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YSP Podcast Transcript: Episode 235. Facilities for residents only | getting large projects right | magnesite solution

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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. To access previous episodes and useful strata tips, go to www.yourstrataproperty.com.au.

Amanda Farmer: Hello and welcome. I'm Amanda Farmer and I have with me today Reena van Aalst from Strata Central. How are you, Reena?

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

Amanda Farmer: I am doing well. You're all decked out in red. We are recording this over Zoom video, and looking fabulous as always. Tell me that you've had a fabulous week and that's why you're in red celebrating.

Reena Van Aalst: Yes, it's actually been quite a good week. I haven't had any meetings, Amanda, apart from a mediation hearing. That was in the morning, that's pretty good.

Amanda Farmer: Nice one. And mediations are still happening by phone here in New South Wales, which is kind of convenient for us, isn't it?

Reena Van Aalst: Yes, but apparently I think they're struggling a bit, having them on telephone. When I was having this current session the mediator, who I've actually met many times before, said to me it's a bit hard because you're trying to write agreements out and trying to talk to each party. And some of the parties said to me, "You sure they can't hear what we're saying when we're having our own separate chat?" And said, "I'll hang up now and ring you back."

Amanda Farmer: Oh wow.

Reena Van Aalst: Yes. So it hasn't-

Amanda Farmer: I wonder if their stats aren't looking so good when it comes to matters resolved in mediation.

Reena Van Aalst: Exactly. Apparently I was supposed to be on Microsoft Teams, but they didn't realise that they'd be in COVID for so long, so they probably haven't had any planning done for them, unfortunately. So yes.

Amanda Farmer: Yes, So it'll be interesting to see what happens towards the end of the year. I know some of my colleagues in other states, particularly places like Western Australia, are amazed that we are still having hearings by phone and that our tribunal is basically closed. Kind of been all over the counter at the moment.

Well, we will of course be the first to give everybody updates on what's happening in that space here on the podcast. Reena, let me know what your challenge has been this week, aside from telephone mediations.

Reena Van Aalst: Yes, exactly. Well this challenge, Amanda, comes from one of my strata schemes where they asked me whether a non-resident owner who doesn't live in the building is able to use the facilities of the buildings. They have a pool, they have a concierge, and she still gets all her parcels delivered to the concierge. And yes, she comes in and use the pool and uses the gym. And my answer is, if the apartment is rented out, which it is, then the answer is no, because the rights that she has to use common property have been given to her tenant. So I just wanted to check, Amanda, that I was on the right track. But I thought I would raise this in my podcast with you today.

Amanda Farmer: Yes, I think absolutely you are on the right track. Couple of reasons there. And any lawyers listening can drop me a line and point me to any cases where this has been considered directly.

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Amanda Farmer: But yes, where there is a lease in place, then the tenant is the one who has exclusive occupation of the lot and also is entitled to use the common property as you say, Reena. And in my view, it is permissible for an owners corporation to restrict non-resident owners from using those parts of the common property that they don't need to use in order to access their lot.

So you can't stop an owner from accessing their lot. Obviously they need to inspect, and if they don't have an agent they're doing that personally or they're giving any agent those rights. But it would be, in my view, a reasonable restriction on that access if an owners corporation was to say, "But you can't access the gym or the pool or use the concierge services because you don't need to do that to be able to access your lot" to the extent that you can under your lease arrange those inspections and things like that with the tenant. So for that reason, I agree with you. What I'm interested to know here is, does this building have a by-law that sets that out? And if it doesn't, maybe that's something to think about.

Reena Van Aalst: Yes. And actually I haven't checked that, actually. That's a good suggestion. I think it would be a good way to try and formally demarcate that separation as a landlord who has given away the rights of occupation and common property use to their seat as opposed to an owner resident who actually lived there and then is able to use all the facilities.

Amanda Farmer: I have definitely seen by-laws in those terms. I was just looking at ones recently, actually. So a lot of buildings have dealt with that in their by-laws. In my view, you wouldn't fall foul of any harsh, unconscionable, or oppressive situations there. You might do if you were telling the owner they can't come on the property at all. But saying that they can't use those kinds of facilities I think is reasonable. And we do have tribunal cases where there have been owners who've been restricted by use of fobs and by the way that fobs are programmed, restricted to certain parts of the property only, for example. Just the level that they need to go to to get to the basement parking and just the level they need to go to to get to their lot. And then if they are residents, then the gym and the pool. So I see it in the same light as those kinds of restrictions.

Reena Van Aalst: Yes. That's actually very true. And I do have a security system, so I might see if that can be done that way as well, actually and try first instance, because apparently they said it's quite aggressive. And what I might do is suggest that they change the fob access areas so that she can't go to those places. Yes.

