

Publication Date: 20 June 2024
YSP Podcast Transcript: 413. Broker Bungle | Rolling Levy Motions | Transfer from Court to Tribunal

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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, Reena.

Reena Van Aalst: Hi Amanda, how are you?

Amanda Farmer: I am great and you must be feeling fabulous after your time overseas. How was your trip?

Reena Van Aalst: It was fantastic. I had a really nice time. It was so good to be away. And now I am back into the thick of things.

Amanda Farmer: I'm sure you had a long list waiting for you when you got back. And I know you're going to share a little bit about the conference that you attended over in Spain. So I'm looking forward to hearing all about that. Before we get there, jump in and give me just one of your challenges this week, Reena.

Reena Van Aalst: Well, this is an interesting challenge, Amanda. It relates to a reduction in office bearer's cover. So I don't know if any of our listeners, either managers or owners corporations have had this happen, but in one particular scheme that we've had a owner that has submitted many, many applications at the tribunal at NCAT, and there's only one actually, I think one in the whole time, but anyway, so therefore the broker said we're going to reduce the office bearers policy and to like, actually to zero. And I think you will why? I mean, the committee hasn't done anything wrong.

Anyway, so we managed to get like a couple of hundred thousand dollars in cover after a bit of argy bargy. But then what happened was the matter went to the tribunal and the owners corporation won the matter. And then when the policy, when that happened, the insurance broker didn't actually come back to us and say, well, we're going to reinstate the policy in terms of office fair's cover back to what it was prior to the reduction. So I emailed the broker and I said to the broker, you know, what's going on? You know, why is this happening?

And she said to me, well, the insurance companies, they're so like overstretched and overwhelmed with work that they don't even check anything. So they're just basically looking at things on a desktop basis. So and I thought to myself, well we're paying on this premiums. We have paid premiums in the past and in this case, the broker was the one that actually had not done their job by advising the insurance company that the owners corporation had won the case that there were no findings against them and therefore that the office of various politicians should be reinstated.

Over time, Amanda, what happened when the first advice came to us about not having any office fair's policy, the committee wanted to resign. And in a sense, we can't manage a building without strata committee. We don't have we only have partial delegation for just about everything that we do.

We actually sought advice from you Amanda and you did state that there was provisions in the legislation that protect a strata committee if they are acting in good faith and therefore the fact that they didn't have the full level of cover of the office bearers policy was in fact okay for them to remain on the strata committee because they actually all wanted to resign. So it's quite a bit of a scare for us. So I think that sometimes the impact of these decisions that are made by insurance companies are not made with proper consideration, I was told by the broker that, when I was trying to understand why we had this cover removed.

And they said, well, they don't really look at all the details. They don't look at the fact that, even their own expert, which they had appointed on our behalf to represent the owners corporation at the hearing, the engineer, there was a conclave that was appointed and there were three engineers that were consulting together. So they knew from the experts report that they had and pointed that we hadn't done anything wrong. The owners corporation had neither had the strata committee.

YSP Podcast Transcript: 413. Broker Bungle | Rolling Levy Motions | Transfer from Court to Tribunal

The second thing that was that a lawyer appointed to defend the claim, the lawyer could see from all the evidence that we provided that the committee had acted properly and in good faith and attended to all the issues and repairs that were requested. It was more about the owner not being happy with the methodology.

But even though those things were happening, the other part of the insurance company doesn't even register any of this. So there's doesn't know what the right hand is doing. So I think it's one of those things where I think for any owners corporation, the biggest portion of their expenditure is insurance premiums. Yet, because of the state of the insurance industry at the moment, we're having to, as managers, you know, follow up the broker, the broker holds up the insurance company. And, again, that's more time for us and more fees for the client.

Amanda Farmer: And I wonder how strata managers do actually follow up something like that. So Reena, you were attuned to the fact that, okay, we've been successful in this case. There is now no question, or there can be no real question about the strata committee's actions. They've essentially been exonerated by the tribunal. So I'm now going to go back and see if their insurance cover can be upped. I'm not sure that a lot of managers would have that on their list to do.

