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YSP Podcast Transcript: Episode 362. Subdivision snafu | approving budgets | motions "to discuss"

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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. Hi Reena.

Reena Van Aalst: Hi Amanda, how are you?

Amanda Farmer: I'm good. It's been a few weeks. You and I have been busy in strata land. It's great to be back here chatting with you, sharing our wins and our challenges. Let's start with your challenge for the week.

Reena Van Aalst: Well, my challenge this week is definitely another new one and I think I might sort of reference this occasionally, Amanda that there are things that I haven't seen even though I've been doing this for now over 20 years. But we took over a strata scheme at the end of last year which had tried to come to us earlier, but there were issues and eventually, I think it was about two years later we were appointed and during that time, the developer had gone into bankruptcy and there was issues with the building which is still prevalent in terms of defects and there isn't even a final occupancy certificate issued for this building, unfortunately, so it's really sad for the owners because you know even though sales are taking place the values aren't being achieved that really should be achieved for a building of this location and size of apartments.

One-half of the apartments had been built it's like a bit of a quadrangle in the middle and then the second half then was built after the first apartment or the first unit was sold. And the subdivision took place and then we you know obviously got the CT and subdivision. Subdivisions always have a unit entitlement zero because there are new lots that are being created but, on the strata roll what we discovered was that there were levies owing about 80 or 90,000 on that lot that had zero-unit entitlement.

Amanda Farmer: So, it was a development lot and then it was subdivided?

Reena Van Aalst: Yes, it was one of the lots in the original strata scheme.

Amanda Farmer: Oh, okay right.

Reena Van Aalst: And then that lot in the strata scheme was then subdivided into new lots, and but to our dismay we saw that in the position report or that was from the other managing agent that they had a balance owing on that particular lot of 73, 000, and that was a lot that was owned by the developer at the time who then used that lot to create the new lots which means that those amounts that we're owing at that time were not transferred to the new lots.

So, unfortunately, the owners didn't really understand, the community didn't understand what this meant and they didn't realize that this was not valid. They had tried to go after the developer in terms of levies etc. but he's now gone to another country.

But apparently, he comes back and forth I don't know what he does but anyway, so they seize the car and one of the apartments is still vacant. So, we've gone to the lawyers that were using the debt recovery and for the whole matter and unfortunately, there's nothing that we can really do about it because obviously he's not in the country anymore etc. etc.

But in a sense, I'm not sure Amanda because the committee have asked me this question, what is the liability of the strata managing agent because they're the ones that would have left that amount on that lot it wouldn't have, I mean he wouldn't have the mechanical ability to do it in terms of the accounting software.

And the other thing also that we found, which again I've never seen before, is that it says two years in a row that there should be an audit done with the accounts, and the accounts have never been audited so had this occurred I think the auditor would have

picked it up two years ago, and perhaps the committee could have done something at the time when he was in the country.

There's just so many issues and I'm just- I know you probably maybe haven't come across this. I'm not sure if any other strata manager out there listening to this story, or any other owners corporation has had this happen where an amount of levies has been left on the lot account and not being transferred when the lot was subdivided.

Amanda Farmer: Yes, I certainly haven't come across it, and it does compound into a complex problem.

Just going back to perhaps, the easiest answer, the audit this is an owners corporation with an annual revenue of over 250, 000 so the audit was mandatory.

Correct, yes. I think you're right that it may have been picked up in an audit, simply identifying that this was a lot that was carrying a significant debt and I'm not sure if there was ever debt recovery action commenced, even prior to the subdivision.

Reena Van Aalst: We're not aware because the records are just not in a very coherent manner and even to this day, we're still trying to get bank statements and things. We've had to actually go to the bank directly.

If any strata managers are that are listening, for those that are involved in that aspect of transfers between managing agents, the banks actually will not provide any statements unless the managing agent gives their consent.

And I suppose in a sense, I was trying to come to terms with this concept of me, hang on it's the owners corporation is the entity that it's their bank account. Although if you look at the terminology on all bank statements it'll say the managing agent in trust for strata plans, I suppose in a sense the agent is the trustee of those funds. Yes, of course like they gave us consent to get the final bank statement.

