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YSP Podcast Transcript: 422. Contracts not attached to agendas | carpet uninsured | cash levy payments

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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, Reena.

Reena Van Aalst: Hi Amanda, how are you?

Amanda Farmer: I am great, we were just having a bit of a giggle and a laugh because I forgot how to introduce you because it's been too long.

Reena Van Aalst: I know and I said maybe I'll start and introduce you and then on your own podcast.

Amanda Farmer: I think it's great. I think we should do that next time. Listeners, look out for it. But it's lovely to be back here with you after a number of weeks of a busy schedule on both sides, I think has kept us away from the microphone. But we are here to share with you our wins and our challenges for the week. We've had a few stacking up. Let's start with your challenge, Reena.

Reena Van Aalst: Well, my challenge, Amanda, relates to agency agreements for strata managing agents and for all our clients out there, when the strata manager is appointed, an agency agreement is the instrument by which the terms and conditions are provided. And I had one of my owners from another, who's got another apartment in another building. And he said to me, Reena, I received this agenda from the incumbent manager obviously and it says that the new manager will be appointed pursuant to this agency agreement which it was not a next to the agenda it says that the annual fee will be x per annum for the first year as set out in the terms and conditions of the agency agreement and says a copy would be tabled at the meeting and available to owners by I'm talking to the secretary.

And he asked me, you know, I mean, obviously he doesn't have a problem with the manager who's being appointed. But the issue is, he said, why isn't the agency agreement attached? Because why should I have to send an email to the secretary? And if you're not at the meeting, obviously, if you're on a table at an agency agreement at a meeting, depending on how it's being held, if it's being held in person or by Zoom or both or the other issue is, you know, obviously it has a lot of, I mean, normally agency agreements are about least 20 pages and have tiny fonts and things like that in terms of conditions.

So he was just asking me, you know, what my thoughts are. And I just thought, well, I didn't think that was right that, normally any document that is being considered should be annexed to the agenda. And I just thought I'd just raise it here with you if you've sort of come across that before.

Amanda Farmer: Yeah, I have definitely come across that before and I have had this exact question, a situation where I was holding a proxy for an owner to attend an AGM and the incumbent manager was up for renewal and their fees had actually doubled. I think it was a little bit of a, you're too hard building and we don't want to manage you anymore. So we're putting the fees up, fair enough.

That agreement was not attached to the agenda. My client had a copy of it because I had seen the agenda and I'd said, go and ask for a copy of it. And at the meeting, I was given instructions to point out to the other owners present and voting, hey, do you realize that this fee has now doubled? They of course didn't realize because they hadn't seen the agreement, didn't even enter their minds that they should see the agreement.

So this does happen. And I've been asked this question indeed by a strata manager previously who had seen like you this practice happening and wondering if it was legal.

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The relevant part of our New South Wales legislation is section 49. The owners corporation appoints a strata manager by instrument in writing, authorized by resolution at a general meeting. So that instrument in writing is what you're talking about, Reena, the agency agreement. It doesn't actually say in section 49 that the agency agreement has to be attached to the agenda. And interestingly, there's a case a little bit old now, I think it's a 2015 case from our New South Wales Supreme Court where this exact question was asked in the context of a caretakers agreement, not Australia managers agreement, a caretakers agreement. And the Supreme Court in that case, ended up holding that it was okay that the caretakers agreement was not attached to the agenda. It was exactly what you're saying it was owners were told it's available for inspection.

I think at the office of the strata manager in that case, it's tabled at the meeting. Supreme Court said that's all right. There's no express requirement to attach it to the agenda. I'm not aware of a similar case in the context of a Strata manager's agreement, but I would imagine that Supreme Court case would be pretty good authority for the same principle in the absence of any express requirement in our legislation to actually attach the agreement.

Reena Van Aalst: But is there a difference in legislation between what's required to be provided for a strata managing agent's appointment versus a building manager's appointment? I think it's section 67.

Amanda Farmer: Yeah, good point. And you're right. Section 67, a building manager may be appointed for a Strata scheme and that appointment is to be made by instrument in writing. So it's the same language, section 67 and section 49, 49 being about our strata manager agreements. The case, if anyone wants to go and have a look at it is Merritton Apartments and the owners of Strata Plan number 72381, 2015 New South Wales Supreme Court case. We'll pop a link to that one in the show notes. Probably worth going having a closer look. I haven't looked at that one for quite some time and just see if that reasoning could be extended to apply to our agency agreements. But I think there's probably a good argument there that it could.