Reena Van Aalst: Yes, exactly, Amanda. Yes, but you're right. I mean, obviously, I'm always trying to make sure we look after our clients. But it's one of those things where, again, you've got to be always thinking ahead of people. And again, I think we all with this is very timely subject at the moment with insurance commissions and remuneration and brokers, etc. And, and the thing is, everyone knows that insurance policies are going up so significantly for many schemes.

And especially for this one, because again, the more claims you have, the more they increase your premium. So, and this is probably, as I said just before, the highest part of any budget for any expenditure for a building is their insurance premium. So you're paying a lot of money, but then you got to do the chasing.

Amanda Farmer: Yes, frustrating.

Reena Van Aalst: So the strategy you weren't happy at all. So it's funny just to think about in terms of any buildings where they're now perhaps the insurers are becoming more harsh in their assessment of office bearers policy and cover.

Amanda Farmer: And perhaps even extending that to building insurance policies where there might be some kind of notation on the policy, perhaps a higher excess because there are certain items that haven't been rectified and it may not be top of the list for a committee or a strata manager.

Once you do attend to those items, make sure you go back to the broker or directly to the insurer and let them know that you've done these things and see if those notations can be removed or however, it works in the insurance world so that if you do have a claim, then you're not restricted when you shouldn't be.

Reena Van Aalst: Yes, exactly. That's right. And sometimes you'll not realize it until it happens at all. Yes. So that's right. Exactly. Yes.

Amanda Farmer: Yes. I guess who's going to get blamed for that. Strata manager. Thank you very much for sharing that challenge, Reena.

My challenge today comes from our member forum. Sometimes there's some questions that crop up in that forum and I say, that's a great one for me to bring to Reena to solve.

And this one is a real brain-bender. Reena, we have spoken about this on the podcast before. Your recommendation, which I think is a good one, that when buildings are striking their quarterly levies at their AGM, they should also have a motion that makes clear that the levies will continue at the same rate until redetermined.

YSP Podcast Transcript: 413. Broker Bungle | Rolling Levy Motions | Transfer from Court to Tribunal

And that just makes sure that if you're a little bit delayed in having your AGM the next year, the strata manager can still issue levy notices for the next quarter and you are going to be able to keep the money coming in even though you may not have officially struck the levies for the next year. And I see a lot of agendas with that very standard now motion on there that levies will continue at the same rate until redetermined.

A member in our forum asked this question, Amanda, if we are under the New South Wales legislation supposed to be setting levies in accordance with the budget, which we have determined first. So the order at the AGM, first of all, we determine the budget, then we set the levies. How can we have a motion that keeps the levies rolling on if we don't have a budget that keeps rolling on when the legislation tells us we are supposed to set levies in accordance with the budget? Is it legal to set levies in the absence of a budget for that same period? And I went, that's a good one. Very clever.

And apparently it was that person's strata manager, perhaps in consultation with a lawyer who had picked this up and said, if we're going to have a rolling levy motion, which is often what they're referred to as, we need to have a rolling budget motion as well. And essentially make clear that we are extending the budget in the same amounts proportionately for perhaps another quarter if we are going to extend the levies in the same amounts for another quarter.

And I had a look at the relevant sections in our legislation. I had a look at section 79, which is our budget and section 81 which says that we then raise levies in accordance with the budget that has been determined. And I couldn't really see a way around that one. I don't know if this has come to your attention before, Reena, it was the first time I had heard it.

Reena Van Aalst: No, that actually hasn't come to my attention Amanda, but if I look at the legislation it says at an owners corporation must at each AGM estimate how much. So I don't know how you can estimate before you even have an AGM by continuing the levies at a certain rate, that's number one. And it says here when estimating the amount needed to be credited to the admin fund, the cap must have before it.

A statement of existing financial situation of the Strata Scheme and estimate receipts and payments. So the thing is that you've got to take into account what money you have. I mean, obviously you're the lawyer and I'm not, so I don't really know if it's saying that, that you must have a budget in order to have be able to credit money to the to the admin or capital because you can track a special levy at any time anyway so that doesn't require you to have a budget that just requires you to say that there's a shortfall in in your funds to do budgeted work so the thing is I mean and that also flies in the face of the fact that now an AGM can be held within 12 months of the financial year so on one hand no one's saying that you have to have it even earlier, which would sort of predicate the argument that you had to have a budget.

