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YSP Podcast Transcript: Episode 159. What does strata building insurance cover?

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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. I am enjoying our little Easter break that we have been having and school holidays. I do want to say at the outset, it is a Friday afternoon at the moment because that is when Reena and I have found time to record, which says a lot for our social lives, Reena. Anyway, but what I'm getting at is that my neighbours who are a bunch of young men are having a little gathering on their balcony, which is right next to my room where I do our recording. So if you hear some beats and maybe some loud voices and maybe some cheering, no, I do not have a nightclub in my home. It is just Friday afternoon and these are the sounds of strata.

Reena Van Aalst: It's funny you should say that Amanda, because I was actually going to get a glass of wine and I thought, "It's been really long week. I should have a glass of wine while I'm talking to you on the podcast." But I wasn't sure if that would be appropriate.

Amanda Farmer: Hey, why not? Why not? The ideas will be free-flowing, very creative.

Reena Van Aalst: Exactly.

Amanda Farmer: I will not stop you, Reena. No problem. Why should the neighbours have all the fun?

Reena Van Aalst: Exactly, now that you've told me that ...

Amanda Farmer: All right. Well let's jump in to your challenge for this week, Reena.

Reena Van Aalst: Yes, so this is a bit of an unusual one, Amanda, because I think many strata managers and owners corporations are involved in debt recovery and usually there's a process that's followed initially by reminder letters and then eventually going to court if necessary and getting a judgment. In this case we were successful in getting a judgment debt against a particular a lot owner who has been a longstanding recalcitrant when it comes to paying levies. So what happens is she doesn't pay the actual amount, accumulates over time, and then when it comes to that final step just before judgment's been ... a judgment has been entered and their judgment's going to be enforced, then she pays the money. This is a very regular cyclical event that's been occurring for many, many years. Apparently what I've heard is that she also does this without other bills like Sydney Water and they're coming into the apartment and so we're not the only debtor that has this experience.

So in this particular case, the judgment debt was obtained and they paid the amount and a bit extra actually, they paid a bit more than that because they obviously owe a lot more than that amount. That was just an amount up to a certain point in time but the email has been received from that owner, and she's said, "Well, I just want you to allocate the payment that I'm making only to levies." Now, we have outstanding interest that's been incurred over the course of the period where the payment hasn't been made and we also have some legal expenses, Amanda, which are very reasonable in terms of the amount of work that was done to obtain that judgment debt.

So my question to you is, what do we do when an owner comes and says, "Well, I don't want you to allocate it to anything else but levies," when we have successfully obtained a judgment debt and obviously interest has been incurred and that's a statutory amount and I know the expenses must be reasonable as I think we've had this conversation previously. So what do we do in that

case, Amanda?

Amanda Farmer: Yes, I have definitely seen this happen before in situations exactly as you outline it is incredibly frustrating for the scheme because they will often be put to expense taking steps to enforce a judgment, which will as you say, be paid at the 11th hour and then those expenses are not going to be recoverable. In a ituation where the owner has, I imagine it's an email or a letter where they have enclosed a check or said, "I've deposited money to your account and you must only allocate it as I direct." Then in my opinion, you must only allocated it as they direct. If they are giving you an express instruction that this payment is only for levies and is not for interest and is not for any other expenses, or perhaps that this payment is only for these levies for this particular period and they nominate the period, then you must follow that instruction.

Now in a situation where you have a judgment debt, so the local court for example, has decided this is the amount that's due and owing and there is a judgment issued, which the lot owner must comply with. That judgment is probably, I would say, well almost always going to include an amount for expenses. So there's going to be the costs of filing the statement of claim, there's going to be probably strata management costs wrapped up in there for issuing notices. There's going to be lawyers' costs, if you have engaged one for doing the work to file the statement of claim and maybe send letters. Generally as lawyers, we're wrapping all of that up in our application to the local court for an order that an owner pay these levies. So even if you have a judgment debt and you've got a lot owner saying, "Only allocate this to levies," in my view, you can't even allocate that to the expenses part of the judgment debt because they are not levies, they are expenses. So you have to be very careful about that.

Amanda Farmer: What I would do in that circumstance, particularly where you have a judgment debt, is to write to the owner to say, "As you should be aware, there is a judgment against you for unpaid levies, which includes interest and expenses. It is in this amount ... " say it's $20,000 " ... You have paid us $25,000. We seek your consent to allocate $20,000 to clear the judgment debt, which covers levies up to this date and these expenses and this amount of interest and then we will allocate the remaining $5,000 to the last 2 quarters' levies," or whatever it is that's outstanding. Then that owner responds and says yes or they say no and then you go on to have an argument about that if you need to. Generally in buildings that have strata managers and that are recovering these types of levies, you will be represented by a lawyer. So always, always go back to that lawyer and seek their advice as to what should happen in the specific circumstance but those are my thoughts in that situation.

