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YSP Podcast Transcript: Episode 088. In Conversation: how to convince a building
to increase levies by 85%

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

Reena Van Aalst: Hi, Amanda, how are you?

Amanda Farmer: I'm doing very well. Thank you very much. We are rapidly drawing towards the end of the year. I cannot believe it.

Reena Van Aalst: The last month has gone really ... Everyone I speak to, Amanda, says this year has gone really fast.

Amanda Farmer: Do you know what? We say that every year. Well, we say, "I know that last year went fast, but this year, this year has gone even faster." I think, honestly, I catch myself saying that every year. It is life. The world of Strata, it keeps us busy, time flies, but it's fun. It's all fun.

Reena Van Aalst: Yes, funny. Keeps you on your toes. It's funny, I actually went to a lunch yesterday for a company that raises capital for large developments and large projects.

Amanda Farmer: Oh.

Reena Van Aalst: When people ask you like what you do, and you say, "Strata," everyone just sort of looks at you like, "Oh my god, you must hate your job." And I go, "No, I actually quite like it."

Amanda Farmer: Yes.

Reena Van Aalst: I enjoy the challenge. I'm one of those sort of very tough people, and sometimes you have the difficult clients. They sort of understood that, when I visit people's homes, they're far more emotional about issues rather than at work. But I said to them, you just have to basically deal with people as the situation arises and just try and put yourself in their shoes. I mean, the other day, I had someone screaming at me about an intercom, but I knew he was mentally ill. The poor man, unfortunately, had a food delivery, and he said, "I'm sick, and I'm hungry." But I just knew from other contact I've had with him that at times, he can be quite fine to deal with, and this time he wasn't. I just didn't get upset about it. He's obviously having a bad day.

Amanda Farmer: Roll with the punches, babe.

Reena Van Aalst: Yes, it's not the end of the world. There's worse things that can happen apart from that, in terms of catastrophes for me as a strata manager.

Amanda Farmer: Yes.

Reena Van Aalst: Having an intercom not working is not an issue.

Amanda Farmer: Exactly, but it goes to show there's a lot of work for our sector to do when it comes to improving the perception, I suppose, of strata management and what it is you guys do and how valuable that work is and how fulfilling it is. It's challenging, but it's also fulfilling. That's a PR exercise, isn't it? That's for our advocates in the sector to get out and say, "This is a good place to be. It's a fun place to be. It's challenging. It's interesting." And we don't have people feeling sorry for us or particularly for you, strata

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managers, when we go to conferences.

Reena Van Aalst: Yes, that's exactly right.

Amanda Farmer: Well, speaking of challenges, what's been your challenge for this week, Reena?

Reena Van Aalst: Well, I took care of a building early this year. It actually had a fire order imposed on it in 2013. They appointed, I think, a consultant, and some reports had been done. They had issued some tenders, I think maybe two or three after that. Then nothing sort of happened. I'm not sure if it was ... The committee advised me, some of the older members, but this is now the senior committee after all this time. Basically, the strata manager wasn't really pushing it, and they weren't really aware of where things were up to.

So I've got the files, and most of the information wasn't even in there. I was lucky to have a very astute treasurer, and she provided me with a whole heap of information and reports that had been obtained by them. So we started following up the consultant, and the consultant said, "Oh yes, this is where we're up to. We had issued some tenders, got some quotes in. We didn't receive any instructions and therefore, nothing has progressed." We said, "Can you please reissue those tenders, see if any of the quotes are valid? And if not, they can be updated by the respective contractors that had made submissions at that time."

That was back in July, August, September, following up, following up. Then last week, I received a letter from Council to say that ... It was like a show cause letter to say that we needed to show compliance with the order, and if not, within seven days, they were going to refer the matter to the Land and Environment Court.

So I quickly got onto the consultant. I said, "Here's the letter. I know that you've been trying to get quotes and get them updated, and you had promised us a report a couple of weeks ago. Can you please expedite that now and write to Council because we need to explain where things are at?" I didn't get a response. I rang the office, and they said he was sick. The next day I rang again, another colleague said he'd look at it. Nothing happened.

It's now a week later exactly. I've been ringing and emailing, and nothing has happened. It's a bit hard now to engage someone new and start all over again, although that is to be seriously considered by the committee in view of this lack of response.

Amanda Farmer: Yes.

