

Publication Date: 5 November 2019
YSP Podcast Transcript: Episode 186. Dealing with damage caused by lot owner + compulsory appointment success

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

Reena Van Aalst: Hi Amanda, how are you?

Amanda Farmer: I am doing well. I think around about the time this goes to air, I will be returning from a short break that I've had overseas and I think you might be wrapping up your break, feeling a bit sad about it maybe.

Reena Van Aalst: Yes, it's hard to think that far ahead, feeling sad before I've even left.

Amanda Farmer: Yes, perhaps, but we're looking forward to having you home. I can say that.

Reena Van Aalst: Exactly. Exactly, Amanda.

Amanda Farmer: All right, let's jump in. Challenges, Reena, hit me with a challenge.

Reena Van Aalst: For all strata managers that have to go out to Parramatta for mediation, I think it's become quite a time-consuming event for us because as I understand from the people at Fair Trading, the majority of applications are lodged by the inner-city areas: eastern suburbs, northern suburbs. So let's not go into the politics of why it's in Parramatta, but I have actually received two applications from the same building, from different lot owners within say two months of each other, basically taking the owners corporation to mediation because of a perception that the owners corporation is responsible for damage to their lot, which has not been caused as a result of the owners corporation's failure to repair and maintain common property.

So in this particular example that I'm referring to Amanda, there was a hot water unit in the apartment above. It only services that apartment, they've installed themselves and it burst and therefore there was quite a bit of water damage that occurred into the apartment below.

It was light fittings, tenant furniture, et cetera, quite a lot of damage. So the owner came to us via the agent and said, "We need you to compensate," and we said, "No, this was not caused by the owners corporation, this is caused by the owner of the above lot and we will happily forward your email to them and you can make direct contact." We didn't give them their details because obviously we had no authority to, apart from what was in the strata roll, but we obviously encourage that dialogue.

So some time passed and we didn't really hear much, I'd sort of heard again, the light fittings and yes, so basically the contents insurer and the landlord insurance would obviously only look after those prospective items but would not look after and take care of the damage to the common property within the apartment, that included the ceiling and light fittings, I believe, I think the walls are okay.

Anyway, and again, I said, "Well no, please refer to my previous correspondence. We did not cause this and we're not going to submit an insurance claim." First of all the excess was quite high so the amount that was in question was even below the excess but nevertheless, and something that I've learned since from you Amanda is that there is no obligation to submit an insurance claim, even if there is an event.



Publication Date: 5 November 2019

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Reena Van Aalst: So I said to them, "No, we're not going to do that. We're not going to submit an insurance claim, nor are we going to pay for the light fittings or the ceiling." And then they said, "If you don't, we're going to take it to the tribunal." I said, "Well you need to take whatever action you deem necessary." So about a month later, I think it takes quite some time now for these applications from the date of submission to Fair Trading to when you actually are advised of a date.

And they've said we're going to mediate, an application has been submitted by the owner of the lodge requesting repairs to common property. So I was wanting to speak to you about this Amanda, because it's coming up quite a lot now that I've had probably three similar cases of varying types where the owners corporation is being held to ransom so to speak, by landlord insurers, contents insurers saying to the owner or the occupant rightly so that we're not responsible for the wall because it's, that's strata, people say that, strata. So of course being common property, et cetera, or even if it's not, it's part of the building structure so it's not relevant to that fixtures in the building, structural or insurable under the building policy.

So Amanda in a sense, what is your advice because obviously we're going to, the committee have declined mediation on this basis because it costs money for us as an agency we pay to go all the way up to Parramatta, stay there for two hours or whatever it takes, sometimes it could be longer, sometimes it could be less, but then you've got to come back. So the whole time, sometimes the amount that is going to be expended just in our fees trying to go out there and be there and to settle something that perhaps shouldn't have been submitted in the first place.

Amanda Farmer: Yes.

Reena Van Aalst: Obviously we can decline mediation but sometimes it is better to go there because you can have a face to face meeting to explain these things, but obviously there's a physical, quite a high cost to that explanation.

Amanda Farmer: Yes.

