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YSP Podcast Transcript: Episode 151. Is a secret ballot really secret?

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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'm Amanda Farmer and I have with me this week, Reena Van Aalst. Hi, Reena.

Reena Van Aalst: Hi Amanda. How are you?

Amanda Farmer: Doing very well, thank you. I do want to let our listeners in on a little secret straight up that you and I have just spent about 20 minutes resolving-

Reena Van Aalst: 25.

Amanda Farmer: You would know. Technical difficulties. So I feel very happy to be here. I can see you. I can hear you now, more importantly. We have solved those problems.

Reena Van Aalst: It's always great with technology, Amanda. When something works, it's fantastic and when it doesn't work, it really stuffs you around and takes up so much time.

Amanda Farmer: And you and I have been doing this for long enough now that I think we're pretty expert these days when it comes to recording a podcast and making sure that we can hear each other and the microphones are working. So when we do have a problem, I get very frustrated.

Reena Van Aalst: I know, me too.

Amanda Farmer: Don't know how to fix it. But we are here now and we are ready to roll with this week's challenges and wins. Reena, do you want to kick us off with your challenge?

Reena Van Aalst: The challenge I had this week, Amanda related to an AGM that was held, and basically, there was a particular owner who wants to wanting to get onto the strata committee and he actually is not an owner. He is related to the owner, and very close relationships. So therefore, a proxy was given for him to attend and also a nomination form was provided by the owner for him to be nominated to the strata committee. And unfortunately, this person has some mental health issues and many of the members and owners there didn't actually want to let him know whether or not they voted for him when it came to the election. So the owners asked me in the committee, can we use voting papers for this purpose? And I said, of course we can use voting papers. And so, basically, whatever the number was, they decided to have one less so that he wouldn't get onto the committee.

Reena Van Aalst: So a ballot was then held after that and he wasn't elected. So of course you can imagine how upset he was as a result of not being elected, and then he wanted to see the voting papers. Now I said to him, "*Well, it's late now. We've been here for 2 hours.*" I didn't want to say too much to him. And then obviously a lot of the owners came up to me later and said, "*Reena, but we're concerned that if he sees our voting papers and knows that we didn't vote for him*" ... They're actually concerned about retribution because apparently there have been events in the past where people's tires have been slashed and things have happened. And even though you can't prove it was him, all of the owners and the committee were quite adamant that it was him, because sometimes you can relate certain events and then consequences.

Now, he's been trying to come and make a time to see the papers, and I said, "Well, obviously you're not an owner. You can't see them." And then the person who owns a lot wrote to us. And so we've been trying to like delay the inspection, Amanda. But I just wanting to ask you. Obviously, it is an owners corporations record, but then the other hand, what do we do when people perhaps may not have voted if they thought he could actually look at the papers. So have you ever had this situation come up before?

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Amanda Farmer: Not exactly, no. It just remind me, is it the owner or the proxy holder who you're concerned about may have the mental health issue did you say?

Reena Van Aalst: The proxy holder.

Amanda Farmer: Okay. So is it possible to speak to the owner and express those concerns?

Reena Van Aalst: Well, we have. But unfortunately, sometimes you get emails from her email address that you know he's written. So it's not exactly ... Yes. So it's a very close relationship. I don't want to disclose exactly how close it is, but it's unfortunate. I think that person also is in a bind. When you have someone who's mentally unwell.

Amanda Farmer: Yes, really difficult circumstance, and it always is when we're in buildings where we do have a difficult behaviour because of mental illness. It's something that a strata manager recently contacted me about with the suggestion that we talk about that in a little bit more detail on the podcast, specifically how to deal effectively as well as compassionately and with understanding with people who suffer from mental illness. So it's definitely something on our list to get stuck into in more detail. But you have a legal obligation to respond to a request for inspecting the books and records. The voting papers are a record of the owners corporation. So pursuant to our action-

Reena Van Aalst: Especially when there was a ballot as well that was used for that purpose. But I think maybe people wouldn't have perhaps voted, Amanda, if they knew that those were going to be accessed by him after. So I suppose it's one of those things. It's a catch-22.

Amanda Farmer: Was it conducted as a secret ballot?

