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YSP Podcast Transcript: Episode 337. Your step-by-step process for solving cigarette smoke drift in strata

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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 to this week's podcast episode. I am your host, Amanda Farmer, and this week I have with me Brenton Pittman. That's all I'm going to say about Brenton right now because he is here with me and is ready to introduce himself and his experience in Strata. Brenton, hi there.

Brenton Pittman: Thank you very much for having me.

Amanda Farmer: My pleasure. And thank you for making yourself available to come and share your incredibly important story, your recent Tribunal experience with all of our listeners. Brenton, tell us a bit about your building, what it's like, how long you've been there, what your strata committee's like, fill us in.

Brenton Pittman: Yes, so thank you. We had lived in Sydney for 35 or 40 years, and spent five years travelling around Australia looking for another place to retire, a place to retire because we didn't need to be in Sydney. We didn't have family there anymore. All our friends travel, so we get to see them anyway. And it took us five years to come across Kingscliff, which is on the border of New South Wales and Queensland and the Pacific Ocean and saw an off-the-plan unit, which is perfect, with a huge visibility, huge panoramic view. So we bought off the plan in 2015, or exchanged, and settled in September 2016. It's a six-pack unit with three units on each side, three levels. The units are a mirror image of each other, and it's a totally vertical building going up and where I happen to be on the top level with panoramic views and glass looking all around.

We've got a strata committee here and it's represented by one owner from each of the units. So we've got six on the strata committee. Unfortunately, the strata committee is dysfunctional, and in fact, we're now looking for our fifth secretary in 13 months with the other four either being replaced or resigning. So we're without a secretary at the moment. And that seems to be quite common here. Not a great deal gets done here and we're a little bit on the tribal side, but sometimes the tribal side goes five-one, which it is at the moment, but normally it's three-three. So we don't get a great deal done.

Amanda Farmer: You do have a strata manager?

Brenton Pittman: Yes, we've got a lovely strata manager who is very, very focused on strata by-laws, but sometimes she's talking into the wind and she realises that some of the audience is not listening to her about what strata regulations are. We certainly do and we get on with her extremely well because it's just we realise that living in strata we just follow the rules, it makes it a little bit easier. So she abides by that. They're very inexpensive, they're very responsive. The woman that we are dealing with is highly professional, so that works out quite well. But it must be very frustrating for her to have her professionalism and not necessarily get the rewards that she would like by seeing a strata body sort of functioning properly.

Amanda Farmer: So this has been your first experience of strata. You bought off the plan and moved from a freestanding home?

Brenton Pittman: Yes. So we had two homes in Wahroonga in Sydney, two different homes. We brought our son up in that, so we were all standalone, very large properties as well. So you had neighbours but at a distance. So this was our first time in strata. Didn't really even consider the strata body when moving in, which is obviously a huge mistake.

Amanda Farmer: Now, you said you have something of a dysfunctional committee or an owners corporation if we bear in mind that your committee is made up of a representative from each lot. You have had a tough couple of years. Share in particular with us what life has been like as you have suffered from smoke drift from a neighbouring property.

Brenton Pittman: The smoke drift commenced about July last year when these new owners bought and moved in. We were away for the first month of it. After that, we noticed it immediately. Unfortunately, after a month I couldn't concentrate and I was working

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from home. I couldn't concentrate. I lost all my concentration when I get a huge hit of smoke. And unfortunately, I lost my job because of it, because my employer couldn't see that I was working in a safe environment.

We would get drifts of smoke every single day up to 15 times a day. So anytime we could go into a room, we would get the smoke drift, we'd have to move around the place to try to avoid the smoke drift. We'd close all our doors and windows for nearly a hundred percent of the time during the day and always at night. So we couldn't get the fresh air, we couldn't use our balcony. And I guess once we started complaining and bring to the attention about the smoke drift, it set the tribal mentality for us who would normally be law-abiding to those that just wanted a bit of a free for all.

So after making very respectful and diplomatic approaches to the respondents, the other parties in the block here would be more advocacy towards those parties rather than us. So we've received abuse over the last 18 months. We've had the smoke drift going, we've had threats. We get sworn out on a regular basis. So to name it properly, it's been horrendous. It's been quite unbearable. It takes a toll mentally, it takes a toll emotionally, and it also takes a toll just on the relationship that you've got with the two of us because Lynette's very eager on extreme fairness and I'm probably more judgemental and tried to react reasonably quickly on things. So there's always a discussion about everything that we try to do. So then that takes a toll on the relationship as well.

Amanda Farmer: Now this smoke drift was emanating from a neighbouring unit. Is it the unit below you, next to you?

Brenton Pittman: Yes, it's directly below us. So the unit block is three units on the north side, which we're on, and three units on the south side. They're a mirror image to each other. So the unit that is affecting us with the smoke drift is directly below us. And we did have a tenant in there previously from the previous owner who was a smoker, and it was the first time we had encountered smoking close hand. We successfully negotiated with her that she could still smoke occasionally on her balcony and we'd be aware of it, but she wouldn't do it extremely regularly and she was very open to making changes if it got too much. Relationship worked very well for 12 months and we were mildly affected by it because of that open discussion.

