Publication Date: 4 December 2019
YSP Podcast Transcript: Episode 190. Vexatious litigants | stop valves (again!) | BMC gas bill

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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 am excited about the fact that it is December, it is summer time and we will soon be heading into Christmas. Fancy that!

Reena Van Aalst: Yes. It's gone by so quickly this year, Amanda. I just can't believe that I've been back now for nearly a month. The time has gone so fast.

Amanda Farmer: Time for another holiday. Are you planning anything over the break?

Reena Van Aalst: No. I don't like going away when there's too many kids around.

Amanda Farmer: I knew I'd get that out of her, everyone. There you go!

Reena Van Aalst: I'm becoming predictable. That's not good!

Amanda Farmer: Come in spinner. Yes. Well, I will be 1 of those parents enjoying the school holidays with my gorgeous child who I love very much.

Reena Van Aalst: Yes. He is a gorgeous child. I must agree on that, Amanda!

Amanda Farmer: Moving over to strata things for this week. Our wins and our challenges. Reena, let me know your challenge for this week.

Reena Van Aalst: My challenge for this week, Amanda, relates to an NCAT application that's been submitted by an owner in 1 of the schemes that we manage. Initially, of course, the owner had submitted an application for mediation, which I had recommended to the strata committee be declined because knowing what the matter was about we knew that there would only be time expended without any resolution.

We had tried to talk to this owner before any of this had occurred and therefore knowing the type of personality that we're dealing with, and in a sense their attitude towards not just the matter in hand, but he was quite hostile against individual committee members using denigrating terminology about individuals. So I gathered that mediation will not really be fruitful or helpful. The strata committee concurred with my recommendation. They had already decided before I even mentioned when they asked me what I thought about or what my recommendation was they had already decided that they did not want to attend mediation but wanted to seek my opinion.

When you look at the application, Amanda, there's actually no evidence. There's a number of allegations about what the strata committee has done and should have done and hasn't done, but there's no actual evidence stating. For example, there's no pictures, there's no statements, there's no anything. It's basically just some emails, comments and what I would call politely a bit of a rant.

Reena Van Aalst: And now, obviously, the owners corporation has to engage a lawyer to deal with the matter. I was just going to ask you in terms of NCAT and how the process works, I know that people can't be denied natural justice and you have to go through the processes as they've been legislated. But what happens if people, Amanda, just keep submitting applications? This is not the first time apparently this has happened. I was advised that this has occurred I think about 2 years ago before we took over as the agent.

If people, Amanda, keep submitting what I would call it frivolous applications with no merit how many applications is someone allowed to keep submitting? What's a quantum of cost the owners corporation has to keep incurring in order to deal with such people?

Amanda Farmer: A couple of things there. You've said that the application itself doesn't attach any real evidence. I imagine you've been served with a copy of that application by the tribunal and there is a date for a first direction's hearing?

Reena Van Aalst: That's correct.

Amanda Farmer: In my experience it does not matter that an applicant doesn't put their entire case together with their application when they file it. They will be given the opportunity by the tribunal at the first directions hearing to file further material. And often it's something like 4 to 6 weeks for them to put on their evidence and then 4 to 6 weeks for the respondent, in your case, the owners corporation to put on their evidence in reply. That's that issue of natural justice and procedural fairness that you refer to, Reena.

So, the mere fact that the application doesn't really have anything supporting it yet is not enough to make it misconceived, frivolous or indeed vexatious. However, if the matter continues and the lot owner perhaps doesn't comply with directions of the tribunal, doesn't put on any evidence, doesn't have any evidence, continues to just rant, as you say, and not actually make or put an arguable case then ultimately you expect that the owners corporation will be successful in its defense of that case.

And if it has engaged a lawyer and it has incurred costs it may consider making an application under Section 60 of the Civil and Administrative Tribunal Act in New South Wales for an order that the lot owner pay the owners corporation's costs. If you look at Section 60, I'll put a link to it in the show notes, it says that cost orders are made in special circumstances and lists the type of situations that may constitute special circumstances. And that includes an application that is frivolous, vexatious, misconceived or lacking in substance.

If that's the case, on an application by application basis, the owners corporation can and probably should seek cost orders if it has engaged a lawyer and incurred those costs. I'm sure your lawyer would advise you to do that. The question of how much is too much? When does an applicant become vexatious or a vexatious litigant, that's really hard to answer generally. It really depends on the specific circumstances of each case and there are no hard and fast rules as far as I am aware.

The way that our legal system works is that everybody is going to be given in some people's views more than a fair chance to have their complaint heard and it often feels when you're on the other side of that that there is an inherent unfairness, particularly when it comes to litigants who may be unrepresented and therefore not incurring the costs that you might be incurring with a lawyer.

