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YSP Podcast Transcript: Episode 303. Can an owner dictate the method for common property repair?

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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. Hey there, Reena.

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

Amanda Farmer: I'm great. I am looking forward to sharing our wins and our challenges. It's been a few weeks, they've been stacking up, I've been saving them up to share with you. But I'm going to ask you to kick us off your challenge for this week, Reena.

Reena Van Aalst: Well, Amanda, my challenge for this week is a question that I received from one of my committee members and I thought, "Oh, this is a very interesting query." There are 2 apartments that require replacement of the balcony tiles. And these are quite large apartments. We are talking about a huge cost in terms of tile replacement. And there are 2 options that were given to the strata committee by perspective contractors. One was to lay the tiles directly on a membrane, and that would cost roughly a $100,000 for these 2 apartments. So this is the quantum that we're talking about. But the other option was to lay them on what they call little chairs, which are a little support that would allow the water to run underneath the actual tiles.

And laying on the membrane would actually mean that there'd be an increased step between the balcony and the actual apartment when the owners actually will have to walk down. And the query to me was, "Well, Reena, do we have to replace like for like in terms of aesthetics and all that?" And then I said, "Yes, like for like is definitely what's required, but should it be on a membrane or should it be on the little chairs?" Originally it was on the little chairs when the tiles were installed back in the 80s. But now in terms of the costs, there's an $80,000 difference between laying the tiles directly on a membrane or laying them on these little chairs that allow the water to go through, Amanda.

So I thought that's a really interesting question in terms of what are the owners corporations obligations in respect to this, and does it require general meeting resolution if we end up going on the membrane as opposed to the little chairs.

Amanda Farmer: Great question. And it's funny that you raise this because I'm working with a client at the moment who wants this tiling system installed in their apartment as part of a fix for a leaky balcony. Am I right in describing this as... I've heard it described floating paver system or a floating tile system.

Reena Van Aalst: Yes.

Amanda Farmer: Our experts out there, no doubt will get in touch and have a lot of technical information for us about this, not our area of expertise. But I understand. My short opening is I understand this system that you're talking about. The obligation of an owners corporation is to properly repair and maintain the common property. Now, our courts in New South Wales have been quite clear about the fact that it is up to the owners corporation, how they do that? Which contractor they involve? Which method they use? What the scope of work is? How much money they spend?

And there have been cases where owners have tried to dictate if you like, to the owners corporation what the repair should be and who should do it and how it should be done. And the court have just said, "No, this is the owners corporations common property. It is up to the owners corporation to decide how it is to be repaired and maintained as long as it's done properly." And we have that word in Section 106 of our legislation. So I'm not giving legal advice of course, specific to this situation, which I don't know anything about, but that my first instinct in response to your question is if the owners corporation has a contractor saying this is the best way to fix this problem. A, because it works, it makes a waterproof balcony. B, it is cost effective. It is $100,000 or almost $100,000 cheaper than the other option.

Then I think it's open to the owners corporation to say, "Yes, then this is how we are going to repair and maintain our common property. Now it is a relevant fact that the appearance, the use, the aesthetics, the functionality of the balcony may change because of that decision and it's going to be important to have a closer look at exactly how much and how significant that change is. So you've talked about different levels then leading to a different step from the inside to the outside.

Reena Van Aalst: Yes, I think that, yes... because when you have... if we use the terminology manner that you use the floating tile, as obviously it's going to bit higher than the ones that are going to be laid directly down the membrane, but I can't imagine it's going to be anything significant. It wouldn't be equal to a step per se. It'll just be up a higher-

Amanda Farmer: It could just be a few millimetres, I'm not sure. And as long as that means that the apartment still remains weatherproof and we're not going to have water coming in, then my view is that it's open to the owners corporation to make that decision as they repair and maintenance decision and therefore not needing a special resolution at a general meeting.

Reena Van Aalst: Yes. That's what I said, Amanda. I just thought... Well, we're not actually... the aesthetics are the same, everything else is going to be the same, the same quality tiles. We are just obviously just changing the type of underlay so to speak, membrane versus these little chair supports.

Amanda Farmer: And as our waterproofing methods and our construction methods and materials become more sophisticated, this is going to come up. And it does come up that we have better ways of doing things, cheaper ways of doing things. And if we took the approach that the owners corporation must always repair the common property using the same materials that were used back potentially 40, 50 years ago, we're going to have a problem. In my view, that's not the approach that the law takes.

