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YSP Podcast Transcript: Episode 170. Do NZ unit owners have stronger property rights? With Thomas Gibbons

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Intro: Welcome to Your Strata Property. The podcast for property owners looking for reliable, accurate, and bite-sized information from an experienced and authoritative source. To access previous episodes and useful strata tips, go to www.yourstrataproperty.com.au.

Amanda Farmer: Hello, and welcome. I'm Amanda Farmer, and this is Your Strata Property. Thomas Gibbons is a Director at McCaw Lewis Lawyers in New Zealand, and specialises in Property and Commercial Law. Thomas focuses on complex and urgent transactions and projects. He has lectured on property company and securities law at the University of Waikato, AUT university, and Wintec. Thomas is the Author of Unit Titles Law and Practice, a practical guide to the Land Transfer Act, and coauthor of Landlord as well as Easements, Covenants, and Profits. He has appeared as an expert witness in the High Court on land development and unit titles matters, and his articles and books have been cited in the environment court, High Court, Court of Appeal, and Supreme Court.

Thomas also sits on the Property Transactions Committee of the New Zealand Law Society, the Board of the New Zealand Institute of Surveyors, the Executive of the Strata Community Association of New Zealand, and the executive of the Waikato branch of the Property Council New Zealand.

Today I am delighted to welcome, Thomas Gibbons. Welcome, Thomas.

Thomas Gibbons: Hi, how are you doing Amanda?

Amanda Farmer: I am doing very well. I'm very excited to have our first New Zealand practitioner on the show.

Thomas Gibbons: This time it's gone transmental.

Amanda Farmer: Yes. Well, I know that we do have lots of New Zealand listeners, so hello to all of our New Zealand listeners, our managers, maybe even a couple of other New Zealand lawyers listening in. But I'm very excited that you're here ready to chat with us today about all things New Zealand ... I'm going to say strata law, but I know you guys don't call it strata law. We'll get into that.

Thomas Gibbons: Yes. We call it unit titles law.

Amanda Farmer: Yes, titles law. You do indeed. Yeah. All these different terms that we have to remember across our various jurisdictions, including New Zealand. Now I know that you, Thomas, are a very experienced practitioner, and we all know that now from your bio, and I've seen you present a few times at the strata lawyers conferences that we go to. So, I know that not only are you across New Zealand unit titles law, you're also across Australian strata titles law. So I'm going to start out by asking you maybe a tricky question. How different, or maybe even how similar, do you think the laws in each of our countries are? Do we have some key differences, some key similarities? Let's jump in.

Thomas Gibbons: So yes, the system we have in New Zealand is I think best described as halfway between Queensland and New South Wales, probably before New South Wales updated. But we are grappling a very different type of industry, and there's still a strong sense of culture in New Zealand around a unit title being an individual property. And we've only really recently seen the courts getting to the idea that actually we've got a whole building and a whole community to worry about. That's really only starting now. The total number of units in New Zealand, there's a lot less as well. There's probably 140,000 or so, all up. And so it's smaller. Yes, size of a midsize city in New Zealand, but it's not big scale. A lot in Oakland, a lot in Wellington, a lot in some of the other centres, but people are still grappling with the key ideas around them.

Amanda Farmer: And what's your legislation like? Are you fairly codafide? Have you got good, solid legislation that you guys can rely on?



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Thomas Gibbons: It's good and bad. So we had unit titles at 2010 a few years ago. That was a massive leap forward from Unit Titles Act 1972. But it was probably based on Victorian legislation and enforced at the time. So very first-generation, not any longer fit for purpose. They recast parts of it, they completely revisited parts of it. Parts of it look like they're written by sociologists rather than lawyers, always a bad thing. Lawyers don't have a monopoly on good ideas. But what they ended up doing is putting some things on that haven't been that thought through, and probably the number one issue is the one size fits all. Compare it to, say, Queensland where they have different modules, and recognise there are different types of developments. It's caught up with that idea at all. There was one governance framework, there's one framework for disclosure for everything, whether you're buying 1 or 2 units on a small block, or one of 600 in a big apartment block. The issues are very different, but the statute is the same, and that's probably the biggest failing, and one that is on the radar for further reform.