Reena Van Aalst: No, it wasn't really ... No one said, "Can you have it as a secret ballot?" And I didn't obviously suggest that because I wasn't aware that he would then want to inspect the record. So I suppose if I had thought probably ahead of time and realised that maybe-

Amanda Farmer: You could have done it that way. That's only just occurring to me now as well.

Reena Van Aalst: Yes. But unfortunately, at the time, even though I knew he wouldn't be happy not being on the strata committee, all the people that he wanted to be on the strata committee did get on. So I thought, well it wasn't as if all the people that he was wanting to be on the committee with didn't get on. So [crosstalk 00:05:41] thought of that. Maybe that is a solution in the future.

Amanda Farmer: In the future, yes. I'm just looking up the legislation now and it's a Clause 29 of schedule 1 to the Act refers to the method, if you like, of voting on motion or for an election via secret ballot. And you can do that if the strata committee determines that the motion is to be so determined, or at least one-quarter of the persons entitled to vote on the motion agree that there is to be a secret ballot. So you probably have enough support in that building to get one-quarter for any particular motion that you want to be via secret ballot. And that is in our Act in New South Wales.

And if we head over to the regulation ... When I look at the regulation, the only reference to secret ballots is in relation to electronic voting, and that's in regulation 41, as well as regulation 15 when it comes to pre-meeting electronic voting. And that just says that if a ballot for pre-meeting electronic voting is a secret ballot, the secretary must ensure that the identity of the voter cannot be ascertained from the form, and that the vote is dealt with so that it's not capable of being used to identify the voter.

But when we think about that, Reena, and I think we've discussed this on a previous episode of the podcast, in order to ascertain the result of the vote, when you're dealing with, say, special resolutions where you must know the unit entitlement of the person voting for or against the motion, you're going to have to be able to identify-

Reena Van Aalst: Exactly.

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Amanda Farmer: The lot number on behalf of which the person's voting so you know the unit entitlement.

Reena Van Aalst: Exactly.

Amanda Farmer: So yes, I think we've discussed that before. How secret is a secret ballot?

Reena Van Aalst: And it says, Amanda, in regulation 41 that the records relating to electronic voting for motions for resolutions by an owners corporation must be retained by an owners corporation. So if you retain the record without identifying the person ... yes, that can only occur where there's no special resolution.

Amanda Farmer: Yes, I don't think our regulation is really dealing sufficiently or satisfactorily enough with secret ballots. And I'd be very interested to hear from listeners, strata managers, committee members who have attempted this secret ballot process, and what they've then done with the ballot papers, because there doesn't seem to be an express exemption from the-

Reena Van Aalst: Keeping the record.

Amanda Farmer: Yes, and people being prevented from inspecting them.

Reena Van Aalst: And also too, with electronic voting, Amanda, I mean, to me ... Obviously, it's only in its infancy, but I think it's ... There could be many cases in the future where there's no record of who voted and how they voted, and if the mechanism didn't record everything, but could it be contested? And things like that. So it'll be interesting to see, I mean, if anyone has any information or experience with electronic voting where it's been challenged or there's been a problem with people trying to use the medium at the time and some people couldn't use it and others couldn't get on. Yes. So I'm interested to see if anyone has any information or experience about that.

Amanda Farmer: Indeed. And Reena, just returning to your specific problem, unfortunately, I don't think I have the solution. In order to comply with the legislation, you've got to make those papers available. And maybe even if you had conducted a secret ballot, you'd have to make those papers available. It's really unclear.

Reena Van Aalst: Exactly.

Amanda Farmer: But of course, if you do make those papers available and then you have a difficult resident on your hands who is taking steps to harass, threaten, or intimidate those owners who may have voted against the election of that person, then all of the things we've talked about previously on the podcast, how to deal with difficult residents, how to protect yourself in that situation apply. For sure.

Reena Van Aalst: Yes. Thanks for that, Amanda.

Amanda Farmer: Okay. My challenge for this week. I only experience this very recently. I think it was just last week that I received the email I'm about to talk about. But I put it straight on our spreadsheet, Reena, and I put it right up to the top for our next episode because I was quite shocked.

