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YSP Podcast Transcript: Episode 248. A warning to "autocratic" secretaries

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Amanda Farmer: Hello and welcome. I'm Amanda Farmer, your podcast host and it's fabulous to be here with you again this week. Today, I am diving into a topic that has been of great interest to me over the past year or so. And, I know it has been to you too, as so many of you keep asking me about this particular aspect of our strata legislation, the compulsory appointment of a strata manager sometimes referred to as an administrator. This is a strata manager put in place by order of the Tribunal who can, depending on the terms of the order, take over all the powers of a troubled owners corporation, including the powers of the strata committee, the committee members, and make all decisions for the community without the need to hold meetings, put anything to a vote or to confer at all with the owners. Now I'm regularly asked by listeners how this process works. I'm approached by would-be clients who tell me that their community is dysfunctional and they want to make one of these applications to restore some sense of order and legal compliance.

I have spoken about compulsory appointments on the podcast previously. A good starting point, if you haven't heard about this before is Episode number 222, Your Guide to Compulsory Appointments. In that episode, I explained how you get such an appointment, I question whether you really need one and discuss what it is that gives these appointments the reputation of being Draconian. It was also a topic covered at the Shared Space Summit last year, my live session broadcast to the summit, are we dysfunctional? How to fix a broken community? That recording is available to our members inside our members' video library. I know I received lots of feedback after that session from people who told me they hadn't previously understood precisely the elements to be taken into account by a Tribunal member who is considering one of these applications and how having that knowledge and that understanding has helped them make a better decision about whether or not to bring an application for a compulsory appointment.

Now, as you'll hear me say in those sessions, including podcast Episode 222, compulsory appointments are not easy appointments to get. Most of them do fail. And, most owners approaching me in my capacity as a lawyer wanting me to represent them in seeking these orders they're told by me that they shouldn't pursue the application either not yet, they're not ready or not at all. However, there are a few rare cases where these serious orders are rightly made and are necessary. And, I want to share with you today, my very recent experience running precisely one of these rare cases for a client's before the New South Wales Civil and Administrative Tribunal, which you'll hear me refer to as NCAT. Just last week, Senior Member Ellis of the Tribunal handed down his decision in the case of Robert Nigel Dixon Pty Ltd, and the owners of Strata Plan Number 69703.

He made orders under Section 237 of our Strata Schemes Management Act here in New South Wales for the appointment of a strata manager, with all powers of the owners corporation and the strata committee, an 18-month appointment. The decision hasn't yet been published on the formal channels, but I am going to give you a link to access my own copy of the decision. I think it is so important that decisions of this type are accessible to and understood by everyone, owners and lawyers alike so that we are aware of the kind of dire circumstances that will ground a successful application for compulsory appointment. Certainly everything that I am going to discuss in this episode is a matter of public record. It's important that I make that clear. Now I acted for the applicant in this very hard fought, very hotly contested case.

It was argued before the Tribunal over a full day with a number of witnesses on both sides, all subject to cross-examination, including expert witnesses. That was no mean feat for everyone involved when you remember that the entire hearing was conducted by telephone, which has simply been the procedure of our New South Wales Tribunal for the last nine months or so. Not yet sure when that's changing, if anybody's wondering, I am still getting listings for hearings by phone as of early 2021. I first became involved with the applicant in this case at the beginning of 2019, they are one of three lot owners in a state heritage listed strata building in Sydney's Millers Point. Anyone who knows that area will know that it is very close to our famous Rocks precinct and it's an area steep in early colonial history. And, as you hear the status of that building as a state heritage listed item was very relevant to the dispute before the Tribunal.

Now I said, I started working with this particular client in early 2019, that early involvement included sending letters off to the owners corporation care of the then strata manager, attending some meetings, a couple of attempts at mediated solutions, writing to the owners corporations, various lawyers from time to time attempting to resolve my client's concerns without having to go to the Tribunal. In that period there was a change of strata manager, but with their concerns about the management of the building still unresolved, my client filed their application in April 2020. The hearing was in November 2020 and the decision has just been handed down now in January, 2021. Now I share this timeframe because it tells you just how long and drawn out these types of disputes can be. My client and I have been good friends now for a couple of years and a credible amount of emotional energy is invested by owners involved in these kinds of litigation, any litigation before the Tribunal or the courts not to mention simply the sheer time and money, if legal representation is involved.

That is certainly one of the first things that I prepare my clients for when they tell me that they want to embark on this kind of process. It is not a quick or easy road to resolution. Now I've said I'm going to give you a link to check out the decision yourself that is over at **yourstrataproperty.com.au/compulsory**, have a read of the decision. Senior Member Ellis goes through the history of the dispute, the evidence, the submissions of each of the parties and his findings, all in some very helpful detail referring also to other relevant cases on compulsory appointments. There are 4 aspects of this decision that I particularly we want to draw your attention to today. And, you can take these as tips if you like for your own successful application or perhaps take them as warnings, things to be careful of whether you're an owner thinking about or involved already in this type of application or a committee member or a strata manager even wanting to avoid or defend an application. Feel free to take these points as some practical guidance, both my own and that of the Tribunal.