But the issue is, I think Amanda, do you think there would be any action against the greatest managing agent in relation, to the fact that there were no audits even though as you said it's mandatory and there were resolutions in their AGM's to have this completed?

Amanda Farmer: Look, it's hard to say whether the apparent loss that's now being suffered and that doesn't even sound like it's clear cut in itself whether or not the owners corporation can claim for this lost income is essentially what it is. It's not clear whether that loss is because of a failure to carry out audits as instructed and that would be the key point to have to prove if this owner's corporation was going to successfully point the finger at the former managing agent.

It's all well and good in a claim like that to say well the managing agent should have followed instructions, the audit should have been done, it's very clear in our legislation in New South Wales that for an owners corporation with a revenue over 250, 000 a year, they must get their accounts audited each year. But what's not clear is whether the failure to do that has led to the present inability to recover some 70-odd thousand dollars. I think you said in levy income.

Reena Van Aalst: But also Amanda my other query is obviously the agent, I mean someone in terms of the accounting and journals etc. would have let this amount on there so that couldn't have been done by anyone but the agent. I don't know if it's under the instructions of the developer or if was it the fact that they just didn't know what they were doing. So even if we go pre-audit the fact that this amount is just set on a subdivision through some journal that would have been created to allow this or to or to leave it at that. I think this would sort of go back even one step before that.

Amanda Farmer: Well if we think about the process of a normal sale from one owner to another, it is part of the conveyancing process that the purchaser who is buying makes sure that they are getting the title clear of any encumbrances.

Any debts, any levies owing, any other mortgage on that title, they're making sure they're getting a free and clear title and we have both contractual obligations around that to make sure the vendor, the person who's selling provides certain documents, does certain things, proves that they have paid certain debts before the purchaser takes on the title.

Now a subdivision is less common and certainly not a process that I’m often involved in, but in registering a strata plan of subdivision and creating new strata lots from the single lot which is the process that I believe has happened here, there would be similar steps to follow to

make sure that that title that you are then subdividing is unencumbered, and it sounds to me like it's that part in the process knowing nothing more than what you've just told me now, it's that part in the process that has been messed up somewhere along the lines where this levy due and owing by that owner of that lot has not been picked up and it hasn't been discharged before the subdivision was registered.

Reena Van Aalst: Yes, so normally what would happen Amanda is that if a lot is subdivided, I think one of the questions that people have come to me about is well, on the section 184 certificate which is the section of the act that is a statement that we provide to you both the vendor and the incoming purchaser's solicitor or conveyancer.

Now on those records, there was zero owing because that amount was sitting on a different lot. So, they'd say the new strata plan is you've got three lots. A lot one, two, three, and SP abc that amount was not transferred to those three lots, so when they bought the apartment, there was no levy owing, so they couldn't pay it. So I don't know if that was an error by the strata manager who did not transfer it.

Amanda Farmer: They should have been paid out before the subdivision, yes.

Reena Van Aalst: Correct. It would've been those, that lot still are better than the levies.

Amanda Farmer: And that subdivided lot now no longer exists. So that's what the lawyers are then telling you there's nothing you could do.

Reena Van Aalst: Yes

Amanda Farmer: I am following it.

Reena Van Aalst: Yes, plus also the fact that even though we could come back and say, "Well hang on, what happened there?" you know, there would have to be some paper trail of how this subdivision occurred and obviously had to be registered with the LRA's etc. So, I think that he's not even in the country is also hindering their ability to even get to the bottom of it.

Amanda Farmer: Yes, it's an interesting one from the professional perspective, but yes it's the kind of mess that I think will need to be sorted out with some specific legal advice, and perhaps, legal advice from a third-party professional who was not involved in any of these transactions to be able to have a good objective, look how it all worked out.

Reena Van Aalst: Exactly. Yes, thank you Amanda, but say like no because one of our team is saying well, why can't we, you know, go back to that zone so those owners would have had a zero thing on their section 184 so they haven't paid anything because they weren't asked to pay it at the time they purchased it, so because we're sitting on a different lot.

Amanda Farmer: Absolutely, it's newly created.

Reena Van Aalst: Yes

Amanda Farmer: I hear you, yes. All right, well I would love to know how this one works out, Reena. It's a lot of money. I imagine for this building to walk away from. Probably worth the investment and some advice.

