

Publication Date: November 7, 2017
YSP Podcast Transcript: Episode 086. Oops we forgot to strike levies, plus how to deal with unfair contracts

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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 very much. It is another lovely, sunny day here in Sydney. We haven't seen rain for what, 3, 4 months?

Reena Van Aalst: Yes. It's been a ... We had a sporadic few showers here and there-

Amanda Farmer: That is true.

Reena Van Aalst: ... But they weren't anything of substance, to be honest.

Amanda Farmer: Maybe when this is going to air, we will have had a deluge-

Reena Van Aalst: I hope so.

Amanda Farmer: ... And everybody will be saying, "Bring back the sun." So how's life in the land of strata been for you?

Reena Van Aalst: Yes, very busy actually. Quite a lot happening. Meetings, et cetera. So yes, it's been quite good, actually.

Amanda Farmer: It's that time of the year where we had a bit of a rush on by-law reviews and by-law consolidations, 30th of November being the date by which those should have been completed, at least in terms of the review. And yes, I've had a few buildings come to me at the last minute and say, "Please, please, please." And I've said, "Unfortunately, I am booked up, believe it or not."

Reena Van Aalst: Yes, I think that ... Well, I mean, I've had this on agendas since earlier this year, and I signed February when sort of everyone came back from the holiday break. But people just leave it to the last minute, unfortunately. And you're sort of trying to get people to have a look before the meeting, you have it on the agenda, you've sent all the current by-laws, and unfortunately, even at the meeting, people haven't really spent much time looking at it. So, it's been one of those things that seem to have dragged out, and I think at the end of the period that we're coming up to being the end of November, when we all have to have reviewed it by, I think everyone's just having to say they're reviewing in and then any changes will be just at the next general meeting because there's really no time to put forward any changes between now and then, really.

Amanda Farmer: Yes. Yes, that's a good point. That is an option. Because the requirement in the Act is simply to review the by-laws, and there's no requirement to actually make your amendments, additions, repeals, whatever it is you're going to do and to register those by the 30th of November, so if you're ... If you've left it to the last minute, if you can at least hold a strata committee meeting and resolve either that the by-laws are in ship-shape, so we've reviewed them and they're looking good, we're not going to do anything. Or, that they do need to be reviewed and further consideration will be given to that in the very near future.

Reena Van Aalst: Yes. Yes, so the advice we have been giving, so that's good.



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Amanda Farmer: So, Reena, what has been challenging you this week?

Reena Van Aalst: Well, I've got a building that I took carriage of in June this year, and they have it November financial year-end. And the levy that had been struck was the first quarter in the new financial year, so it was one December 2016, ending on 28th February 2017. And so in June, when I had taken over, there was no levy struck from April, May, and June. And by the time you do the take-on, and you go through the records, and meet with the committee, and see what has to be done, and what funds need to be raised, and hold the AGM, it was actually ... The AGM was held in August, so 2 months after we'd taken over. So that meant that the levies were running out of money because they didn't obviously have enough money in their funds to start off with.

But the thing that I'm sort of raising as to why the AGM should be held in a timely manner, is that there was actually a settlement that occurred on the 2nd of June, and when the Section 184 certificate was issued, of course, there were no levies due and owing at that time, because there'd been no-

Amanda Farmer: None are being struck.

Reena Van Aalst: ... Levies struck. And so then when I've sent out the new levy notice to the new owners that had settled on the 2nd of June, and the levy commences from the period of 1 March onwards, they then wrote to me and said, "Well, we're not paying this and we didn't know about this," and I said, "Well, I understand that your Section 184 certificate, which obviously I had a copy of in the records, did show that there was no levies, and that was cause there was none struck."

So anyway, they refused to pay and I said, "Well, you need to go back to your lawyer and sort it out with your lawyer and obviously the other lawyer acting for the previous lot owner." And coming ... But they are liable for the levies, cause the levies travel with the lot, and I think they've come to some arrangement with the previous owner. I haven't seen the check come through yet, so it's now October.