Amanda Farmer: Yes. Gosh, can you imagine in a building like that, that sounds like it's got some fairly high level services there, if every tenant and every owner, resident or not, was using those services? The poor concierge.

Reena Van Aalst: Exactly. That's right. And now he's being screamed at when the parcels haven't arrived and she hasn't been told about them. Exactly, yes.

Amanda Farmer: No, we don't want that.

Reena Van Aalst: No.

Amanda Farmer: Okay, excellent. Thank you for raising that one. I'm not sure we've that question on the podcast before, so that's a good one to cover off.

Reena Van Aalst: Yes.

Amanda Farmer: My challenge for this week actually comes from a member inside our membership community, and this was a question posted in our online forum which is one of the most popular places inside our membership. And it's a question about the process for tendering for particular work. Large projects I think this member was thinking of. What is the process for putting together a tender document for sending that out to contractors? Say for example we're doing balcony upgrade works, we're putting nice new balustrades in. Quite an extensive project, could be multiple millions of dollars in some buildings. And this member asked if we could chat, Reena, about how that process works, because it can be quite a challenge for a lot of buildings. And some buildings do it well, some not so well, are you able to speak to your experience of working with buildings on these kinds of projects? What's kind of the first thing that you might do when a building says, "We want to do a major value add project like this?"

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Reena Van Aalst: Yes. In the example of, say balustrades, Amanda, we're actually doing one right at the moment anyway so that's probably a good topic to talk about. We try and first of all understand what's involved in terms of, is it all apartments, some apartments? What the basic concept is. And then we need to really engage an expert in that area like an engineer or an architect or both, and basically for the strata committee to articulate what their requirements are. And then usually that would have to probably go to a general meeting anyway if we're talking about adding to common property. But once that process is then accepted and then it's put into train, you'll need to require those engineers, architects, and professionals to then put out a tender document that the strata committee has looked at and approves to a number of different companies. So at least then everyone's quoting on the same thing.

Now there's a cost to that, and I think sometimes there are committees and owners that perhaps want to bypass that and then they want to go to 3 different companies, and then each company will give them a different view on how the work should be done, different costs obviously as a result of that. And then it's really hard, I think, for laypeople such as committee members and managing agents to really make any sense of which way is the best way to go forward when you're not using someone that's trying to compare apples with apples. Now, I know that people sometimes think, "Oh, engineers or this expert or that expert, they don't really know much about how we want to do it. And the document's 100 pages. Why does it need to be 100 pages?" But you're talking about the quantum of work in terms of dollars and the impact that it has on a building in terms of value add, then I think doing it properly and correctly in that way is really the only way that you can actually say, "Okay, well we need all our homework. We engaged someone."

And even the processes of engaging an engineer or an architect, that takes time too because obviously there's people that are much more qualified in certain areas than others. Perhaps you may ask them about other things that they've done in the past with buildings, other projects. So if you're trying to mirror that in your own building, to see if they have expertise in any particular area, I find that's really helpful. And again, Amanda, we talked about this in our last podcast episode about referral. You may have someone you've used before in a building where they did this particular project, you might refer them to this building. But then also they may have their own people that they know that they've worked with in other buildings themselves. I see people Google people up. So there's a myriad of ways of engaging professionals, but I still believe that in order to be able to compare apples with apples when you do a project, you need to have someone that provides a tender document that pretty much says, "This is how we want the work to be done."

And then that goes out, and then at least you're comparing apples with apples. And that person also should then be responsible to check the work as it's going along to make sure that they are complying with the tender or with whatever the scope was, the scope of works in the tender, how things should be done. In a sense you need that professional oversight, I believe. And again, maybe for a 4 year renovation it may not be needed. That's more cosmetic, but I think for more structural things, even windows. Even adding windows, it's not just a matter of adding a window. I think there's a lot more to it than that.

Amanda Farmer: Oh, and the problems we see when windows are not done properly.

Reena Van Aalst: Exactly, yes.

Amanda Farmer: Yes. So the good tender documents I see, Reena, have all of those components for sure. And when we're talking about technical work like balustrades, balconies where there's remedial work involved, maybe we're having to deal with concrete cancer. Windows is another good example. Having a set of technical specifications is what I see in these tender documents where the engineer has said, "This is the work that's needed, this is the scope, and this is how it is to be carried out. These are the technical specifications." And then the tender document should contain things like the conditions of the contract. So if you are ultimately the successful tenderer then this is the form of the contract that the owners corporation will require you to sign up to. So the contractor knows exactly what they're getting into, there's no surprises down the track when their tender is accepted to say, "Oh, oops. We didn't realise you wanted this particular type of contract. That's now going to cost extra because of these other considerations." So there is a lot of work to be done. And this is, of course I see it too, Reena, where committees balk at this process of getting the engineer involved in the beginning and putting the tender together because they see this time and this cost of putting all of this together.

