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YSP Podcast Transcript: Episode 195. Mouldy clothes | CMS changes | approval for solar panels

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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 excellent. First week of the new year for us. Happy new year.

Reena Van Aalst: Happy new year to you too, Amanda.

Amanda Farmer: 2020. I think it's going to be a big one.

Reena Van Aalst: I think so too.

Amanda Farmer: Looking forward to it, and looking forward to jumping into our wins and challenges. We have a few that we've carried over from 2019 I think. Kick us off with your challenge, Reena.

Reena Van Aalst: Recently, we had a case that was submitted by a lot owner against the owners corporation for failing to repair and maintain common property matters. So this has been going on prior to our carriage of the scheme. And what had happened was, there was water penetration and dampness in the apartment which was being rented out. And when you look at all the correspondence, which we still haven't received all the books and records, unfortunately, we've got a few files and we've been told they've closed the building down so we can't get them. That's another issue on the side. And when you look at what was provided and from the strata committee, they weren't even aware that the owner was having all these problems until someone had put a note in to the secretary's letterbox saying, "I've been trying to deal with this now and nothing has been resolved". So the strata managing agent had not told the strata committee that there had been this problem.

And I think there was a few emails trying to send out someone but nothing much was really done. So by the time the strata committee did find out about it, just before the AGM at that time, they had been provided with the letter of demand from that owner to compensate them for lost rent. And the interesting other item that was sought in the application was; the tenant claimed that her clothes had been damaged by the mould, and there were some photos. And I mean, she had some nice clothes, but she's actually claiming $5,000 for the damaged clothes. So the owners corporation had already briefed the lawyer just before we took over. We then put the insurer on notice of a potential claim. And then this is Ronnie, who I've mentioned in a previous episode 179, where the broker wasn't aware of which policy the claim should be made under.

So we've sought advice from the lawyer because we're not sure whether or not the owners corporation is liable to pay for the tenant's clothing, which in a sense, a sum of $5,000 has been reported to be the loss. There's no evidence in terms of receipts. I think most people, of course I know, wouldn't keep receipts of all their shopping, although I do.

Amanda Farmer: Of course you do.

Reena Van Aalst: But then again, I want to know what year I bought it. So there you go. And so that lot owner also, Amanda, hasn't shown that they've actually paid that amount of money. So we can't see that there's any loss to the owner for reimbursing the tenant that $5,000. So, we've asked the lawyer whether we should be reimbursing the tenant's clothing, and they said, "Oh yes, you should make some contribution towards that cost."

Reena Van Aalst: And the strata committee is saying, "But why? We don't understand. If they haven't paid that ... First of all, there's no evidence that the lot owner has reimbursed the tenant anything. And if we pay for clothing, then aren't we sort of admitting that we agree with the fact that, even though there is a claim for clothing, because if you give them $1,000 or $2,000 then what's stopping them from saying, 'Well hang on, no, it's actually $5,000 or ...'" Yes. That's the challenge that I'm facing, and I probably just need some of your advice as to how best to manage this particular problem that we have with the tenant clothing.

Amanda Farmer: Yes. Well, I can give you my thoughts and some informal guidance. Certainly not advice on this podcast.

Reena Van Aalst: I should ask, can I have your informal guidance Amanda?

Amanda Farmer: Yes, you may have my informal guidance. What we're talking about here is section 106 of our Strata Schemes Management Act in New South Wales, which sets out the duty of an owners corporation to repair and maintain the common property. And since this section came in, owners have had the right to also recover from the owners corporation any reasonably foreseeable loss that they have suffered as owners, as a result of the owners corporation failing to repair and maintain the common property. So if we assume for now, Reena, that in your example this water damage is indeed a result of a failure to repair and maintain. For example, maybe it's an old roof membrane that has been leaking, probably should have been replaced some years ago.

