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YSP Podcast Transcript: Episode 246. Tree roots | insurance valuations | fence dispute win

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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. Happy New Year, Reena.

Reena Van Aalst: Happy New Year to you too Amanda. How was your break?

Amanda Farmer: Lovely, very enjoyable, much needed, and I am looking forward to getting into 2021. How about you?

Reena Van Aalst: Yes. The same, Amanda. It was just good to have that nice downtime where the phones aren't ringing and I can catch up on a little bit of work that I wasn't able to do during the year. So it was good.

Amanda Farmer: Nice one. Now I'm not sure if you have had many wins and challenges yet Reena, but we've always got some in our grab bag. Share your challenge for me this week.

Reena Van Aalst: So a few weeks ago, Amanda, I received a call from a tenant one night saying that there was a problem with the toilet and then it wasn't flushing. And they were concerned that there was stuff coming out of it when that happened. So I said to them, "Okay." I emailed the plumber straight away that night and said, "Just to let you know, tomorrow morning can you please go out to his apartment?" Anyway, the plumber hadn't seen the email. And then at about 9 o'clock in the morning, I received a phone call saying that probably half of the apartment had been flooded, that the sewage had come through the toilet and basically affected the hallways, the lino in the kitchen, one of the bedrooms.

And so I rang the plumber and said, "Have you seen your email?" He said, "No." I said, "You better get out there very quickly." So anyway, he went out there and basically it was a tree roots issue, which apparently had happened in some years going in another apartment on the ground floor, in this building. Anyway, so then I proceeded to contact the company that insurance brokers use, where they come out and they do the cleaning and they get blowers and they do an initial report in terms of the damage. And therefore, as a result, the apartment was uninhabitable because of the fact that there was all this discharge and sewage all over the place. And apart from the fact that it's unhygienic as well. So the tenants asked me, "Can we relocate?" And I said, "Well, yes, you have to relocate, it's uninhabitable, but in terms of who's paying."

So that's an issue between the landlord, who has an agent, and myself. We will work all that out. Anyway, because obviously, they were quite hysterical. And I suppose some people react a bit more emotional than others, but be that as it may, I said, "Please find somewhere else. Anyway, so then I get this back and forth manner, and I advise them, "No, you have to stay out a bit longer." And I think it was about a bit over a week extra that they were relocated. I'm going to send me their invoice for payment and say, "Can you please pay our rental costs because we can't claim on our personal insurance because of the fact that it was caused due to tree roots and therefore their policy doesn't cover that?" And then they gave me the... They had to park their car at the place they were staying-

Amanda Farmer: So sorry, this is the tenant.

Reena Van Aalst: Tenant. Yes. And then also then they even gave me a bill for their first night of dinner. It was very strange, but anyway, and then they've been emailing the agent and myself in relation to their clothes and replacing the bed. And I said, "Hang on." So anyway, I'll go. We got onto the insurer. We have a \$10,000 excess for this particular scheme for any water damage, which this is part of that. So they insurer has correctly said that there're no rights to tenants in terms of loss of rent. And that therefore this is the responsibility of the lot owner to deal with their tenant. They can obviously put a loss of rent claiming based on the rent that the landlord has lost from the time that they had to leave the apartment from the time they were able to return.

Reena Van Aalst: But my question in manner is in terms of the recent case we discussed before Christmas in relation to damages

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and things like that for failure to repair and maintain common property under Section 106. In this instance where it's just tree roots and then there's no one... I mean, even though it may have happened in the past, it's not something that you can actually plan for or maintain as such. I assume, in this case that the owners corporation really has no obligation to pay that rent, but just to reimburse the loss of rent to the landlord through the policy. And it's obviously even if the \$10,000 excess will have to pay that and then any differences is followed by the insurance company. So I just want to obtain your thoughts on this issue.

Amanda Farmer: Yes. Good question. First of all, your right that the tenant has no claim against the owners corporation when it comes to any kind of loss and damage. It is only an owner under Section 106, Subsection 5, it is in our Strata Schemes Management Act, "That may recover from the owners corporation any reasonably foreseeable loss suffered by the owner as a result of the owners corporation's failure to repair and maintain the common property." So you're quite right to question, "Is this a loss arising from a failure to repair and maintain the common property?" Because we've been doing everything that we should have been doing, I assume, to meet our Section 106 duty? We had no idea that there was an issue with tree roots. This is something that arises from the tree roots, not from a failure to repair and maintain the common property. And I suspect there's nothing that could have been done to prevent this.

