

Publication Date: 31 January 2017
**YSP Podcast Transcript: Episode 046. In Conversation with Reena Van Aalst -
signing DAs and problems with NCAT penalties**

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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 today I have with me, Reena Van Aalst. Hi Reena, how are you?

Reena Van Aalst: Hi Amanda, how are you?

Amanda Farmer: I am doing very well. I want to start by telling our listeners a little bit about why you, Reena are here today and why this episode and hopefully some future episodes are going to be a little bit different to the norm.

Now, Reena is not only a colleague of mine but also my friend and she has been a mentor to me particularly as I have built my strata experience and my strata contacts over the last 14 years or so. If you want to know a little bit more about my background and how I came to be working for Reena at 18 years old, you can have a listen to Episode 035.

And that is part of the presentation that I did to OCN members here in Sydney on the new strata law and the first 10 minutes or so of that presentation gives everybody a bit background on how I came to be in the strata sector. And Reena plays a central role in that. So check that out.

Reena has also been a previous guest on the show Episode 02. Reena is a highly experienced and accomplished professional. She was previously the General Manager and Licensing-in-charge of Dynamic Property Services. One of the most respected strata management companies in Sydney. She remains a board member of Strata Community Australia New South Wales.

Now, Reena this year is embarking upon her entrepreneurial journey. She has started her own strata management business; Strata Central, and you can find out a bit about Strata Central at the website www.stratacentral.com.au.

And I know that Reena is filling what I think has been a gap, and as a growing gap in the marketplace when it comes to strata management services. She is offering boutique, personalised, hands-on management. She's taking on very few buildings and I know that she's very fussy about who she takes on. So if you are interested in having a chat to Reena about management get in touch with her very quickly because I know her portfolio is filling up.

Okay, so let's get into the reasons why I'm telling you this episode is a little bit different. It is not unusual for me to telephone Reena and vice versa for Reena to call me. I know some of her team members in her formal role will also give me a quick call with a strata question, a strata problem usually goes along the lines: "Hey, Amanda have you come across this?"

"Reena, I'm going to a meeting tonight what do you think I should do in this circumstance?"

And it recently occurred to me that that is the kind of thing that you, our loyal listeners would really get a lot of whether you are a manager, an owner, a committee member. Just hearing about the day to day of what we are going through at the call phase of strata management and strata law.

How we're resolving the frustrations that we face as well as how we are achieving our wins too. Being a fly on the wall to those kinds of conversations. So I've invited Reena to join me regularly on the show hopefully maybe a couple of times a month so that we can do just that.

Have a conversation about our week in strata and in the process hopefully cover off some answers to questions you might have, offer some solutions to problems you might be facing and just give you what I hope will be an interesting behind the scenes insight into the strata sector.



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Now we are kicking this off as a bit of an experiment. Yes, it's a bit different to my usual format. We want to know what you think. What you think of this format, Reena and Amanda in conversation, is it helpful to you, do you want to hear more.

We are going to be guided by you so over my journey [inaudible] episode as well to let us have your comments and we'd love to hear from you on some topics that you'd like us to have a chat about. Definitely shoot those through.

So bear with us – we have set up a bit of structure to these kinds of episodes and we will fill our way through for the first few. No doubt. The first thing I want to ask you, Reena is how's your week been?

Reena Van Aalst: Oh, it's been quite good, Amanda actually because I think now instead of January runs on a holiday still and people are getting back into the phase of life, school hasn't started yet. So, yes.

Amanda Farmer: Yes, traffic is good.

Reena Van Aalst: Yes so we are slowly getting back into it which has been a nice change from before Christmas.

Amanda Farmer: Yes, I really love this time of the year for that exact reason. It's a little bit slower especially in the legal industry where the courts are quiet, a lot of legal practices shut down, barristers are away which sometimes is frustrating. But it also means that everybody is a little bit more relaxed and it's the time when I know I clean out my office, I get my pile of papers scanned, do all sorts of life admins so I've been enjoying that this week too.

Reena Van Aalst: It's great.

Amanda Farmer: Okay, so, Reena part of what we want to talk about in these episodes is what is frustrating us as strata sector stakeholders, let me call us that.

And there are things that frustrate us, there are things that we find incredibly rewarding and I want to make sure that we cover off both of those. What has been frustrating you this last week?

Reena Van Aalst: I think the question of development applications and the managing agent being asked to sign them is one of the very common pressures that I think a lot of strata managers have faced and I faced this week.

