

Publication Date: 17 November 2021
**YSP Podcast Transcript: Episode 288. Unsigned contracts | Pet Bonds | New
Community Schemes Law**

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Amanda Farmer: Hey hey, Amanda Farmer here. You are hearing from me straight up. I'm about to take you over to my chat with Reena Van Aalst. We are sharing our wins and our challenges this week. But a quick heads up, events have overtaken Reena's win since the time we recorded this episode. You will hear me mention that I'm saving Reena's win for the end of the episode. The win Reena was going to share related to our Women in Strata End of Year Party.

Reena and I issued an invitation to secure your spot at that event on Thursday, the 9th of December. Unfortunately, since recording this episode we have sold out. We are now running a waitlist for the Women in Strata party which you are more than welcome to join if you're so inclined. There is a link to all details relating to that event in the show notes for this episode over at yourstrataproperty.com.au/podcast. Find this podcast, episode number 288 and you will see the link to more information about the Women in Strata party but do be aware that when you attempt to secure your spot you will be directed to the waitlist.

So for that reason, you weren't be hearing Reena's win this week but I didn't want to issue the invitation only to disappoint. Having said that, this is a jump packed episode. We are covering unsigned building management agreements. Are they enforceable? Pet bonds, should we really imposing bonds on our pet owners and our new Community Land Management Act in New South Wales. When does it start and what do you need to be thinking about right now? I'll take you on over to my chat with Reena Van Aalst.

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.

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

Reena Van Aalst: Hi Amanda, how are you?

Amanda Farmer: I'm great. I am looking forward to diving into our wins and our challenges for this week. I know things tend to get a little more challenging at this time of the year, busy time for all of our strata professionals.

Reena Van Aalst: Yes, I think the actual challenge, Amanda, has been, I think, coming back into the office, I think, for some people, and a lot of work that's been banked up for contractors, now that they're actually able to do the work, now that lock down's ended, I think it's added extra pressure because people are just trying to juggle so many jobs that haven't been done in a very short amount of time. I think it's putting the strain on a lot of strata managers at the moment as well, so let's dive in. My challenge this week is actually quite an interesting one that I haven't really come across before. And what had occurred at a first AGM, there was a contract that had been approved for a building manager for 3 years. And in this particular meeting, we actually had it by Zoom and therefore we used the Zoom poll feature.

So there were so many people at this meeting, it would've been difficult for us to accurately ascertain who was voting for and against. So we used the Zoom poll feature, which obviously helped us also determine that the numbers that we thought were in favour of the motion were actually indeed accurate. What transpired after that would've been perhaps maybe 2 weeks after that when the minutes were going out, we were setting up the contract to be signed by the secretary, and all of a sudden the secretary said, *"Oh, we don't want to enter into this contract. We don't feel comfortable. We don't need a building manager for 3 years, et cetera, et cetera."*

Anyway, so obviously as time has evolved, there's been some conflict and emails back and forth. And the committee have now engaged a lawyer, which has been a good thing. And the lawyer has drafted motions for a general meeting to be convened in order to rescind the motion that had been passed at that meeting. And my question to you, Amanda, is well when someone's actually been engaged and they've got a contract and even though it hasn't been signed, the majority of the owners were in favour of reappointing, the building manager. They had been appointed prior by the original owner. Can this be affected? Can you just put a motion on just to rescind a contract that's already been approved at a first AGM?

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Amanda Farmer: Very interesting question. The contract has been approved by ordinary resolution, but I think you said there Reena, it hasn't been signed?

Reena Van Aalst: Yes, that's correct.

Amanda Farmer: And that is, I think, off the top of my head, and Reena and I do not pre-prepare these discussions I can tell you, this is the first time I'm hearing this question. Thank you, Reena Van Aalst, for throwing this one at me. It's also 9:30 in the morning. A good way to start. I am looking at Section 67 in our Strata Schemes Management Act here in New South Wales. And that's the section that tells us how a building manager, and that's a defined term, it's important to look at the role of the building manager, how a building manager may be appointed for a strata scheme. And it says that the appointment is to be made by instrument in writing, we might call that a written contract, executed, and that means signed, legal word for signed, by the building manager and under the authority of a resolution passed at a general meeting of the owners corporation.

Now, the question is whether Section 67, therefore requires both the resolution and the signing of the contract in order to make that contract effective. I haven't seen the minutes of this meeting, the form of the motion, but I'd suggest that lawyers who are involved,

I imagine there may be lawyers on both sides involved, will be looking very closely at the wording of the motion and whether there was by the resolution and obligation on the owners corporation or members of the owners corporation, once the resolution was passed, to go ahead and sign that contract. And it could be that even though that step, the signature, the owners corporation seal on the contract, is not there, that contract could still be valid binding and enforceable. I expect that's what the building manager may be saying. They've got their resolution and were proceeding in the full expectation that the owners corporation would carry out the formality of affixing its seal to the contract. That didn't happen.

