

Publication Date: 25 June 2019
**YSP Podcast Transcript: Episode 167. Defamatory emails | renovation approvals |
expiry of agency agreements**

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Amanda Farmer: Hello and welcome. I'm Amanda Farmer and I have with me today, Reena Van Aalst from Strata Central. Hi, Reena.

Reena Van Aalst: Hi Amanda, how are you?

Amanda Farmer: I'm doing very well. It is another busy day for each of us, I know and we're on a tight schedule here, so I'm just going to jump straight in. Is that okay?

Reena Van Aalst: Sounds good to me.

Amanda Farmer: I want to know what your challenge has been this week?

Reena Van Aalst: An interesting challenge, Amanda. We had an owner that had submitted a by-law for a renovation and the committee had gone through the by-law and everyone was happy with the contents and all the that were contained in that by-law. But then, just before the agenda had to be issued, the owner said, "I've just got some new plans and they've just been updated and I'm going to send in the revised plans. But they're okay with the by-laws." We all said that's fine. I think there was some little detail that had to be added to the plans that the committee had requested in the first instance when they were submitted with the original draft by-law.

And then just before we were about to issue the agenda, we went through the by-law and we noticed there were actually some extra additions that weren't actually in the original by-law. And unfortunately, we had to go back to the owner and say this is not what the committee had approved and because the owner sent it in the morning, the agenda was being issued after us saying where are the final plans?

It was a bit touch and go whether or not we could actually include it because the fact that the committee had actually not approved that version, there was some slight changes, there were annexes that were referred to that weren't in the original by-law. So yes, it was just a bit of a challenge, Amanda.

I'm not sure perhaps if any of our strata managers out there had this problem occur where the committee has considered a by-law that's been put to them. Not that they can approve the by-law, but it's always good to have the community's thoughts and opinions so that when it's presented to all owners that the committee can say, "Yes, we've had this vetted."

I suppose another thing we could have done in that, Amanda, but I suppose we didn't do was because of the fact that the owner had a strata lawyer draft the by-law. And, sometimes, if owners go to their own lawyer and their own lawyers aren't very experienced in strata law, you get sometimes by-laws that really don't make sense. And I've had quite a few of those and unfortunately, some owners don't really want you to give them any feedback. And then when it gets knocked back at the meeting, which has happened just about a month ago, actually, in one of our schemes. They had to go back and get some major modifications done to that by-law to make it actually reasonable for owners to consider.

Amanda Farmer: Yes, I'm really glad you're raising this example, Reena, because it does come up regularly. I do a lot of by-law drafting on behalf of lot owners and they say to me, once we have prepared the by-law, they say, "Okay, what's the next step?" And I always recommend that the by-law is sent to the strata committee first up, generally care of the strata manager and that we say to the strata committee, "This is a by-law for proposed renovation works at lot 6, for example. We're sending this to you as a



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Reena Van Aalst: And I totally accept that in an advisory capacity. That is our role to help owners understand what special privileges by-laws should contain, what the Act says in relation to the terms and conditions of such a by-law. And so, sometimes, there's a bit of a fine line when someone has had the committee consider a actual by-law and then the owner then changing it. So no, definitely, Amanda, we just submitted it as it was. I was just trying to make sure that the owner knew that it was actually different, the plans weren't what had been asked for and, therefore, there was a chance at the meeting that there could be some issues in relation to trying to have it passed.

Amanda Farmer: Yes. And definitely a good idea to bring that to their attention. I think what it comes down to is owners being aware of how long this process often takes. So people purchasing a strata property and thinking, "Yes, I'll just renovate it. I'll do a new bathroom, a new kitchen and I won't put a tenant in until that work is done." Thinking that that's all going to take 2 weeks. No. Not only do we have to have the by-law prepared, put to a general meeting which has noticed periods that need to be complied with. But we would also like to put it to the strata committee before the meeting is even called to make sure that it's in line with their requirements. So it can be kind of a few months, really.

Reena Van Aalst: Yes. And also, the Secretary can call a general meeting, Amanda, or the committee has to call it. So even that process requires the committee's input as well.

