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YSP Podcast Transcript: 447 - A \$50K excess | conflicted committee members | an insurance win

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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 going?

Amanda Farmer: I am great. We are recording this in that tricky week of the year. Two short weeks, we're going into Easter. We will then have Anzac Day the next week.

And I know you've just come screaming in. Reena sat down and said, (sigh)

Reena Van Aalst: Yes, literally. Actually, it's like that at the moment. I think many of my colleagues I've been speaking to are also experiencing the same amount of the workload in strata is still at a high level and hopefully a few days of break might give us a bit of a rest in terms of. A lot of managers actually work on the weekends and after hours.

It's more probably having a break from all the volume coming in because every time you send an email you get one back.

Amanda Farmer: So hopefully things quieten down a little bit from Thursday for a week. People taking time off, school, holidays, away from their computers. That's what we need for our strata managers.

Reena Van Aalst: Yes, exactly.

Amanda Farmer: Hit me with your challenge for this week, Reena Van Aalst.

Reena Van Aalst: Yes, well, I had an interesting one, Amanda, and I think many of my colleagues also would have had this particular experience, but it's lot owners whose personal property, in terms of it not being common property, so we're talking about flexi hoses or hot water systems that are within the lot that actually burst.

And then they come to the owners corporation and say, "I want to lodge a claim for the damage." And obviously they can't insure the property because it's under the building policy. So they can't go to their own contents insurer or any other insurer and say, I want to insure this piece of property. And then when we get the bills and we get the invoices, we find out that the damage both to their property, which may be their own carpets and their own fixtures and fittings, if it's leaked in the kitchen or whatever, kitchen cupboards, et cetera, and then also when the people downstairs.

So we've had, like the other weekend, we had one that the tenants were away and it cascaded down a number of floors into the car park. And so in this case, the damage is significant, but it's less than the excess because some of our insurance policies have high excesses due to previous claims. So this one actually was \$50,000. The actual excess.

Amanda Farmer: The excess..

Reena Van Aalst: Is 50,000 for water damage claims. Now, when the owner submitted the invoices, we said, "Oh, we're going to submit it to the insurer." Obviously we didn't realise, like, as you said, so we'll put it as a claim if we can. But then, when we collated all the invoices, it was less than 50,000, so it's not worth putting it. Now, that particular owner still is very, apparently his email to me was, I'm very disappointed that the claim wasn't accepted.

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Well, what I'm trying to say to him, well, we didn't actually submit it because even if we submitted it and we have submitted ones in the past just because owners think that we haven't done our job, so we just submit it anyway and the broker comes back and says, well, it says in the excess, so are you sure you want to do this? And we go, no, we're just being asked to do it.

So in that case, Amanda, we're saying to that particular owner, well, because it was your own flexi hose, you are responsible because your flexi hose caused damage to your own apartment and common property in other people's apartments. So. And they're refuting that. So what's your position on that, Amanda, in terms of your advice to the owners corporation in such a situation?

Amanda Farmer: Yes, great timing. I spoke to exactly this example last week when I was online with a group of strata managers delivering their CPD.

And one of the topics, as you know, Reena, for this year's CPD for strata managers is the proper repair and maintenance of common property. And when I deliver this education, I often see surprised faces in the audience when I say things like, "The owners corporation's duty is strict, even if you are not negligent. The owners corporation has a duty to meet the damages and consequential losses of owners."

And so I lay all of that groundwork, and then I get the questions, of course, "And Amanda, what about this situation? What about that situation?" And last week I had exactly this question. What about that burst flexi hose which is under the sink in the bathroom, or it's in the laundry, or it's in the kitchen? Is the owner's corporation responsible for all of that consequential damage that could happen when an apartment floods because of a burst flexi hose?

And my answer to that was no, the owners corporation is not responsible because that hose is not common property, as you've just said, Reena.

Reena Van Aalst: Yes.

Amanda Farmer: So there's been no failure to properly repair and maintain. There's no breach of that duty. Legal Duty to properly repair and maintain. And if there's no breach of the duty, then there's no responsibility or liability that flows for the owners corporation. So I think you're right.

