Publication Date: 7 June 2022

YSP Podcast Transcript: Episode 316. A committee member's failure to disclose a conflict of interest

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Intro: Welcome to Your Strata Property, the podcast for property owners looking for reliable, accurate and bite-sized information from an experienced and authoritative source.

Amanda Farmer: Hello and welcome. I'm Amanda Farmer and I have with me today Reena Van Aalst from Strata Central. Hey there, Reena.

Reena Van Aalst: Hi, Amanda. How are you?

Amanda Farmer: I am good. It's lovely to see you. I can see you over video as we're recording this. I was just saying it's been a little while. It's been a month or so since we have had a podcast chat, so it's good to catch up.

Reena Van Aalst: Yes, definitely. It's been a while.

Amanda Farmer: Lots of wins and challenges happening during that time, I am sure. Why don't you kick us off with your challenge for this week.

Reena Van Aalst: Well, my challenge this week Amanda came from one of my committee members who asked me this question. And I thought this is a really good one that I really don't know the answer to. And I thought to myself, well, what's the best way to actually get the answer, is to raise it here, and perhaps maybe other strata managers may have had the same issue arise in their schemes that they're managing. So basically, as people in New South Wales are aware, strata committee members have to declare any conflicts of interest or any pecuniary interests in anything that's on the agenda. I am aware that some managers aren't aware of that because when I received some strata schemes from other managers, I noticed that motion has not been included. So anyway, that's just an extra little bit of information there.

And what happened was in this particular building that we don't manage, but this strata committee member has another investment. And he advised me that there was a quotation where a strata committee member did actually have an interest in this company. However, that was not disclosed. And I don't know how it came to be found out after the event, once the work had already been completed, that the strata committee member had not disclosed that he had a financial interest actually in this company.

It wasn't just that it was a relationship, it wasn't like his brother-in-law or something like that. Anyway, so the question is, can that resolution be rescinded, and can the invoice therefore not be paid for the work because a disclosure wasn't made? So I know there is a contractual issue, as well as a legal issue, I think Amanda in terms of the contract. Well, quote was accepted, a work order was issued, the work was done. That's to one side. On the other hand, the disclosure wasn't made at the time that it should have been. What are your thoughts on that? Have you come across that before?

Amanda Farmer: Yes, I have come across this before. What Reena is talking about for anyone who is unsure is Schedule 2 in our Strata Schemes Management Act 2015 in New South Wales. Clause 18 in particular requires a member of a strata committee who has a direct or indirect pecuniary interest in any matter being considered or about to be considered at a meeting to disclose that interest if the interest appears to raise a conflict with the proper performance of the member's duties in relation to the consideration of that matter. So, that's Clause 18 in Schedule 2. And Reena, I know you have a practice, which I recommend also that strata committee meetings always have a standard motion at the beginning of them to ask committee members present and voting if there are any conflicts of interest to be disclosed because it depends what's on the agenda. Maybe there's an item there that does raise a conflict. Maybe there is nothing controversial on the agenda, so there's no question of any conflict.

Now, the disclosure is required to be made if there is this direct or indirect pecuniary interest, and that interest appears to raise a conflict. So those questions have to be considered first when deciding whether to make a disclosure. And when we say pecuniary interest, I think you've said this too Reena, we're talking about a financial interest. That's the definition of the word pecuniary, as I

understand it. And if that disclosure is made, it is then up to the strata committee to decide whether or not that member should be present when the motion is being considered and whether they should be allowed to vote. Whether they should be allowed to take part in any decision of the committee in relation to that matter that's set out in our legislation. So even if there's a disclosure, because there is a pecuniary interest giving rise to a conflict, the committee can still decide to allow that committee member to stay in the meeting and to vote on the motion.

And that's where this issue of, well, if a disclosure wasn't made and it should have been, and I am inclined to agree with you, it should have been, if this person has an interest, a shareholding, a directorship in a company that is going to be contracting with the owners corporation. I think that's a fairly clear pecuniary interest. There may be some debate as to whether that raises a conflict. But I think a committee member acting with due diligence is just going to put the hand up and say, "Hey, I'm disclosing this."