Amanda Farmer: And the challenge is this. I had a building I was helping out in relation to a mediation application that a lot owner had filed. I'd had a chat with the building. It was a longstanding dispute. There'd been a few letters already that we'd sent across to the lot owner. Lot owner applied for mediation. And just in case anybody's not sure, you do have a right as a respondent to mediation to decline to attend mediation, and that I find is often the case with buildings that have ... They feel like they've tried to resolve a dispute for some time, and for whatever reason they're just not getting their message heard by the lot owner who has the difficulty. And sometimes it's just not worth the time, the effort, the money for the building to attend mediation, and they're quite happy for the matter simply to proceed straight to the Tribunal, and they choose to decline mediation. And there's no adverse inference drawn by the tribunal if that's the case, if an owners corporation or a lot owner declines to attend mediation as a respondent.

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Amanda Farmer: So I was chatting to this building about that application. We'd decided that they would decline to attend mediation, and I sent an email to our Fair Tradings mediation services unit explaining that the building was not going to attend mediation. In the meantime, I had also noticed that when mediation services had sent a copy of the mediation application over to my client, they'd only sent part of it. They'd only sent the paragraph that explained what it was that the lot owner wanted and a few attachments that they had filed online. They'd done their filing online.

Reena Van Aalst: That's the only way you can do it now, Amanda. You can't file any other way.

Amanda Farmer: You can only file online?

Reena Van Aalst: Yes. Because what happened, I think, a couple of months ago, we sent one in and they said, "*You can only do it online now.*" So even though they had it, they said, "*You've got to basically do it again.*"

Amanda Farmer: Okay. So my clients had received this version of the online application. When I looked at it, I said, "*That's the whole application. I can't see who the respondents are to this application. We've got a letter from Fair Trading saying that we, the owners corporation, are the respondents.*" But the letter also said that there was a second respondent, another lot of in the building. And I said, "Where's that page of the application? I can't see that." And that's when I realised I only had part of the application. I asked my client, I said, "*Have you got the rest?*" They said, "*No, this is all we got.*"

Amanda Farmer: So returning to my notification to Fair Trading when I was telling them we are declining to attend, and I said, "*By the way, do you mind sending me the entire copy of the application? Because I haven't seen it and I'm not exactly aware of who the respondents are.*" And the email I got in reply was, "*We do not send full copies of mediation applications to respondents for privacy reasons.*"

Reena Van Aalst: Really?

Amanda Farmer: I have never heard that before. I nearly fell off my chair.

Reena Van Aalst: But how can it be ... So is the privacy relating to the fact there was an extra party, Amanda? Because of the other respondent?

Amanda Farmer: I have no idea, but this is a prerequisite to litigation. It's a statutory process. It's set out in our Act that you have to go through this mediation process. And to withhold the details of parties to that mediation process, I don't understand it. I think the privacy issue might be the contact details perhaps of the lot owner. So their email address or things like that. But I questioned it when I was told that and said, "What part of the legislation? Is this new? I've never heard this before. I used to get ... As we said, it used to be hard copy and now it's online. So is this something new with the online?" And the email that I received in return was to confirm that nothing has changed in policy or procedure or the law. In the past there was always the paper application form, and Fair Trading says that they didn't ever send the respondent a full copy of the form. They always excluded page 2 because of privacy, and they only ever sent page 3 and 4.. Now that could be right and maybe I've just never picked it up.

Reena Van Aalst: I suppose, now that you're rejigging my memory, I mean ... I'm just trying to think. I know that most of the time we are the applicants, so it's really hard for us to ascertain ... Now I'm just trying to think when an owners corporation has been a respondent.

Amanda Farmer: If they have always withheld a page, I simply haven't noticed. What's happening now, because as you say, the applications are being filed online, it's quite obvious that as a respondent when you receive this stuff, you're only getting a paragraph because you're only getting what's called part 5, which is the issue description. So that's the only bit you're getting and then you're getting attached documents, and you're being told in a covering letter who the applicant is and who the respondents are. That's it. That's the only information you're getting and you're getting told to turn up at 10:00 AM at Paramatta on a certain date.