From a practical perspective I do suggest that the committee is in close consultation with this owner and makes sure that this owner understands what the finished product is going to look like, if it is a better product than what was there before then having the contractor explain that. As I said, I'm working with a client who wants this installed in their apartment at the moment and it's repair and maintenance and that is not the scope that the owners corporation proposed, but we've gone back and said, "Hey, have you thought about this?" And that contractor engaged by the owners corporation has said, "Yes, if you want that, we're happy to do that." So having that communication piece is really important because we could be preparing for a fight that we are just never going to have because the owners are on board.

Reena Van Aalst: Yes, definitely. I mean, I think the building members been in touch with both owners and I think that I will just check it whether or not the contractor has been involved in any of the sort of negotiations and conversations about the differences in terms of... I think especially just probably more that step issue. Maybe the only other thing perhaps may need to be communicated in terms of impact on their amenity. So thanks, Amanda. I appreciate that one.

Amanda Farmer: Let us know how that one turns out for you. The challenge I have this week relates to an owners corporation signing and sealing a development application. Now we've talked about this a few times on the podcast, Reena, comes up every now and then. If an owner is going to be doing work at their lot that then affects the common property and they need council consent for that work, then if a development application is required to be lodge with council, an owners corporation has to sign that development application and stamp it, seal on it because it is the owner of the common property that is going to be affected by the development.

Now, a couple of times over the last few years I have had lot owners approach me saying, "Amanda, I want to change the use of my lot, my strata lot. It's a commercial premises, for example, and it used to be an office space and I want to change the use to a music studio, was one of the examples from the past. Or I want to change the use to a beauty salon. And I know I need to lodge a development application with the council because currently it's an office and that's something the council has to approve. And I'm trying to lodge the development application but the council tells me because I'm at strata lot I need the owners corporations consent, their signature and their common seal on the development application. And I can't get it. I can't get it because the owners corporation doesn't want me to run a music school, doesn't want me to have a beauty salon, and they're not signing the DA, and so I'm stuck. Can't lodge with council, can't get my change of use, I can't run my business."

And on these occasions when owners have come to me, I have asked them whether their change of use, their new business premises, involves any alteration to the common property. Whether they're doing any work at the property that impacts the common property. Are they installing new toilets? Are they putting air conditioning in? Are they doing any that would change the external appearance of the lot? And often in these circumstances the answer is no. "Amanda, I'm putting a few desks in there. I'm putting up some partitions that are not permanently affixed to the wall. I'm really not doing anything. I just need to go to council because of the change of use."

And my advice in that situation has been, "Well, you don't need the owners corporation's consent, the owners corporation signature on the development application because you're not affecting any common property. A change of use is not a change to the common property. A change of use is a planning issue. It is an issue that is solely within the remit of the local council. It is not an issue that an owners corporation does or should have any say over. It is up to the council to decide whether you are permitted to operate that particular business or not. Yes, down the track. The owners can have a say in that by lodging any objections or submissions with the council. But the owners corporation can't hold you up with the lodgement of the development application because their property is just not being affected by any work that you're doing."

Now, that is often a first challenge that we face in this situation, getting the owners corporation to understand that it doesn't have to affix its seal to the application. And then the second challenge I then face and I'm facing one at the moment, is getting the council to understand that situation and understand that because no common property is being affected then just because it's the strata lot doesn't mean the DA needs an owners corporation seal.

Reena Van Aalst: Well, I think, Amanda, the challenge that you are facing is because on most DAs it says that you need the consent of the owners corporation not the consent of the individual owner. So I think that's probably the challenge in terms of how this is being treated by both the owners corporation and council. And I also think that the problem is that in the majority of cases that I've been involved with when we've had change of use, there has been an involvement of the change of the common property. It's highly rare that a use of a lot would be changing. I mean, I've had commercial going... becoming residential, I've had offices becoming cafes. But the one that you are describing is definitely not one that would really impact significantly or at all on the owners corporation.

Amanda Farmer: Generally, when a client comes to me with this problem, it's because they've tried to just go to the counter of the council or even online these days and you're right, Reena, there's a ticker box. Are you a strata lot? Yes. Do you have the consent of the owners corporation? Oh, no. There is no actual inquiry into whether the property of the owners corporation being the common property is being impacted. And that in my view is the right question to be putting on these forms. Instead of saying strata lot therefore need consent the owners corporation, it should say strata lot, are you impacting any common property? Yes or no. If yes, then please also have the signature of the owners corporation on this form. If no, then the only property that's being affected is the lot itself that is owned by you, the lot owner, yours is the only signature needed on the form.

Amanda Farmer: I think that's the missing piece. And when I get involved, I have a letter turning into a popular template letter that

I then send to the council or if it's already been knocked back or I encourage my client to attach it to the development application where I actually refer to the law, the Environmental Planning and Assessment Act, various cases that we have which make clear that if only lot property is being affected and if it's a change of use, then the owners corporations consent is not required. But we have to drag council kicking and screaming to that conclusion. And it's frustrating for owners who are often business owners who are losing money in the process of not being able to run this new business.