Even if that disclosure was made, the balance of the committee members may have said, we are still happy for you to vote on this, so that may have happened. Also, was that committee member's vote a deciding vote on the issue? Maybe there's six committee members and everybody voted in favour. So even if this person was excluded from the decision-making, the motion may still have passed, the contract may still have been entered into. So the question is really, if the disclosure had been made, would this person have been removed from the decision making and if they had, would the result have been different?

Reena Van Aalst: And also Amanda, another point to consider is that because that committee member has had the benefit of receiving all the other quotations that were put forward for the particular work, then they have an advantage of either undercutting, which happens all the time, which is not an issue, I suppose. I mean, as you've said, Amanda, sometimes it may be a good thing to have an owner or a committee member whose company is going to do some work. Sometimes owners feel more comfortable knowing that one of their own, who has skin in the game is doing the work, so that may not be the issue. It's more, I think in this particular case, the fact that it wasn't disclosed. And I think the fact that that person had the benefit of all the other quotations and therefore, are you really getting the value or has that community member just undercut the price of the other quotations just to get the work?

So I think there are several different factors I think that come into play as you said earlier. Were they a deciding factor? What information did they have? What the repercussions, if any, as a result of them doing work? But let's say for example, the committee, let's say they were the deciding factor, I suppose then opens it up, another Pandora's box in terms of whether or not the invoice should be paid. I mean, my view has always been that when someone's been asked to do work, then in a sense the owners corporation cannot sort of not pay the invoice unless the work is not satisfactory. So I think that was my initial view in terms of what I thought would be the advice to that committee member.

Amanda Farmer: Yes. My technical legal take on this is you can't put the milk back in the bottle. So it is very hard to unravel this now that it has happened. And I agree with you that where the work has been done, then that contractor is entitled to be paid through one form or another, whether it's under a contract. Or whether it's pursuant to what we might call the common law principle of quantum meruit, where you've done work of value and therefore you are entitled to be paid something for that work. So depending on the value of the contract, of course, commercial considerations should always be taken into account here. It's sounding like maybe there's a lesson to be learned for the future by this committee. I absolutely think it's concerning that a committee member who had an interest in the company that was awarded the contract had access to earlier quotes and whether or not that was taken into account, there is this sense that there's a lack of transparency and-

Reena Van Aalst: Exactly.

Amanda Farmer: Yes, the conclusions could be drawn that are unfavourable to that committee member. Why you would put yourself in that position, I do not know.

Reena Van Aalst: Exactly. Yes. Well, I think sometimes your mighty dollar puts people in a lot of positions.

Amanda Farmer: Sadly. Well, thanks for bringing that one to our attention. A good reminder there for our committees, for our

strata managers, to be thinking about conflicts of interest and the need to disclose. And always a good idea to have that motion on your committee meeting agendas, all of your committee meetings as a standard motion. So that we're turning our minds to whether we might have conflicts of interest that need to be disclosed.

My challenge for this week arises from our sustainability infrastructure provisions in our New South Wales legislation. We've been talking a little bit about this lately because electric vehicle charging is such a hot topic, which I'm excited about. I think it should be. It's a really important step in the right direction as we work towards a more sustainable future. And our buildings really do need to be thinking about how they're going to facilitate electric vehicle charging in their basements.

And in the course of watching a couple of webinars, reading some articles, listening to some news reports about installing this kind of sustainability infrastructure, we call it in our residential apartment buildings, I have heard a number of people refer to the type of resolution that's needed at a general meeting to approve this installation. And it's not an ordinary resolution. It's not a special resolution. It is indeed a sustainability infrastructure resolution. And we had legislation introduced in New South Wales last year that made clear that such a resolution has a lower threshold to get across the line at a general meeting. If you have a look at Section 5 in our Strata Schemes Management Act 2015, it tells us that a resolution of an owners corporation is a sustainability infrastructure resolution if less than 50% are against the resolution. Now, I'm saying that slowly and just wrap your head around that for a minute, less than 50% are against the resolution.

