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YSP Podcast Transcript: Episode 064. In Conversation – the battle to evict a terror tenant and the importance of getting Tribunal applications right

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Amanda Farmer: Hello, and welcome. I'm Amanda Farmer, and I have with me today Reena Van Aalst. Hi, Reena.

Reena Van Aalst: Hi Amanda, how are you?

Amanda Farmer: I'm doing very well, thank you. I have had a busy week, a bit of tribunal work this week. Having time out of the office always keeps you on your toes, but it's good. That's what we enjoy doing as lawyers: advocacy, and getting good results for our schemes. I'm going to mention that one of my wins this week happened in the tribunal, so we shall get to that shortly. But, before we get to wins, we always like to talk about challenges. What's been your challenge this week, Reena?

Reena Van Aalst: Well, based on our previous podcast, Amanda, of ... Speaking about, you know, the expiry of the time coming up for agency agreements ... I had a committee approach me back in April, actually, and they asked me to put a tender in, did an interview, et cetera. And they had a community meeting and decided at that community meeting that they would appoint Strata Central, and they would terminate their current managing agent. So, they asked me for the motions that would be issued for that particular part of the agenda, and I submitted those motions with the explanatory notes. And the agency agreement, of course, which should be next to the agenda, so that owners know exactly what they're approving.

And so, when the agenda was issued, one of the owners rang me, and he was part of the interviewing committee. And he said to me, "Reena, something's not right here because your motions have been put in after the motion to reappoint." I said, "That's strange." So, what the agent did was, basically, put the motion to terminate and to appoint Strata Central at the end, and put their own motion to reappoint themselves before the motion to terminate. Every other motion that had been submitted by the strata committee in terms of some by-laws, et cetera, had a note saying, "Submitted by the strata committee." But, the motions they were being terminated had these two particular items omitted. Every motion on the agenda had an explanatory note, except the motions that I had provided. And the motion that I had provided for the appointment of Strata Central had been amended, and-

Amanda Farmer: Oh.

Reena Van Aalst: Exactly right. And then, the agenda did not have the agency agreement, it only had the agency agreement of the incumbent agent.

Amanda Farmer: Oh dear.

Reena Van Aalst: So, anyway, so I've been ... The committee also contacted me and I said, "Well, you need to ask the agent to reissue this agenda. This is not correct." So, anyway, within a few hours ... I don't know if the committee even had time yet to contact the agent. And, that afternoon, the agent reissued the agenda by email only, and said: "Please find attached revised agenda with some amendments." It didn't say what the amendments were, so then the committee asked me to have a look at it. I had a look. So, one part was that their commission was going to be increased by plus or minus 10%, instead of the previous motion that had 5%. And my motions had been put back in exactly as they were given, with the explanatory notes, but the agency agreement had not been included.

So, I was actually quite taken aback by the behaviour of this agent, who I know works for a reputable company. And I've spoken to the principals, who basically have said to me, "Thank you for bringing this to our attention," and they're "going to remedy the situation." But, I just think that it's really interesting to see how some managers take it upon themselves to do whatever they can to keep a building, and it was just ... I was quite surprised. And the other thing that happened during the meeting was that this



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manager was asked to leave the meeting while the motions to terminate were discussed, and he refused.

Amanda Farmer: Goodness. I'm not sure why you would think that's a good endorsement for your service, first of all.

Reena Van Aalst: Yes.

Amanda Farmer: To be not putting an agenda together in the way instructed, and then refuse to leave a meeting when requested ... That's a little bit odd.

Reena Van Aalst: Yes. So, anyway, that was bit of a challenge. I mean, I think that the poor committee members didn't know what to do.

Amanda Farmer: Yes.

Reena Van Aalst: And I sort of felt very vulnerable, because they were just being dictated to by the strata manager, without having any say. And, even though they had a strata committee meeting, and they had minutes to say, "This is what the decisions were," and some ... Related to things ... As I said earlier, a matter about by-laws ... Something related to this aspect. You know, he decided what he would say, and how he would say it, and what order it would go in, and ... I think that when a relationship breaks down ... Like, one between a strata manager, and the committee, and lot owners ... I think it's just important as agents, you know ... It's good to leave on a good note. There's no point undertaking such disingenuous activities and underhanded type of behaviour because it really backfires.

Amanda Farmer: Yes.

Reena Van Aalst: And I think that, if you try and keep people against their will by just trying to do things like that, it really does show you in a bad light.

Amanda Farmer: Yes.

