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YSP Podcast Transcript: Episode 278. Nominating one too many | mezzanine flooring as minor work | third option strata manager

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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 there, Reena.

Reena Van Aalst: Hi Amanda. How are you?

Amanda Farmer: I am okay. I'm saying okay. I don't usually say okay. I usually say great. And I'm loving my week in strata. Look, like everybody else in New South Wales, I am lockdown and dealing with all that flows from that, including homeschooling. So I am on some days in homeschooling hell, as I said to one of my colleagues this week. Fascinatingly, I've just heard from Richelle who helps us out here in the background. Many of our listeners will have heard Richelle's name. Richelle is in the Philippines, and Richelle is also homeschooling. And she's just told me, Reena, that their school in the Philippines has a requirement that if you are homeschooling, you must also, at the same time, do some marriage counseling.

Reena Van Aalst: Sorry. (laughs)

Amanda Farmer: I love it. That makes perfect sense to me. Richelle, who I know is listening in, it makes perfect sense that successful homeschooling goes hand-in-hand with a successful marriage or the other way around, perhaps.

Reena Van Aalst: Well, I think, in this pandemic, Amanda, I'm not sure if you've been watching the 7:30 report. They had a series of the moment called why women are angry or what's that effect. And they were saying that during the pandemic, women's workload and share of the home duties has increased so dramatically in addition to the fact that they are working from home as well as homeschooling and taking care of all the other things that comes with being at home, including the intellectual part of it, which is like planning, thinking, organising, making sure that things are happening at the right times, the right food is there and shopping is done on time. And yes, so I think, unfortunately, at the moment, marriage counseling is definitely needed I think for many people to try and help them navigate these times where you've got to be all things to all people, including clients, I must say.

I'm speaking to one of my colleagues as well, who is a strata manager. And he said to me that in his company, everyone's pretty much at breaking point at the moment in terms of the workload. And I think the ability also for some people to work and manage other people remotely is also a challenge because some people work really well when they're working from home or on their own or autonomously, some people actually, especially extroverts. I was told by one of my clients, actually, that he said, it's like opposite of a you shave. At the beginning, they sort of are happy with the fact that they've got the flexibility. They can go for walks. Then after a while, they start to deteriorate. And I think some people are noticing that with their team members where, at the beginning, it was all a bit of a novelty.

And now over time, and as it sort of prolonged, it's becoming far more damaging to people's mental health. And their ability to work, I think, as you said, the homeschooling or the other factors that come into it, that normally you don't have to worry about when you're trying to do your job.

Amanda Farmer: Yes. It's a really difficult time for everybody at the moment. And I do think we are seeing things get worse before they get better, but they will get better. I do firmly believe that. And I do want to make clear just in case my husband is listening. He doesn't listen. But just in case he is, you're actually doing a great job.

Reena Van Aalst: Almost. He is doing the same. He does all the house duties, all the shopping. I do this made every night, everything to complain about.

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Amanda Farmer: Fantastic. And look, hats off to all of the partners, wives, husbands, parents, whoever you are out there putting in the extra mile. So we, in the strata world, can keep serving our clients and keep solving these problems, which, Reena, we're going to get into. We couldn't do it without you. There you go. Share your challenge with me this way, Reena.

Reena Van Aalst: So Amanda, my challenge for this week is a new building that we took over. And we received the AGM minutes. We're doing the checking as we do in terms of are there any by-laws that need registering, entering of levies, et cetera, committee members. And we found emotion on there where the committee election had taken place. And the AGM had decided that the number was going to be one more than the people that were elected and nominated at the meeting because that person wasn't at the meeting and then they knew that they wanted to be on the committee, and therefore, they decided they would just create a vacancy. And so we've taken over. We've just said, "No, you can't actually do that. You can't have a vacancy unless after the number has been decided and who have been elected during the course of the year. If someone decides to sell or resign, then you will have a vacancy, but you can't create a vacancy in anticipation for this owner to join."

So now this owner wants to join, and I've pretty much said that that can't happen. And I was just wondering, Amanda, if you have any sort of ideas or thoughts on how best to address this because, at the time, there was this strata manager there at the meeting. So the strata manager didn't tell him that this wasn't possible. And I mean, they're not relying on the strata manager per se, they're saying that's another reason why we've left, but now we have this problem where no one else wants to resign. And we have this person who wasn't able to make the meeting and who did not nominate in writing either want to join the committee. And I've just said, obviously, that can't happen. So I was just wondering probably on your thoughts. I know in the face of what we're going through at the moment, it's not a major challenge when one thinks about all the other challenges we have in strata during COVID. But yes, what are you thinking in terms of how the best way would be moving forward to try and address this anomaly?