So the issue relates to when the DA is executed by their managing agent even though a meeting is held. A committee meeting, if it's normally the first instrument by which we do discuss the DA.

And what happen in this particular case was that the owner of a retail lot in a residential scheme which is obviously the ground floor lot usually retail lots are mixed use schemes. They wanted to install a new sign to replace a previous sign they had on the façade of the building.

The façade of the building is common property and I advised the chairperson and the committee that I wasn't able to sign the actual DA because there were changes to common property. The biggest sign was going on the actual property and we needed to make sure that the lot owner would maintain and repair it, etcetera.

In this particular building, the chairperson is highly influenced by the retail lot wanting to sort of keep favour I think in this instance. So, she said to me, "Reena no. We're not going to do that. You are going to sign the document" and I said "well, I'm sorry but I'm not able to sign. I know I have a delegation you can't give me that power".

So what I suggested to them as a win in terms of trying to get the signage installed was to ensure that the chairperson or any other office bearer would sign the DA.

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Reena Van Aalst: I also made a note to the minute that the reasons that why I won't sign it so I actually put that in the minute to make sure that I was protected.

Amanda Farmer: Yes.

Reena Van Aalst: I've actually have another case where it's a much bigger issue in another residential development where an owner was putting like a roof installation on their top floor balcony and that sort of went haywire and again I refused to sign it you know which is a good thing. Because when the person installed it without the DA all hell broke loose.

Amanda Farmer: Yes.

Reena Van Aalst: When you submit a DA to council they assume that you have received all the consents from the owner's corporation. They don't realise that a by-law may be needed. So therefore we had instances historically, where in the past some of the managers that I used to work with would allow the agents to sign the DA's on their behalf just to submit the DA to council to make sure if it was approved. A lot of the owners don't want to go the expense of calling a general meeting, having a by-law drafted.

Amanda Farmer: Yes.

Reena Van Aalst: And then the owner's corporation declines their request.

Amanda Farmer: Yes.

Reena Van Aalst: So they want us to sign it but then what happens the minute they got the signed consent and it's been approved. Then a lot of them just go ahead and do the work and don't come back for the by-law.

Amanda Farmer: Yes.

Reena Van Aalst: So that's why I think this policy holds managers in a good state when you say no we can't do that.

Amanda Farmer: Yes, I agree with you 100% that the manager should not be executing the DA and I like how you dealt with that situation in suggesting to the chairperson 'hey, if you want to do this, then it's on you. You sign it, I'm not'. I think that's a good policy for you to have. This issue of owners corporations executing. We say 'execute' when we really mean affix the seal.

Reena Van Aalst: Sign. Yes.

Amanda Farmer: affix the common seal and have the person who is authorised to affix the seal, sign the actual document. This issue comes up a lot and I get calls from strata managers asking me whether or not they can sign. And of course, I always say it's not a matter for you to decide. You're under instruction from your owner's corporation and the committee should be dealing with that issue.

But there is case law here in New South Wales to the effect that affixing an owners corporation's seal to a development application is a merely a mechanical process that enables that lot owner then to submit the application and it is not by affixing the seal you are not giving your consent to the work.

And as you rightly say, Reena the work might require a by-law because it is altering common property, it is changing the external appearance of the building. So by affixing the seal, you're not giving that approval under the Strata Schemes Management Act. What you're doing is allowing the lot owner to submit the document; the development application to council and yes, that owner should be coming back and then getting the owners corporation's approval for the work.

Publication Date: 31 January 2017

YSP Podcast Transcript: Episode 046. In Conversation with Reena Van Aalst - signing DAs and problems with NCAT penalties

But I see the frustration there as well that lot owners don't necessarily understand that and they think once our development application is approved we can go ahead and do it because council says we can. Notwithstanding the owners corporation hasn't approved it. I've been actually in litigation in a very similar circumstance where the work is going ahead when it didn't have a by-law.

So from my part, my advice to committees who are in that situation is that yes, it is legal for the seal to be affixed as long as it's been properly signed by those who have the delegated authority whether it's your strata manager or its 2 members of your committee.

But be very clear and do this in writing both meeting minutes and in letters to the lot owner to say the fact that we are affixing the seal is not approving your work under the Strata Schemes Management Act it is merely allowing you to submit the application. And I have seen some councils who then give development consents that have conditions attached and those conditions include.

Reena Van Aalst: Yes.