Reena Van Aalst: But I'm not really sure, Amanda, what will happen now. If we get referred to the Land and Environment Court, whether or not we would have any action against the consultant. We don't want to start any proceedings with him, but I'm just saying ... It's also the safety of the building. It's not just a matter of complying with the fire order.

Amanda Farmer: Absolutely. You said 2013, the fire order came about.

Reena Van Aalst: Yes.

Amanda Farmer: Have there been, in terms of the preliminary reports that have been done, is it extensive work that needs to be ...?

Reena Van Aalst: Oh, it's major.

Amanda Farmer: So what I'm getting at is if you were to bring a new consultant on now, it would probably take them months to get up to speed.

Reena Van Aalst: Yes, exactly.



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Amanda Farmer: Yes.

Reena Van Aalst: This is why we've been reluctant to do that, Amanda, and just trying to ... Let's try and get maybe this part of the work done with this particular consultant. Get those tender quotations updated and see where we can go from there. But even that, Amanda, ringing, emailing and ringing.

Amanda Farmer: So they just don't respond?

Reena Van Aalst: No.

Amanda Farmer: That's crazy.

Reena Van Aalst: Well, when I spoke to him, said oh that person's away I can't sign up for a fact until next week. I said-

Amanda Farmer: What does that matter?

Reena Van Aalst: I know. But Wednesday has come and gone.

Amanda Farmer: I think maybe your energies are best focused on getting that consultant into gear. Bringing someone new on at this stage, as you said, is just not ... That's not going to be possible. Council's asking you to show cause. You don't really have too much of an excuse there. Have they been extending the order all this time? Because generally, orders...

Reena Van Aalst: Yes, that's a really good question, Amanda. I don't think that Council has really ... They sent the letter earlier in June or July, asking for a program, and that's when we got onto him and said, "What's happening? Where is it up to?" We've been chasing him up since then, so we didn't even get an opportunity to tell them what we were up to, and I suppose they got fed up. But I found that councils, not all councils but ... City of Sydney's very astute in its follow-up. There's no way that an order issued four years ago would still be outstanding. But other councils in the North Shore, or the northern area or even like eastern suburbs and some of the other councils, they don't really follow it up as diligently. I'm not sure.

Amanda Farmer: Yes, and maybe that's why your consultant's so relaxed about it because they do it a lot all the time and think, "Oh yes, it's going happen." Nothing happens till it happens.

Reena Van Aalst: Yes. My concern is if there's a fire-

Amanda Farmer: Exactly, yes.

Reena Van Aalst: -and people are injured or people's lives are lost. I mean, then what's going to happen?

Amanda Farmer: Yes. Well, I'd be interested to hear how you work your way through that one and if you can get this consultant. My advice would be just to ... You've got to be the annoying client who's constantly ringing and not going to stop ringing until you get this work done.

Reena Van Aalst: Yes. I've been emailing one day, ringing the next day, ringing [crosstalk 00:07:40].

Amanda Farmer: And perhaps including in your emails that if Council does take these next steps, and the owner's corporation is put to cost, then they will be looking to the consultant because they've been let down.

Reena Van Aalst: Yes.

Amanda Farmer: And I wonder what the terms of the engagement of that consultant were. Obviously that's before your time and

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what promises they've made that they're not breaking, as to what they could do and when they could do it. But it's actually, it's good to talk about this. It's a good tip, I suppose, for our listeners that when you are engaging in this process with these kinds of consultants, having them agree with and adhere to timeframes is really important because time is of the essence when we're talking about safety and also when we're talking about council orders.

Reena Van Aalst: Also I don't mind if you just say, "I'm flat out" or "I'm getting to it" or whatever, but there's just been no communication.

Amanda Farmer: Silence. Unhelpful.

Reena Van Aalst: Yes, exactly.

Amanda Farmer: Well, I hope you can work your way through that one, and let us know how you go.

Reena Van Aalst: Yes, definitely, Amanda, I'll keep you posted.

Amanda Farmer: Now my challenge for this week, I have had a listener ask me this question, is the developer obliged or required to set aside actual funds in the capital works fund? And we're talking about for a new building, during the initial period. So before the first AGM, and when the developer still owns the majority of the lots. Should the developer be budgeting for and putting money into the capital works fund the same way that owners would be paying levies after the first AGM and depositing money to a capital works fund?