Reena Van Aalst: And I think as agents wanting to be professionals in our industry, and making it more lucrative, and more enhancing for lot owners, and for prospective people to bank strata management as a career ... It's not really good to have these types of things happening because it really gives a bad name to strata managers who, on the whole, I think, do a very good job. You know, we work very hard. It's not an easy job. And then people like that, you know, really give the industry a bad name.

Amanda Farmer: Yes, I agree. And not a very nice thing to have happened to you. But, good on you for being able to sort that out together with the committee, and also bringing it to the attention of the principal of that business, so that they were aware that one of their employees was conducting themselves that way.

Reena Van Aalst: Yes.

Amanda Farmer: What I'm actually seeing a little bit of lately, and I wonder if this will increase, is buildings who have gotten a little bit more savvy when it comes to holding meetings, and are excluding their strata manager altogether. From the process of putting together the agenda to chairing the meeting ... And, the couple of meetings that I've been to for the purpose of assisting those committees to run the meetings ... They say that they've done that because they don't see the value in having their strata manager there. And they say things like you've just said there, Reena, "The agenda's not put together properly. They don't put on the agenda what we want, so we've had to go and do our own agenda. And we also find that the meeting is taken over with the way they want to run it, and the things they want to discuss, rather than what we want." And I think that's what will happen. Buildings will vote with their feet, whether it's looking for another strata manager, or excluding the strata manager altogether.

Reena Van Aalst: Yes, and that's a bit sad, Amanda, like you said, when people don't even want the strata manager to be in



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attendance, because ... I was at a meeting last night, and people said to me, "We want you to have input." And I said, "Don't worry, I will give my input," whereas previous managers just sat there and didn't say boo.

Amanda Farmer: Yes, yes.

Reena Van Aalst: I'm thinking, "What's the point of having someone that doesn't say anything?" I mean, even if you say, "Yes, that's a good idea," or something, like-

Amanda Farmer: Yes.

Reena Van Aalst: I mean you don't have to always disagree, I just-

Amanda Farmer: Add some value, please.

Reena Van Aalst: Yes, add some value, yes. And you're being paid to do not just the minutes, but to give advice, so.

Amanda Farmer: Yes.

Reena Van Aalst: Yes, that was an interesting experience that I came across, where it is quite common that managers sometimes don't give value. And, at a meeting, it's your time to actually shine. And, in a sense, show what value you can give, show what your skills are, show what your experience is. I mean, everyone's different in how they do it. And every committee has different types of ways of running the meetings. Sometimes the chairman likes to give more time for the manager to assist. So, whatever the way that the building is run, it doesn't really matter. You need to fit in within that cultural part of committees that exists.

Amanda Farmer: Yes. Good advice. And I love that; meetings are a time for strata managers to shine. And it's so true. You're so often behind the computer screen, at the other end of the phone, or the email. And buildings really are questioning, "What do you do for us?" And it's when you're sitting there in that meeting that you have the opportunity to show your value. So, a really good message for all of our manager listeners.

Okay, well, my challenge this week ... Or, a challenge that I have been approached with by a lot owner ... This is a problem that I think I've mentioned before on the podcast, but this particular lot owner seems to be experiencing it to another degree.

What's happening to this poor lady is that the owners corporation has done some workaround on the common property. I'm not sure whether some of that involved accessing lots and the courtyards for the lots. But, basically, what's resulted is this lady has suffered damage to her lot property. And, from her point of view, that's because the owners corporation hired a negligent contractor who didn't do things the way he was supposed to. And that has caused her significant loss of amenities. She can't use her courtyard. Apparently, it just fills up with mud when it rains. I think what the problem is ... The levelling of the courtyard wasn't done properly, so she's basically got this muddy swimming pool in her yard. And, the question that she's asked me is, "How do I deal with this? This contractor was employed by the owners corporation. They've done some shoddy work. Who is my claim against? Is it the contractor? Is it the owners corporation?"

And I've said it is the owners corporation who you need to be talking to about this. They are the ones who have the relationship with the contractor. You don't have a legal relationship with the contractor, but you do have a legal relationship with the owners corporation. And they do have a duty to repair and maintain common property. But, also, where they have carried out work on lot property, then there is actually a section in the act that requires them to ensure that they don't damage that lot property. Or, if they do, that they fix it up before they finish.