Reena Van Aalst: So what's your advice Amanda? Because it's happening quite more and more now I'm finding.

Amanda Farmer: Well look, the owners corporation has a duty to repair and maintain the common property, let's start there. If the owners corporation fails to repair and maintain the common property and an owner suffers some kind of loss and damage because of that failure, then there can be a claim against the owners corporation. In the situation that you've outlined, there has been no failure to repair and maintain the common property. Yes, there has been some damage to both lot property and common property but that hasn't been caused by a failure to repair and maintain. That's been caused by a burst hose, water penetrating from one lot to another at an area I imagine that didn't need to be waterproofed because it's a kitchen or whatever it is. So there's no failure there in the owners corporations structure of the building. You're right that this essentially becomes a matter between the two lot owners.

And as for insurers, I relate completely to your experience of having a situation where a lot owner's contents insurer has refused to indemnify them, sends them off to the owners corporation, but doesn't have of course that background understanding that as a matter of strata law the owners corporation doesn't have any responsibility to meet that claim. In some circumstances the owners corporation might, but in the one that you've outlined, they don't. So the lot owner feels as if they're acting on the advice of their insurer to go after the owners corporation and then gets a surprise when the owners corporation, via their strata manager or sometimes a lawyer says, "Ah, sorry, we have no obligation." And the issue does get confused I think when owners corporation building insurers say, "Just lodge a claim and we'll pay it anyway." I know that's happened to you, we've just spoken about it separately.

Reena Van Aalst: Mm-hmm...

Amanda Farmer: And I often say, I think strata building insurers are incredibly generous.



Publication Date: 5 November 2019
YSP Podcast Transcript: Episode 186. Dealing with damage caused by lot owner + compulsory appointment success

Reena Van Aalst: Yes, Amanda you know what you are absolutely right on the mark because in another event I was told it doesn't matter that it was caused not by an insurable event per se, by some lot owner's personal property affecting someone else's common property, they said to me, "You have to lodge a claim," and I said, "No, I don't have to."

Amanda Farmer: Yes now let me be clear on that. I agree and we've talked about this. You don't have to lodge a claim. No one has to claim on their insurance policy.

Reena Van Aalst: No.

Amanda Farmer: I don't have to claim on my contents policy. If my place burns down and if I decide I don't want to claim on the policy, I don't have to.

Reena Van Aalst: Mm-hmm..

Amanda Farmer: You may have duties to notify your insurer under the policy where there's been damage to property and that makes sense.

Reena Van Aalst: Yes.

Amanda Farmer: They need to be aware of what their risk is, but you certainly don't have to claim, and I have this debate the other way for lot owners against owners corporations where the owners corporation says, "Why are you claiming carpet replacement? For example, from us, you should claim on your contents insurance. Yes, it was damaged because of our failure because of a leaking roof or something, but don't you have contents insurance? They'll cover it." And I say to my client, "Even if you have contents insurance, you don't have to claim, why should your premium go up?"

Reena Van Aalst: Mm-hmm....

Amanda Farmer: The owners corporation is responsible to meet this cost, it's their bad luck if you don't have contents insurance or if you don't want to claim but you don't have to.

Reena Van Aalst: Mm-hmm....

Amanda Farmer: It's often a generous lot owner that will claim for their contents. That's a separate issue, but I do see how strata managers and their clients can get confused by strata building insurers who say, "Oh yes, we'll pay it anyway," because there is almost then an admission of liability that we are responsible for paying this when in this kind of circumstance I can't see that you are.

Reena Van Aalst: That's right, Amanda. Yes, so I think that's an issue. I think that a lot of strata managers aren't even aware of that in a sense that if the event is caused by another lot owner's property, then the owners corporation is not responsible.

Amanda Farmer: Mm-hmm.....

Reena Van Aalst: Even if it does affect common property.

Amanda Farmer: Yes, that's right. Bear in mind that at some point if the common property is not repaired by the owner responsible, the owners corporation may have to step in to effect that repair or require the owner responsible to effect that repair.

Reena Van Aalst: Yes.