Amanda Farmer: And what do you see as a lawyer? What's the fallout from that? How do you see your clients struggling with that one size fits all approach? What are the kind of problems you're getting?

Thomas Gibbons: So, one of the most obvious problems is around in mix use developments, where you might have some commercial retail on the ground floor, and some apartments up above. Particularly if they've been developed at different times, the living system in the Act is really blunt, and you can only live the one way. And so, actually, you have different owners with different drivers. You can't get around that, and that causes a lot of frustration for people. We still don't have a good sense of what a committee is by stow and how it's supposed to be run. They lift a lot of gates on the legislation and regulations around how to run a good committee meeting. People fell in the gaps themselves with codes of conduct, and things like that, but there's really basic issues that under individuals really struggle with, and find it hard to do well with.

Amanda Farmer: You're sounding a little bit like New South Wales, I have to say, particularly that example of mixed use schemes. We still see a number of problems with our mixed use schemes in New South Wales. As you say, it's commercial or retail down the bottom, it's the restaurants that are bothering the residential apartments upstairs. The newer buildings, the way that we do it in New South Wales, is to have 2 separate strata schemes, and they then have shared facilities, which are managed under a document called a strata management statement. So we've tried to deal with it that way, but I've certainly had my fair share of tribunal disputes between retail owners and residential owners. Hopefully, that's something we'll see less and less of as developers are using a better titling structure.

Thomas Gibbons: And we have provision in New Zealand for lair developments, probably [inaudible 00:06:43] like that. We've got a head body corporate and other products corporate underneath that, but it's, again, hasn't been used much in that context. Not on a small scale, or medium sized scale for that matter, so. And people are still struggling with the very idea. That's the only way you see it, they want more flexibility and can't get it.

Amanda Farmer: Yes, we definitely struggle with that in New South Wales as well. You mentioned there, Thomas, just the the day to day management, the role of the committee. What role do by-laws, as we would call them in New South Wales, or rules perhaps you might call them, what role do they play? Do you have a fairly strong by-law making power, and is that used efficiently?

Thomas Gibbons: Very uncertain by-law making powers. So under the Sidney Two Act, we had roles that were put on the statute, but could be easily changed. And unfortunately, what occurred is a lot of developers sitting those up in nefarious ways, essentially to lock in particular governance. So particular committee members, or committee had to be comprised a particular way, locking in a manager for a 20 year contract, those kinds of things. So, when these problems came through, there are a lot of ultra virus rules that were set aside as impossible. And then, when the 2,000 tenants came, and they said this can't continue, and they put most of the governance roles and the legislation itself, but they didn't have enough. And what that has mean is that some committees feel they can put in some rules which have guidelines around governance, or how decisions are made, conflict of interest provisions, codes of conduct, things like that.

But there's a lot of uncertainty about whether that can actually be done, because our roles are now called operational roles, and it's to do with use and so on most of the time. And trying to put governance into those kind of provisions seems a bit dangerous or uncertain. So there is a big gap, there is a big vacuum around. We put extra governance rules, if you want to ask them, and how

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you can enforce them. And yes, we see a lot of individuals and committees grappling with it. Particularly an issue when you've got strong personalities, because a lot of the time owners and committees are reasonably standoffish, way apathetic. They're letting the manager or secretary run things. It's when they start asking questions that you see bigger problems arise, because there's not a lot of certainty there.

Amanda Farmer: And how do you find the level of education, if you like, of your committee members? Do they have access to good information? Where do they go to get better at making good decisions?

Thomas Gibbons: So we have professional bodies, SCA has an NZ chapter, and we have a body corporate chairs group, and they put some effort into those things. Increasingly, a lot of education available to owners and to managers. But yes, the average owner themselves are sort of grappling in the dark, and can easily get a bit confused over what the statutes is, how things should be run. There's principles sit out throughout, and other areas of law. Incorporated societies law, any law on the body, pens principle and things like that. So various workarounds, and the court's decision, they stepping in and saying, "Well, the statute doesn't say you can do this, but you still can. We think it's okay." That's things like decisions by email by a committee, but a lot of that is not codafide. That's really state by state, with a lot of uncertainty and the tribunal of the courtroom

Amanda Farmer: I'll make sure that I put in the show notes to this episode a link to the website for SCA New Zealand. It is a reasonably new branch of SCA, but it's a good place if you're in New Zealand and you're looking for resources to certainly get started. What are the hot topics, Thomas, that are hitting you on the ground in New Zealand?