And so In terms of cash flow, I think that that notion has been included to allow the owners corporation to continue to be able to fund its expenditure until the revised budget is passed, or the budget is then passed at the AGM, at which you look at how much money you've got in the bank, because you've already collected that one quarter or two quarters.

So yes, I mean, obviously, I haven't looked at the legislation in the way that that person has said that. And it says that you must when you're looking at your budget, you look at your levies, but the levies will show you that you've already had some money coming in the first quarter and therefore you are looking at the funds. So I'm not really sure if you can say that without a budget, you can't have levies. It just says that you need to look at your financial situation when you've passed your budget.

So, I think it's not as I'm not sure if it's where it says that you can't do that because when you estimate an ounce it need to be credited you need to take into account how much you've got but so how much you've got would include the first quarter. So, if you're raising say \$500,000 you've already raised 100 you only got to then raise 400,000 for the rest of that year.

Amanda Farmer: Yes. I think the point was that in having this motion to continue levies at the same rate, you are essentially striking more levies, but you haven't got a budget to back up those additional levies because your budget only goes for 12 months and you're striking levies for perhaps 12 months plus another quarter.

Publication Date: 20 June 2024

YSP Podcast Transcript: 413. Broker Bungle | Rolling Levy Motions | Transfer from Court to Tribunal

Reena Van Aalst: Yes, but I mean, but those expenses aren't stopping just because they haven't been budgeted like, so that's a very sort of, and also, I mean, sometimes what we're doing now. We're actually budgeting higher. So what we're doing now, we're actually budgeting the first quarter of the new year is going to be higher because we know that the budget's going to be higher. So we're already crediting a higher amount than just keeping it the same because otherwise any increase will have to be born in either three quarters or two quarters. So and sometimes it's a cashflow thing. Sometimes we know that we have a bill coming. Let's say it's your insurance premium that's due on the last day of say your financial year, then you got to make sure you got the money in the bank so that the first quarter could be even higher. So again, it's not as sort of yes.

Amanda Farmer: The other thing that I noticed in looking at these sections, unless I'm missing it, that doesn't seem to be any legal requirement that your budget cover 12 months.

Reena Van Aalst: No, that's right.

Amanda Farmer: You can have a budget for 18 months if you want, you can have a budget for nine months if you want. I don't know if buildings ever do that, but it's certainly not in there that it needs to be a 12-month budget.

Reena Van Aalst: Yes, it just says that each annual general meeting, but you're right.

Amanda Farmer: To meet the estimated expenses. It doesn't say the estimated expenses for the next 12 months or for the financial year. That might be somewhere else in the act where I'm missing it. Someone will let me know if I'm wrong, but you know, there's an idea that you could approve a budget for a limited period or a longer period than 12 months.

But look, as I think I answered this member in the forum, is anybody really complaining about this? You know, are we creating a problem that we don't have here? I think it's important to think, practically and pragmatically about these things, especially when there seem to be gaps in our legislation and make the least worst decision. And I think leaving your building short of funds because you might be having an AGM later than planned is probably not a great move. And I would be surprised if somebody were critical.

Well, maybe I wouldn't be surprised about them being critical, but I'd be surprised if there would be found to be a reasonable basis for someone to be critical of that kind of practice on a pure and technical reading of the legislation. So I'm certainly not here today suggesting everybody stop passing these rolling levy motions. I don't think you're allowed to do it. I just thought it was an interesting brain tickler for us.

Reena Van Aalst: Well, I mean, the other way that it would be not so good is to say, let's have a special levy on the first, which would meet the shortfall because we haven't got a budget and we don't know what we're going to spend. So the other thing also matter too, is that if you don't have that first quarter coming in, then you've got to then have it paid very close to the second quarter.

Amanda Farmer: Yes.

Reena Van Aalst: So it actually means that the way it's being done is it's evening out the payment cycle because people never so think, well, I haven't paid the lease for six months. So it doesn't matter. I'm paying all this now. I think I don't have the money now because people obviously spent the money or, you know, that sort of thing doesn't psychologically link together, but we're actually increasing the first quarter already. So that, cause we know levies are going to go up. So even if they decide to raise less than the rest of the year, at least we know we've got that first amount coming in covering costs.