Amanda Farmer: Yes. Interesting one. Now, Reena, you probably well across the law here because you've said a few times now this is not possible, can't do it. I imagine you're looking at Regulation 9 in our Strata Schemes Management Regulation, which says that if the number of candidates nominated for election to the committee is the same as or fewer than the number of members decided on, so the number that the owners corporation at the general meeting have decided will be the number on their committee, then those candidates nominated are declared by the chairperson to be and are taken to have been elected as the strata committee. So I agree with you. It is not possible to elect a strata committee that then leaves a vacancy at the end of the general meeting. Your committee is as elected on the night. So first step, I imagine this new committee that's wanting to fill this vacancy. You've told them that's the law. They're aware that that is, in fact, the law. You're not just being difficult because you like to be difficult sometimes.

Exactly right, Amanda. And unfortunately, the committee understand that that person couldn't make it, and they did their best in their minds to be able to accommodate that other person's request. But it's more now the person that wants to be on that can't be on. Now I've already said to the other person, you must welcome to attend the meetings. You can give you a thoughts and ideas, but you just don't obviously have a vote. But that person's always been on the committee for many years, apparently. And this is sort of now I think more of a perhaps a face-saving issue more than just the fact that they aren't officially a committee member.

Amanda Farmer: So it is the person who's missed out, they are the ones that are pushing to be on the committee. The other committee members, they can either take it or leave it or they accept your advice that this is not legally possible.

Reena Van Aalst: Well, they accept my advice. That's everything, yes. I referred them to the Regulation and the Act, and they understand that this is the law. They were dissatisfied with the previous managing agent not bringing that to their attention because had that occurred at the meeting, then we wouldn't be in this situation now, having even discussing this challenge at all even. And the other owner who wanted to be on there would have at least been told at the time of the AGM that here are the minutes. Obviously, you weren't there. And therefore, you didn't submit the nomination in writing, and therefore, you weren't able to be elected.

Amanda Farmer: How many are on the committee?

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Reena Van Aalst: 5.

Amanda Farmer: Is any one of those 5 willing to resign and give up their place for this person who is so desperate?

Reena Van Aalst: Yes. Well, I did ask them that question and most of them have said no. One person said, "Well, I'm happy to. But then again, I turn up to the meeting. I was there on time. The AGM date had been set and communicated beforehand." So yes. So at the moment, there is one potential person that could be doing it, but they're more sort of doing it to try and perhaps appease that person rather than really wanting to resign. And I'm hesitant to sort of tell the committee that they should influence that person in any way, but there was only one person that could be amenable to perhaps resigning.

Amanda Farmer: Look, I think you've covered it. They're my ideas. I'm definitely telling this owner who has missed out that they're welcome to attend committee meetings. That's something that happens in my building. We have a very small committee, but we have a couple of owners who tune in, give their thoughts and help out as needed. They don't have voting rights, but indeed are part of the discussion and their views taken onboard in the decision-making, reminding that owner that that's available. But it seems to me that the committee's hands, your hands, Reena, are tied. That is the legislation. It is unfortunate that the committee seems to have been misguided when it came to this election. But if this particular owner wants to be on the committee, I can't see them missing another general meeting or this opportunity to being on the committee again.

Reena Van Aalst: Thank you, Amanda. Yes. And I think it's good for our listeners out there, especially perhaps the schemes that don't have the strata managing agents or perhaps the ones that do that you cannot have a vacancy at AGM where the strata committee is elected. So that's something to remember and just be careful of that one. If someone does try and sort of push that because someone I know is not present, yes, that can't happen.

Amanda Farmer: Yes. I like it. Good reminder. I've never known that to come up before, Reena.

Reena Van Aalst: Yes.

Amanda Farmer: Always something new.

Reena Van Aalst: Exactly.

Amanda Farmer: Speaking of something new, actually, my challenge for this week is a novel one as well, at least in my experience. I have been asked by a committee to give my view on proposed minor works that are going to be carried out by an owner. Now in New South Wales, owners can carry out what we call minor works under Section 110 of our Strata Schemes Management Act. If they have an ordinary resolution of the general meeting or if the power to approve minor works has been delegated to the strata committee, if the strata committee says the minor work is fine, then the owner can go ahead. Now our Section 110, together with our Regulation 28, has a nice long list of what kinds of work constitutes minor works.