Amanda Farmer: Yes.

Reena Van Aalst: But we'll see how we go. But I just wanted to remind strata managers that, I mean, sometimes there are legal repercussions that occur when you don't hold a levy ... An AGM on time now. Even though, I think they knew that they were going to be terminated, and there'd been some efforts to frustrate the process by some of the committee members, one particular person and the agent sort of acting down on the instructions of one person. And I think the thing that always we've raised, Amanda, in numerous of our podcast. But it does have an impact when you don't hold an AGM on time, you don't strike levies, it has an impact on the cash flow for the scheme, it has an impact when someone buys in.

Amanda Farmer: Yes.

Reena Van Aalst: And unfortunately for this person, they actually hadn't really taken a strata search, because the levies were quite huge, and the lawyer wrote to me and said really, "Why are the levies so high?" You know? Very sort of ... The tone was quite aggressive. And I said well then if his client had taken a strata search, they would have realised that there's actually a fire order on this building, which is why. And the moment we've raised to date is by no means anywhere near what we have to raise once we get all our final quotes in for the tenants that have been issued. But it just shows that you really need to make sure that an AGM is held within the proper time frames. Now, under the new Act now it says per year.

Amanda Farmer: Yes, once in each financial year.

Reena Van Aalst: Yes.

Amanda Farmer: Yes.



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Reena Van Aalst: Yes. And I know sometimes people will ... Some agents have been delaying that, you know, sometimes for reasons beyond their control. And sometimes on the instructions of committee members, which are, in my particular example I have the agents in on the advice of the committee, and therefore levies haven't been struck for about 3 months now for another scheme. So again it does affect the running of the scheme if someone's buying and selling in that period because there will be a shortfall for when they settle, and when the levies been struck in the period that it's covering.

Amanda Farmer: Yes, it's a really interesting point that, about the incoming purchase not being on notice that levies are due, I suppose because they weren't actually due. They weren't in that Section 184 notice.

Reena Van Aalst: Yes, exactly.

Amanda Farmer: And look, it's been a long time since I've done any conveyancing, but there are clauses in the standard form contract for sale that deal with how levies are to be portioned on settlement. And I think it says something about the adjustment of regular periodic contributions. Now, there was probably a bit of back and forth between the lawyers there about whether there were any regular periodic contributions because they hadn't been struck. So, interesting to see that they've seemed to have resolved that in a way that at least there is a check coming to you. Who's funded that, I wonder?

Reena Van Aalst: Yes. It would have to be, Amanda, the previous owner. There's no way that-

Amanda Farmer: Yes, I would think so. Yes.

Reena Van Aalst: 'Cause they were the owner of a lot for that time.

Amanda Farmer: Yes, yes, yes.

Reena Van Aalst: At that period, so, yes.

Amanda Farmer: Yes. But no, let ... You want to avoid that situation, so it's not just about having meetings to pass by-laws and confirm minutes and things like that. You do need to be thinking about levies that need to be raised and if they're not struck for the next quarter then there ain't going to be any money, honey.

Reena Van Aalst: Exactly.

Amanda Farmer: Okay, well, my challenge for this week. I've had a question from a member inside the YSP online community, and this member has quite astutely, let me say, pointed out the difference between the Standard Form SCA Strata Management Agency Agreement. The difference between what's being called the 2016 version and the 2017 version. Now, Reena, were you aware there's two different recent versions of the SCA Standard Agency Agreement?

Reena Van Aalst: There was one that was issued last year in November I think, or early December, just after the new Act came in. Well, it would of been November, I'd say. And there's actually a workshop for managing agents that SCA put on how to complete the new agency agreements. And then there was another one that came out in July of this year from memory, for those that had signed that they weren't using. And you also had to sign a declaration that you wouldn't be using any private ... You know, the agreement was for, that was one of the conditions that SCA had put on members. Because we don't want people using different versions and amending them, the legislation wanted people to use the current version. So an updated version was then issued in July this year.

