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YSP Podcast Transcript: Episode 299. Expecting Too Much of Managers | Banning solar | STL By-Law Thrown Out

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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.

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

Reena Van Aalst: Hi, Amanda. How are you?

Amanda Farmer: I'm great. I have been looking forward to our chat. I have a bit of a list running at the moment, even though we're only a month or so into the year, of wins and challenges already. And I've been bursting, I've been bursting to share them with you, Reena. Let's jump right in. I hope you've got one for me. What's your challenge for this week?

Reena Van Aalst: Well, it's actually really strange, Amanda, because as I was preparing for our podcast today, I actually did the win first, then I was struggling to think of a challenge. I thought, "That's not normal." Normally, the challenge is always front of mind, but for the first time, I had to struggle to think of one, which is hopefully a good thing for a change.
Amanda Farmer: Well, a great start to the year.

Reena Van Aalst: Yes. So, my challenge for this episode, Amanda, it relates to a compulsory appointment that I've had now for two years. Basically, the purpose of the appointment was to actually proceed with a fire order that had been stagnating over a number of years. In this particular strata scheme, there are 4 lots, and 3 lots are owned by one person and another person owns the fourth lot. Basically, the person that owns the fourth lot really hasn't been happy with the way that the fire order has progressed because of a difference in terms of what the building class should be, that whether it's a Class 1 or a Class 2 building. Because depending on that, the way that the building fire order works have to be completed would be altered.

Basically, this particular owner's been going to council to try and change the class of the building by getting an order imposed in the building, which today has not yet succeeded. However, the only thing that I can work with is basically the orders that we have based on the building class that has been stipulated in the orders.

Of course, now I get another email from this person who said to me that basically that I've failed and that I've signed off on an AFSS when I know that the work hasn't been done properly to the right standards and basically saying that I'm actually a fraud. Anyway...

Amanda Farmer: An AFSS being the Annual Fire Safety Statement.

Reena Van Aalst: Statement, yes. So basically, the reason for this to challenge, Amanda, is that I think a lot of lot owners don't understand what a strata manager's qualifications are and what their role is. Now, he believes that I need to understand building regulations and Building Act and all that sort of thing and the standards. And therefore, I'm professionally negligent, he said, and I'm fraudulent because I should know this information. And therefore, I should not be signing off on an AFSS when it's the wrong class building and when I went down to the building and I know the works weren't completed properly. Now, I went down to the building to meet with the fire contractor and the engineer who has been appointed pre our appointment, so it's more than two years ago, to oversee the fire order.

I think the reason that I'm wanting to stress this, Amanda, today in terms of being a challenge is that many strata managers sometimes are attacked or admonished for not actually understanding the role of what a strata manager should be doing in terms of building, repairs, or... I think in one of your podcast you talk about waterproofing. Even though we need to have a general idea of these subjects and topics, we don't know, for example, what the standards are that apply to the measure of a fire safety equipment. For example, you might have AS 1973 or AS 1973.2. I mean, you need to buy the standards, and secondly, we're not qualified. That's why we actually engage experts to try and help us.

The frustration that I have, and the challenge is, I'm not sure, Amanda, how you think being a lawyer working in this area, how do strata managers try and advise their owners what a strata manager's responsibility is, because I think people really don't understand what their role is and no one ever looks at our contract to see what we're supposed to be doing.

Amanda Farmer: Yes. Well, this is a good example, signing off on an annual fire safety statement. Just walk me through, Reena, that process itself, because I think that will be illustrative of where the boundaries lie as to your expertise and the service that you're providing to owners' corporations. So, each building has to submit an annual fire safety statement to the council and to the fire brigade, and a qualified fire safety practitioner is brought in to inspect all of the relevant fire safety devices and to provide that certificate. That is their job within their expertise. What do you then do as a strata manager? So when you're being accused of signing off on something you shouldn't have, what does signing off mean, and what's your process?