Obviously, the owners corporation, it sounds like, Reena, has received some legal advice that without the owners corporation seal on this document, it is open to them to rescind the resolution. Very risky business is my short answer. Very risky business, indeed. These building management contracts, especially if it's for a large scheme, can be very valuable. And you've mentioned there, I think the building manager was previously working with the developer, so there's been an expectation there that this relationship with the building would continue over a number of years, 3 year contract, and building managers engage staff, and they forecast their work for those coming 3 years. I think it would be remiss of me to provide any hard and fast answer without more information, but I'm certainly interested to see how this one pans out, Reena.

Reena Van Aalst: Yes, well the crux of the dissatisfaction, in inverted commas, in terms of the actual contract, it's not to do with the performance of the building manager at all. It's to do with the fact that some of the committee members think that they don't need a building manager for 3 years, even though it's a large scheme, they believe that once they're over the first year or year and a half of the scheme when things are then progressing well and any defects have been addressed in the buildings and have got some sort of rhythm, that they don't need a building manager for a large scheme. And I think that's really where it's coming from, it's not about the performance of the building manager at all, it's the fact that they don't believe that they should be bound for 3 years and that they don't need a building manager for 3 years.

Amanda Farmer: And they've changed their mind on the term. And I wonder, is it proposed that will there be a new motion to then appoint the building manager at a reduced term or no?

Reena Van Aalst: No, I haven't seen any resolution to that effect. It's just about rescinding those resolutions at this stage. I don't know what's going to happen in the future. And what you're saying, Amanda, does make sense because the issue is, I think that they've asked for a lesser term, which of course has not been approved by the building manager, but I don't know if they're going to put another company forward that will then have a reduced term. So yes, I'll keep you posted.

Amanda Farmer: Yes, please do. I imagine there will be lawyer's letters flying back and forth and they will probably delve into questions of contract law. What is it that is necessary for a binding contract to be formed? We must always keep that in mind, in addition to looking at the provisions of our legislation. I've just had a very quick look behind Section 67 here, Reena, on AustLII,

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and there is a case that is linked. It's a District Court case from 2019, New South Wales District Court. The case name is Premium Building Management, PTY Limited, and the Owners of Strata Plan No 69204. I'll put a link to the case in the show notes for this episode. But interestingly, on my quick review, it looks like it is precisely on the point that you are experiencing with your owners corporation at the moment.

Was the building management contract binding, valid, enforceable? Even though I think in this case, neither the building manager nor the owners corporation had signed the contract. And I will say I haven't read the entire case, I've just had a quick look at the summary, I will share this with you. In particular, Reena, it will probably interest your community. But in short, it looks like the District Court found that there was a binding building management agreement entered into, the agreement was sufficiently complete or certain as at the date of the meeting, and the absence of execution signing by the building manager in that case did not result in any in validity of the agreement. I believe in this case, the owners corporation may also have refused to sign the agreement, and the building manager in that case was awarded lost profit in the sum of about \$150,000.

Reena Van Aalst: Wow, there you go.

Amanda Farmer: Interesting. There may be more cases out there, my colleagues will certainly let me know, but I think that one is worth looking into you. And yes, let us know how you go with yours.

Reena Van Aalst: Yes, I will, Amanda, I'll keep you posted definitely. Well, thank you for sharing that case. It does actually bring into clarity for me the whole notion of contract law and that signatures aren't always an issue when it comes to someone actually performing a service, the other person accepting the service. So I think that's sort of goes back to this whole premise of contract law and yes, it's not as simple as it looks in terms of how people perceive things.

Amanda Farmer: Well, strata is not as simple as it looks and some of us do forget sometimes, lawyers included, that it is not just the Strata Schemes Management Act or the codified law that we should be looking at when we're trying to solve a problem. We are lawyers first, we are strata lawyers second, and there are many other legal principles out there that we need to be taking into account when we're advising our clients. Okay, shifting gears quite a bit actually over to my challenge because I'm talking about pets, one of my favourite subjects, there's my pet barking-

Reena Van Aalst: Exactly, I was going to say, Amanda. I can hear him in the background.

