

Publication Date: 26 October 2023

YSP Podcast Transcript: 384. The strata lessons hidden in residential tenancy cases

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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 to this week's podcast episode. I'm your host, strata lawyer, Amanda Farmer. It's great to be here with you this week.

As always, lots happening in our strata space, especially where I am here in New South Wales. Last week, I walked you through some of the big changes we have to look forward to in our Strata Legislation Amendment Bill of 2023. Last Friday, I continued that discussion over on our Facebook page with our regular Friday Live session.

I had a bit of a closer look at the reforms, highlighting some more changes that I believe are going to impact you as owners, committee members, strata managers.

Last week I also came across a couple of cases of interest. Not strata law cases, funnily enough, residential tenancy cases. But cases that I believe have the potential to really impact the way that our buildings are dealing with claims from landlords. Where landlords are suffering loss and damage in a building where repair work is well overdue, where it's not happening, where it's not happening fast enough.

I spoke about those cases also during Friday Live, and I've decided to bring you that discussion, that part of Friday's discussion, to the podcast this week.

So what you're about to hear is an edited down version of Friday's chat. If you haven't joined us for one of our Friday Live sessions, I stream those to our Facebook page, to our YouTube channel, to my LinkedIn profile. And you have the opportunity to tune in and to chime in. Let me have your comments, your questions, your thoughts.

You'll hear me in this chat, saying hi to those who are joining me live, taking some questions acknowledging different points of view. It's always a great place to understand what's going on the ground, what's impacting you in your buildings as you live in them, as you manage them.

We've been running our Friday live sessions since about March 2020. Originally started as a way to come together during lockdown. But they've been so popular and so enjoyable that I have continued them to this day with no plans of slowing down anytime soon.

So today you're getting that part of our live chat that covers these important tenancy cases. You'll hear all the details coming right up, so I won't say much more on that.

Yes, I did outline some of the further changes coming to us with our New South Wales reforms, including an update on the progress of that bill through our parliament. You won't hear those details. So if you do want the full version of the chat, you want to go and check out the video, find that on our Facebook page.

Just search Your Strata Property, that's the name of the page, and you can like or follow the page to make sure you are the first to know whenever I'm going live. It's also the place where I post breaking news, updates and interesting articles and other stories that I might come across in our strata circles.

So I'll take you over now to this edited version of last week's Friday Live. You'll hear me open with a welcome to the new members of our online membership community and finish up with an invitation to our New South Wales strata managers to join me at an exclusive event that I'm hosting for the very first time in Mudgee in February 2024.

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You'll hear me mention a link to find out more and that link is in the show notes for you for this episode or just hit the homepage of the website, yourstrataproperty.com.au and you will see in the top menu there, your access to CPD in Mudgee 2024.

Space for that event is strictly limited and it is filling up. So I do encourage you to get in quick if you want to be there with me, with Reena with a number of other very special guests. You can find out who they are when you hit the website and learn more about the program I have in store for you. But right now, let's jump right into this week's episode.

Now speaking of members, member calls, new members inside our community. We have welcomed quite a few new members over the last few weeks. I want to say a special hello to those new members, to Stan, to Luke, Robin, Marlene, Kirsty, Yvette, Carmelo, Steve, Melody. Welcome all of you to the Your Strata Property Online community.

There was a lovely comment from one of our members posted in our forum a couple of days ago. That member is using the username, Stevie, which I can tell you is not at all connected to their real name. And I read out that comment in a video here on the page, which you might've seen earlier. Stevie saying that they were so deeply relieved to be in our membership community. So relieved that Stevie felt like crying. Stevie was saying thank you so much for providing this safe place to get some answers and to work out the most effective approach.

So if you are not yet a member of our online community and you need a safe place to get some answers, then come on over and join us. The place to go to find out about membership and to walk on in those membership doors is stratamembership.com. Richelle and Mina here helping me out today. We will drop a link here in the comments for you if you want to go check that out.

We're going to look at some recent media attention on strata this week. We are going to return to the Strata Legislation Amendment Bill 2023 for New South Wales, and I'm going to fill you in on a few more changes. You might have caught this week's podcast episode, but there's a lot of change coming and I haven't yet covered off all of that for you. So we're going to visit a few more changes that are coming up in that bill. Bit of news on that bill, actually, as I went searching, uncovered an update for you, I'll fill you in on that.