Reena Van Aalst: Yes. In this particular example, Amanda, we actually have an engineer. What I did is I've got the engineer to go out and check that everything that has been signed off has been signed off correctly. Being a fire order as well, so it's not just your normal AFSS, it's also a fire order, so there's a higher level of caution and checking that needs to take place in this particular case. But for a normal annual fire safety statement, because we are signing on behalf of the owners' corporation in our capacity as owner' agent, we are saying to the fire brigade and to council that the buildings measures have been tested in accordance with the standard that's been listed on the actual document and that they actually do meet the criteria.

And therefore, we are ascertaining what we're saying is true and correct, and we're signing off on behalf of the owners' corporation in the capacity of owner's agent. Because there's a section in the statement where it says owner, and then another section says owners' agent. So obviously, if the owners' corporation sign that document, then they sign it in that area. If we sign as agent, then we are signing in that area.

So we're obviously just certifying to council that we have complied with the regulations based on the certified fire practitioner's sign off, because they have to sign off as well. They sign the certificate in their particular area. Because sometimes you have more than one practitioner, Amanda, that's actually signing. For example, lift landing doors need to be certified if you have lift landing doors. And now under the new regime, previously the fire safety company that was doing all the other testing would sign off on it, now that's no longer accepted and you need a lift consultant or a lift specialist that needs to come in, so they will then sign next to the lift landing section that they have certified. So sometimes you may have multiple experts signing off from different parts of the certificate.

Amanda Farmer: And then as an agent, you are relying on the sign off, the certification provided by those experts, those qualified professionals, and you are carrying out what is essentially the administrative task of completing this form to say that everything is true and correct, you did actually have an expert come out and that expert actually did inspect and did actually sign the form. What you can't do, and it sounds like this is what this particular owner wants you to do or expects you to do, you can't say whether or not that expert is right, whether or not their opinion on the fire safety devices working or not working is correct because that's within their expertise. All you can say is that as an agent you know they did it, you know that this is the form that they have signed, you know that this is their signature, and you're confirming that that work has been done. As to the quality or accuracy of that work, that's a separate issue.

So, where you have a complaint or an inquiry, if perhaps it was put more politely to you along those lines, my suggestion is that you attempt to explain to the owner that your role in this particular situation is as a strata manager completing an administrative task, which is signing off on a form, and you are not a fire engineer, you are not a certified practicing fire safety professional. All you can do is to confirm that the work has been done, not the quality or extent of the work.

Reena Van Aalst: Exactly. But that's what I did explain to him but he refuses to accept that the strata manager's role is just that. So, in a lot of people's mind, Amanda, lot owners, sometimes they believe that our level of expertise and qualifications are actually higher than what they are. I think that's something that we actually need to sort of communicate as an industry and a profession because people's expectations need to be educated in terms of what we are able to do and what our qualifications and what our

expertise is. It's definitely not providing advice or trying to... I think in this case, because sometimes someone has an axe to grind, they may use other types of things to try and muddy the waters. But I think that we have had many instances, I think many managers have, where people think that you should know this about building, you should know that. And in a sense, a strata manager really does not have those qualifications or expertise.

Amanda Farmer: Yes, I agree. I too see that, and I see strata managers struggle with that. I think having as clear a contract as you can so that you can refer back to that and point to the services in the contract that you provide and make clear that whatever may be demanded of you outside your expertise is not listed there in those services. And indeed pointing out that if you did attempt to provide those services, that advice, if you gave legal advice, if you gave engineering advice, then you would be exposing not only yourself but the owners' corporation definitely to unacceptable risk. And that is why you do not provide that advice, cannot provide that advice, and if the building insists on obtaining that advice from you, then in my view, you cannot continue. Your role is untenable there as strata manager.

Sometimes laying it out to owners like that, "If I was to do that, well, let's play that out. How is that going to end for everybody here?" Not comfortably, that's for sure. But I agree with you, it's a big challenge, strata managers being able to accurately and effectively communicate what it is that they do and more importantly, what it is they don't do. And for owners to have understanding of that. We continue to work on improving that if we can.