Telling the owner, "Okay, well if we can lodge a claim and get this covered under the building insurance policy, we will do our best." And as you say, some policies will respond and that's great, others won't at all. Or they may say this is the excess. And then if the excess is something like \$50,000, then in my view it becomes a question for the owners corporation, is it reasonable to refuse to lodge this claim?

Because if you play it out, an owners corporation that refuses to lodge an insurance claim can be taken to the Tribunal by a lot owner. We've talked about this before. There's a section in the Strata Schemes Management Act, and one of the considerations for the Tribunal is going to be whether or not the owners corporation was acting reasonably in refusing to lodge this claim. And I think it's perfectly reasonable for an owner's corporation to say, "Well, first flexi hose, the damage is \$5,000 worth of damage, the excess is \$50,000. We, the owners corporation would be responsible for paying that. No, we're not going to pay that commercial nonsense."

Reena Van Aalst: Exactly.

Amanda Farmer: Yes. It does then however mean that the responsibility is the lot owners to fix all of this consequential damage, whether in their lot or in someone else's lot and the common property, because it is their fault.

Reena Van Aalst: Exactly.



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Amanda Farmer: I mean is the hard conclusion it's their fault that this hose burst, that it wasn't looked after, that it was left to get old and fray, and it should have been replaced, it should have been checked for that reason.

Some buildings have bylaws that deal specifically with flexi hoses make it very clear to lot owners that you are responsible for your hoses. You must attend to them. Some buildings actually do audits every two years or so and a contractor around to check because it's just causes such heartache and such expense when these things do go. So the owners corporation does take on that responsibility to go around and check and say look, this needs to be dealt with lot owner, you need to do it.

And then there are bylaws for insurance excesses where an owners corporation might have a bylaw that says, "We'll lodge the claim for you. But if it's your fault and if you are covered and there is an excess, then lot owner, you are responsible for that excess." So when the excess is \$50,000, the lot owner is thinking really hard about, "Hmm, do I really want this corporation to lodge this claim?"

So you do end up in that kind of unfortunate situation where, yes, the lot owner can be left holding the account or responsible for the account, the bill at the end of the day, in that situation. But please, what I want to be clear about is that is because this wasn't a failure of the common property; this was a failure of property. Of course, if it's a failure of the common property.

Reena Van Aalst: No, that's a different situation.

Amanda Farmer: It's a different situation if the insurance excess is 50,000, the owners corporation doesn't want to claim on insurance, fine, but then the owners corporation must pay for the fix and all the consequential damage. That's a different story.

Reena Van Aalst: That's right, Amanda. That's what we tried to tell him. But unfortunately, I think there's a lot of misunderstanding in terms of people not realising what is common property, what's property, and perhaps confusing that strict liability to repair and maintain, that's in the act.

The win that I'm going to talk about is the Strata Futures roundtable that I attended. And the CEO of CHU, Kimberly Johnson, gave a presentation about insurance. And the two things that she said that contributed to increasing costs and claims was one, the flexi hoses, which we all have discussed and know about. And the second one is obviously block gutters. So if owners corporations could do two things to minimise their risk is to obviously arrange for those two things to be inspected.

So that day I was sitting there like, "Oh, I better email my plumber and get him to come around and have a look at all the flexi hoses in the apartments." And I think that's another thing that we've tried to encourage, Amanda, where, you know, we say to the owners, corporation and the committee, it's better to get the owners corporations, plumber to go around and do the inspection and at least then if there's a cost that the lot owner must pay, then it'll be much cheaper than having everyone get their own plumber and then getting compliance certificates to say that it's been checked and it's either working, doesn't need to be replaced or it needs to be replaced.

Amanda Farmer: Yes, great tips there. It's flexi hoses and block gutters. There you go.

Reena Van Aalst: Very simple things to manage in theory.

Amanda Farmer: Yes, exactly. Well, thanks for sharing that one, Reena. Good timing.