Reena Van Aalst: Yeah, because the same writing instrument in writing.

Amanda Farmer: All the more reason why our owners have to be on top of their agendas. Did you tell me Reena that the agenda said the agreement is available on request? Right.

Reena Van Aalst: Yes, or by asking the secretary and we tabled at the meeting, but I mean, it's not a one-page document that you can just table and give out. Yeah, I don't know that, I tabling has probably got many connotations and meanings, I think.

Amanda Farmer: You're right. And especially when we're at a stage where owners are asking more questions about their contracts with their Strata managers as they should be. Are you receiving commissions? Are you receiving other benefits? Are these disclosed? What is included in our agreed services fee? What is additional services? Are the fees increasing? And that's something that's fairly easily worked out by looking at the front page of the contract comparing it to last year. But if you don't have that contract, you don't know.

Reena Van Aalst: Yeah, exactly. think it's probably, and right, you're talking also about the disclosures, Amanda, in relation to managing agents, obviously, which are becoming more, which will be updated in this new legislation that's being considered at the moment. But yeah, I think that with building managers, I think it's already more straightforward in terms of what they charge for and what's extra. I mean, I haven't seen a building management company disclose any other connections which perhaps they probably they need to if they were owned by the same strata management company or I'm not sure the disclosure needs to come from the strata managing agent side or both. Obviously, it depends if the building manager's acting for a building that's where the strata manager also manages the same companies of managing it or not. So yeah.

Amanda Farmer: Yeah, true. Well, let me know if you hear anything different on that point and if anyone tuning in has a different view. My challenge for this week arises from a Friday live chat that I hosted over on our Facebook page about a month ago now. And some listeners who tune into the podcast will also be tuning into our Facebook live chats and may remember this one. I was unpacking a recent case coming out of our Supreme Court once again.

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And that one related to carpet in lots and whether or not original carpet in place at the time of registration of the strata plan is common property. And our Supreme Court held in that case that yes, that original carpet in place at the time of registration of the strata plan is common property. I said that that had apparently from the articles I was reading and what I was seeing on social channels that had come as a surprise to some lawyers, some strata lawyers. I was saying, wasn't too surprising to me. I was pretty sure that that was the law based on some previous Supreme Court authority. The case if you missed it and you want to go and check it out is Strata plan 99960 and SPS building contractors link to that one in the notes for you.

But after having that chat on live, I received an email from an insurance specialist. I have his permission to release his name. His name is Scott Driscoll strata insurance consultant and Scott very kindly reached out to me said Amanda I agree with you I wasn't too surprised by that decision as well but I have a feeling I know where this confusion about whether carpet is lot property or common property I have a feeling I know where it comes from. Reena's nodding to me as I can see her on the video here and he and Scott very helpfully laid out for me in an email the relevant sections of our New South Wales legislation whereby an owners corporation must obtain insurance for the building and then compare that to the actual policy terms that we see come out of our major insurers.

And Scott ultimately said, look, 70% of insurance policies really in strata look like this. And the insurance policies expressly exclude lot owner contents. Fair enough. However, lot owner contents is defined as including floor coverings, such as carpet. So while carpet, and I come back to original carpet in place at the date of registration of the strata plan, while carpet is common property and our Supreme Court has confirmed that, most likely your building insurance policy does not cover carpet inside a lot. It will cover carpet on the common property, but very likely it doesn't cover carpet inside a lot. And Scott sort of explained to me how that's under the insurance contracts act, how insurers are bound by those requirements and can't be covering things that don't belong to in the eyes of the insurance contracts act, I guess, don't belong to the insured, the owners corporation. and Scott concluded his comments by saying, I wonder if this Supreme Court case will change that legislation and require owners corporations to be insuring carpet.

But that's where the confusion probably comes from where strata managers are saying, damage carpet, wet carpet, moldy carpet, not our problem because it's not covered by insurance. You come across this one, Reena?