Reena Van Aalst: Yes, definitely.

Amanda Farmer: Let us know how it all turns out.

Moving on to my challenge for this week. I have turned my mind to this particular issue before, I'm not sure if I've mentioned it on the podcast, but it has come up two or three times in the last few weeks so thought I'd bring it back for further discussion.

The preparation of a general meeting agenda and the placing of motions on that agenda. This is what my challenge is about this week.

“Who is entitled to put motions on the agenda of a general meeting?”

Now I think many of our very well-educated listeners will know that a lot owner is entitled under our NSW legislation to require a motion to go on the agenda of a general meeting. They have to make sure that the wording of that motion is sent through to the secretary - usually, the strata manager, if there is one - prior to the agenda going out, and as long as the strata manager is receiving that motion together with an explanatory note, then the strata manager must comply with that request and put the motion on the agenda. That's in our legislation.

But who else, if anyone, is entitled to put motions on the agenda? Are strata managers legally able to place motions on the agenda of general meetings? In the last couple of weeks, this has come up for me in the context of strata managers proposing motions for their own reappointment. Their agency agreement is expiring and they would like the owners to consider a further three-year contract and they are putting that motion on the agenda.

I'm told in these situations; I’m thinking of without receiving any instruction from an owner or from the strata committee to place that motion on the agenda. And I’m being asked the question, “Amanda, is that legal?”, “Can our strata manager do that?”

And of course, it is the cause for some conflict where the building in particular does not want to reappoint this strata manager, has motions of its own proposing one or two alternate strata managing agents and never asked for this motion to go on the agenda.

Reena, I don't know if you recall our past discussions on this, so if you have a view on this…

Reena Van Aalst: Yes, we have discussed this, Amanda.

Well obviously, the strata managing agent really cannot put their own motions, their own reappointment on the agenda. I mean really, in a sense putting on their agency agreement and what delegated authority they do have, I mean really, they have to just ask the committee regarding any general meeting motion.

Even an AGM, like a lot of owners come to me and say to me from other companies that they've experienced where the strata manager just sends out the AGM agenda, doesn't even ask them if they're available, they don’t even ask them what levies they're proposing, etc. etc.

So, I think there's a bit of a misunderstanding in terms of an agent's authority, but definitely, in terms of your own reappointment as a managing agent, you really need to you know come and ask the owners corporation you know, like and there's a requirement three months before the expiry to let the owners corporation know through the strata committee that it's expiring, and then all you know, practice is to say “If you'd like to ask to continue if you did, what term would you like?”

Obviously, there's a negotiation in terms of that aspect, perhaps, but I think a lot of strata managers don't really understand what their authority is and I think this is part of the problem, I think with a lot of people that come into the industry and retention of good staff etc. etc.

And I think this is also being born in them that we've recently been important in terms of burnt out and stuff. I think there's a lot of people that just don't really understand how the act works, and we haven't been trained, Amanda, on how it works I think sometimes it's part of it too.

Amanda Farmer: Yes, I agree with you. And look, overall, I agree strata managers should not be proposing any motions for a meeting agenda without receiving instructions from an owner, and I think it's arguable as to the strata committee's authority to instruct a managing agent to put motions on the agenda. I think as a matter of practicality, it has to be the case that the strata committee has the authority to instruct the managing agent to put certain motions on as you've alluded to there.

There are some mandatory motions that must go on the agenda of each general meeting and it surely can't be right that a lot owner has to requisition those motions in order for them to go on. So, I think the rule of thumb should be unless you have an instruction, clear instruction from the committee or from a lot owner as to what goes on that agenda, then you don't start proposing motions. Especially not

motions that are in your own commercial interest.

I don't think there's any problem with preparing a draft agenda, and circulating that for instructions. But I'm glad you've raised this Reena, because I'm seeing this too. Agendas going out without committees even seeing them, without committees approving them, and you mentioned their levies being proposed without committee authorization, without committees signing off on draft budgets. Exactly that came up just within the last week in a building where I'm acting for an owner.

