

Publication Date: December 5, 2017
YSP Podcast Transcript: Episode 090. In Conversation: the difference between by-law reviews and consolidations

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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. I feel like I haven't spoken to you in a little while.

Reena Van Aalst: Yes, feels like a long time.

Amanda Farmer: A little bit to catch up on. It's a busy time of the year, getting closer to Christmas. I don't know whether it's the same for strata managers, but certainly, with lawyers, our clients tend to want everything done before the end of the year before we close up shop and go overseas and go and enjoy our time away. Do you feel the same?

Reena Van Aalst: Oh, yes. I mean, everything's at a much higher pace in terms of getting quotes done, meetings done. Everyone wants something done before the end of the year. Exactly, Amanda. And also, December obviously being a shorter month, and also I think are invoices are getting paid. Everyone wants their invoice paid before Christmas as well.

Amanda Farmer: Oh, yes. True.

Reena Van Aalst: I'm sure that includes lawyers too.

Amanda Farmer: Thanks for the reminder. I need to get mine out. Yes. So amongst all of that, what has been your challenge for this week, Reena?

Reena Van Aalst: Well, it's been actually quite a funny week in that I've actually had about 4 different people approach me about compulsory management, which we know from the Act is Section 237, where the owners corporation's powers are taken either in full or partially by the strata managing agent. And I think we have discussed this before, Amanda, that the managing agent has to consent to the compulsory appointment. But it's actually an indication to me either of, I don't know, just perhaps the demographic that we work in or the fact that there are just issues that are arising due to different interests, different personality types. I actually had one building where there's been physical threats in a meeting where someone's stood over somebody else.

Yes. Another one is non-compliance with the Act. So there has been agendas that don't comply with the Act. Another case has been where the strata community pretty much tells the strata manager what to do and whether it's legal or not, or whether it complies with the Act or not. That managing agent seems to do whatever they've been asked to do by that strata community in order to remain as the manager.

Also had another case in another community association who contacted me. And another strata manager was involved in a meeting taking attendances and, yes. So it's been really strange. Within one week I've had 4 or 5 people approach me. I've even had lawyers approach me directly as well to take on compulsory management for some of our clients.

Amanda Farmer: Yes, so they're approaching you seeking your written consent, which they can then attach to their application for compulsory appointment?

Reena Van Aalst: Yes.



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Amanda Farmer: And do you find, Reena, maybe you haven't seen this play out yet. But relative to the number of consents you're issuing, are those orders then being made and you find that you're taking on these buildings? Is it more likely than not that an order's made?

Reena Van Aalst: Well, in this case, I mean, I think when the lawyers are involved it's always occurred. It seems to be like a fait accompli. But in other cases where the lawyer hasn't been involved, what I try and do is say, "Well, take me through what's been happening." You better do a bit of a chronology to advise, and obviously, you need to attach accompanying documents. And sometimes I can say to them, "Well, even though I understand that you would want a compulsory appointment because of the way that things are transpiring, but sometimes" ... I mean, I haven't really been involved in any of the applications so I don't really know what the tribunal looks at in order to grant these orders. But what I've noticed is that I think sometimes that just because something doesn't work out the way it should and there's background stuff start happening or stuff that shouldn't be happening, it doesn't necessarily mean that you've got enough evidence to actually submit the application. So I always tell the people that they should probably get some legal advice on it before they actually ... Before I even give them a proposal and give them a letter of consent. So I think sometimes you just need to get that advice.

Amanda Farmer: Yes, it's interesting that you say the applications that are made by lawyers acting for lot owners who are seeking these appointments are generally the most successful applications. I think that's because lawyers generally are, perhaps, conservative when it comes to these things. None of us likes to lose. Lose litigation. So we won't be advising our clients to go ahead and make an application if we don't think it has good prospects of success.

And just looking at that Section 237, anybody who's not familiar with it, it sets out the circumstances in which an order can be made by the tribunal appointing a managing agent to exercise all the functions of the owners' corporation and the committee. And those circumstances are that the management of the strata scheme is not functioning or is not functioning satisfactorily. So we as lawyers might say in short-hand, your owners corporation needs to be dysfunctional to be able to ground this kind of an order. Interestingly, you can also get this kind of an order if the owners corporation has failed to comply with an order that's been made under the Act. So if they've been ordered by the tribunal to do something, often repairs and maintenance to common property and they haven't complied with that order, you can get a managing agent appointed to carry out that function.