Publication Date: 5 November 2019

YSP Podcast Transcript: Episode 186. Dealing with damage caused by lot owner + compulsory appointment success

Amanda Farmer: So if the owners corporation does it there's an avenue then for you then to claim from that owner who should have done it. Or you can seek an order requiring that owner to do it because whilst it's not your responsibility, it's important that you don't sit back and let that problem sit there and get worse as it will do.

Or you can seek an order requiring that owner to do it because whilst it's not your responsibility, it's important that you don't sit back and let that problem sit there and get worse as it will do.

Reena Van Aalst: Yes, of course. Well I think in this case, I mean the ceiling repair is something that they could, it's just a bit of painting and also I think light fittings definitely are not common property anyway, they're part of the building fixtures and fittings, but they're not common property. So in this case Amanda I think we're on safe ground to say that we're not responsible.

Amanda Farmer: Yes. Thank you for sharing that one. It's a bit of a deep one, but I know it has come up between us a few times recently and there'd be many others out there who are struggling with that and that is not by any means a conclusive conversation about that, but it's an important topic to start wrapping our heads around.

Reena Van Aalst: Yes, definitely. Amanda.

Amanda Farmer: Okay, here's an interesting little challenge for you Reena. I attended the offices of a strata manager very recently and conducted an inspection of books and records for my clients. Now my clients are the owners of lots in a building. One owns for example, lot 5 and one owns lot 6, so I'm acting for two owners in a building. I made my request for inspection. I told the strata manager, "I'm acting for the owner of lot five and lot six. I'd like to come and inspect the records."

Strata manager said, "Fine." We set up the appointment, I attended, spent about two hours there. I then went to pay the bill and we know that we need to pay for our inspections pursuant to our legislation, \$34.10 I think it is under the regulation.

Reena Van Aalst: For the first hour.

Amanda Farmer: For the first hour and then a little bit more, an additional \$16 for each half hour afterwards. That is not my issue. My issue is that the strata manager proposed to charge me twice because I was conducting the inspection on behalf of two lots.

Reena Van Aalst: Sorry I shouldn't be laughing.

Amanda Farmer: I'm glad you're laughing because I then had what I described as a near knockdown drag out fight with the strata manager about why I thought that was not correct.

Reena Van Aalst: Well I think they may have had to perhaps give you lot owner records for each ledger. Say the strata roll for that each lot and perhaps their financial ledger, which I don't think is...

Amanda Farmer: They should've given me a lot of records for everybody, I was entitled, am entitled to inspect every record.

Reena Van Aalst: I know, but sometimes Amanda when someone's coming to do a search for a particular lot, because obviously if someone's selling or buying and this, we know the purposes and particular cases, we make sure that we had the ledger so that people know is that person updating their levies, is the strata roll correct for that lot. That stuff obviously is going to form part of a contract of sale in terms of the lawyer knowing.

Amanda Farmer: Sure, that's fine.

Reena Van Aalst: But apart from that, everything else would be the same. I mean, that's why they're providing all the records the same time. So this is really, I mean I must say I think that I've always heard everything that I can possibly hear about in strata but that's definitely a new one.



Publication Date: 5 November 2019
YSP Podcast Transcript: Episode 186. Dealing with damage caused by lot owner + compulsory appointment success

Amanda Farmer: Well look, I started out by laughing. I then had the strata manager come out and speak to me and I said, "Oh look, you're not charging me twice." "Oh yes I am, because it's for two lots." I said, "What part of the legislation says that you are to be charged on a per lot basis?" I said, "Section 182 is the section that says you can request an inspection of the records. I've requested one inspection of one set of records and Schedule 4 to the regulation sets out what the fee is for an inspection of records." Very different to, for example, when you're requesting a strata information certificate on behalf of a lot.

Reena Van Aalst: Yes, Section 184 certificate.

Amanda Farmer: Section 184 certificate correct, and you're paying for that on a per lot basis. That was the example that was put to me. I said, this is not Section 184.

Reena Van Aalst: Yes.

Amanda Farmer: This is a completely different section and I was also told that this strata manager had been doing this for 20 years and had never had a lawyer question the double charging. And I said, "Well it's your lucky day."