We are going to be having a look at a couple of cases involving landlords, strata investors, where those landlords have been slapped with orders to pay significant amounts of money to their tenants who have in two very similar very recent cases, tenants who have been suffering from water ingress, from mould.

Those tenants have been successful before the Tribunal in receiving their compensation awards. Raising the question, how is it that our landlords, our owners, get stuck with these bills when clearly in both of these cases, as I'll show you the reason for the water ingress and the reason for the mould was the owner's corporations failure to repair and maintain common property.

So I know you like a case, I know that is how we all best learn looking at those real life applications of our strata law. So I'll be taking you over to have a look at a couple of those cases all in our Friday afternoon here today. Alright, so that's what I wanted to say about the proposed changes to our New South Wales legislation. I've seen many more eyes come on in here live since we've kicked off. So if you've missed any of that, do head back and catch the replay of this chat.

This replay goes inside our member video library and it also sits here on the Facebook page, sits on YouTube and sits on my LinkedIn as well. If you need to go back and have a revisit and certainly if you've come in and you haven't yet said hello to me, feel free to say hello here in the chat. I'm seeing some new names come in here. John is here. Hey John, how are you?

Alright now let's turn to our cases, our landlords who have been ordered to pay significant sums in of compensation to their tenants. This story, that news story that I mentioned in my email this afternoon straight up. I wanna say thank you to Karen Stiles at the OCN, Owners Corporation Network for dropping this in my inbox.

I think it might've been Monday or Tuesday, it was early this week and Karen sent the link to this article, which I'm going to share on the screen. And said to me, "Amanda, surely the landlord who's been ordered to pay their tenants over \$14,000 has some kind of claim against the owners corporation." And I said, "interesting question Karen, I'm going to take this one to Friday live."

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So thank you Karen styles at the OCN for keeping me up to date. Owen saying, Karen's a great advocate for owners. She is indeed. And I did see a hello there. Hey Debbie, how you doing? And David is here saying hi. Awesome.

Okay, so this is the article. We've got a link for you if you haven't seen it yet. This one on [7news.com.au](https://www.7news.com.au) landlord order to pay tenants 14,000 over mouldy property. I'm assuming that's a video story about it. Please ignore advertisements about BET 3 6 5. That is not what we are here about today.

A New South Wales landlord has been ordered to pay her tenants more than \$14,000 after the property she owned became mouldy after heavy rain. So the application was made to the Civil and Administrative Tribunal.

It was a residential tenancy dispute, not a strata dispute, a two-bedroom villa. The tenants claim the rent they paid was excessive and they wanted a rent reduction. Now ultimately you can go through and read that whole article, but I could do one better for you. I'm going to give you the link to the case. I went searching through the reported cases for a case that kind of matched, kind of matched this description.

And I found it helpfully in this article. They disclosed that the member who decided the case was member French. I think and had they've let us know exactly the amount, and amount of compensation that was awarded, which was \$14,766.

Now the case which, I think, I will perhaps be able to share with you this way. There we go. This is it and I'm going to make it bigger for you. And Richelle and Mina have the link to pop into our comments here. Who wants to pronounce that name for me? Radford I believe was the landlord. This is a case where the orders were made on the 13th of September, 2023. The Tribunal has found that the rent was excessive and is not to exceed a certain amount.

There was a large refund therefore due to the tenant. And there was, that's the refund amount there, \$9,513. And there was also an amount to be paid for compensation for temporary accommodation expenses. So these tenants had to move out while the work necessary to rectify swollen floorboards and damaged walls over a couple of months over Christmas. Last year, the tenants moved out to temporary accommodation and this was the amount that the landlord was ordered to reimburse them for their temporary accommodation.

Bearing in mind that the landlord, I believe was also charging them rent at the same time that they had to move out and they were paying their temporary accommodation. So this wasn't a double dipping here, there was a reduction in rent and also an amount for temporary accommodation.

So this case, I'm not going to drag you through all of those, the all the paragraphs of the case, but do go and have a read of it. It's very similar to another case where when I went looking for this one, I found the other case, which is called Warland And Huang linked to that one coming to you as well. I don't think it's gonna come up on your screen, but that case were, the orders were made on the 20th of September. So only a week later than our Radford case.

And essentially the same thing, a claim for a reduction in rent because tenants had to live in wet mouldy conditions. In the Wallen case, it was a three-bedroom apartment and they were only able to use two of the three bedrooms. And ultimately their rent reduction equated to about \$2,000 I think was the claim.

