

Publication Date: 31 August 2023
YSP Podcast Transcript: 376. Surprised by an expired agency agreement?

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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: 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 good. I'm very pleased to be here with you. It's been a little bit longer than our usual between podcast drinks. We've both been crazy busy this time of year, so it's lovely to be back on air.

Reena Van Aalst: Exactly. Lovely to see you, Amanda.

Amanda Farmer: And I know you've been racking up some wins and some challenges to share with me and our listeners this week. So, let's jump in, hard things first. What has been challenging you this week?

Reena Van Aalst: My challenge Amanda relates to by-law breaches and the issuing of those types of emails and correspondence. So, we had received an email from the Secretary of the scheme where he had personally received a complaint from an owner that another owner was in the lobby trying to provide some information regarding emotion. The details exactly I'm not really aware of. However, this owner felt harassed and thought, I should be able to walk through the foyer without getting harassed by someone every time I walk past.

So, the secretary asked us to issue a by-law breach letter. Well, we didn't have an issue letter, it was just an email. And it was just saying that there's been a complaint about you harassing someone in the lobby. Can you please refrain from doing this as this is a breach of the peaceful enjoyment of an owner lawfully using common property. And the person who received the by-law breach email, he was quite upset and basically said I need evidence, because obviously we weren't aware that they hadn't come to us directly, We went back to the secretary and said, "Is there any evidence?"

And when the secretary went and spoke to the complainant, he said, "Oh, I'll just withdraw it. I don't want to get into evidence and this and that.", which even though I said to the secretary, "We don't have to provide evidence. I mean, the person has made a complaint. We're not trying to crucify anybody. We're just letting them know that please stop doing this." Anyway, the secretary said no, this person is worried now, I've obviously made a mistake in terms of reporting it. I'm going to write to the owner directly and tell him that we're withdrawing the whole complaint and apologizing. Now, the owner then didn't accept that apology and said that Strata Central acted unlawfully, that they should know the conditions of their license and unless I get an unconditional apology from Strata Central, then I'm going to go to Fair Trading.

And so, I suggested to the secretary, why don't we have a meeting with this owner? At least then we can try and sit with him and just see exactly what has been so upsetting because references were made, this is on the record, all this is stuff, but what also was on the record is an apology. So, anyone that would ever see the record, which as we know, no one ever sees emails, but if they were to see this email, they would also see a corresponding apology from the secretary.

And the secretary made it clear to him that I gave the instruction to the Strata Central. It wasn't that they would. And then when we asked for a meeting, the meeting was refused. The owner said he doesn't see any benefit or utility in having. That basically, Strata Central and the manager concerned who sent the email should know the law relating to their license and all that sort of thing. And therefore, unless they receive an unconditional apology from Strata Central also that they're going to report the manager and Strata Central to Fair Trading.

And so, I just wanted to ask you, Amanda, like on what basis could he submit an application? Because as far as I'm aware, we're

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still into the law of the agency and our agreement, we have delegated authority when given instruction by the secretary to issue correspondence and that we were able to do that. And nothing in the correspondence was defamatory.

Amanda Farmer: Now, let me just clarify. It was an email sent saying there had been a complaint about behaviour on the common property. We have a by-law about behaviour on the common property. Please comply with the by-law, or something like that. It was not a formal notice to comply with the by-law under section 146 of the act.

Reena Van Aalst: No.

Amanda Farmer: Okay, and has there been any talk about or resolution of the committee that a formal notice to comply should be issued?

Reena Van Aalst: No.

Amanda Farmer: No, because the complainant has now withdrawn their complaint and actually given an apology.

Reena Van Aalst: Yes, and therefore the secretary wrote directly to the owner that we had emailed and apologized directly, the secretary could see that this owner was having a go at us and he said, "You shouldn't be in trouble, you just did what I asked you to do." And it wasn't as I said an email that said anything except what we've just discussed.

Amanda Farmer: Right. Okay. So, the crux of it is you, the strata manager are acting on the instructions of the committee to do something arising from facts that the committee, specifically the secretary has informed you about. You followed that instruction. Yes, look, I can't see where these allegations about breach of your agency agreement or your license terms or your legal obligations as an agent are coming from. It sounds like you've bent over backwards to accommodate this person and to make clear that perhaps this has all been a bit of a misunderstanding. Seemingly in my view on the part of the secretary or the committee who have received this complaint or the complainants then withdrawn the complaint, look, these things happen and it's necessary to backpedal a bit sometimes.

But as you say, Reena, you're there as agent acting for the principal on their instructions. It sounds like those were at the time they were given valid, legitimate, reasonable instructions and circumstances change.