Amanda Farmer: Yes, for sure. Always good to recap on those what can seem to be basics for players like us, for Strata Managers, for Strata Lawyers, but good to recap on the process and why we do the things we do the way we do them.

Reena Van Aalst: Exactly.

Amanda Farmer: All right. My challenge for this week, this has been on my list here, Reena, for a little while and we're finally getting to it, which is exciting. This was a question asked by a member inside the Your Strata Property online membership community and it is about financial statements and the reporting period.

We have discussed this a couple of times in the past on the podcast, particularly because under our 2015 legislation in New South Wales, we no longer have to have a fixed time at which we have our annual general meetings. We can now have an annual general meeting at any time within the building's financial year and the question that was asked by this member inside our online forum was if a building is holding its annual general meeting at different periods, so for example they might've held it last year in August because the end of their financial year was the end of June for example, and all the accounts were ready for August. And then, for whatever reason, changes Strata Manager, a committee that took their eye off the ball, they didn't have another general meeting for 18 months.

Isn't it the case that their financial statements, their accounting records, if you like, are going to display different reporting periods? And I understand that the formal financial statement, as it is audited will always reflect the period of the financial year and you may have supplementary accounts prepared to cover off the interim period. And I think we've chatted about that before. But this very good question raised by a member was, well, what happens then with budgeting and if you're trying to compare your previous budget to your current and your forecast, isn't it the case that we're going to be comparing different periods of expenditure and how do we navigate that one?

Reena Van Aalst: Well, if we use your example, Amanda, of say a 30 June year end, and in last year's case, you would have had the AGM in August. So, therefore, you probably may not have had any supplementary accounts issued. So your budget would be for the period 1 July to 30 June say of this year. Now, let's say you hold the AGM in January for arguments' sake or whatever time, could be 6 months later, 5 months later. Your budget still starts from 1 July. It's just that the actuals ... You've basically gone further into that financial year than you would have liked.

And, therefore, in a sense, the budget should be far more accurate because you're 5 months, you've already spent this much. So you can probably-

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Amanda Farmer: Oh, so you're kind of budgeting retrospectively there.

Reena Van Aalst: In a way because you sort of have gone towards the halfway mark of your budget. So the budget doesn't change. You have obviously a further supplementary counting period because now, if we're in October for example, and then we've had 4 months of financials. So in a sense, I think people perhaps are confusing the supplementary periods not matching, but the reporting period will always be the same, but it's the additional supplementary accounts that will be different. But the budget is still the same for the financial period, financial year end. It's no different, that still stays the same.

Amanda Farmer: And that, in turn, means that where your AGM is delayed for whatever reason, the owners corporation is actually incurring expenses of spending money, if you like, on items that haven't been budgeted.

Reena Van Aalst: Strictly speaking, yeah. But I think the other thing that's having more an issue, Amanda, is the levies. Now, some managers don't allow for levies to be struck beyond the financial year end. So let's say you had a 30 June year end in this example, the last was issued in April. The April, quarterly, be April, May, June. But then after that, you've got no levies being issued because they haven't put a motion that they continue at a certain rate.

And so what happens is it actually affects the cash flow because you have no money coming in, which is a real issue. And let's say you decide to increase the levies, then you've pretty much got to bear any increases in the shorter period of time because you've already had, say one quarter or usually one quarter that normally would have elapsed. But in one case I had 3 quarters have already elapsed before we took over and no levies struck and there was no continuing motion to allow those to be re-determined until the next AGM.

So there's also the income side of, it too, which sometimes is a problem. Or even if you did have a recurring levy that allowed you to continue in the new financial year at a certain rate, sometimes that rate is low or was based on a different budgetary allocation or expenses. And then the increase, I've had this happen in quite a few buildings, too. The increases have then been borne in 6 months. You had to increase your levies substantially or even by 20 or 30%. Then the remaining 2 quarters then have that increase in levies built into them.

Someone asked me last time, "Oh, we're still paying a special levy. It's like, "No, it's not a special levy. It's just your normal levy at the higher rate." And therefore, once you adopt a new budget and you need far more money than you had in your previous financial year, then that increase has to be borne in 6 months rather than say 9 months, which would have been the case had the AGM been held in a timely manner.