There's an AGM coming up. The draft agenda has been circulated, and there are levies proposed. But when I saw the draft, I said to my client, "Well, that's great that levies are proposed, but where's the draft budget? Surely, we don't know what levies we need to raise until we've seen what the budget is."

My client went back and asked the strata manager, and my client is a committee member. Went back and asked the strata manager, "Can we please have a draft budget?"

And the strata manager said, "The proposed budget will be attached to the agenda when it was sent out."

In writing. That was in writing, in an email. It's now in my inbox, and that's just terrifying. Strata managers do not set budgets. They may assist, and really should, I believe, be assisting their owners corporations with their budgeting. Prepare a draft, circulate it to the committee well in advance of the meeting, and get instructions on that budget.

There may be things the committee wants to change. The committee may have questions. It is a budget that's being proposed, it is not a budget that is already set by the manager or even by the committee. Owners have to vote on it.

Reena Van Aalst: You're absolutely right, Amanda, and I think this is a problem also with portfolio sizes, because when the strata manager has like, you know, 70 buildings or whatever, then it's very hard for that process that we're talking about to take place.

I mean also even when strata manager is proposing a budget, they need to provide explanatory notes or documentation in terms of like, well, the contractual amounts that you're paying save for maintenance on certain matters so that the committee understands you know how these figures are being calculated.

And also, when the committee understands how the figures are being calculated, and then it's presented to an AGM, then at least then there's some background knowledge and authority in terms of speaking for the adoption of the budget, because if the committee aren't aware of how this budget was calculated and then it's being put forward to the owners, then how can the committee really support or endorse what's being put forward.

And as you said, sometimes it may not be correct, it may need amendment, and there could be things that haven't been thought about. And I think also what I find, sometimes when we propose budgets, and the owners didn't want to try and you know, obviously cut it down, because it's too much and they did a going up.

You know, Sarah Smith my colleague always uses this really good way of trying to address such concerns. "So okay, tell me where you want what services do you want to reduce from this budget. What do you want to cut out?"

Because sometimes it does come down to that where it's such a tight budget, really, that you know "do you want to get rid of this?", "do you want to get rid of your cleaner?", "Does someone want to bring the bins in?" like yeah, we're coming into this sort of like... This is obviously an extreme case that I'm talking about, but sometimes you know people do want us to reduce our budget. Say for repairs or something when you know, in the last three years I've spent 20,000 per annum and it's just going up and up, and as we all know as managing agents for insurance now. I mean if there's any whiff of any issue in terms of risk where anything that's prevalent in terms of you know, reoccurrence, water penetration, you know, you're lucky to get just the incumbent insurer giving you three- or six-months cover if once they've been made aware of a problem.

So, you know having this burden of obtaining insurance and then having them try and to put forward meaningful budgets is really important. And also, it's an asset like I mean I don't know what I said one would one would expect to have to increase in value without

maintaining it. I don't know how we all want to get paid more money in our jobs and in our profession so I don't know why I think everyone thinks that a building that's aging needs less money. I mean even human beings are aging for medication, healthcare...

Amanda Farmer: Exactly

Reena Van Aalst: I mean how much is a hip replacement for the taxpayer? I mean there's a lot of money.

Amanda Farmer: I like your analogy there. Yes, exactly. Look, it's an issue of itself accurate budgeting, but certainly, strata managers wanting to protect themselves from criticism should not be placing any motions on the agenda without having those either requisitioned by an owner or signed off by the committee even when it comes to things that might seem straightforward for strata managers. Setting levies, budgeting, getting instructions. Your client decides you advise. That's it.

Okay shifting over to your win for this week, Reena.

Reena Van Aalst: My win for this week Amanda comes from a long-standing NCAT application that was submitted about a year ago by an owner even though the works have been completed, and we're talking about substantial works. That lot owner is not happy with you know, some of the works that were done, you know, we had the superintendent engineer come out, do an inspection on a number of occasions, and you know he just didn't agree with what was being suggested as to the cause of order ingress, and anyway and so the matter then was action was taken - I think twofold - one was against the owners corporation, and one against the builder but the application was to make the owners corporation a party to the proceedings that this owner was putting forward.

