

# THE ROGUE STRATA MANAGER – A Nuanced cross jurisdictional response by way of hypothetical - Susan Proctor FAICD, LLB, BA, NSW Accredited Specialist Property Law

## Topics Covered:

Building Defects and SM in adopting role of Project manager;

Strata Manager tapping into funds;

Termination of Strata Manager;

Cladding Current Issues faced by EC and role of EC/SM.

## Jurisdictions Covered:

ACT

QLD

VIC

NZ

NSW

WA

## Participants:

Susan Proctor – Proctor Legal, Host (ACT)

### Panel Members

Jason Carlson – Grace Lawyers, (QLD)

Tim Graham, HWL Ebsworth, (VIC)

John Greenwood, Greenwood Roche (NZ)

Stephen Goddard, Goddard & Co, (NSW)

Pino Monaco, GV Lawyers, (WA)

## **INTRODUCTION**

A rogue is but a vagrant, tramp by another name, a dishonest or worthless person, a scoundrel. To apply the descriptor in the context on which I embark comes with the potential threat of law society proceedings, defamation and harassment, but bravely I will take on that challenge in the interests of the broader strata community and naturally on a hypothetical basis.

The Rogue Strata Manager...Let me introduce you to Maria.

## **SCENARIO ONE**

Maria is a strata manager and licensee in charge of 'Strata Management Matters' (SMM) with a catchy by line 'Your investments are our Passion....we know that the three most important things to anyone are cashflow, peace of mind and return on investment...'

SMM has embarked on an aggressive growth strategy and touts itself as being 'one of the only Strata Managing Companies to offer services Australia and New Zealand wide', such drafting really gives some indication of where Maria is taking this Company...

Part of the SMM expansion strategy across markets is to target more vulnerable OC's who have had/are experiencing significant building and management issues, and that are in the process of changing over strata managers and that are enticed by SMM's low pricing and cross jurisdiction operations and greater perceived resources and systems.

SMM grows its base by responding to EOIs across jurisdictions and signs up a new OC (aptly named 'Didled' OC) in the ACT.

The OC does not get advice on the Strata Management Contract and relies on the assurances made by SMM that it holds all relevant licences to operate in the ACT. It does not appear that much due diligence has been conducted and presumably SMM have got through the EOI process on price and national experience/strength.

All appears well and the OC is attempting to address some of its historical issues with SMM leading the way, when some of the OC's contractors start complaining about unpaid bills.

In following up the enquiry with the SM, the treasurer of the EC is assured that payments will be made soon, there are just some auditors conducting a review of the accounts currently held throughout Australia and New Zealand, and that matters will be business as usual on completion of the audit.

The EC then receives notification that Joint Managers of the Company have been appointed by NSW Fair Trading but that SMM is not currently in voluntary administration, receivership or liquidation and that the role of the Managers is to undertake a reconciliation of the trust accounts while managing the ongoing business.

The correspondence raises concerns in relation to monies (that may be) unaccounted for and that some communities may need to raise special levies if there is such a deficiency and alerting the EC to the possibility of making a compensation claim against the applicable statutory government fund. This however cannot commence until such time as the monies that may be deficient are sufficiently identified. It is noted that the Managers intend to sell the SMM business and will continue to trade it until such sale occurs. The Managers note that the business trades in every state and Territory and in

NZ and that the process of completing the audit will accordingly take some time.

<b>Scenario 1 Questions</b>	Please respond as to how you would within your jurisdiction only.
Jason – QLD	Jason, you receive a call from the Treasurer of an OC when they receive the notice from the administrators which refers to Sections of the NSW legislation in relation to the appointment of administrators and they ask you for guidance as to what it means for them in the context of Queensland Law and what is the applicable compensation fund if they have a shortfall in their accounts?
Tim – VIC	Tim, you notice that some of your accounts have not been paid by SMM for work that you have completed for an OC in VIC. In following up same the OC seeks your advice as to whether or not they should terminate the Strata Management Contract in these circumstances. What process would you recommend the OC embarks on?
John – NZ	John, the Treasurer of an OC calls you and seeks your urgent advice as to what to do on receipt of advice that there are anomalies in the trust accounts of SMM, which have been notified through the generic correspondence issued by the Joint Managers of NSW Fair Trading. The Treasurer asks you what, if any, statutory government compensation fund exists and how does it work?
Stephen – NSW	Stephen, you are contacted by your ACT college buddy, who is the solicitor tasked with making the NSW Claim for the ACT

	Owners Corporation when it becomes known that the Diddle OC has had over \$1 mill in funds misappropriated. She seeks your guidance as to how long such claims take in NSW and how successful they generally are and what other avenues you may take?
Pino – WA	Pino – you are instructed by an impacted OC who has had over \$500k of misappropriated funds notified. How do you advise your OC as to next steps to take in terms of WA law, statutory compensation claims and other avenues of potential redress?