This means that a sustainability infrastructure resolution will pass if 49% of the vote is against the installation and votes against the motion. It will pass if nobody votes in favour of the motion and nobody votes against. Maybe everybody abstains from voting, then certainly you have less than 50% against and so the motion will pass. Now I'm raising this as a challenge because what I'm reading and what I'm hearing when people are talking about electric vehicle charging and solar installations, and the lower threshold for approval is that you only need 50% to approve your proposal. You only need a majority vote, 50% an ordinary resolution. I want to be very clear that's not the case. It's actually even easier than that. The definition of sustainability infrastructure resolution is cast in the negative, it's about how many votes are against. And if you have more than 50% of the value of the votes against the motion, it will fail.

But if you have less than 50% against, it will pass. You could have a significant number of owners against the proposal, and it will still pass because they don't make up more than 50% of those present and voting. And when I'm talking about the value of votes, I'm talking about unit entitlements. So we calculate our sustainability infrastructure resolutions, the same way we calculate our special resolutions. We look at the value of the vote based on a lot's unit entitlement, not on a simple show of hands. Reena, I don't know if you're coming across this in practice?

Reena Van Aalst: I haven't actually had any that I've had to include on any motions to date. But I think it's a really good reminder, Amanda because in any sort of layman's terms, a majority is always 50%. I mean, we just had an election recently, so I suppose that wasn't 50% either to be honest if you think of it that way.

Amanda Farmer: Look, I'd like to think that these motions are being put up and they are being passed with an overwhelming majority in favour. And I have seen a couple of those. So this question of exactly what does a sustainability infrastructure resolution mean may not come up, but where it's borderline and where someone who's proposing this kind of installation is concerned they may not get the support. I think it's really important to understand that it's about people actively voting against these proposals that will bring them down. It's not about not getting that majority in favour.

Reena Van Aalst: Yes. When you say that, it's really interesting how you're saying that most people are for it. Because at a few meetings that I've been to, and even some of my committee members, when we've been talking about EV charging, some people say, "Oh, well, we don't bring a petrol pump to a building, so why should we bring EV charging?" And I keep saying, "Well they're not really the same." In terms of the fact that there are petrol stations around that you can, whereas there's not that many EV stations that people can just go and take their car to.

And I think sometimes people are looking at the value of their apartment. And sometimes it is being impacted where a lot of people

do want to buy electric cars and they can't, or that I won't buy it in a building where they're older and they don't have the infrastructure there. So there are mindsets that are against it. I think philosophically people they're sort of, I wouldn't say anti-green, but aren't really into the sustainability measures at all. And therefore, depending on the mix of the building, it could be an issue like you're saying Amanda, it's not necessarily an overwhelming thing.

Amanda Farmer: Yes. Well, it will be interesting to see how this new development rolls out in our communities. Always something new, always something different in strata. It's why we love it. Your win for this week, Reena?

Reena Van Aalst: My win for the week is really strange because it happened so quickly. So about a year ago, I'd submitted a proposal for a Section 237, which is a compulsory appointment consent for a building that came to me where there's been protracted issues with repairs of a roof and it's been going over 7 years and apparently this has been at NCAT. Anyway and so I hadn't heard, and so they rang me last week and they said, we wanted to hear more and understand more about the compulsory appointment process and how you would deal with it. And I gave them some insights of how I've been managing a few of these. And they said to me, "We've gone to the strata committee, which is a new elected committee and they're happy to consent to you being the compulsory manager." And I thought, "Wow, that's interesting."

So they went to NCAT and then the next day there already was an order issued. And I thought ill take about a month before it gets put forward. And I would've thought there would have to be arguments for and against, or I don't know, but the next day I got the letter. I'm thinking, "Oh my God, this is so quick, I have not anticipated it." But it was the first time Amanda I've come across an affected lot owner and the strata committee together consenting to compulsory appointment. Now, obviously, there are issues relating to owners and someone that's got some voting power through a company nominee arrangement. So apparently there are a lot of companies that are lot owners in this development, so even though it's not the proxy threshold that's being used to stop the work from happening, it's this person being a company nominee for a number of different companies. As well as having some proxies has been able to stop the work from happening over a number of years now. So yes, just very interesting.