So, first of all, for this was indeed a case where the Tribunal found there had been a failure to repair and maintain the common property. This is almost always a feature of successful applications, even unsuccessful applications for compulsory appointment. One of the most important, the most serious obligations of an owners corporation is the obligation to repair and maintain its common property. Now, in this decision, the Tribunal repeated what is very well known now in our strata law, the fact that the obligation to repair and maintain is a strict duty it is not just a matter of taking reasonable care or using best endeavours. The common property must actually be repaired and maintained. And, their Tribunal found the fact that this building in this particular case was heritage listed did not change the scope of the obligation to repair and maintain, but it did make the fulfilling of that obligation of greater importance because the building is one of historical significance.

So that is certainly something to bear in mind when you're dealing with buildings that may have some kind of heritage status, whether that's a heritage listing which is a little more unusual than perhaps being in a heritage conservation area. The Tribunal found that there had been at this building a longstanding failure to repair and maintain the common property. A detailed report had been obtained by the owners corporation, itemising what repairs were needed way back in February 2018, but it wasn't until April 2020 that a decision was made to proceed with some of that work, not all of it and to proceed in a manner that was different to what had been set out by the expert in the report. In particular, it had been decided to exclude some of the items in the report and the Tribunal was critical of that. In this case, the owners corporation had also been warned by a heritage specialist that the work shouldn't be split up into different stages which is what the owners corporation was proposing to do in order to save some money.

The owners corporation had to its detriment ignored that advice. The Tribunal found that there was no proper scope, tender, budget or schedule to carry out necessary maintenance and repair of the property. And, that was notwithstanding a number of reminders that the owners corporation had received from me as the applicant's lawyer reminding them of their legal obligation under Section 106 of our New South Wales Act to attend to repair and maintenance. And, that series of letters was in evidence in the proceedings. This shows you the importance of doing what I call your homework, preparing your paper trail before you commence proceedings. What happens in the lead up to an application is always going to be relevant to the Tribunal. Motions to carry out certain work had been put to meetings, those motions had been defeated or deferred. There was no motion to do anything on the agenda of the AGM that took place immediately before the Tribunal hearing, the Tribunal was critical of that.

No recent quotations had been obtained, no consideration had been given to raising any money to fund the work. It was pointed out at the hearing that the owners corporation had only budgeted $5,000 for repair and maintenance work for the coming year and the financial records already showed that that money had been spent. Now, because this was a case where a failure to repair and maintain the common property had been made out the Tribunal was content to order an 18-month appointment for the compulsory strata manager, likening this case to the UniLodge case and other successful compulsory appointment coming out of our Tribunal

in 2020. And in that case, a 2-year appointment was ordered acknowledging that the compulsory strata manager is going to have quite a bit on their plate to get this building up to the standard it needs to be in to meet its legal obligations.

Now the second aspect of this case that I want to highlight is that the Tribunal found the secretary of this particular owners corporation had engaged in what the Tribunal described as autocratic conduct. Now, remember I've said there are 3 owners or 3 sets of owners in this building all were represented on a three-member strata committee. There was evidence that decisions had been made, work had been done on the common property without anyone other than the secretary knowing about that work or directing that work. The Tribunal found that a contractor had been directed by the secretary to remove particular items from their scope of work, that the secretary took it upon herself to authorise repairs without consulting with other members of the committee or indeed, even with the strata manager. Now, the secretary in this building did hold 48% of the unit entitlement and that was acknowledged by the Tribunal. This did not give her authority to issue instructions to contractors or to issue instructions ultimately to the owners corporations lawyers.

And, that became a key issue in the proceedings, who was instructing the lawyers and what authority they had to do so. A secretary only has the functions set out in Section 43 of the Strata Schemes Management Act in New South Wales, these functions are things like preparing and distributing minutes of meetings, giving notices of meetings, maintaining the strata role, facilitating inspections of records, answering communications, in summary, attending to matters that are of an administrative or secretarial nature. These functions do not extend to making decisions or issuing instructions in relation to two legal proceedings. If you want your secretary to have that power, if you are the secretary and you want to have that power, you must be expressly delegated that power, that should happen by resolution at a strata committee meeting. Even better do it at a general meeting, but Section 36 of our New South Wales legislation does say that a decision of the strata committee is a decision of the owners corporation. So, your strata committee can delegate you, as secretary, that kind of authority to instruct lawyers, to make decisions in relation to legal proceedings that may be on foot.