There is 1 reported case that I'm aware of, Reena, that I'm just putting my finger on now and I will put a link to this one in the show notes as well. The case name is Singh, S-I-N-G-H, and the Owners of Strata Plan 11723. It's a 2013 Supreme Court case where an owners corporation was able to get an order pursuant to the vexatious proceedings act of 2008 in New South Wales. It was an order that prevented a lot owner from instituting any further proceedings in New South Wales. That's called a vexatious proceedings order. The lot owner couldn't institute any further proceedings against the owners corporation.

The short summary is that this owners corporation had been in litigation with the owner for more than 3 years, various different courts. I'm not sure that the tribunal was involved in this case and I believe that the dispute originally arose from unpaid levies and the lot owner would not accept that those levies were due and owing.

Amanda Farmer: Of course, as we know, when those kinds of disputes happen the bill just keeps racking up. It's very rare for orders to be made under the Vexatious Proceedings Act. There are very few reported cases where orders have been made. So as I said, it would be a very serious situation and anyone seeking that order would be very well placed to get some considered advice on that issue.

Reena Van Aalst: I do understand, Amanda, he wouldn't be deemed a vexatious litigant because it's only been a few times. But I think that when people make frivolous applications and it is time consuming because the strata committee's, obviously, elected to undertake management of the scheme. Most people would see that in relation to common property and improving the amenities and making the building more valuable, a much nicer place to live for the owners and a good place for investors to purchase apartments.

What I'm finding at the moment that a lot of time many schemes is being expended dealing with these types of applications, which really then take up a lot of resources both financially for the scheme as well as emotionally. Because when people are involved even if they're not going to court or people live in the same building, you see them, it creates that level of discomfort. You walk into the foyer, that person's there or you're in the garage, you're getting your car out and it goes beyond your normal sort of mitigation that you have say in normal courts or in normal circumstances where people live separately, they don't see each other and then they might meet at court, they have both their lawyers there, et cetera.

This is a bit more personal because involves people's homes. I think the fact that NCAT has very little standards in terms of... Even costs would be a good way to perhaps be able to sort of circumvent some of these misconsidered applications as you so put it Amanda, but at the moment it doesn't seem that that's the case.

Amanda Farmer: Yes. I agree with you that strata disputes are a beast of their own. That's exactly what Chris Irons said when I interviewed him in Episode 174. He's the Body Corporate Commissioner in Queensland. He was explaining the role of his office and how he felt that the commissioner's office had an unusual role in both providing guidance and information to those living in body corporates but also being part of the dispute resolution process. He felt that that was a justifiably unique and unusual role because these are unique and unusual circumstances.

These are people who may be in dispute with each other and living next door to each other. I see it being quite similar to say family law where we've set up quite a separate distinct legal regime for family law disputes recognising that the people involved in those disputes have obviously very close relationships and there is a great benefit in preserving that relationship so far as is possible or not making it even worse.

It may be that some disputes will reach that level of being vexatious. Yes, a cost order. Cost orders are getting made by the tribunal. I have certainly been involved in cases where cost orders are made. They do happen so bear that one in mind. But hopefully you don't see too many more applications from this particular lot owner.

Reena Van Aalst: Exactly. Thanks, Amanda.

Amanda Farmer: I am going to look back at an issue that I raised around about 3 episodes ago, Episode 185. That was a solo episode from me and I was talking about the question of stop valves or stopcocks within lots or servicing lots. I answered the question are they lot property or are they common property? The view that I expressed was that they are lot property because they are for the exclusive benefit of 1 lot and based on the definition of common infrastructure in Section 4 of the Strata Schemes Development Act they don't fall within that definition and are therefore lot property unless of course there is some kind of separate marking on the strata plan.

Now, I'm raising this again, Reena, because that was a solo episode. I was essentially having a chat with myself for the benefit of our listeners, I do want to talk to you about this issue because it's 1 that's come up few times in the member forum. There's been a lot of discussion in that forum about the question. It's come up in my own building.

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Amanda Farmer: Many, many managers would have this issue of having to replace stop valves across an entire building.

I've also had a listener contact me. Michael has written in to say that his view is essentially in line with mine. He says that from the boundary of the lot onward, internally, to the lot, the stop valves, piping and fittings, including flexible pipe work to taps, are, in his view, the responsibility of the lot owner.

Interestingly, he says that the pipework that is on the other side of the boundary in fact belongs to the waterboard or Sydney Water and there will be obligations that the owners corporation has to Sydney Water to make sure that those pipes are in serviceable repair. So that's a good point and thank you, Michael, for sharing that view.