Amanda Farmer: So there is actually dysfunction there within that owners corporation. That would be my question. I often get asked, "Amanda, can we have a compulsory manager just because we want one." And I say, "First of all, well only the Tribunal can appoint a compulsory manager." And a compulsory manager will only be appointed to a community that is not functioning satisfactorily. So there needs to be some evidence before the Tribunal that that's the case. It may be that these proceedings you're talking about Reena were on foot for some time.

Reena Van Aalst: Oh yes. They have been. There's been, I mean, proceedings on foot against the owners corporation for some time, it's been. That's correct. It's been going on for a number of years. But it's the first time I've actually seen a strata committee and the affected lot owner come together. Because normally it's the lot owner against the strata committee who are not usually wanting to do the work or facilitating the work. So yes, it's just interesting. And also the speed at which it was done, which is unusual when it comes to NCAT, I must say...

Amanda Farmer: I'm sure the Tribunal was very happy that the parties had come to an agreement that would solve the problem and take that burden off the member.

Reena Van Aalst: Exactly.

Amanda Farmer: And great to hear that both parties were happy with your appointment, Reena.

Reena Van Aalst: Yes.

Amanda Farmer: I mean that may have been a big part of it. That they know you to be a sensible professional who will assist their building.

Reena Van Aalst: Yes, exactly. Thank you, Amanda. Yes, it was interesting.

Amanda Farmer: Nice one. Good to hear. It'll be interesting to hear how that community progresses to solve their differences with you at the helm.

Reena Van Aalst: Thank you.

Amanda Farmer: My win for this week also arises from some Tribunal proceedings, not proceedings that I was involved in. This is a case where a client of mine, has been a client from time to time, lot owner, approached the Tribunal without representation, running their own case. Did an excellent job as it turns out and had the Tribunal make an order which required the registration of a by-law. Now, this can be done under our New South Wales legislation, Section 149 is the relevant provision in our Act where the owners corporation has refused to pass a common property rights by-law. These are by-laws where an owner might want to do renovation work or might want the exclusive use of part of the common property. If the by-law doesn't pass at the meeting because certain owners, if not all owners are against a proposal, then a lot owner can go to the Tribunal and say that the owners corporation is being unreasonable. There's nothing wrong with my proposal, nothing wrong with the by-law I've put forward and the by-law should be made.

That's exactly what happened in the case of this owner. And they happily reported to me recently that they had achieved an order, making a by-law that permitted them to carry out some renovation works at their lot. A happy result for that owner. It's a small building and I do think it was one particular neighbour who was against the renovation. The Tribunal found that the reasons that neighbour was putting forward for voting against the by-law were not reasonable reasons and therefore could be disregarded and the by-law could be made. The way that happens technically is that the order of the Tribunal is actually registered. So you don't even have to go back to a meeting or pass the by-law again or attempt to pass the by-law again, you register the certified copy of the order from the Tribunal. So that's something I'm assisting my client with now. But hats off to them for getting that result in what can be a technical area of our legislation and a technical application to the Tribunal. But good to know for owners that option is there for them.

Reena Van Aalst: Yes. I had one of these also Amanda, that happened in a small building. And I think what happens when it's a smaller building, it's it takes only one or two people to actually be able to stop a special resolution from being passed as compared to a larger building because of the unit entitlement, you need more than 25% to be against it.

Amanda Farmer: Yes. I often do say myself Reena that the smallest buildings can have the largest problems because it is really easy for a decision to become deadlocked or for there to be an inability to move forward because of the opinions of one or two people only.

Reena Van Aalst: Exactly.

Amanda Farmer: But a good result for that owner in that case, using the avenues available to them, to ensure they can continue to live comfortably and add value to their property. It has been wonderful chatting with you again today, Reena Van Aalst. What have you got planned for the rest of the week?

Reena Van Aalst: Just more work, Amanda a strata manager's job is never-ending, especially at the moment with the rain.

Amanda Farmer: Yes, I do not envy you. I will send you out to continue with that to-do list. And I will catch you next time.

Reena Van Aalst: Excellent, Amanda.

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 via 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?