Amanda Farmer: you must get the consent of the owner's corporation and sometimes they are savvy enough to say you must have a by-law approved by the owner's corporation and I've appreciate Reena what you said that it doesn't always happen but it should.

Reena Van Aalst: In this case Amanda, what happen is that they actually have put the sign on.

Amanda Farmer: Yes. They've gone ahead and done the work.

Reena Van Aalst: The sign has gone up.

Amanda Farmer: Yes.

Reena Van Aalst: Yes, so basically I think even though there are court cases that you are referring to

Amanda Farmer: Yes.

Reena Van Aalst: tell people that we are only going to allow you to put the seal to just submit it and we have that historically using those a letter attaching you know the DA. But, unfortunately people don't seem to understand or I think in this case didn't in a sense especially when you got retail sort of interest. It makes it difficult because it's actually money attached to a business.

Amanda Farmer: Yes.

Reena Van Aalst: and therefore, it affects the business and becomes urgent so again.

Amanda Farmer: Yes and then you have the relationship between the landlord and the tenant of course.

Reena Van Aalst: Yes.

Amanda Farmer: because it's often the tenant who's the one who wants to do the signage and submitting the DA.

Reena Van Aalst: Exactly.

Amanda Farmer: And that's the situation that I've been recently and what the owners corporation actually did was went to the tribunal for an order that the work, although approved by council have been done in breach of the Act. So that option is still available to owners corporations but you know, it's hard to put the milk back in the bottle isn't it once it's been spilled.

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Reena Van Aalst: Especially with this sign that's a huge sign that is facing a major road in the eastern suburbs. Yes, that's correct.

Amanda Farmer: Yes, exactly.

Reena Van Aalst: So the win in that situation so was that the scheme ended up signing the DA for the retail lot owner and the DA was submitted and approved and then the sign was installed.

So the latter part of that signage is not the win in terms of there wasn't a proper by-law that was passed but at least I gave them an alternative way of obtaining the same result without having to implicate myself as a managing agent where I really have no authority.

Amanda Farmer: Yes.

Reena Van Aalst: to undertake the signing of the DA.

Amanda Farmer: Yes. And I think that's a key here and it's something that I see less experienced players. I'm talking about strata managers get trapped up in 'I know this is not legal or I know this is not authorised but I'm being told to do it and panicking'.

And that's an awful situation to be in and I give advice to strata managers who call me with that panic to say 'hey, you are a contractor of the owner's corporation, you take their instructions. If they are instructing you to do something that is illegal you are well within your rights to say no I'm not doing it and you can do it yourself'.

The committee members can do it, the chairperson can do it, and it's something that all too often strata managers completely, understandably, in the heat of the moment, forget about so great reminder.

Let me unload my frustration for this week and I know those in my office who might be listening know all about this because this has been a pretty hot one. In Episode 040 of the podcast I talked about what to do under the new New South Wales law when you want to enforce an adjudicator's orders.

So under the old law, if you have an order of the strata schemes, adjudicator for example, stop breaching the no hanging of washing on the balcony by-law and the lot owner continue to breach that order you would go the Tribunal and you would get a penalty order.

Now that we no longer have a system of paper adjudications in New South Wales and there's no such thing as adjudicators we all go straight to the Tribunal to get orders. What happens when there is a breach of the Tribunal's order?

So the Tribunal under the new law orders the lot owner to stop breaching the no hanging of washing on the balcony by-law. The lot owner doesn't comply and you want to get a penalty order. Well, the New South Wales Civil and Administrative Tribunal Act says that: "The tribunal can issue a penalty up to \$11,000 for an individual breach of a tribunal order."

Now, we are in the situation where we have a building that obtained an order from the adjudicator under the old legislation and the legislation now says that old adjudicator's order should be treated as if it was a Tribunal order.

Okay, so we go far enough we want to go to the Tribunal to reinforce this order as if it was an order of the Tribunal. We want a penalty of up to \$11,000. When you look closely at the legislation it seems that there is no way to make that application because it can only be made by an authorised official.

Reena Van Aalst: Huh?

Amanda Farmer: And if you look at the definition authorised official under the Civil and Administrative Tribunal Act, it is the

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minister or a person with a written consent of either the minister or another person authorised by the minister for that purpose.

Reena Van Aalst: Oh, dear.

Amanda Farmer: So yes. So we have written to the Tribunal asking them how we make this application for a penalty order and they have said 'hey, you are right. We don't really know. Why don't you write Fair Trading'.