Reena Van Aalst: Yes. So I mean, we've had instructions, Amanda, from say numerous lot owners to where there's been either a dispute or in one particular case that I'm dealing with at the moment, they don't believe that the opening balances were correct and they had made a payment. So we've actually gone back to the auditor who did the audit at the time because we don't even have all the books and records for that time period so I can't even check the bank statements to even say, "Yes, there was a payment, but it was allocated to a different lot."

So that I understand, but yes, I'm a bit perplexed when an owner who has a statutory obligation to pay levies and interest, and I understand perhaps expenses, they may want to fight about them, but obviously they have to be deemed to be reasonably incurred and I'm sure that's a different argument, but what you're saying is obviously you obviously cannot allocate those amounts, to anything except for levies and obviously seek the advice of the lawyer and, and then see what happens after that. If they refuse to agree, then I suppose it's a different argument.

Amanda Farmer: Yes, that's right and just to be clear, if the owner just pays and says nothing, then allocate it to the latest outstanding, which I think is what strata managers generally do, they just allocate payments to whatever the earliest debt is and follow on from that and that may include interest and expenses as well. But where there is an express instruction for money to be used in a certain way, then you do need to follow that instruction. That's not to say you can't go back and say, "Hey, in case you didn't know, you might as well clear the judgment debt because we're about to go and file bankruptcy proceedings," or whatever it is. But yes, it's important not to act contrary to those instructions.

Reena Van Aalst: Yes. I suppose the other issue is that the owners corporation obviously hasn't had the benefit of that cash for some time and also it has paid those expenses to recover the levies. So I suppose it's one of those things that you're saying has to be dealt with at a future time.

Amanda Farmer: Yes.

Reena Van Aalst: If that person says, "No, you don't have my consent to allocate it to expenses but only maybe just interest," they might agree perhaps to interest Amanda, then the owners corporation's already incurred those costs and it's already been out of pocket. I mean, I don't know if you're going to have to have another legal argument about the costs.

Amanda Farmer: Yes, well what would happen is, if your judgment debt included expenses, and this owner is saying, "I only want the component of the judgment that contains levies to be paid," they're going to have a partially paid judgment. So there's part of the judgment will still be owing and then the owners corporation is free to go ahead and enforce that unpaid part of the judgment.

Reena Van Aalst: Okay, well that's an interesting-

Amanda Farmer: That's the situation.

Reena Van Aalst: Well yes, that's good.

Amanda Farmer: And maybe explaining that to the lot owner will get some traction. So to say, "You got a $20,000 judgment debt. You've told me you only want us to pay $15,000 of that because that's the levy component. We'll do that, but we'll still have 5 grand and you will be issued with a garnishee order, an examination notice. You'll still be in litigation with us, so there's not going to help you."

Reena Van Aalst: Yes that's a great idea. Actually, I like that idea Amanda, that's good.

Amanda Farmer: Yes, just forming that one on the run here. That sounds good to me too. All right, so let us know how you go with that one.

Reena Van Aalst: Yes, I will actually, I'll keep our listeners posted on that one.

Amanda Farmer: Thank you. My challenge for this week, this is a question from a follower on our Facebook page. If you haven't headed across to find the Your Strata Property Facebook page, make sure you do that, lots of fun happening over there. It's a question Reena about building insurance and I am not sure that we've really got into this on the podcast. We have been doing this for about 3 years now and I don't think we've had a detailed discussion about the requirements for Strata building insurance under our Act. This message on the Facebook page was, "Please Reena and Amanda, cover off what is required for building insurance."

The specific question, which we can probably deal with pretty promptly from this person was that they'd like to know how much their individual unit is insured for and if they don't think it's enough, then how do they get extra coverage?

Reena Van Aalst: Interesting question because I think I had the same conversation today with a perspective company title building actually, that have asked me to provide a proposal. The first thing I think people need to understand, which I think perhaps isn't understood very well, is that the building insurance covers the construction of the building if there was a total replacement required. So a lot of people look at their building sum insured and think, "Oh, hang on, my apartment's worth one million and the whole building's only insured for 3, so that can't be right."