But, Reena, what's your experience with the stop valves? Do your owners corporations pay for the replacement in various lots across the building or do they make lot owners pay for them?

Reena Van Aalst: It's really interesting question, Amanda, because I assume when you mean stop valve you mean a stopcock. It's the same thing, I think. And basically, our experience has always been that this is an owners corporations responsibility for the main reason that depending on the building they're normally not situated within the lot. They're outside of the lot. That's 1 consideration we've taken into our thinking as to why the owners corporation has been paying for them. Not always, but in older buildings they usually have been.

The second thing is that in the Common Property Memorandum that's been issued by Fair Trading and I believe also the previous one that had been issued by LPI as it was known before it became LRS, Land Registry Services, that also had that as a owners corporation responsibility. So based on those 2 factors I do agree that those only service that 1 lot. But it's been one of those things that I really haven't had much contention with and it's always been assumed to be an owners corporation responsibility for the reasons that I've mentioned. Now that you talk about it, Amanda, it does make sense that why should it be? It only services that 1 lot.

Amanda Farmer: Now, interesting point about these valves being located outside the lot. I know I'm thinking of valve say in my own building where they are certainly within the lot. We've got 3. We've got the bathroom, the kitchen and the laundry. So good to know that in some of your buildings they'd be located outside the lot. However, from my point of view, I don't think that changes the legal position. When you look at the definition of what is common infrastructure under the Strata Schemes Development Act.

The act says that common property includes common infrastructure and common infrastructure includes pipes, wires, cables or ducts that are not for the exclusive benefit of 1 lot. Even if these valves are located outside of the lot, if they are for the exclusive benefit of the lot, I think they're still going to be lot property. The reason this is maybe gray, confusing or not intuitive is because we're not talking about property that is reflected on the strata plan. So we're not talking about boundaries, we're not talking about floors or walls, which we would usually see marked on the strata plan and then the act gives us a definition for where the lot property boundary lies.

It's not shown on the strata plan. I do add a caveat there that there may be some strata plans that would have a notation about certain items of plumbing or stop valves. Of course if there is a notation then that notation will prevail. So it's always important to look at the strata plan. But when we're talking about infrastructure we do need to look at this definition in the Strata Schemes Development Act and think about whether it is for the exclusive benefit of 1 lot.

Thank you, Reena, for raising the Common Property Memorandum. I have since looked at that and can see that it does list the main stop cock to the unit as an item that the owners corporation is responsible to repair. I'm finding that hard to reconcile with the definition of common infrastructure in the development act. So I'm not quite sure if that's in the right place. However, if we do look at the other parts of the memorandum, which sets out lot owner responsibilities, we see that it lists any pipes downstream of any stopcock only serving that lot and not within any common property wall.

Amanda Farmer: That aligns with my view about what are the pipes that are for the exclusive benefit of a lot. They are going to be lot property, but I don't really understand why then the main stopcock to the unit should be common property. If someone can explain it to me.

Reena Van Aalst: Amanda, now that you've mentioned this what you're saying makes absolute sense. I suppose when you've been working such a long time in strata and certain things.

You've actually just looked at and thought yes that sounds right on the surface, but when you examine it a bit more closely and you're talking about the development act, in a sense the benefit of the stopcock, it is only benefiting that 1 owner because it doesn't affect any other owner. If your stopcock's faulty it's not going to affect you.

Amanda Farmer: Some people might say to me, "Well, Amanda, on that reasoning a waterproof membrane, which only services 1 lot, well that's common property." To that I say, "Yes." Because that is on the horizontal boundary, that is under a floor. The definitions in the development act tell us that the boundary of the lot property is the upper surface of the floor and anything below that is common property. So that makes sense according to that definition. The definition of common infrastructure, I believe, appears to exclude the stop valves if they are for the exclusive benefit of 1 lot.

Reena Van Aalst: Yes. Definitely what you're saying sounds correct, Amanda.

Amanda Farmer: Thank you. I don't mean to harp on about an issue that may be minor and nobody has a problem with but it did come up because a lot owner had questioned being asked to deal with that.

Reena Van Aalst: It can be an issue because let's say, Amanda, it's consequential damage. Let's say the stopcock is faulty, there's a water leak in the apartment, floorboards that have been damaged that the owner's installed. They're not common property. If it was the owners corporation's responsibility to maintain it and repair it, depending on how the interpretation is applied, then it can have ramifications. So I think what you're saying is quite significant. It's not a big deal but I think that happens if it's faulty when you're talking about water it can be quite an issue.