This is a true unexpected insurable and insured. And the insurer is covering what they need to cover under their policy. It will be for the owner to make out that there has been a failure to repair and maintain the common property and that their loss is a result. We can use exactly that word in the legislation, a result of the owners corporations failure to repair and maintain. Certainly we have a case law in New South Wales that says, "The duty to repair and maintain is strict, it is absolute. It arises immediately that an item of the common property stops working or is in need of repair, you don't have any grace period." You can't say, "Well, we're doing that in a month or a year or 2 weeks."

Your duty arises and must be met immediately. This situation, as I hear it, doesn't have that connection to the failure in the Common Property Act. I can't, and the owner would have to point to where the failure to repair and maintain arises and that's not to say that he doesn't. In some circumstances where there's plumbing issues, now there may be something wrong with the pipes, maybe there was a recommendation some years previously to replace pipes because this kind of event may happen. There could be all sorts of unique circumstances in a particular situation, but that is my broad view of this one on its face.

Reena Van Aalst: Yes. So the plumber has actually advised that he will install a run off, that if that ever happens again it runs off out into the garden and not into the apartment. So that was done straight away Amanda, once the quote was provided, we did the work and it was done within 3 or 4 days. That was done so that if it never happens again, rather than that discharge happening within an apartment and just goes out into the garden areas or wherever it was appropriate. So in a sense, even that might've happened in the building previously, I mean, I'm never, since we started managing it in September 19, we've never had any other event occur. So as long as if like every 3 months I'm hearing about this. Yes. I mean, it has happened historically and it's happened in many buildings, including my own. It's hard to know when the tree roots are coming through and what to do about it.

Amanda Farmer: Yes. It's almost like saying there was a once in 100 year rain event, and we had one of those in Sydney a couple of years ago, and because of that my apartment was flooded and the owners corporation failed to repair maintain common problem and that's why I suffered my loss. It's a bit of a stretch when we're dealing with these intervening forces.

Reena Van Aalst: Yes. Thank you, Amanda. Thank you. It's been a comfort.

Amanda Farmer: No problem. Happy to provide that comfort for you, Reena Van Aalst. My challenge this week also arises from insurance. This was a question posted in our member forum recently, and it relates to insurance valuations. And I mentioned to this member that I would raise this with you. And I'd love to hear the views of other strata managers too, because I think this is a unique issue arising from the management of our buildings, less so a legal issue. But this particular member owns in a 3-storey apartment block. They've had a recent insurance valuation done, which recommends a building sum insured that is significantly lower than the valuation done 3 years ago. And when the owner's having a look at this report, they can see that there are a number of things that were included in the first valuation that are not included in this more recent one. And the owner is not quite sure why there is such a difference between these two valuations. Have you come across this before Reena, when comparing valuation's? It's quite surprising that it would come in lower after 3 years.

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Reena Van Aalst: Yes. I haven't ever had it come in lower. And what we always try and do with valuations is always use the same valuer. It's more practical. I think they've got the measurements and the records. And so we tend to try and use the same valuer and normally it's more economical as well then having a new company coming out. So this is the first time that I have come across a situation where the new valuation is less than the old one for no apparent reason. I mean, sometimes building costs do go down when there's downturn in the economy because the valuation is determined by the building costs or the replacement cost and not market value. So if there's less demand on building costs and valuations may go down, but I can't see at this point, even with COVID that that really has had much of an impact in terms of building costs but I'm not a valuer, but it does seem highly unlikely.

Amanda Farmer: Now we do have some legislative requirements in New South Wales when it comes to calculating insurance coverage under our damage policies. And that is set out in the Strata Schemes Management Regulation, 2016 in New South Wales. So you can have a look at Regulation 39, which cross refers back to Section 161 of our Strata Schemes Management Act. And there are a number of items there that must be considered, addressed when calculating the building sum insured. So what I would be saying to owners who are concerned about valuations not being accurate is to refer to those sections, ask the valuer to confirm that they have addressed the requirements of each of those sections. The other interesting thing Reena about this particular valuation was that apparently it was accompanied by an offer that if the building agreed to reduce their building sum insured in accordance with the valuation that had been done, they would get a \$2,000 rebate on their insurance premium. And there was a time limit on that. They had to take it up within 14 days.