My challenge for this week is about strata committees and specifically strata committee members. Can they approve repair work that impacts or will benefit their own lot. This has been coming up a fair bit in our member forum. I actually posted a question on our Facebook page earlier this week putting it out there, because, you know, I'm of a couple different minds about this and I know there's a few different views.

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I asked the question, "Committee members, what do you do when considering a motion to approve repair work at your own lot?" And I was interested to hear back from those who commented on that post, wondering whether they'd say, "Well, we're committee members and we recognise we might have a conflict, so we remove ourselves from the voting or we just vote in favour because we want our lot fixed, we deserve it, we work hard for the building."

And I got a mix of responses, probably unsurprisingly to me, my view on this one, and I have to make clear that in New South Wales, we do have specific legislation that requires committee members when they're considering a motion at a committee meeting in which they have a financial interest, if that financial interest is sufficient to give rise to a conflict of interest, then that committee member is required to disclose that interest and to remove themselves from voting and from discussing the matter.

So the question around, "Okay, there's a leak at my lot. I'm a committee member. Plummer has issued a quote for that leak to be repaired. It's a very black and white situation. The owners corporation is legally required to do that plumbing repair. Do I vote on that at a committee meeting or not?" I have always been of the view that it is safer to just remove yourself from voting on matters that impact your lot, whether it's a bylaw breach notice to be sent to your tenant, or it is a new balcony balustrade and new waterproofing and new tiling, all of which are going to dramatically increase the value of your lot.

Or it's that simple plumbing repair that arguably is not really increasing the value of your lot, not really a financial interest in that, but you could be seen to be prioritising your repairs over others. I think it could be argued both ways, but I just think from a committee member perspective, it's safer to put your hand up and say, "That's my lot. I'm not going to involve myself in the voting."

What do you think, Reena, and what do you see on the ground with this application of the New South Wales law?

Reena Van Aalst: It's funny, Amanda, because I just had this very conversation yesterday with a lawyer that one of my community members asked me to ask this question, and it was based on a general meeting, so it was a bit different. But the analogy that was used was that a lot owner at a general meeting is like any other owner and they can vote for their own renovation approval or they can vote for something that they've got an interest as long as they've disclosed it.

However, when you're elected to a strata committee, you're like a board of directors for a company, so your fiduciary duty is different in terms of the fact that you're there to represent all owners. And in the case that you've just mentioned, that it is appropriate for that person to remove themselves. And actually, now the legislation is a bit tougher and leave the room, or if it's zoom, be put into the waiting room while that discussion is taking place.

So I think if you think about your function as an owner versus your function as a strata committee member, they're quite different. Even though we know in strata that a lot of people get onto the committee for their own benefit, for their own lot to be fixed, for their own agendas. However, I think now the legislation has recognised that to be the case, which is why I think these provisions have been put in place and strengthened recently.

Amanda Farmer: Yes, look, I just think that's the safest bet. Why try to argue yourself out of it, you know, into it. Argue yourself into the.. Because, you know, some people, in response to this question that I posted on the Facebook page, are saying, well, you know, Section 106 Strata Schemes Management Act is the legal duty of the owners corporation to repair. There's no discretion about that. It's not as if you could say anything different.

You know, it has to be done. But what happens in reality is that not everyone is on the committee, not everyone is sitting in on the meeting, not everyone's privy to the discussion. They see the minutes and they see that, "Oh, look at these three committee members and all of their lots are getting this repair, all of their lots are getting these new balconies or all of their lots.."

That's what happens. People don't think logically about this. It is a bit of a grey area, and I just think taking the safe route is the better way to go. Even if, you know, you could have two lawyers arguing it either way.

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Reena Van Aalst: I also think, Amanda, that depends also on the extent of the repair, because sometimes people, you get three quotes, whatever, and, you know, they're not apples for apples.

And if the more expensive quote is being approved, then that could also be seen as, "Oh, it's only because you're on the committee that the answer corporation is approving a more expensive quote, which may be the case. And it may be that the fact that perhaps that contractor, even if all the quotes were like, for like that quality work is better, you know, they've had experiences with them, they clean before they, you know, when they leave.

