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YSP Podcast Transcript: Episode 249. Asbestos in fire door | hard flooring discrimination | unreasonable refusal

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

Reena Van Aalst: Good, Amanda, how are you?

Amanda Farmer: I'm doing great. I'm looking forward to sharing our wins and our challenges here on today's episode, as we like to do every couple of weeks or so. Let's jump right in. What's been challenging you this week, Reena?

Reena Van Aalst: Well, this is another interesting one. I think I keep saying this every time we talk about our challenges, but there's always something new, I think, in strata, and it doesn't really matter how long you've been in strata, I think there's always something that's a new challenge. And this case, one of our schemes has had their Annual Fire Safety Statement fire equipment testing, which is an annual thing that's got to be submitted with the council for buildings that do have those measures. And this scheme hasn't had their fire doors checked for some time, even though it's a legal requirement to have the doors tested annually.

Unfortunately, the contractors that had been appointed previously weren't doing a very thorough job and only some of the doors had been inspected. When they undertook this recent inspection, they were about 60 doors that were needed to be repaired. And as this scheme was built in the '80s, sometimes there are still asbestos doors used at that time. Before any remedial works could be undertaken in terms of the hardware or changing the locks, et cetera, we had to ascertain whether or not there was asbestos, and testing had to be undertaken.

The fire safety contractor recommended that we get samples out of these doors. And one of the owners raise concerns in relation to how the samples were being undertaken. He said that his wife was pregnant and he was very concerned that if there was any asbestos, that that would obviously be generated into the apartment. So the contractor actually was not testing them within the apartment. They said, "We'll take the door off the hinge and take it into the stairwell and close the door. And we will undertake the testing there."

And then the owner said no, and he became quite rude and attacked both the building manager and the contractor and said he would not allow that to happen, he will not allow the door to be removed or anything to be done to the door. I suppose, Amanda, my question today is, how do we deal with something like this where the door is common property, we do need to have it checked, because it does need to be repaired, but not every single door is asbestos because over the years they have been changed, but we don't know until we actually do some testing. This is a big challenge. And I was just wondering if I could get your thoughts on this?

Amanda Farmer: Yes. Well, tell me this, has the contractor told you if they are going to take the door off its hinges, as I understand it, take it downstairs, take a sample and then put it back, how long does that process take? Is that a day's work? Is that 2 days? Is it 20 minutes?

Reena Van Aalst: Oh, I think it's just a day's work, within the same day. All they want is to take a sample, so until the sample's tested, they don't really know if there is asbestos. The door may not be asbestos at all. They may contain no asbestos, but we don't know until we get a sample for testing.

Amanda Farmer: Yes. And removing the door from the residence, taking it outside, is a precaution, basically. They can take the sample while it's in place, but because the resident has expressed concern, they are proposing to completely remove the door and put it back. Is that right?

Reena Van Aalst: Correct. Yes.

Amanda Farmer: Okay. Look, as you've said, Reena, this door is common property, I imagine, unless it's in an unusual place, but yes-

Reena Van Aalst: It's a front door.

Amanda Farmer: A front door. Perfect. And the owners corporation has access to that door. You don't need the resident to facilitate access. Unlike, for example, if you had to get into a bathroom and inspect the waterproof membrane, you may need some consent to access. It is, in my view, open to the owners corporations' contractor to go and remove the door at a time that suits the Owners Corporation's contractor, and conduct the sampling.

Now, of course, you'd be doing that with plenty of notice to the resident to say, "Look, we've had these communications, we've had some back and forth about that. We propose to take a sample. You've asked us not to take that sample within the vicinity of your living space. That's fine. The solution that the contractor proposes is to remove the door, take it downstairs to the backyard, take the sample. This process will take 2 hours, 3 hours." However specific the contractor can be. "This will be taking place at 10:00 AM on Friday the whatever of February. We are giving you due notice." I think if the owners corporation does all of those things, the resident, I'm not sure if there are a tenant-

Reena Van Aalst: It's an owner.

Amanda Farmer: ... or an owner.

Reena Van Aalst: It's an owner.

Amanda Farmer: They're going to be on fairly shaky ground to challenge any of that. The owners corporation is attending to its legal obligation to repair and maintain the common property. They have a duty under the legislation to do that. The occupier of a lot has a duty to facilitate any inspections, any access that's necessary so the owners corporation can meet that duty. In this case is actually, aside from the resident not chaining themselves to the front door, there's nothing that the owners corporation needs them to do or not to do.