Reena Van Aalst: Well, that is highly unusual in terms of the taking up within 14 days, Amanda, I mean, it is normal that when the building sum insured goes down, the premium will go down and when the building sum goes up, the premium goes up. That is how the premiums are calculated based on the replacement costs and other risks as well. But that's one of the major factors and it's usually like a multiple, I think, after a certain threshold. But to have a time limit to accept this is really unusual. I don't know. Is it because of the renewal period? I mean, normally I think the insurer gives 14 days grace to accept.

Amanda Farmer: A quote.

Reena Van Aalst: Yes. So I'm not sure if it relates just to that aspect of the... Without having all the details, it's really hard to make a comment without knowing if it relates to the date of expiry of the policy, and then there's a 14 day period to accept it because really after that then the building could be uninsured. Because even when you don't pay by the due date, I think the insurer gives you a holding over period. I thought it was only 7 days, but it may vary.

Amanda Farmer: The interesting thing about this particular aspect of the question. I think Reena was that apparently it was the valuer, the person who had done the valuation and quoted the lower building sum insured who was recommending the taking up of this particular policy. That's my understanding of the situation because the member has commented to me that this valuer, it was apparently independent of the insurers, but was somehow making an offer that expired within 14 days.

Reena Van Aalst: Yes. It sounds very unusual that that valuer would be getting involved in anything to do with the renewal process apart from providing evaluation. Perhaps if questioned, providing an answer to the insurance company or the broker.

Amanda Farmer: Yes. I've assumed it was the valuer. I could be reading that incorrectly and maybe it was the strata manager, but it certainly wasn't the insurer directly making this recommendation and offering the premium rebate. There's another party involved there. So if any of this is ringing bells for others out there who may have experienced similar offers or interactions with valuers, insurers, brokers, we would be happy to hear from you.

Reena Van Aalst: Yes. Definitely, Amanda. I would like to hear more about that because I'm not sure how common this is and sometimes you don't hear about things and then once someone raises it, then there's a whole tsunami of others that have had the same experience.

Amanda Farmer: Hey, the story of my life hosting this podcast. I can tell you that's exactly what happens. And of course, if you're not happy with the valuation or there's just something about the whole scenario that's making you uncomfortable, then obtaining another valuation from a professional, qualified, experienced valuer is always a good idea. You said there earlier Reena that you like to use the same valuer of the same building, they're familiar with the building. That sounds like a good idea to me. Any other

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recommendations for selecting a good valuer at to make sure we're getting the right sum insured?

Reena Van Aalst: There's one that has done a lot of strata work before because normally people that have done strata work are familiar with the requirements and the legislation, as you said Amanda, in one Section 161. So maybe this valuer perhaps may not be aware and also in other registered valuer, I don't know, like in terms of the qualifications that's required because I think sometimes we find in strata that many companies try and offer you a capital fund forecasts and valuations and this and that. So maybe using someone that perhaps speaking to other lot owners who in other buildings, or if you're a manager, perhaps looking at speaking with the other colleagues in your office to see what other valuers they've used.

Amanda Farmer: Yes. Good advice. Reena, your win for this week?

Reena Van Aalst: Yes. So one of my strata schemes recently... Well, I wouldn't say recently, it was like in 6 months because these things, as you know through the Tribunal Amanda, do take some time. So two lot owners applied for compulsory appointment because they felt that the scheme was dysfunctional and I didn't agree with that proposal. And then they'd spoken to me about it because having disagreements is not necessarily an indication of dysfunction. And in this particular case, the owners corporation by majority was able to have the repairs and maintenance completed, they raised special levies to achieve that outcome. This is for a small scheme, a lot of money in the bank. So in terms of being able to do the work, the funding was there. They were getting quotes from various companies to do painting and sewage and other works. However, there was always arguments about the accuracy of minutes. So sometimes just the first motion would take a bit of time when proposals were put forward and not agreed to, or in some rare cases they were agreed to.