Reena Van Aalst: But in terms of matter of the older strata schemes, where there was mixed-use, do we have by-laws where an owner had to notify the owners corporation or get their consent to change the use of their lot. So is that applicable in this particular situation or not really?

Amanda Farmer: It hasn't been in the cases I've been involved in. But it's a very good point to make sure that we do check by-laws. In terms of notification, I think that's either one of our standard model by-laws now since our 2015 legislation, or it might be in

the Act somewhere that notifying the owners corporation of a change of use is required. I think if there was a by-law that said the owners corporation's consent is required to a change of use that might be harsh unconscionable or oppressive.

Reena Van Aalst: Yes. I think now it would be that back then it was quite commonly used because I think in those mixed-use schemes there was far more control required or perceived to be required to make sure that when you bought in and there was like X amount of restaurants, some X amount of commercial suites and retail outlets, so that mix didn't change too much. And also too, I think in some of these schemes where they're totally commercial and retail, the thinking was that you didn't want to have too much competition between the different types of entities that were trading. So that you didn't want to have like too many restaurants or too many hairdressers or whatever. So they tried to just have 1 hairdresser, 1 nail salon, X amount of restaurants so that there was... that was I think the thinking at the time in terms of why that consent was required, it was to sort of have... which again is not right to stop competition. Because that's again against the law.

I think that was the thinking at the time when these by-laws. We are talking about 20 years ago, Amanda, when use schemes were actually being introduced and we can see, I think from what you're saying now, in reality, they are very hard to manage because you've got the owners again, withholding their consent, not even knowing the impact of what they're trying to do, people buying into these schemes, not really knowing them. When you buy into a mixed use scheme, there's always going to be an element of noise if it's restaurants.

I mean, I've got one particular scheme where there's an owner who's complaining about and has been for like 10 years that the heat that comes in from the restaurants below is affecting her amenity. And she's gone to... we've had engineers do reports, we've had just gone to council and then also the noise factor when it's been a new restaurant now that's just opened and the noise. And I mean, I understand you don't want to live in noise, but if you're living in Bondi, it's going to be a bit hard to say.

Amanda Farmer: Oh, exactly. Yes.

Reena Van Aalst: Even though it's a prestige building, it's still a Bondi, so yes. So let us know how you go with that. I mean, what are we up to in terms of-

Amanda Farmer: Oh, look, the letter is drafted my experience with these, having done a couple before is that I can get council over the line, convince them eventually. But what's interesting is always dealing with different councils.

Reena Van Aalst: Yes, that's right. They're all different.

Amanda Farmer: Yes. And this is a council that's not sort of in my local area, it's a little bit further removed and I haven't dealt with them before and I'm interested to see how my letter is received. And we can you with there are all different types of bureaucracies. And so in some bureaucracies, there can be, this is the way we've done it, this is the way we've always done it, and this is what the form says and so this is what's required. But our job as lawyers is to assist our clients to unpack that and explain to those who may need to understand that that may not necessarily be what the law is.

Reena Van Aalst: But why can't the owners corporation just put all this to an end and just put the seal on, I mean.

Amanda Farmer: Because they don't want the beauty parlour as I have called it. I have called it a beauty salon for the purposes of this podcast.

Reena Van Aalst: Okay. But it's not really. Is it a brothel?

Amanda Farmer: No. No. It's not a brothel. No, it isn't. No.

Reena Van Aalst: Okay.

Amanda Farmer: Okay. Always fun with you, Reena Van Aalst. Let me have your win for this week.

Reena Van Aalst: Well, my win, Amanda this week is a really important one because it's talking about councils. This is a City of Sydney council win, who have provided us with an extension for our annual fire safety statement, which was due actually in November last year. And they've given us now till April this year to have all the work completed. So basically we were able to show, obviously the building management team was able to show that we've obviously been trying to get testing done, which was done. And because they give you a 3-month window in which to submit the certificate once testing has been done, we were concerned that we would have to retest again. And due to COVID, obviously, inspections were delayed, contractors were unable to do the work on time.

You have to get number of quotes. It was quite a lot of work to be done with dampers. We are talking about tens of thousands of dollars. And we were able to show council that we have approved these quotes. This work is scheduled to start, half of it's already been done. And normally the City of Sydney it's like, even in last year in COVID, it's like they didn't really care. It was like $1,000 fine a week until you submit it.

We were lucky to have someone that actually came down to the building, looked at everything and then has given us an extension till in the end of April. And has also said that we don't have to retest even though it's being submitted in April again, because otherwise, we would've been out of time to retest, to get to retest again, 3 months before April would mean we got to do it another retest. So yes, this was the first time ever that City of Sydney council has given such an extension and has not required testing to be done again. So yes, I just thought that was a significant win in terms of my experience with them.