And a little-known part of this Section actually permits creditors - so people who are owed debts by an owners corporation - it permits creditors to seek an order for the appointment of a compulsory managing agent. And that's something that I've seen used quite successfully in a few cases. One, in particular, a lawyer who was owed a bit of money for some legal work they'd done. The owners corporation hadn't paid them, and they went off and got an order for a compulsory manager so that they could have the special levy raised and have their bill paid. And that judgment creditor can under this Section be an applicant for that kind of order. So something that maybe contractors out there might want to be aware of, and certainly owners corporations should be where you might have some large debts outstanding that that is a risk that a judgment creditor can make this kind of application.

Reena Van Aalst: Wouldn't they just go through a normal course of debt recovery? If you go to a local court, etc.?

Amanda Farmer: Just to be clear they do have to actually have done that because they have to be a judgment creditor. So they have to have a judgment already. And what this really is a method of enforcing that judgment, because how else do you enforce it? They're not going to wind up the owners corporation, hopefully. A more cost-efficient and time-efficient way to achieve the end of getting your judgment paid is to have a manager appointed who are immediately going to raise a special levy and your funds will then be in to be able to meet that judgment. So that's where that Section been designed to do. And not many people know about that one.

Reena Van Aalst: No, exactly.

Amanda Farmer: So, yes. I'll be interested to hear, Reena, those consents that you've sent out recently?

Reena Van Aalst: Yes, I'll let you know how a few of them go. But one in particular one I have asked them to go and get legal

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advice on the matter because they don't believe that their application on the face of it has enough evidence. Even though there is probably evidence there, but they need to produce that evidence.

Amanda Farmer: Yes. And when it comes to managing schemes, I know you've got a couple at the moment under a compulsory management. How does that compare to managing the scheme under a normal, if you like, agency agreement?

Reena Van Aalst: Yes. I actually find you tend to worry more about those schemes because in a sense you're making all the decisions. So in a sense, I mean, how I treat them is how any building should be treated or would be if they had their own committee. You've got to practice your fiduciary duty by getting 2 or 3 quotes for things like you would if the committee was acting in its own capacity. And I suppose, in a sense, one of the advantages is that you don't really have to ... I mean, I like to take into consideration what the owner's views are so when the AGM comes I obviously ask them if they have any particular things they'd like me to include on the agenda. But in a sense, you get people's feedback, but then you don't have to actually act on it if you don't think it's in the best interests of the owners corporation.

Amanda Farmer: That's right.

Reena Van Aalst: And when you're in that position, also, there's always going to be friction between owners, which is why you have been appointed. So sometimes, in a sense, a lot of owners in those schemes gain comfort by knowing that there is a compulsory appointed manager who's able to take care of the scheme and make sound decisions on their behalf.

Amanda Farmer: Yes, but you do need to be tough because they're under that appointment for a reason. There have often been difficulties and conflict, and tough love I like to call it. They need a bit of tough love. I think you might be good at that, Reena, which is probably why you're being approached for those quotes.

All right. Well, my challenge for this week comes from a podcast listener. The listener approached me and said, "Amanda, we have been going through this process of reviewing our by-laws so that we can comply with the new Act to have met the requirement to review our by-laws by the 30th of November, 2017." And they said they were going through that process, but the fact is that this listener said that the strata manager had actually invoiced the building for conducting the by-law review, and this committee, in particular, had no idea that the review had been conducted ostensibly by the strata manager, and didn't understand how it was that this charge could be invoiced to them. Now when the listener came to me with this query, I said, "Well, is there anything in the agency agreement that says the strata manager has the authority to review the by-laws or conduct a review of the by-laws and to charge whatever it was the amount that had been charged?" And the listener said, "No," they'd had a look at that and there wasn't any clause. So I'm just raising this, Reena. I don't know if you've heard about this happening-