Amanda Farmer: Right, so that's where the 2017 version is coming from.

Reena Van Aalst: Yes.



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Amanda Farmer: Okay. Now I don't get to see these different versions of the agency group, because not being a strata manager and a member in that form of SCA, I don't have access to those agreements. But this person has sent to me the Clause 6 that is in the 2016 version, as compared to the Clause 6 that is in the 2017 version. And the purpose of Clause 6 is basically to set out what the managing agent is liable for and not liable for. And what's quite clear when you compare these two Clause 6's, is that the new 2017 version attempts to limit the liability of the agent in a much broader way than the 2016 version was. So what used to be Clauses 6.1 to 6.4 has now become 6.1 to 6.6. So it's much longer.

And, where previously the agent was not excluded from being liable for breach of statutory duties, so if the agent breached the Act they were liable to be sued in negligence. Now the new 2017 contract says that the agent is excluded from liability even in relation to a breach of the Act. So a breach of their statutory duty. And I'm really heavily summarising that, there's all sorts of conditions that apply to exclude that liability, but to cut to the chase, what the 2017 version is trying to do, and I'm going to get into why I don't think it can do that, is trying to limit the liability of the managing agent in certain circumstances more so than the 2016 contract did.

And this person's contacted me and said, "Amanda, is that legal?" And they were very concerned to see this change when they've ... Their old contract from last year had a much shorter and narrower Clause 6. And now the new contract they're being told to sign has a much broader Clause 6. And the point I wanted to make in response to that, A.) to really provide proper advice on this would take many hours and cost a building a considerable amount of money. But the short story and this is not in any way advise, but guidance is that the Australian Consumer Law applies to make these kinds of terms unfair and therefore unenforceable.

So terms that attempt to limit liability, that limit a consumer's right to sue, which is what this clause tries to do, that limit damages that can be paid if there is a breach of a duty or a breach of a law, in standard form contracts, which is what this contract is, it's a standard contract that's put to buildings on a take it or leave it basis, and I do hear owners complain about that. The provisions of the Australian Consumer Law apply to declare the terms unfair and therefore unenforceable if anyone attempts to rely on them. And you can actually apply to the court for a declaration that the term is unfair. And if the court makes that declaration, then wherever that term appears in any of these contracts, it is void.

So that's something that it may be of interest to listen, it's not even in just the context of a strata manager's contract, but in the context of a lots of different contracts you might be dealing with in your strata scheme, where a standard form contract is put to you and it's got fine print, and you're told just to sign it and, "No, we do not negotiate." Then you can take some comfort from the fact that if you do end up in trouble, if you do end up in a situation where you may need to sue the party that you're contracting with, and that party tries to rely on one of these clauses to say you don't have a right to sue me because you signed this contract, which is incredibly unfair. You could be in a position with proper legal advice and representation to have that clause set aside and to be able to make the claim that you want to make.

So just interesting to see those versions changing in such a short space of time. You know? I'm not privy to why that might be the case, commercial parties obviously attempt to protect themselves and put themselves in a strong position, but I don't think there'd be too many owners out there who are picking these things up, and certainly not going through the time and trouble to find out whether or not that's legal.

Reena Van Aalst: Yes, it's interesting now that you raised it, Amanda, I actually haven't really gone through the agency agreement in that level of detail to see that the liability limitations had been-

Amanda Farmer: Expanded.

Reena Van Aalst: Expanded, yes. So I will actually look into that and see if we can provide some feedback.

Amanda Farmer: Yes. Yes, for sure. Oh, and what I am going to do is put a link in the show notes to a guidebook, which I've actually found quite useful. It's a guidebook put out by the ACCC, and it's a quick reference guide to unfair contract terms. And it sort of goes into, in a little bit more detail, what I have been summarising here for you today. So I'll put a link to that guide in the show notes if you want to find out more about what unfair contract terms are, and if you think you have them in your contract, what

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you can do about them.

