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**YSP Podcast Transcript: Episode 171. Who pays contents insurance excess |  
adjourned meetings | pre-1974 lot boundaries**

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**Amanda Farmer:** Hello and welcome. I'm Amanda Farmer. I have with me today Reena Van Aalst from Strata Central. Hi Reena.

**Reena Van Aalst:** Hi Amanda. How are you?

**Amanda Farmer:** I'm doing very well. We are here for our regular catch-up. We do this about once every couple of weeks. Reena co-hosts with me on the podcast. We cover off our wins and challenges for the week. Reena, I'm going to ask you, do you feel like you have had mainly wins or mainly challenges the last week?

**Reena Van Aalst:** I would say in strata management generally, it's mainly challenges.

**Amanda Farmer:** Yes, it's often hard to find the wins in the weeds of the challenges, but they are there. It's important to celebrate them, I think. So that's part of what we're doing here today.

**Reena Van Aalst:** Yes, exactly. I think sometimes what is a win may not always be considered to be a win because of the journey that you've had to endure, Amanda, to actually get there, so ...

**Amanda Farmer:** Very true. Now, having said that, we're actually gonna start with challenges this week. Reena, what has been your challenge you'd like to chat about?

**Reena Van Aalst:** Well, this is actually probably one that's very common in terms of there was a problem with some plugged up pipes in a strata scheme that we manage. Unfortunately, I think people were disposing of those toilet wipes into the toilets, which is actually a case recently where the agent also said that they weren't responsible for that. But anyways-

**Amanda Farmer:** I saw that, yes.

**Reena Van Aalst:** There weren't that many complaints about it, I would say. Not enough evidence. Anyway, so the sewage unfortunately got into the apartment, and just destroyed all the carpet. Some people's belongings, some furniture. The building manager acted very quickly and promptly. The plumber was called out. We arranged for the carpet people to come out, but originally they thought they could dry it out. But then they realised that wasn't possible. So it had to be removed. There were tenants in the apartments, they had to be relocated. There's obviously loss of rent.

So this is all now still in train. But the interesting question, Amanda, was by the owner of the lot who rang me this week and said, "Well, I've got contents insurance and I've been asked by my property manager to claim on my contents insurance for the carpets and etc." And I said, "Yes, that's correct." He said, "But why should I have to pay the excess when it wasn't my fault? It was basically the fault of the building where people had been obviously throwing these things down the toilet causing this blockage." I thought, Amanda, I would raise this in our podcast today just to see what your view was 'cause it is consequential damage that he has had to endure, and whether or not the owners corporation could reimburse him for the excess that he has to pay. So I wasn't really sure about that one. I thought that would put that one to you, Amanda.

**Amanda Farmer:** Very good question. The way that I think about this is to look at the owners corporation's legal obligation to repair and maintain the common property. Most of us will be across that by now, especially if you've been listening to the podcast for a while. If the owners corporation doesn't properly repair and maintain the common property and a lot owner suffers some kind of loss or damage, then our legislation in New South Wales says that the owners corporation is responsible for meeting that loss

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and that damage. Now, it sounds like that's what's happened in this case. The owners corporation-

**Reena Van Aalst:** I think I would disagree, Amanda, because it's only accidental damage. It's not as if it hasn't done something. It's that people have been putting these things down the toilet and no one would know about that until something happens. So it's actually covered as accidental and will damage under the policy because it wasn't something that was known. Otherwise it wouldn't be covered by the insurance company. The insurance company has covered the rest of the claim.

**Amanda Farmer:** Okay, very good. So the owners corporation's building insurer has covered the claim. So they've obviously taken the view, "This is not a failure to repair and maintain. This is an accident." Perfect. Okay. I like that.

**Reena Van Aalst:** Yes. But the excess that he has to pay for the carpet.

**Amanda Farmer:** Yes.

**Reena Van Aalst:** Which is not covered under the building policy. So therefore, the building policy will cover the building aspect of it.

**Amanda Farmer:** Yes.

**Reena Van Aalst:** Damage to the building. But the other side of the coin is that he has to now claim on contents insurance for the carpet replacement and other sort of things that were damaged that were contents. So he's now saying to us, Amanda, "I want my \$500 excess."

