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YSP Podcast Transcript: Episode 096. In Conversation: beware long-term fire safety contracts

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Intro: Welcome to Your Strata Property. The podcast for property owners looking for reliable, accurate, and bite-sized information from an experienced and authoritative source. To access previous episodes and useful strata tips, go to www.yourstrataproperty.com.au.

Amanda Farmer: Hello and welcome. I am Amanda Farmer and I have with me today Reena Val Aalst. Hi Reena.

Reena Van Aalst: Hi Amanda, how are you?

Amanda Farmer: I doing very well, thank you very much. We are getting towards the end of January already, my gosh.

Reena Van Aalst: I know, it's quite scary isn't it, how time flies and how the holidays have just been going by really quickly.

Amanda Farmer: That's it. I know a lot of my colleagues weren't planning on heading back to the office until after Australia Day so still a little bit quiet around but next week we will be back in full force.

Reena Van Aalst: I think each week, Amanda, on the roads you tend to see that the traffic is increasing slowly but each week it increases more and more, so.

Amanda Farmer: Yes back to school soon, all of that fun stuff. All right, let's jump in, what has been your challenge this week Reena?

Reena Van Aalst: Well at the end of last year Amanda, one of my schemes had their annual fire safety statement due this year but obviously we try and start getting quotations for the contract to be reissued because of the time, they weren't happy with the incumbent company, which I had only inherited once I had taken over the scheme earlier last year.

And the following week, it was just a coincidence, I received an email from a company that I had never heard of saying we're going out on this date to do an inspection and I said, well who are you? He said, well we have a contract with this scheme and I said but, last year, early in the year when we were having to get our annual fire safety statement submitted, your company wasn't the company that was being used to do the testing or the repairs. He said, oh no, here's the contract that the previous managing agent had signed and I said, well can you send it to me? I didn't have any record of it so they sent it to me and I thought, that's strange and also what had happened was that the managing agent had been asked to pay the amount in advance so it was paid for in 2016 for 2017 testing. Even though the testing had not occurred as far as I was aware because again, I had taken that scheme on in February and we had another company doing all of the testing and repairs.

So, we look up the records that we had and we found that it had been paid in advance and they said to us, well yes the contract just renews by itself unless you give us notice and I said well, again, give me a copy of your contract and they did and that's what it said and I said, well you have only given me very short notice and we were already going to appoint somebody else but I thought, if the scheme is already paid for and the committee was totally unaware of this, mind you, which is one of the reasons they left the previous strata managing agent.

They said to me, we are not aware of this, if we have paid for him, we might as well get him to do the testing and I said, of course. And because they had given us such short notice, we obviously couldn't comply with the date that they had set and the week after, they said, well now that contract has run out now, you have got to pay us again.

Amanda Farmer: What!

Reena Van Aalst: To have us retest and I said, no, I said we weren't aware of the contract and they sent me an invoice.



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Amanda Farmer: Oh my goodness.

Reena Van Aalst: Anyway, I said I am not paying it and we appointed somebody else now and we are going to be looking at the paperwork that had been issued. But one thing I wanted to state to our listeners, which is something that I have always told these companies, is under the Australian Consumer Law Part 2-3, it talks about unfair contract terms for consumer contracts, which obviously this is, and as a corporation is deemed to be a consumer under the law, and it says that contracts can not automatically renew themselves without proper notice. We didn't even know that they were going to come until we just got an email and I really don't know Amanda, how they found out that we were the agent because again, unless probably the previous managing agent had told them that, they had lost the plan and it had come to us.

So, yes I just wanted to raise that and I think I have seen it a lot in lift companies where they have these 5-year agreements and if you don't tell them, Amanda, three months before the anniversary date and they just roll over. And again, I had that happen with one of the major companies and I wrote to them and I said I am sorry, Australian Consumer Law, here is the section, you can't automatically renew this contract without proper notice and they basically accepted what we had to send.

So I think it's a good lesson for strata managing agents and owners corporations out there that when a company tells you, oh, it's automatically renewed because you didn't give the notice period, you didn't terminate the agreement in that notice period window, which can range from 3 months to 1 month on average then, the contract cannot automatically renew itself, it doesn't get renewed.

Amanda Farmer: Yes thank you very much for sharing that Reena, that's some really good practical advice and a prime spot for strata managers and owners to get stuck on when it comes to fire safety because it is something that is obviously at the top of your list of concerns and to make sure that you are compliant and I hadn't heard that before that there were companies out there, fire safety in particular, who were entering into these kinds of contracts or proposing these kinds of contracts for buildings and then taking advantage of that auto renewal so I am sure that there is other managers out there as well who might have gone through that experience and hopefully can check out their Australian Consumer Law and use that to their advantage.

Reena Van Aalst: Yes I think also, because with fire safety and having an annual fire safety statement date where the statement is due Amanda, it puts a lot of pressure because if you have got a deadline you have got to meet and someone is holding you to ransom then that's where I think the issues can arise.

Amanda Farmer: Yes absolutely. Well, I will be interested to know how you go with this particular company as well. Sounds like bad business to me.