Reena Van Aalst: Thanks, Amanda, that's what I thought but I just wanted to make it perhaps clear to some other strata managers out there as well that - and owners in particular - that pursuant to the law of agency, and also your agency agreement, there are things that we are allowed to do such as issuing levy notices, I mean you know it says even though you might have a treasurer a treasurer can delegate that function to an agent so I think sometimes owners don't understand that when we're writing to owners or residents that normally, I think, on the most part, it's normally based on an instruction either from the strata committee, or sometimes we may get an email from an owner saying, you know, that's living below another apartment. I've had "Last night there was someone running around on the floorboards." You know, we need to take people on face value and then through a negotiated process, the person may say, yeah, I did that or I didn't do that. But I haven't really ever had someone say that you have to like produce evidence. When we went at the tribunal or at a court or anything to try and produce evidence of a breach.

Amanda Farmer: And that's why I asked, was it a formal notice to comply that had been issued? Because you'll see under section 146, when that notice is being issued, the owners corporation does have to be satisfied. Those are the words in the section, satisfied that there has been a breach of the by-law, not the threshold, let's say when you're sending an email drawing attention to something that has occurred on the common property and attempting to nip it in the bud, let's say before we even get to the level of having to be satisfied.

Reena Van Aalst: Thanks, Amanda.

Amanda Farmer: Okay. Moving on to my challenge for this week. I have been working with an owner in a building that has been,

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let's say taken by surprise at the expiry of their strata manager's agency agreement. I think this is something we've talked about on the podcast before Reena, but I'm bringing it back because I've seen it happen maybe two or three times in the last month.

I've had clients or members in our online community come to me and say, "Amanda, we've just discovered that our strata manager's agreement has expired without notice, they've been operating for the last couple of months possibly under an expired agreement. Oh no, what do we do?" And this continues to amaze me that our professional strata managers are allowing their agency agreements to expire. What I did see in one recent situation was that the agent upon realizing their agreement had expired, encouraged the strata committee to convene a meeting and pass a resolution to extend their expired agency agreement for a further period of three months. With the intent that would take them to the AGM and they could enter into a new agreement.

My view has always been that you can't extend an expired agreement. Once that date has passed, you've lost your opportunity. Yes, you can resolve to extend an agreement before it has expired and the extension of three months is set out there, you know, New South Wales legislation. But once that agreement is expired, all bets are off. There's really, in my view.

Open to challenge from other lawyers who might be out there. In my view, no way to cure that. Now it is necessary, our legislation tells us it's necessary for a strata manager to inform their owners corporation that the end of the agreement term is coming up. Section 50 subsection 6 in our Strata Schemes Management Act says that at least three months before the end of the term of appointment, the strata manager must give written notice that the end of the term is coming up. Is that something that you do, Reena?

Reena Van Aalst: Yes, we do that regularly, Amanda, but I've seen many other companies that we received buildings from, where they haven't even done that, where they've actually been operating on an expired agreement. And I think I did mention in one of our other episodes, Amanda, that I had raised this with our PI insurer because I was concerned that for an agent to do that, would they be covered? And the PI insurer wasn't really sort of direct in relation to answering that question, because I think it depended on what the agent had done and what ramifications could have arisen from their actions.

But I'm actually aware of another agency agreement from one of my colleagues that was showing me where it expired, I think about a year ago. And what they were trying to do when they were trying to be reappointed was to basically ratify it back to a year before its expiry. So, in a sense, to try and remedy that, that loophole where they had been operating on it on an agency agreement that had expired one year ago, and to bind them into a new one. So, to ratify the appointment back to January of that year, and then obviously extend for a new term as well.

So that's something I've seen also in a general meeting, which I'm thinking I've never seen, that was like one of the extremes because it had gone on for so long. But I think the problem is, Amanda, that when we have systems in place, and I think our software actually does have a contract expiry register so that we can see in red when our agency agreements are coming up. But I'm not sure about other programs. And I think perhaps, yeah, there seems to be someone that's not taking responsibility and it's sort of falling off the radar, I would say, but it does require people to be looking at the expiry dates, you know, someone that's assigned specifically to make sure that that's covered. But I'm seeing it more often than not, but not three in one month, like you said, I haven't seen that before.

Amanda Farmer: Yes, it just kept coming up. I can imagine why a building and a manager in particular who has picked this up would want to at least pass a resolution attempting to deal with it because it really does call into question that agent's authority to charge fees under that agency agreement, the authority to carry out acts under that agency agreement, and to the extent that there may be any dispute about what's occurred in that period where the agent was operating under an expired agreement, the owners corporation may be able to say, well, you didn't have the legal authority to do those things, managing agent, because you didn't have a valid agreement, nor should you be paid pursuant to the schedule that set out in that agreement.