Included on that list is the installation of hard flooring. Now this particular example that I was helping a committee member with is an owner who wants to install a mezzanine floor in their apartment. So I imagine this is a loft-style perhaps, and they're looking to extend that loft flooring or install another section that becomes a new mezzanine floor. So it's not actually the installation of hard flooring on a concrete slab that's preexisting or the lifting of carpet, it is technically the installation of a hard floor, but it's a considerable change to the layout of the apartment.

Now, this owner has apparently enquired with the local council and the local council has said, there's no development consent needed. I query that and suggested that the committee themselves enquire with the council and see if that's right, particularly if the floor space of the apartment is being increased, because, of course, there are concerns that with additional floor space, there may be additional bedrooms. This is a one-bedroom apartment. Maybe the owner is planning to turn it into 2. And of course, if this can all go through very easily as minor work for this owner, then there'll be plenty of other owners in the complex who would want to do this work. So a few concerns there on the part of the committee. They're saying, Amanda, is this minor work?

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Amanda Farmer: The owner thinks it is. They say they only need an ordinary resolution. We think it's major. Have you ever come across this kind of renovation before, Reena?

Reena Van Aalst: No, I've never actually come across someone wanting to create a whole new mezzanine floor. Even when there was no minor renovations provisions in the Act, Amanda, even prior to that, I've never had anyone, even that whole concept of adding another floor in that way has never been brought to my attention by any scheme that we've managed.

Amanda Farmer: Yes. It's interesting, I had a look at whether the work may be work involving a structural change, and I came to the conclusion that it was not a structural change. We're not changing the structure of the apartment. As I say that, I'm not sure. What do you think, Reena?

Reena Van Aalst: But you're adding a structure to the apartment. So in terms of the walls and the load-bearing ability of the... I don't know if it's an extension of an existing part of the mezzanine floor or is it a whole new floor in another section, so I suppose without having all that information. But again, that's where I think we would need probably an engineer's advice, a structural engineer's advice in relation to whether this is a change. And once you understand more about the work, then I think, Amanda, you'll be able to make a more well-informed decision as to whether it is structural or not.

Amanda Farmer: Yes. I think that's a very good tip. The question of whether this is a structural change or not could be answered by an engineer. And if it is a structural change, then indeed it is no longer minor work. Section 110 is clear about that. And I would be telling the committee that the owner needs a special resolution and a by-law to interfere with common property to that extent. The other thing that I have already raised with the committee is that if there are concerns that this owner of perhaps future owners are intending to add bedrooms together with their new mezzanine floor, then the building would be well-placed to introduce an occupancy limits by-law, which restricts occupancy to 2 adults per bedroom. And the bedroom count is based on the original development consent. So even where owners go ahead and add bedrooms, there is still a limit on how many adults can reside in the apartment. So introducing one of those by-laws fairly quick smart, I know the committee was pleased with that idea.

Reena Van Aalst: Yes. That's a very good idea, Amanda. But just to make to the point of the structural versus whether it's not structural, I would equate that to being the same as the removal of a wall. So in Section 110, the removal of a non-load bearing wall is permitted. However, if it was a load-bearing wall that required beams, then that would then require a special resolution because, obviously, it is a load-bearing wall and removing that could obviously affect the whole structure of the apartment, let alone the floors above and below.

Amanda Farmer: Yes. The term wall is defined in our Act. I'm just looking at it now to see if it includes a floor.

Reena Van Aalst: Yes. I don't think so. But I think, Amanda, that's why I think you need the advice from a structural engineer because even when people say they're moving a non-load bearing wall, we always want to see a structural engineer's certificate to say that. We don't just rely on an owner saying that it's not a load-bearing or non-load bearing wall. The committee always want us to get some evidence from a structural engineer that the wall is indeed non-structural and its removal will not have any impact on the building structure itself.

Amanda Farmer: But he's not removing anything in this scenario. He's just adding a floor in airspace.

Reena Van Aalst: Yes. But I think that also could impact the structure in terms of weight. So, yes.

Amanda Farmer: Yes. And still be a structural change.

Reena Van Aalst: But I mean, perhaps my example wasn't as suitable in the terms of adding versus taking away. But I think it's also getting what my point really was, was about getting someone who's got the knowledge such as the structural engineer to say whether or not this type of addition or removal would have an impact on the structural integrity of the building.

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Amanda Farmer: Yes.

Reena Van Aalst: Obviously, the committee would not have that knowledge.

Amanda Farmer: Yes. I like that. That is exactly what they should do. Thank you very much, Reena Van Aalst, for that guidance. Let's move on to your win for this week.

