

Publication Date: 20 March 2019
YSP Podcast Transcript: Episode 154. When you're unhappy, go back to the contract terms

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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. It feels like it's been a little while since we have spoken. We are back together again.

Reena Van Aalst: Yes. It feels like a really long time actually. I think maybe because we've both been so busy. A day seems like such a long time now. So two days ago seems like eternity.

Amanda Farmer: Yes. I heard someone the other day talking about preparing for the Easter holidays, which I couldn't believe are going to be upon us very soon. Do you have plans? You taking some time off?

Reena Van Aalst: No, I don't usually take time off at Easter because it's usually school holidays and I try really hard to stay away from having any time off when there's too many kids around.

Amanda Farmer: Kids, families, expensive airfares. All the joys of school holidays.

Reena Van Aalst: Exactly. What about you?

Amanda Farmer: No, no plans. No plans. We will be enjoying school holidays, yes. But just planning to do the staycation, as they say.

Reena Van Aalst: Is enjoying the right word, Amanda?

Amanda Farmer: Yes, Reena. It is.

Reena Van Aalst: Okay.

Amanda Farmer: I am a happy parent.

Reena Van Aalst: Okay. You've only got one, I suppose.

Amanda Farmer: Yes, that does help with the happy. All right. Now let's get into it. Challenges. What has been challenging you this week?

Reena Van Aalst: So we had very ... And again, another interesting occurrence, Amanda, where a tenant had left a wardrobe on common property. They had a store room, and I think there might've been ... I'm not sure if a notice had gone around to say, "We're going to remove it on this particular day." There may have been a notice just in general saying, "We're looking at renovating and upgrading the store room, and if you have stuff can you please remove it?" But no date was given and nothing was particularly itemised in terms of dates and times, so people would have deadlines to meet. And so, the committee decided to remove a wardrobe, and then the next minute the tenant said, "You had no right to remove it." I went on, I think it's Gumtree or eBay and it's going to cost \$200 to replace." And the committee said, basically, "You had no right to put it there in the first place without consent." I think a lot of the people just did things without even asking.



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Reena Van Aalst: Anyway, and so then there was a claim ... I mean, there were so many emails and telephone calls. I mean, you'd think over this old wardrobe. Anyway, the agent then got involved and pretty much brought to the owners corporation's attention the fact that they had no right to dispose of it, and the section of the Act that I'm referring to is 125 is disposal of abandoned goods on common property. And basically, there's rights given to owners corporations to be able to undertake this, but then the regulations then pretty much articulate how that's to be done. Regulation 32. So it applies to goods that are on common property, obviously other than vehicles or other things that are permitted by the owners corporation to remain on common property. And it says that a notice has to be placed on either goods and that there should be a period specified in the disposal notice, and it must be not less than the size of an A4 piece of paper, be in a place where it wouldn't be affected by weather, describe the goods and state the date the notice was issued, and obviously give a timeframe being not earlier than 5 days before the notice was placed on or near the goods, and so forth.

So I won't go in to the rest of the contents of that regulation. I'm sure you'll have it on your show notes. But unfortunately, after back and forth and back and forth, they offered her \$100 rather than 200.

Amanda Farmer: Did they follow this abandoned goods procedure?

Reena Van Aalst: No. So I think this is a good lesson I think for strata managers who perhaps may be asked by their strata committees, or if the manager is away that the owners corporation is about to do something like this, or if any of your owners who are listening want to undertake any disposal of the goods that are on common property or seemingly abandoned goods, because I think no one knew actually which apartment this wardrobe had belonged to. They should probably take heed, because it's back and forth telephone calls, meetings, etc. Our time, strata committee time. So they offered them \$100, which I think should have been really more than that because they wanted 200, and I think we spent more than \$100 arguing over \$100, but anyway.

Amanda Farmer: I have no doubt.

Reena Van Aalst: So it's now all been sorted out, but just a note that owners corporations can't really dispose of anything that's abandoned on common property without going through this process. If you have a very educated tenant or agent then I think you'll find yourself in a little bit of trouble.

Amanda Farmer: Yes, and it is an involved process, and it's quite similar to the motor vehicles process, but it is different and it's in a different section of the regulation. Regulation 32, I will put links to regulation 32 and also the section of the Act which is 125 in the show notes, and you do have to have the notice on there for 5 days. At least 5 days.