So then you have to explain, well, it's not the market value, it's the construction costs. So that's one thing. Only evaluation can really provide certainty in order for the owners corporation to really know whether the cost that they are insured for is actually accurate at the time, because obviously there's an escalation clause sometimes in some of the valuations, because if you only value at today's date, and then in the 3 years you don't value the building, Amanda, well obviously the building costs do change over time, they might go up, or they might go down, they might stay the same.

So it's based on building activity and building costs, so that's one thing. In terms of getting extra insurance, I don't believe that's possible because you can't sort of double insure. I think that many times when there's sort of gray areas in terms of insurance

claims where people have their own contents insurance for certain things and they'll say, well they want ... perhaps we've had to provide definitive emails to our clients to say, "No, this is not covered under strata insurance," and therefore they are then able to claim on their contents insurance and vice versa.

Reena Van Aalst: So I think perhaps maybe the questioner on Facebook needs to maybe perhaps understand the difference between the market value and the building insured value, which is obviously ... includes fixtures and fittings et cetera. It's not just about the market value of the actual apartment.

Amanda Farmer: Yes. The place to look in New South Wales in our legislation is section 160 of the Strata schemes management act as well as Section 161. 160 is the Section that says that the owners corporation must insure the building. The definition of building is quite generous under our legislation, isn't it Reena?

Reena Van Aalst: Yes.

Amanda Farmer: It's not just a what we would usually consider the common property. It does include the fixtures and fittings, as you say. If we had to rebuild the building and we had to get everybody moved back in and living as they were, then they need bathrooms and they need toilets and vanities and they need kitchen cabinets and sinks. So the owners corporations building insurance does cover all of those things.

Reena Van Aalst: It also includes Amanda, removal of debris, so obviously ... and also there's any permit costs because depending on the location of the building, if it's on a very busy street or highway, then you may need that part of the highway to be partitioned if while reconstruction is occurring on some parts of the building. It also allows for the remuneration of architects and other persons who services are necessary to basically assist with the rebuilding and the replacement, repair or restoration.

Amanda Farmer: Yes, that is it, so that's all in Section 161. Just on that point about contents insurance, in my experience Reena, I have found some contents insurance to be quite generous when it comes to claims for example, where there's water damage or flood damage. The owners corporation's insurer, particularly in a case of flood might cover areas of the common property and then the contents insurer covers quite a bit in my experience. I've seen them cover kitchen cabinetry and things like that, that that has been damaged. So do always make sure that you've got contents insurance and in a case of some catastrophic damage, make sure you're talking to both the owners corporation and their insurer as well as your contents insurer.

Reena Van Aalst: Another thing Amanda, just to point out in what you said about the generosity of contents insurers is that, let's say there's a fire in your apartment, for example, or a flood, and the kitchen basically has to be rebuilt. Let's say you've had a really nice kitchen, you know you've got like high-end dishwasher and stove et cetera. Whereas the fixtures and fittings that the owners corporation standard insurance policy wouldn't cover like Miele and all those high-end brands, this is going to cover normal brands. So what I've had experience in previously is that, let's say the owners corporation will only pay say $1,000 for a stove and an oven then the contents insurer will kick in for the difference. If there's any ... If you say, "Well hang on, I want the same as what I had before."

In some cases some insurers actually require the owners corporation to disclose expensive fit outs. So especially I think in commercial and retail where they're very expensive fit out that I've done, like I say in restaurants in the city which are underneath strata buildings and form part of the Strata scheme normally does have to be disclosed because obviously, your standard policy is not going to cover expensive restaurant fit out.

Amanda Farmer: Indeed. Thank you, very interesting topic and no doubt there'll be some more questions arising from that. Another little tip is to make sure you do keep your building valuation up to date. I have seen a few buildings who forget to get updated valuations over time and we don't want the building to burn down with a 10 year old valuation and to be under-insured.

Reena Van Aalst: Well now Amanda, with the new legislation there's actually no requirement, whereas before you had have a valuation no less than every 5 years, whereas now that's been removed.

Amanda Farmer: So strata managers don't forget to keep your buildings on top of that as well.

Reena Van Aalst: Exactly.

Amanda Farmer: Okay, let's change gears and chat about your win for this week, Reena.

Reena Van Aalst: I had an interesting experience happen, Amanda, where sometimes you think when you've been in Strata for so long and you've had so many different types of experiences that aren't part of the normal run of the mill of strata that nothing and you could ever happen again, but it has. So I was at a meeting, chairing the meeting for the AGM. I knew that there was going to be some issues because one of the owners who was now proxy farming, but you know with proxy farming now you just have to distribute proxies amongst different people as opposed to just keep them to yourself now. Anyway and I could see they're all prefilled and they were for people that had never, ever turned up. Lots that had never, ever even given a proxy, which is all fine, I mean, these things happen.