Reena Van Aalst: Yes. So I think this is a win that I think many occupants and owners in strata schemes would agree with is that the new laws about keeping your pets in strata schemes from the 25th of August. So now these laws don't allow owners corporations to be able to just to refuse point blank not to have pets in buildings. So no blanket bans are allowed anymore. They can refuse an animal if it unreasonably interferes with another resident's use and enjoyment of their lot of the common property. And again, that's a very subjective particular point of the legislation. Residents still need approval to keep a pet, and the owners corporation can still set reasonable conditions and guidelines.

But Amanda, you've alluded to it in some of our previous episodes of this podcast where this legislation is not saying animals can just be on your current property and do whatever they want. The owners corporation through the by-laws can still stipulate conditions in terms of the management and making sure that the pets do not become problematic in some buildings because, as we all know, when you have 1 or 2, it may not be an issue. But as owners can have more and more pets in buildings, we have come across issues where there's droppings in the garden, urinating on the fake grass and things like that. So again, I know that there are some people out there thinking, "Oh no, this is going to open a Pandora's box in terms of the quantity of perhaps applications we're now going to receive." But on the other hand, I think that's where you've mentioned before, Amanda, it's important to have really good, robust and detailed by-laws that pretty much govern the whole keeping of pets in strata schemes.

Amanda Farmer: Yes. I'm glad you've raised this one, Reena. I did speak about the new legislation Section 137B and regulation, 36A in a podcast episode 276. So if you want the detail of that legislation and how to access copies of it, head back and have a listen to that episode. I'm interested, Reena, that you're raising this one as a win. You and I have talked about pets a few times on the podcast, and I know you're often the devil's advocate to my pro pet strata dweller position, letting me know about some of the poor experiences that your clients and residents have had with pets. So you think this clarity is a good thing for our residents?

Reena Van Aalst: Yes, I think it is because at least now, like when we tell people they couldn't have pets and all the angst that went with that, I do understand people's feelings about that. But now that it is established that people can have pets, then at least we're not having an argument on that front. We can say, okay, you can have pets, but it's A, B, C, D, E and F. Whereas before, when we had the arguments about no pets, I mean, again, some people have still told me that if someone applies, the answer is no. And I've just said [crosstalk].

Amanda Farmer: I'm not surprised you're hearing that. Yes.

Reena Van Aalst: But I'll just say now that, because at least now this is in the public forum as well, this whole new information and changes to the Act is now being publicly discussed. So at least there's now another owner in this building has come now with their lawyers saying, well, we've heard about the news. So I'm trying to say, I still think, overall, it is a good thing as long as people do the right thing because otherwise there have been a lot of pets in residents I've heard in multiple buildings where they've had blanket bans that have been living like illegally. You don't get all the benefits, but you've got to hide the animals as you go down the lift and things like that. So at least now people can be more sort of, not as if it's a big Pandora's box and everyone can just come out with their animal. But I think people will feel now they can probably apply and be granted consent. So now coming to the fact that it's like being able to get married, so to speak, as opposed to just living together. I don't know.

Amanda Farmer: I like it. I like that analogy. Very good. And all the more reason as you say, Reena, to be having a look at your pets by-laws, you're keeping the animals by-laws and making sure that you do have that application process clearly set out in the by-laws, what is it that owners who are wanting to keep or do have an animal need to do in terms of notifying the strata committee and what are the reasonable conditions that the strata committee can impose in respect to the keeping of the animal.

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Amanda Farmer: So that if those conditions are not met, then there are consequences whether that is warnings or directions to remove the animal and definitely have a look at Regulation 36A. That's the new supporting regulation for this new legislation that sets out, I think, a good strong list of circumstances that do cause unreasonable interference with other occupants' use and enjoyment of lots and common property. And those are the kinds of examples, I think, need to be put into your by-laws.

Reena Van Aalst: Yes. Definitely, Amanda. It's quite prescriptive actually.

Amanda Farmer: Hmm. All right. Thank you, Reena, for sharing that one. The win I'd like to share this week relates to the compulsory appointment of a strata manager. I was recently working with an owner who was involved in tribunal proceedings. These proceedings had been commenced by the owner. I wasn't instructed to appear in those proceedings. I was helping this owner from the background with some submissions and some letters that were being sent across to the other side. But it came to my attention that at one of the early directions hearings before the tribunal, the tribunal member had had a look at the material that had been filed by the applicant, my client, and also the material in response from the other side and had said, "Look, my preliminary view here is that your building is dysfunctional and it's very likely a strata manager will have to be appointed."