Reena Van Aalst: Thanks, Amanda.

Amanda Farmer: My challenge for this week relates to a by-law, a proposed by-law that has been brought to my attention. Not a case that I'm working on, but I do receive stories in my inbox, anecdotes that listeners, colleagues, clients, and friends hope will be helpful information for the podcast. And this particular by-law that was brought to my attention is in relation to the installation of solar. Very popular, increasingly desirable installing solar on our common property rooftops perhaps and having a more sustainable, more environmentally-friendly building community one would think is a laudable goal that we're all working towards.

Surprisingly, to me and to the person who sent this to me, this was a by-law attempting to prevent owners from installing solar. This by-law was addressing, apparently, concerns about aesthetics, concerns about each owner having the equal opportunity to install solar. There was a concern they might not enough space for everybody to have solar. And it was asked of me, "Amanda, how is it that a building can take this position? Is it legal? Is it possible a building can take this position and say, 'No, we don't want any solar panels, or if we broaden that, any other kind of sustainable infrastructure.' Can a building say no electric vehicle charging in our building? Can they pass a by-law that states that position?"

I pondered over this for a little while and added it promptly to our challenge list here for the podcast. Have you heard about buildings doing this, Reena, getting very hot under the collar about solar panels in particular and attempting to prevent them by way of by-law?

Reena Van Aalst: No, not yet, Amanda. But actually yesterday I had a meeting where we had an owner who owns two lots in a commercial scheme, and they actually had by-law passed to allow them to actually install solar panels on the roof. So, I've had the opposite happen where people are encouraging and agreeing. Any criteria that the owners wanted before the by-law was passed was to see that the structural engineers report said that the capacity of the roof to withstand the weight of the panels was satisfactory. And that was confirmed by the engineer two days before the meeting. So that was all fine. So, receiving that information gave the owner's comfort that even though they had no issue with the installation philosophically, it was more about whether the roof would be able to withstand the weight. And that was all confirmed to be positive.

Amanda Farmer: Yes. Well, look, my pondering on this issue led me to this general point of view, and not legal advice of course, everybody's building is different, everybody's situation is different, but I can't see how a complete ban on installing solar or a particular type of sustainable infrastructure is all that different to a complete ban on anything else, a ban on pets, for example. We know from our Court of Appeal that a by-law banning pets is of no force and effect, and we have amended legislation to that effect.

There are decisions in our tribunal where bans on other things, such as hard flooring, complete bans on hard flooring, have been overturned or found to be invalid or unenforceable. In my view, the law now is quite well-settled that these type types of all or nothing by-laws are at risk of falling into the category of harsh, unconscionable, or oppressive, and therefore, under our New South Wales legislation, unenforceable.

I add to that the comment that new legislation assisting owners' corporations to approve what we call sustainable infrastructure, solar, electric vehicle charging, came into effect last year, 2021. It is easier than ever before to pass a resolution approving these installations. Special resolutions are not required. We now require a sustainability infrastructure resolution, which has a lower threshold of approval and it's far easier to get approved. I think there's a clear intention there from our lawmakers that we should be doing everything we can to get this kind of infrastructure into our strata communities. And so, a by-law that prevents this without any further investigation, without any conditions, any criteria, any application process where applications may be reasonably refused or perhaps because the structure in a particular building is not suitable, is an attempt to circumvent the provisions of our legislation. And such by-laws leave themselves open to successful challenge. So I'm concerned to hear that buildings are attempting to ban sustainability infrastructure outright by using by-laws.