So, that section I'm talking about is Section 122 in the Strata Schemes Management Act 2015. It's Subsection 6 of Section 122. I'll put a link in the show notes. And it says that "An owners corporation is liable for any damage to a lot, or any of its contents, caused by, or arising out of, the carrying out of any work, unless that damage arose because the owners corporation was

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obstructed or hindered." So, in this lady's case, there's been no obstructing or hindering of the owners corporation. They've carried out work, and her lot property has been damaged, so she could claim that damage back from the owners corporation. She's also queried whether, in this situation, there might be some negligence on the part of the executive committee. Because they seemed to, unfortunately, have contracted with a builder who wasn't qualified, and is potentially uninsured.

Reena Van Aalst: Oh, that's very concerning.

Amanda Farmer: It's all a bit of a mess. And I've said to her that I do have coming up on the podcast a representative from CHU. He's going to chat to us about executive committee liabilities and deal with office bearer's liability coverage. But, unfortunately, there's no quick, easy answer for this lady. She does have rights, but ... Trying not to be a typical lawyer and suggest litigation ... I just don't see how she can resolve these significant issues without going down that path, unfortunately.

Reena Van Aalst: So how have her concerns been addressed to date by the owners corporation?

Amanda Farmer: What I hear is that she's raised the issues with them. They say, "Oh, we're talking to the builder. Oh, we're trying to resolve it. We're having these problems with the builder because it turns out he may be unlicensed or doesn't have insurance," or something like that. And she's really being pushed aside. And the owners corporation has more important things to do, but in the meantime, her courtyard is a muddy swimming pool. And, quite rightly so, she wants that fixed.

Reena Van Aalst: Yes.

Amanda Farmer: So, I have been involved in these kinds of situations before. It generally starts out with a letter from me reminding the owners corporation of their obligations. And it's not good enough, in my opinion, for owners corporations to say, "Oh, yes, well, we're dealing with it over here on the one hand, with the builder, and you're just going to have to wait." It does happen. And owners corporations sometimes don't make any move until litigation is commenced, which is unfortunate that owners have to go to that expense. But it's also important for owners to be aware of their rights, and that they do have these rights. And something like Section 122 can give them an avenue to at least start that conversation with the owners corporation.

Reena Van Aalst: I think the owners corporation, in this instance, should at least get some professional advice, Amanda, on how to deal with the builder, in the first instance, if that's the stumbling block, which I think it appears to be. Because the Office of Fair Trade ... You can actually make complaints quite cheaply. You would lodge an application with the Office of Fair Trading to the building department, and ...

I should come out on site. I had this happen in a building that I was managing. We had an engineer ... Basically, it was like water penetration, similar ... not similar, but to the muddy swimming pool in the courtyard ... But, water always being a significant problem within buildings ... And so, we had an engineer come out and do an inspection, gave a very quick report. And the contractor had tried to say, "Well, that's not correct." He just waterproofed it with the shower seal type of sealing of the tiles on the balcony. And, basically, we were able to ... After I lodged the application with Fair Trading, the building inspector came out, and we negotiated, and we got 3/4 of the previous bill paid back to us.

Amanda Farmer: Great.

Reena Van Aalst: So, if people are uninsured or unlicensed. So, I think the Fair Trading is far more harsher in its penalties.

Amanda Farmer: Yes, definitely.

Reena Van Aalst: So, I guess corporation could seek some professional advice, and get that rolling. And that's something that should be done immediately. And then, at least that can be done concurrently with trying to address your lot owner's concerns and issues in her courtyard.



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Amanda Farmer: Yes, absolutely. I agree with you, I think that's an excellent first step.

Okay, well, what's been going well for you this week, Reena? What's your win?

Reena Van Aalst: This is based on an incident that's been happening in one of my schemes for over 12 months. And, finally ... We had a tenant in this building who was breaching all the by-laws. She had a pit that was unauthorised. Noise. Parking on common property, and in visitor's car park. Rubbish being not disposed correctly, with respect to recycling and regular. Parties ... You know, it was like 12 months of hell. She was abusing other people in the building. And, with the owner's help ... Finally, because we brought it to the owner.

The agent wasn't really being all that helpful, because they wanted to keep the tenant, and, obviously, the remuneration that is attached to that tenant. But, through an owner, we were able to find another owner that knew the address of the actual owner, and their contact details. And we asked the owner to, basically, terminate the tenancy agreement, which she agreed to do. And, even though it's been 12 months of hell in this building, at least that was achieved.

And one thing that came out of it during the year was that the owners corporation held an AGM, and they installed cameras. It was an incident where the police had to attend. And, because there was no evidence, there was nothing that the owners corporation could do. So, the police recommended that cameras be installed. So, an AGM was convened and passed a special resolution to add the cameras to the common property, and in various parts of the building. And, yes, it went well.