We have a good friend of our practice who is a barrister. We have run this passed him. He has looked very closely at the legislation and he has said that he doesn't know either. So we are now in the position of having to write to Fair Trading, cross or fingers and hope that somebody comes up with an answer.

And I'm actually happy that I can put this out on the podcast because if there are any legal practitioners or highly experienced strata professionals who might be listening to this saying 'Amanda, oh my gosh you completely missed the point. This is how you do it'. Please contact me. I would love to know and my clients would love to know as well.

So how do you get penalty orders now under this new law, looking at those relevant sections of the Civil and Administrative Tribunal Act. I would love to know. That is my frustration for the week. Any thought some Reena?

Reena Van Aalst: I hope that Michael Courtney is listening to Amanda, whose from Fair Trading.

Amanda Farmer: Yes. Yes.

Reena Van Aalst: if you are listening to our podcast today, can you let us know what Fair Trading's position is on Amanda's frustration and it's quite a legitimate one when they no one can give you an answer.

Amanda Farmer: Yes and frustrating of course at the end of the day for the client who is sitting there wanting to enforce this by-law rather, this order that had been obtained and the lot owner hasn't complied. And we the lawyers who supposed to know this stuff can't make head or tail on the legislation. So, yes Michael Courtney is a good suggestion. He's actually on my list to come on the podcast, Michael.

Reena Van Aalst: Yes, maybe you can ask him then Amanda.

Amanda Farmer: Yes but anyway, I want to move on to a win and my win. Because I haven't resolved that penalty order issue yet and hopefully I can come back to you the listeners and let you know the answer. I'm going to give you a win in a completely separate case that we had specifically this week.

We won a local court case for a lot owner who was being pursued and has been pursued for the last 5 years or so for unpaid levies. And it wasn't so much the unpaid levies that the owner's corporation was after it was the expenses incurred in attempting to recover those unpaid levies.

So my client, the lot owner had paid up the levies. She said, yes you are right I am overdue. I will pay up and the owner's corporation as it is entitled to do under the Strata Schemes Management Act then sought to recover its legal costs and expenses in having to get advice, file a statement of claim, appear in court in relation to those unpaid levies.

Now my client objected to that and she said 'these expenses are far too high. They should never had been incurred because the unpaid levies had actually been paid by me and were incorrectly allocated to pay earlier expenses rather than pay levies'.

So I was actually up to date in my levies when I was being pursued. But most importantly, a lot of the costs were incurred in Federal Court because the owner's corporation had commenced bankruptcy proceedings against the lot owner and those kinds of proceedings are quite expensive. There is a very high filing fee and barristers are usually involved and what the owner's

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**YSP Podcast Transcript: Episode 046. In Conversation with Reena Van Aalst -
signing DAs and problems with NCAT penalties**

corporation tried to do was claim the expenses of the Federal Court proceedings in the local court.

So they've gone back to the local court and reopened the earlier levy recover proceedings so they could claim their Federal Court costs. And specifically, in this case that I run the magistrate said that is not allowed. You cannot claim Federal Court costs by reopening local court proceedings and that hasn't been held before by the courts here in New South Wales expressly.

It's certainly been hinted out by the Court of Appeal in cases like Demetriou that we all rely on when we are talking about levy recovery and whilst our local courts are a lower level jurisdiction court,

it's interesting and of course, a great win for this lot owner to get that kind of a judgement. We expected there will be an appeal so it will be interesting to hear what a high level court in New South Wales says about that.

But there was really a great win for this long-suffering lot owner and unfortunately, it seems that she has been in a building that handed this task over to its strata manager I think and the strata manager then of course briefed lawyers to run it.

And nobody was really looking behind the scenes to the personal impact that this was having on this lot owner. And whether in fact this proceedings could or should legitimately be pursued. So I know that she is feeling much more comfortable this week to have that reassurance from the court that she has been on the right track. So a great win for us this week that I'm very happy to share with you.

Reena Van Aalst: I'd just like add a few points to your win, Amanda. Congratulations, it's a really good outcome for your lot owner.

Amanda Farmer: Thank you.

Reena Van Aalst: I think the main areas that managing agents need to be aware of is when most of our software will always allocate any payments to the oldest debt on the actual ledger of the owner.

So that is why I think in your case Amanda, you were saying that she said she paid her levies and there were using the levies to pay other expenses and interests.

So I think that lot owners moving forward that listening to this podcast should remember that if there's a dispute with your owner's corporation about your levies you need to let the managing agent know that you want your levy allocated only to the levies and interest and not any expenses.