Reena Van Aalst: I think we had to get them to open the door so that we can take it off.

Amanda Farmer: That's interesting. Well, if that's the case, I mean, I would've thought if you're taking it off the hinges, I suppose there's a lock there. You might need a locksmith if the door is deadlocked to assist, but I'd be setting out exactly what communications have taken place to try and do that cooperatively. And then telling the resident that absent their facilitating this or their express consent, this is the date we intend to do it. We are going to attend. We will have a locksmith with us to assist us to... We will not enter your lot property. It's important that that's made really clear. We're not dealing with your lot property. We're not entering your lot property. We are dealing only with the common property and the deadlock on the door is part of the common property. That's why I say the owners corporation can come in with a reasonable amount of notice and simply carry out that work.

Reena Van Aalst: That's great. Thank you, Amanda. Because it's taken about 2 months now, we've been trying to work with the owner, unfortunately, unsuccessfully, to try and relay their concerns. Well, thank you for that, you really put my mind at ease now.

Amanda Farmer: And I think as long as all of those attempts to try and do this cooperatively are in writing or on the record, you've got emails, you've got letters, and it's clear that you are doing this in a roundabout way, you're doing this in a way that may take a bit more time and is more involved for the contractor, but you're doing it because the resident has raised these concerns about asbestos, and you want to acknowledge those concerns and do this as safely as possible. And that's why you're actually going to remove their front door. And you suggest that somebody be home to preserve the security of their lot property, but you will only be dealing with the common property and setting out exactly how and when you're going to do that.

Reena Van Aalst: Wonderful. Thank you so much, Amanda, that puts my mind at ease.

Amanda Farmer: Let me know how it go. Hopefully it's not an urgent tribunal application for me to decide.

Reena Van Aalst: At the moment, it's in our challenge box. Hopefully it will be moved to our win box next time we talk.

Amanda Farmer: That will be good to hear. Definitely. Now, speaking of tribunal cases, the challenge that I'm bringing to today's episode is indeed a case or an issue arising from a recent tribunal case. I posted about this on, I believe, on LinkedIn and also on our Your Strata Property Facebook page a few weeks ago. It is their decision, not from the consumer and commercial division of our tribunal, which is where all our strata disputes are heard, but it is from the administrative and equal opportunity division, where discrimination disputes are heard.

And the case is called Araya, A-R-A-Y-A and the Owners Corporation Strata Plan 65717. The decision was handed down in January 2021, and I'm bringing it to the podcast as a challenge, Reena, because once again, this issue has been addressed in past cases. But once again addresses the issue of whether state disability discrimination legislation applies to our strata schemes and applies so as to require our owners corporations to perhaps upgrade or make changes to the common property to cater for somebody's unique need.

Now this case related to the use of a visitor parking space that was marked disabled. The residents were using this space. They weren't visitors, they were residents. They were using this space. And apparently all residents were using this space. And the discrimination complaint arose from a resident who did indeed need to use the disabled parking because they had a disability. And they said, "Well, we're using it. We have a disability. Others are using it. They don't have a disability. And we're the only ones who are getting the by-law breach notice."

Reena Van Aalst: Interesting.

Amanda Farmer: Everybody's a resident, everybody's using the visitor parking marked for visitors who are disabled, and only the resident who has a disability is the one who's getting the by-law breach notice. So on that ground, they said they were being treated differently to other residents and therein lay their discrimination complaint.

Now that, I appreciate, doesn't go directly to the issue of our strata scheme being covered by disability discrimination legislation, but the tribunal in this case, and it was 2 members of the tribunal, a senior member included, did confirm. And as I said, this has been confirmed in previous cases in New South Wales, but confirmed once again, that owners corporations provide a service, and because they provide a service, they are covered by state discrimination legislation.

So a number of questions, perhaps, at least for me, arising from this. And these are questions that buildings have been asking for a little bit of time, going to issues such as installing ramps on the common property if you have a resident who is in a wheelchair. Installing electronic access doors for residents who may not be able to use keys or push open doors. And also, I query by-laws that ban hard flooring. Is that going to be discriminatory if somebody has a disability and specifically has a need for hard flooring to be able to move around their apartment. Now I think this case and a couple of others that have come before, including the Black case in Victoria, are going to be relied on by people to run those kinds of arguments drawing in our disability discrimination legislation.