**Amanda Farmer:** Yes.

**Reena Van Aalst:** "Paid to me by the then 'cause it wasn't my fault."

**Amanda Farmer:** Yes.

**Reena Van Aalst:** And I'm thinking, well, it's not really our fault either. But I wasn't really sure how the new way defined this case.

**Amanda Farmer:** Well, the only avenue for an owner to claim that kind of a loss from an owners corporation is through a failure to repair and maintain. If it is not a failure to repair and maintain, there is no claim against the owners corporation. He has what we say as lawyers, he has no cause of action.

**Amanda Farmer:** I've actually been reviewing some cases on that question recently. There's quite a good tribunal case. It is a recent one. I'll just find the name and I'll put a link to it in the show notes. It goes through exactly this process of what avenues do lot owners have to claim damages against owners corporations. This tribunal case makes very clear that the only avenue is under Section 106 which is a right that arises because of a failure to repair and maintain the common property. Now, that case is Sik, S-I-K not sure if that's the right pronunciation.

It's an appeal panel case from March 2019 with the New South Wales Tribunal, so I'll put a link to that in the show notes. It's a really good one for going through that process of in short saying there are very limited avenues for lot owners to claim damages from owners corporations. I would say if this is accidental damage, your building insurer has covered it, the contents insurer has covered it. Unfortunately, he's left with the excess.

**Reena Van Aalst:** Now, the other thing, just to throw a bit of a spanner in the works, Amanda, is that he said that they should have been something in the building that would stop, I don't know, some plumbing thing. I don't really understand. I have to look more into it. That should have been built into the all apartments. This is obviously a new, very recent block that would stop this thing from happening. Therefore, had this been done, then he wouldn't have suffered this loss in damage.

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**Amanda Farmer:** Right.

**Reena Van Aalst:** I suppose if something has been built a certain way and there's something that should've been done that hasn't been done, does the owners corporation then become responsible if it didn't even know until this event occurred that this was a case or is a totally different avenue?

**Amanda Farmer:** Yes, it depends on, obviously that's something that he's saying by the sounds of it. I would query what does the owners corporation's own plumbers say about this? What's their view? Is this as we think? An accident because of flushable wipes that are actually not flushable. Nobody's holding these companies to account. If it's an accident and that's what your plumbers say, then you're entitled to rely on that. If he wants to take a different view and say, "Well, the pipes should have been constructed a certain way."

**Reena Van Aalst:** Or there should have been something that was inserted at the junction where it doesn't allow it. Yes. I don't know.

**Amanda Farmer:** Well then query, is that an original building defect. If it's a new building, are they still within their warranty period to go back to the builder? If it is some kind of a defect, then yes, that would fall within that repair and maintenance obligation. So then we're back to that other view. Yes.

**Reena Van Aalst:** Yes. Okay. Yes, that's good to know. Thanks, Amanda.

**Amanda Farmer:** Interesting one. I'm sure there's many managers out there, our owners no doubt, who have that question come up. It's an awful situation when there is a sewage problem and horrible for the person who has to deal with that in their apartments.

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

**Amanda Farmer:** Okay. My challenge for this week relates to meetings and specifically the adjournment of meetings. So Reena, no doubt this happens to you from time to time. There is a need to adjourn a general meeting and we certainly have provision in our legislation in New South Wales for meetings to be adjourned, what happens when we adjourn meetings and when should the adjourned meeting then take place. But something that I couldn't answer and I don't believe is set out in the legislation is what happens to the motions that are resolved prior to the adjournment. Do they become actionable? Can the strata manager, the committee members actually take steps to do work that has been resolved to be done? For example, even though the meeting has not officially ended, it has actually been adjourned. What's your view on that, Reena? Have you been in that situation?

**Reena Van Aalst:** It's funny how you say, Amanda, about meetings being adjourned. So in the previous legislation when a quorum wasn't achieved, the meeting had to be adjourned. A general meeting had to be adjourned. See, it was adjourned three times. So the same meeting, general meeting, had opened and went over like 3 or 4 months because there were issues originally arising out of a proxy that had been submitted, which allegedly had been forged. So the meeting was adjourned at the point that that forgery, inadvertent comments had been discovered. Then it was adjourned again for, because there was so many issues and so much discussion that unfortunately there was, I think 2 or 3 hours had lapsed and we still hadn't completed the meeting. So my view is that you can still complete the resolutions that have been adopted cause you'd had a quorum at that particular time those motions were considered.