It is usually a sensible course to delegate that kind of authority to one or more members of the strata committee so that you are not always having to go back to all of the owners to seek instructions about the conduct of litigation which might from time to time include important decisions like do we settle? Do we continue to prosecute? Do we continue to defend these proceedings? The best opportunity that I find to consider whether that delegation of authority should happen is when the motion is before the general meeting as it must be, in New South Wales, to approve the engagement of lawyers and to approve the expenditure on legal fees. Our legislation requires us to approve expenditure on legal fees at a general meeting. It's a good time to put forward a motion if you'd like to delegate authority to one or two or more members of your strata committee to make decisions about the legal proceedings and to instruct the lawyers.

That did not happen in this case. That is not a position any secretary should want to find themselves in.

The Tribunal also found that an invoice was paid by the strata manager, in this case, without the required pre-approval. There's a warning there for strata managers to make sure if you are pressing that button to pay an invoice on behalf of an owners corporation, that you either have delegated authority to do that under your agency agreement or the strata committee has given you that approval or has approved that invoice. I know some strata managers have some complicated arrangements when it comes to whether or not they can approve invoices. For example, invoices over a certain amount maybe invoices over $1000 cannot be approved, but invoices less than $1000 can be approved by the strata manager without specific instructions from the committee. Make sure you're clear on that. In this case, the evidence was, and the finding was that the strata manager had paid an invoice without the required pre-approval.

The third aspect of this case that I want to bring to your attention is the Tribunal's finding that there had been a failure of the owners corporation to comply with some other obligations under the Strata Schemes Management Act. We've already talked about the obligation to repair and maintain the common property, quite a common situation in these types of applications. In this case, there was also a failure to comply with Section 103 and 105 of our New South Wales Act. Those are the sections about the proper engagement of lawyers, the proper approval of expenditure on legal fees and the circulation of lawyers costs agreements.

So, there's a word of warning there too, I think to lawyers to make sure that your engagement is secure, that there has been a proper engagement, perhaps even that you've seen the minutes of the meeting at which your cost agreement was considered and

approved. I know my clients send minutes across to me together with my signed costs agreement. It is not a comfortable position to be in when the legality of your retainer is challenged before the Tribunal and certainly not a position your owners corporation client wants to be in.

And finally, the Tribunal found that the owners corporation in this case had actually breached earlier orders of the Tribunal. There had been an earlier interim order made in these proceedings, preventing the owners corporation from carrying out work in a certain manner. It was found that that interim order had been breached on instructions of the secretary. And there were also some procedural directions about preparing the case for hearing which were not complied with. The matter was first listed for a final hearing in August, the owners corporation wasn't ready to proceed on that day and an adjournment was granted, but a cost order was made against the owners corporation for the applicant's costs wasted in having to prepare for that day. And, it was recorded that the owners corporation had failed to comply with orders of the Tribunal, requiring it to properly prepare its case for the hearing. Now, while that happened, during the course of the proceedings the Tribunal found that to be a relevant fact going to prove the unsatisfactory functioning of this particular owners corporation.

Now that is my summary of the main reasons why the Tribunal found this particular owners corporation was not functioning satisfactorily and that it was appropriate for it to make an order appointing a strata manager with all powers of the owners corporation and the strata committee, including the secretary, the chairperson and the treasurer. The Tribunal was asked to consider whether it may be appropriate to appoint the then current strata manager in the role as compulsory manager, but the Tribunal found that that was not appropriate as that manager had served during a period where the owners corporation had failed to perform its duties. Sometimes we do see the incumbent strata manager proposed as the manager who should then take on all powers. Sometimes this makes sense, other times it doesn't. It doesn't make sense in a case where the strata manager has been in some way, complicit in the owners corporations failures to function satisfactorily. And, that was certainly my submission in this case and that submission was accepted by the Tribunal who preferred to appoint the strata manager proposed by the applicant, a person who'd had no previous involvement with the building at all.

So, do go ahead and access a copy of this decision over at yourstrataproperty.com.au/compulsory. That page will direct you straight to a PDF copy of the decision, there is no need to opt in. I do hope this practical guidance drawn from my own personal experience running this case that of one of my clients being an applicant in this case and recorded in this very recent decision of the Tribunal is helpful to you and will help you make better decisions about the commencement or the defense of applications for compulsory appointment. Of course, our focus is and should always be on the proper and efficient management of our communities in the best interests of all owners. Some communities need a little more help with this than others. I am happy to do my part to help yours. Thanks for joining me this week. I'll catch you next time.

Outro: Thank you for listening to Your Strata Property, the podcast which consistently delivers to property owners reliable and accurate information about their strata property. You can access all the information below this episode by the show notes at **www.yourstrataproperty.com.au**. You can also ask questions in the comments section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?