Reena Van Aalst: Yes exactly.

Amanda Farmer: All right well, my challenge for this week, this comes from a member inside the, Your Strata Property online Membership Community. If you haven't heard of that before, head over to yourstrataproperty.com.au/membership and you can find out all about what membership offers but this was a member inside the forum who asked the question as to whether or not it was legal for there to be a clause in a contract for sale so when you are purchasing your strata unit, is it legal that there is a clause in the contract that says, you must vote the way that the former owner directs you to vote?

Now, we saw this quite a few years ago when there were developers who were selling off the plan so we call them the original owner and I think it was amendments, Reena you might tell me that, it was a while ago, it might have been 2008 amendments or a while back to the Strata Schemes Management Act that made clear that developers or original owners who were selling off the plan, could not include, or if they did include in their contracts for sale, a requirement that the purchaser vote in their favor or as they direct or pursuant to-

Reena Van Aalst: Or give them a proxy I think.

Amanda Farmer: A proxy or a power of attorney that those clauses were void in the contract. Now, that's been part of our law for



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some years and this particular member hadn't bought from the developer, the original owner, but there was still that clause in their contract, which was kind of bizarre and they had asked me, is that still illegal? And I looked to Schedule One of the Strata Scheme Management Act 2015 here in New South Wales and I saw in Clause 27 of Schedule One, that indeed, that is illegal, even if it's not the original owner who is including that clause in your sale contract that is illegal as well.

So the relevant clauses in Schedule One and I will put links to these in the show notes, are Clause 25, which deals with the original owner and Clause 27, which is a blanket provision that basically says any clause in a contract for sale that requires the purchaser of a lot or any other person to cast a vote at the direction of another person, is void and unenforceable.

So that's something really important to remember. I find it surprising that these clauses are still around when that's been our law for some time and kind of scary that the clauses are around and people are complying with them or think that they need to comply with them and don't realize that they in fact, illegal. So I am really glad that, that member was able to raise that question in the forum and shed some light to that issue.

Reena Van Aalst: Mm-hmm (affirmative), that's a good one to note.

Amanda Farmer: All right so let's move on to some wins. What is your win for this week Reena?

Reena Van Aalst: Well in a scheme that I manage, I had an owner that was trying to railroad some work before Christmas, they had rented out the apartment for some time and the tenant had left so there was a bit of time before Christmas and then obviously the New Year to try and do some work Amanda, and they had lined up a builder and everything. And they wrote to me and said, this is what we are going to do and I said no, they wanted to remove an internal wall and I said, do you have an engineers report?

Yes, we do have one and it said that the structural beams would have to replace those where the walls had been removed. So straight away I knew and I realized that was an alteration to common property, it would need a by-law and there had been some other work in that scheme where people had not submitted special by-laws so the committee was quite wary of people trying to do this.

So I wrote to them and I gave them so much information, I said, this is an example from another building, I whited out all the stuff, even though it's probably documented, I didn't want to give that sort of detail so I whited out all of the information, so this is the type of thing we need to use. A by-law that pretty much includes these points and then he was then I think a retired lawyer and said, why should we have to have the responsibility of future repairs and maintenance? And I said it's beyond our tenure of ownership. I said, well basically, it was during your tenure of ownership that the work was carried out, not the person that then buys your lot subsequently. So that's why the onus on repairs and maintenance will fall on you and every other person in perpetuity that buys that lot.

Anyway, so after back and forth, they were trying to then bypass me as an agent and go straight to the strata committee, which they had gone to a meeting on a weekend and the committee had met with the person and told them it needed more things than what I had even asked for. Even though I wanted a structural drawing, they said, we want our own engineer to also inspect and you need to pay for that et cetera.

And I said to the committee, well why wasn't that minuted anyway? And they said, it was after the meeting and I said, well you should have sent me an email moving forward so at least we have got a record that this was something that was also communicated to them as well. So they decided not to proceed as far as I know until I heard on Monday that there was some work going on and I wrote to them and said, oh we are just doing cosmetic work, the handyman is just doing some painting et cetera.

But unfortunately I think people when they want to renovate, it happens to me and my team quite a lot, they want to renovate Amanda, there is deadlines with the tenancies, people moving in and out, you have got to try and take advantage of the window. Obviously, as the apartment is not being rented out, they are losing rent so there is loss of income and there is committees sometimes may hold meetings in a way, someone says, no our next meeting is in two months, you will have to wait.



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So, there is a lot of pressure on strata managers and committees I think when it comes to renovations and I think having a good by-law in place to allow minor renovations to occur where the committee can give the consent as opposed to general meeting resolution is also a good thing that schemes should look into. But if you want to do more than that, you need to have a special by-law as an owner.

Amanda Farmer: Yes what's really interesting in our new law the 2015 Strata Scheme's Management Act here in New South Wales is that we have this section, it's Section 145 and I will put a link to it in the show notes and it relates to what we call common property rights by-laws. So what used to be exclusive use, special privileged by-laws where you are being granted the right to use a particular part of the common property, that Section 145 now makes very clear that while the by-law remains in force, it is binding on the owner for the time being of the lot specified in the by-law.