## SCENARIO TWO

A former lawyer, turned Strata Manager, lets call him Bill, has established himself a rather lucrative strata management business targeting smaller OC's with building defects in less affluent suburbs. The bespoke Strata Management Agreement includes a provision that basically puts the powers of delegation of the OC into the hands of the SM, without requiring any reference back to the OC.

Bill has a team of preferred engineers, lawyers and maintenance crew that Bill regularly engages on behalf of the OC pursuant to the above delegation and without the specific authority of the OC.

The OC is struggling with the cost of the reports, the recommendations of lawyers and the consultants in terms of the costs of significant works to be effected, all that have been obtained without reference to the Owners Corporation or its Executive Committee. The Committee is increasingly frustrated and concerned as to the lack of funds and current state of affairs regarding management issues. The EC is worried that the SM may be taking kick backs for referring the work and is charging time for “project management” costs.

The EC has serious concerns as to how the OC’s funds have been utilized and applied with no transparency provided. The SM refuses to provide financial information or to communicate other than through the owners portal and seeks to ostracize the committee from other owners.

The active undermining by the SM is encouraged via other owners in complaints and threats made to the EC by a single member of the OC.



<b>Scenario 2 Questions</b>	Please respond as to how you would within your jurisdiction only.
Jason – QLD	The Chair of the EC rings you and advises that the consultants reports indicate that there is punching shear in the stairwells and that collapse of the roof is imminent if remedial action is not taken. There are no funds to cover such works and the SM is proposing a loan arrangement be entered into, however the EC has significant concerns as to the reliability of the claims being made and the role of the SM. What process can the EC undertake in relation to the SM.
Tim – VIC	The EC indicates to the SM that they no longer have confidence in their management and that they will seek an alternative SM. The SM responds in return that the EC has not been validly constituted and therefore has no standing in making decisions on behalf of the OC. What advice do you provide to the EC in relation to the agency agreement and the potential termination of the SM.
John – NZ	The SM refuses to release information necessary, citing privacy concerns, for the EC to communicate with the Owners for the purposes of calling an SGM to address the urgent works issues – what can the EC do?
Stephen – NSW	The SM dramatically resigns at the SGM and thereafter notifies the EC that it has a three month period to collate the books and hand over same. The EC wishes to access its funds and stop the SM from accessing those funds urgently, what can it do?

Pino – WA	The EC is concerned and disenchanted about the whole process and ultimately an administrator is appointed. What complaint mechanisms exist for the EC to ensure others do not suffer the same fate in relation to the inappropriate actions taken by the SM.
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### **SCENARIO THREE**

The OC of ‘Combust’ are precariously close to no longer being capable of maintaining its building insurance, due to its Combustible Cladding casing.

The Broker has searched thoroughly but the advice has come back that the OC will not be able to get insurance until such time as sufficient remediation has occurred.

This leaves the owners with significant issues, including compliance with the law – the statutory requirement to maintain insurance, their mortgage terms – and potential breaches and the threat of stigmatisation.

<b>Scenario 3 Questions</b>	Please respond as to how you would within your jurisdiction only.

Jason – QLD	The EC approaches you with the threat of the building no longer being insurable - what are the risks the OC faces?
Tim – VIC	The EC understands there is a remediation contribution it can seek, how does it organise itself to do this, what is the role of the SM?
John – NZ	The EC have identified and remedied the cladding issue at a significant cost, what compensation schemes may be available to it? (any comments re class action by Omni Bridgeway/High Court?)
Stephen – NSW	An OC wishes to borrow for the remediation works, how does it close out on future risk for insurability?
Pino – WA	What information is the OC obligated to or recommended to make public/provide by way of disclosure in a sale process, would the building be considered stigmatised?

## LEGAL DISCLAIMER

The fact scenarios are very loosely based on some cases/circumstances that may have arisen with a healthy dose of fiction, and the responses are on a jurisdictional basis. This paper and the presentation does not constitute legal advice and should not be relied on. Should you require legal advice you should seek it out accordingly.