It hasn't happened. So this triggers the right of the owner to seek their loss from the owners corporation. But the loss must be reasonably foreseeable, and it must also be a result of the owners corporation's failure to repair and maintain the common property. So there's 2 things there. I'm not sure that a $5,000 bill to replace clothes damaged, apparently by mould, from a tenant is reasonably foreseeable loss. I'm not sure how the clothes got mouldy, where they were located, is the wardrobe actually above the site of the leak? Is it in any way connected to the water penetration? Even if they are mouldy clothes, how reasonable is this claim, and is it a result of the owners corporation's leaky roof? So those are the kinds of things that the tribunal would be looking closely at, if it was considering this claim, and indeed, the owner would need to prove the loss.

So they would need to say, "Well, here's the evidence of the tenant claiming the amount from me. Here's me paying the tenant the amount", but that's not necessarily going to be enough for them to get a full reimbursement, if you like. The tribunal has to look at those questions of whether the loss was reasonably foreseeable and whether it is indeed connected to the contravention of section 106 on the part of the owners corporation. I can hear where perhaps the lawyers that are advising you are coming from when they say, "Oh, well look, just make a contribution". That's a commercial approach to avoid litigation. If we're talking about the sum of $5,000, then you're certainly going to be spending more than that defending a claim with legal representation in the tribunal for that kind of amount.

So there probably is a commercial resolution there. But in terms of making sure you limit your exposure to any further liability, you can definitely do that, make that compromise, make that settlement on the basis that you make no admissions. And you are making the payment without prejudice to your position in respect of that issue, and the lawyers will be able to help you do that and make sure you do it in writing and make it very clear that, "This is a settlement. We don't necessarily admit that we owe this money or that we have the liability that you alleged, but we're making this payment on the basis that everybody walks away from this claim and we're done and dusted".

Reena Van Aalst: But in the first instance, Amanda, shouldn't the lot owner who's making the claim establish that they have actually reimbursed the tenant that amount so that that is part of the claim that they're making? Because just to allege that the tenant is seeking $5,000, I mean, how do we know that any claim has been made? There's no receipts, there's just some photographs of mouldy clothes. I am aware that the owners corporation has been doing various things to try and mitigate this particular problem, which has been historically happening, I think, because of the location of this apartment, which I think below ground. It was a warehouse that's had a refurb, so there's some pipes that were causing ... little things have been done along the way, and that report had been obtained and things are being done. But I think the question that the strata committee is facing, and in a sense has sought my guidance is really, the question of this $5,000.

Reena Van Aalst: Not the fact that perhaps it could be rent and other costs that the owners corporation is prepared to pay the affected lot owner, but it's more about this $5,000 claim for clothing, which the owner themselves has not yet shown evidence that they've paid.

Amanda Farmer: Have they shown evidence that the tenant has claimed it from them?

Reena Van Aalst: I think they've just sent photographs and a letter, but nothing ... I think she might've put that in writing to him that she wants $5,000, but we haven't seen any responses that he's made or any payments that he's made, and now the tenant's gone. So he's trying to claim that because of the fact that this had happened. Although I think some of the members who live onsite had said, "Well, she was planning to leave anyway at the end of her lease". But one of those things where you really can't prove either way what the intention was.

Amanda Farmer: Yes. Well that's interesting that the tenant has gone because section 106, sub-section 5 is very clear that it's the loss suffered by the owner. It's not the loss suffered by anybody else. So the owners corporation's only obligation is to deal with the owner's claim. So I would be a little bit concerned if the tenant has gone and you have no line of communication with that person, that the owner is now claiming this amount. It may be different if, for example, you were sitting around a table with both the owner and the tenant, and the tenant is there saying, "Well, I've shelled out $5,000. The owner owes it to me, but you owners corporation owe it to the owner. So let's just shortcut this and pay it to me". Everybody signs a document that says that's been done and the owner has no further claim against you and the tenant has no further claim against the owner. Practically, those kinds of things do happen, but where the tenant is not involved in the communication, I would be concerned to see clear evidence of the owner's loss.

Reena Van Aalst: Yes, definitely. Thank you Amanda for your informal guidance.