Amanda Farmer: Absolutely. That's part of how this discussion came up. I have been involved in a case where that has been called into question, whether it was the lot owners fault that this item was faulty or the owners corporations'. That's why we had looked at it closely and recognised that our assumption was quite possibly wrong. So there we go. Nice one. Let's change gears and discuss your win this week, Reena.

Reena Van Aalst: My win for this week, Amanda, relates to a strata plan that is part of a building management committee. I think we have talked about these before. In this case we are not the BMC manager, we are the strata plan manager. There's only 2 members in the BMC. What had happened was earlier in the year I'd received a gas bill from the developer because this is still a new building and it was quite a large amount.

I thought it's not on the shared facilities but I asked the building manager, "Does the hot water system service just the strata plan or does it service all other entities within the building management committee?" He said, "No, Reena, there's a number of hot water systems. There's only 1 gas meter into the whole development. So it does." Then I went out there myself to do an inspection and have a meeting. I went out and looked at it myself. I saw the meter and then meter number.

I was quite confident of my position so I advise the developer to send that to the BMC manager even though I knew it wasn't on the BMC shared facilities, which is really the crux of my issue. Many months pass, I hear nothing, I assume it's all been dealt with. Then we get another bill and this time the developer is refusing to pay the bill. So I assume from not having any communication that the developer ended up paying it, I think. I don't know.

So the BMC manager comes back to me now and says, "Oh no, I can't pay it because it's not on the shared facilities."

Reena Van Aalst: I'm thinking, "Yes, but we're when going to pay it either because we're not going to pay your portion." So what I suggested, Amanda, to the BMC manager is that with the consent of both lots that we agree to pay the gas bill because it's an omission of the shared facility register. It should have been included, but it was an omission.

We accept that and that we pay the bill. At first he said, "Oh no, I can't do that. It's got to be on the shared facilities. " I'm saying, "Can we just be a bit pragmatic about this? They're going to cut the gas of so I suggest that you just pay it and get the consent of both parties in writing that we agree to pay it.

It doesn't matter about by the percentage of this stage, I'm sure it'll work out to be what it is for most other things, but at least pay the bill." Thankfully he agreed with my advice and he's going to pay the bill.

Amanda Farmer: You've done that based on a split that's applied generally across the entities?

Reena Van Aalst: Yes. There was a general percentage but it doesn't really matter because the way that BMC's working, Amanda... This is what people don't understand. There's a pool of money there. You paid out of the pool and we've agreed to do it on that percentage.

Amanda Farmer: Oh, sorry. I understand what you're saying. So you've asked the BMC to pay it and you'll continue to make your usual BMC contributions to that fund.

Reena Van Aalst: Yes and then we will add it to the shared facilities by unanimous resolution. We will pay it in accordance, which we believe is the standard percentage that's been used across most of the shared facilities because it's a pretty 2 to 1 ratio for most of the expenses because it's based on usage.

There's double the amount of lots in 1 entity then there isn't the other. So it's not going to be one of the ones that are going to be fighting about what the percentage is going to be. It's pretty standard. It's just worries me that even though something's not part of a shared facility and it clearly should be that sometimes people don't take the practical approach.

Amanda Farmer: Yes. I was recently involved in a dispute with BMC parties in relation to electricity usage. It was discovered after many years that the contributions that were being made were not reflective of the actual usage and these parties attempted to resolve this by installing submeters. I do query whether that might be something that you'll use in your case, Reena, if there isn't agreement about a fair split.

The submeters were monitored for some time and an average usage determined and ultimately adjustments made, payments made back and forth and the shared facility schedule updated. That was quite an adversarial process that ran for a number of years and by the time it got sorted out there was a fair bit of money to be paid from 1 party to another.

Reena Van Aalst: What can happen with those types of disputes, Amanda, because the fraction of time means that there's more money that's involved because the fact that it's been going on for so many years. The good thing about having a building management committee, in a sense administer that particular role, is that there'll be an adjustment in the account. So if it is a shared facility it just means that that entity will have to then pay more and the other one gets a credit and so it becomes more of an accounting exercise.

It does impact on the budget of the strata plan because their BMC contributions are based on whatever they're paying at BMC level. It may give them a reprieve of a year or 2 in terms of some of the expenses because you have such a huge credit that's been allocated to your lot as a result of you paying so much and the other lots having to pay a lot more. So it goes back to the question of owners who didn't live there all that time now are paying electricity to fund when they weren't even an owner at the time.

Amanda Farmer: The moral to the story being to identify these things quickly and nip them in the bud as you've done in this situation, Reena.