So, without going too much into detail at this stage, after six various appearances throughout the year to last month we actually had a hearing where the owner then tried to seek an adjournment, and obviously had to present evidence again as to why the matter should be adjourned and the hearing not proceed. And luckily, despite all the efforts of that owner, the application for the adjournment was dismissed.

So, the matter obviously didn't end up proceeding though the hearing then was concluded and obviously now we're waiting for the decision of the tribunal, I think it was a good win because sometimes, you know, when owners aren't happy with the outcome, they try and bring up other issues that sort of are designed to in a sense track away from the issue at hand, and I think the request for an adjournment was on the basis that some information hadn't been provided to him. But after two hours and 15 minutes exactly, the application was dismissed, so yes, it's a corporation and the committee were very happy with that. And now we just await the decision of the hearing.

Amanda Farmer: Yes, there is a bit to be said there about the length of litigation and how long it takes for these matters to progress through our tribunal. I was asked that earlier this week by a client who's looking at potentially commencing tribunal proceedings, and this person had had a look at the NCAT website, and said, “Oh, Amanda I read somewhere it says something like four to six weeks.”

And this person had interpreted that as “Oh it takes four to six weeks from the time I lodged my application to get a decision.”

That is not what it takes. I think the reference to four to six weeks on the NCAT website is from the time you file your application to the date of your first directions hearing, and I’ve heard you just say there Reena, you had about six appearances before the tribunal, these were proceedings that were commenced more than 12 months ago.

It is taking at least - I’m telling clients - at least nine months to get through a fully defended application before the tribunal, which means getting to the end of a final hearing. And that is if there are no hiccups along the way, no requests for adjournments, no adjournments granted, no interim applications filed, and we must remember for most cases to add to that at the very beginning, a period for mediation. And if you're going to apply for mediation through fair trading, and mediation is mandatory before commencing most tribunal applications.

Fair trading is still taking about three months from the time you file your media mediation application to the date of your mediation. So, we're now looking at 12 months. If you count that period from filing mediation to the end of a final hearing, at least 12 months to get a hearing and that's not even a result. The member may then reserve their decision as it sounds like they've done in your case, Reena, and take some weeks if not some months to deliver that decision.

Reena Van Aalst: You know, I think Amanda the other sort of a misnomer that exists in the tribunal and the whole fair-trading space is that this is a free service for owners. So, you don't have to pay a fee to lodge a mediation application like you had to many years ago, and I think this whole thing of people thinking it's free, and therefore it's a low-cost avenue of resolving disputes, it's quick like you've said, and it's actually nothing could be further from the truth in terms of that aspect because even though you can self-represent yourself in a court of law as well, I mean in this particular case there were three experts.

So, we had the owners corporation had its engineer, the applicant had their engineer, and then the builder had their engineer. So, we have three engineers and there's an order for you know Scott schedule and a conclave report, then each person had gone and given their own. I mean this is actually costing so much money. Even the senior members said, "Please remember that this case is costing, having lawyers and barristers and engineers, this case is costing more than the repairs itself in terms of the content."

So, yes, obviously an offer had been made beforehand to settle the matter which was refused, but even an offer was undertaken by what all the experts had agreed was the issue in terms of there was one minor defect in which all three engineers had agreed was a case.

And even though that builder had gone and said "I'll come and fix this."

The owner refused and said that "We need to wait till the NCAT proceedings are over."

So, I mean if there is that damage that's been before to be occurring then you think that "Okay, let's get that done first and let's wait for any other things that may come out of the decision of the senior member."

So, yes, like I said, Amanda, these things are quite protracted, and they're quite costly for lot owners in terms of, because if you think about it, even though the laws of evidence don't apply in the strict court sense. The tribunal you know describes how evidence needs to be presented, what information is required, and you know, and so apart from the hearing itself they also need to look at documents that support assertions made by either side.

So, it's not just a thing of just you know like I said four to six weeks and I mean think about like for any legal defense claim, the insurance that paid the cost of the strata managing agent. So, I mean I was there eight hours. So, like the owners corporation has to pay that cost, and you know they're just grateful and thankful that I'm able to sit there for that time and help them, and you know because I'm across the whole matter and my statement was obviously the principle apart from the engineers that the cases depending on my statement and my evidence. But a lot of owners like in communities, they're worried that I might resign because of the pressure that I'm being put under.