Amanda Farmer: That is my informal guidance, I will send you the bill. No problem, it is all interesting to me. Hopefully to some other people who are listening. Okay. I am going to talk about community management statements in the category of my challenge this week. CMSes, as we like to call them, and what we need to do when it comes to amendments of the community management statement. Those managing community schemes, living in community schemes, will be well familiar with this. When you have a by-law within the CMS that is added, repealed, changed, we look to Section 14 in the Community Land Management Act, which tells us that an amendment of the CMS has no effect until it is registered. And in New South Wales, that is registered with land registry services. And I'm raising this as a challenge this week because section 14 also says that an amendment cannot be accepted for registration later than 2 months after the passing of the resolution that makes the amendment.

Now, that is very different to our strata schemes, which now have 6 months to register by-law changes with land registry services. 2 months is a far shorter period in practice when you're having to get a number of documents together, produce an original certificate of title, get strata managers or committee members to sign documents and get things lodged. And I did have a scheme approach me the other week with an expired resolution, if you like, and there were quite a few amendments they had made at their general meeting to their community management statement. And by the time they got to me, they were out of time, I had to sadly inform them, and they had to convene another general meeting to pass those amendments again.

Reena Van Aalst: And did they pass, Amanda?

Amanda Farmer: They did pass again. Yes. It was all relatively straightforward, which was good. But at the time I'm recording this, we are now on the clock again and trying to make sure those amendments get registered in time. And I'm seeing how this time limit was missed last time by ... Look, I'm not sure if it was the committee that didn't understand the time limit or the managing agent, but you think you've got a lot of time, but once you get those documents together and send them off and then they sit on somebody's desk for a couple of weeks and then you think about Christmas and things like that, the time moves quickly. So anybody who's not aware that amendments to community management statements must be registered within 2 months of the resolution that passes the amendment, this is your reminder.

Reena Van Aalst: That's a very good reminder Amanda, because I do recall when I was working in my previous company that this actually did happen, where the CMS change was overlooked. And, unfortunately, when the resolution was put forward again, it just barely got passed because there was problems with it in the first instance where it was passed. And I think the responsibility, I believe, probably should lie with the strata managing agent because I don't think the committee members would be aware of what the statutory timeframes are. So I think as an agent, it is up to us to give guidance.

And even if it's for a particular owner because sometimes when we are passing by-laws or CMS changes, Amanda. It could be relating just to a particular lot, but I still believe that it's up to the managing agent to let that lot owner know that, despite them having to pay for it, they still have to also be wary of the timeframe that's applying to their registration of either the by-law or a CMS by-law change.

Amanda Farmer: Yes, and it is unhelpful that we have two different timeframes for strata schemes and community schemes. Prior to our 2015 act, under our 1996 act for strata schemes, the period was 2 years to register a by-law. Do you remember that, Reena?

Reena Van Aalst: Yes, I do remember that. That was fantastic.

Amanda Farmer: So when our 6 months came in, we all were a little bit panicked and had to brush up on our internal operating procedures and make sure that everything could move quickly. For community schemes, that's obviously even quicker.

But indeed, if they are looking at amending the community legislation, then I certainly would be suggesting that this 2 month time period be extended out to at least 6 months to match our strata scheme period.

Reena Van Aalst: Yes, I totally agree with that.

Amanda Farmer: All right. It's only the first week of the year Reena, but I'm sure you have a win for us already.

Reena Van Aalst: Yes. Well, this is one that's carried over from last year, Amanda, but one of our strata schemes that we've spoken previously about where they had some balconies that were illegally installed by owners many, many years ago. There's no development applications, there's no consents from council, and the owners corporation is now looking at basically replacing windows and balconies and installing new balconies. And we are also aware that some of the illegally installed balconies actually don't comply with the height restrictions now, that would be in effect if we were to rebuild new balconies.

Reena Van Aalst: And the question has come up, Amanda, in which we've sought advice from you, is that; how does the owners corporation, through its strata committee, ask those owners now, who have bought apartments with balconies. Because some apartments have balconies on one side and some don't. And you can see that some balconies, some of them are a bit different because obviously, different people have installed them over the years. So people have bought in ... Obviously a balcony does add value to a lot, and how do we now come and say to them, "Well now, we want you to pull that balcony down"? So we sought your advice on that and you've told us that there's a case that states that the maintenance of common property includes the removal of any illegal works. And so, Amanda, perhaps I can pass on to you to give more clarity in relation to that advice.

