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**Intro:** Welcome to Your Strata Property, the podcast for property owners looking for reliable, accurate and bite-sized information from an experienced and authoritative source.

**Amanda Farmer:** Hello, and welcome. I'm Amanda Farmer, and I have with me today, Reena Van Aalst from Strata Central. Hi, Reena.

**Reena Van Aalst:** Hi, Amanda. How are you?

**Amanda Farmer:** I'm doing well. I am enjoying my week in strata, and I'm very much looking forward to working through some wins and challenges with you. What has been challenging you this week, Reena?

**Reena Van Aalst:** Well, this week again, Amanda, I know I keep repeating myself, I sound like a broken record, but I have another challenge that I've never had before. I think sometimes you think to yourself, over the years, you think you've had pretty much everything that could possibly happen to you happen, but this is a new question that I've had asked, in terms of the use of a swimming pool for a strata scheme, where there are retail lots, commercial lots and residential lots. And this development predates the building management committees, which I think would have probably prevented the question that I'm about to ask you.

But basically, there is a commercial owner who has about 40 staff that work in their offices. And they have actually asked for 40 swipes for each of their staff members so that they are able to have access to the pool, and the gym, and the car park. And at the moment the building managers come to me saying, "Well, that's a lot of swipes for all the staff to be using." And normally if you look at, say, a residential apartment, you look at the square metre inch, you look at the occupancy limits that are allowed under Section 137 of the Act. If you look at it on a comparable basis, then they would only get about 10 swipes. And there's nothing in the by-laws at the moment to stipulate the use of these facilities by any particular component of the building. So I was just asked, "What do we do in this case?" And I thought, "Oh, this is a question for Amanda, I think."

**Amanda Farmer:** Thank you. Well, I think you hit on it there, Reena, when you've mentioned by-laws, this building needs to consider adopting a by-law that regulates the use of these facilities. If the commercial lot is approved for the use that it's currently being used for, 40 people coming and going, maybe that's a coworking space or something like that. Assuming that the local council has approved that use, and you've said it is a mixed-use building and that's the commercial part of the building. Well, you can't stop people coming and going to work. But in my view, you can pass a by-law that says that employees of this business are not entitled to use the facilities like the swimming pool. I have definitely seen by-laws like that in mixed use buildings, and my recollection is that there are a couple of cases in our New South Wales tribunal that have upheld by-laws like that.

I can understand completely why the building is concerned about this additional strain on its facilities, and I don't see that it is in any way unreasonable, or to use the words in our New South Wales legislation, "Harsh, unconscionable, or oppressive," to say that the staff of this building are not entitled to use the swimming pool.

**Reena Van Aalst:** So, Amanda, in the meantime, obviously by-laws will take some time to be drafted and a general meeting to be arranged. So in the meantime, is it reasonable to say, "Well, pursuant to the occupancy limits of an equivalent lot in size, your lot would only be entitled to, say, 10 swipes at this point?"

**Amanda Farmer:** We're talking about different things here. The issue of swipes, number one, and then the access that those swipes allow. So is this a building?

## YSP Podcast Transcript: Episode 256. Can the staff of a commercial lot use the pool?

**Reena Van Aalst:** Yes, sorry. They all have swipes at the moment. It's just the swipes actually give them access into the building, and obviously into their own area of the building, in terms of access to the office, but they don't give them access to the car park, to the swimming pool, and the gym. So obviously those sections are, at the moment, deactivated.

**Amanda Farmer:** Yes. I don't see a problem with that. You really do need to be putting in place a by-law pretty quick smart about access devices and how many each tenant, so that's the leaseholder, the name that is on the lease, how many they're entitled to, and how they apply for more, and what process the committee, I imagine it will be, should follow when considering that application. They need to be and should be, in my recommendation, reasonable in the circumstances, taking into account the kinds of tenants that they have working from the premises. And if it's a large business, as this one is, with many staff coming and going, I don't see that it's unreasonable that those staffs need access to be able to get to and from their workplace. I imagine there aren't 40 car spaces in the parking lot for every staff member to park, there might be 2 or 3, so there will only be 2 or 3 fobs that allow that access. And in my view, there should only be two or three fobs that then allow access to the swimming pool. You've got to draw a line somewhere, don't you?