Reena Van Aalst: I'm sure Amanda, when they saw your name already coming, that would have probably instilled some concern. But my other experience has been of strata was that it's funny because I actually manage a building, which is part of the BMC. The strata scheme is managed by our company and the BMC is managed by a different company. So obviously the BMC I believe, and I can see is being mismanaged because the strata manager there doesn't even understand how the BMC works and I won't go into that for this particular purpose. Safe to say that there are costs that are not being billed to the BMC that we're being asked to pay and had been incurred by the strata scheme prior to our appointment. So I wanted to go down and have a look at all the records of the BMC. So I'm at an appointment and they knew I was coming et cetera, I think the receptionist knew it was me, but I don't think anyone else knew it was me.

Reena Van Aalst: And then of course when I went there, I know all the people and I said hello and it was all nice and amicable. But I think what I find is that they said that you can't actually download anything electronically that you have to pay for every single photocopy. I said, "I don't want photocopies, I just want electronic records. I want to be able to get copies of my searches electronically, I don't want to have to, I want to be able to put it on a USB or get a link."

Amanda, if they can send me a link on Dropbox or Google Drive or whatever and I can then just save them myself. And then the receptionist said no and that's when I said, "Can I speak to someone?" I saw one of the principals who was able to help me and said, "Don't worry, we'll send you a USB et cetera." But that's because I know them and obviously as strata managers we're all colleagues and we try and help each other wherever we can. But I think to myself, I think it was \$1.20 a page or something, and I'm thinking if I want to get a copy of all the minutes, I mean if I was a normal search and I'm wanting to search all the records, then if I have to pay \$1.20 a page I mean, that's, I just don't believe that's correct.

Amanda Farmer: Yes and it's frustrating that it comes down to who you know and ...

Reena Van Aalst: Yes.

Amanda Farmer: How you understand the legislation and that you need somebody like yourself or myself to advocate for you to get what you're entitled to.

Reena Van Aalst: Amanda, did you end up paying for all the fees?

Amanda Farmer: Good question, this how our knock down drag out fight ended was that the strata manager said, "Well, Amanda, I've heard what you've had to say and as a courtesy, I will waive that fee." And I said, "Don't call it a courtesy. It's called applying the law."

Reena Van Aalst: Mm-hmm.

Publication Date: 5 November 2019
YSP Podcast Transcript: Episode 186. Dealing with damage caused by lot owner + compulsory appointment success

Amanda Farmer: But yes, we were not going to agree on that, but I did save my clients the double fees. It wasn't about the 30 bucks.

Reena Van Aalst: No.

Amanda Farmer: Honestly, it was about strata managers understanding, knowing and applying this legislation properly.

Reena Van Aalst: Well it's funny you should say that Amanda, because when searchers leave our office and they go, "Oh, do you want the check to made out to the strata plan or to your company?" And they go, "Don't worry, we know the strata plan." I said, "That's right."

Amanda Farmer: Yes.

Reena Van Aalst: It has to be the strata plan and this particular, this other case I'm referring to, I paid by credit card, but it all goes into the bank account of the company, of the strata manager, not into the strata plan's bank account.

Amanda Farmer: Yes and it's important to understand that it is a payment to the building. I do wonder whether those companies then pass that on to the building. Perhaps that's what they're doing.

Reena Van Aalst: Well, it does come back to the manager anyway, Amanda so in a sense, but it's more about how it appears. So, a lot owner doesn't have a direct relationship with our company. The relationship is with the owners corporation. So the money goes into the owners corporations account and then we draw down that money for ourselves.

Amanda Farmer: That's your fee.

Reena Van Aalst: But what I'm trying to establish again is the law of agency. So the money has to go into the strata scheme's account, then the strata scheme pays a managing agent because that person doing this has no legal relationship with the strata company.

Amanda Farmer: Mm-hmm, you're right.

Reena Van Aalst: It's a relationship with the owners corporation that allows them as agent to come in and do a search, et cetera, et cetera.