The only caution I would add to that comment, Amanda, is that if a motion depends on a subsequent motion, let's say you're approving a quote but you haven't yet approved the budget or you don't have enough money for it, then I suppose that would be the only caution. I would say that you can't proceed until a subsequent motion has been adopted because sometimes I find with managing agents and people in general or committee members that they, they put motions in an order necessarily that's not sequential.

So it's like putting the horse before the cart. So you've really got to make sure that if you are adopting a particular quotation, that

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you basically make sure that the budget has been approved. Now, I'll give you an example. I've got one coming up where they want to install solar panels, which obviously has a special resolutions. It's an alteration to common property. So we have to make sure that that's past first. Then the budget has to also be approved to allow that to be funded. So we have to put that motion before the budget. So that is very important that anything that's interdependent has to be approved. But prior to the actioning of any motions, but I don't believe that you can action the motion because the meeting hasn't finished.

**Amanda Farmer:** Yes. That was the view that I ended up taking when I thought that through. But one thing that I did point out to the person who was asking me this question is to be aware that the strata committee does not vacate its position until the end of the meeting. Our legislation says that. I think, Reena, you and I talked about that a couple of episodes ago.

**Reena Van Aalst:** Yes.

**Amanda Farmer:** So query whether if there are steps that need to be taken by the strata committee, who is the new strata committee, the old strata committee? Who are the legal committee members? Because even though you may have elected a new committee, if your meeting is then adjourned after that election has taken place and that motion is resolved, those new committee members haven't not taken up their positions. You still have the old committee because our legislation is expressed. It says that the committee members for the previous year only vacate at the end of the meeting.

**Reena Van Aalst:** Yes. It makes sense, Amanda, because this chairperson doesn't stand down the minute the new committee election takes place, he or she continues to chair the meeting to its conclusion.

**Amanda Farmer:** So there might be things that the strata manager can do in the midst of well, while waiting for the adjourned meeting to take place. But it may be that the majority of things cannot happen because they require the new strata committee to take certain steps. I suppose the old strata committee could still do things.

**Reena Van Aalst:** Well, I mean, I suppose it depends on what was on the agenda because the resolution of a general meeting can be delegated to the strata manager because of the General Meeting Authority doesn't require the committee consent in the first instance unless, Amanda, there are steps the committee has to take to effect those resolutions.

**Amanda Farmer:** I wonder if that's why we often see the election of the strata committee being one of the very last things that is on the agenda of an annual general meeting. I think that's a good course of action.

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

**Amanda Farmer:** Okay. If you want to find out more about adjourning meetings in New South Wales, checkout Clause 20 of Schedule 1 to our Strata Schemes Management Act. I'll put a link to that one in the show notes. Moving over to your win for this week, Reena.

**Reena Van Aalst:** Yes. This is actually quite a really satisfying win, Amanda. Because I'm taking her a scheme where it's part of a BMC and the strata scheme that that we're managing is actually the majority entity. Even though unfortunately the way that the document was drafted was that voting rights are equal even though the general spirit of the shared facilities is three to one in terms of contribution and allocation.

So we're now the strata managers. We've been managers since the end of last year. The BMC manager is still the manager that was the manager that had been managing the strata schemes. What had happened was this building manager and there were repairs that had to be done. I keep telling the building manager, "No, this is actually not a strata scheme responsibility. It's actually the responsibility of the building management committee."

So for those that don't understand what this means, it's when 2 or more entities share a service. So therefore, it's not solely just for the use of one entity. Both entities use this particular service. For example, a garage door where occupants of both buildings have

car spaces in the garage.

**Reena Van Aalst:** There's only one garage door that is there. So that is what we consider to be a shared facility because 2 entities are sharing the same garage door to get into their account spaces. Anyways, the fire issue came up and other issues. Every single time I keep telling that building manager, "No that's not right. I'm not paying for this. It's got to be invoiced to the BMC." Then the BMC manager is telling him, "No, she's wrong and that's not right." Providing these clauses that weren't even relevant, but anyway. So I've sort of felt I was in a situation where property manager was like the meat in the sandwich. I know that I'm right 'cause I manage a number of building management committees. So I do know how they sort of operate in the whole premise behind how they're constructed.