**Reena Van Aalst:** Yes, that's what we're trying to ascertain in terms of, there's got to be some limit, but what would that limit be? And I think the committee were just looking at an occupancy limit type arrangement. If you look at a residential apartment, you have 2 people per bedroom, etc., and therefore, if you look at the square meterage in the UE and trying to use that comparison, I think Amanda, that may be perhaps over complicating it. Maybe I will suggest that a by-law be drafted that will pretty much limit the access to facilities to either a set amount or some sort of calculation that allows those occupants to use it. But it also doesn't allow the whole company, which is totally out of proportion in terms of number of people that would be able to use it at any one time, in any event. You couldn't even have 40 people up there.

**Amanda Farmer:** Yes. And have a think about chatting to the owner of the lot, and see what their expectations are. And you might find that there is a cooperative solution here. The owner might say, *"That's fine. We're happy to only have 3 or 4 fobs that give access to these facilities, and those will be for the team leaders, or for the directors of the company, whoever that might be. We don't want our staff members using these facilities. It's a concern to us as well."* So having that conversation could be quite helpful.

The other thing to look at, Reena, is the conditions of consent that the council has issued. I have been involved in mixed-use buildings where the council has been quite strict about the use to which a commercial lot can be put, including hours of use. So if there is a lot, for example, that has 40 people working, coming and going, they can't attend the building on a weekend, or after 5:00 PM on a weekend. Something like that. Have a look at those conditions, because they may provide a shortcut for you and can be incorporated, indeed should be incorporated into the terms of the by-law.

**Reena Van Aalst:** Well, thank, Amanda. Yes, we hadn't actually thought of that, so we'll look at the conditions of consent to see if there are any limitations or restrictions.

**Amanda Farmer:** It's a tricky one. And as you said, Reena, a problem that is going to become less common as our developments are constructed a little bit more thoughtfully and creatively, using stratum parcels, and separate strata plans for residential and commercial buildings.

**Reena Van Aalst:** Indeed.

**Amanda Farmer:** All right. My challenge for this week, Reena, I'd like to continue our discussion from a couple of weeks ago, Episode 253. We spoke about balconies being enclosed by owners over many, many years. And a building that you were working with, Reena, did not have any record of approval for those enclosures, one of the balconies was suffering from water penetration. And the question that we debated was, who is responsible for fixing this defect in the balcony enclosure?

Now I thought this would be a common problem that owners, committees, our listeners generally, may have experienced. And indeed we did hear from one of our listeners, who happens to be a strata lawyer, who shared with us his experience in a past case

YSP Podcast Transcript: Episode 256. Can the staff of a commercial lot use the pool?

before NCAT, where exactly this issue was considered.

The case is called prior, P-R-I-O-R. And the owners of Strata Plan 4382. It is an unreported case, but we are lucky enough to have a copy of this decision, and I will pop a link to it in the show notes, so you can go and check it out. As I said, very helpfully shared with us by a listener who is also a strata lawyer. And the upshot of this case is that there was a balcony enclosure that had been in place for about 40 years. And no-one had really been too concerned about that until there was eventually a complaint about the enclosure, and tribunal proceedings ensued.

Now, in this case, there were council documents from the 1970s, that indicated that the owners corporation had approved an application to council to enclose the balcony, and the Tribunal determined that that was enough to show that the owners corporation had consented to the enclosure, way back in the 70s. There was no by-law, and there was no shifting of responsibility for affected common property over to the lot owner. So the owners corporation was responsible for the work required to rectify damage to the enclosure, which of course was the purpose of the application.

Now, have a read of this case. It was sent to us, Reena, on the basis that it was a little bit unsatisfactory, I'll put it politely. There is some interesting reasoning in the case, but I wanted to raise it as a follow-up to our discussion from a couple of weeks ago because that's something we didn't mention. Council records, that is an important avenue to go down if you're not sure what the history of alterations or additions to common property might be. There's no helpful history on the owners corporation's books and records, check-in with the local council. It's surprising that this council had records that were about 40, 50 years old, but they did, and it determined the case.

**Reena Van Aalst:** Well, I think the interesting thing is, Amanda, that when council has given consent, then that then has shifted the responsibility to the owners corporation. But I suppose if it had there been by-laws then that would have been averted, I think, in that case.

**Amanda Farmer:** Yes, I agree and reiterating there, our suggestion from last week that buildings don't ignore these works when they see them going on, they're aware that they have gone on in a building, unauthorized works, that haven't been covered off by a by-law. These are the kind of situations you can run into the Tribunal, finding that the owners corporation is ultimately responsible because the lot owner is able to produce some record, however tenuous, let's say that, of approval from the distant past. Nobody wants to be in that position of being surprised by a legal obligation that you assumed you didn't have.