Amanda Farmer: And we're not talking here about just a couple of cigarettes and a couple of moments during the day where you and Lynette were suffering from that smoke drift. The Tribunal in ultimately its decision, which we're going to talk about, did make a finding that there was possibly up to 40 cigarettes being smoked a day by your neighbours and that you were being impacted at all hours of the day and the night, including very early mornings, 2:00 AM, 3:00 AM. Have I got that right?

Brenton Pittman: Correct, yes. They themselves admitted in a letter, but it wasn't put into the final evidence, that they were smoking between 16 and 18 a day. The Tribunal member put that down to up to 40 cigarettes on a typical day, and not every day was typical. So if there'd been any sort of partying going on where you get cigarette smoke going past midnight, and we're talking about not a young couple, I mean, the respondents are 50 and 70 years old. Some days we were recording, hand recording up to 15 episodes of smoke drift. So it could be that in that 40 cigarettes being smoked that the Tribunal member found that there may have been three or six smoked in one session, three by each, so they'd have a cigarette and then light up again if they're having a drink, then light up again. So you'd get this constant drift of cigarette smoke coming in from whatever direction.

Amanda Farmer: No wonder you were suffering. Now, you alluded to it briefly earlier, Brenton. What were some of the steps that you took both directly with your neighbours and perhaps with the owners corporation before you ultimately made a Tribunal application?

Brenton Pittman: Amanda, we tried everything within our power to resolve this, knowing that we had successfully resolved it with the previous resident there to joint satisfaction. So we sent over a six-week period after we returned and left it for a month until we returned from our holiday to write the first email, and we sent the email to both respondents on their two separate email addresses outlining that we were apologetic about the intrusion, that we were receiving amounts smoke drift. We record to let them know about how many we were receiving on a day, what it was doing to us in regard to irritated nose, eyes. We let them have a very heads up on any health issues that both of us had, what we're looking for in regard to a remedy on this, and if they can just

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permanently eliminate smoke drift. And it was as the Tribunal member and our solicitor both recorded, they were respectful and polite emails.

So we sent three of those emails over a period of six weeks. The first one was not responded to and the excuse was they both didn't receive it. The second one came back that they would take it under consideration, and the third one came back, "We don't believe you and don't send us any more emails on this." So that was on three emails. We then organised with the wonderful strata manager to come in and meet the four of us, and she facilitated a meeting. And I wouldn't call it mediation, it was really a facilitation. We just wanted a witness there, and we outlined again what our issues were with the smoke drift. The respondents denied that they were causing any of the issue. They came up with suggestions that were pretty wild, but nothing that they would change in their actions, and suggested that we get an air filter.

So at the end of that facilitated meeting, there was zero resolution that was to our satisfaction. The smoke drift continued. We then wrote to the strata manager and the secretary asking for a notice to comply. We do not have a strata by-law for smoke drift in this apartment because the by-laws were produced in July 2016 before the new by-law model came out in November 2016. So we missed that window. We applied for notice to comply to Section 153 of the Strata Schemes Management Act 2015 in Section 153. And we outlined what the issue was. The owners corporation put it to a vote and voted 5-1 to not proceed any further. And each one of those voting powers made a comment about how our claim was fictitious and making some type of personal comments about us as well in their voting.

Amanda Farmer: Can I just stop you there, Brenton?

Brenton Pittman: Yes.

Amanda Farmer: Just to clarify for our listeners who may not be familiar with the model by-laws that are in our New South Wales legislation, what Brenton's referring to there is that as of November 2016, a model by-law was introduced, which new buildings being constructed from that date probably have in their registered by-laws, which relates to smoking and smoke drift, both on the common property and smoke drift from lots. And Brenton's saying that his building didn't have such a by-law. There'll be many buildings out there that don't have by-laws that deal with smoking or smoke drift. And so what he and Lynette proposed at a general meeting was an addition to the by-laws so that the building did have a by-law that dealt with smoking and smoke drift. And that proposal was not successful before the owners at a general meeting. Thanks, Brenton for that indulgence.

Brenton Pittman: Thank you. And we have put that forward three times, at three AGMs for the smoking by-law. So it even happened before the respondents moved in. So not being successful with the owners corporation, we then went to Community Justice Center. We chose that instead of New South Wales Fair Trading because we knew that they're probably a bit more of a personal touch. And Community Justice Center for New South Wales, very open, totally non-judgmental, and will just try to mediate on the issue or get a mediation going. They have attempted three times to mediate the issue with the respondents through us and the respondents declined any mediation.

So up until now we've had eight attempts to the respondents to be able to talk about and do something about this to joint satisfaction. But at the moment it's still going all their way and not our way. And there have been no reduction in the smoke drift that we're getting. At that time, in about September or October, we then approached NCAT.

Amanda Farmer: Yes. And after what has been a hard-fought, very hard-fought, and I don't say that about all cases, a very hard-fought battle, you have been successful before the Tribunal and we'll talk about the orders that the Tribunal recently made. Brenton, can you share some key steps that you took in the Tribunal litigation that you believe led to your success?