But as we all know, Amanda, as practicing managers and yourself being a lawyer as well, we're practicing in this area, sometimes there are many reasons why the AGM can't be held on time. And now that sort of time restriction is no longer there apart from having it once in a financial year. You can still push it out until the end of next financial year if you really wanted to.

Amanda Farmer: Well, that's right. And I'm not sure I agree. The Managers are busy and it's often hard to pin down a date in a diary, but I'm not sure that that should ever extend past 6 months, which is the example that this particular member was giving me because of these issues with expenses being incurred that are not budgeted and then having to catch up on the levies. That just causes a problem. And I wonder if our New South Wales legislature thought about that when they changed the rules.

Reena Van Aalst: Yes. Well, I think the other issue, Amanda, to consider is that it's really up to the committee to decide when the AGM is held, not the Strata Manager. Although, I do know many Managers operate where they just issue the AGM agenda, they don't get any input from the strata community about the budget. And that's that. And they have like a running schedule of AGMs one after the other.

But, unfortunately, I think that's not really the best. I mean, it may work for many people and everyone's got their own business model, but I believe that, depending on your delegated authority, it's always best to get the committee's input into the budget. And, of course, make sure that the dates is set by the committee. Obviously, there's got to be availability on both sides to hold the meeting.

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Amanda Farmer: Yes, absolutely. And again, giving yourself enough time to be having that conversation. I know in our building, we've been talking about it, ours is due in about 3 months and so we've started talking about it now.

Reena Van Aalst: Yes, it's great.

Amanda Farmer: Okay, let's jump into your win for this week, Reena.

Reena Van Aalst: I've got a potential scheme that wants to change over to our company and I met with them 2 weeks ago and they said to me that their agency agreement expires, I think, in about 5 days' time from today. And I said, "Well, did you get a notice from your Strata Managing Agent that the contract is expiring?" And they said, "No." They said, "We just know the day because, obviously, we're looking to change." And that's why they looked at it.

So I advised them that in the new Act there was an obligation and a Section 56 of the Strata Schemes Management Act where it says that the Strata Managing Agent must give the owners corporation written notice at the end of a term of appointment at least 3 months before the end of the term of appointment and at least one month before the end of each extension of a term committed by this section.

And so basically the term that's basically permitted by the section is that the term of the appointment of a Strata Managing Agent may be extended by the strata committee. It says this is a period of up to three months after it would otherwise expire, but not for any period that would extend beyond that at the next AGM, pending a decision as to the reappointment of the strata managing agent.

So, basically I said, "Well, that doesn't sound right. So they should've told you that it's going to expire in 5 days from now. But at the time, it's been over three weeks. And they said to me, "What are we going to do?" So I gave them the motions to allow the extension of up to 3 months or the next AGM, whichever is sooner for them to be able to let their agent know because they obviously want to make a decision to change. But, they haven't really had the understanding or the experience to know that you've got to hold another general meeting to appoint a Strata Managing Agent.

And so they only started this process about a month ago and getting tenders and meeting different management personnel. And they were so happy that I gave them this advice because they were just concerned what would happen. Because I said to them with the new legislation, your agency agreement for a managing agent stops on that day. So there's no extension. Before, even if the contract had expired, it would just continue on on a month to month basis until it was terminated.

But now, their delegation to the agent ends on the day that the contract expires. So they're were happy, Amanda, about the fact that I gave them some breathing space to be able to continue their process of evaluating different strata management companies.

Amanda Farmer: Yes, really important to have a look at Section 50 when it comes to the term of appointment of Strata Managing Agents, that's in our New South Wales Act. And you were just referring there, Reena, to Subsection 4 and 6 about the extension of the term for periods of up to 3 months after expiry. And also Subsection 6 where it says that the agent must give written notice of the end of the term, at least 3 months before the end of that term for the reasons that you've set out.

Gosh, I've seen a few agency agreements that are coming up for expiry and the agent has not given that Section 50 Subsection 6 notice. I'd say there's quite a few managers out there who are missing that one.

