

Publication Date: 15 December 2020
YSP Podcast Transcript: Episode 244. No committee office bearers I invalid instructions to agent I reduced building sum insured

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

Reena Van Aalst: Good thanks, Amanda. How are you?

Amanda Farmer: I am good. We are recording this the week before Christmas. So it's the usual end of year craziness. I'm sure it's the same for you.

Reena Van Aalst: Yes, I think people have become really anxious this year, more than ever I think Amanda, because of COVID and I think people's general heightened anxiety levels, perhaps not being able to travel and working long hours from home. I think people are far more demanding than they sometimes would be.

Amanda Farmer: The prospect of spending Christmas with family instead of escaping overseas, perhaps has some people feeling a bit anxious.

Reena Van Aalst: Yes.

Amanda Farmer: Well, let's jump into our strata wins and challenges for this week. Reena, kick us off with your challenge.

Reena Van Aalst: Yes, this is a challenge that's coming up next week, actually, Amanda and I was told to think about it. And so I thought the best place I would raise it and think about it would be with you. So this owners corporation I'm aware that there'll be 6 nominations or 6 thought owners for the strata committee. And I think that all owners will get onto the committee. However, there'll be a strata committee meeting following that to elect Office Bearers. And I've been advised,, Amanda that they will be deadlocked on every single position being the Chairperson, Secretary and Treasurer.

Amanda Farmer: Wow.

Reena Van Aalst: And so they said to me, "Well, what'll happen if we can't elect anybody? Have you had this happen to you before?" And I said, "I think I do recall perhaps one occasion where this did happen," but what I said to the owners were, "We're going to be sitting here all night until someone sort of agrees that one of you will be elected as one of those Office Bearers. It also may be one person that could do more than one position." But unfortunately, I was reassured that that would not be the case, that despite any protestations on my behalf of trying to convince someone to allow one or the other person to become an Office Bearer, it's not going to happen.

Amanda Farmer: And Reena, you are obviously the Strata Managing Agent. There's no concern that you won't be reappointed or your contract is in place for the next-

Reena Van Aalst: I'm not concerned about any of that aspect to be honest. I really-

Amanda Farmer: Okay. Let me tell you the reason why I'm asking that is because you will have, I assume, as normal delegated authority under your agency agreement to exercise the functions of Chairperson, Secretary, Treasurer. Would that be normal?

Reena Van Aalst: That's right. Yes, we have partial delegation. So basically under instructions from the strata committee, we had that authority definitely, Amanda. Yes.

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Amanda Farmer: Okay. Excellent. Now I am just digging into the New South Wales Strata Schemes Management Act here. I'm looking at Section 41, which you'll be familiar with Reena. The members of a strata committee must at the first meeting of the strata committee after they assume office as members appoint a Chairperson, Secretary and Treasurer in accordance with this act. Now, as far as I'm aware from my digging, there is no fallback there if office bearers are not appointed, unlike the actual election of a committee, and I haven't put my finger on the section, but my memory is that there is a fallback if there's no committee, then the owners corporation is managed via the owners corporation, which is a bit weird.

Reena Van Aalst: Correct. That's my recollection also, Amanda. But it also says on the Section 37 that obviously the members of the strata committee must act in the best interest of the owners corporation. And I think, even though I'm not sure if by not electing Office Bearers, if they're really not acting in the best interest of the owners corporation, if that's a statutory requirement to actually elect one of those Office Bearers.

Amanda Farmer: Yes, I like that. The trouble is they're making an attempt and they just can't agree on who should be elected to those positions.

Reena Van Aalst: Correct.

Amanda Farmer: There is a section, Section 48, which permits the Tribunal to order that a general meeting take place in order to elect a strata committee. But I'm looking at that now, and it doesn't extend to orders appointing a Chairperson Secretary or Treasurer. I think the fallback would be simply that you've got a Strata Manager that has delegated authority to exercise these functions and the Strata Manager...