Thomas Gibbons: I guess it's remedial work. So, we've had a leaky boat in crisis for a number of years, getting bitter largely. But what we're only getting now as decisions around cost allocation coming through. So in New Zealand, we have different terminology where people have a big remedial project. They apply to court for what's called a scheme, and the scheme or remedial scheme is basically the court giving it's check to a big project, usually of uncertain nature and scope, and authorising the committee to carry on, and do whatever they need to to get that remedial project done across common property, unit property, whatever. What we're seeing more recently is some depart just from that, and people drawing on case law around benefit, substantial benefit, and so on. And there's been a big push around looking at the whole of the building, and really trying to capture the essence of the idea that all unit owners are in this together.

You might have one owner with a deck that needs to be repaired, but it's really, really important that the whole building is up to standard and up to code. And if a building isn't up to code, it's a problem for all owners. So what we see is those issues worked for the courts is that some owners thought, "This should be for this owner's benefit. I shouldn't have to pay for this." And the courts are telling them, "No, they do have to pay for it. Everyone's on this together." It's in some ways a pretty good message, pretty simple research. And it's one that I'm encouraging clients take on board. But it does mean that some owners don't have the autonomy they expect. They really are part of a community and part of a collective. That's number one issue recently in case law.

Amanda Farmer: So when you're talking about applying to the court for a scheme, that's not a situation where you're dealing necessarily with original building defects and you're involving the developer. Is that a situation where you might be a 15, 20 year old building, and you need to do some building wide remedial work? You must still go to court?

Thomas Gibbons: Yes. Most of the time people do. So yes, these are 25 year old buildings. A lot of the time, they weren't constructed well at the time, whether it was coastal ... We had a fairly bad building code at the time that didn't really do the job. So, a lot of remedial issues only coming to the floor now. And yes, what most people have decided is that it's best to go to court, get the court's approval to this remedial scheme, and take repairs forward from there.

If you don't go to court, you traditionally have come up against issues on what is unit property, what is common property, is the body corporate actually authorised to do this? So it's been a form of insurance for committee members. Just touching on that, it comes back to the ultra virus issues we had for many years. So we had all sorts of rules and all sorts of decisions at risk of being set aside, because the court drew such a strong distinction between what was common property and what was unit property. And the courts went as far as calling this the fundamental theme of the act that the two don't talk to each other, and are very different

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concepts, and that's caused all kinds of problems around unit owner rights, or the corporate responsibilities and so on.

Amanda Farmer: And is it very expensive to go through that court process, or is it fairly procedural and easy?

Thomas Gibbons: Not that cheap. Probably cheaper than a fully contested hearing, because a lot of these involve a concept of what the remedial work is to look like, and a fairly standard document, most of the time, saying what works are to be done, how decisions are to be made, how costs are to be allocated, with a little bit of variability. What you come up against is court process, of course. So you've got to serve owners properly, you do usually have a hearing, but most of these aren't contested. Yes, there's definitely dollars involved. Varies enormously depending on how complex and how contested. But yes, there's still a fair bit of owner money going into that process, and it is front loaded. But what it does mean is once it's been through the court system, most of them are usually reasonably straight forward after that.

Amanda Farmer: Very interesting. What else is at the forefront there in New Zealand?

Thomas Gibbons: They're seeing a lot of issues around rules, and same in every jurisdiction, short-stay issues. They've been a big issue in New Zealand over the last period of time. One of the ways they're being addressed as through rules which address use, so restrictions on change of use, restrictions on subleasing, and things like that. No one's really wanted to bring the test case yet, and it's been interesting to see opinions for and against the idea that short stays can be regulated through operational rules.

The interesting phenomenon we've had in New Zealand is the law relating to body corporate rules or by-laws has been very, very constrained, and they're very easy to challenge. But the law relating to land covenants, which in New Zealand includes positive covenants, has been very, very flexible. So over the years, some developers have differently clued on to the idea that if you want to restrict Airbnb, or short stays entirely, then you could put a covenant on the title, and that will lock in use to a much greater extent than a rule which can be challenged by any owner, and changed by majority.