Reena Van Aalst: Yes. At least 5 days, yeah, and it can't be somewhere where it's going to get wet.

Amanda Farmer: Yes. Interesting to be talking about this topic in the context of a podcast episode a couple of weeks ago when I spoke to Beth from Waverley Council about waste disposal. And I know that the councils have issues, of course, with goods being abandoned on council property, and I think this Section of the Act and regulation being designed to empower owner's corporations to deal with a similar problem on the common property. But query how much power do you really have when you have to follow this rather involved process? And who wants to have junk on their common property for 5 days anyway?

Reena Van Aalst: At least 5 days it says.

Amanda Farmer: At least 5 days, yeah. Exactly. But yeah, good example of finding yourself in strife when you don't follow that procedure. And as managers, you advise, they decide. Tell them how to do it right. Whether they follow it or not is up to them.

Okay. My challenge for this week. I have a question from a listener, and this is Hayley asking the question. She says that she lives in a strata property with very low fencing. It's around 1.4 meters, so that sounds a bit lower than our standard 1.8, I think is our fences generally on boundaries. She has privacy and safety issues and she's got young kids who are playing in the backyard, and she has proposed raising the fence. It's a common property fence, but no one will support the costs of doing that. And she has

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asked us, what are her rights to privacy and to ensuring the safety of her children?

Amanda Farmer: Now, I said to Hayley that you and I, Reena, would discuss this on the podcast. I can say for one, there is no right to privacy in our legislation, not in our strata legislation. There are privacy principles when it comes to certain corporations, large corporations and personal information and things like that.

Reena Van Aalst: And surveillance, Amanda, also.

Amanda Farmer: And when it comes to surveillance, yes. But when it comes to enjoying your backyard and your home, there is, as far as I'm aware, no right. It's not in our constitution or anything like that that we have a right to privacy and have people not peering over our back fences. So unfortunately, there's nothing in that respect, Hayley, that will help you.

Safety, I think, and let me know what you think Reena, may be the avenue to go down, particularly if the fence is not at the standard height. It does sound quite low. In our legislation in New South Wales, if your building has the model by-law in place that relates to doing work on the common property, that model by-law says that you basically can't alter the common property without approval, but you are not prevented from installing a safety device, a structure, a screen to prevent harm to children, to protect your lot against intruders, or to prevent the entry of animals or insects into the lot. So have a think, Hayley, about whether there is something that you might do to the fence that will protect your lot against intruders or prevent harm to your children, because subject of course to the by-laws that your scheme has in place, it may be that you are permitted to do that and you don't need approval. What do you think, Reena?

Reena Van Aalst: I think those measures may be useful, Amanda, probably as a secondary option. But I think in the first instance, some of my schemes where you've got the ground floor garden apartments, some of them have small types of bushes or things that will grow and provide a natural screening. I mean, we've got this between our neighbours here where I live and in the adjoining apartments. Now it's grown as high as the apartments, which is ... Maybe I should find out what the name of that plant is. It's actually quite a nice one and the roots aren't very intrusive. But also, you might get pots and then you can grow them in pots.

So if you don't want to have a permanent thing, you're not good at gardening, you might want to get some pots and grow things, and those the natural screenings, they're quite effective. You still get the light in, but you're not having this ... I suppose with a structure perhaps or installing something, it has to obviously be in keeping with the lot. That might be expensive. I don't know what sort of fencing there is. But it can be quite costly and then might have to be removed if she sells the lot or whatever. Yes, I think the natural way I think is a good way to start. At least you know they're your plants that you can take with you and move around the garden in the future. Ours was more not for privacy per say. Initially, it was just a nice plant along the driveway, but now it's grown up so high it needs constant pruning.

I think there's another scheme I just actually went to this week and they actually have a similar thing, the same plant, and that's shared between their boundary of their driveway and the adjoining property. And that's, again, grown quite high and you can't see it. So the 2 options, I think, Amanda, are the initial option could be just some natural shrubbery, and then second option if that's not feasible is to do something more permanent like you've suggested.

Amanda Farmer: Yes. Excellent. I hope that helps you, Hayley. And of course, anybody listening, if you have particular questions, whether it arises from something Reena and I have spoken about on the podcast or something different that you'd like us to address, please do send your questions through. When I get those I can generally either direct listeners to an episode that we've already recorded that deals with the question, or I let you know that we have it on our list and we get to it. So there you go. Send in those questions.

Wins for this week, Reena.