And they said, Amanda, "Please don't leave us", It's like "Don't worry, it's okay, that's your job."

Amanda Farmer: Yes, that's your job, that's right and that's what you're paid to do, and that's a way a professional looks at it. Of course, where you are a defendant to litigation, it is very difficult to have a lot of control over that process, making offers to settle subject to whatever advice you're getting is often a good idea.

But if you are an applicant or thinking about becoming an applicant, please listen carefully to what Reena and I are saying about the realities of litigation. It's certainly something I prepare my clients for when they're looking at taking that step. I am one of those lawyers who say avoid the tribunal or court if that's the correct jurisdiction at all costs in my mind should be an avenue of last resort sometimes it is necessary in order to preserve rights if there are time frames and things like that or you are just hitting a brick wall.
But this is what you're facing when you do take that step and you've got to be prepared for that, as best you can, as an applicant in litigation.

Reena Van Aalst: Thank you, Amanda.

Amanda Farmer: My win for this week, I was asked by a strata manager inside our members' QandA forum about how to manage general discussion at meetings - specifically general meetings.

This strata manager was facing difficulties where the owners wanted to propose motions for the agenda, in this case, to discuss various items. And the motion was framed in that way to discuss, but then the manager was finding at the meeting - and this was happening

quite consistently at the meeting - those present were then coming to conclusions after their discussion, and making decisions and wanting to action items, whether it was to agree to do certain work, or sign contracts, or instruct somebody. And this manager was concerned that taking those steps was actually not legal because there was no motion on the agenda to do those things, to take that action, to engage that contractor, rather the motion on the agenda was to discuss.

And the manager said to me, “Amanda, how do I handle this? Am I right? I've been telling this community that they can't go about their general meetings like this.”

And my answer was “You are right, you are, as difficult as it might be, doing the right thing by telling these owners “No, the motion is to discuss the item, the resolution is therefore that the item was discussed.”

And to the extent you come up with some action steps from that discussion, then a further meeting will need to be convened. Whether that's a committee meeting, or a general meeting, depending on what you've discussed. And there must be a motion put forward to take that action, enter that contract, engage that person to do that thing. Reena, do you find communities getting off track with discussions, particularly at general meetings?

Reena Van Aalst: Yes, I mean I think for small schemes, sometimes they'd like to put on those motions, but I always tell them that's fine as long as you know that discussion is not a resolution. So, you can discuss what you want to do, but in terms of, as you said Amanda, it comes up with some action points like getting quotes. But definitely, and I tell them because people that weren't at the meeting don't have knowledge or any notice of what may be decided or agreed, and therefore they're at a disadvantage.

And had they known that you were going to like discuss them to approve a quote, then they would have come. So that's why the act is quite specific in terms of putting people on notice why there's an agenda, time, period, in terms of notices, etc. and definitely, when it's discussed, I just say “If you want an outcome then don't put on for discussion. Just raise it at the meeting” and then we can go ahead and say this matter was raised like out of the meeting and the manager was asked to get quotes. “If you want any resolution as such, then there's no point putting it on there. Apart from the context of this discussion.”

Amanda Farmer: Yes. I love that summary, thank you.

And thank you for pointing out that it is actually in our act that there must be notice of motions. For anybody wanting to refer to that, it is in clause 18 of schedule 1 to our strata schemes management act. A motion must not be submitted at a general meeting if a requirement to give notice of that motion has not been met. That's my summary, and I was able to point this particular strata manager to that clause in the schedule to confirm that yes, the manager was acting in accordance with the law by telling these owners that they shouldn't be making these decisions for all the reasons that you have summarized there too, Reena. Thank you for that.

Reena Van Aalst: Thanks, Amanda.

Amanda Farmer: All righty, gosh, we've covered a lot today. Love these chats. Thank you so much Reena Van Aalst for joining me, sharing our wins and challenges. I'm already looking forward to the next time.

Reena Van Aalst: Me too, Amanda!

Amanda Farmer: I'll catch you then.

Reena Van Aalst: Bye!

Amanda Farmer: Bye!

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 **yourstrataproperty.com.au**.