And there was a claim for some damaged property as well in the Wallen case, the tenants also attempted to claim a part payment for the cost of their European holiday. Which they took while their accommodation, while their residence was uninhabitable. And there's a cute phrase in the decision that says that that is not the purpose of the Residential Tenancies Act to reimburse you for the part costs of your European holiday perhaps could have stayed elsewhere, didn't have to be in Europe.

So interesting cases I keep coming back to, they are tenancy cases, they're claims by tenants against their landlords for failure to provide suitable accommodation. And then charging what has turned out to be excessive rent. But in both of these cases, from the strata perspective, in both of these cases, the decisions record the landlord's attempted defence. And the attempted defences were these problems arise from defects in the common property, leaking roofs, and leaking balconies.

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And the mould that has occurred because of the dampness problem has occurred because the owners corporation is not doing anything to fix this. And it's not our fault said the landlords that the tenants have had to live in these conditions. It is the fault of our owners corporations. In the case that was reported in the news, there was some evidence that there was an insurance claim lodged on the part of the owners corporation. And they were waiting on an insurer to meet the claim and that's why no work had been done, not so in the second case, in the Wallen case.

The Tribunal in these Tenancy applications have said, "It doesn't matter. It doesn't matter that the landlord was waiting on the owners corporation to do something. The responsibility under the lease is that of the landlord. And that's a contractual relationship between the landlord and the tenant. And the landlord has these responsibilities both under that lease and also in the Residential Tenancy Act to provide accommodation that is dry, that is safe, that is free from health hazards and the landlord has failed in those respects."

There's a comment in one of the cases that there was no evidence that the landlord had communicated with the onus corporation about the issue. If they had, whether or not they had, they didn't put that before the Tribunal. I'm not sure that would've changed the Tribunal's position in any event by the sounds of these findings.

But if we think about the landlords in these cases and going back to Karen's question when she dropped into my inbox earlier this week, don't the landlords have a claim against the owners corporation here? My short answer to that and very generally speaking is yes, yes they do. And where it is not possible for a tenant to be claiming losses from an owners corporation, it is absolutely possible in New South Wales for a landlord to claim losses from an owners corporation where there has been a failure to properly maintain and repair common property.

And it is very often the case that a landlord's biggest first, most important head of loss is lost rent. Where they've had to move out a tenant or the tenant has claimed a rent reduction because of leaks. Because of floor damage, not being able to use a bedroom, mouldy carpet, mouldy clothes where a tenant has claimed those amounts from a landlord.

I have certainly been involved in cases where a landlord has successfully then claimed those amounts from an owners corporation. So I do hope that the landlord parties to these proceedings are getting some advice along those lines. And understanding whether or not they do have a claim against their owners corporations for these losses that they have now suffered having to pay compensation to their tenants.

And our New South Wales legislation makes it reasonably, or in my view, fairly clear that as long as these losses are reasonably foreseeable. And they arise from an owners corporations failure to repair and maintain, then they're the kinds of losses that are claimable. And loss rent damage to lot property. Those are the kinds of losses that I would think are reasonably foreseeable.

The one catch in all of this is that an owner must claim these losses within two years of becoming aware of those losses. So some of these cases, some of these claims did start a couple of years ago. So the landlords there will have to be very careful about that. But I know when I'm sitting down with owners, whether they're investors or whether they're owner occupiers. And we're talking about what kinds of loss they may be suffering because of a failure by the owners corporation to repair and maintain, I'm very, very interested in when that loss first arose and making sure that we're across that two year time period. Because you can lose that opportunity to claim.

I want to head back to, Wendy made a comment very early on when I first mentioned these cases today that I said I would come back to. And I believe it was about this question of insurance. Wendy said, "What if the mould is due to defects that the owner's corporation is trying to get the builders to fix for months?" Yes. So the reason why, that's a really important question Wendy, is because in New South Wales there's this provision in Section 106 of our Strata Schemes Management Act that says the owner's corporations duty, legal duty to repair and maintain common property can essentially be placed on hold if the owner's corporation is pursuing someone else in respect of those defects.

