst:** Yes, they're finished. They've been concluded.

**Amanda Farmer:** This is the cost aspect now that remains outstanding. Yes, it would be something that they would really have to think hard about. From your perspective as a strata manager, for strata managers listening who might be in this kind of situation, not necessarily about a cost assessment, but a lawyer saying, "Yes, I'll act for your owners corporation and I don't think I have a conflict." I think as a strata manager, I would be saying to the committee, I am concerned that this lawyer does have a conflict. Having been doing this for 20 years or so, been through a cost assessment process, I can't see how the lawyer will not come unstuck, if you like, down the track, because that's what we have to think about as lawyers. Maybe not now, but down the track, am I going to have something that I can't use because it would breach the confidentiality of my other client?

**Reena Van Aalst:** They're doing somebody else in, and it's more money wasted.

**Amanda Farmer:** Exactly. So all you can do it warn the committee and say, look, the lawyer says they don't have a conflict. I'm skeptical about that. Matter for you. You can accept the lawyer, or you can take on board my skepticism, which comes from my experience, and choose someone completely independent.

**Reena Van Aalst:** Yes, that's a good-

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**Amanda Farmer:** Or proceed. And so when it all falls apart, and the lawyer down the track, 2 months time, says, oh, I've got this e-mail, but I can't use it because it would be to breach the confidentiality of my other client. I have a problem, you're going to have to go somewhere else. You can say, voila! I told you so. Sorry you had to spend that \$10,000 that you're not going to get back, but maybe next time you'll listen to me, the strata manager with the experience. That's what I would be doing as a strata manager.

**Reena Van Aalst:** Yes, thanks Amanda, that's what I have been doing-

**Amanda Farmer:** Yes, because it's quite unusual-

**Reena Van Aalst:** When I spoke to the committee member who said he spoke to the lawyer and said there's no conflict, I thought, that doesn't sound right. I'm not an expert, but it didn't sound right. But anyway, we'll see how it goes.

**Amanda Farmer:** Yes. Let us know.

**Reena Van Aalst:** Yes.

**Amanda Farmer:** All right. Well, my challenge for this week, I was recently involved in an AGM where it was proposed to appoint a new managing agent and the motion on the agenda was to appoint the new managing agent for a term that was expressed to be until the next AGM. I had never seen that before, and usually for those who may not be experienced in these matters, an agency agreement will say it's for a term of 1 year, 2 years, or 3 years, 3 years being the maximum that we can now have in New South Wales. But this one said the term is until the next AGM. Now bear in mind that an AGM doesn't have to be held at a particular time any more. A building just has to make sure that they have an AGM in each financial year.

**Reena Van Aalst:** Yes.

**Amanda Farmer:** So, it's a very indefinite term, I would think, until the next AGM. It could be 12 months, but it could be 2 years, if the AGM was stretched out.

**Reena Van Aalst:** I don't believe that's valid, Amanda, because the Act specifically says that you've got to- I'm going to have to check the Strata Schemes Management Act which deals with this, but the Strata Schemes Management Act refers to the maximum duration of the contract, so, and that's why also- as a 12 month contract, you've got to give 3 months notice to the strata committee that it's basically going to expire in 3 months and then they can extend it by periods of up to 3 months to the next AGM.

**Amanda Farmer:** That a very good point, because you wouldn't know necessarily 3 months out when the AGM's going to be held, so you wouldn't be able to give that notice because you don't have certainty as to the expiry date of your agreement. It might be that the contract, from a legal perspective, it might be that the contract is void for uncertainty.

**Reena Van Aalst:** Yes, exactly. I don't think that's correct at all. I think, it's funny because- I had a client contact me for a unit that they own in another strata scheme, and they were saying to me, they sent me a copy of their agenda for their appointment of a new managing agent. And there was no contract attached to that agenda Amanda, they only have a title held at the meeting. So maybe that's a podcast for another day, but I think it's quite common that it's been happening and I'm not really sure how people can basically make a comparison between various managers or even the one that they've been provided in the agenda, if there's no information about their fees, the duration of the contract-

**Amanda Farmer:** Yes, you don't know what the terms are-

**Reena Van Aalst:** Exactly. I don't know-

**Amanda Farmer:** Yes, I have been in at least 2 meetings where that's been an issue, where there has been an appointment proposed and no agreement attached, and I have urged the chairperson to rule the motion out of order, and I've referred to Section

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49 of the Act, which says that the appointment of a strata manager is to be made by instrument in writing authorised by resolution of the owners corporation general meeting. So what you're actually doing is authorising the instrument, and how can you authorise an instrument that you don't have, or haven't seen, or don't know exists, or don't know the terms of-

**Reena Van Aalst:** Like passing a by-law attach the agenda, and passing an agenda about A, B and C, and there's nothing apart saying it's about the rooftop, but nothing more than that.