Reena Van Aalst: Yes. And the other one too, Amanda, which, I think, may perhaps not been known by some strata committees, also Sub Section 5 says that however, if a strata has extended a term of appointment to a strata managing agent under this section, so up to 3 months, the strata committee must give the Strata Managing Agent at least one month's notice of a decision not to reappoint the strata managing agent or not to further extend the appointment. So it's a two way street. So the committee also has an obligation. Well, I'm not really sure, Amanda, how they would know that obligation, unless the Strata Managing Agent told them that they have to do that.

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Amanda Farmer: And I'm not sure whether the template agreements that are floating around that are issued by the various industry bodies reflect these terms. I hope they do because that's the first place that you go to in looking at, okay, our term is coming up. It's been 1 year or it's been 2 years or 3 years, whatever it is. And you look to the contract to see what each party's obligations are in terms of notice periods. I'd like to think that the standard form contracts are reflecting what is set out in Section 50.

Reena Van Aalst: I'm sure that they are but I'm not sure whether or not the agents are exercising those functions as they need to under the Act.

Amanda Farmer: So a good reminder there. I will put a link to Section 50 in the show notes for this episode which you can access over at yourstrataproperty.com.au/podcasts. Transcript always available there too.

Okay. Well, for my win this week, I am bringing to the table a case as I often like to do whenever we have decisions of our Tribunal or our courts. I think that's a win because that gives us some access to information, what's going on out there in this big wide world that is strata, what's happening in real buildings in real life and how is our legislation being applied.

And by the time this episode goes to air, a number of you may have already read about this case. It's received some media. It is a case where a chairperson was awarded \$120,000 in damages because of a defamatory email sent by a resident. Now, this is a district court case in New South Wales. The decision came out a few weeks ago in May and it is called Raynor and Murray and I will put a link to the reasons for decision in the show notes.

It is a good 93 odd page decision that I was scrolling through recently. Lots and lots in there, but the short story is that a resident circulated an email, addressed to the chairperson but then copied to, I think, about 16 other owners. The terms of the email are set out in the judgment, but the resident was responding to requests that the chairperson had made to the resident to keep her letterbox locked because there had been some mail theft around the building and the chair had received some advice from police that it is best that everybody keep their mailboxes locked.

And there had been a series of prior emails between the chair and this particular resident about looking the mailbox and for whatever reason the resident wasn't too happy about being told what to do with her mailbox. Now, the interesting thing I find about this case is when you read the email that was sent by the resident, in my experience, having dealt with difficult people, difficult pieces of correspondence, the email's not all that bad.

Reena Van Aalst: Yes, that's what I thought, Amanda. I mean, honestly, that case has received a lot of public attention and we referenced it in our recent May newsletter. But when I read that email I thought ... I mean I have got so much worse correspondence in our files. And our company also put out a newsletter some time ago about, you know, be careful what you put in the records because the records are a public source for owners to inspect and potential purchasers.

So, at the time we used it in a sense to warn people, be careful what you put in there because it's not just between the managing agent and yourself. But owners have a right to access all the records, including emails and that as you said, Amanda, you've seen so many emails in your time, sometimes they can be really, really terrible, you know? And I would say defamatory things said about other people ... I mean, I've had people ... Someone called someone a cockroach. I've had, you know, anything goes beyond just ... Like really personal attacks. So yes, I think I'd definitely agree about what you just said about that, Amanda, the thing wasn't as bad.

Amanda Farmer: Yes, go and have a look at the case. The terms of the email in question are set out in full and to just give you a little taster. The resident set out the history of communications that she had received from the chair about this issue and said things like, "Rather than a simple knock on my door for a chat in person or to speak to me face to face, you've consistently chosen the public email option, copying in residents, alleging that you will hold us financially responsible for any mail theft. You've harassed me, your emails are provoking. This is a consistent attempt to shame me about the letter box issue. It's offensive, harassing and menacing and please stop sending me these emails."

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Amanda Farmer: So this was the email from the resident to the chair. That's sort of the end of the email. It's worth reading the whole lot. As I said, that was copied into a number of other owners and that was a key issue here. But the trial judge said these words. "It would be fair to say that every sentence of the defendant's email struck a blow at the plaintiff and was intended to ridicule and humiliate him in every way."