And the intention, I believe of that part of the section was to allow exactly this situation you're talking about where the owners, corporation's pursuing the original builder, it can have some breathing space. And not have to urgently and immediately rectify

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defects while it's waiting for the builder to do so and to get involved. And the trickle down effect of that is if the owners corporation doesn't have a legal duty to repair and maintain 'cause it's pursuing someone else, then the owner may not then have a right to claim damages. Because the breach of the duty has to come first and then the da the right to claim damages arises. So that could be a tricky situation for an owner, whether they're a landlord or whether they're an owner occupier suffering losses because of a failure to repair and maintain the common property. If the owner's corporation is in the process of pursuing someone else, then it may not, I say may not, who knows for sure, but may not be possible to recover those losses.

And I get asked the question in this context, well what does pursuing someone else mean? And we do have a case or two that answers that question and I believe the answer is there has to be some proceedings on foot. There actually has to be an application before the Tribunal. It can't just be we sent a letter to the builder, we're having a chat, it comes up at our meetings. There has to be some kind of legal action that has commenced and that is in train and there are deadlines and there's a timetable that's pushing everything along. We do have a case that makes that clear. I think it might have come up in our member forum.

I'm getting a thank you from Wendy with lots of exclamation marks. Good, glad that was helpful. I want to be clear also that these, while these are residential tenancy cases and they're claims by tenants against landlords, there is some really helpful discussion in there and articulation. I think of the kinds of claims that owners can make against owners, corporations.

And as always, I speak about the law in New South Wales, but the types of losses that the tenant has suffered there. In one of the cases there was damage to a table, damage to clothing, damage to a wardrobe, damage to carpet. There was this inability to use a bedroom, there was the need for the tenants to actually completely vacate the property for a couple of months while all the floorboards were ripped up.

If you're an owner occupier and you are facing exactly those kinds of losses in your own home, then in the same way tenants can claim those losses against landlords. You as an owner occupier can claim those losses against your owners corporation. So interestingly to me, there was a successful claim in one of these cases. It came up in both cases actually, and I think it might've only been successful in the Warland case.

A claim for loss of quiet enjoyment and a recognition that there was a value on that and that the tenant had suffered stress and anxiety because of the whole debacle of having to live in a mouldy premises, having to go through not being able to use part of the premises, having trades come and go. There was a figure placed on that the, the loss of quiet enjoyment and compensation payable to the tenant.

I don't see why those same principles wouldn't apply if you were an owner occupier and you were having to put up with that kind of disturbance. One of the tenants successfully claimed some lost wages for having to be present at the property on a few occasions to be able to show the tradespeople through and explained to them what the issue was.

She claimed quite a few hours of lost wages and was ordered just a small amount of that because they were the best evidenced claims. And the Tribunal said, "You know, on some other occasions you could have left your key with someone else. But on these couple of occasions it was clear that you personally had to be there to explain the situation. And I'm going to award you lost wages as one of your losses that you've suffered."

So interesting. There is, as I was reading this, I was thinking there's a, there's a treasure trove here for strata lawyers who may be arguing these kinds of claims on behalf of owners looking at these residential tenancy cases. And I fear, I fear, and I say this as a landlord myself, I fear that we're going to see more of these types of claims by tenants where we have aging buildings, where we have this difficulty. It seems to be able to engage and to pay contractors to do this ever increasingly expensive work in our buildings.

It's taking a long time to get big problems fixed and we're seeing this trickle down effect. An owners corporation, perhaps a strata committee who is frozen at that decision making stage for whatever reason, can't get quotes, can't get two quotes, going have to do that in New South Wales now can't get two quotes, can't move forward, can't raise the money, and then the resultant effects on the common property as it continues to deteriorate. Therefore impacting residents whether they be owner occupiers or whether

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they be tenants resulting in either Residential Tenancy Act claim or a Strata Schemes Management Act claim.

It's just the perfect storm. And when I look at the case law database and see two almost identical cases decided in the same week applying the same principles, that really, really hits home for me. Okay, heading over to catch up on these comments. Gail's saying great info. Thank you Gail.

Owen's saying, did they make a claim on strata insurance for loss of rent? Not mentioned as far as I can remember there Owen, I don't think that was mentioned but that is a good reminder, that's a good reminder that our landlords may have that opportunity.