Okay, so, what's been your win for this week, Reena?

Reena Van Aalst: Well my win has been helping some owners in a large scheme, which I don't manage. And they came to me just for consulting services, and basically, they had issues with a particular chairperson who, you know, I think we've spoken about this example in a few different episodes. You know, where people assume carriage of all the affairs of the owner's corporation. They start not to share information with the other committee members that wouldn't ... This is obviously a large scheme with 100 lots, all the proxies had to be in 24 hours before, and he wouldn't even show it to any of the other committee members, all of proxies that were received. Anyway, so I just, in a sense, just gave them some advice about one of the provisions in the Act for proxies now, where it's actually per person and not per lot. The 5%.

Amanda Farmer: Oh, yes. Yes.

Reena Van Aalst: And so I sort of explained per person could mean really any person, so it could be your mother, brother, sister, neighbour, anybody. Anyone can [crosstalk 00:14:48]-

Amanda Farmer: Yes. Anybody can hold a proxy. Yes, that's [crosstalk 00:14:51]-

Reena Van Aalst: Yes. So in a sense, they then were grateful because the strata manager had told them the incorrect advice. Yes, so they were able to sort of get the numbers and get themselves on the committee, and it was actually quite a good outcome at the end of it. But I think the meeting went till about 10:30 or 11 that night, so.

Amanda Farmer: Oh, my goodness. You know, I've attended meetings like that, but the fact is when lawyers are at meetings, then there are real problems, so it's not unusual that I would attend meetings that go till 10:30 or 11 at night. But really, they should not be going on that long. That's not nice for anybody.

Reena Van Aalst: No, no. But it happens sometimes.

Amanda Farmer: It does. It does. So yes, good point. That's been raised with me before, as well. I have had some strata managers and lot owners who have been under the mistaken impression that only an owner can hold a proxy. The legislation does, as you say, Reena, very clearly say that a proxy is held by a person, and in schemes of 20 lots or less, one person can hold one proxy. More than 20 lots, one person can hold the equivalent of 5% of the number of lots in proxies. So a good revision there for us.

Reena Van Aalst: Yes, I think these things only come up I think because time evolves and, you know. And sometimes usually there's a contentious issue, and that's where I think you see the issue of proxies really coming up, but on the whole it's not normally a problem for people to have 1 or 2 proxies, if it's five ... And that usually is within that 5% limit for the largest scheme, but for the smaller schemes what we do when we send out our agenda, we actually tell people that as you are a small scheme with 20 lots almost, you can only have one proxy assigned to you as a person, so that ... And then when a proxy does come in, and say it's a chairperson and they receive more than one proxy, then we let the person that's given them that proxy know that that proxy can't be used and that if they wish to assign it to somebody else.

Amanda Farmer: Yes. Yes. Fabulous. That is a good ... Best practice.

Reena Van Aalst: Yes.

Amanda Farmer: Okay. My win for this week. I have been able to help out a listener who approached me with a question that, to me, is very simple and very easy to answer, but it's a really good example of something that trips people up simply because of terminology. And that was the question of, "What is a dealing?" We're always talking about dealings, we're talking about the registration of dealings, what in the world is a dealing?

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Well, I was able to direct that listener to a page on the Land and Property Information, New South Wales website. And there is a really short description there of exactly what a dealing is. I'll put a link to that page in the show notes for this episode, but in my own words, a dealing is a document that's registered on the title. And if we're talking about strata buildings, we talk about the common property title, and that's where you have your unit entitlements recorded, and you have your address for service and things like that. People can do a title search and look at how many lots there are in your scheme and see if there are any dealings registered on the title that effects the ownership or the rights to use the property.