Amanda Farmer: Yes, sure. And I am not going to correct you in this case because it has indeed been legal advice that I've been able to give to the building that you're managing, Reena.

And it's an interesting question. What I do just want to clarify for our listeners when we're talking about these illegally installed balconies, because we are both familiar with the building and our listeners are not. What we're talking about here is a part of the common property that was jutting out, if you like, from the facade. And owners had installed balustrades to enclose that part of the common property so they could use that area as their own personal balcony. So some had done that, some hadn't. And of course as you said, Reena, that's a great benefit to those who've done it. But, unfortunately, it was not approved work and the balustrades are not compliant with the relevant building codes.

Amanda Farmer: But this owners corporation quite cleverly, I think, is appreciating that they can improve the value of everybody's investment by properly installing balconies and also doing some work to change windows to become doors, etcetera. So you had asked me to have a look at this and advise what the owners corporation could or should do about these illegally installed balustrades, if you like, non compliant balustrades. And I have pointed you to the case of Krimbogiannis, if I'm saying that correctly, and Strata Plan 21702. It's a 2014 case. It's a case that was around for many years at the time. Went through the tribunal, went through the lower courts, ended up in the court of appeal. And that's a case that tells us that the owners corporation's duty to repair and maintain includes a duty to remove illegal installations from the common property. And that that removal is part of maintaining the common property, which, I quite like that. It makes sense to me.

If somebody decides that they're going to add to the common property, whether it is a balustrade or it's perhaps an air conditioning unit, or it's a lockbox that they have put near the letterboxes so their short term tenants can get access. The owners corporation should have the right to go and remove that item. And sometimes that can be removed without recourse to the lot owner; you just take it off the letter boxes. Or sometimes you need access to the lot to be able to carry out that removal. So you'd then be seeking permission to access. And if you couldn't access, I would say you'd be applying to the tribunal for an order to access on the basis that you have to, owners corporation, meet your section 106 duty to repair and maintain. So, in a circumstance, where these are illegal installations, then my view has been that the owners corporation can go ahead, remove those balustrades, replace them with the compliant new balustrades and have nice new, safe balconies for everyone.

Reena Van Aalst: Well, thank you Amanda. But what if the costs become excessive because we're going to have to deal with an owner who may not want us to come in and remove that balustrade? Or if the contentor says it's going to cost not a small amount, but perhaps a more significant amount of money than perhaps had been originally quoted to remove that illegally installed balcony? Does the owners corporation, would they be able to then try and recoup that from the lot owner that's installed the balcony, or lives in a illegally installed apartment with that balcony?

Amanda Farmer: Yes, it would be the responsibility of the lot owner who has carried out the illegal installation to meet whatever costs are incurred by the owners corporation in going in and removing that installation. And we find that set out in section 120 of our New South Wales act. That's a section that says the owners corporation can carry out work that an owner or tenant should have carried out and fails to do so, or work that an owner or tenant has been ordered by the tribunal to carry out and fails to do so. The owners corporation can carry it out and recover the cost of the work from that person.

So in a drawn out process or a defended process, if you like, where the owner perhaps doesn't agree that their installation is illegal and that they should remove it, and if they don't remove it, the owners corporation will do so and recover the costs. The owners corporation may have to apply to the tribunal and obtain one of these orders under section 120 requiring the owner to do it. And if that person doesn't do it, the owners corporation can do it and recover the costs.

Reena Van Aalst: I think our scenario is going to be, Amanda, or our challenge, is that a lot of these balconies were installed way before the current owners who have bought them. So they actually weren't the ones that had actually illegally installed them. I know that doesn't make any difference in terms of people doing their due diligence and making sure that whatever apartment they buy, that all the approvals have been met. But I can see a challenge in that where the owners have bought apartments with these balconies that had been installed maybe even 20, 30 years ago.

Amanda Farmer: Mmm. I think the key for that building is going to be to assess exactly what the additional cost is to the owners corporation, of having to remove the illegal installations before the new compliant installation goes in.