However, you'll probably tell me as strata managers that it's becoming increasingly difficult for insurance claims on the building insurance perhaps claims on the loss of rent policies to be met and to be successful because the damage to the common property, the consequential damage to the problem is arising from a lack of repair and maintenance. And where you have a lack of repair and maintenance as opposed to an insurable event, then the insurer is going to be less likely to respond. So I've definitely seen buildings that are in a bit of pain there where the insurance claims have been declined, insurer sends out a contractor or an assessor and they say, no, not going to cover you because this is very clearly a lack of repair and maintenance. It's not as if we had a one in a hundred year storm and you've got flooding. So more and more difficult to claim on insurance.

Wendy saying, I found my landlord insurance didn't cover me if it was common property because it wasn't my property. Very frustrating. Yes, yes, that's right. So your landlord insurance or if you're owner occupy your contents insurance, there's often this intersection between those two policies. Contents insurer won't cover certain things to do with the building. Building won't cover certain things to do with your contents. Again, I've been surprised over the years by how much a contents insurer will cover where contents are damaged because of a failure in the building contents insurers often will step in and accept a claim. So always worth checking in with them if that's what you want to do.

At the end of the day, as an owner, you don't have to, you don't have to claim on your contents insurance. I've been involved in situations acting for owners who say, you know, the owners corporation says they won't pay to fix the problem and I should just claim on my contents insurance. Well, no, as far as I'm concerned, my view is you can't force someone, a lot owner to claim on their own insurance. Maybe they don't have insurance, but if they do, they may not want to affect their premium. If it is a problem that has been caused and damaged, that has been caused because of a failure in the common property failure to meet that duty to repair and maintain, then it should be for the owners corporation to fix that regardless whether the owner has contents insurance or not.

Richard's saying, very, very interesting. Good to see you here Richard. Sean B is saying planned, proactive maintenance and practical decisions by owners in the maintenance and budgeting of this will prevent issues. Yes. How many of those buildings have you got, Sean taking up their planned proactive maintenance?

Look, I always say I work with the top 2% of the top 5% of most dysfunctional communities, so I certainly don't see a lot of that, but if that was happening then it wouldn't come across my desk. So perhaps that is happening for most buildings out there in the world, which is good.

Okay, those are your two cases that I wanted to draw your attention to in our residential tenancies division of the Tribunal. But incredibly instructive I think for us in strata and strata lawyers who are dealing with damages claims, acting for owners as I do when these claims are being made against owners corporations, they're going to find a lot of juice, a lot of juice there in those types of decisions.

That's about all that I have for you today. If you are a New South Wales strata manager and you are on my email list, you would've got an email from me this week letting you know that we still have spots available for our Mudgee event. Our one day CPD event that is happening on the 23rd of February, 2024, right here where I am in my hometown of Mudgee.

And I have put the challenge out to you to make 2024 different, make it a different year. If you've got to October and you think, "Oh my God, it's October, another year is coming to a close and I had really good intentions, you might be thinking to focus on what

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matters this year to invest in my network, in my relationships. In making sure that I am stepping up into that role of trusted professional advisor.”

If you made all those promises and you've got to the end of the year and feel like you haven't quite got there, you've just been white-knuckling, I call it, hanging on to that rollercoaster, that is strata. I absolutely get it. And I challenge you to make next year different.

As I said in my email this week, what I do when I am making promises to myself when I want to make changes is that I take one small smart step towards making that change. And that one small smart step might be for you. Signing up to join us in Mudgee in February 2024 and get the year off to a flying start. It is a day that you will have me for the day there to quiz me on your strata questions.

Reena Van Aalst is joining us in Mudgee as well and a few other strata specialists that I have chosen, particularly because they are the ones that I can see changing the conversations that we're having in our strata space.

A place to get away here in the gorgeous countryside removed from the burdens of our troubled high rises. A place to breathe to plan your 2024 and to keep your promise that 2024 will be different. So if you haven't yet got your ticket, and I know there's a few of you here who have, I'm so looking forward to seeing you, if you haven't yet got your ticket, there is a link, Richelle and Mina are popping into our comments here.

Head over there, and find out about the program that I've put together for you. Find out who our special guest speakers are and secure your spot with us in Mudgee. I'm going to be enjoying the sights and sounds of Mudgee on this gorgeous, I've been looking out the window all day today. I did go outside once looking out the window and just marveling at what a gorgeous day it's been and a gorgeous weekend. I'm going to be enjoying all of that this weekend.

I hope you are doing something nice for you with those around you. I will look forward to seeing you all here again next week. I so appreciate your company and I will catch you next time. Bye for now.

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