So some examples of a dealing include by-laws, by-laws are dealings, they affect rights to use the property. Transfers are dealings, so on your own title, the title to your lot, there will be a transfer recorded, which records the purchase of your lot. So it will have your details there as the transferee at the time, and you can search historical transfers so that you can see who's bought and sold the property over time. A mortgage is a dealing, so you may have a mortgage registered on the title to your lot. Leases are dealings, so you may have a lease registered, and going back to the common property title, you might have something like a lease to a telco so that they could have their telephone tower situated on your common property. So, that would be another kind of dealing that's registered on the common property title.

When I talk about searching the title, we can do that as lawyers, online. We have agents that were associated with and we can log onto the system and search for titles, and get copies of those. And otherwise you can contact land and property information directly and you can do a search through their website, as well. You pay a small fee and you can get copies of dealings, and titles, and things like that. So if anybody was wondering, that's what a dealing is, and as I said I'll give you a link in the show notes to LPI's own short description about dealings. So, that's your legal 101 for the day.

Reena Van Aalst: That's good Amanda, yes. I think a lot of strata managers and owners would find that quite useful to understand where to find that on get that number and then be able to actually investigate what the dealing is. And what I do is I ... In our company, we keep a record of all the dealing numbers like in a summary sheet so that we know that ... Each dealing, when it was passed, and what it's about as a quick reference point.

Amanda Farmer: Great. Good idea.

Reena Van Aalst: It's just good for all of us now, for us to access that information quite quickly, so we have every dealing number when it was registered, and then what it's about so that you don't have to actually open the dealing. Could be it like a by-law, you know, addition, or like I said like a Telstra [crosstalk 00:20:08]-

Amanda Farmer: Or an easement.

Reena Van Aalst: Yes, easement or a Telstra lease like you mentioned before. Telecommunication tower, their leases. It's a transfer. This is actually a good quick summary for anyone to have a look at.

Amanda Farmer: Yes, good idea. The other thing that I want to mention before we sign off is that ... Oh, it's probably in a couple of days' time once this episode goes to air, but SCA New South Wales is hosting its principals night off, they're calling it the PNO. No, it is not a cruise. It is an evening in the Blue Mountains, which I think Reena, I'm going to be seeing you there.

Reena Van Aalst: Yes, I'll be going there, yes. Definitely.

Amanda Farmer: Excellent, excellent. And the intent is to have business owners, industry leaders in strata, take a night off. Hear from a couple of interesting experts, of which I am one, and take some time to work on their business rather than in their business. And I think there might even be a spot of yoga in the morning on Friday-

Reena Van Aalst: That's for the women, Amanda.

Amanda Farmer: ... And I'm looking forward to that. So it's for the women?



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Reena Van Aalst: Yes, the men I think, there's golf arranged for men. It's at the Fairmont resort.

Amanda Farmer: Oh, lovely. Are the men allowed to do yoga and the women allowed to play golf if they want?

Reena Van Aalst: Of course.

Amanda Farmer: Oh, good. I'm very glad. Not that I'm a golfer. I'll be doing yoga, I'm not sure where you'll be Reena. Are you a golfer?

Reena Van Aalst: No.

Amanda Farmer: Well we're looking forward to it, and if that sounds like it's up anybody's alley, then head over to the SCA New South Wales website and check that out. I know it's only a couple of days until ... I haven't even said the date. I think it's the 9th of November, isn't it, Reena?

Reena Van Aalst: Yes. Thursday the 9th.

Amanda Farmer: Thursday the 9th of November, I'm sure they've still got some spots if you haven't heard about that yet and want to take a night in the Blue Mountains with Reena and I.

Reena Van Aalst: Yes. And many others.

Amanda Farmer: Yes. I think that's it for this week, anything else Reena?

Reena Van Aalst: No, all good Amanda, thank you.

Amanda Farmer: Oh good, see you in the Blue Mountains.

Reena Van Aalst: Okay, see you then.

Amanda Farmer: Bye.

Outro: Thank you for listening to Your Strata Property, the podcast which consistently delivers to property owners reliable and accurate information about their strata property. You can access all the information below this episode by the show notes, at www.yourstrataproperty.com.au. You can also ask questions in the comments section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?