Anyway, so I decided to actually write to the author of the document, the lawyer who actually drafted the SMS for the development. Basically, I just said this is my interpretation. This is their interpretation. Can you please provide clarity? Because I thought if I went back to the author of the document then that would hopefully dispel any issues arising out of the misinterpretation because there are invoices that have been paid by the strata scheme before we took over that that are actually building management committee invoices. So finally the lawyer said no, that what you're saying is correct.

The clauses that the other manager was referring to don't apply in this instance. It applies to certain things, which was fairly obvious to me, but anyway. Yes, so now we have agreement at least on what is a shared facility, I hope. But unfortunately, the owners corporation had expended money on fire doors, and I said, "Well basically you need to reimburse us for this fire door report." And they're saying, "No, the other member won't reimburse it because its consent wasn't obtained." I said, "Yes. But that was because you gave incorrect advice." So now we're getting into this, the second part of the situation, but hopefully it'll be resolved. But yes, so I suppose it's a very good win, Amanda. But I think that it just probably opened another Pandora's box for, I think for other schemes where perhaps their managing agent doesn't really understand how the document works.

**Amanda Farmer:** These complex titling structures can trip many of us up from time to time. It is so, so important to go back to the document to work out who's responsible for what. Certainly, in the case of a BMC, a building management committee, the SMS, the strata management statement is a really important document. In that situation, Reena, are you just managing the BMC and there are other managers managing the strata schemes?

**Reena Van Aalst:** I don't know. I'm only managing the strata plan who's a member of the BMC. Yes, actually it's the majority member. It's paying for 75% of the costs, Amanda, because it actually has 3 times the number of lots and apartment. Yes, sure. So the cost is accurate. What's not accurate is the voting rights, which are equal. Then you have a manager that doesn't even understand how it works.

**Amanda Farmer:** Yes. I find that is just so common that these strata management statements are drafted in a way that is inherently unfair and they're so difficult to change.

**Reena Van Aalst:** Yes.

**Amanda Farmer:** And difficult when you have different managers managing the entities and then a different manager managing the BMC. You have these differences of opinion. It can be helpful to have different views of course, and different ways of management. Often if there is conflict, it's important to have different representatives guiding the different entities. But yes, you take the good with the bad. Hey?

**Reena Van Aalst:** But I think, Amanda, in this case like the BMC manager was the manager for the strata plan initially, so that was like ... But in a sense, if the managers understand what's covered by the building management committee and what's not, then the strata plan is paying more money than it should be paying.

**Amanda Farmer:** Yes. Well, therein lies the conflict because you were pointing out a mistake on the part of the BMC manager who was then managing the strata scheme and having them overpay for ...

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**Reena Van Aalst:** Exactly.

**Amanda Farmer:** Yes. So will never going to win that one. Not Without a fight.

**Reena Van Aalst:** I mean, now I got back to the invoices that are facing me.

**Amanda Farmer:** Oh no.

**Reena Van Aalst:** That's what I've been asked to do is to audit all the invoices, which is correct because in the day, we're still paying our BMC levy, the amount that's been raised in accordance with the BMC meeting. But the portion, Amanda, those costs and inclusion of them is incorrect, so ...

**Amanda Farmer:** Yes, so work out how many thousands or tens of thousands or who knows, even hundreds of thousands of dollars you've over paid. Then make that commercial decision as whether it's worth pursuing.

**Reena Van Aalst:** Exactly.

**Amanda Farmer:** All right. Thank you for sharing that one, Reena. Let us know how it all works out.

**Reena Van Aalst:** Yes, I will.

**Amanda Farmer:** The win that I want to bring to the table this week relates to this interesting question, which a number of managers are probably across, how are our older, schemes, our pre-1974 schemes different to our newer schemes? In particular when it comes to the boundaries between lot property and common property. Now, this is a question that has received lots and lots of attention inside our member forum at the moment. It was such a great conversation. I thought I'd bring it to the podcast. No doubt there are some of you out there who have no idea what I'm talking about and this will be an educational session for you.