Reena Van Aalst: I would be suggesting, Amanda, that if there's no Secretary as such, that's been appointed, then the majority of the committee would delegate that function to us. So rather than Secretary saying, "Write this letter," it'll have to be in the majority. That's how I see it at the moment.

Amanda Farmer: Because doesn't that usually happen anyway. I mean, when you have a Strata Manager, these are largely symbolic, let's say titles.

Reena Van Aalst: Correct.

Amanda Farmer: They do matter when a committee member, for example, a Secretary wants to do something that perhaps the rest of the committee doesn't support, for example, convene a meeting because the Secretary can by themselves convene that meeting and doesn't have to have the backing of the committee. So it becomes quite a powerful position in that respect. If you have no Secretary, then that won't be available to a particular member of the committee.

Reena Van Aalst: Yes, Amanda. So we do have that delegated authority.

Amanda Farmer: So look, is it a problem if a committee that has, or an owners corporation that has a Strata Manager with delegated powers, doesn't have Office Bearers? I'm not sure that it is. I'm not sure the Tribunal would intervene.

Reena Van Aalst: Yes.

Amanda Farmer: And how could it? Really, it can't nominate office bearers itself. It has no power to say Tom Jones must be the Chairperson. There's not much you can do. And it can't force a committee to have a functioning effective election.

Reena Van Aalst: Yes. Well, I mean, obviously I think that all owners will be elected on the strata committee. I think it's just the Office Bearers.

Amanda Farmer: Yes.

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Reena Van Aalst: But I think Amanda, you have given me some ideas there and I think overall, yes, apart from the fact that the Secretary has the most power and in a sense that power then can't be used, the Treasurer doesn't actually have any functions either. When you look at the act, they don't even have the authority to approve invoices, which I think people think the Treasurer does have that authority. But if you look at the Act, there's nothing there to say that they have that authority anyway. And we've been delegated all the functions of issuing them levies and making them money, which is part of the functions of a Treasurer.

Reena Van Aalst: So I suppose, and in effect, we have chaired meetings before for this strata scheme and in the absence of an elected chair, then we'll continue to do so. So I suppose now you've given me some comfort now and some ideas on how to approach this when I have the meeting, but I'll keep you posted and see what happens because maybe it may not happen at all. Maybe they might come to their senses in the meantime and try and work it out amongst themselves.

Amanda Farmer: Definitely let us know. I do find it curious that Section 41 is mandatory in that the strata committee must elect Office Bearers, but as far as I can see it and maybe I'm missing it, but as far as I read the legislation, there's no fallback if that doesn't happen. There's no consequence if that doesn't happen.

Reena Van Aalst: Or penalty.

Amanda Farmer: Or penalty or ability to go to the Tribunal and complain about that. No specific section giving the Tribunal jurisdiction.

Reena Van Aalst: Yes. And we've taken over buildings, Amanda, from other managing agents where they've never even had a meeting out to the AGM to elect Office Bearers. So when I say, "Here's a Treasurer," there's nothing there. So it's probably more common than not, I think, but I suppose I'm not used to it.

Amanda Farmer: Yes. Yes. And certainly self-managed schemes wouldn't go to that level of compliance if you like, but it is helpful. I do a lot of work with a lot of owners these days. And often when there are factions on the committee or a particular committee member, who's not happy with the way things are running, I do dig in and look at the minutes of meetings and try and work out who holds which office because as we've said, the position of a Secretary is a very powerful one-

Reena Van Aalst: Yes, relatively.

Amanda Farmer: Relative to other positions.

Reena Van Aalst: Yes, exactly.

Amanda Farmer: Yes. Excellent. Well, keep us posted on that one. We'd love to hear how you go.

Reena Van Aalst: Yes.