Reena Van Aalst: Yes, I agree, Amanda. I think that sometimes you have to wonder what level of control I think buildings want to have in terms of how owners are able to live their lives. When you look at solar installation as you've mentioned, that is now the threshold, as you said, where it needed a special resolution, which meant there was a far greater chance of those resolutions being defeated because only a small amount of people were required to defeat them has now all been changed. The intention is now to encourage buildings, where possible, to have this infrastructure. I don't understand when something doesn't really make any difference to anyone else. And the aesthetic reasons that you've mentioned, I mean, unless you're flying over the building, and now I think you can get probably more aesthetically pleasing solar panels anyway in terms of colour and things like that.

So yes, there are many buildings and you'd be really surprised at people that really want to control so many things in a strata scheme. Sometimes it could be money. Sometimes it could be various by-laws that they try and pass. And as you can see, Amanda, they obviously had enough there to pass it. But again, you don't know who was at the meeting. Was it only a few people, even though there may be a number of lot owners. A smaller building has a smaller quorum requirement. Two people could be a quorum in a small building. So that's all it would take necessarily, and other owners were not available.

I find that sometimes people when these by-laws are being passed, you don't get very much interest until after when that's already happened. Then people say, "Well, I wasn't aware of this. I didn't see the agenda or I didn't get it or whatever." But I think that sometimes you do find that these things can pass quite easily, but to undo them, as you've just said now, to try and enforce a by-law as being harsh, unreasonable, and unconscionable, requires someone to go to the tribunal and go to NCAT and try and get the by-law overturned.

Amanda Farmer: Yes. I encourage my owners' corporation clients and committees who are coming to me asking about the drafting of by-laws and what behaviour they can regulate, activities they can regulate through by-laws, I always ask them to think about what it is they're trying to achieve. And we've heard from our Court of Appeal, quite cleverly I think, that all that a blanket ban achieves is administrative convenience. It makes it easy for the committee to address applications, requests from owners to do things that affect the common property. If it's a by-law that says you can't, then the answer is simple, it's no. But the highest court in our state has said that that is not the function of an owners' corporation. Administrative convenience is not a reason to impose a ban. What our by-laws need to do is to address an activity's impact on the common property and other occupiers and how those other occupiers use and enjoy their lot and the common property.

If a by-law doesn't go to those issues, then it may well be open to a successful challenge. So, how is your by-law regulating the use and enjoyment of the common property? And a by-law about solar, a by-law about pets, a by-law about hard flooring can be drafted in a way that addresses the impact of all of those things on other occupiers and their use and enjoyment of the property. A ban doesn't have to be the answer. There can be conditions. There can be an application process that assesses different applications in different parts of the property differently.

Just on the point about sustainability infrastructure resolutions, in case any listeners are wondering, Reena and I have both said there's a different threshold of approval for those kinds of resolutions. A sustainability infrastructure resolution will pass if less than 50% of people present and voting are against the resolution. So you can have 49% of the vote opposing this installation of sustainability infrastructure and it still passes. And that's what we mean by a lower threshold of approval. It is much easier. You can have almost half against the proposal and it will still pass because you've got less than 50% against the resolution. And that is calculated on a unit entitlement basis. So have a look at Section 5 in our Strata Schemes Management Act in New South Wales if you want to find out more about sustainability infrastructure resolutions.

Reena Van Aalst: Yes. That's good advice, Amanda. I definitely agree with that.

Amanda Farmer: Thank you, Reena. Heading over to your win today.

Reena Van Aalst: Yes. My win is also related to compulsory management. This is actually a nice story where we were asked to be the manager a year ago, actually. It's only a two-lot scheme and it was one owner that was quite problematic, and that owner now sold and ever since that time, it's just been smooth sailing. And so, I emailed the owner that had asked for our appointment at the time just to say, "How's it going? It's coming up for expiry, and do you want to look after it yourself? Or do you want us to manage it?" She said, "Oh no, I think the other owner said let's try and manage it ourselves." So I thought that's great. I mean, I think it's great when... When something happens in a building where someone usually has to sell in these types of cases where compulsory management occurs, it's usually very sparring conflict between owners. In this case, with a two-lot scheme, it's even worse because it's much harder when you're only living with you and it's a duplex and it's a duplex, so it's one top of the other.