Reena Van Aalst: Wow, Amanda. So I've actually had quite a bit of experience in terms of buildings where, for example, in a swimming pool, one of the owners was disabled and she couldn't go down the stairs. So the owners corporation actually did install handlebars in the actual pool to allow her to facilitate her entry into the pool. And obviously the issues of alteration of common property come into effect there. And so therefore we did end up passing a resolution at the general meeting to allow that to happen because I'm not sure if one, legislation would negate the effect of another in terms of altering common property, because as you're referring to, installing ramps and making some changes such as those actually do require alterations to the building, which are obviously common property changes.

So Amanda, in this case that you're referring to, how did they know that they were the only ones where letters were being sent to? How did they know that?

Amanda Farmer: That is an excellent question, Reena, because this case before the Administrative Decisions Tribunal actually failed. The applicants were not able to prove that they had been discriminated against for precisely that reason. They couldn't show, whilst they alleged that the owners corporation was pursuing only them for the by-law breach, they couldn't actually prove that. The owners corporation denied that they were pursuing only them. They said that they had pursued other residents as well and that is part of the reason why the applicants were not successful in proving discrimination. But certainly the tribunal did find that the legislation applied and if they could have proved what they call differential treatment, then they may well have succeeded in their claim.

Reena Van Aalst: Oh, that's very interesting, Amanda, isn't it?

Amanda Farmer: It is. And I've mentioned there a few past cases. I mentioned the Victorian case of Black. I'll put a link to that here in the show notes. There's also a previous podcast episode where I chatted to Tim Graham, Victorian strata lawyer about that case. I'll put a link to that past podcast episode as well. And the New South Wales case that I was thinking of is Hulena, H-U-L-E-N-A, also an Administrative Decisions Tribunal case, which lays the groundwork for this position that owners corporations are indeed covered by discrimination legislation.

So things to think about, alarm bells, I suggest, or some warning bells should go off when you do have a resident with a unique needs asking for something in particular that the owners corporation may at first not be inclined to permit. And again, very good point, Reena, about this need for a special resolution to upgrade, improve, enhance the common property. I imagine the way that would play out is that if the special resolution didn't pass and the upgrade wasn't going to go ahead, then the owner, the resident who needs that upgrade, is going to apply to the tribunal, consider which division they might have the most success, whether they're applying on the basis of an unreasonable refusal in the consumer and commercial division, or whether they are triggering some rights under anti-discrimination legislation and applying in the administrative decisions division.

Reena Van Aalst: Yes. Interesting one, Amanda. I suppose you couldn't fail at one and then try the other one, could you?

Amanda Farmer: No. Well, there is a principle whereby litigants must bring all of their claims arising out of the same fact scenario at the same time. You can't argue one angle in one case, fail, and then try a different angle in another case. You're going to get pulled up for that. So indeed, anybody thinking about these types of claims, they are not straightforward, whether you are an applicant owner or whether you are a respondent owners corporation, absolutely get yourself some legal advice, preferably from a qualified practicing strata lawyer.

And the hard flooring issue is front of mind for me at the moment, because I am involved in a matter where I'm acting for an owner who wants to have hard flooring in the apartment because of a particular medical situation, and the owners corporation has refused permission on the basis they say they have a blanket ban on hard flooring. Nobody has hard flooring in this very well-established building. And we are going through the process. We've applied for mediation, and hopefully it doesn't get to the stage of litigation, but certainly all of these issues are front of mind for me at the moment.

Reena Van Aalst: Well, that's interesting. We actually had a similar case in one of our schemes where they had a blanket ban on flooring. And this particular owner obviously was in a wheelchair and needed the ability to move around in his apartment. So the owners corporation or the committee actually said that they would disapprove that application only. They would make an exception to the by-laws on the basis of his needs. And that once that apartment was sold, one of the conditions of consent was that it had to then be re-instated to carpet after that owner sold the apartment. So I don't know if that might be something that your scheme may want to consider, but is it a habit, Amanda? They're actually pushing it to the next level.

Amanda Farmer: Yes. It's definitely worth exploring those kinds of mediated solutions. Because if you think about it from the building's perspective, once you have a tribunal decision saying, "No, your blanket ban on flooring is harsh, unconscionable or

oppressive, the by-law is invalid," then you've opened up the whole building there to hard flooring applications. If you can, as quietly as possible, and that's not to say that there aren't processes where you need to inform owners what's going on, but resolve a dispute with a particular lot owner on terms that suit that owner's circumstances, meet their concerns, and also suit the building in the long term, then that's absolutely the better way to go.