The applicant had proposed somebody. The respondent had proposed somebody else. And the tribunal member said, "It is simply a matter of having to determine which strata manager it should be. And the respondent was, as you can expect, concerned that the strata manager proposed by the applicant would not be the right person for the job. So I suggested a third option, strata manager, someone who I called an independent and neutral strata manager as far as that could be possible. And we ended up settling the case on the basis that both parties agreed that this third option strata manager should be appointed, this is someone who the applicant had never spoken to. The respondent had never spoken to. It was a local strata manager, close to the building with a reasonable quote experience in compulsory appointments and small schemes. And orders were made by consent appointing the third option strata manager. With each side, least unhappy about that result.

Reena Van Aalst: I like the key word there, Amanda, least unhappy, which I think is a very good result because I think most people will never happy with compulsory appointments. Normally, the applicants are if they're the ones that are the proponents. But then again, if each person then puts their own manager for, then that it becomes an issue as you've just mentioned in terms of the perception of impartiality and et cetera. So that's a really good outcome, actually. That's a fantastic outcome. I'm interested to see perhaps the matter in 6 months time, if you get to talk to your client to see how it's all going, and hopefully we'll be going much better than it would have been or has been in the past.

Amanda Farmer: Yes. Time will tell. I wanted to bring it to the podcast because sometimes we can become so entrenched in our litigation and our respective positions and not think about cooperative solutions. The tribunal can be helpful in that regard. It is certainly less formal than a court. And I know practitioners, lawyers will be used to appearing before members where the members read the material and actually tells the parties where they think this might go. That would actually be quite improper in a court with a judicial officer forming a view on the evidence before actually hearing the case.

But in the tribunal, there is a lot more flexibility for our tribunal members to do that and to give their view, which can be helpful. Sometimes it's frustrating. Sometimes we, as lawyers, get a little bit concerned by that. But particularly where there are unrepresented parties, it can be helpful if the tribunal says, look, I think this is the way this has going and gives either the applicant or the respondent the opportunity to investigate an alternate solution and not spend more time, more money potentially chasing a case that is just not going to get up.

Reena Van Aalst: Yes. Sometimes, Amanda, on the face of it, those types of cases, perhaps can be seen from the outset because you just have a cursory look at all the material and you can obviously form a view. Sometimes it's not that hard to come to that conclusion. But on the other hand, I mean with some of these other buildings where there are areas where there has to be a compulsory manager, it's anonymous because one owner doesn't like what the manager's doing or for many other reasons. And sometimes there are people that do come across very well-spoken and articulate, and they can propagate their case perhaps much better than another person who's not... I mean, this is when there's no representation I'm talking about. And so therefore, I think, tribunal perhaps using that as a way of thinking, well, on the face of it, it could actually also have adverse consequences.

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Reena Van Aalst: If there are people that know how to play the system and are quite experienced being in the tribunal. And we all have one person that you've come across in your management of many schemes that would perhaps fit that bill.

Amanda Farmer: Yes, definitely. I've certainly been before the tribunal in cases where the tribunal member has said, "Well, isn't this what needs to happen? And it hasn't been what I've wanted to happen." And I've said, "No, member. No, this is far more detailed, far more complex." And it's important that the tribunal gives the parties the opportunity to run that case. And the tribunal always will. You will have that opportunity. You're entitled procedural fairness. And if you want to put your case forward and you want to have that opportunity to air all grievances and all evidence, then you'll be given that opportunity. But if it is the type of case where the arguments may be borderline and there is something that rings true about what the member might be saying in terms of a preliminary view, it's important to listen to that, I think, and take that onboard.

Reena Van Aalst: Yes. Definitely, Amanda.

Amanda Farmer: Fantastic. Well, thank you, Reena, for another engaging chat. I really loved this one. We've covered a lot. I am going to send you out into that long list of to-do's. I'm going to head back to some homeschooling and hopefully...

Reena Van Aalst: I think I would prefer homeschooling now to doing strata management at the moment. It's really grueling.

Amanda Farmer: Oh my goodness. There you go. Did everybody hear that? So all those strata managers out there who are also homeschooling, I want you to comment under this episode. Let us know which you prefer. Let's run a poll. What's more painful, strata management or homeschooling?

Reena Van Aalst: Yes. Well, I mean, I'm obviously talking for someone that doesn't have any experience of homeschooling so they've got to let me biting my words next time we come across this topic, Amanda.

Amanda Farmer: Yes, we'll take that with a grant as well. Yes. Thank you, Reena. Catch you next time.

Reena Van Aalst: Okay. Bye, Amanda.

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 by the show notes at www.yourstrataproperty.com.au. You can also ask questions in the comments section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?