**Amanda Farmer:** Exactly right. So I do think that Section 49, too, gives you that direction that you need to be attaching agency agreements to agendas to make it a valid motion to appoint a strata manager, and I would, in the situations I've been involved in, it's been lot owners who've engaged me, who don't want a particular manager appointed or re-appointed, and it's been a very easy way for me to make sure that manager is not appointed, because they're stuffed up. They haven't put- or their committee's stuffed up, by not instructing that that agreement be attached and it's-

**Reena Van Aalst:** It's actually not the committee, because half the time the committee aren't really aware of the legal processes that are involved in appointment of a managing agent. Sometimes it's the other managing agent that doesn't want the incumbent to know what their terms and conditions are, and what they're charging, which is really stupid, because at the end of the day, you get the books and records, that should be in there anyway. And also what I've noticed in some companies, and I've had to basically go back and say, you can take out all your proposals and all your company stuff and whatever you want, but you can't take out the agency agreement that's actually part of the meeting. It was approved at a meeting, you can't just take it out of the files.

**Amanda Farmer:** Yes, well, I would think anything that's been put to the owners corporation or the committee for consideration, whatever, it's a quote from a contractor, proposal, or tender, they're all records of the owners corporation. They should all be in there.

**Reena Van Aalst:** I think there's a real misunderstanding in terms of the laws of agency, Amanda. I think managing agents really understand that they're just the custodians of someone else's information, it's not their information. And in terms of when you take on new schemes, you just see that more and more. There's probably only one company I've dealt with that actually understands the law, and every other company that just gives you bits and pieces, you don't get e-mails, you don't get this, you get an export of whatever document management system they're using, and it just says doc, doc. So you've got to open up every single document to find out-

**Amanda Farmer:** It's horrible.

**Reena Van Aalst:** What exactly-

**Amanda Farmer:** And you're charging, you have to charge the building for that work.

**Reena Van Aalst:** Yes, well sometimes it's hard because there's so much, sometimes you have to charge because the time spent just trying to go through the information that's been given to you can be quite time-consuming. It can be days of opening documents. And also someone said to me, because in a sense, we're actually writing to an agent asking for some records that hadn't been provided. And so they said, how do you know that you don't have it? I said, well sometimes you don't know until you need something and you haven't got it. So sometimes you don't know it's not there until there's a reason to access that information.

**Amanda Farmer:** I think that's a whole topic in itself and I'll put that on our list for a future episode. That hand-over process from a former manager to a new manager, that's great for our strata manager listeners to get some tips on, and also our committee members to understand what's going on in the background when you do terminate or an agreement comes to an end for your current strata manager, you've got a new one. Because there's often delay, takes time for accounts to be closed and then opened.

**Reena Van Aalst:** Yes, bank accounts to be closed, new checks, closing check to be received from the bank and all that-

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**Amanda Farmer:** All right, it's on the list. Stay tuned. All right, let's change track and chat about your win for the week, Reena.

**Reena Van Aalst:** So, we've had an apartment in one of our schemes that's had some water leaking into the apartment beside it, and now more recently into the apartment below. And the building manager's been trying, unsuccessfully, to try and obtain access and there's a bit of a rift between this particular owner and the building manager. And so unfortunately, he said, Reena, can you please help me? I just can't get in. And the other agent also of the adjoining lot has written to me saying we've got water penetration. Our tenant's asking for lost of rent, etc. So I had to end up writing a letter just to say, well, basically, if you don't provide access we'll have to go to the tribunal, and also we gave 7 days' notice, because under the Residential Tenancy Act, you've got to give a tenant 7 days' notice before, as a landlord, you can even go in or an agent can go in.

**Reena Van Aalst:** So within the hour, we got a response and access was provided. But unfortunately sometimes when there are personality conflicts or just even conflicts between lot owners and building managers, you can really affect the running of the building, because in this case, there's animosity between them and I think that's why access wasn't provided, and therefore, there was loss and damage occurring in adjoining apartments and those underneath.[crosstalk 00:14:32] Just horrible when you have to go to the tribunal and lodge applications, it's costly-

**Amanda Farmer:** Doesn't always help things to move faster, that's for sure.

**Reena Van Aalst:** No, so anyway that was a good win, I thought. It was a quick one actually.

**Amanda Farmer:** So your letter basically told the owner that you did have that right to go to the tribunal to seek an order for access, and if they don't provide it, that was your next step, and then they-

**Reena Van Aalst:** I also provided an the email from the agent of the adjoining building, describing what conditions were occurring in that apartment, and the fact that the owner was facing lost of rent claims, so I tried to sort of say, well, this is quite serious now, not just about water leaking, it's really getting- so thankfully, she agreed and access was obtained the next day.