So it's really, yes, been a big issue that people have been grappling with and trying to decide on. One of the biggest tribunal cases was around a rule which tried to restrict a certain unit to being used as a brothel, and what the court said there, or the tribunal said there is that because that was an existing use and was illegal use, it couldn't be restricted. Something that was pretty much it under the district plan, and was even under our planning laws couldn't be restricted. In fact though, there's another session the other way, which is a shopping centre could restrict a particular use of a particular unit, because that was in the best interest of the shopping center. So we have a situation where case law tribunal rose all over the place.

Amanda Farmer: Now on that point, I'm often talking on the podcast about how I feel our legislation finds it hard to keep up with this fast moving world that is strata, particularly where I am here in Sydney, and there's often a number of things that can go wrong in the drafting process, and maybe not all the right people are consulted, or not everybody's ideas make it to the final draft. And we then see our courts and our tribunals step in, and try and close gaps, and fix those loopholes, and give us the guidance that we need. Now, I have heard somewhere along the lines, Thomas, that maybe you take a different view, and perhaps you feel that the courts often get it wrong more often than the legislature. Can you tell me what that's about?

Thomas Gibbons: Yes, so legislation isn't perfect, but sometimes easy to change. We had a perfect example of bad legislation when the 2010 Act came out in New Zealand. There was one provision that said normally, a decision is made at a meeting, but you can make decision outside a meeting if you have a written resolution signed by 50% of owners. This wasn't a majority, wasn't 50.1%, and that created the issue where if you had, let's say 4 owners in development. Two could pass a written resolution, and that would be valid cause it was 50%, and two could pass an opposing resolution, and that would be valid because it was 50%, and it was just bad drafting. Fortunately, that issue never hit the court system, and it got fixed up a few years later while legislator reform. But what the courts have done in New Zealand has unfortunately put a lot of reliance on this idea of fundamentals, and they've done this through a filter, I believe, of property rights.

So saying that some property rights are absolutely sacrosanct and can't be touched. But what that has meant is that we have



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situations where the courts say there was a fundamental theme of distinction between common property and unit property. We have this idea that this was what a body corporate fundamentally is, and the more they use that term, the more they get away from actually thinking through what the consequences of their decisions are at a policy level. And so what that has meant is that we have some decisions which when you reflect on them, even for a brief period of time, you realise they just don't work in practice. And we've had decisions there around, as I said, the nature of body corporate. We've had decisions around how minority relief works, which really curtail the impact of these sections, and make them less flexible, rather than more flexible.

There are occasional times they get it right. There are times they've fixed up some bad drafting the legislation, but they haven't always done it well, or made it easy, and that's been a bit of a challenge. So I think they get it right about 40% of the time when they make broad statements of principle. I think the courts are much better off sticking to particular sessions, and avoiding broad statements of principle. Because I just see them not think through what the consequences are, and that's a bad thing for New Zealand, what in corporate law. And that's why when people say, "Hey, I'd like to see the act reformed," I say, "That's fine, but we've got to fix up this decision, this decision and this decision because they're a problem."

Amanda Farmer: Yes. That's so interesting to hear that experience, because there is a school of thought ... And I say New South Wales because that's where I am ... From certain people here that there needs to be greater recognition in our legislation, and here now decisions coming from our courts, recognition of property rights, and that there is far too great an ability for private citizens to be regulating other private citizens in our strata schemes based on the flexibility that we do have in our legislation.

Thomas Gibbons: Yes, I think that comes back to what those core rights are that we are protecting, and I suspect it's pretty messy or muddy in every jurisdiction. One of the good things our legislation has done is codify voting rights, so they can't be sat aside, and that's pretty useful and important. One of the things that some of their decisions have done locally recently, is putting a big emphasis on everyone's got a contribution to the well-being of the building, and repairs to the overall building. And that's a good thing. I mean, I think the dangerous property rights can become a mask for everything else. And at the end of the day you are buying into collector. You've got to accept some loss of autonomy as part of that. That's quite challenging to some of our western ideas of property rights, where people do think about a quarter acre standalone or an individual house a lot of the time.