Anyway, so the owner had said that they weren't able to come to the meeting and so I said, "Oh, okay." The next minute, the owner does turn up, which I was a bit surprised and then is somebody else that was with him and it was actually a lawyer. He actually came but he wasn't going to vote, he had given his proxy to the lawyer. Anyway, so the chairperson who wasn't me, basically ruled the proxy is out of order because he had actually seen the signatures of those people that had allegedly given proxies and he said, "There's 3 different versions of the same signature." So obviously he ruled them out of order and the lawyer then took him to task and myself and said that basically, "You can't do that. You have to take a vote on it."

I advised, "Well no, this is a procedural matter. The chairperson doesn't have to put the adoption of any proxies to the vote." I mean, it obviously would have caused a different outcome had those boxes been allowed to be used but I'm just thinking, Amanda, that's an interesting one where it was a good outcome in the end because at least people weren't able to unduly exercise proxies that were at weren't validly obtained. I think, I know if they were, I don't know the...

Amanda Farmer: Yes, they were questionable.

Reena Van Aalst: Yes, questionable but I think it's interesting this time, Amanda to perhaps understand that if someone is challenging you or the chairperson in relation to the validity of proxies and this is not actually something needs a vote, it's a procedural matter and the chairperson has that authority.

Amanda Farmer: Yes, I agree with that. So this lawyer was saying in order to declare a proxy invalid, the meeting needs to vote

Reena Van Aalst: It needs to go to a vote, yes. I even said to him, I said, "With all due respect you don't seem to know very much about strata." And he said, "Yes, I don't."

Amanda Farmer: Oh, it wasn't a Strata lawyer and he agreed with you. Oh, how funny. Yes, I certainly haven't seen that before, in fact quite the opposite. Our legislation actually requires all motions to have notice. So all motions to be included on the agenda, unless they are motions to amend a motion that's already on the agenda.

Reena Van Aalst: Exactly, yes.

Amanda Farmer: So that's, I think, the short answer to that. So, yes, good result there.

Reena Van Aalst: Yes.

Amanda Farmer: Okay, I am bringing you this week in the category of my win, a case that I was having a little read of a few weeks ago. This is a case from the Supreme Court in New South Wales and it was published in about February this year, 2019. I'm going to make my best attempts to pronounce the name of the applicant, which is Khadiv Zad, K-H-A-D-I-V Z-A-D. I am sure that is not how you pronounce it. I will include a link to this case in the show notes, but I wanted to bring you this case because it's a good

one about common property rights by-laws or what we used to call exclusive use by-laws and the requirement that there be lot owner consent for such a by-law to be valid. So this is a case that was considering the old 1996 Act, but we have identical requirements in our new 2015 Act. So it's certainly very relevant.

Reena Van Aalst: Amanda, can you just explain when you mean by lot owner consent, do you mean the consent of all lot owners? Because obviously you had to have the consent of that lot owner in the first place wouldn't you?

Amanda Farmer: Yes, so it's the consent of ... This case was about having the consent of the owner who had the benefit of a car parking exclusive use by-law to repeal that by-law. So the building repealed the by-law by special resolution, therefore taking away what was quite a valuable right and the lot owner said, "I never consented to this." Now the really interesting thing about this case is this all happened in 1999.

Reena Van Aalst: Oh, jeez.

Amanda Farmer: So that's 20 years ago.

Reena Van Aalst: Years ago.

Amanda Farmer: 20 years ago this happened. The applicant in this case had actually purchased the lot around that time, around the same time, 1999 or early 2000, when this by-law was repealed. They have somewhere along the lines become aware that this has happened and that there was no consent either from them or from the former lot owner and they have engaged a lawyer to argue what was very much a legalistic case. So not about the facts, everybody agreed on the facts. It was about whether the by-law could have been validly repealed without the consent of the lot owner and the applicant took the position, "Well, the legislation says that you need the consent of the owner who's got the benefit of the by-law if you're going to be removing that right. We never consented, there's no evidence of the owners before us consenting, the owners corporation agrees there was no consent. So court, what do you say about this?"

The court ended up pointing to the Section of the legislation which is now section 143 subsection 4, which says after 2 years from the making of a common property rights by-law, it is conclusively presumed that all conditions and preliminary steps precedent to the making of the by-law were complied with and performed. So the court said, "That is a very clear statement that after two years we just assume that consent was provided and you cannot challenge the validity of the by-law on the grounds that there was some procedural defect like lack of written consent."