And I am really uncomfortable with that. As a lawyer, I feel very uncomfortable about any part of a document like this. The initiation of a statutory procedure being withheld from a respondent. And I would like to dig deeper into this question of how the privacy

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legislation apparently prevents Fair Trading from providing this information.

Amanda Farmer: Now, to that end there's some exciting news. I have invited representatives of Fair Trading to come onto the podcast and teach us a little bit more about the mediation process. And this question is certainly on my list, as well as many others that I know our listeners often ask about mediation, how it works, why we have it, what the potential outcomes are, what the role of the mediator is. And this whole question around what we're entitled to see and not see did spark that conversation about sharing some more information with listeners from Fair Trading mediation services unit via the podcast. So very excited that that is coming up. I'm not going to name names yet because we're still in discussions about who's going to be involved in that chat, but I am looking forward to bringing it to you.

Reena Van Aalst: Well that's wonderful news, Amanda. I think it'll be good for both owners and managers to hear from someone from Fair Trading, especially if they haven't actually experienced mediation before.

Amanda Farmer: Yes. So stay tuned for that one.

All right. Let's change gears and jump into your win for this week, Reena.

Reena Van Aalst: Well, the win for this week occurred in relation to a meeting that was held recently and the chairperson being able to rule motions out of order. Now, I think people might say, "*Well, how is that a win?*" But sometimes there are motions that basically are unlawful or conflict with the Act or have already been considered before. So in this particular scheme there were 2 motions that were submitted by an owner that were identical to 2 motions that had been previously resolved, except for the fact that there was some details about the installation of the subject common property. I won't name it, otherwise it will be apparent to those who are listing which scheme I'm talking about.

But these motions had already been passed before, and when they had been passed there was a lot of detail attached to what common property changes were going to be undertaken. So you have a concept plan, etc. were attached. In this particular case, what happened was that the motions were submitted without any reference to any concept design summary or anything that would allow a person voting to understand exactly what they were voting for. So just for those people that perhaps don't know much about the role of the chairperson, and I think this is something that does occur in many schemes where many people have an understanding of a chairperson's role being more than really what it is. And in a corporation, I think which people perhaps allude to, in a corporation, the chairperson does have a lot more power. In some instances they have a casting vote and other items that are related to in the Corporations Act, or particular company constitutions.

Whereas, in the Strata Schemes Management Act, the chairperson's function is listed under section 42. So basically, it's to preside at meetings of either strata committee or general meetings, and it's to make determinations as to quorums and procedural matters at meetings of the owners corporation and the strata committee. So pretty much that is what the chairperson's role is in a nutshell. But the one that I think is really important, I think perhaps people haven't really thought about, is that a chairperson may rule certain motions out of order. So this is Schedule 1, part 3. General meetings, Section 19. So the chairperson at a meeting may rule a motion out of order if the chairperson considers a motion, if carried, would conflict with this Act or the by-laws of the strata scheme, or would otherwise be unlawful or unenforceable, or any requirement of this Act to include the form of motion, the notice of meaning has not been complied with. So I suppose in that case that would refer someone didn't have an explanatory note that was required.

So in this case the chairperson ruled the motion's out of order. And to me, that was a win I think because it just shows people that you can't put motions on if you don't have all the corresponding supporting information, that people can't make fully informed decisions. And also, if something's already been agreed to be done, then you can't keep rehashing the same thing over and over when actions have been taken to effect those resolutions, Amanda. So have you had experience of that happening?

Amanda Farmer: Yes, absolutely. It is an incredibly powerful part of the legislation and it is very important, I agree, for our chair people, chairs I think is the official term, to know exists and to use that. And I can think of at least 3 meetings in the last 12 months that I've attended where I have pointed to that section and urged the chair to rule a motion out of order for various reasons,

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because there wasn't supporting documents attached or the *motion* didn't contain the explanatory note, or to resolve the motion would have been to *effect* an illegality because it wasn't possible under the law to do what it was that the motion was proposing.

Amanda Farmer: So chairs are always very reluctant to take that step. And in some cases, the chair has been my client. In other cases, the chair has not been my client and it's been a bit of a hostile suggestion, if you like, or received as a hostile suggestion to rule the motion out of order. So chairs can become very uncomfortable about taking that very serious step. So it's important to know before the meeting, I think, with having communicated with your strata manager, or strata managers talking to their committees if the strata manager is going to chair the meeting, how it is you're going to handle a particular motion. And if you're to rule it out of order, be very clear about why, and being able to communicate that to the meeting.