So, I think ... For those of us that have lived in a building where there has been a troublesome person, whether it's lot owner, or tenant, a mental illness ... I think there was a bit of level of mental illness and drugs in this particular case, Amanda. But, I think that, for those that have to endure this, whether you're a lot owner, whether you're a tenant, as a resident ... It is quite unsettling. Because, when you go to work and you're working, and there's an issue, it doesn't matter. Because, when you come home, and you have to listen to parties all night, and ... You know, there was wooden floorboard, so that, you know ... And high heels, and 2 daughters, and ... So, it just made life so uncomfortable-

Amanda Farmer: Yes.

Reena Van Aalst: - for the people that were around her. And, of course, the committee's time was taken up having to deal with it at every meeting, in terms of by-law breaches, and mediation, et cetera. Yes, so after 12 months, even though it's difficult but-

Amanda Farmer: It sounds like, maybe, a targeted effort. And an acceptance that this might not be a quick process, but we're going to stay committed to the cause. We're going to understand that we need to gather evidence, so we may need to invest in things like CCTV. We need to be calling the police, we need to stand together, we need to give statements. And, of course, relay all that to the owner, who, at the end of the day, has the power. Of course, there's the tribunal avenue, but that use-

Reena Van Aalst: Takes time, and ... Yes.

Amanda Farmer: Takes time and money and ... Much easier if you can get the owner to say, "Look, this is a breach of the lease," and to have that tenant move on. So, great result from what sounds like a very committed committee.

Reena Van Aalst: Yes. Thank you, Amanda.

Amanda Farmer: All right. We are getting to my win.

Reena Van Aalst: Oh, yes.



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Amanda Farmer: Yes. Which I prefaced at the beginning of the episode. I have been in the tribunal this week, and have had some success. This was kind of an unusual experience where we turned up, and we were the respondents to an application ... It was an application brought by one strata scheme against another strata scheme.

Reena Van Aalst: Are they adjoining?

Amanda Farmer: Yes, these buildings are adjoining. And, under Section 233 of the Strata Schemes Management Act, the tribunal does have jurisdiction to make an order settling a dispute between two strata schemes. So, this particular applicant ... It was a small strata scheme on the one side, and the scheme I acted for was a little bit larger next door. And the application was signed off by a committee member in the applicant strata scheme. And, as soon as we saw that, we thought, "Hmm, I wonder if this person has authority to file this application." Because there had been some emails proceeding it, and some complaints and they'd all come from this one particular committee member. And we hadn't seen minutes of any meeting where there'd been a resolution to commence these proceedings. There didn't seem to be any evidence of authority, and that was something that we planned to question immediately when we came before the tribunal.

When we did come before the member, the member asked the applicant to explain why this was a dispute between two strata schemes. And, without giving away too much detail, because I don't want to identify the buildings in question ... It was a dispute about the basement parking. And, these strata schemes share basement parking, and there's an easement and right of carriage way for one to use the other's property. And this particular strata scheme was saying that my client was infringing on their space, and had damaged some of their garage doors.

Reena Van Aalst: Oh.

Amanda Farmer: And the position that we took before the member, just in the first 10 minutes of the appearance, was to say, "Well, it's not clear why this is a dispute between two schemes. Isn't this a problem that one particular lot owner has with this strata scheme? And, if that's the case because their garage door is being damaged ... If that's the case, then they don't actually have standing under this Section 233 to bring this application on behalf of their strata scheme. It should be an application that they bring personally, and not being a member of the scheme in question." So, the scheme they're complaining about, they're gonna have difficulty bringing that application. So, surprisingly, and this does not happen very often ... The member dismissed the application within the first 10 minutes of the appearance.

Reena Van Aalst: I've had that before, Amanda. But it was basically on written submissions-

Amanda Farmer: Oh, yes.

Reena Van Aalst: - where we had a subsidiary strata scheme that was making an application against a community association.

Amanda Farmer: Right.

Reena Van Aalst: But, the actual application was just lodged by one of the owners, it wasn't lodged by the subsidiary. And we said that there was no evidence that we could see that that scheme had actually resolved to submit the application. And it was also just because there was no standing by that person to do so.

Amanda Farmer: Yes. It's a very good lawyer's trick. When we see applications that are filed the first thing we look at is, "Does the tribunal have jurisdiction to resolve this dispute?" So, in our case, we were thinking, "Is it truly a dispute between two strata schemes, or is this just the complaint of one person?" And then, secondly, does the applicant actually have standing? So, do they have the authority? Do they have the power to do what they're doing? And, as you say, Reena, if a lot owner is signing off on an application, and saying that it's on behalf of an owners corporation ... Well, they better have the minute of a meeting that's giving them the authority to do that.