But it's just a great amount that new owner's bought in and everyone's getting along and now they can look after themselves. I just think it's wonderful. I hope that they go well looking after themselves. I mean, sometimes people don't realise there's the accounting function and the other statuary functions that we look after. But for a two-lot scheme, I think perhaps if both people they're quite intelligent and one of them actually has some legal background. So yes, this is a nice way to just end the compulsory management rather than like my previous example where I'm still interim and I'm still getting bashed up. But this one now, yes, it's just a nice story and a nice win to have people getting along and looking after the building themselves.

Amanda Farmer: Yes. I like that term of phrase, "They can now look after themselves," as everybody should be able to do. And I suppose it's assumed that owners' corporations can run themselves, manage themselves successfully. Not always the case as we learn here at the coalface, so wonderful to see a community turn around like that. Learn some lessons, have some different personalities onboard perhaps, and be able to move forward into the future positively.

Reena Van Aalst: Yes. It's a nice change, Amanda.

Amanda Farmer: Great win. My win for this week, I am bringing you a case from our tribunal appeal panel here in New South Wales. This is a goodie. This is a case, once again, about a by-law, so still talking about by-laws and harsh, unconscionable, or oppressive provisions in by-laws. I will include a link to the reasons for decision in the show notes for this episode, but it is the case of strata plan number 91684 and Liu, I hope I'm pronouncing that correctly, L-I-U.

In this case, a by-law that permitted an owners' corporation to deactivate fobs, access swipes, electronic keys, access to a building was challenged on the basis it was harsh, unconscionable, or oppressive. This was a by-law that allowed the deactivation of fobs if there was a breach of the building's rules about short-term letting. So, an owner or an occupier found to be in breach of the short-term letting by-law and all the rules around short-term letting could have their access device deactivated by the owners' corporation, and therefore not be able to it into the building and into their property. The tribunal found that this by-law was beyond power. It was harsh, unconscionable, or oppressive. Importantly, the tribunal and the appeal panel confirmed that access to your property is an inherent right and a provision in a by-law that removes that with no reasonable preconditions, no stipulations about how the breach is found, evidence of the breach, whether it was a tribunal order finding there was a breach, simply the committee

deciding there'd been a breach in the by-law, and then the access device being deactivated, it was found that such a provision in a by-law severely impacts the fundamental right of owners and occupiers to access their own property. And it outweighs any benefit that the owners' corporation may be seeking to achieve with that by-law.

Now, because that provision was found to be unenforceable, together with another provision which was that the costs incurred by the owners' corporation in dealing with a by-law breach, enforcing the by-law could be recovered from the owner. So there was a cost recovery aspect to this by-law. That provision was found to be invalid as well. The whole by-law was thrown out. The owners corporation argued that just those provisions should be severed from the by-law and the rest should remain in place so we can still regulate short-term letting, and the tribunal said, "No, that's not the by-law that owners voted for at the meeting. We can't just take out a couple of clauses that we've found to be unenforceable." So the whole by-law was found to be unenforceable.

And I know some listeners ears would've pricked up there at my mention that a cost recovery provision of a by-law was found to be unenforceable. That is really important, to understand the reasons in the decision on that point, because a lot of us are using cost recovery by-laws, recommending them to our buildings, making sure that owners corporations can recover their costs from owners who might not be doing the right thing. Have a read of this decision. It goes into some detail about the drafting of that provision. And there's a few hints there as to how the drafting may be changed, may be improved a little to perhaps make that type of provision in a by-law more likely to withstand challenge.

Reena Van Aalst: That's very interesting, Amanda. I think I do recall many years ago someone approached me from a building, I'm not sure if this is the same one, where they were actually quite proud of the fact that they had this by-law and they were able to actually use it quite effectively to stop short-term letting and also overcrowding in this particular building. They had a lot of overcrowding that was happening in some of the apartments, and therefore they were using the deactivation of the fobs as a way to stop the overcrowding.