Reena Van Aalst: Yes, that's a very interesting point that you're raising Amanda, because I think when you think about any other service provider, let's say building managers, they have up to 10 years, but even if their agency agreement expires, it just continues on a month to month basis. Even if like we've had the other day, a mobile phone plan that expired for one of the lift like

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the lift lines now have the mobile phone chips in them, and of the company's commander said, you know, it's expired. And I said, well, it's obviously going month to month. Why does it need to be in a fixed term? And they said, oh, you know, you can get a better rate et cetera.

But it's unfortunate that the only agreement that really expires for an owners corporation is an agency agreement for a managing agent. Electricity contracts, if they expire, then, you know, you might go into higher default rates, but you still get, you don't get electricity being cut off because it's expired.

I understand the intention of that legislation, but it has put an extra burden on strata managers to make sure that, you know, they've got systems in place that, you know, again, we have to then send an email to the committee, they say yes, then we have to do a committee meeting and writing, then we have to follow up voting papers and just say, are you financial? And so, it's not just the end of just saying your agency agreement is going to expire in three months, you go then take the action to enable the extension to occur. And that's more time and effort on the managing agents' resources. I'm not sure what we can do Amanda in terms of, I know this month-to-month thing sort of was wide, like they were many agreements just continued for so many years and no one really did anything about it. But I think the fact that it expires so suddenly also is another issue. I think for managers and for and for as corporations as well. I don't think it's just to impact on the manager

Amanda Farmer: Yes, definitely. Especially when the legality of acts that might have been carried out and money that might have been paid out is called into question when an agreement expires that does affect the owners. It was something I was going to ask you, Reena, what systems do you have in place to be alerting you to the expiry dates of agreements? And you've said you've got the dates in your software and there's a bit of an automated process around that. However, you may still need to convene a committee meeting to extend agreements if there's no AGM in the near horizon.

And I do think that's where these agents who are failing to recognize, to be aware of these dates, looming might be falling down. They don't have those systems, the technology, they're supporting them to alert them to these dates. The policy around this change, and it was a change in our 2015 legislation previously, could have agreements that would roll over for continuing terms and month to month.

Reena Van Aalst: Well, I think the continuing terms, Amanda, that was deemed to be unlawful because then that was the Australian Consumer Law. You may recall that no agreement could then because unless you gave the required notice that you wanted not to renew it, that's all now being removed from the legislation. So even though some agreements may have said that, that wasn't able to be enforced. But however, I think, yes, I mean, if every other agreement can go month to month, why is it that a managing agent's agreement can't go month to month? And I understand why I think there was a bit of complacency and all that sort of thing. But then, you know, why just single out the managing agent? Why is it that the building managers' agreement can't then should end right on the dot, and they get 10 years and we get three? And I'm not again, making comparisons. But 10-year agreements up to 10 years are quite a big amount of time to allow an entity to be your service provider.

Amanda Farmer: That's a good point that you raise. Actually, I was asked that in the forum very recently, and I went searching for that time period, maximum three-year terms for everything, except building manager agreements, which are maximum 10-year terms in New South Wales, or embedded network agreements that get approved at the first AGM, they are not capped at that three year mark either. Interesting.

Reena Van Aalst: Right. Yeah! Food for thought.

Amanda Farmer: So, agents out there listening, committees out there thinking, "I wonder when my agent's agreement expires, that must be coming up soon." Make sure you're on top of those dates, at risk of being in a world of pain. If everybody's on board and it is an honest mistake, genuinely overlooked, the committee's happy with the strata manager, then it's unlikely that anything would come of it at the next AGM. If you want that strata manager to continue, then I suppose you enter into a new agreement.

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But technically, legally, if someone wanted to challenge that arrangement and wanted to call into question the acts of the agent that were being carried out under an expired agreement, then they could. And I think they could do so quite easily as a matter of law.

All right. Now we have this week a joint win. I think, Reena, are you okay for me to introduce this as our joint win?

Reena Van Aalst: Yes, Amanda, I'd love for you to introduce it.

Amanda Farmer: Well, we, dear listeners, have some exciting news and Reena is very much part of this news too. I've been in planning mode for a little while now, planning a very special in-person event that is going to happen in February 2024.

Before I get there, I'm just going to rewind a little. Some of you may know that earlier this year, 2023, I became an approved provider of CPD, Continuing Professional Development Training for our New South Wales Strata Managers.

Our Strata Managers must do a certain amount of CPD education throughout the year in order to meet the conditions of their license here in New South Wales, and they can't just go anywhere to get their CPD education. There are some compulsory topic areas that must be covered and those topics can only be delivered by a New South Wales Fair Trading-approved CPD provider of which I am now one. But that is not the exciting news. The exciting news is this. And this is the first time that I am, well, at the time we're recording this, this is the first time I'm announcing this news with all the details.