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Amanda Farmer: But when we see it, particularly as a lawyer who sees it down the track, if there's a problem, when there's a problem, if you got good, tight tender documents then you're much better placed as an owners corporation to resolve those issues more quickly and with less costs, and of course to get the project done more quickly and smoothly.

Reena Van Aalst: Exactly. And also, Amanda, as you said, if there are any hiccups through the way. We had a hiccup in this particular scheme where the scaffolding wasn't allowed to be put on the main road, which is where it would have been originally installed but council has said, "No, it has gone on this other road on the other side of the building," which then impacts on the view of apartments and they're now getting less rent. So again, that's why you need to have a good contract in place that if there's any of these variables that happen along the way, then you're on pretty good ground in terms of your rights and the ability to say to the corporation, "Well, it was in our contract. We thought we could put the scaffolding here but the council have said no." So yes, it's a bit of a to and froing sometimes also once the period has commenced and then you're trying to negotiate with lot owners or other stakeholders that are affected by the actual work themselves.

Amanda Farmer: Really good question there from that member inside our community. What I'm hearing as some key takeaways here, Reena, is that it's really important to have the right people on the job. And I think that comes from the point of your strata manager. Is your strata manager someone who like you, Reena, is used to doing these kinds of projects or has at least done them before, knows what they don't know or knows what to look out for? Do you have the right engineer who's going to put the right documents together for you? Then the contractors who are quoting on those documents. And then other experts like lawyers. If it's a big project, if we're talking about significant sums of money it's definitely worth getting some legal advice on the documents as a whole or at least on the contract that the contract is going to sign up to, the works contract.

And when you have that expertise on your team, then you as a committee are filling in those gaps in your knowledge having maybe not done a project like that before, not quite knowing what's involved. And it's not always a one size fits all. Every project's different, every building's different. But getting the right people involved that are going to be able to guide you in the right direction.

Reena Van Aalst: Yes, that's exactly right, Amanda. With the complexity and differences in projects it's important to have, like I said, the right team and the right professionals guiding you in that process.

Amanda Farmer: Yes. For sure. Nice one. Let's shift over to your win for this week, Reena.

Reena Van Aalst: Yes. This is a bit of an unusual one. In a scheme we just took over recently there was a tenant that wanted to get the NBN connected. So they rang our office and they asked us for the keypad number to get into the actual NDF room. So we gave them the number but they couldn't actually get in. I'm not sure what was wrong with the lock. They actually broke the lock.
Reena Van Aalst: Yes. This is a bit of an unusual one. In a scheme we just took over recently there was a tenant that wanted to get the NBN connected. So they rang our office and they asked us for the keypad number to get into the actual NDF room. So we gave them the number but they couldn't actually get in. I'm not sure what was wrong with the lock. They actually broke the lock.

Amanda Farmer: The NBN contractor broke the lock?

Reena Van Aalst: Correct. Yes. Anyway, and then thank God we had his number because when someone rings us we always take down their number. And then we tried to ring him and he refused to come back out. And then once he realised it was our number he refused to take the calls. Anyway, the committee member took photos of all the damage. We then obviously got the police out and we had an event number. And then we submit it through our insurance company as a claim.

Anyway, then we got onto the NBN complaints team. And they've been very, very helpful and basically now they're going to cover the cost of all the damage. And then once that claim is finalised with the NBN complaints department we're going to be able to then get the excess back from our insurance policy. They have told us that already that we'll get a refund of the excess we've paid because NBN fully reimbursed the insurance company for the money that's been expended in fixing that door. So yes, just for a change I could just do a nice, feel-good story where someone causes damage, you then are able to go to the superior of that company or entity.

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Reena Van Aalst: And then they said, "Yes, fine. We're going to fix it. We're Sorry." And then get our excess back, and it's a dream. It's a dream come true.

Amanda Farmer: Something actually worked the way it was supposed to.

Reena Van Aalst: Yes, it was easy. It didn't go on and on forever.

Amanda Farmer: The owners actually got what they were entitled to.

Reena Van Aalst: Yes, first time around. Not like I'm having to fight and fight and fight and fight. So yes.

Amanda Farmer: Well look, I wonder if anyone else has had a similar experience with NBN. I find myself saying, "Wherever NBN goes, disaster seems to result." This is probably the first good news story I've heard about NBN, and even then I know you're going to the next level to get a problem that NBN caused fixed. Yes, they're an interesting outfit.