Reena Van Aalst: Jeez.

Amanda Farmer: Now there is an earlier case, which is the case of James, where the supreme court said something very similar but it wasn't binding in that case. It wasn't relevant to the decision in question in that case, but the supreme court back then said the same thing and that was then relied on in this 2019 case for the supreme court to decide this issue in that way. Lawyers have been a little bit uncertain about this perhaps until now. I think most of us have said, "Yes, we think that's the case. If there wasn't any consent, then if your application was brought more than two years after the repeal, then you're going to have a problem because of this subsection which says everything is presumed to have been done properly." But now we have a very clear statement from the supreme court that says, "Yes, that is what that Section of the legislation means both under the 96 Act and under our ... " Well let's say this, the 2015 act uses exactly the same words. So it will be very persuasive in any similar question under the 2015 Act.

Reena Van Aalst: Well that's very interesting Amanda, because when you go to LRS now, or formerly the LPI, and they want you to submit all these forms when you're lodging the consolidation, they even ask you ... for even old schemes if you haven't lodged a initial period expire form, they won't even let you register it. So I'm really surprised that there's no oversight by a statutory authority like LPI, or LRS as they're now called, when you're submitting say, a repeal of a by-law. That even though the minutes would have been produced with the by-law to show evidence of that occurring, that they wouldn't have asked for the consent of the owner at the time.

Reena Van Aalst: So what you're saying is, in a sense LRS just assume that when you submit it you've got all the necessary consents?

Amanda Farmer: Yes, LRS never ask to see ... in my experience anyway, never asked to see the consent forms but it is certainly something that we are very careful to tell owners to make sure that they submit these consent forms and that when we are preparing by-laws on behalf of owners, we just included a template form as a matter of course now for common property rights by-laws and I think strata managers are pretty well on top of this, that if it's a common property rights by-law being made, you need the consent. If it's being repealed, you need the consent of the lot owner, if it's being amended.

Reena Van Aalst: Well I don't think people understand, Amanda, about the repealing. I'd say I doubt that they would understand because ... I mean, obviously when you're submitting a by-law and it's you, and you're the lot owner, then of course you're consenting even if you don't fill out a form to say, "I'm consenting."

Amanda Farmer: True, true, it wouldn't be controversial.

Reena Van Aalst: No. So, "Here's my by-law, please put it on the agenda of the next general meeting, or please convene a general meeting on my behalf and I'll pay for it, et cetera." But I think when it comes to ... I mean I've always told people that have tried to repeal mostly that you can't do that without their consent. That's because I just know that not because ... and I don't think many people would have actually known that, especially whoever was the manager for this particular scheme back in 1999. I mean did they say to the person, to the owners corporation, "Who was the instigator of this particular resolution and did they have legal advice about it?"

Amanda Farmer: I wonder if now that this clear statement of the law has been made, you might see some buildings attempting to quietly repeal exclusive use by-laws without consent and wait for two years to pass. I'm not giving anyone any ideas, I'm sure, but that is the danger really of this kind of ...

Reena Van Aalst: It is actually, when it's so explicitly mentioned Amanda, in the legislation as you've said, both the former and the current, I think it does sort of to me, raise a bit of a red flag when people are saying, "Well, you've only got 2 years and we're going to assume that if that time has elapsed then that consent has been provided, bad luck." Yes.

Amanda Farmer: Interesting. Well I read that case and thought it was a good one to bring to the podcast. I will put a link to it in the show notes for this episode over at yourstrataproperty.com.au so you can click through and have a read. I think that is all from me this week. Reena. Anything else from you?

Reena Van Aalst: All good, Amanda.

Amanda Farmer: That is it, you're welcome to come over and join my nightclub that I have going on over here, Friday night.

Reena Van Aalst: I might have to ... I'll have a glass of wine first.

Amanda Farmer: Yes, okay. Why not?

Reena Van Aalst: Or 2.

Amanda Farmer: Or 2. You'll need it after a busy week and another one to come, No doubt.

Reena Van Aalst: Exactly.

Amanda Farmer: Enjoy. Enjoy your weekend. I know there's many of you listening to this, it is not the weekend, but don't feel bad, there will be one coming up soon.

Reena Van Aalst: Exactly.

Amanda Farmer: We're off to enjoy ours. Thanks Reena.

Reena Van Aalst: Okay, thanks Amanda, bye.

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