Amanda Farmer: Yes, it is good on you. I've seen that change in council attitudes, definitely through the pandemic where there has been an acceptance that contractors can't get to buildings, were locked down for a significant part of last year and not able to come and do the necessary testing and a lot of buildings, mine included have been over due with being able to lodge their annual fire safety statement and I have seen councils apply some flexibility there. So it's a good reminder to our strata managers to check in with the relevant local council if the building struggling to get their annual fire safety statement in on time, there may be some room to move there.

Reena Van Aalst: Yes. I think also the other thing, the impact on the insurance policy to remain like obviously it did have an impact, but in these cases you can only do what you can do. And what we're finding now is that, I mean, to add salt to the wound, we've got the rain now also causing havoc in terms of people being able to attend. And I mean, I've got a building we are supposed to collect the books and records from, and they've just said, "Oh, we'll close our office because of the storms." I said, "But when are you and open?" And they haven't even told me, so I don't, what's going to happen there.

Amanda Farmer: Oh dear.

Reena Van Aalst: Anyway.

Amanda Farmer: Yes, I'm sure. In a few weeks' time we'll be chatting about the cleanup.

Reena Van Aalst: Exactly.

Amanda Farmer: Yes. Wrapping up with my win for this week. A notice to comply was issued to one of my lot owner clients some weeks go. I think I might have mentioned this perhaps on a Friday live, maybe not a podcast, but a Friday live. I was talking about washing on the balcony. Washing that was allegedly visible from other parts of the common property. And a notice to comply was issued by the owners corporation to my lot owner clients. This is a formal notice under our New South Wales legislation requiring an owner to comply with a by-law. And in this case it was the washing on the balcony. No washing on the balcony by-law, very common one in many of our buildings. This notice to comply was issued and ultimately an application was made to the Tribunal for a penalty order because it was alleged that my clients did not comply with the notice and still had their washing on the balcony.

Now, the win here is that the penalty application very recently was withdrawn by the owners corporation. And it was withdrawn after I served a set of written submissions explaining to the owners corporation and to the tribunal primarily why the notices to comply were not valid and why there was therefore no legal basis for the owners corporation to pursue its penalty application. And for a number of reasons, the notices weren't valid and the owners corporation had failed to file any evidence in support of its allegation that my clients were in breach of the by-law.

There's a really important lesson here for strata managers, committee members who are wanting to go down this path of issuing a notice to comply and then ultimately bringing penalty proceedings to make sure that you understand that in these applications the rules of evidence apply. There are strict requirements for what should be in and notice to comply and it's very easy for it all to fall apart if you have a lawyer on the other side who understands these laws and understands the rules of evidence and the procedure in the tribunal. So I do think and I certainly did encourage this owners corporation to get some legal advice and some legal representation when dealing with notices to comply and with penalty applications because I think that was the downfall in this particular situation.

Reena Van Aalst: I think also, Amanda, I think many strata managers don't really understand the steps that need to be taken in order to progress these matters through the tribunal. And I think a lot of compulsory orders are made for strata managers in extreme cases, Amanda, where there has been lack of compliance with the Act and with the procedures. So I think in your case it appears that even though your client may have been breaching the by-laws it was more about how the strata committee perhaps went about it and what steps they took and how they took them.

And also I would think that most people wouldn't have be able to not necessarily afford a lawyer, but I think a lot people that would receive one of those notices will automatically go to a lawyer. So I think it's a testament to show managing agents. So you never know who you're dealing with. And even though on the face of it may seem like a very simple breach, just washing on the balcony, you've got to cross I's and dot your T's and make sure that everything is done correctly so that the owners corporation at the end of the day does hasn't sort of had on its space then has to withdraw and perhaps there may have been some merit in their application.

Amanda Farmer: Yes. Well, I'm certainly not going to make any admission here on this podcast that my clients were in breach of the by-laws. Definitely, there was a failure here to issue a proper notice to comply, attaching the right by-laws as in the form they were registered and I think a lack of understanding that in penalty proceedings it is very important that you put your case in a certain way so that the tribunal has evidence that is admissible, that it can accept and it rely on. And the respondent, the lawn owner can then understand the case that is being put against it and the case that it has to meet. So who knows what may happen in the future, in that building when it comes to by-law enforcement and notices to comply. But I think a good lesson there to make sure that you don't underestimate the formality of that process. Thank you very much for spending time with me today, Reena, I will look forward to chatting with you next time, send you out into your strata day.

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

Amanda Farmer: See you later. Bye.

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