Reena Van Aalst: Yes, all the time, Amanda. And the thing is that the insurance policy covers fixtures and fittings. So to me, original carpet is a fixture. You just can't pick it up and like take it with you when you leave. If you're leaving or selling your apartment. So if original flooring, if there was original timber flooring, it would be covered and the insurers cover that. But for some reason, yeah, it's just it is. I think it all has come from the fact that insurance companies don't replace and insured carpet.

And then that has probably evolved into this, well, it's not common property, even though it's original and it's an original fixture and it's in floor coverings usually are part of the building. And the insurance, I don't know why they excluded it, because if it was your dishwasher that was where your kitchen burned down, they'd replace the whole thing. The whole kitchen would be replaced. Fixtures, fittings, everything that was there originally, what not sort of added by you would be included. So yeah, it just makes no sense, but.

Amanda Farmer: Yeah, really interesting. And, I welcome any further comments from insurers or brokers or those in the space on that particular point. I did make a comment on that in the Friday live chat to say, you know, whether it's insured or not, if it's common property and it has been damaged because of some failure of the owners corporation to properly repair and maintain other parts of the common property, then it needs to be replaced, it needs to be fixed at the owners corporations cost. But it was good to get that insight from Scott into why this confusion may exist. I totally get it. And it may be that we do need some changes to our legislation whereby it's very clear that an owners corporation, must ensure those fixed floor coverings to the extent that they are original and are common property.

Reena Van Aalst: Yeah, it's interesting Amanda, because I think when you look at strata management, I mean, I've always said that people that work in strata management, when you ask them, like, why they think x or y about the legislation or why they're writing or saying anything in response to a query, it's always because someone else has usually like taught them.

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And this is a bit of an example where down the years, your insurer says it's not covered, so it's not common property. You know, it's become this thing where people aren't questioning it, and they should be questioning it. And if you think about the logic of it, it's pretty apparent if it's original.

Amanda Farmer: Yep. Okay. Thank you very much. Scott Driscoll strata insurance consultant for reaching out about that one. Reena over to your win this week.

Reena Van Aalst: Yes, Amanda. In our episode 415 when we spoke about accepting cash at a meeting and you and I had different views on that particular requirement where in a sense I mentioned that the banks Macquarie and Bank of Queensland through Strata Cash and DEFT through Macquarie are not accepting cash so people can actually either make a direct payment from their account into the bank account of the owners corporation pay by BPAY if they want to pay by BPAY or use a credit card, but they could not bring cash to a meeting and we could not bank cash. And so I went back and and corresponded with David Edgerton from Strata Max and his response also concurred with what I sort of believe to be the case is that Strata Pay as a payment provider has the right to pick and choose what payment channels they provide and whether cash or any other form is considered to be legal tender doesn't change that.

So again, they could go to the post office and they can transfer that amount of money for debit savings account at the post office. And even apparently now the ATO is also doing the same thing now. Apparently you can't just go and pay cash. So I think what's happening is because of all this money laundering issues that are happening. I listened to a very quick part of a podcast about money laundering and the way it works. I mean, it's just so complicated, like in terms of how money can really quickly change from one entity to another. I think now, which is why there's public institutions, Amanda, in terms of banks and that are really being cautious about taking cash. And I think strata sort of become the byproduct in terms of people wanting to pay like, you know, a couple of dollars here or some interest here or when.

Obviously, we don't want it. We never ever took bigger amounts of cash at meetings. I mean, I had someone try and give me 10 grand once in cash and I said, no, like, yeah. And so I think it's one of those things now that is now changing because of the fact that these institutions are choosing not to take cash. And I think also, if you think about it in terms of cost, the transactional cost of me banking a dollar 20 is more than the dollar 20. Like it's printing out the deposit form for us. So I've going down to the post office, taking it to the thing or the bank. You know, waiting in line. I think you can deposit, I think some banks take cash in those envelope things where you can just stick it in, but I'm not sure. But the banks like Macquarie, you can't do that. You can't just go to the teller and machine and stick it in like you do for Commonwealth Bank or Westpac and things like that. So yeah.