Reena Van Aalst: Exactly, Amanda.

Amanda Farmer: I like it. Before we wrap up I'm going to share my quick win for this week. This is a win actually shared with me by a committee member in a scheme and this committee member had recently attended an AGM at which it was resolved to raise a significant special levy to pay out a loan that the building had raised to cover some remedial works and the loan had been outstanding for a few years.

The majority of owners decided it was time to pay out the loan in full. So there would be a special levy raised. It was expected that those owners who didn't attend the meeting, who perhaps didn't read the notice of meeting weren't on top of what was happening. It was anticipated that when they got their levy notice setting out the amount of the special levy that there might be some concerns and some questions raised. Indeed that is what happened in the case of this building. The special levy notice went out and this poor committee member had owners knocking on her door, sending her emails saying, "Why in the world have I got a notice requiring me to pay thousands of dollars? I was not expecting this."

The reason I share this as a win is because this committee member quite astutely made the decision to contact the disgruntled owners and there was one in particular who was quite unhappy and had actually started emailing other owners and demanding a rescission of the resolution. She contacted him very quickly in person, knocked on his door, said, "Hey, can we have a chat about this?" He said, "Yes, sure." Met with her at the building and they spent about 20 minutes working through the reason for the special levy, when it was raised, confirming that there was notice of meeting issued, making sure that his address for service was correct and it was the one that he was happy with.

Hearing from him firsthand that the reason he was so concerned is because he does have some other financial commitments coming up in the next few months and he wasn't able to pay the levy when due but could pay over a period of reasonable installments. He was able to hear direct from that committee member that that is perfectly fine and able to be arranged by the strata committee. A payment plan could be entered into and the owners corporation had agreed to do that.

This gave that owner the comfort that he needed. In my view this situation could have worked out quite differently if the committee member had not been so proactive in having that face-to-face, calm, neighbourly conversation and being able to resolve those concerns. So hats off to that committee member and I know she is also a listener to the podcast. So, well done!

Reena Van Aalst: That's a great outcome, Amanda. I think it is great when the committee members live on site, that the person that's got the problem also lives on site and that makes it a bit more available to have that medium in which to try and sort problems out. I think it also goes back to sometimes a more deeper issue that I believe happens in buildings where people really don't read anything that they receive.

I'm not sure on this case if I'm just talking about in general and not about your particular example because he may have received the agenda... or might not have received it, who knows? When you post something you assume it's gone but that's not always the case. People actually receive agendas. In cases where I think we're going to increase the levies significantly we always write a letter. Either the chairperson has a report or we'd write a letter to try and explain to the owners the fact that the levy's going up.

We also now include a schedule per lot to show that this is what the intended amount's going to be. If it's more than 1 quarter we then put more than 1 quarter and give an annualised amount. But I actually believe and in any 1 case I left something in yellow because I wanted it to stand out. And even after all that people just don't read anything. One thing I've learned historically is that people always look at their levy notice. If nothing else that's what they look at. It's 1 piece of paper telling you pay here or pay this amount.

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Reena Van Aalst: I think that people in strata... I'm not sure if it's how they are across everything else in their life or just that their home is something that they don't think of in that sort of business way or in a work way, but they just ignore a lot of basic information that's provided to them so they can actually then make the phone calls, come to the meeting, ask the questions.

I remember once, it was years ago. It might've been even 16 years ago. I remember at the time the chairperson said, "No one is going to come to the meeting. I've written a letter. I've said I'm going to triple the levies." He made it sound doomsday. He said is he did it on purpose because he wanted to try and send a message. You need to come to this meeting and hardly anyone came. Obviously enough for a call and then we get all the phone calls about the levy notice once submitted out.

Amanda Farmer: I know we are preaching to the converted here because if you are listening to this podcast you are obviously a highly engaged owner. But it's a really good tip here for committee members who are preparing for AGMs, preparing for contentious motions that are going to be on agendas, to make sure that the communication trail is there because you know that you might not get the emails or the complaints when the agenda goes out. You might not get the attendance at the meeting and the emails and the complaints when the minutes go out, but you'll get them when the levy notices come out.

If you can, as best you are able, communicate like a human being. Not like a computer, not like a robot, with the other human beings who have these concerns then it's going to save a lot of time, trouble, heartache, probably money for you down the track. So it is possible to promptly resolve what might at first glance seem to be difficult problems just by having the conversation.

Reena Van Aalst: Exactly, Amanda.

Amanda Farmer: And that is it, I think, Reena, for our conversation this week. It's been lovely chatting with you.

Reena Van Aalst: You too, Amanda. See you next time!

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