**Reena Van Aalst:** That's correct, Amanda. I think on one of the episodes that we had the discussion in relation to pipework for gas supply under floorboards. And again, even though many of the owners had actually undertaken this at their own expense, there were no by-laws to state that, and therefore the owner who made the application against the owners corporation, saying it was common property, was able to show that at the time of registration of the strata plan, those gas pipes could have been there, and therefore there was nothing to the contrary. And again, without by-laws shifting the responsibility to the actual lot owner, then these things do occur when there's no proper record-keeping, or proper approval processes, that have been undertaken.

**Amanda Farmer:** Yes, they do indeed. Moving on to your win for this week. Reena, do you have a win to share with us?

**Reena Van Aalst:** Yes, so basically for those that have been following the recent review of the Strata Schemes Management Act and the Development Act, there was a deadline that's now been extended to the 7th of April. So for the various bodies that are undertaking those reviews, it gives us a bit more breathing space. And also there's been now a third survey about the keeping of animals in strata schemes. The additional survey is in response to a requirement by the Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021, which commenced on the 24th of February 2021. And this new provision requires a minister to review the strata management laws, as they relate to the keeping of animals in strata, and to table a report in both houses of parliament by August 2021. So I think this whole topic, Amanda, of pets and the recent decision is coming to a head now, I think.

## YSP Podcast Transcript: Episode 256. Can the staff of a commercial lot use the pool?

**Amanda Farmer:** Yes, thank you for raising this, Reena. I did talk about the new legislation in our Friday Live, a couple of weeks ago, and I'll pop the link to that replay here in the show notes, so you can go and check it out. The amending act, which indeed did commence on the 24th of February, introduces a new section, 137B, into our Strata Schemes Management Act, which provides that a by-law which unreasonably prohibits the keeping of an animal is invalid. Now that particular section does not actually commence until August this year. Between now and then, this survey is being conducted, so that owners can express their opinion on the keeping of animals in strata schemes. And as I understand it, some regulations can be developed to better guide our buildings when it comes to their rules about the keeping of animals. So I understand that's the purpose of the survey. It just cropped up, I think, within the last week, at the time we were recording this and we will make sure there's a link for you to participate in that if you would like to.

**Reena Van Aalst:** So, Amanda, what's been your experience in terms of buildings and individual owners coming to you about this whole pet issue? Have you seen a flurry of activity in terms of unreasonable refusal for some buildings, or people coming to you to amend their by-laws, to make them more pet friendly?

**Amanda Farmer:** Yes, definitely since the Cooper decision last October, when our Court of Appeal invalidated a blanket ban on pets at the Horizon building, I've had many owners approach me confused about whether the law had changed because of that decision, whether all blanket bans on pets were now invalid, including owners who had approached their committees for approval to keep a pet in the face of the ban, and were still being told, "No, we have a ban, and you are not allowed to even make an application. We don't have to consider your application." I have a number of clients currently in mediation about those issues.

**Reena Van Aalst:** Yes. We have a similar situation, and we've been trying to reason with the committee to say that, "*You just can't say no,*" but yes.

**Amanda Farmer:** Yes. And with the passing of this new legislation, I've been saying to my clients, and to buildings as well, who are reaching out to me asking what's happening, that it is only a matter of time before your blanket ban will be declared invalid. That is not what the new legislation says. The new legislation says that we cannot unreasonably prohibit the keeping of an animal. What is unreasonable? The legislation says that it will be unreasonable if the animal has no impact on other occupier's use and enjoyment of the common property. You cannot assess impact if you have a blanket ban. So in my view, we will see this travel through the tribunal and be tested, and we'll get some case law about what this new section means. But I would not be surprised if we see, time and again, blanket bans being declared invalid because they simply don't allow an owners corporation to test that question of whether a pet will have any impact on other occupier's use and enjoyment of their lot or the common property.

**Reena Van Aalst:** Yes. It's a very interesting question, Amanda, and I think it's only going to be a matter of time before those conditions and situations are assessed in more detail. I think the word, "Impact," what does that mean?

**Amanda Farmer:** The other points to note about this new legislation, the Sustainability Infrastructure Act, is that it introduces a lower threshold for the approval of sustainability infrastructure. So it's not just about pets, there is a reason why the amending Act has that title. If a building wants to install sustainable infrastructure, or an owner wants to install sustainable infrastructure, and requires a resolution at a general meeting, to add to or alter the common property, then that resolution will pass if not more than 50% vote against the resolution.