Amanda Farmer: Since the recent change to our Strata Schemes Management Act, introducing a new section that really puts pet owners on the front foot, in our strata schemes. Prohibiting owners corporations from banning the keeping of animals unless there are specific circumstances. That's not what I want to talk about today. But the particular question that I have been seeing come up again and again since that new legislation has started to become familiar to us all, is whether or not an owners corporation can charge a resident, a bond, a pet bond. I am aware that buildings are revising their by-laws, putting in place new by-laws to govern the keeping of animals, which reflect our new legislation, which is great. I encourage buildings to do that and to get some specific advice about that. But I am concerned to hear that some buildings are using that as an opportunity to create a new rule that says any resident who wishes to keep an animal must, together with their application for approval to keep an animal, pay a bond. And the bond maybe some hundreds of dollars, I've seen in some examples.

The question I've been getting, Amanda, is this legal? My answer to that has been, a bond in my view is open to challenge on the grounds that it may be harsh, unconscionable or oppressive. That may not be the case however, if the amount being sought from the pet owner is an application fee or a fee to cover the owners corporation's costs of processing the application. These are fees that certainly have been upheld by our Tribunal in the past, a fee where the building manager has to come out to deal with a particular issue, the hourly rate of the building manager should be covered by the resident who's caused the problem. If that's in a by-law, then I say, yes, that's recoverable. Where we get into trouble is where these fees become hundreds and hundreds of dollars, and they are instead of a cost recovery, they are a penalty or they are a bond.

I do caution buildings against imposing bonds for the keeping of pets. Some people have asked me, "Amanda, isn't it just the same

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as any other application that an owner may make, for example, renovation works?" We often ask for bonds for renovation works. I think this is a little bit different. If you're doing renovation work that affects common property, you are directly and immediately interfering with the common property and there is a risk that common property will be damaged. So seeking a bond in that situation is probably not harsh, unconscionable, or oppressive. Very different to a bond for the keeping of an animal. That animal, in the best circumstances, will not have demonstrated any tendency to damage the common property or cause any trouble or any nuisance. And our legislation is quite clear that it is only until the animal does interfere with the enjoyment of other occupiers that the owners corporation should step in and prohibit the keeping of the animal. I'd say the same applies when it comes to charging any kind of penalty or any kind of bond.

But an application fee to cover the strata manager's time of processing a pet application or the building manager's time of doing that paperwork shouldn't be too high I imagine \$100, a couple of hundred dollars, maybe. If that's in your new pet by-law, I think that's probably enforceable, but it will be interesting to see if this is challenged, how it may play out. What do you think, Reena?

Reena Van Aalst: Yes, I think, Amanda, there's a lot of time that's expended in doing lots of things in terms of owner applications. I've got one at the moment, they're trying to do a renovation and they need a by-law and I've been going back and forth and back and forth. And obviously, the owners corporation is paying for my time to do that. When it comes to applications for pets, I'm not sure if owners will find that it's the same as any other application that's made for a minor renovation or any other type of application in a building. I'm not sure if people are going to think, "Well, why are you charging an application fee for a pet, yet you don't charge an application fee for a minor renovation, such as floorboards when there is a by-law that allows floorboards to be installed?"

So I think that's where some building may find that there may be some pushback by owners and residents when the same type of regime is not being applied to any other type of application under any other by-law the scheme already has in place. So I think it's probably going to be watch this space based on buildings that want to include this for various reasons. And it is time consuming, there's no doubt about it, but I'm not sure if the appetite is there to distinguish between a pet application versus any other application that an owner would make.

Amanda Farmer: Yes, I do think buildings should be very careful not to impose a double standard in relation to applications. And I think that's where the frustration, the heartache, the confusion is coming from. From pet owners who are seeing these bonds, exactly as you say, Reena, their building is not charging fees or bonds or application fees or processing fees for any other kind of application. So it is received as a disincentive to apply for a pet and I completely understand why you would receive it that way if your building wasn't charging fees for anything else. So, yes, it's a great point. If you're going to seek to recover those kinds of costs, do it from an objective point of view. It doesn't matter what the application is, your strata manager, building manager's time in processing that. If you're going to have a policy that cost is recoverable from owners, then have a carefully drafted by-law that covers all those circumstances I think.

Reena Van Aalst: Yes, I definitely agree with that, Amanda.

Amanda Farmer: Now I know, Reena, that you have a special win to share this week. And if you don't mind, I'm going to suggest that you share that at the end of our chat, because I think that's a great way to wrap up today. And if you don't mind me bumping you, I'm going to jump in and share my win now.

Reena Van Aalst: This is the first time this has ever happened, Amanda, we've been out of sequence with our wins and challenges, but I'm definitely happy to make a change on this occasion.

Amanda Farmer: The world has gone topsy turvy. Okay, my win for this week, some new legislation for New South Wales due to commence on the 1st of December. It is our new Community Land Management Act, 2021, and Community Land Development Act, 2021. Now you are going to be hearing, listeners and probably Reena, are going to be hearing from me a lot more about this in the coming weeks and probably early next year as this Act rolls out. I've already been getting questions from members inside our Q and A forum as strata managers start to wrap their heads around the changes that are happening for our community schemes. In general, our community scheme legislation is being brought to line with our strata scheme legislation. So a lot of the changes that

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we saw in our 2015 Act are now being made to our 2021 Community Land Management Act, which I think is great.