Reena Van Aalst: Yes, I did actually have the same thing asked of me by a building that had asked me to provide them a proposal. And they said to me, "Do you charge for a by-law review?" And I said, "Well, what do you mean?" And they said they'd been charged, I think, a few hundred dollars by their strata manager for a by-law review. And I thought to myself, well, what qualifications does a strata manager have to review by-laws? I mean, I think that as an agent I provide advice about perhaps looking at what breaches are occurring in a building, for example, and saying, "Perhaps you may want to think about a by-law that addresses this, this, and this, based on what happens in the building." But in terms of having the qualifications to actually review by-laws, I don't really understand how a managing agent could charge for that. And on what basis they could actually ... Do they give a proper review? Did they give a report or?

Amanda Farmer: Yes, who knows. I think there's actually been a bit of confusion around terminology when it comes to these reviews, because ... And I may have raised this in a previous episode. There is a difference between reviewing the by-laws and consolidating the by-laws. Now when the new Act came into force last year, there was immediately a requirement in the Act that the secretary must keep a consolidated, up-to-date copy of the by-laws. So many strata managers that went about collating by-laws for their schemes, making sure that all the by-laws were in one single Word document or a PDF, in what was essentially a typing exercise. To put all the by-laws together and some strata managers, they might be busy, they might decide to outsource this work, and they get instructions from their strata committees to engage a lawyer to do that task for them. And I've certainly been

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doing them in my practice. And as I said, it's a typing exercise. I'm assisted by my paralegals in doing that, and I charge about \$500 to put a consolidated copy of by-laws together.

Now that's very different to a by-law review, which is the process of looking at the by-laws; deciding what should be added, amended, or appealed; looking at the problems that the building's been having, and how these may or may not be effectively addressed by by-laws; and then, having new by-laws drafted. Now that's a process that I've been charging, depending on the size of the building and the number of by-laws, up to \$8,000 for that process. And it's definitely something that an experienced strata lawyer needs to do. I wouldn't be surprised if what strata managers are doing is the consolidation, not the review. But certainly, if they are doing the review, I would be very concerned that they're outside the scope of their professional skill and probably professional obligation, without having some authority under their agency agreement to be doing that.

Reena Van Aalst: Yes, I don't even think that half the time those strata managers that have done that actually do have the authority or the knowledge, I don't believe, Amanda. Because unless it's a new agency that came out just after November last year, I don't know how that would even be included, unless they got it as part of their schedules of charges a review fee. But it does seem a bit strange to me.

Amanda Farmer: Yes. Now just on this topic of agency agreements, a couple of episodes ago, Reena, you and I discussed the SCA standard form agency agreement, the 2017 version. And this was in [Episode 086](#). And I have an update for our listeners.

Reena Van Aalst: Oh, great.

Amanda Farmer: Yes. Very kindly the President of SCA New South Wales, Chris Duggan, had a listen to our episode and has reached out to me and has offered some clarification. And the clarification goes to the point that we discussed, Reena, that the listener who contacted me was concerned that the strata manager, in particular, had put their agency agreement to the building on the basis that it was a take it or leave it agreement. It was in the SCA standard form and that it could not be amended.

Now, Chris has provided me with the wording of a Section of the SCA user guide, which apparently SCA issues to corporate strata managers and explains to them what it is that the standard form SCA agency agreement does and how it should be used. And this guide actually contains these words, "*The corporate member may make amendments to the template agency agreement by hand alterations or by attached special conditions to reflect terms agreed with specific clients.*" So what Chris is saying there is that the SCA standard form agreement is not a take it or leave it agreement, and should not be put to buildings by SCA members on that basis. And if SCA members are doing that, then they need to go back and they need to look at that user guide and refresh the contents there.

So I absolutely thank Chris Duggan, President of SCA New South Wales for tuning in to the podcast and weighing in on that issue. And I did tell Chris that I would address this in this episode and put that call out there to strata managers to be really clear about the fact that you can be amending these agreements, and you can be having those discussions with your committees. And it's probably unhelpful, both in a commercial respect and a legal respect, to be telling your buildings that they can't negotiate those terms.