I mean in terms of looking at things just on face value, looking at three quotes that even if they were the same doesn't mean that the quality of the work and you know, how they approach the whole repair in terms of cleaning access, you know, etcetera., etcetera. Putting out notices, perhaps letting people know there's work happening where. So I think sometimes those things also come into consideration which someone looking from the outside may not even know about.

As you said, they're not at the meetings, they don't hear the discussion, they're not across who the best plumber is for that particular type of work. As an example.

Amanda Farmer: Yes, I can see where this could cause problems where you've got a very small committee, and because that person can't vote on the motion, you may lose your quorum. You may have a one-person committee. I was talking to a member in our community the other week, and she said, "Well, I'm the only one on the committee, so what do I do?"

And I've said, "Well then it's got to go to a general meeting. You know, you can't decide to, you know, approve your own lost rent claim." Which is what, that's a real no, no. So that one's got to go to a general meeting. So, therein lies the benefit of bigger committees as well, where you've got a few committee members who might have conflicts on a particular issue. You don't lose that opportunity for the balance of the committee to vote.

Reena Van Aalst: I think some managers may disagree with you, Amanda, because I think on the balance of probability, the conflict thing arising and having larger committees, I think most of us would find in general it's easier to work with a smaller group of people.

Amanda Farmer: Oh, interesting.

Reena Van Aalst: Yes.

Amanda Farmer: I've been meaning to ask you actually, because I was teaching this the other week, the new law around community association committees. Up to 15 members now on a community association committee. Have you got any of those? Did you notice any people jumping in and boosting the numbers on those committees?

Reena Van Aalst: No, we haven't had anything like that happen, Amanda. So yes, we're just waiting for it. But I think, I'm not sure what my other managers think, but I mean it's hard enough to deal with in terms of. See, I think if everyone's aligned and people are on the committee for the right reasons, then having a larger committee is not a problem.

But when you have different agendas, different skill sets, different intellect, different backgrounds. And again, this is why I keep saying that strata is a flawed concept. It's one of those things where, like, if you're on a board of directors, usually it depends obviously on what the company is about. If it's a, could be just a club thing, or it could be more of a professional thing, but normally people don't have such a vested interest.

Whereas when property and money is involved, sometimes the same person can have a view if they're not financially involved or interested, versus in another scenario, the same person can have totally different behaviours and views. So, but I think it's one of those things where, you know, the intention is good and the reasoning is sound, but the practical application and working of that scenario, I think it's yet to be seen.

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Amanda Farmer: Yes. All right, share with us your win for this week, Reena.

Reena Van Aalst: Yes. So on the 14th of March, Kate McHugh and John Minns convened a Strata Futures roundtable that was attended by many stakeholders in the industry. You know, we had academics, we had insurers, we had suppliers, we had researchers, we had strata managers, we had lot owners. It's interesting, I actually had a lot owner on our table from a development that I used to manage many years ago.

So it was quite interesting to see how the place had emerged. And funny, one of the questions that we were talking about was AI and things like that and the future of strata and how we can make it easier for us to manage in terms of all the background and administration. And he asked me the question, he said, "Oh, normally we're taking you 15 minutes to respond to an email, and now it only takes you five.

You're going to charge us 15? Are you going to charge us five? And I thought, yes, it's funny how people are thinking about this before it's even happened. But anyway, so the event was a really. We had debates, we had different speakers. It was basically trying to look at pathways for evidence based strata management. At the moment, there's no data to basically give us any idea, apart from the statistics from Land Literacy Services, in terms of how many lots there are in New South Wales and how many strata schemes and how many strata managers.

But apart from that, there's no other evidence. And I think in order for strata living to be seen as something that's going to be a positive thing in the future, rather than all the negativity, we've had recently in terms of whether it's management and defects and insurance costs, etc. We do need some more evidence-based research to be able to actually look at the sector in a more objective way and then look at pathways and answers for improved management in strata.