If that cost is substantial, then the building may decide that it is worth spending some money to litigate that issue with an owner who doesn't come to the table. If the cost is not substantial and when faced with the comparable cost of legal fees, the owners corporation might decide that they will take a commercial position and wear that.

Reena Van Aalst: Yes. That's good advice, Amanda. Thank you.

Amanda Farmer: Not a problem at all, and I did send you the bill for that one. Onto my win for this week.

I am continuing the theme of community schemes and I want to share with you a story from a community that I worked with very briefly to assist one of the strata schemes within the community association to assist them to have solar panels installed on their roof. And since helping this scheme, I've heard a similar story, and I wouldn't be surprised if some of our listeners are going through this at the moment. With solar and energy saving measures becoming more and more popular, I think we're going to see more buildings confronting these kinds of questions. And this was the question in this particular case.

The strata scheme wanted to put solar panels on their roof. They're part of a community with a number of different strata schemes, quite a dense community. And the community association had said, "You can't do that without getting our approval. And that's because our community management statement says that you cannot install anything on a lot without first getting the approval of the community association". So this strata scheme had assumed that what they were being told by their community association was correct. They had gone to a general meeting of the community, sought the approval, and the approval was not given because a couple of other buildings were concerned that the solar panels would block their view.

Reena Van Aalst: Oh, how large were these panels, Amanda, in terms of height?

Amanda Farmer: Yes. I'm not sure of exactly the height, but I think it was a situation where they had to be propped up on an angle because of the type of roof or the location. So the thought of this other building was that they were actually going to block their view. I'm not sure if that was the case or not, but that was the complaint. And I've since heard similar complaints from other communities. So I don't think it's uncommon. I was called in to have a look at the community management statement at that stage and to advise on whether or not my interpretation was the same as the community schemes. And when I looked at the definition of lot, I realised that everybody had assumed that the definition meant a community development lot on which a strata scheme is located. So they had read the by-law as meaning you can't add anything to a strata scheme building without getting the approval of the community association.

But when I tracked through the definitions, the definition of lot was a strata lot. It was a lot within a strata scheme you can't add anything to. And I am paraphrasing here, it's a bit more detailed than that, but you can't add anything to a strata lot without getting the approval of the community association. So I had said to my client, "You're not adding anything to a strata lot, you're adding something to the building. You're adding something to your own common property", and there was no other part of the community management statement that governed that issue. I do think it was a bit of an oversight on the part of the drafters of the community management statement. They may have intended to regulate the strata schemes in a different way, but that is not what the community management statement said. And the latest update on that situation is that the solar panels are being installed and happy residents.

Reena Van Aalst: Well that's a good outcome, Amanda. I think that you are correct, that that probably was an omission because well the ones that I've seen in the community management statements always refer to a strata scheme as a lot. So they talk about a lot within a strata scheme and a strata scheme as a lot also. You need to obtain consent because obviously that would affect the look of the development, especially in communities where there is a theme that's prevalent in the design. If people start putting things that aren't consistent with that theme, that may affect the values. So it's a good outcome for them, Amanda, having a very clever person that looked at everything like...

Amanda Farmer: Well, I think we spoke about this in our last episode, Reena. It's important not to assume when we're reading legislation, when we're reading by-laws, when we're reading community management statements, important not to assume that we think we know what they mean, that we know what they mean.That this term that we see everywhere is defined the same way in this particular document as it is in other documents. So that is indeed the skill of the lawyer from our experience. That's what we breathe day and night, is reading this kind of stuff, and preferably more day than night. And yes, and also a reminder to be very clear that your documents, that your by-laws actually say the things you want them to say.

Reena Van Aalst: Exactly. Words are important.

Amanda Farmer: Yes, and that's lots of words from us. We're wishing everybody a productive, successful, prosperous 2020.

Reena Van Aalst: Yes. I'm getting my head around trying to say 2020 Amanda, and also writing it when I'm writing my notes and things, trying to get it back into my head.

Amanda Farmer: We'll all get there, we always do. I look forward to catching up with you next time, Reena.

Reena Van Aalst: See you then, Amanda. Bye.

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