The other issue that was occurring was that special resolutions weren't being passed because the fact that by the number of lot owners and those that were in disagreement with each other, special resolutions weren't able to be passed. Just related to one of the lot owners, being able to do some work in their apartment and that lot owner took that to the Tribunal and that's a separate proceeding of that particular problem. Others include replacing one type of fence with another type of fence and there's obviously the disagreement about that. So the hearing occurred before Christmas and just now after Christmas we've received the judgment to say that appointing a managing agent under Section 237 is quite draconian. It should only be used in extreme cases where there is dysfunction. And in fact that there's disagreement about how something should be done, is not a sign of dysfunction.

Also if repairs and maintenance aren't being done in a timely manner or as per the active manner, that those lot owners can go to the Tribunal and make applications for that to occur, just separate to having a managing agent being appointed compulsory. So all in all, I think that's actually quite a good outcome. I actually was sceptical of the application in the first place. And I told the owners who put it. I said, *"These things they're hard to get and you really got to show that things aren't working."* And the fact that you might disagree on how things should be done, it doesn't mean that it's not functioning correctly. And I think for people that live in strata when you are living communally and decision-making is based on a fixed number of people who really are volunteers and may or may not have any knowledge in terms of the Act which is why you have a strata managing agent to assist you in that regard that having someone take over all those functions is really a big ask.

And one of the things that I was a bit concerned about was the fact that the owners thought that the managing agent if they were compulsorily appointed, would then make sure that the offensive one type would not affect the other type, and I said, *"But I'm not sure any agent worth their salt will not do that,"* because we are a custodian of the building for a fixed period. In most cases, it's only a year that you get these orders for. So I don't know why any agent would then decide that they think that you should replace this fence with that type of fence being a different material. So I'm not sure if they actually were aware of the agent's ability and appetite for doing such work and also special by-laws.

I mean, as an agent, again, I think you and I have had this conversation before where I was a compulsory manager for a building, Amanda and we sought your advice in terms of an owner wanted to do a bathroom renovation. And they had already submitted their motion. And the general meeting was being held the day after we were the actual compulsory manager. And I sought your advice as to how to proceed with this because, in a sense, I don't want to be making by-laws that in my period as an agent, when really, if everyone's really against us doing the renovation. So luckily you gave me the advice, it was a bathroom renovation. We invited all the owners to come, we listened to any concerns. And of course, in that case, there weren't any and that proceeded to be passed, but overall, I can't see how a compulsory manager should be making decisions of that type, which are really more

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about, not about doing the work, but how the work should be done. What are your thoughts on that, Amanda?

Amanda Farmer: Oh, yes. I see it time and again, with owners who think that this is a cure all for the problems of not just the building, but for their own problems. And they do forget that as well as the owners corporation, losing its powers or the strata committee losing its powers, they too, as owners are going to lose the power to vote. They have no rights, capacity, authority to instruct the compulsorily appointed strata manager. And in effect, everything is handed over to that strata manager to make whatever they think is the best decision. And they may not think that your renovation is the right decision for the owners as a whole. As you say, Reena, eventually this building is handed back to the owners and you need to make sure that you've done everything in everybody's best interest so far as you could in that circumstance.

So, yes, it's something that I remind my clients and I deal with many clients who want to bring these kinds of applications that, that is the result. If they are successful, they may feel it's a bit of a Pyrrhic victory, if you like. They get the order that they sought it, but have lost their power along with others in the building, losing their powers as well. Something definitely to be mindful of.

Reena Van Aalst: I think also as the managing agent said, "*Do participate in compulsory managing a building.*" I mean, one particular fence is a very small cost. The one that the owner actually wants is quite expensive. And so I'm not sure... And cynically, it may look nicer, but I mean, as an agent, who's in the compulsory position, how do you make a decision on which fence to replace it with, I mean, should you be replacing it like for like because that I would believe you shouldn't do in that position. But I think they were thinking that they would do what they wanted them to do. I don't understand.

Amanda Farmer: Oh, it's very common. Very common that the owner who's proposing a particular manager is proposing that manager, thinking that that's going to be their person on the inside for the next year or however long the appointment is.

Reena Van Aalst: Yes. Yes. That's probably what it is.