Reena Van Aalst: Yes. Be careful what you wish for, for your scheme, Amanda. They could actually find themselves opening the flood gates.

Amanda Farmer: Yes. Yes. We're trying to send that message.

Reena Van Aalst: Good luck.

Amanda Farmer: All right. So those are some pretty hefty challenges for the week, Reena. Let's lighten things up and head over to your win for this week.

Reena Van Aalst: This one comes from one of our strata schemes and it was actually a lot owner who had submitted a by-law to renovate their apartment. And that included flooring, it included new windows, kitchen, air conditioning. And because this is in a heritage building, there were a few more concerns than there normally would be for a normal apartment. And initially at the first meeting that was actually held in March last year, the owners had said that the plans were too small, they were illegible, and they required some more information, including a heritage report, which was then obtained for the next meeting, which was then held in June. So in June, all those concerns were apparently remedied by the applicant. It went to another general meeting in August last year. And of course it was defeated again. And the applicant owners then went to NCAT to seek an order that the by-law be made on the grounds that the application was being refused unreasonably and NCAT then ruled in favour of the applicant.

So in a sense, it's taken nearly a year now because the judgment was delivered last Friday. And if you think of when the applicants had first submitted their by-laws back in March 2020, it's taken that long for the ability for the owners now to proceed with their renovation. But yes, I suppose in a sense, if you look at the case, obviously which I can't refer to, Amanda, but it talks about the definition of what's unreasonable. I think that's pretty much the takeaway for the applicant owners and the respondents. And it was unfortunate because the owners corporation could not oppose the application because there was only 2 particular owners and we had no instructions to actually oppose the applications. It was then opposed by 2 lot owners who were then joined as respondents to the application.

So it was a bit more technical than usual in the sense of being a small scheme and the owners that voted, who didn't vote, et cetera. But the whole notion of what is reasonable and what is unreasonable was really at the core of the decision of the tribunal.

Amanda Farmer: And that is a really important concept to have our heads around because I see these types of disputes becoming more and more common, I have to say. Maybe it's more owners wanting to, or recognising, that they can add value through renovations and perhaps more owners corporations, or the majority of owners in a building, not wanting those renovations to go ahead. Everybody's at home, you don't want noise, you don't want disturbance.

You've mentioned there, Reena, that you can't mention the details of the case. Now I appreciate that the case might not be a published decision on the Caselaw New South Wales website or on AustLII, but if there are reasons for decision, unless they've been marked that they're somehow restricted, you can actually publicise that yourself. You can actually circulate that. Yeah, it's a common misunderstanding. There used to be a time, long, long ago in the olden days where we had law reports, we had books where cases were actually published. We didn't have AustLII and we didn't have Caselaw. We didn't have them online. And all the decisions of our courts were recorded in those books and we'd go off to the library. Not we, I shouldn't include myself in that. Not that old. Those old lawyers would go off down to the Law Society library and check out the book and read the cases.

Now that we have these online libraries, not everything is published and I am increasingly concerned, and I think strata lawyers around the country, New South Wales seems to have a particular problem with this, that cases are not being published on the

online channels, on our Caselaw databases. And so they're not accessible to other lawyers, to owners, to strata managers, to understand why these decisions are made, what the concept of unreasonable means, what, for example, dysfunctional might mean in the case of an application for compulsory appointment. And just last week, I published myself, the reasons for decision in a compulsory appointment application that I was involved in. The tribunal hasn't published that, it's not otherwise available. It may come out later. We do have this delayed publication thing that happens here. I'm not sure why. I think the president goes through the decisions of NCAT in particular and decides what should be published and what shouldn't. So it may be published later, but it doesn't-

Reena Van Aalst: Yes. The reasons are definitely not... They don't identify the actual applicant, so therefore they can't really be shown to be-

Amanda Farmer: Well, even if they do, our courts, our tribunals are places of public record and that's proper. They should be. If it is going to help others and often, Reena, I know we talk about cases on the podcast and I might say to you, whether it's on air or later, "Hey, can you shoot me a copy of that decision because I'm in something similar and I'd be really interested to know the tribunal's views on that particular issue." So I'm going to ask that about this case. Will you shoot me a copy of that decision, Reena?