Amanda Farmer: Yes.

Reena Van Aalst: So that your levies are always being paid and updated in the ledger.

Amanda Farmer: Yes.

Reena Van Aalst: And just to ask another question, Amanda about your case so why did they bring it back from the Federal Court then back to the local court. Did she then paid then just withdraw it. How did it happen?

Amanda Farmer: Yes. So what's happened under the old law which is case run under Section 80 of the Act says that: "Your expenses of levy recovery need to be recovered together with." It you uses the word together with the unpaid levies and the Court of Appeal here in New South Wales has held that to mean that you can only recover expenses in the same proceedings as you are recovering levies.

Now, what we do when we are acting for owners corporations and we're filing statements of claim and we are getting judgements. We seek an order as part of that judgement that we are at liberty to return to the court and reopen the proceedings to claim any

Publication Date: 31 January 2017
**YSP Podcast Transcript: Episode 046. In Conversation with Reena Van Aalst -
signing DAs and problems with NCAT penalties**

additional expenses that might arise when we are trying to enforce the judgement.

So the owner's corporation in this case obtained that judgement for unpaid levies and they also got an order and it was some 3 years ago that judgement was entered. They also got an order that if there are additional cost of enforcement, they can come back and they can reopen the case in a local court and get a further judgement for those additional expenses.

Amanda Farmer: So they went off and they said to the lot owner, 'Here's the judgement, you need to pay, she was late in paying, they issued a bankruptcy notice that ended up in a Federal Court'.

They are incurring all of this extra expenses. She eventually pays up and they say 'oh, by the way we now got \$10,000 that we have incurred trying to chase you'.

Reena Van Aalst: No.

Amanda Farmer: We want that paid too. She doesn't pay it so they go back to the local court. They rely on that earlier order.

Reena Van Aalst: New judgement.

Amanda Farmer: That's right. You are permitted to reopen these proceedings to claim expenses. They did that but this local court magistrate said, 'no, you're trying to claim expenses that you incurred in the Federal Court that's a completely different jurisdiction. It's not as if you were just sending letters and aemails and trying to track down this owner to enforce the judgement and get her to pay.

You actually commenced separate proceedings, you incurred additional legal costs in the Federal Court. You can't come back here and ask me for an order that they be paid'. There are different proceedings and that's really interesting.

I think it's right, I think it's a right decision but assuming it's upheld under appeal if there is an appeal it's going to change the way we deal with levy recovery. How plaintiffs, owners corporations deal with levy recovery in the local court.

Now I have to say that the Section under the new Act here in New South Wales uses some different wording. It doesn't have that together with wording. So we have yet to see how those cases will run. But they may run a little bit differently we might have solved some of those problems. But yes, interesting for anybody who is involved in either doing that work or lot owners at the moment who are involved in recovery proceedings.

I probably get, I would say 2 or 3 calls a month from lot owners who are unhappy about the way that the owner's corporation or their strata manager is dealing with levy recovery. Because they say 'hey I paid up. I paid up 3 months ago and now there's another charge on my account and its expenses or its interests'.

And they don't understand how they can ever get in front if owners corporations are permitted to do put those additional amounts on the ledger if as far as lot owners concern they paid up to date. So a lot of interest in that topic.

Reena Van Aalst: Yes, it's a very hot one I think, Amanda because I mean all owners have to pay levies and from time to time people face situations where they can't pay on time. So, yes. Congratulations on that win again.

Amanda Farmer: Yes. Thank you. Okay, so thank you much for joining us, Reena.

Reena Van Aalst: Thank you, Amanda.

Amanda Farmer: And I really look forward to doing this regularly. I hope our listeners are enjoying and I know I certainly am.

Publication Date: 31 January 2017
**YSP Podcast Transcript: Episode 046. In Conversation with Reena Van Aalst -
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Reena Van Aalst: Me too.

Amanda Farmer: So do let us know what you think of Reena and Amanda in conversation. If you want us to discuss a topic in particular whether it's something of concern to you as a manager, an owner, a committee member let us know. You can email me directly amanda@yourstrataproperty.com.au or leave a comment in the show notes to this episode which you'll find this episode and all our other episodes <https://www.yourstrataproperty.com.au/listen-to-podcasts/>. So I can't wait to hear from you and I shall see you soon, Reena.

Reena Van Aalst: Thank you, Amanda.

Amanda Farmer: Bye.

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