**Amanda Farmer:** For those listeners who may not be across that section of the Act which allows you to go to the tribunal to obtain an access order, it's Section 124 in our Act in New South Wales, and it says that the tribunal may, on application by an owners corporation, make an order requiring the occupier of a lot to allow access for the purpose of, and there's a list of a few things, but basically in your situation, Reena, it was for the purpose of allowing the owners corporation to carry out its duty to repair the common property, I imagine being some failure in waterproofing.

**Reena Van Aalst:** From what I understand, it may be the renovation that the owner completed in her bathroom- it could have been worse.

**Amanda Farmer:** Right, okay, but you've got to investigate that as a first step, really.

**Reena Van Aalst:** Is it an owners corporation problem, or is the owner's problem?

**Amanda Farmer:** Yes, good point. I've recently been involved with a building where an owner was alleging a water leak within their garage, and had sent pictures that there was water leaking in their garage. It's not clear whether it's coming from the slab above, or whether it's coming from a pipe that's running through the garage, and then showing some damage to their goods that's happening in the garage because of the leak and some mold that's growing. And the owners corporation then proceeded to say, "Well, yes, we'll send our plumber in to have a look. Let us know when you're available to grant access." And this owner has, for whatever reason, known only to this owner, refused to allow access.

And this owners corporation said to me, well, Amanda, what obligation do we have to force some kind of access? And I've said, well, it's water that is not affecting anybody else, unless like your example, Reena, where it's going to another lot. We've asked everyone around that garage, are you having water leaks? No. It doesn't seem to be having any impact on the common property or

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other lots or other people, so I said, well, why would we go to the expense of making an application, seeking an access order? This owner is going to continue to suffer their own damage if their goods are being wet and subject to mold, but other than saying that, this is, if you don't let us in, we can't help you.

**Reena Van Aalst:** Exactly.

**Amanda Farmer:** That's all we can do. So good to draw a distinction between those situations where there's an obvious failure in the common property that's going to affect either another lot or other parts of the common property will get worse, and something that an owner is alleging is happening within their lot, but not providing you access so you can determine-

**Reena Van Aalst:** Can't really do much.

**Amanda Farmer:** Can't really do much, that's it. Okay, my win for this week, I wanted to have a chat about a 2-lot strata scheme, one owner of which has come and approached me about how best to manage a renovation, and, Reena, I'm not sure whether you manage any 2-lot schemes, but I'm sure you've had some experience of them in your time as a strata manager. Those small schemes often have the biggest problems.

**Reena Van Aalst:** I've only actually been asked to- I've been asked to manage them, but I try not to. I've been doing a lot of consulting, actually, because I think sometimes they just need, one party needs that help.

**Amanda Farmer:** Yes, so they unfortunately, when there's a problem in a 2-lot scheme, a dispute, a personality clash because there's only 2 owners, they are very hard to resolve, often becoming tractable and of course, if you have meetings you try to get something done, you can have a deadlock very easily if the unit entitlements, as they usually are, are equal. So I do get involved in these situations, sadly, where there's NCAT proceedings or disputes in 2-lot schemes.

But this one was a little bit more positive, and that's why I've listed it as a win. This owner's recognised that they want to do some renovation work. They've looked at the by-laws, which is simply the model by-laws from the model '96 Act. They have no other real by-laws, they've got obviously the strata plan that shows where their boundaries are, and they've said, well we want to do a bathroom, a kitchen, we want to remove some walls. We're obviously going to affect the common property. So we're going to need some kind of a by-law. But in the meantime, is there a way, because we're a 2-lot scheme, is there a way that we can make very clear that each owner is responsible for the common property that is immediately adjacent to their lot?

So, for example, can we say that the waterproofing in the bathrooms is the responsibility of the owners? That the ceilings, that the floors, that the laundry, the tiles, if there's ever a problem, if there's ever a leak, it's the responsibility of the lot owner. Which kind of makes sense because, Reena, 2-lot scheme, we're not really affecting the other, we're not really paying levies, we pay an insurance premium for the building insurance which we must have under the Act, that particular type of policy. But can we achieve this separate togetherness, if you like? And I said, yes you can, and I think you do that by way of a by-law. So we know in our Act we have this ability which we've always had for the owners corporation to specially resolve that it will not repair or maintain a specified part of the common property, and that's now in our Section 106, used to be Section 62-3, it's 106, 5 or something like that now. An owners corporation has always been able to remove its obligation to repair or maintain a specified part of the property, but only if it will not affect the safety of the building or the structure of the building.

**Reena Van Aalst:** Integrity-

**Amanda Farmer:** Yes. So how do you ensure that it's not going to affect safety or structure? Well, you pass that responsibility on to the lot owners. So if you say, the owners corporation is not going to, for example, deal with bathroom membranes in this 2-lot scheme, then you must also have a by-law whereby the lot owners take responsibility for dealing with their own bathroom membranes and provide their written consent to that. So this particular lot owner has now asked me to draw up that all-encompassing by-law that, my short summary of it is that it makes the lot owners individually responsible for those parts of the

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common property that are immediately adjacent to their lot and we'll set those out with some specificity, and each lot owner consents to that, and away they go. They're able to then, forever more until that by-law is amended or repealed, look after their own little part of the world.