Under Section 14 of the Strata Schemes Management Act 2015 in New South Wales, the first AGM must be held within two months after the initial period. And anybody who's not familiar with that term, "initial period," it starts on the day that the owner's corporation is constituted, which is on the registration of the strata plan. And it ends on the day when there are owners of lots in the scheme, the sum of whose unit entitlements is at least one-third of the aggregate. So once the developer has sold off at least one-third of the unit entitlement, then the initial period ends.

So the first AGM is held on the expiry of the initial period, or I think I've just said within two months of the expiry of the initial period.

Reena Van Aalst: Yes.

Amanda Farmer: And the agenda for the first AGM is stipulated in Section 15 of the Act, and the agenda for the AGM must include a motion to decide the amount of contributions required to be made to the administrative fund or the capital works fund. So my understanding then, Reena, is that there is no requirement for the developer to be contributing to a capital works fund. But indeed, the developer should be paying for maintenance items and covering costs that are coming up within the initial period and paying for those directly.

Reena Van Aalst: Yes.

Amanda Farmer: Is that a fair summary?

Reena Van Aalst: Yes, that's correct.

Amanda Farmer: Excellent. Well, I hope that answers our listener question. How about your win for this week, Reena?

Reena Van Aalst: My win actually this week was ... I had an AGM for a scheme that hasn't been raising adequate levies. They've actually been raising sort of special levies here and there during the last two or three years to the point that they've pretty much run out of money. I sat down with a chairperson and treasurer, and we basically went through a whole spreadsheet of expenses that we had to cover in the next 12 months.



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That resulted in an 85 percent increase in their levies, which you can imagine was ...

Amanda Farmer: A bit of a shock.

Reena Van Aalst: Yes, exactly. The chairperson wrote a letter that went out with the agenda just to tell owners, "we really need you to come to the meeting. This is what's being proposed." And of course, we didn't get very many people. We just barely got a quorum, and then some of the owners at that meeting were quite against raising any funds. One particular owner actually said, "I've just bought in, and why should I have to pay for things that I haven't?" I said, "Basically, the previous managing agent hadn't even obtained a capital fund works forecast or sinking fund at the time." So there was no real record of what should've been raised.

But nevertheless, this is why you should do strata searches when you buy into a scheme because you'll see that there's no capital fund. You'll see what's been raised. Fortunately, we did by majority get the levies approved, but it was a really hard task. Sort of to add insult to injury, because the first levy had already been issued in the new financial year, the 80 percent increase was borne in the remaining three quarters. So it's actually, for those that were sent that levy notice, it was quite a shock for some people because it was even more than 80 percent for those remaining three quarters.

Amanda Farmer: Yes.

Reena Van Aalst: But a lot of people actually, they had lived there for a long time and understood that there's so many areas that we need to address water penetration. And without having enough money in the funds, we needed to raise that money. Money that I raised went to a West Perth property market seminar. And they were saying that, since 2009, I think it was one of the ... not RP data, but I think it's called company that gives you all those statistics it's kind of replaced RP data that gives you sort of all about property prices.

So between 2009 and today, property prices have doubled pretty much in Sydney and I said to them, I said, "Out of all of you, whose salary has stayed the same since 2009? You're trying to maintain levies since 2009 at the same rate when building costs are going up by at least 10% per annum in that period. The value of your asset has doubled. Your own personal income hasn't stayed stagnant."

Amanda Farmer: Hopefully not.

Reena Van Aalst: Hopefully not but I mean workers until recent times have had increases and wage growth has been one of the issues that's been sort of talked about now, it's sort of stagnated, Amanda. So people have this sort of notion in their mind that levies should stay the same and I'm thinking, "but how?" Levies staying the same actually means you're going backwards because even if you account for inflation which if you look at inflation, it's a basket of goods and services and then an average is worked out but building costs and repair costs are actually at a much higher level than CPI.

So even if you're increasing levels by CPI, you're not really actually keeping up with inflation.

Amanda Farmer: Yes that's a really good point and I was actually going to ask you Reena how did you get that across the line. And thank you so much for sharing all of that guidance which sounds like that's what you were saying to them in the meeting and that's what was able to sell the notion if you like.

Reena Van Aalst: I think it was really good that I have a great chairperson that I work with and her and I had met extensively before the meeting, we'd gone through everything. So we understood all the expenses, what was coming. And so between her and I, like she was using different ways to explain it. I was trying to give them my experience as a strata manager and having other buildings that I've managed to try and give them that comparison to say that this is quite a unique situation to find yourself in.

And I said I've never managed a building that had no money before, to be honest so that's quite a new experience for me. But when you're quoting for a building I mean I don't normally ask them, "How much do you have in your account?" Maybe I should now. Ask them that.