So in particular, Amanda, can you take me through sections regarding the enforcement of the breach? Did they actually give by-law breach notices? Did they have a meeting to approve any of these actions? Or was it just a fact that they're just complying with the by-law without having any notice given to the owner or through a meeting that they were going to actually deactivate regularly? Or was it like a...

Amanda Farmer: The full terms of the by-law are not recorded in the appeal panel's decision. I expect when the tribunal determined the case at first instance, if there were some written reasons, they would've gone into more detail about the terms of the by-law. But I agree, Reena, it would be very interesting to see what process was followed. The appeal panel's decision doesn't really get into that. It simply makes the finding or confirms the finding of the tribunal below, that to remove somebody's access to their property is not on. So it may be that even after warnings and 3 notices and breaches of the by-law that deactivating a fob is still not a very smart move for an owners' corporation.

Reena Van Aalst: I think one would assume it's an inherent right to have access to your lot, Amanda, as you've said. That's pretty much the crux of the decision. I think there's maybe different ways that you can probably achieve the same outcome without going to such length. But I know that in some buildings, short-term letting and overcrowding are really big problems. I think sometimes owners' corporations may feel that their hands are tied in terms of how they're able to deal with this. Because a lot of owners speak to me, Amanda, about by-laws and enforcement. Because, for example, with pet by-laws, I mean, we've got one that had a very descriptive pet by-law from its inception about 4 years ago when it was registered the plan. However, at the moment, when people apply, they approve them, and now they're saying it's becoming like a dog's... I wouldn't call it dog's box, but I mean, there's so many dogs and animals there now, and it's one particular animal. They're urinating on common property, and because there's so many, you don't know who's doing it. And therefore, even though the by-law is quite prescriptive in terms of what conditions have been imposed on all those residents that have approvals given, it's the enforcement of this, which I think sometimes people find hard.

Now for us, for a particular case where we're dealing with someone who's got two dogs and only one dog's allowed. And the agents apparently allowed that. The tenant wrote to me and said that the agent had approved two dogs even though only one's

allowed, yes, in the by-laws. Now we had to now go to the tribunal to try and deal with it because everything we've done with the agent and the resident hasn't been successful. We're really hitting our head against a brick wall at the moment. So, yes, I mean, I'm interested in the matter to understand more about that by-law and what the wording was and how it was applied by that owners' corporation.

Amanda Farmer: Yes. I am looking at the list of people who are involved in that case, both lawyers and strata managers. I'm sure a few of them are listening in to this podcast, so may be able to reach out to us and fill us in. But I agree with you, Reena, this is why buildings develop by-laws to find creative ways to deal with difficult residents, attempting to charge costs back to those residents, attempting to restrict their access to various parts of the property, all things that many buildings attempt to do through by-laws. And indeed, because that formal process of enforcement takes so long is so difficult, often uncertain, and expensive. So a lot coming out of this case, that's why I've listed it here as a win. It's an important read and to be having a look and probably getting some advice, I'd suggest, specific to your own laws, your own building, looking at how they're drafted. If you have short-term letting by-laws or by-laws that seem to allow the deactivation of fobs and access devices, prevention of access, and of course, recovery of costs, just having a look and making sure that you're on some safe ground there in light of this appeal panel decision.

Reena Van Aalst: Yes. Very important, Amanda. Definitely.

Amanda Farmer: Alrighty. Oh my goodness, I really think that was a big one, Reena, lot's covered in that.

Reena Van Aalst: Yes, exactly, a lot there. Brain strain.

Amanda Farmer: Thank you for your time. Always good to cover off those difficult issues with you and stuck up some more of the next few weeks.

Reena Van Aalst: See you next one, Amanda.

Amanda Farmer: Bye, Reena.

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?