You know and sometimes buildings have money in term deposits so again if you have money in terms of you can't just go break it because you've got even months notice and sometimes I've had buildings where they've run out of money because they've had money in term deposits and they didn't raise enough money in their normal thing so I have to say so we're basically like Rob P to pay Paul because they had all this money in term deposits they spent too much in their normal fund and they got one month's notice to break a term deposit I said yes.

Publication Date: 20 June 2024
YSP Podcast Transcript: 413. Broker Bungle | Rolling Levy Motions | Transfer from Court to Tribunal

Amanda Farmer: You hinted earlier, Reena, that perhaps part of this problem is due to the requirement now that you only need an AGM once in each financial year. Whereas previously you had to have your AGM within two months of the anniversary of the last one. Is that my recollection of the old legislation?

Reena Van Aalst: No, of the first AGM.

Amanda Farmer: So then assuming that had been complied with year on year, you would always be holding the AGM at around about the same time, give or take two months. Do you think that was a better process? Do you think that helped buildings focus that AGM data a little better?

Reena Van Aalst: Not really. I think most of us do want to hold our AGMs very quickly after a financial year in because we want to make sure that we set levies at the correct rate. You don't leave it for six months and then have to do one increase by double and like a 10 % increase overall annually if not done within six months is 20%. You know what I mean? Like 10 % annual is 20 % payable. So I think none of us want to do that.

And no one ever complied before. I mean, as in people didn't necessarily comply because they sometimes might have had delays for legal reasons or they're waiting for something to come in. And then there were no cases about people not having them on time. So I think no one's delaying them because they want to delay them and because of the legislation. I think it's more of, we want to get the right amount of money quickly. It's just that there are sometimes things like other issues that there's no point having them in AGM if you don't your body management tender hasn't been done. You don't know if your body management is going to go up or down.

Amanda Farmer: So it gives you more flexibility, which you think is helpful.

Reena Van Aalst: Yes, I think it has been there. But I think, I mean, there are some have been delayed but not to the extent that I think anything to do with legislation would, but let's now change the act to say within six months rather than each financial year. I don't think that's the case. That's only my personal experience, but it could be different fathers out there.

Amanda Farmer: Good to know. Well, thank you for having that discussion with me, Reena. Over to your win for this week.

Reena Van Aalst: Yes, well, part of my trip included attending the International Research Forum on Multi -Owned Properties that was held on the 15th of May to the 17th of May in Tarragata in Spain. And that was put on by Hazel and her team from the University of New South Wales. And we had some great speakers that attended that and gave papers all over the world. Michael Tease was one of the ones that was from Australia as well. And I think that it was showed us in a sense, all the problems that we're facing here in Australia are very similar in the world as well.

So not as if Australia is unique in that sort of multi-apartment living, all the challenges that we're facing. I think Australia is much more strongly focused on making sure that buildings are well maintained. And we have the capital fund forecast and buildings having to repair and maintain as a statutory obligation. Other countries don't have that. We had speakers from Australia, We had speakers from the US, from Belgium, from Spain, Israel, all different countries. And in Spain, 70 % of people live in apartments. So it's a high. So that was a good place to sort of talk about multi -unit living and all the challenges. And so, yes, it was fantastic. And I learned a lot in terms of how do people do levies over there, what's the interest rates, all the different things that.

Amanda Farmer It's huge.

Reena Van Aalst: And then it was more an academic, obviously conference. So it wasn't, but it was good to listen to academics in different, different parts of the world and talk about their experiences. We also had someone from Singapore as well. So it was very well. We had an Ethiopia too, Strata Island Ethiopia. So there you go. Yes.

Publication Date: 20 June 2024

YSP Podcast Transcript: 413. Broker Bungle | Rolling Levy Motions | Transfer from Court to Tribunal

Amanda Farmer: Fascinating. Well, look, you let me know who the stars of the conference were and I would love to invite them to have a chat on the podcast. That would be great.

Reena Van Aalst: Yes definitely.

Amanda Farmer: Always good to look beyond our own backyard, I think, to see how others are doing it differently, doing it better, to see perhaps that with all of our problems, we're making a good fist of it as best we can compared to others.