Reena Van Aalst: The first ever we've ever had such an outcome. Very happy for a change.

Amanda Farmer: Good. And good lesson there to pursue your rights and get your complaint in front of the right people, I think.

Reena Van Aalst: Yes, exactly.

Amanda Farmer: Excellent. Thank you for sharing that quick win for us, Reena. My win for this week relates to a by-law that I have been helping a building with for a little while now. And it is a problem that will be common to so many buildings. It relates to magnesite. Magnesite in our floors, applied to our concrete floors in buildings of a certain age as an underlay, really. And when it gets wet it leaches chlorides into the concrete and causes concrete cancer. So when buildings become aware of this, maybe they're aware that there is concrete cancer and that needs to be fixed or they're aware of the potential for concrete cancer, they want to get rid of the magnesite. And some clever buildings want to do this in a systematised way.

They want to make sure it's being done whenever an owner renovates their property, for example, because they don't want to close too much disturbance. But if you are changing your carpets to hard floors then you must get rid of the magnesite and you must let us know that that's happened or allow the owners corporation to come in and take the opportunity to inspect the concrete while it's exposed and check for concrete cancer. Now, this building I was working with one had a by-law that basically set out that whole process. At what times can we come in and check for concrete cancer? At what times do we require lot owners to facilitate the removal of magnesite when renovations are being done? Or maybe when their lot is changing hands or at a convenient time to do this significant work.

And as part of this by-law I think the question came up, "Amanda, if we as the owners corporation are legally required to deal with concrete cancer because it's part of the repair of common property and the lot owner as a result suffers some loss, they're losing their flooring for example and they have to put new flooring in, we accept that we are responsible for paying for that. That is a consequential loss as a result of our need to repair the common property. However, what we don't accept is that an owner that may have a 30 year old floor is entitled to a brand new floor after we go in and remove the magnesite and deal with the concrete, if we have to."

And what was suggested to me by a committee, which I thought was quite clever, is that they would offer to owners the depreciated value of any lot property that was affected by the owners corporation having to go in and do this work. And they referred to a particular tax ruling that set out how these values may be calculated. And they have essentially enshrined that in the terms of their by-law. And when it was raised with me I thought, "Oh, that's an interesting way to think about this problem." It's not one that I had come across before. And I wanted to bring it to the podcast to run past you, Rena. Is this something that you've come across?

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Reena Van Aalst: I'll put my accounting hat on. The depreciated value of a floor of that age would be zero, so I don't know how you could... I don't know. I haven't come across that before because normally the ones that we're involved in, the scheme will budget for 1 or 2 floors a year depending on how many renovations are happening in the building, and therefore they won't go in unless the person is doing a renovation. So if they're not renovating there's no need for the owners corporation to go in there and do any repairs unless it's for lifting, which hasn't happened in any recent times that I've been involved in particular buildings that have magnesite. Yes, so are you saying that this committee's going into apartments where they're not renovating?

Amanda Farmer: Yes. The difficulty with this building, and this is something that we've had a lot of back and forth on, I've been working with the building for a while, is that they have engineering advice that this work needs to be done and it needs to be done now, which indicates to me that they've already got concrete cancer. Which is a different situation to where you may have magnesite but you don't have the concrete cancer. You don't have the damage to the common property. So in my view, the mere existence of magnesite is not a failure on the part of the owners corporation to repair and maintain common property. It is only when you have that defect, if you like, in the common property, which is the concrete cancer that you have an obligation to go in and deal with it, and therefore an obligation to cover the lot owner's consequential losses as a result of you having to do the work, and certainly having to rip up a floor.

I take your point, Reena, that a 25 year old floor would have the zero value, and that's the point of this committee quite cleverly saying, "Hang on a sec, why does this particular owner get a brand new floor out of us when others have done a recent renovation and they've paid for that themselves?"

Reena Van Aalst: Yes, and they're subsidising the people that haven't replaced or renovated.

Amanda Farmer: Exactly. Yes. And then the person who has renovated and has a beautiful new floor before they realised concrete cancer was a thing, why should they suddenly lose their floor and have to pay to have their floor put back in? The owners corporation should pay for that. So this committee has become attuned to those 2 different situations and thought, "What's fair here?" And looked at tax rulings about depreciated contents in properties. And it's really relevant to investors in tenanted properties but has decided to extrapolate some of that and incorporate it into this by-law. And we're not at final terms of the by-law yet, and there's still some back and forth about some legal issues, but I just thought that was a creative way of dealing with a common problem and grappling with these really hard issues that we have in strata law when it comes to repairing and maintaining common property, being responsible for lot owner losses, but to what extent our legislation is not really clear. So being able to confine that in a by-law so that future committees can use it as a guide I think is a good idea.