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Reena Van Aalst: Yes, yes. And, the thing in the question about your case, Amanda, is that ... With this basement car park, is it part of the building? I mean, how are the costs shared between these two strata schemes? Is it through a strata management statement, or is it some sort of document? Because I know there's another scheme I used to manage that ... It was two schemes sharing a basement car park, but they had a deed between the two entities that dictated how the cost would be split. So, there was no strata management statement, it was just a deed between the two schemes. So-

Amanda Farmer: Yes, yes.

Reena Van Aalst: Wouldn't there be some sort of provision for dispute resolution if it was part of a building management committee?

Amanda Farmer: Yes, as far as I'm aware, there was no building management committee, no strata management statement. All there was was this easement. So, there was a right of carriageway, granted by my strata scheme that I acted for, to the others for them to use, that ... To basically use the same driveway space.

Reena Van Aalst: Oh, this is a driveway.

Amanda Farmer: Yes.

Reena Van Aalst: So, it's no garage door that allowed people to ... So, there was no cost sharing garage door maintenance.

Amanda Farmer: No, no.

Reena Van Aalst: Okay.

Amanda Farmer: What was happening was, apparently ... allegedly, I should say ... People from the scheme I act for were using this space, and they were damaging the garage doors that belong to the other lot owners, in the other scheme.

Reena Van Aalst: Oh, okay.

Amanda Farmer: So we said, "Look, this is a dispute between private parties. This isn't a dispute between two strata schemes."

Reena Van Aalst: Yes.

Amanda Farmer: And the member accepted that, which was a really good result.

Reena Van Aalst: And were a lot of costs incurred in this application?

Amanda Farmer: Look, not really. We were lucky. We were briefed at quite short notice, and we spent a couple of hours looking at the documents. We met with the client. And, literally, it was one of those unusual turn-up-and-you're-there-for-15-minutes, and it's all over red rover. And what I was actually expecting, like you said, Reena ... To have a direction that we each file written submissions on the question of jurisdiction and standing. That's what I would have expected to happen. But we got one of those nice, friendly members who just said, "Yes, I want this off my desk, so I'm gonna dismiss it today."

Reena Van Aalst: Yes, Amanda I think overall. In my experience, usually quite good decisions overall. I mean, you might get a member here and there, but, then again, you can get a judge here and there that does the same thing. And, in my experience, in the previous adjudication process, where it was based on written submissions ... Every one that I've been involved in, you know, where the person is either vexatious, she sort of didn't have enough evidence, or the application was totally flawed by not being a party that could actually make an application ... I've found that NCAT's decisions have been quite fair, and-

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Amanda Farmer: Well, let me say, Reena. That might say something about your standard of management. And your-

Reena Van Aalst: Oh, thank you.

Amanda Farmer: And the advice that you give to your buildings.

Reena Van Aalst: Maybe the applications have had ... Yes, we've had ... I mean some of them I used to draft myself before we had good people, good lawyers drafting-

Amanda Farmer: Yes.

Reena Van Aalst: - such as yourself. Other lawyers, yes!

Amanda Farmer: And I think if you're getting to the stage of litigation, certainly if you're a respondent, there's not too much you can do about it if the application is filed against you. But, if you're an applicant and you are well-advised, either by your strata manager or by your lawyer ... That, yes, your case has reasonable prospects of success, and we should proceed down this path. Then, really, there shouldn't be too many surprises.

Reena Van Aalst: Yes.

Amanda Farmer: You should have your ducks in a row. And you don't want to be spending that time, and money, and effort unless you've got a convincing case.

Reena Van Aalst: Yes. So, I think I look forward to hearing about any more cases, Amanda, that you have at the tribunal with the new regime.

Amanda Farmer: Yes.

Reena Van Aalst: To see how that pans out for other cases. This is a great result, so congratulations.

Amanda Farmer: Yes, it's been a good week.

Reena Van Aalst: Yes!

Amanda Farmer: Anything else to add before we wrap up, Reena?

Reena Van Aalst: No, I'm just glad it's the end of the week, Amanda. I'm actually ... Had a busy week, and I'm quite tired, so I'm actually going out to dinner tonight, which I'm looking forward to.

Amanda Farmer: Love ... excellent. Enjoy, and I shall catch you next time.

Reena Van Aalst: Okay, Amanda, have a nice weekend, bye.

Amanda Farmer: Bye.

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