Amanda Farmer: Yes indeed, yes. So important issue I think, if not for the general application that is, we need to better understand these every day provisions that we're applying and sometimes without thinking and not reading.

Reena Van Aalst: Exactly. I think Amanda it sort of makes you wonder what else are they not getting right.

Amanda Farmer: A few things [laughs] That's right . Yes that one is ongoing.

Reena Van Aalst: That's why you had to do a search right?

Amanda Farmer: Yes indeed. All right, win for this week Reena?

Reena Van Aalst: This is a very interesting win, an owner had come to me asking if I would consent to compulsory appointment. She was going to do the application herself and I was quite supportive. Apparently she'd been, obviously vetted a number of companies and when I realised that she was going to complete the application herself, knowing how hard it is to get a compulsory appointment under Section 237 I thought well, I'll never hear from her again she won't be successful. I must say to my surprise two weeks ago she emailed me the orders and basically she was successful. There were a number of obviously issues that contributed to that decision, but one of the ones that stood out for me I think, and I think perhaps part of the reason why the member made the decision, was because the chairperson instructed the strata manager to basically except a quote of about \$25,000 for a roof repair.

Publication Date: 5 November 2019
YSP Podcast Transcript: Episode 186. Dealing with damage caused by lot owner + compulsory appointment success

Reena Van Aalst: There was a telephone instruction, there was no email, no committee meeting, no general meeting, nothing. And obviously even the email thing wasn't referred to in the judgement, it just said that there was no regard to the law that someone just tell someone to do it and the strata manager just did it. The company that actually is in question is quite a large company, they have been around for a long time. So again, it's not sort of people that, like small companies that people might perceive don't have the expertise. It's actually quite disturbing for me as a strata manager to see when judgement has come out, where it says that on the instruction of one person by telephone that a strata manager actually proceeds to undertake their request. Now a lot of buildings have come to me Amanda saying there is a lot of favoritism and people think, again, the chairperson has got more power when they actually don't, but this is another perception that we've spoken about previously.

Reena Van Aalst: But for someone to say, just do this and they do it, I mean I'm just flabbergasted, I know it happens quite a lot. This is the thing.

Amanda Farmer: Absolutely yes.

Reena Van Aalst: When you actually see it, and I think this is part of the reason why she was successful because it was so bad that a lay person who has done so much work, I'm not discounting any of her involvement and I mean she's done such a marvelous job, but she's not legally trained and nor does she know the strata act like I do. So in a sense it was a real win for her and a real indictment on the standard of strata management I believe unfortunately. I think it's, I'm seeing a lot more and more of it now as time is going on.

Amanda Farmer: Yes. My advice to owners who come to me wanting to apply for a compulsory appointment is always that they are difficult orders to get. So that's interesting that you might be seeing more of those come through. I imagine that acceptance of a large quote without any meetings, without any legitimate approvals that was but one example of the kind of non-compliance.

Reena Van Aalst: Yes.

Amanda Farmer: Okay, it was only a few days ago Reena that I had a lot owner client in my office complaining of exactly the same thing, that decisions were being made outside committee meeting. It wasn't clear who was instructing the strata manager to spend money, to accept quotes, to do work and it was significant work and her concern was that it was actually work that didn't necessarily need to be done. So unusually, we're often dealing with situations where work is not being done when it needs to, but there are from time to time situations where work is being done, it doesn't need to and it is behind some veil of secrecy that it's all happening and that's not the way our buildings should be run and I'm pleased to hear that the tribunal at least seems to be recognising that and giving owners some relief by way of a compulsory manager.

Reena Van Aalst: Yes. Well the other interesting point too, Amanda, is that in this particular case, the allegation was that sometimes the strata community members have approved quotes by instruction to the strata managing agent that benefited their lots.

Amanda Farmer: Yes.

Reena Van Aalst: And that's while there are other lots that were, that needed work done and that were being neglected. So again, I think we've spoken before about the motives of strata community members at times, not being in the best interests of all the owners, but perhaps they come onto the committee for their own lots and their own purposes. So that's another thing to be mindful of where this was quite apparent in that was not actually noted as such and it wouldn't be, but you can see from the threat of the judgement that the strata committee was actually acting in a self-interested manner where they were just undertaking repairs that affected their lots and other lots were being neglected.