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Amanda Farmer: Yes, "can you afford me?"

Reena Van Aalst: Yes so it's more about understanding that you need to have a reserve. We need to be able to pay for unexpected repairs and maintenance that may come up from time to time. And you know, the government has through legislation said that you need a capital fund forecast. And obviously, it doesn't force people to adhere to that but at least it's a guideline of what levies should be raised and then obviously that varies from here to here depending on what priorities are in the building and what priorities the committee wants to look at.

And I think water penetration is one of the worst issues in all the buildings. Waterproofing is failed in balconies and it's causing concrete cancer so it's a serious thing that you know, if left untreated for longer periods of time, it's just going to cost them more to fix. So we tried to get that message across and yes, between her and I, I was just so exhausted that night when I got home because it was a real like campaign effort on my part I feel to try and get the message across.

Amanda Farmer: Yes, I can imagine. But good on you for getting it there and you've shared some really good insights there with our listeners, both committee members and strata managers who might find themselves in a similar position having to sell a large increase in levies to owners and get along the line. And they've got a few more tools in their toolkit now which is great.

Reena Van Aalst: Yes, thank you, Amanda.

Amanda Farmer: Okay well, my win I want to share this week. Well I should say first of all, it's not actually my win, it's a couple of other lawyer's wins but we've had some good cases that have come out of the Tribunal and also the Court of Appeal here in New South Wales and both cases interestingly relate to the right to claim damages from an owners corporation for where a lot owner has suffered some loss because of an owner's corporation's failure to repair or maintain the common property.

Reena Van Aalst: Oh, interesting.

Amanda Farmer: Yes, the two cases I'm talking about are Rosenthal which was the Tribunal case decision that came about in August this year and McGilwayne which was the Court of Appeal case from September. So I'll put some links in the show notes to these cases so you can have a read of them. I've actually summarized them on my Lawyers Chambers website so I'll give you those summaries.

But basically in the Rosenthorpe Case, the Tribunal has confirmed that under the new Act here in New South Wales, you can approach the Tribunal for an order for damages and when we say damages as lawyers, we mean money. The Tribunal can now give you some money if the Owner's Corporation has failed to repair and maintain the common property and you, a lot owner, has suffered some loss because of that. So for example, there has been water penetration due to waterproofing failures or roof failures and you've got water coming into your apartment and because of that your wardrobes and your carpet and your other fixtures and fittings have been damaged. You haven't been able to perhaps live in your unit or rent it out because it hasn't been fit for habitation.

You've suffered some loss there and you've had to pay some money, perhaps renting another place, perhaps claiming on your own insurance, replacing those items. You can go to the Tribunal, under the new Act and ask for the Tribunal to make an order that there be some money paid to you. Now of course not as simple as that, you do have to prove that the Owner's Corporation has failed to meet its duty. You have to prove that that failure caused your loss and you have to prove the amount of your loss so that you can get what you've asked for.

But in the Rosenthorpe case, that lot owner was awarded about \$9,000 I think and also the costs of those proceedings. So that was the first case that we have seen come out of the Tribunal confirming that new right which didn't exist under the old law and that takes me to the McGilwayne case which is the Court of Appeal case. This is actually relevant to the old law where a lot owner attempted to claim against their Owner's Corporation in nuisance. So alleging that the failure to repair and maintain the common property actually resulted in a nuisance to this lot owner because they couldn't use their property in the way that they should have

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been able to and under the Common Law, so not under the Strata schemes management Act but under the Common Law, you can claim damages if there has been a nuisance and somebody has failed to meet their Common Law duty.

So the issue in McGilwayne was whether an owner could actually go outside of the Strata Schemes Management Act and make that claim under the Common Law because at that time under the old act there was otherwise no way to claim damages and we had some old cases here in New South Wales that said, "No, the Strata Schemes Management Act covers the field. You can't then apply to a court under the Common Law for damages if the Strata Scheme management Act says no damages then there are no damages." And the Court of Appeal has essentially overturned that and said, "No, you can claim in nuisance and you can seek damages in a court and you don't necessarily have to go down the Tribunal avenue."

Of course, under the new Act now we have that new provision that says the Tribunal can award damages.

Reena Van Aalst: Yes.