Because as we can see, you know, the amount of conflict, the amount of, you know, so many negative things that are emerging, which, who knows, I mean, in terms of, if you look at the evidence, this could be just a small thing compared to the majority, the ones that don't have conflict or if you look at the conflict, it's, it's cyclical. I mean, you know, you manage schemes and nothing could be happening for many years, and you have a new owner come in and then there's a lot of trouble, and then that owner's inverted comments, either put in their place or sold, or they sell the next minute.

I mean, so, yes, it's hard to know because you can only look at your subjective experience, which is not necessarily like, it's perhaps indicative of your demographic or it could be indicative of the lots of the strata scheme size that you're managing, but it may not be a broad thing where you can actually make definitive answers and look at future decision making and looking at legislation changes that would perhaps correct some of these issues that schemes are experiencing.

Amanda Farmer: So is that the outcome of the roundtable, John and Kate going to be doing or be investing in?

Reena Van Aalst: Yes, they're going to be compiling all the research that they've done both at this workshop and with other people and trying to then bring out a paper on that. So..

Amanda Farmer: Okay, interesting. Something to watch.

Reena Van Aalst: Yes.

Amanda Farmer: I did receive an invitation from John to attend that event, and unfortunately, I couldn't make it on that day.

So has been a little bit of chatter around about what went on and how much people enjoyed it and the good work that is being done there. We just have so many advocates for making strata better, you know, and I think we should be grateful for that. We should remember that when we're in these dark days, that, yes, I think are cyclical, and things sometimes get worse before they can get better.

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But there are so many good, smart people out there who are rooting for strata to be improved, to be a good choice for people. You know, it's going to be the only choice, so we're going to have to work it out.

Reena Van Aalst: Exactly.

Amanda Farmer: Thank you for sharing that, Reena. My win for this week. This comes from a building that I am personally involved in. I do sit on the committee, and I've mentioned some of you may pick up.

I've mentioned this building a couple of times. It's a building where there has been some significant remedial work done over the last few years. Waterproofing problem or has been the main concern in this building. That work now thankfully coming to an end. Part of the work involved leaky balconies. A few leaky balconies in the building and these are balconies that were repaired only four or five years before by a contractor.

So, of course, when those balconies failed, the committee looked into the responsibilities the warranties that contractor had given and whether the owners corporation could look to that contractor to come back and fix their what it turned out to be shoddy work or whether there was some insurance that would respond homeowners warranty insurance. And turned out that builder had become insolvent. No longer around, their insurer was stepping in, and the owner's corporation made a claim against that insurance that was all playing out while other waterproofing work was happening around the building.

Took a little while for the insurer to process that claim, but ultimately, they came back and denied the claim. Denied the claim on the basis that this wasn't a problem. They said with the contractors' work, they did the work properly. The problem was with the design that the engineer years ago; this is all pre-DBPA in New South Wales. The design that the engineer, the owners corporations engineer, had put together for the waterproofing was somehow I never had a close look at the details, but somehow was defective.

And on that basis the insurer said we're not responsible for the engineer's work. If you have a problem go and sue the engineer. Owners corporation thankfully didn't accept that, got some legal advice, decided to appeal the insurer's decision. And the happy result is just within the last couple of weeks, a settlement between the owners corporation and the insurer. Insurer has agreed to pay over \$700,000 to the owners corporation.

Reena Van Aalst: Wow. That's a great outcome, Amanda. So can I just ask you what was the value of the work that had been done at the time, so back pre-2020.

Amanda Farmer: Yes, I couldn't tell you. I wasn't involved in the building pre 2020. I imagine it was much less. The actual cost to the owners corporation at that time was much less. It was certainly done as part of a larger scope of work, I think in the building were done and only four of them had failed.

So I don't know whether you know if you could break out those four balconies, how much it was if you tens of thousands of dollars each balcony. But what the insurer needed to look at this go around was how much is it going to cost to fix the problem and the evidence, the expert evidence that the owners corporation had because by this time when you appeal an insurer's decision, you're in the Tribunal.

Legal proceedings had been commenced and there's deadlines for this. So really legal advice if you're thinking about appealing an insurer's decision. But the evidence of the owners corporation came from their contractor saying we now have to fix this. This is how much it's going to cost to fix these three or four balconies, I think it was, and this is the amount we want.