Reena Van Aalst: Yes, but I think the main takeaway for me was that all buildings in countries are aging and needing more money. And therefore this is a very common theme in terms of what was being spoken about at the conference and about whether buildings have to be, you know, like strata and neural process should be taking place, how it should take place. And, you know, that sort of mechanism was a very, for buildings that hadn't that needed to be basically demolished. And I forget that there's some older.

Strata has been around, I think, in a lot of countries for many years, in some form of living. So it's one of those things. It was just interesting to understand the termination processes in other countries, and then all of them now are more at 75 % like we have now in New South Wales. So yes, it was interesting. Yes.

Amanda Farmer: Right, interesting, yes. Excellent, well thank you for representing us. Over there.

Wrapping up with my win for this week, I wanted to share perhaps a little bit of technical litigation procedure with everybody. I was recently involved in a case that is still ongoing and I might be able to say a little bit more about it in the future. But as part of this case, it was necessary to transfer the proceedings from the district court where they were commenced over to the tribunal.

I'll give you a bit more information. This is a case where a lot owner is being sued by their owner's corporation for an alleged failure to pay levies and fairly straightforward legal proceedings. You would usually think the amount of unpaid levies was quite high over a hundred thousand dollars. So the proceedings were commenced in the district court by the owner's corporation against this owner. And this owner has taken the position that the levy that is outstanding is invalid and that she is not required to pay it. She was encouraged to seek advice from a strata lawyer who is better able to understand than perhaps a straight litigation lawyer.

The nuances involved in that kind of a case, that strata lawyer ended up being me. And when we had a look at the case, we realized that there was a little bit more going on here than just, an unpaid levy. And for that reason, the district court was probably not the appropriate place to decide the dispute.

The tribunal has power under our strata legislation to do certain things like declare that a resolution creating a levy is invalid or to find that the levy is excessive or otherwise unreasonable or even the power to appoint a compulsory manager if things are not happening as they should be happening in a Strata Scheme. And for that reason, it was our position that these proceedings properly belonged in the tribunal, not the district court.

I'm classifying this as a win because when this was explained to the owners corporation and the owners corporations lawyers, they very promptly agreed that the proceedings should be transferred over to the tribunal. So that is in the process of happening. What seemed to be a fairly straightforward levy recovery proceeding has morphed into something a little bit more complex that involves some other areas of strata law.

And where that happens, it is important that your proceedings are in the right jurisdiction and there is power in both the district court and in the tribunal to make sure that that transfer can happen.

Reena Van Aalst: So Amanda do you need the consent of the other the ounce corporation to allow you to transfer it or could they have fought it and said no?

Publication Date: 20 June 2024

YSP Podcast Transcript: 413. Broker Bungle | Rolling Levy Motions | Transfer from Court to Tribunal

Amanda Farmer: Yes, they could have fought it. We didn't need their consent. The way that it's done is that you file a motion in the district court, which is like an application, a request of the court to say we would like to transfer and these are the reasons we'd like to transfer. As it turned out, the owners corporation said, yes, you can file your motion, but we consent to that motion. And generally the way things happen, if there is consent to a motion, then the orders are simply made and the result in this case, a transfer happens quite smoothly.

Now I appreciate him being a little bit cagey about the facts in that case. They are interesting. I'm sure I've picked your interest. I hope I can share a little bit more about that case with you all in the future.

Reena Van Aalst: So I can probably just ask you one thing, Amanda, and obviously you can sort of say whether you can answer or not, but I assume it was a quarterly levy, but it wasn't just like a normal, say, you know, \$1,000 a quarter type levy. It wasn't that sort of levy.

Amanda Farmer: It was a special levy and a special levy raised for, allegedly a particular purpose. And it is that single special levy that is being disputed. Yes.

Reena Van Aalst: Okay all right so it's not your regular quarterly levies that okay that's interesting well let's see wait to hear more when you are able to tell us more.

Amanda Farmer: Yes, indeed. Thank you very much for joining me to catch up on the podcast, Reena. We did miss you during your time away and we're glad to have you back. I'll let you back out into your busy schedule and look forward to catching up with you next time.

Reena Van Aalst: Thanks, Amanda. Take care. Bye.

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