Amanda Farmer: Yes, and strata managers need to be attuned to that and to protect themselves from allegations of favoritism and non-compliance and making sure that these decisions are going to properly constituted committee meetings if not general meetings. If the committee meeting is the appropriate place to approve this kind of stuff, then sure in a committee meeting, but otherwise a general meeting and not allowing one or two committee members to give instructions alone about these important issues.

Publication Date: 5 November 2019

YSP Podcast Transcript: Episode 186. Dealing with damage caused by lot owner + compulsory appointment success

Reena Van Aalst: I think it also comes from a two-fold reasoning in terms of why perhaps managers I think do this. One, I think that managers sometimes feel that if you don't stay in with the people that have the power or they perceive to have the power, then they're not going to have their contract renewed. And the second point is now Amanda, which I've heard is that under the new Act where managers have a maximum of a three year term and therefore they have to then keep putting on their agency agreement to renew their contracts for future AGMs or general meetings, whatever the case may be, that there's that pressure that whereas before when the contract ended, the date ended, it would go on a rolling month to month basis.

Now when the contracts ends it actually just ends. So there's more pressure on managers to be seen to be perhaps doing what they've been told to do to be able to retain their business or meet targets, whatever the case may be. So I think that's another sort of thing that my finding now, I'm not sure if it's one or the other or a combination of both or just lack of training and ignorance. It could be multitude of factors.

Amanda Farmer: Mm-hmm.. Concerning and something to be watching for sure. I'm going to wrap up with my win for this week. It is a win that one of my clients has experienced. In short, this lovely lady is an owner in a small building. There are 5 lots and for many years the committee has had 4 members, notwithstanding, we have 5 owners and she had sensed a bit of an effort on the part of the other committee members to keep her off the committee and that had been concerning her. There's some urgent remedial work that needs to be done around the building and not being on the committee she had been cut out of a lot of those communications so one of her goals was to get herself on the committee at the upcoming Annual General Meeting and we talked about how she might do that and also she had concerns about some work that was proposed for the building and didn't think that the scope properly addressed some items relevant to 2 of the lots.

So she thought that the way they were proposing to repair windows at her lot and her neighbor's lot was not going to be effective. So I worked with her to get second opinions on those items and to put those to the strata committee and also explained to her the process. Going back to that election of the committee, the process of nominating the committee members first, setting the number and then electing those persons to the positions if you need to hold an election. So I'm happy to say that her meeting took place a short while ago. She has been elected to the committee. She did explain to the committee how helpful it would be if all owners were on the committee and in small buildings, how that is quite normal for all owners to be on the committee and she also was able to get a motion resolved that the scope of works for the windows in particular would be reassessed and a second opinion obtained.

Now I have to say I do believe that the strata manager in this situation played a key role in changing some minds in that building. As I said to my client, I recognise this strata manager as somebody who was listening to what I was saying, to what my client was saying, who could then pass on to the committee, for example, in his experience, most small buildings do have everyone on the committee, and that's a good idea. So they weren't just hearing that from me. They weren't just hearing it from my client, but they were hearing that from their strata manager. And that makes a big difference, I think when a committee that perhaps is not making the right decisions or could do a little bit better, here's from someone who they may see as on their side, someone in their camp, their strata manager, that they should be doing things differently. Then it's easier to get these kinds of initiatives across the line. So there's an example, I think of a good strata manager doing good work in the best interests of their client as a whole.

Reena Van Aalst: That's a great outcome, Amanda. I think because in these small buildings, sometimes things can become far more volatile because of the fact that you only have a small pool of people that you're dealing with, so I think that's a great outcome for both strata manager and your lot owner and yourself. That's wonderful.

Amanda Farmer:

Yes, always good to have happy clients and a lovely way to finish off our episode, lots in there this week, Reena.

Reena Van Aalst: Yes, definitely Amanda.

Amanda Farmer: Keeping everybody on their toes.

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Reena Van Aalst: I'll catch you next time.

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