Amanda Farmer: Yeah. So you did share David Edgerton's email with me and we thank David and Strata Max for tuning in and for giving us some insight into that question. Reena, you and I had talked about whether a strata manager has to accept cash, whether an owner's corporation has to accept cash. I was saying, well, cash is legal tender. Surely an owner has a right to insist. And David in his email that you shared with me was pointing out, well, Strata Pay as a payment provider has the right to choose the payment channels that it accepts in the same way that a strata manager as a professional is managing the owners corporations accounts can say we don't accept cash.

And David, I think properly pointed out that maybe for strata managers, there is room to make it clear in their agency agreement, the terms of their engagement with the owners corporation that these are the payment methods that they accept or are able to accept and make it very clear that they don't accept cash. Just so that they can point to that. If you're in that situation at a meeting, someone's handing you an envelope of \$10,000 you're able to say no, per this clause of our contract, we don't accept cash.

Reena Van Aalst: Yeah, that's a good idea, Amanda. And I think also for ages, I think when we send out our email saying, you need to be financial to be able to vote. I think we should also add to that, you know, like, first of all, go check your ledger to see if you're earning money, because a of people don't realize that when they've paid their levy, and it was late that the interest has been incurred. And until they get the next levy notice, they don't realize that they had any interest owing. That's number one, I think. And the second thing is to say that don't accept cash.

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Unfortunately, and these are the methods by which you're able to pay your outstanding living. The other thing also, you're probably fine because a lot of meetings are now held electronically by Zoom, like that even that doesn't happen as much anymore because unless you're in person, someone's handy, no one can hand you cash through electronic means. But I think trying to foster that education and understanding as you said Amanda, where people know through the agency agreement in terms of how they visit whatever provider you're using, what their terms and conditions are for payment methods and also think bringing that in our agendas to the forefront.

Amanda Farmer: Yep. And explaining why, you know, security, less cost, less administrative cost, addressing government requirements about anti-money laundering. I think they're all great reasons. And Natalie Fitzgerald, strata manager mentioned this on the podcast very recently. Owners just want to understand. They just want to understand why these decisions are being made, why the strata manager may be operating the records, the accounts, the building, the way that the strata manager is. And it's not enough anymore to say, because I said so, because that's just the way it is. Our owners need and are entitled to more than that. So I think wherever we can go a bit deeper and provide that extra information, that's going to be well received.

Reena Van Aalst: Yes, 100%.

Amanda Farmer: All right. Finishing up with my win for this week. I have been involved for some years with a building in Sydney, small building, officially three owners, but about five lots. A building that's been through some struggles, that have been tribunal proceedings, there has been a compulsory manager appointed in the past. A lot of work to be done on this building. It is a heritage building and that makes the work more complex, more expensive. It's in my win list this week because much to everybody's surprise, the local council has just approved the termination of the strata scheme.

I say much to everybody's surprise, to the surprise of my clients, to the surprise of a few lawyers who have been involved. As I said, it's a heritage building. There are a few complicating factors. Many people, including myself, did not think that this would go through council, but it has. And all owners agree that the strata scheme should be terminated. So there will no longer be a strata plan. Each owner owns their particular lot has no responsibility over any common property, which will no longer exist. It is a bit of a unique setup. It's probably more like a terrorist-style setup. There isn't any large shared facilities like a pool or any air conditioning plant. Everyone's kind of got their own thing going on, but I've brought it to the podcast just to, I suppose, make people aware that this does happen. When I have owners who come to me in two or three lot schemes saying we want to terminate, we don't want to be part of strata anymore.

I say, look, first thing you want to do is go and chat to the local council and just see if it is possible from the council perspective, because sometimes for certain planning reasons, it just isn't. And you do need that council permission. That's not the only thing you need if you're going to do one of these types of terminations. You do need the consent of all owners. If you're going to follow this rather straightforward or less burdensome process of terminating with everyone agreeing. You need to pass the meeting resolutions. You need to get the approval of the registrar general in order to do all of this in accordance with the legislation.

So that's all playing out for this building. And I'll let you know if there's any reason that doesn't work out, but it is possible in my experience rare, but it is possible for these smaller perhaps more unique buildings where council is on board that you can have these terminations without too much trouble.

Reena Van Aalst: So which council was it? You said, Terrace. It sounds like it's City of Sydney, was it?

Amanda Farmer: Yeah, the city of Sydney, the city of Sydney council.