So what happens with our older schemes, and it's actually pre-1 July 1974, schemes that were registered pre-1 July 1974, they have different rules applying when it comes to the boundaries between lot property and common property. That's because they fall under our 1961 Strata Titles Act. There were some amendments when our Strata Scheme Development Act of 1973 came into force and that came into a force in 1974. The transitional provisions around that legislation are a little bit confusing and they trip up many a manager, many a building. Whenever I have to look into this, I always have to go back and revise the legislation as well.

But the general rule, which we talked about inside the member forum is that where you have a boundary that separates part of a lot from a another part of the same lot, that boundary, whether it's a wall, whether it's a balcony door, a window, a slab, if you have a terraced lot.

So you've got an upstairs downstairs. What is within that boundary is lot property. Now, that's unusual because under our newer legislation for our newer schemes, that boundary, the slab, the balcony window, the balcony door would actually be common property and the responsibility of the owners corporation. In these older schemes, it is lot property. Now, that is not the case where the boundary is separating the lot from another lot or the common property. So where we have the balcony slab that's separating the lot on level 3 from the lot on level two, that slab is common property just as it would be as we're used to in our newer schemes. So the waterproof membrane, if there's any concrete cancer, even in our older schemes that's going to be the responsibility of the owners corporation. The same applies to a balcony balustrade because that's essentially a wall that is separating the lot from generally the common property or outside of the strata scheme.

The balustrade is going to be the responsibility of the owners corporation. Now, this came up in the forum because a strata manager had been confused about this and had been telling a lot owner that because you are a pre -1974 scheme, you're responsible for not only your balcony doors and windows, but your slab, and your waterproof membrane, and your balustrade.

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**Reena Van Aalst:** Really?

**Amanda Farmer:** Yes, so we delved in some depth into this question and I together with some other experts in the forum provided this guidance. Do you find it's something that confuses buildings you're working with, Reena? What do you think of my explanation? Please do jump in and clarify anything.

**Reena Van Aalst:** Oh no, I mean, yeah, you're spot on the mark, Amanda. Exactly what you're saying is correct. In a sense when you've got a window or a balcony door, that's what I think confuses people. But to me, when you understand how it works, where the boundary of the lot is is pretty much right on the edge of it. Upper surface, bottom, and right on the edge. Then I think it makes it, if you can visualise it in that way, I think it helps people understand. What is common property and what is lot property. I suppose in a sense, I've had this question asked about an older scheme is where people have actually, for example, added balconies where balconies weren't present onto the boundary of the lot. Does it become common property or is it still a lot of property even though there's been no formal approval of those subject balconies, Amanda?

So that's something that's probably still for an older building. But I suppose it's a totally different question. I think we can probably talk about it another time as when people make alterations to common property that are not approved in let's say, 30 40 years ago, do those and become by default common property because they look like they're common property? On the outside, you would think that these apartments that had windows that have then taken them off and made balconies and put balconies there, are they now common property or not? So yeah, that's totally for another day, but ...

**Amanda Farmer:** Well, bear in mind the caveat on all of this, and I probably should've said this at the beginning, is that you start by looking at the strata plan. If there is any note, a written notation on the strata plan that says anything about where the boundaries lie, that note prevails. So often we will see on older plans that even though under the legislation, the balcony doors and windows separating the inside of a lot to the outside balcony would be lot property, there's a notation on the plan that says no, these are actually common property.

So it's really important to look at the strata scheme. Always look at the strata plan of course, but particularly for our older buildings before you make this assumption about balcony doors, just check that there's nothing contrary on the strata plan. I wonder if when these older buildings are doing renovations, you said you talked about unapproved renovations there, Reena, so no doubt, nothing would be noted on the strata plan.

**Reena Van Aalst:** No, exactly.

**Amanda Farmer:** But if balconies are being added or or modern things are being done, it would be really important to update the strata plan and make clear. I would suggest in line with the modern legislation where the boundaries lie.

**Reena Van Aalst:** Yes, exactly. Thanks for that, Amanda.

**Amanda Farmer:** So I found that to be a win. It's always good to revise those complex issues for everybody and I know that was helpful for those who were involved in that discussion in the forum. I think that is about it for this week, Reena. Anything to add?

**Reena Van Aalst:** I think, Amanda, all good.

**Amanda Farmer:** Excellent. Look forward to catching you next time.

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

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