And the insurer initially pushed back on that, and ultimately, before things got more serious in the Tribunal, this settlement was reached, which has been a really great result for the owners corporation. But I brought it here today because I just want to put it out there. You know, sometimes it's worth not taking no for an answer, especially where insurers are involved. It's not often that I would be one to advocate for litigation, and I am personally quite risk-averse when it comes to litigation.

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I don't like sending my clients, and I don't like sending my communities that I'm involved in into litigation. Certainly, if I'm involved in a community as an owner or connected to an owner or sitting on a committee, I'm not giving legal advice. I'm referring the owners corporation on to get independent legal advice. But you never know how these things are going to turn out. This is a building that thought it wasn't going to get anything and was left paying the bill for what turned out to be a multimillion-dollar waterproofing works project.

And now over two-thirds of that is paid for with this insurance settlement because there were a few owners together with their lawyer who were willing to dig in, join a legal subcommittee, push this through, spend some hours concentrating on the case in order to get that result for their fellow owners. And it's important that I say I was involved in helping to kick off this insurance claim, but I wasn't part of the legal subcommittee that went on to achieve that result.

So, not patting myself on the back here, but definitely being grateful to those owners who were part of that and have achieved that settlement.

Reena Van Aalst: So can I ask you, so when you went to the Tribunal to appeal, did you already have obviously, your own expert advice that contradicted the insurer's findings?

Amanda Farmer: Yes, it's a really good question. My memory of that, because I think I was still quite closely involved at that stage. My memory of that was there was a really short time frame. I think it's something like 45 days rejecting the claim, to then file in the Tribunal. And what we did do at that stage was get quick advice from a lawyer, strata lawyer, and she said, "Look, it's worth lodging at lodge it to preserve your right, get that date for the directions hearing."

And between now and then we need to make sure we're getting the evidence that we need to back this up and if the evidence doesn't back us, then we can pull out early before there's too many costs involved. But it was a decision was made that the best step to take in that situation was to preserve that right to appeal and not lose those 45 days.

Reena Van Aalst: And I think also from memory, I think, is it six years that you have Amanda to lodge the claim for the Home Building Compensation Fund insurance? There is a limit. I can't remember what it was now. I think it's other six years, I think. Or..

Amanda Farmer: Yes, six years. So we were under that. Yes, six year policy and that was nearly up that I was involved in that actually. I put the claim forms together, and it's really not work that I do in my legal practise anymore. I don't act for owners, corporations. So I was looking very closely at the law on that and looking at all filling in all the forms and going back and forth with our strata manager because the insurer was asking lots and lots of questions and what documents or work that was done many, many years ago.

But we were just in time, just inside that six years, thankfully, to make that claim and, you know, we were all feeling quite positive and thinking, well, builders insolvent, they're not around. Insurers going to respond, obviously the balconies are leaking, something's gone wrong, we'll get something few hundred thousand would be nice to contribute to our project. So when they came back and said, "No, declined." Everyone got a bit of a shock.

So, you know, sometimes that happens and you can think, "Oh, well, we tried that. We're not going to be able to get around that." But insurers not always right.

Reena Van Aalst: Yes, well, I mean, that's definitely the case. I mean, I suppose when you think about it, insurers are trying to minimise any payout so unless it's really. The evidence is very compelling on the face of things, that's a great result, Amanda.

That's really good. I had one where we had an engineer who did a specification for a roof membrane, but unfortunately and we were trying to put a claim in with the Home Building Compensation Fund insurance, but the builder actually is still around. He's under a different name, but he's still around. So they said that we couldn't claim for some reason. So yes, that's wonderful, Amanda, that's fantastic.

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Amanda Farmer: Thank you. Happy owners all round. I hope you enjoy your long weekend. Reena Van Aalst. Please do try to log off, try to enjoy some family time, some time to yourself, doing nice things.

Reena Van Aalst: Thanks Amanda.

Amanda Farmer: Catching up with you next time.

Reena Van Aalst: See you then. 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.