We will have things like harsh, unconscionable or oppressive by-laws being invalid under our Community Land Management Act, which hasn't the case for some years. I do want to point out that there are transitional provisions in this new legislation. So there's a couple of things that are different and are going to affect the way things run in community schemes. And we'll raise questions about what we should be doing now within our schemes to address those. For example, Section 35 in the 2021 Community Land Management Act says that, "The facilities manager for the association or for a subsidiary body of the association is not eligible for appointment nomination or election as a member of the association committee." Now I was asked recently by a manager, "Amanda, we have our facilities manager currently on the committee within one of our community association. What happens on the 1st of December, does this person cease to have authority to see it on this committee?"

And I had a look at Schedule 3 to the new legislation in particular clause five, which contains what we call a transitional provision, making clear that the committee remains as is for the balance of their term, even though this new legislation commence during a committee's term. Clause 5 specifically says that "A person who before the legislation starts was a member of an executive committee is, when the legislation commences, taken to have been validly appointed as a member of the committee for the balance of their term."

So we went through this transitional period some years ago when our new Strata Schemes Management Act was commencing 2016, 20 17. We're about to go through the same in respect to our community associations, which from a lawyer's perspective's very exciting, some interesting questions cropping up, but it will be important for managers, in particular, to be across these changes. I am hoping to put together a webinar, which I haven't finalised the date for yet, so I don't have that registration ready for you, but I will let you all know when that's happening and provide the link to join us, a webinar devoted to unpacking this new legislation and giving you the need to know.

Reena Van Aalst: That's excellent, Amanda. I think the legislation has been reviewed now for quite some time and hasn't been changed, I think, since 1989 when it first came into effect. So I think these changes are long overdue, especially the ones, I think, holding meetings electronically, which hasn't been the case I think for communities for quite some time. So I think bringing it into line with strata schemes is really a good thing moving forward, I think, for those that do live in community associations. I think maybe, Amanda, for those that don't know what that means, maybe you might want to explain what a community association is. I think for many people that listen to our podcast, they may not be aware of what a community association is.

Amanda Farmer: Yes, very good point. And I can all so pop some links in the notes to previous episodes where I've spoken, I think, in a bit more detail about community associations. So these are often large scale developments. It may be a community with a number of different strata schemes within it and all governed by an overarching community association. So two sets of by-laws, by-laws in a community management statement, by-laws within your own strata scheme. We have some very large development, certainly in Sydney, and these are what we call complex schemes. Often, as you're hearing, different legislation to be across different governing bodies, your community association committee, and then your strata committee, and different managers, building managers and strata managers, all making our lives richer.

Reena Van Aalst: Yes, we used to call a strata scheme a vertical living. And we used to refer to those that lived in houses in a community association as horizontal living, so it's horizontal living with strata schemes. And not all communities actually do have strata schemes, some actually don't have any. So you may be a part of a big community and there's different community associations within that community, different DP numbers. And then you may or may not have any strata schemes within those associations, so they're quite complex actually.

Amanda Farmer: Yes. What I've come to start calling free-standing homes, some people call properties that are not strata-titled Torrens, which is not correct because all property is on the Torrens title register, so strata schemes are Torrens titled, but they are a form of Torrens title being strata title. So yes, townhouse, townhouse developments, villas, other types of freestanding homes within a community, all, however, being subject to by-laws, community management statement, and having to understand how community property is managed and shared.

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Reena Van Aalst: Yes. Very complex actually then.

Amanda Farmer: So yes, this new legislation helping us manage those a little better, a little more efficiently, which is great. So I think that is a win and you'll be hearing more from me on that soon, stay tuned.

Reena Van Aalst: That's great.

Amanda Farmer: Excellent. Well, I can't wait to see you, Reena Van Aalst in person very soon. Hang in there, few more weeks, a month or so until it's the end of the year. And I know you'll be having a bit of a break, which is great. I hope others out there are taking some time off too, for the end of the year. If you weren't thinking about it, book it in now, Amanda said so.

Reena Van Aalst: Definitely, Amanda. I think a lot of our meetings have been banked up now to the end of the year because of the fact that some schemes didn't want to hold their AGMs electronically. So they've got quite a heavy schedule now between now and the end of the year. So head down, keep going.

Amanda Farmer: Well thank you, Reena Van Aalst, I'll catch you next time.

Reena Van Aalst: Thank you, Amanda. See you next time. 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 comment section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?