Reena Van Aalst: Can I ask you, Amanda, on your strata committee, is there an accountant that's on that strata committee?

Amanda Farmer: I'm pretty sure this strata has an accountant.

Reena Van Aalst: Even though I agree with the concept in general principles in terms of, yes, why should someone that doesn't do any work subsidise those that have? But I'm not really sure in terms of the depreciation aspect because, as I said, most things, I'm not sure what the timeline is. Is it 5 years or whatever it is for plant and equipment? I don't know, it's been years since I actually have looked at this aspect of tax rulings. But I said an old floor, like 25 years old, would be zero. Does that mean they're going to give them nothing or just give them like-

Amanda Farmer: Yes, I think that's the plan.

Reena Van Aalst: So it's a way to make you innovate, in a way, and it's sort of forcing you to-

Amanda Farmer: Yes, to encourage you to maintain your property. The same applies, you can see how it would apply to bathroom innovations. And perhaps this is more common in our older buildings, where you have a leaking waterproof membrane. If that is an original membrane it is the responsibility of the owners corporation to fix that leak. But of course, when you go in to fix a bathroom membrane, you've got to rip up the tiles, you've got to replace the tiles.

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Amanda Farmer: So there are certain owners, because they've never touched their bathroom, get a nice, newly tiled at least shower recess at minimum paid for by the owners corporation, and in my building, that is a big bone of contention.

Reena Van Aalst: Yes. It's a big cost.

Amanda Farmer: It's a big cost, it's a lovely, nice, new finish for that owner. And it's often investor owners who are interested in the bottom line, perhaps, and not wanting to... They haven't renovated because they're not there enjoying it.

Reena Van Aalst: Yes. It's a return on investment equation for them.

Amanda Farmer: Yes, exactly. And then the owner occupiers, who have done beautiful renovations and have made the place a nice place to live and taken on by-laws the future responsibility for their bathrooms. I can see how clever committees could be using this kind of concept of depreciated value to deal with those situations as well. It'd be very interesting to see it tested.

Reena Van Aalst: Yes, definitely. I'm really looking forward to hearing more about it, actually. Once you've finalised it, maybe perhaps if you have any future events with owners in terms of how that pans out, because I'd be very interested to see how someone who will get zero for their floor, how they're going to deal with the whole outcome of whether or not they're able to afford that at the time. Part of it, as we know Amanda, some owners may have not done a renovation because they're asset rich, cash poor. They've lived in an apartment, they've had it for many years, it's with a lot of money now. But in terms of them being able to renovate, they might be able to have the financial means to do so.

Amanda Farmer: Yes. I think it's going to come down to that boundary between nothing, of course, and not replacing a floor or a floor covering, and something very basic that doesn't lead to an upgrade or what we would call at law betterment, because owners are not entitled to betterment and that is what this committee is picking up on and saying, "Well, aren't we then improving their position when all we have to do is replace and have like for like? Very difficult of course, very old fixtures and fittings to have like for like, but having the most basic, cheap floor covering or the cheap tiles I think is the way it's going to pan out.

Reena Van Aalst: Yes. I think that's probably going to be a more palatable way of dealing with it. The cheapest of the cheap, but not zero.

Amanda Farmer: Yes.

Reena Van Aalst: I think you'd have a bit of a battle with the zero figure.

Amanda Farmer: Yes. I accept that they have to have a floor, a floor covering at some point.

Reena Van Aalst: Yes. They could have polished concrete in there, but who knows?

Amanda Farmer: I would still like to think that this issue comes up, it's the 5% of cases. Owners would be taking the opportunity to say, "Yes, I do want to renovate. And look at that, the owners corporation is going to pay for the topping and the leveling and I've just got to fork out for the floor. I would like to think that it's the minority of cases when you end up with this fight about what kind of floor you're entitled to have.

Reena Van Aalst: Yes, I think you're absolutely right. I would be the minority. I think most of people, Amanda, do you want to improve their apartments when they can. And a time like this when the owners corporation is doing all the other work for them, it's ideal time to do it.

Amanda Farmer: Yes, indeed. All right, well there you go. All about creative ideas here on the podcast. Happy to hear from everyone out there what you think. Tell me why it can't happen. I will look forward to chatting with you again soon, Reena. I'll send you out into another week in strata.

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Reena Van Aalst: Yes. Catch you later, Amanda. Bye.

Amanda Farmer: Bye.

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