So we have, as I discussed in our Facebook Live a couple of weeks ago, this rather odd phrasing, which is the same type of phrasing we use to define a special resolution where the successful vote is defined in the negative. Not more than 50% vote against, your resolution will pass, and you will be able to install your sustainable infrastructure. Solar panels, electric car charging, those are the big ticket items that we're thinking owners and buildings will get into now, which is great. And this legislation has been welcomed, indeed, in lots of different strata circles.

**Reena Van Aalst:** Yes, I think the energy efficiency measures that buildings are trying to introduce to lower their operating costs, and obviously make a difference in terms of the environment, Amanda, I think is a very welcome addition to our legislation, making

## YSP Podcast Transcript: Episode 256. Can the staff of a commercial lot use the pool?

sure that the bar now is a bit lower in terms of achieving that outcome. Because I do recall previously, in a scheme that I used to manage, that the owners corporation wanted to install solar panels, and unfortunately requiring a special resolution at the time, because it was actually unsuccessful because a lot of the owners didn't like the fact, the visual aesthetics on the roof of this building. And therefore, now, if they want to revisit that, they'll be probably able to achieve that outcome, having the 50% threshold, as opposed to a special resolution.

**Amanda Farmer:** Yes. Good news. Wrapping up with my win for this week. Some time ago, Reena, I discussed with you a decision from not the Consumer and Commercial Division of NCAT, but the administrative and equal opportunity Division of NCAT. It was a case about discrimination law and confirming that discrimination law does apply in our strata schemes. You and I discussed the impact of this on owners corporations, thinking about whether they might have to upgrade areas of their common property to cater for people who, for example, have a disability and need different avenues of access to a building.

And I mentioned in that chat, the question of hard flooring. I had had a couple of cases where owners had a medical reason why they needed hard flooring in their apartments, and they were battling, in essence, with owners corporations that had hard flooring bans. And we were raising these questions of discrimination, and whether that was an avenue that an owner could go down. Now, my win for this week relates to one of those cases, where the matter has been resolved. The committee has considered these issues of the particular owner's need to have hard flooring, their legal obligations in the context of discrimination, and also the fact that hard flooring is defined as minor work under our Strata Schemes Management Act, and therefore should be allowed, if approved by ordinary resolution. And the committee has sensibly come back to my client and said, "Your hard flooring installation will be permitted in your particular circumstances." So they haven't changed their by-laws. They haven't removed their ban, but they have, to put it one way, made an exception for this particular owner because of his particular circumstances, which I think is the right result.

**Reena Van Aalst:** That's a wonderful outcome, Amanda. I think, many years ago, we had a similar situation in a building that has a blanket ban on hard flooring, and an arrangement was achieved between the lot owner and the strata committee, in terms of the person requiring the use of a wheelchair, and not being able to move around easily within the apartment. So, that was also done. And I think included in that arrangement was the fact that once that person sold the lot, or left the lot, that carpet would have to be reinstated. So there were some conditions given on that consent. But I think that, yes, Amanda, you're absolutely right, that is the right decision. And sometimes, even though the ban may work in the majority of cases, that people that do have disabilities, or do have special needs, need to be considered more compassionately in terms of these types of amenities that make their life much easier.

**Amanda Farmer:** Yes. And we're talking about the same thing here, aren't we, as in the pets circumstance. Exercising discretion, not taking an administratively convenient approach, and that's really what bans are, that's what our court of appeal has said. And doing the work to consider each application on its own merits. It is, I acknowledge, a little bit more work, but it is more likely, I believe, to lead a committee to the right result, the fair result, and avoid costly litigation down the track.

I know this building, in particular, was getting some advice from a very experienced strata lawyer, and I can see that that advice must've hit home, which has saved both parties time, trouble, and preserved the sense of community, in a building where everybody's been neighbours for a long time and will continue to be so. And to see these kinds of cases resolved cooperatively is always a good thing.

**Reena Van Aalst:** That's wonderful news, Amanda.

**Amanda Farmer:** There are good news stories in strata, aren't there, Reena?

**Reena Van Aalst:** Yes. So they're far and few between, but they are out there.

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**YSP Podcast Transcript: Episode 256. Can the staff of a commercial lot use the pool?**

**Amanda Farmer:** We do struggle, dear listeners, sometimes, to source our wins for the fortnight, but we get there, which is good. Lovely to see you, Reena. I will chat with you next time.

**Reena Van Aalst:** See you then. Bye.

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