Reena Van Aalst: Yes. I think it's important to let people know why. Although, I received advice from another lawyer who said that you don't really have to even give the reasons. But I think it's always the best thing. I think it's a good idea to give the reasons because I think people need to understand what is wrong with the motion and why it couldn't be considered.

Amanda Farmer: Yes, I agree with that. Now, there is some more information on how to chair a strata meeting back in Episode number 89. I think that was a solo episode from me, and I am pretty sure that I cover off in a little bit of detail that process of ruling motions out of order and certainly pointing out that that right exists. So if you're a chair or trying to become a better chair, or you're a strata manager, that's a good episode to go back and have a listen to.

And Reena, I will say, I think we can share with our listeners, you and I have been asked to do some more in depth education, if you like, specifically around chairing meetings. And for those who are wanting to be better chairs and ... Not yet releasing any information about what's happening there, but we can tell you to stay tuned and we will have something special. A special opportunity, let's say, for our listeners coming up first half of this year.

Reena Van Aalst: Yes. Looking forward to that, Amanda, I think a lot of people do get very nervous when they have to chair meetings and they don't really understand ... They just sometimes read the motion but they don't then say, "*Well, all those for and all those against*" ... Because in a sense ... I think it's a really important tool I think for people to learn and understand and become more confident, I think, too when they're chairing meetings.

Amanda Farmer: Yes. Really important.

Okay. So my win for this week. I want to share with our listeners who may not yet have come across it, that Your Strata Property is on Facebook. And you may have received, if you are on our email list, an email a couple of weeks ago letting you know about the Facebook page and what things are happening over there. Probably the most valuable part of the Facebook page, I think, for those who visit it are the short videos that I've been recording over there live. They are live videos, so you're getting me raw and unedited. But they're just short snippets. Much, much shorter than the podcast. Giving you some everyday tips. It's usually something that I've been working on with a client and then I've jumped on Facebook and just shared that experience.

I've talked about smoke-free apartment buildings, the rules around committee meeting notices, and minutes. Who do we send those to? Whether you're a large or a small scheme. Secure parcel delivery, some tips for self-representing in the Tribunal, how to deal with noisy neighbours, and lots more. So I'm over there regularly. The thing about Facebook is that it will pop up and tell you if I'm there and recording a video, and feel free to jump on and make a comment or ask a question and ... yes, I'm really enjoying it, Reena. I actually have on my list to get you involved in these Facebook lives very soon.

Reena Van Aalst: Oh, thank you. Well, as you know, I'm not on Facebook. But I'll be interested to see how it all works.

Amanda Farmer: Yes. There's lots of fun things that you can do with Facebook. I've been doing polls, surveys, as well as the live videos, and just playing around a little bit and seeing what it is that works best for our listeners, how you like to learn, how you like to receive this information. So if you're enjoying it, let me know.

If you haven't yet checked it out and you've got a Facebook account, you head over to Facebook and type in Your Strata Property



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in the search field and you'll find our page there. And tick that like button, and then whenever you're on Facebook and things are happening on the Your Strata Property page, you'll get a notification. So having started this episode saying that we're now becoming podcast tech experts, I'm very fast trying to become a Facebook tech expert, which is a whole another world.

Reena Van Aalst: I can imagine. And when it's going well, Amanda, I'm sure it's wonderful. But when it doesn't work, then it's very frustrating.

Amanda Farmer: Yes. yes. I haven't yet had any Facebook disasters, but we'll see. Everybody stay tuned for the Facebook disaster. The live video that my little boy walks in on and I can't delete it or something like that. It's going to happen.

Amanda Farmer: All right. Well I think that is it for this week. Thank you, Reena. Anything to add?

Reena Van Aalst: No. All good, Amanda.

Amanda Farmer: Straight back into the fray.

Reena Van Aalst: Yes.

Amanda Farmer: I'll catch you next time.

Reena Van Aalst: Okay, 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?