So that just goes to your point Reena about the by-law being applicable, not only to the person who is doing the work but the future, the future owners of the lot, they are going to be bound by the obligations set out in the by-law and particularly if the by-law requires the payment of money, so where somebody might be granted the exclusive use of common property and the Owners' Corporation has said, that's on the condition that you pay us some kind of a license fee or some money for that benefit, then anyone you sell that lot too, also becomes liable to pay that money under the by-law. And that is set out clearly in Section 145 now so if you or any of the lot owners that you might be advising as a manager, you are trying to draw to their attention that these rights are not only going to affect them but anyone that they sell to, then shoot them a copy of Section 145.

Reena Van Aalst: Yes that's good advice, Amanda.

Amanda Farmer: And hopefully this owner in particular, Reena, has decided maybe not proceed with such extensive works or?

Reena Van Aalst: I think so, yes I think also they were trying to get it done before Christmas or early in the New Year. The chairperson apparently was away and they said, well I need the strata roll, do you have to be there? I said, well I think the committee would want me to be there and you might not want me. I we were trying to hold a separate meeting, get everyone's addresses and the committee definitely did not want to have a bar of any of that.

Amanda Farmer: And was this somebody who had just bought in or?

Reena Van Aalst: No they have been an owner for a long time but they had been in the building for many years Amanda so here's the thing, a long-term tenant had left and therefore they were taking advantage of renovating it and yes.

Amanda Farmer: Yes well you have been in strata for a long time, you should know how it operates. You do see a lot of people who are just buying in and haven't been properly educated yet and don't understand that if they want to rip out the bathroom, well you are going to have to get consent for that. Interesting to see if that all becomes too hard and they just move on with getting another tenant in there.

Reena Van Aalst: Exactly.

Amanda Farmer: All right well my win for this week relates to some tribunal proceedings that I have been involved in. It was quite a drawn-out proceeding, it started under the old act before a strata scheme's adjudicator and it was a commercial lot, a restaurant in fact. And the restaurant had removed part of the ceiling and when the owners corporation found out that this was the case, they were particularly concerned about fire safety because it was a ceiling that, because of the materials that had been used in the ceiling, had preserved the fire safety of the building and they had asked the commercial owner to reinstate the ceiling and the owner had said, well, the ceiling is not actually common property, it's lot property and because it's lot property, we can remove it and we don't need your consent and no, we are not putting it back.

And they had relied on the fact that it was a bit of an unusual ceiling, it was actually, they called it a false ceiling, we called it a dropped ceiling because that suited our purposes before the tribunal.



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Reena Van Aalst: But I mean, what is a false ceiling? There is a ceiling there, what's false about it? Like it's not real.

Amanda Farmer: Yes so we ended up, before the adjudicator having an argument about what was originally there when the building was started and it was an existing building before it became the strata plan so a surveyor had gone in and drawn a plan around an already existing, already constructed building and we had some evidence on from the surveyor who actually drew the plan to say that that ceiling was always in place and that it is in fact, common property.

That was disputed by the owner, the adjudicator found in our favour and the owner appealed to the tribunal. So it took about 12 months this case was sort of, submissions going on, the hearing and then we waited a long time for a decision and we have just received it recently and the tribunal has confirmed that indeed, the dropped ceiling is, in fact, common property and has directed the lot owner to apply to the Owners' Corporation for retrospective consent to have removed that ceiling and there has been a time frame placed on that so the owner has to apply by a particular date and if the Owners' Corporation receives that application, then it must convene a meeting and consider that application and of course, not unreasonably refuse it if it meets all requirements.

So for example, if there is a by-law in place that shifts responsibility for the affected common property onto the lot owner and makes sure that they are properly insured and indemnifying a particularly dealing with those issues of fire safety. So one of those really black letters if you like, strata cases, what is lot property? What is common property? Where does the boundary lie? And particularly when you are dealing with false or dropped ceilings, these things can get a little bit confusing but that was a good win there for our owners corporation client.

Reena Van Aalst: Oh it's a great outcome, Amanda.

Amanda Farmer: Yes so that case is actually reported and I will put a link to that in the show notes. It's the case of Melani M.E.L.A.N.I and the owners of Strata Plan number 22214 so there is a nicely reasoned decision there from the tribunal. It was made under the old law, under the 1996 Act but an interesting read there for anybody who wants to check that out and I will make sure that's also inside our case database, which is accessible to members of the YSP online community.

Reena Van Aalst: That's great Amanda.

Amanda Farmer: So anything else to add Reena?

Reena Van Aalst: No, all good. Just getting back into the swing of things.

Amanda Farmer: Yes that's it. Do you know what? It is episode 96, four more episodes and we are at episode 100. We have something very special planned don't we Reena?

Reena Van Aalst: We do.

Amanda Farmer: So make sure you keep tuning in and look forward to episode number 100. Catch you next time.

Reena Van Aalst: Bye Amanda.

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?