Amanda Farmer: I'm going to jump into my challenge this week. And I was contacted by a long time listener recently who shared with me a bit of a story from their building. And I have to say, I do get a number of these emails, listeners sharing what's going on and wondering if it may be of interest for the podcast. And definitely, this was one that I wanted to bring to everybody's attention. I had never come across this situation before, but apparently, a committee has passed a resolution that they will not keep certain records. The records that I am talking about are emails that may contain confidential or private information. And they have instructed their Strata Manager that an email marked confidential or private or not for the file should not be held on the owners corporation's records, should not be made available for inspection. And the Strata Manager is complying with that direction. What do you think of that, Reena?

Reena Van Aalst: Very strange, Amanda. I think you and I have had this conversation where owners and strata committee members have asked us to keep emails private. And we've always said to them, "Anything you send to us, once it's receded into

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our system, it's on the record." The owners corporation's records are everything, emails, every form, letters whether they're marked private or not. I think we've had this discussion, Amanda, it's only privileged items that are marked accordingly and advised by Lawyers that should not be available for searches but everything else is available. And I don't understand how a Strata Manager would not know that when that is sort of-

Amanda Farmer: Yes.

Reena Van Aalst: I think the law of agency, I think, is a problem. I think that people don't really understand the law of agency and what that means in practice. So in a sense, you are just an instrument by which you're a conduit between the owners corporation and say third parties. But in a sense, you can't decide what is private or not private based on what you're told. All the records are the owners corporation's records.

Amanda Farmer: Well, to that point, the Strata Manager seems to be saying the committee has resolved that it will keep its records in this particular manner. It will not include emails that are marked private and confidential. And I, as an agent am simply following that instruction. Now, I'm glad that you raised the law of agency because it doesn't quite work that way. If an instruction is illegal or without authority or the instruction will result in an illegality, then the agent should not be following that instruction. And I think quite plainly, a decision of a strata committee to withhold records is contrary to the act and the resolution for that reason is invalid. And the instruction that flows from it is invalid, if not illegal, and the Strata Manager should not be following that instruction.

Reena Van Aalst: Is the Strata Manager aware, Amanda, that the resolution is invalid and has no basis in law?

Amanda Farmer: I doubt anybody's told the strata manager that. This is not a matter that I'm involved in. I've just got the background from a listener. The listener, I believe is a resident in the building. So perhaps now having heard my thoughts may return to the Strata Manager and relay some of that. But this is an experienced strata management company. I was quite surprised to see their name attached to this. And I think Strata Managers can really tie themselves up in some knots here when they acquiesce perhaps or comply with these unusual, strange, illegal instructions from strata committees. I don't know why a Strata Manager would put themselves in that position.

Reena Van Aalst: Well, I think some Strata Managers and strata companies, Amanda, fear perhaps losing the business or the contract, or especially, it appears that there would be some disharmony in this building if there are things that are being marked private and therefore it appears that something is going on and then trying to see to the strata committee. But unfortunately an agent can also be brought into proceedings if they've also acted contrary to the Act. So I'm not sure if it's a matter of trying to please the client or being ignorant of the law or actually a combination of both really, it sounds like to me, Amanda.

Amanda Farmer: It does.

Reena Van Aalst: So keep me posted on that if the listener comes back with any further information once they've heard his podcast.

Amanda Farmer: Yes. And I do want to make sure that those listening who might think this is a good idea to keep records a certain way or resolve not to keep certain records, to be very careful about that and make sure at all times you're complying with the Act. We do have very strict requirements right across the country in our different jurisdictions about what you should be retaining, what you must keep, what you must make available for inspection. And a resolution to do otherwise is not a valid resolution and any instruction that flows from that is not a valid instruction and should not be followed by a Strata Manager.

Reena Van Aalst: Yes. Interesting, Amanda. Keep us posted on that one.

Amanda Farmer: Shall do. Now, let's move on to some happier topics, perhaps. Have you got a win for me this week, Reena?