By the time this chat goes to air, you may have seen this in your inboxes. I am hosting a one-day CPD event on the 23rd of February, 2024, and I'm inviting our New South Wales licensed strata managers to come along and tick off their compulsory CPD hours. Now, not only do you tick off that legal requirement by spending the day with me and with Reena, Reena is going to be there too. She is one of our special guest presenters. You can also do it in style. The Your Strata Property one-day CPD event is being held in Mudgee.

Reena Van Aalst: Nice.

Amanda Farmer: I have a gorgeous venue organized for you to spend the day with me, with Reena, with our other secret mystery special guest speakers, your every need will be catered for. And then we move on to an all-inclusive sunset banquet dinner at a local winery. This is all happening on Friday, the 23rd of February 2024.

If you are listening to this podcast episode, as soon as it drops, which will be around the 31st of August, early access tickets will have already opened to our pro members. You know who you are, check your inboxes for your special link to book into this event.

Now there are very limited spots available at the event, that restriction is placed on us by New South Wales Fair Trading. We can only offer face-to-face CPD training to a small group. So, assuming tickets don't sell out once the pros have had their shot at them, general access will be made available to everyone from Thursday, the 31st of August.

So if you're up to date with your podcast episodes and you're listening to this one around about that date, hopefully, there are still some more tickets available there for you. You can check out all the details of the event and secure your spot over at yourstrataproperty.com.au/cpdevent. That link is for you in the show notes.

Over on that page, you'll also find out who our other special guest speakers are. They have been secured. They are there over on the website. Have a look. I know you'll love them. You'll be very excited to be hearing from them.

Reena Van Aalst, I can't wait to spend the day and the evening with you in Mudgee.

Reena Van Aalst: We're looking forward to it so much because it's such a lovely place to have education and when you think about a winery, it's you know relaxing, and it's sort of a more professional environment even though it is a winery because I think when people are there, they're more relaxed and it's not like sort of being in an auditorium or you know those sort of venues where

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they're just mass-produced seating and mass-produced dinners and things like that. It would be nice to have something that's more intimate with a number of strata managers. And it's also a good way for us as colleagues to catch up rather than just to be in a formal conference type sort of a thing where you can relax. I'm really looking forward to it Amanda. It's going to be a great event.

Amanda Farmer: Yes, so it's still early enough in 2024 to be fresh from your Christmas break before you dive into the overwhelm of the year. It is an escape and a change of scenery, a place to spark some fresh ideas and absolutely to connect with those other, look, I'm going to say it, high-achieving professionals, those who are at the top of their game, the people who are coming to this event are people whom we all learn from, who contribute so much to our space, and who I just know you're going to love getting to know on a personal level, both me and Reena, getting to know us a little more in person and getting to know other event attendees. You guys know how I like to do things. No sponsors, no trade booths. No one's selling you anything that you don't need. We are focused on solving the complex challenges that you, strata managers are facing, that Reena knows you're facing because she's facing them too. That I am helping managers through every day.

And celebrating, celebrating the hard work that we do, the strides that we're making, and the relationships that we're building. That's what our one-day CPD event in Mudgee 2024 is all about.

Reena Van Aalst: And I think the lovely thing that you're doing, Amanda, also, and that's quite unique is that you are not having all those trade booths and all that other type of stuff around, which can be distracting. And sometimes, when someone is there for a purpose, and of course, we all need the suppliers in our industry to help, but it's just a unique event where you only have managers, you don't have sponsors, and it's in a forum where people can feel comfortable liaising, communicate and meet and get to know their peers rather than, you know, having to spend time with many different stakeholders. It's just nice to spend time with other managers from other offices and other companies and see what they're going through and to learn from them as well. We can all learn from each other and help each other. So I think it's a great idea.

Amanda Farmer: If you want to join Reena and I in Mudgee on Friday the 23rd of February 2024, head over to yourstrataproperty.com.au/cpdevent. I hope there are still some tickets available if you're listening to this later in the year, it's quite possible that we've sold out and I'm sorry about that.

Reena Van Aalst: You might have to have another event.

Amanda Farmer: Maybe, we'll see. Might become a thing. The annual or biannual, Mudgee getaway.

Reena Van Aalst: Yes, exactly.

Amanda Farmer: Well, that is a lovely way to wrap up our chat today, Reena. Thank you so much for spending time with me and with all of our listeners. Have a fantastic week in Strata.

Reena Van Aalst: You too, Amanda.

Amanda Farmer: Bye 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 yourstrataproperty.com.au.