Amanda Farmer: Well, thank you for sharing that. I do agree that it is not a path that buildings, owners should want to go down, except in the most severe of circumstances where other attempts to resolve the dispute or particular disputes have failed. I'm going to move into my win for this week. And this also arises from last year, the end of 2020, I was working with an owner involved in NCAT proceedings with their building. I didn't appear in those proceedings. There were no legal representatives permitted, but I was chatting to her. We had a couple of meetings, assisting her, put her submissions together and her legal argument. And the dispute related to the construction of a fence between 2 lots that had a backyard courtyard and there was a common property fence in place.

It was damaged, in need of replacement. And the owners corporation had resolved to replace the fence with one that was to be twice as high. So where we had a 1.8 metre a fence, the owners corporation had resolved at a general meeting, an ordinary resolution to install a 3-metre fence. That was the preference of the owner who wanted this high fence in place. They preferred the high fence for privacy reasons. When my client came to me, I explained that in my view, this was not a repair or replacement. This was in fact, an upgrade, an addition, a change, an alteration to the common property, and it could not be done on an ordinary resolution. A special resolution was needed under Section 108 of our New South Wales legislation. So this owner took that particular argument to the Tribunal. The other backup, if you like, argument that she took to the Tribunal was that if the fence was to be replaced with a 3-metre fence, if they ultimately did get the special resolution, or they felt that they already had almost unanimous support, so they'd get it anyway, they needed a planning consent.

They needed to approach the local council for this kind of an installation because it was so significant. And I encouraged my client and she did obtain a report from an expert that set out the relevant planning controls and why this kind of development was not exempt and why a development application and consent was needed, which in turn would give the neighbours the opportunity to object and explain why they didn't want this 3-metre high fence. It would block their own light and stop them enjoying their outdoor area. So with those arguments, I'm told my client went off to the Tribunal and a short time after the hearing was opened, the owners corporation essentially capitulated and accepted my client's position, that it indeed did have these difficulties without a special resolution and without a planning consent. So good result there for an owner before NCAT.

Reena Van Aalst: That's great news, Amanda. And I think that's really important for people to know that if you do get the right

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advice, which obviously occurred in your case, that even if you don't have a lawyer present that if you're able to articulate your argument legally and succinctly, and this is key to the fact that hopefully common sense will prevail and the findings will be favourable. Yes. I think people don't understand that changing something, you don't actually own that fence. And therefore the owners corporation does decide to make a change and it must comply with the Act in terms of what type of resolution is required.

Amanda Farmer: I know from my own experience, Amanda, that sometimes when my committee's asked me, I'll say, "You can't do that." So again, sometimes it does come down to perhaps getting some advice beforehand. So that at least if you know something is controversial, you've done it correctly in the first instance. And therefore that aspect of the application couldn't be challenged by a lot owner. The other part could have been, but you need to make sure that you have all your ducks in a row and make sure that you give the advice. But again, sometimes it's hard to know whether advice is given or advice is ignored.

That is true. That is a very good point. And the interesting aspect of this case I found was the planning controls. And it's something that perhaps strata managers are not thinking of when we're talking about backyard fences or fences separating courtyards in a strata scheme. Why would the local council need to be involved in that? But when you've got an owner on the other side, who's not happy about this fence. They're going to chase every rabbit down every hole, especially if they've got a lawyer there recommending that they do and are going to find ways to make it difficult for the owners corporation, or perhaps the owner who wants to do this work to have that kind of development without the necessary consent. So something to always bear in mind. What consent do we need under the strata legislation and is this the kind of work that perhaps we need to dig a little deeper and find out if there's any local council involvement needed as well?

Reena Van Aalst: Sometimes you'd be surprised Amanda, depending on the council. You may need a CDC for removing internal walls. And that's something that people don't even think about. And we don't even really push that, but we just say, you need to get all the necessary authority approval, but we don't know what they are. So, yes. Very interesting thing to think about that. There could be council involvement even within your own internal renovation. So, yes.

Amanda Farmer: And with that, I think we will send everybody off into a new year. That is plenty to keep us occupied for now.

Reena Van Aalst: Yes. Definitely Amanda. Strata is always full of new things.

Amanda Farmer: That's right. And we'll be back in a couple of weeks time, at least together sharing our wins and challenges as we like to do every 2 weeks or so. I look forward to seeing you again soon, Reena.

Reena Van Aalst: Me too, Amanda. Enjoy.

Amanda Farmer: Bye.

Reena Van Aalst: Bye.

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