Reena Van Aalst: Yes. So the win for this week is one of our strata schemes having some funding issues in terms of a major

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project. What's happened is since the last insurance renewal that occurred in November 2019, there was an instruction at the time, or perhaps a very brief note to make sure that the defects of waterproofing were addressed by the next renewal. And so when we took over this building, we asked the strata committee, were they made aware of this instruction or directive from the insurance broker. And they said, "No." They'd only received the initial email at the time and nothing during the year to remind them that this was necessary.

Reena Van Aalst: So when it came time to renew the insurance policy, of course, none of the work had been completed. And the insurer then declined to offer terms at a reasonable premium citing that waterproofing and water penetration issues are a major risk. They would only provide 6 months premium at the annual rates. So we, as the strata committee had to work very quickly with the insurance broker and try and get some funding. So we're looking at about a half million dollars in terms of expenditure. And we also approached the Insurance Broker and asked him if we could actually spread this over 2 insurance periods. And they were agreeable, as long as they could see that we'd started.

Amanda Farmer: Shall do. Now, let's move on to some happier topics, perhaps. Have you got a win for me this week, Reena?

Reena Van Aalst: Yes. So the win for this week is one of our strata schemes having some funding issues in terms of a major project. What's happened is since the last insurance renewal that occurred in November 2019, there was an instruction at the time, or perhaps a very brief note to make sure that the defects of waterproofing were addressed by the next renewal. And so when we took over this building, we asked the strata committee, were they made aware of this instruction or directive from the insurance broker. And they said, "No." They'd only received the initial email at the time and nothing during the year to remind them that this was necessary.

So when it came time to renew the insurance policy, of course, none of the work had been completed. And the insurer then declined to offer terms at a reasonable premium citing that waterproofing and water penetration issues are a major risk. They would only provide 6 months premium at the annual rates. So we, as the strata committee had to work very quickly with the insurance broker and try and get some funding. So we're looking at about a half million dollars in terms of expenditure. And we also approached the Insurance Broker and asked him if we could actually spread this over 2 insurance periods. And they were agreeable, as long as they could see that we'd started.

So thanks to strata loan funding, we were able to obtain a loan for the whole amount of money. And now we're going to be able to have the funds rather than raising special levies on owners that we understand perhaps due to the COVID and the rental market, not being as strong, therefore not putting the pressure on owners financially. So that was quite a good thing, as we've spoken about I think before, Amanda, in terms of having the option of using a strata loan to fund projects, even though the money has to be paid back and the duration of the loan will vary according to what the owners prefer. It's actually a very good tool to allow work to happen, especially when the insurance company is saying they'll let you do this work, "We're not going to insure you," and no one's going to insure you because everyone else declined. The incumbent provided a renewal terms of 6 months at the annual rate.

Reena Van Aalst: So yes, so that was a pretty good win. So hopefully we can start those works in the New Year and be able to get our insurance renewed next year at a more reasonable premium.

Amanda Farmer: Yes, good result there for that building. And always important for us to be aware of and to remember the various options that we have for funding work. And it is good that we have facilities like strata loans. They're quite unique financial products. I have had a couple of past guests on the podcast, both from Lannock Strata Finance, Paul Morton, and also from Macquarie Bank who are both leaders in this space, particularly my Facebook Live chat with Paul about a month ago. We'll put a link to that in the show notes here under this episode because Paul talks quite casually and in quite an accessible way about what strata loans are, why we may need them in particular circumstances. And I think this is a classic example of where a strata loan is really the only option. Urgent work, owners don't have the funds to pay a very large levy right now and having the loan there to be able to comply with their legal obligations is important.

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Reena Van Aalst: Definitely, Amanda.

Amanda Farmer: Excellent. Now I am bringing a case to the table when it comes to my win for this week. I want to make sure that our New South Wales listeners in particular are aware that our Court of Appeal handed down its decision in Vickery and The Owners of Strata Plan Number 80412. This was around mid November 2020. And the reason this decision was so important and so many of us, our Lawyers in particular were waiting most of the year for this decision is because we have now got confirmation from the highest court in New South Wales that the Tribunal here does indeed have the power to award damages in strata disputes.