Reena Van Aalst: This is quite a liberating one, actually.

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Amanda Farmer: Sounds good.

Reena Van Aalst: A win where I actually resigned from a building because they weren't complying with the Act, and I just thought to myself, "Really I just don't want to be" ... To me, in terms of your reputation in the marketplace and standards that you want to maintain, there's no point when people are challenging provisions of the Act trying to do things that they shouldn't be and trying to hide things from owners. This involved actually also the collective sale issue, and the committee were going around doing things, not letting some owners know things. And also, we had a search of the records, and because nothing had been sent to us either the searcher said, "It was mentioned back in May 2018," I think it was. What's been happening? And I said, "Well, I don't really know." And I think that was eventually sold, but I don't know if they ever found out about what was going on in terms of the collective sale. And when you think about property prices now and the stamp duty that people pay, unless it's going to be a huge windfall, which I don't think it was in this case anyway. Eventually I think the owners, they didn't get enough to get that through.

But nevertheless, I just think when you're dealing with people that don't want to comply with the law, it's just ... I think some managers perhaps don't really agree with perhaps what I'm saying, but I think at the end of the day, those clients are putting you at risk and it just takes one thing to happen and then your reputation's shot. And also, I just don't want to manage buildings where people don't do the right thing. Yes. So that was a win. I think most people would say, "Oh, my god, that's not a win because you're losing a management fee." It's like, I don't even care.

Amanda Farmer: Not at all. And how did you do it? How did you communicate this to them?

Reena Van Aalst: We were lucky that our re-appointment was coming up and I just said that, basically, we're not going to continue and we're going to resign at the end of the period so that we didn't have to continue. So the timing was quite good. But I suppose if that wasn't the case then I perhaps would've gone through the agreement and gone through the clauses and given them 3 months. I mean, there's no more such a thing as three months as such, but I think there are some dispute resolution mechanisms which schemes can apply towards a managing agent and vice versa.

And it's funny because I had someone call me the other day and they were telling me how terrible their agent was and they want to change. I said, "Well, have you looked at your agency agreement?" And they said, "Oh, no." And then he had a look and rang me back and said, "We've got another year to go." And I said, "Well then you need to basically go through the dispute resolution mechanisms." And I said, "Now the Act actually does assist owners corporations through the tribunal to take action if certain things haven't been done." But a lot of people don't want to go through all that dispute resolution mechanisms, which I think should really be done, but a lot of people don't have time for it. It's like, well, how can an agent just keep doing that and this and that? And I said, "Well, they really can't," but as we know, terminating any contract, whether it's an agency agreement with the strata managing agent or a lift contract or any other contract, commercial or whatever, normally there are dispute resolution mechanisms that have to be undertaken prior to the next stage being undertaken as well.

Amanda Farmer: Yes. It is a serious step to terminate a contract, but sometimes we do forget when we're having difficulties to go back to that contract and have a look at what our agents obligations are. Are they meeting those obligations? What are the obligations of us as a building? Are we meeting those obligations? And sometimes it can be as easy as pointing out these things. You promised that you would do this under the terms of our contract and you are not doing this. Then sometimes that's enough to bring, whether it is a building or whether it is an agent, into line. But we do forget about that document, don't we?

Reena Van Aalst: Yes, I think that people do, and I think it's just, "I just want to terminate. I just want it finished." And it's not that easy.

Amanda Farmer: No, especially if you have a long contract. And of course, we are limited to 3 year contracts now in New South Wales. I see a lot of one year contracts. I know, Reena, you generally propose a 2 year contract.

Reena Van Aalst: Yes, because I think two years, especially for a new scheme, it takes nearly a year to get your head around the building and also to make sure that if there are things that are happening, it does take time. So by the time you set up the building,

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you want to make sure you have 2 years ... I mean, I know a lot of agents do three, but I don't like to do 3 because ... Unless the building and I are happy together, because to me there's no point extending it beyond 2 years at the most in the beginning. And then if it's a good building and you have a good relationship, then to me 3 years could be fine. A lot of people were actually concerned, because at the moment there's a company that's transferring ownership from one entity to another, and they have to get the consent of the owners corporation by general meeting. So the owners corporation can't unreasonably withhold its consent.

So again, if it was a long contract then you may not want to be with the other entity. So yes, there are advantages and disadvantages in whether a term is short or it's the maximum of the 3 years.