Now, I read that in light of the email itself, and I'm not sure that I agree with that. But that's the decision in this particular case. And the award of \$120,000 was made up of \$90,000 in general damages and \$30,000 in aggravated damages because the trial judge found that the defendant had acted particularly badly in not apologising when asked by the chairperson's lawyers to apologise on a number of occasions and by presenting their evidence in the case in such a way that it looks like the earlier emails from the chair had also been copied to a number of other owners, when in fact, I think it came out in the evidence that the chair was only communicating direct to the resident about her letter box and was not being public about that communication as opposed to the tenant's email in reply.

So, the court found that that was particularly bad behaviour and so punished the resident for that with an additional \$30,000 award. But, definitely, anybody who is sending emails as a resident or as a committee member, Strata Manager, have a read of this case. I wonder whether it's a one off, but it's definitely worth being across those issues.

Reena Van Aalst: I think that's a really good point, Amanda, that people need to think about what they're writing when they actually do put fingers to keyboards and what will happen if the resident, Amanda, can't pay that money? What happens then? I sort of thought about that at the time thinking, well that's a lot of money. So what would happen if she couldn't pay the money?

Amanda Farmer: Yes, well, the usual enforcement procedures would apply where there is a judgment debt. If she has assets that can be sold to meet the debt, that may have to happen.

Reena Van Aalst: But if she doesn't have any assets, Amanda, that would equate to that sort of sum, would that be like one of those things where you've got to pay it back for the rest of your life or something like that?

Amanda Farmer: Yes, she might declare bankruptcy if they pursue it that far. She may be able to enter into an installment arrangement where she can pay that by installments. She may appeal. This is still only a few weeks out, so I don't know the parties to this case or the lawyers who are acting, so I don't know what the word on the street is about an appeal. But it's interesting, it works through the defenses that the resident raised, particularly in relation to truth and to qualified privilege and to triviality. None of those defenses were successful in getting the defendant off in this case. So check that one out.

Reena Van Aalst: Yes, definitely. Amanda, I think the lesson to be learned is that be aware of what you write. I think that's pretty much the key takeaway is just be careful. It's because you know you're writing an email doesn't mean that it may not end up in the hands of someone who just might take ambrance and take the matter much further than you could imagine.

Amanda Farmer: Yes, indeed. I always find responding to difficult emails, a good rule of thumb is to take a breath and if you can even wait 24 hours.

Reena Van Aalst: Yes, yes. Well, another thing, Amanda, is to actually just do a draft and just send it to yourself and then wait another 24 hours and then, usually, you have to do a severe edit of that original, typing down, softening.

Amanda Farmer: Or you read it in the calm light of the next day or the next couple of hours and you realise, yes, actually I don't need to say all of that.

Reena Van Aalst: Yes, exactly. Cull, cull, cull.

Amanda Farmer: As lawyers, we're constantly reading correspondence through the eyes of a judge or the tribunal member or what would this look like if it was attached to an affidavit? It becomes this ingrained approach in a lawyer's brain and it's a good

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one if you can establish it. Always looking at your own correspondence with critical eyes. What would a third party who is judging my behaviour in this situation ...

Reena Van Aalst: Yes, that's exactly right. I mean my husband who's a lawyer has always trained me to write everything that I've ever written, what would a third party ever say if it ended up in a situation where someone else had to look at that and make it a decision, based on what you've written. That's why I'm not surprised Amanda, when I receive records from other agents that there's a lot of banter, chit chatter between even lawyers and their clients. And I'm thinking, this is formal correspondence and I've actually got a copy of it. I'm thinking, why do you write like this? And you know, I think in general, so that's something that perhaps people could do off air. But not when they're talking about a client. They're muddling this familiarity with formal correspondence.

And I was thinking, to me it's like, when you're a strata manager, you're a strata manager, you need to be professional. And any personal relationship you may have with people that you're working, with need to be, I think, excised from email communication.

Amanda Farmer: Yes. That is a very good reminder to all of us to remain professional. Okay. I think that about wraps up this week. Reena. Anything else?

Reena Van Aalst: No. All good, Amanda.

Amanda Farmer: I will catch you next time.

Reena Van Aalst: See you then. Bye.

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