**Reena Van Aalst:** That's a great idea, Amanda. I think it also minimises so many future disputes between existing and other owners. What about, obviously with the annual fire safety statement, even a 2-lot scheme would have very minimal fire safety, like say, smoke alarms and fire doors and potentially some exit signs, maybe at the back, I don't know. So obviously that will still be under the owners corporation's responsibility since it has to submit the annual fire safety statement to council, not individual members.

**Amanda Farmer:** Yes, we probably wouldn't deal with anything that relates to fire safety, and we'd only be covering things that we specify. So the things that I thought of so far, obviously that waterproofing, original tiles and internal walls where they meet the floor, because where you're removing an internal wall where it meets the floor or the ceiling, you're going to be affecting the common property. Floors, ceilings ...

**Reena Van Aalst:** What about windows?

**Amanda Farmer:** Yes, windows, yes.

**Reena Van Aalst:** But what if they then change, obviously in a 2-lot scheme, you want that uniformity, Amanda, and architectural integrity. Wouldn't you want the owners corporation to still have control to make sure that there is that, or- because one person could make it, louvres and one could have ... like a hodgepodge.

**Amanda Farmer:** Well, that's going to be a matter for them, I suppose. I'm not sure that they would be too worried, I haven't been out to see the building. But if you think about it, why is it any different to say, a duplex that is not strata title, or a semi-detached residence that is not a strata title, and we have plenty of those in Sydney, and they each look completely different to each other. They're attached, but they're different properties.

**Reena Van Aalst:** I know that, but I think with a duplex, it's a bit different, because duplex has that uniformity. You can tell when there's a duplex, because they have that similar ... one lives upstairs and one lives downstairs, that's how I sort of look at it.

Yes, or you have one next to the other.

**Reena Van Aalst:** Yes, side by side.

**Amanda Farmer:** One wants to paint theirs orange, and the other one wants to-

**Reena Van Aalst:** I've seen this one down here in Rose Bay, and one side looks like nice and modern, and the other side looks like, oh my God, to me it's like, you wouldn't want to- I don't know, it's just- in other cities in the world, especially like, say in the UK, there's far more uniformity of architecture than there is in Sydney. In Sydney, it's a real hodgepodge.

**Amanda Farmer:** It might be something that you specify, as long as it doesn't affect the external appearance of the building.

**Reena Van Aalst:** Yes, exactly. You can change it, as long as it's within keeping, so that-like you have in community associations, where everything has to maintain a certain look. It does affect the value actually.

**Amanda Farmer:** The external appearance, yes, street appeal.

**Reena Van Aalst:** It does matter. Some people won't buy anything that looks marginally different than their lot. It can affect the sale of that. The person that's done the right thing, kept it architecturally the same, where the other person hasn't, and they're trying

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to sell, and they say, well I don't want to live in a building where someone else above me looks like the poor cousin in-

**Amanda Farmer:** Yes, yes, for sure. And then we come back to things like washing on balconies. That external appearance stuff, yes. All right, so yes, I can give you an update on how the wording of that by-law turns out, but I thought that was a really good idea and anyone who is in a 2-lot scheme-

**Reena Van Aalst:** Yes, it's a great idea.

**Amanda Farmer:** You know, it's not always doom-and-gloom when you buy into these schemes, you go, oh my gosh, I didn't realise it was strata and I didn't realise my neighbour was going to be a pain in the neck. There are ways and often I think you have had this question before as well, Reena, often these 2-lot schemes want to get rid of the strata structure and become completely separate, but that's a matter for the local council, and councils generally in my experience do not facilitate that kind of a change because of lot sizes or whatever it is that's in their planning instruments. So how do we achieve some independence, some autonomy, without having to make those planning changes. Well, by-laws are always a good instrument for that.

**Reena Van Aalst:** Every time I walk past a duplex, I always think, unless you own both of them, don't buy into one of them.

**Amanda Farmer:** Yes, I kind of agree, I have to say. Okay, well, awesome. That was a fab episode for our January 2019. Lovely to be getting right back into it.

**Reena Van Aalst:** It's very strange to be writing 2019. I keep writing 2018.

**Amanda Farmer:** We'll get there. We always do.

**Reena Van Aalst:** After the first few weeks, it sinks in.

**Amanda Farmer:** Yes, exactly. All right, well have a great week, Reena. I'll catch you next time.

**Reena Van Aalst:** You too, Amanda.

**Amanda Farmer:** Bye.

**Reena Van Aalst:** Okay, bye!

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