Reena Van Aalst: Yes, I think that's right, Amanda. I think that a lot of managers don't really understand the Australian Consumer Law in the first instance in terms of contracts and how they work. And also, I mean, I've known for a very long time that we were able to always amend the SCA agreement by either crossing parts out of it if the client and our company mutually agreed to that amendment and we initial it, or we add an extra page at the back to say that there's additional clauses that apply, or, yes. So I think that's always been the case, but perhaps I think members don't understand how these things have worked. And maybe SCA could probably do a bit of a broadcast and remind managers on how to use the SCA agreement.

Amanda Farmer: Yes. Yes, I think that's definitely the intention.

Okay. So, Reena, what has been your win for this week?



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Reena Van Aalst: Well, it's funny. I had a building that asked me to quote and they considered a number of strata managers and they had interviews. And they decided to put our company forward.

Anyway, and so, at the end just before AGM was being issued, I had an email saying, "Will you reduce your agreement from 2 years to 1 year?" And I said, "No, 2 years is good because it takes time to set up a new building, to understand what's happening, to get to know the owners. And 1 year's not really sufficient." And I also don't really agree for a first time relationship to do 3 years. I know most managers have been doing 3 years, but I think 2 years is good because it gives each party time to ensure that they're happy with each other.

And so they said, "Well, we had asked you that." And I said, "No, I don't recall being asked that. But the answer is, basically, I'm sorry." Then I had another committee member from the same building asked me about some archive fees and BAS fees, etc. And I'm thinking, "This is not a very good way to start a relationship. I can already see" ... It'll be fractious from the beginning if people are worried about ... I mean, I can understand if they've had a bad experience with their previous manager and therefore they're very cautious. And there's nothing wrong with being cautious. But on the other hand, when you don't know how many boxes they're going to have in storage and you've got to pay for storage ... I just thought that was a bit too extreme.

So basically I just said, "I'm sorry, but it's better if I withdraw my consent to be your manager, because I don't think it's going to work. From the beginning this is happening." And they said to me, "Oh, no, no, no. It's only 1 member." And of course now they still want to have Strata Central appointed. But I think it just goes to show that there is that premise where people don't really understand lot owners, how much work is done in the background by strata managers, and especially in the different parts of the company.

So in email they will see strata manager doing certain things, but in the background there's people doing insurance, there's people doing data trends, there's people doing Accounting. And there's a saying, "If you pay peanuts, you get monkeys." And I think strata management has really been an example of that where there's been a lot of competition. People want to get managements that discount their fees, but then you really can't produce the service that's needed. And so, I think sometimes for managers, if you know you're delivering a good service; you're available to your committee members; you meet with them regularly; you're engaged with the building; you're proactive. I think based on that, you need to make sure that you charge adequately. And those people that have had bad experiences with strata managers, and there are many that I would say fit in to that camp, would say, "No, let's just give it a go and let's try someone new." And I think, as managers, we should stay strong and say, "Well, if we do deliver a good service, a high quality service, we need to charge appropriately for that." Because you need to engage good people, and anything in life, quality always usually costs.

Amanda Farmer: That's right. I think it's really about placing a value on yourself, isn't it?

Reena Van Aalst: Yes.

Amanda Farmer: And I think strata managers have struggled with that for so long, and hopefully with examples like yourself, Reena, we're starting to see those tables turn a bit. If you want to be professional, if you want to be respected, if you want to take up the status of, for example, lawyers in the quality and the importance of the work that you do, you've got to first of all value yourself, and that's about putting your services out there to owners and explaining to them what it is we do and why it is we charge this much. I've got to say, my cost agreement contains all sorts of little things like archive fees and fees for emails and faxes and photocopying. Do you think I ever get questioned about that? Absolutely not. People just take for granted that if you're going to receive the quality of service that a lawyer's going to provide, then you've got to cover those back-end costs. And I think strata managers could take that kind of example if they want to be respected in the work that they're doing, which is just as important as the legal work that we do in this space, then you need to be charging accordingly. And that's the only way that you change the perception of the profession.

Reena Van Aalst: Yes, exactly. And I think there's a long way to go for strata managers I think in this area, but I think we're getting there. Slowly but surely.



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Amanda Farmer: Yes, good. No, absolutely. I think it is a win, and good on you for sticking to your guns and placing that value on yourself telling that particular building, "If you want me, then this is what you're signing up for." And lo and behold, they still want you.