Amanda Farmer: But the interesting thing here is Reena that under the new Act if you're going to the Tribunal, you can only do that within two years of the date of your loss. So there's a very tight time period. If you are going to claim in negligence or nuisance which McGilwayne now seems to say you can, you have a 6 year period because that is the Common Law limitation period on those claims.

So I think what we're going to see is people who are within time maybe take the Tribunal route and people who are outside of that two year period may take the court route.

Reena Van Aalst: So I want to ask you a question because I actually have a situation at the moment that is sort of based on the case that you've just mentioned. In this particular building, there was a leak that caused damage to a homeowner's fixtures in their apartment but the problem has been that the Owner's corporation has been trying now for the last, I don't know, six months or nine months to get actually try and find the leak.

So they haven't been negligent but they were looking at so many different areas. It's a large building and then they found it was coming from the rooftop but they were looking at windows and rises and all those different areas. So finally they were able to find the source of it. So in those cases would the Owner's Corporation liability be reduced because it actually didn't fail to maintain, it was its inability to find where ... Because sometimes leaks, Amanda, are very hard to find in buildings.

Amanda Farmer: Yes, sure.

Reena Van Aalst: So what would happen do you think in those kind of types of cases?

Amanda Farmer: Yes, it's a really good question. Our case law in New South Wales has established that the duty to repair and maintain is a strict duty and saying things like, "Oh we didn't have enough money or we were getting around to it" are not going to fly and you're still going to be found to be in breach of your duty if you are not repairing and maintaining. Now your example is a little bit tricky because it sounds like the leak was there, the common property was failing but it sounds like the Owner's Corporation was doing everything in its power to try and find that leak and then the question would be, what was it exactly the Owner's Corporation was doing? Were they engaging experts?

Reena Van Aalst: They were. But you know how it goes, first of all, you get a plumber in, they tell you this then they tell you that. Then you engage a waterproofing person so I've been involved in many schemes were sometimes just trying to find ... And you have to put dyes there and it's not from there. Sometimes leaks, they're slowly occurring over time and then say you might have damaged cupboards, you might have damaged floorboards and then but you're still trying to find where this leak is coming from. Amanda Farmer: See the problem is that the leak is there in the first place and the leak has caused the damage. And what you have to prove is a that the Owner's Corporation has a duty and you do that by pointing to the legislation, they do have a duty. B,

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that they have breached that duty. So they've breached that duty through their failure to repair and maintain the existence of the leak if it's deterioration over time then it's going to be pretty hard to say that they're not in breach of their duty.

And I know that sounds unfair and it is strict but that's what our case law has said. Where you have room for movement I guess and room for debate is where the lot owner has done or not done something that has contributed to their loss. So perhaps they didn't tell the Owner's Corporation. Perhaps they didn't allow access to their lot so the Owner's Corporation could inspect and carry out works. Then that's where you come into the third part of this equation which is the causation.

What is it that has caused the loss for the lot owner? Is it the Owners Corporation's failure to repair and maintain or was the Owners Corporation diligent in its duty and it was the lot owner's failure to allow them into the lot, to report it in a timely way, to facilitate inspections and things like that. So yes, there can be mitigating factors there on both sides that may reduce the Owners Corporation's liability but these things are so entrenched in the facts, in exactly what it is that's happened.

But the thing to you have this duty to repair and maintain home to Owners Corporations and I do it quite regularly, is to say, "You have this duty to repair and maintain, it is a strict duty. You must comply with it and do it as quickly as you can and as you say Reena, if you're in a situation where it's not a quick fix then make sure that the written record reflects that you are doing everything in your power to resolve this issue promptly for the lot owner to reduce their loss if not eliminate it.

Reena Van Aalst: Yes, in this case, Amanda we just have to go through the records and see what communications there were between the lot owner and the Owner's Corporation and ascertain like a timeline type of arrangement to see how long has it taken and what steps have been taken by both parties.

Amanda Farmer: Yes, that's what I would suggest.

Reena Van Aalst: Yes.

Amanda Farmer: Okay, wow. I feel like that was a jam-packed episode.

Reena Van Aalst: Yes, quite a lot there today actually.

Amanda Farmer: Exactly, well don't forget so you can grab the transcript of these episodes. Head over to www.yourstrataproperty.com.au/088. This being episode 88. And you can grab a transcript, share it with your fellow owners, committee members, strata manager and they can get all the value that you are getting too and thanks for joining us.

Anything else to add Reena?

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

Amanda Farmer: Excellent, I shall catch you next time.

Reena Van Aalst: Thank you, 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 via 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?