Amanda Farmer: Yes. But keeping those lines of communication open is always a good idea I think when it comes to resolving problems. Okay.

My win for this week. I think I may have mentioned one of these before, but I'm going to raise it again, because it is always a nice win to have when you can negotiate settlement of a claim before having to proceed to litigation. And I was in that position a few weeks ago. I was acting for a lot owner who had experienced some damage to their lot property because of water penetration. The issue had been fixed. So the common property, that part that was leaking, had been rectified, but my owner being an investor owner had an empty unit for a few months and had some lost rent and also some contents damage. So they came to me because unfortunately they weren't getting very far communicating directly with the committee and the strata manager, and I sent a couple of letters setting out what the law is. So the Section 106, duty to repair and maintain the common property, and the right of an owner to claim damages from the owners corporation where the owner's corporation has failed to meet that duty. And without even having to file ... I don't think we even filed an application for mediation.

Reena Van Aalst: That's pretty good.

Amanda Farmer: We reached a settlement, a sum of money that my client was happy with and the owners corporation was least unhappy to part with. And happy client and owners corporation did not have litigation on their hands. So definitely a win.

Reena Van Aalst: That's fantastic news, Amanda. I think it would be good if a lot of buildings could actually take heed of this advice that you're giving, because sometimes there's no point going to the expense of having loss of rent claim on top of obviously the damage to common property that would have had to be paid for by the owners corporation. So I think sometimes some buildings just either they don't have the money or they don't want to spend the money or-

Amanda Farmer: Yes. I find that these cases are the most smooth where the owners corporation has engaged a strata lawyer who is providing them with sensible advice, because we know, strata lawyers, if these problems have happened in a building and the rights of owners are now enshrined in the Act, what they are entitled to in terms of recovering their loss and damage. It's in most cases a fairly clear cut case, unless there's a question around the amount that the lot owner is claiming, then 9 times out of 10 there's some compensation to be paid to the owner if they have suffered because of a failure to repair and maintain the common property. So look, I am generalising of course, and every case is different, but I do find that where there's sensible advice on both sides, then these matters can be resolved fairly quickly.

Reena Van Aalst: I mean, I have had examples of where owners have tried to claim items that really haven't been damaged because of the failure to repair and maintain common property, and we actually have photographic evidence of the stuff and where it was stored, for example. But that's a topic for another day, because sometimes it's the other way around, where sometimes you get some people making spurious claims, Amanda, against the owners corporation to try and get some reimbursement or funds, when they really don't have any rights to do so.

Amanda Farmer: Yes, for sure. Do have to be conscious of that. Okay. I think we are just about ready to wrap up. I will remind everyone while I'm here that the webinar, the better buildings webinar that I will be hosting, is on the 28th of March at midday. You register over at YourStrataProperty.com.au/webinar. So many of you already registered. I'm really excited for the webinar. We did one last year. It was super fun. Got to chat to all of you online, answer your questions. We are focusing this time on strata



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committees, something Reena and I talk about on the podcast a lot. How a properly functioning strata committee can dramatically improve your experience of apartment living. We're going to talk about election procedures. We're going to talk about the duties of the committee, committee meetings, and I will share with you what the best buildings do when it comes to their strata committees. And Reena and I will have something special for you on the 29th of March, on Friday. I have managed to get Reena involved in a video broadcast, and I might leave it at that for now. But if you're registered for the webinar, you will hear about the Reena and Amanda video broadcast. Are you excited, Reena?

Reena Van Aalst: Yes, it sounds like fun, Amanda. I'm really looking forward to it.

Amanda Farmer: Yes, it will be fun. And we do get so many questions about strata committees. It's a complex area, when we're talking about elections and meeting procedures, who can stand, who is eligible. It's something that comes up a lot inside my member's forum, and it has been on my list for a while to do a deep dive into strata committees.

Reena Van Aalst: I think if you look at the whole proxy farming concept, I mean, a lot of that has to do with electing a strata committee. Sometimes people don't want some people on there and it becomes like a factionalised thing where-

Amanda Farmer: Yes.

Reena Van Aalst: I mean, in a sense obviously the government has tried to remedy that, but there are still many ways of working around that, which we can also talk about too.

Amanda Farmer: Yes. Good point. Add it to my list. Extra slides, please. Alrighty. I think that's it. Until next time.

Reena Van Aalst: Okay. Thanks, Amanda.

Amanda Farmer: Thanks, Reena. 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?