Reena Van Aalst: Yes. And if they don't, that's fine as well.

Amanda Farmer: Exactly. Yes, good on you.

All right. Well, my win this week. I'm coming back to a topic that I've raised a couple of times on the podcast, and we finally have a tribunal result. This topic was, how do you enforce an adjudicator's order that was made under the old law when we now have the new law? And we now have a decided case, and no doubt by the time this goes to air many of our listeners will have heard about this, read about it in the paper. It has appeared in the Sydney Morning Herald. Both the actual paper and domain online. It's the case of Strata Plan 82306 and Anderson, and that's a published case so I can let you know those details. I will put a link to the judgment in the show notes if you want to have a read.

And this was a case where I appeared before a panel of the tribunal and it was a specially convened panel to hear this issue in particular. It included the President of the tribunal. And we sought guidance from the tribunal as to how we seek a penalty order for a lot owner's breach of an earlier adjudicator's order. And there was great confusion in the process because the new Act did not make clear how it was that we could do that.

Now, the tribunal has provided that guidance and said that when you have an order made by an adjudicator under the old law, then it is enforced under the old law as if the old law still applies. So you go to the tribunal and you can seek a penalty of up to \$5,000, which is the old law if there's been a breach of an adjudicator's order. So there may still be some of those old orders floating around. They are in force for 2 years from the date that they're made, so we've got another year on that if you've got an adjudicator's order that might've been made right before the new Act came in, if there's been a breach of that order.

So for example, the adjudicator said the lot owner must replace the flooring that she's removed from the lot, and the lot owner doesn't do that, then you head off to the tribunal and you seek a penalty order under the old Act.

Now what this case also highlighted, and this is what's been reported in the media, is that if an order is made by the tribunal under the new Act, because we no longer have adjudicators so these kinds of orders will now be made by the tribunal, and that order in the first instance is not complied with, there is an avenue to pursue the breach of that order. You apply to the tribunal again and you seek a penalty, but you can't make that application unless you have the minister's consent.

Reena Van Aalst: Oh, dear.

Amanda Farmer: And the tribunal identified this in the judgment and I've been quoted by Sue Williams in the Sydney Morning Herald calling for a change and calling for an amendment to the Act that makes this process less onerous and doesn't require the minister's consent to be able to seek a penalty order for breach of tribunal's orders. It is already hard enough for by-laws to be enforced and for recalcitrant, let's say, lot owners to understand that there are consequences for their actions. So requiring a building, for example, to jump through hoops to try and get their application even filed under the new law is just a recipe for disaster, I think. So hopefully that call will be taken up and I know other lawyers are making the same call.

But definitely go and have a read of that case. It's a really interesting one that traverses various aspects of both the old and new law, and I'll have a link to that one in the show notes.

Reena Van Aalst: That's great, Amanda. I think I would say that it might've been a flaw in the Act where this wasn't really thought about thoroughly at the time. I don't believe that it was made to make it more difficult for owners' corporations to enforce their rights. But I think you're right. We need to wait and see what happens in that space.

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Amanda Farmer: Yes, I think you're right. And I think the flaw is this. What there should be is a delegation of some authority from the minister to the Department of Fair Trading or the tribunal or whatever the appropriate body is, the registrar of the tribunal, that the applications can be made to that person and that person is delegated the authority to provide consent on behalf of the minister. There is a way to do that in legislation and that's what needs to be done in this particular case. So it's not actually the minister who's providing the consent, but somebody who's then been delegated that authority. And I'm not sure that that option is there in the legislation as it stands.

Okay. So I think that's it for this week, Reena. Another jam-packed episode.

Reena Van Aalst: Yes. It's been quite busy, Amanda. So hopefully we'll get to hear more about that legislation change in the near future.

Amanda Farmer: Yes. Definitely. And remember, you can always get the transcripts of these episodes. This particular episode you'll get the transcript from yourstrataproperty.com.au/090, this being episode 90. Thank you once again, Reena.

Reena Van Aalst: Thank you, Amanda.

Amanda Farmer: Catch you next time. Bye.

Reena Van Aalst: 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?