Amanda Farmer: So when our new legislation started in 2016, we had a new provision in our Act that we didn't have before in the 1996 legislation that confirmed the right of a lot owner to claim damages from an owners corporation should they suffer some form of loss as a result of the owners corporation's failure to repair and maintain the common property. So we saw a few cases run through the Tribunal where lot owners were awarded some large sums because of loss of rent or being out of pocket because of a leaking ceiling, for example. And on appeal, some of those decisions were challenged on the basis that our legislation actually isn't that clear that our Tribunal has that power to award damages.

And if you want some more background on that discussion and those cases, have a look back at episode number 203 with Strata Lawyer, Allison Benson. We recorded that earlier this year, and we were talking about the most recent appeal panel decision on this topic.

So now we have this confirmation that these claims can be heard by our Tribunal. I think that is good. That's why I've listed it here as a win that we have the clarification. However, this was not a unanimous decision. One of the Court of Appeal judges disagreed with the other two, and there has been a call for some clarification to take place when it comes to our legislation in New South Wales, which is very timely because we are about to embark upon a statutory review of our strata legislation. And I hope that this particular issue will be on the table, so we don't see future challenges or future confusion in this area.

Reena Van Aalst: That's wonderful, Amanda. I think there has been a lot of confusion from the various cases that you've discussed on the podcast, as well as in general. And I think that it gives closure in terms of owners and their rights and the jurisdiction upon which they'll be able to recover damages. So I suppose this is more about, I think, Amanda, failure to repair and maintain common property, as opposed to someone just being the subject of an event and then saying, "Well, the owners corporation should have done this and should have done that to prevent something." Is that correct?

Amanda Farmer: Yes. In the particular case that was under consideration, yes. We were talking about Section 106 of our Strata Schemes Management Act, and there's the subsection in there that permits lot owners to claim their loss and damage as a result of a failure. However, more broadly, the case was also looking at Section 232, which is what we Lawyers call the broad order-making power of the tribunal. And that section was given quite a broad interpretation by the majority of the Court of Appeal bench. And I think we are going to see that section relied upon by owners seeking different types of compensation, I'm going to call it, not damages, different types of compensation outside of what is specifically in Section 106.

So definitely have a read of the judgment. I'll put a link to it here in the notes. It's got lots of historical background and some interesting discussion about the evolution of our strata law and does cover those issues, not just of 106 damages, but the broad powers that our Tribunal has to make all kinds of orders, which is encouraging on one view. As I said, it provides that clarity and that room, I suppose, for owners to have their problems solved before our Tribunal. But the legislation is still not as clearly worded as I think it could be or should be. And I've mentioned there that we are having a review of our New South Wales Legislation.

The submission process for that has opened up only this week, actually. So I'll put a link to the website for New South Wales Fair Trading, where you can have a look at the discussion paper. You can make submissions on changes you believe are necessary to our strata legislation. I think that's open until about the 7th of March, 2021.

Reena Van Aalst: Yes, that's correct, Amanda. The REI New South Wales Strata Chapter Committee is already starting to embark

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on that review next week, actually. So we're going to, as a committee, start working on that. So yes.

Amanda Farmer: Yes. Excellent. I'm going to have a closer look at the discussion paper as well, and perhaps bring some of those issues to the podcast and start chatting with you about what your views may be on where we do or do not need change in our legislation.

Reena Van Aalst: Yes. Sounds good, Amanda.

Amanda Farmer: All right. Now, I think that is it for today. Anything else you want to raise before we head off for Christmas break?

Reena Van Aalst: Just looking forward to the end of the year, Amanda, is all I can say.

Amanda Farmer: Yes. It has been an interesting one indeed. Well, have a lovely break, Reena, and we will see you in the New Year.

Reena Van Aalst: Happy Christmas, Amanda. Have a good break.

Amanda Farmer: You too.

Reena Van Aalst: Bye.

Amanda Farmer: Bye.

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