Yes, I use the phrase, not my house, my castle, but my house part of somebody else's castle. And that's a big mindset change for a lot of people. Then we get beyond that idea into what areas can this collective intrude on? And obviously Cathy Sherry's written a lot about that, and there's some big ideas in there around discrimination, and the rights of children, and the rights of people to have hits. And we do have to keep a close eye on those, but I think they're resolved through thinking very carefully about those issues rather than relying on simple principles and expecting those principles to resolve all other issues.

We're better off thinking about the detail of individual issues, the advantages and disadvantages, who benefits, who doesn't, and trying to come to policy based decisions rather than simply ... Yes, knee jerk reactions around what is fundamental, or what is principle in a particular situation, and expecting that to resolve all other issues. And we see that again in court decisions where issues about pets on New Zealand have sometimes come down to is it common property or unit property? And that's probably the wrong question to be asking. If we insist on there being a fundamental distinction between the 2, we need to look more broadly at what the issue actually is.

Amanda Farmer: It's going to be very interesting to see how things continue to evolve in New Zealand. I make that comment about infringing on property rights, and how much flexibility we have in our legislation, off the back of some very recent media here in New South Wales that we have had a community scheme pass a by-law that prevents children under 16 from swimming in the pool, which is one of those examples that Cathy gives regularly about our by-law making power going too far.

Thomas Gibbons: Oh, that's too far. And that's where it has anti discrimination law, or should have it.

Amanda Farmer: Yes.

Thomas Gibbons: Fundamental ideas about fairness, and right or wrong, in my view, and singling out children, young people in

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that way is ridiculous. And the fact that some people feel the right to make rules like that for other people is wrong, but it does come back to a consideration of what is right and wrong, and why, and what it means for society. Rather than just trying to hang an answer on one particular idea or notion.

Amanda Farmer: Now, Thomas, every guest on the podcast receives this question. I'm not sure if you're prepared for it, but here it is. What book has had the greatest impact on you, and why?

Thomas Gibbons: Yes, it's really difficult to pick just one book, because I absolutely love books, and I read lots, and lots, and lots of them. I'm not going to be able to name one because there are so many, but I'll give you 2 examples and you can use them as you will. I've recently been rereading *The Women's Room* by Marilyn French, and it is absolutely fascinating read, probably not everyone's cup of tea, but a lot to think about in that context. One of the books I read at law school that had a very big impact on me was *Patterns Of American Jurisprudence*, because I absolutely love law. It's by Neil Duxbury, and it talks about all the different American legal ideas.

I'm going to start a theme here. One of the other books I read was Sue Middleton's *Educating Feminists*, and it's absolutely fascinating about the way our life histories have an impact on the way we live. But if I was going to name just one, I would have to say John Gresham's, *The Rainmaker*, absolutely brilliant book. And if anyone's ever doubting why to become a lawyer, that book will remind you that being a lawyer is a very important part of helping people in society. Very important part of helping people and, and as a job that's dedicated to justice, and lawyers really do have an important role to play.

Amanda Farmer: I love hearing that, and I love hearing that you are a lawyer who loves the law. There need to be more of us out there who are loving what we do, and a feminist to boot. There you go. That's why we get along, Thomas.

Thomas Gibbons: Always.

Amanda Farmer: Before we wrap up, Thomas, do let our listeners know where they can go to find out more about you. And is there anything you'd like to add?

Thomas Gibbons: So if they're wanting to find out more about me, Amanda, they can go to the McCaw Lewis website, mccawlewis.co.nz, a profile page for me and everyone else in the firm. Obviously, I'm on LinkedIn, and there's a bit of information there. If you Google my name and add unit titles, there's a few things that come up, but yeah. Or give me an email.

Thomas.gibbons@mccawlewis.co.nz. And yes, I find these issues absolutely fascinating, and I always have to talk to people about them.

Amanda Farmer: Excellent. I'll make sure all those details are in the show notes for this episode. It has been a pleasure chatting to you, Thomas, and you have done New Zealand proud. Tell you what, you'll be back.

Thomas Gibbons: Thanks very much, Amanda. Cheers.

Outro: Thank you for listening to Your Strata Property, the podcast which consistently delivers to property owners reliable and accurate information about their strata property. You can access all the information below this episode via the show notes at www.yourstrataproperty.com.au. You can also ask questions in the comments section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?