Reena Van Aalst: Yes. Will do, Amanda, now that you said I can. But I was actually going to ask you a question because normally I think in family law cases, when they do publish them, they change the names that no one knows who they are, but I don't know why they can't... I'm not sure why privacy or knowing the strata scheme would be an issue because I suppose you could find out where it was, but I can't see how that's an issue anyway. But I don't know why, if it was an issue like that, they wouldn't just call it Strata Plan ABCD, so that you-

Amanda Farmer: Yes. No, I don't think that's the issue at all. I think perhaps the position is that our online databases may become a little bit overrun with cases and information because we just see so many decisions come out now, that there is a policy in our courts and tribunals not to publish on these forums everything. The term used by lawyers is unreported. The case is unreported. It's not actually in a law report somewhere. It's not online. The fact that it is unreported does not mean that it is not a public document, that it shouldn't be accessible.

Unless of course, Rena, as you point out in the family court, there are decisions that are restricted. There are names that are changed and that's made very clear in the reasons for decision. I don't know that I've ever seen a case like that in our strata context.

So I'm always more than happy to share reasons for decision that I receive. I get a few through strata managers who hear something on the podcast and say, "Hey Amanda," and they shoot me something. And I say, "Do you mind if I put a link to that in our show notes?" That kind of thing, that's great. We all need to be helping each other.

Reena Van Aalst: Yes, exactly.

Amanda Farmer: The more understanding we have, then the more smoothly I think we can be resolving these disputes for those that we're working with.

Reena Van Aalst: Yes. Like you said, Amanda, that helps you then advise your owners corporations or lot owners when they have a similar case in terms of whether they will be successful or not, based on previous cases.

Amanda Farmer: Exactly. That's it. So thank you for sharing that, Reena. That led us down a little bit of a rabbit hole, but an important one, nonetheless.

Reena Van Aalst: Another one, you mean, another rabbit hole.

Amanda Farmer: Yet another rabbit hole. Indeed. I am going to wrap up with what I'll call my win for this week, but it's actually a little something that I'm involved in that I'm quite looking forward to this week. We are recording this at a time just before I'm about to dive in to the annual conference for the College of Community Association Lawyers in the United States.

Now just as we do here in Australia, we have the Australian College of Strata Lawyers, in the US they have a rather large group of what they call community association lawyers who meet up regularly and also have an annual conference where they get up to date on all things community association law. And I am joining in on that conference this week, which is very exciting. It's my first time to tune in. And I say tune in, because of course I'm not jumping on a plane and heading over to California, which is a little bit sad. That was the plan, but not happening. It's all happening online. So I am going to be having some early nights. Tonight I'm in bed at 7:00 PM to get up at 3:00 AM so that I am on US Eastern Time and ready to tune in for 4 hours of online conferencing with fellow community association lawyers.

Reena Van Aalst: That's a great opportunity, Amanda, I think to be able to join them, even though we have this physical issue in terms of travel. So how did you find out about it? Is that just through some contacts that you had?

Amanda Farmer: Yes. So we do have contacts through the Australian College of Strata Lawyers. Our college is in close contact with the College of Community Association Lawyers and we are looking to the future to be doing more things together, to be inviting each other's representatives to our annual conferences, and building and developing that relationship. Because, I can tell you what, whatever problems we're having here, they're certainly having over there. And there's a lot that we're could learn from each other.

Reena Van Aalst: I think the US has a lot more problems, not just in the community association areas, which I think we saw a few weeks ago, but yes, it's great, Amanda. I think it's such a great thing to be able to share knowledge with all your colleagues who are experiencing the same issues worldwide really.

Amanda Farmer: Yes. So I'm hoping to bring you some updates, give you a rundown on the topics that are being discussed, and what ideas are coming out of that conference. I'll look forward to updating you, whether it's here on the podcast or if I can stay awake for a little bit longer in the afternoons, give you some updates over on Facebook, will be good.

But yes, I have the last few days been tapering and getting up earlier and earlier each morning. So this morning was 4:00. Tomorrow will be 3:00. That's right. And getting to bed early. So, all fun.

Reena Van Aalst: You definitely have to acclimatise your body because there's no way I could go to bed at 7 o'clock today if I got up the time that I got home.

Amanda Farmer: Exactly. Yes, it was about 9:00 AM I got back from the gym, because when you get up super early, you kind of have to find things to do. So did a bit of work, went for a walk, went to the gym, came back and said, "I'm ready for lunch now," while my family was getting ready for breakfast.

Reena Van Aalst: Exactly.

Amanda Farmer: Well, thank you so much for joining me, Reena, for another session of wins and challenges. I will send you out into the strata world to earn some more wins, face some more challenges, and update us sometime soon.

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

Amanda Farmer: Bye bye.

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