Reena Van Aalst: That's unusual because they're actually imposing these sort of, not heritage, but for bit larger schemes in the area, they're trying to sort of limit the number of schemes that can be changed in terms of like being terminated because they don't want sort of these luxury apartments or going into these areas and forcing people out.

Amanda Farmer: Okay.

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Reena Van Aalst: One of our schemes had some sort of listing at it, some heritage, but because it's not a very nice-looking building. So is it a reason because it was to do like, will the structure remain or and someone make it into a house?

Amanda Farmer: Yeah, so everything will remain. So to be clear, it's not a redevelopment. It's not a termination for a collective sale or anything like that. It's not what we'd call a part 10 under the Strata Schemes Development Act. There is a section, believe it's section 142 under the Strata Schemes Development Act, which I'll go and check and I'll pop that in the notes for this episode. But that's the section by which if all owners agree and all approvals are obtained and by approvals that is local council, registrar general, approvals of all the owners and the owners corporation, if all debts of the owners corporation are paid, then the scheme can be terminated by order of the registrar general.

Not often a power tapped into. But as far as I'm aware, there's nothing proposed in terms of development, redevelopment. If that was then going to happen in the future, then it would be for that individual owner of their own plot to make their applications and have that approved. And aside from the usual environmental planning legislation that enables your neighbors to object, there would be no strata law requirements around that.

Reena Van Aalst: So what's happening with, I'm sort of trying to get my head around like it's terminated, what everyone like what they're just gonna live in there without being strutted or okay.

Amanda Farmer: Yeah. They will live in it as if they're a row of terrace houses. Yep. And each be responsible. There'll be, they're dividing walls. I don't know if there needs to be some easements registered to make sure that the place doesn't fall down. And certainly the owners corporation is, I believe we should be getting some legal advice about that, making sure that that's all in place. But otherwise they're responsible for their own roof and backyard and bathrooms.

Reena Van Aalst: Yes, I suppose it's easier Amanda because it's like terraces are side by side. I mean, I think there'll be some people here listening to you thinking, I'd love to get rid of my strata. And even though I think for people that live vertically, I think it's a bit more challenging. But anyway, it's another story for another day.

Amanda Farmer: True. Yes, that's right. Yeah. It has to be, as I said, a unique style property. And even then, know, really you and I have been involved in some smaller schemes where that's been desired. And council's just said, no, because of the land size, because of our planning controls, this particular lot, this particular plot of land must be strata titled and remain that way.

Reena Van Aalst: Exactly. that's very interesting. That's a great one, Amanda.

Amanda Farmer: Yeah, I'll let you know if anything changes on that front, but we're always worth a try. You don't ask, you don't get.

Reena Van Aalst: Exactly, yeah, that's great. I think also, I mean, to me everyone must be happy because they can then do their own thing and not have to, you know.

Amanda Farmer: Yeah. Well, here's the thing. It was sparked by, as I mentioned, very expensive remediation project that needed to be done. That wasn't happening. My clients ended up in the tribunal about that. The compulsory manager appointed to move that along. A lot of the work needs to be done in one place. Other owners don't necessarily want to pay for that. So that is now going to have to play out in a non-strata context.

Reena Van Aalst: Yeah, that's right.

Amanda Farmer: But everybody agrees with that. That's the key point here. There is unanimous approval for this termination and that's why it can happen through this less expensive, less administratively burdensome process.

Reena Van Aalst: Yeah, I think the reason that I've always said, and I keep saying it was last night, 21 buildings that strata is a

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very flawed concept is because people see themselves paying for something that they're not actually getting any direct benefits

So they're fixing up someone else's bathroom or someone else's issue then theirs has been done and doesn't require any repairs or they've renovated their bathroom. It's like, well, people see that people that don't renovate their bathrooms as being the beneficiaries of all this money, whereas people that actually go to the expense of doing that as an example Amanda. So I think that's sort of where that's coming from, I think. Yeah, it's great outcome.

Amanda Farmer: Yeah, I think you're right. Thank you for the chat today, Reena Van Aalst. We've covered some broad topics today and I'll look forward to catching up with you soon. Go and rack up those wins and challenges for me. Maybe some more wins than challenges. Catch you next time.

Reena Van Aalst: See you next time, Amanda. Bye.

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