Brenton Pittman: Yes. First of all, I believe we were successful in both cases because the Tribunal first when we went to them the first time, we did receive a positive decision, but it was overturned through appeal because of supposed new evidence from the respondents. What made both of them successful I believe was diary notes, written diary notes, not just memory, and qualitative

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and quantitative diary notes. We write down each time we had a smoke drift, we'd write down the time, we'd write down that it was cigarette smoke drift. We'd let it be known where we were in the apartment, what it did to us, what we were doing at the time and what we had to stop, how we were reacting to it physically and how we were reacting to it mentally or what we could do for our... If we were halfway through a job or something, if we had to stop doing that and move location, we noted who was receiving it, if it was myself and Lynette or just the one of us, and we then put that into a written diary.

We also did a dot matrix, which I know that's just me on an Excel spreadsheet, just noting the times these were happening. And when we were getting responses from the respondents about, "No, it's not us, it's the bloke across the road," or something, we would note that down. He would then say, "It's not cigarette smoke drift, it's cane burns." We'd note if that was happening on the day. It couldn't have been happening because of the wind, we kept a record of the wind. So it was really over-the-top diary notes. But as one of the Tribunal members mentioned, it was meticulous evidence in the diary notes. That was number one.

When we put our evidence in, we gave the Tribunal member drone pictures that real estate agents had done when they're selling buildings of what our building was and where the respondents were sitting. Could be on their balcony, and the position of the chap that they were saying who's 30 meters away, that we were getting his smoke drift and not theirs. So we had floor plans in there. We also knew that one of the Tribunal members previously in the appeal was not convinced that smoking was a health hazard. So we drew out the World Health Organization stuff, the Australian Health and the New South Wales Health and what they were saying, that passive smoke drift.

We also researched, found that cigarette smoke drift from research around the world can travel for one cigarette more than nine meters. Cancer Council New South Wales and Victoria are extremely helpful and we put their research in about how smoke gets into windows and door frames and weep holes and open windows and whatever to get into buildings. We included that. It was very hard to prove nuisance because there's no definition of nuisance, even though in my mind if you've got 800 cigarette smoke drift events in 200 days, I'm thinking that would be a nuisance. But we also had to illuminate on that further to show that it was a nuisance for those numbers.

We also had character references, which had nothing to do with smoke, but we provided that on ourselves of people who had known us for more than 50 years and giving some sort of background to our personal lives to show our genuineness. And that was counteracting some of the more poisonous responses that the respondents had input in their claim from the owners here, which were totally irrelevant to the case, but just personal attacks, and I can't think of much more that we put in there.

Amanda Farmer: I think that's plenty, Brenton. To say that your evidence was thorough is putting it lightly. The description in the Tribunal decision is that your evidence was compelling, and I believe all parties who filed witness statements were cross-examined. You were found to be credible witnesses, whereas the respondents were found to be evasive in their evidence.

The reasons for decision are lengthy. They are themselves thorough, and I do encourage all of our listeners to have a read of this decision. It summarises everything that you've just heard Brenton say was put forward in support of the applicant's case or it also summarises the respondent's evidence in reply and what their arguments were against the application.

I have uploaded a copy of the written decision as provided to me by Brenton in the show notes for this episode, which you can access over at yourstrataproperty.com.au/podcasts. Just find this podcast episode number 337 and you'll be able to have a read of the decision. It is a very helpful decision for anybody, any owner that is bringing an application in nuisance generally, and that's an application under Section 153 of our Strata Schemes Management Act in New South Wales and specifically applications to deal with the hazard of smoke drift in our apartment buildings. Brenton, what was the most challenging aspect of the litigation, and how did you deal with that challenge?

Brenton Pittman: The most challenging for us, I guess, was not knowing the amount of information we had to provide to get the Tribunal members to get across the line. So it really was more is better, more quality is better. The length this took, and NCAT are very, very busy, and we probably had more than a dozen direction hearings via video, and dealing with more than six different

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tribunal members, each of a different mindset on how to approach it. So the most difficult was the length of it from September 2021 to October 2022, and consuming every day for those 13 or 14 months, which is just unnecessary. After sending polite emails to stop smoke drift, really what we wanted and what it cost us is just not comparable. This would not have been done properly if we didn't have the use of a solicitor just to help us stay on track with it.

Brenton Pittman: Dealing with the Tribunal members sometimes was frustrating as well, because they would be more prone to protect the unrepresented respondents, rather than the applicant who was represented. So we found that a little bit difficult as well. And then obviously when the original decision was set aside, we then went back to full-fledged smoke drift again and we couldn't do anything about it. So the most difficult part, I guess was the length of that and knowing that it just consumes your day, you wake up with it and you go to sleep with the thought of what you need to do next for a position that you didn't expect to be in.

Amanda Farmer: Has it been worth it?

Brenton Pittman: No, because it's still ongoing, and we still can't believe we're in this position of being ostracised by the people in the building because we are just trying to exercise our Strata rights, and the problem's still happening because we still have to find a way to have this stop. And Amanda, I guess there's two things. I mean, either we could just put up with it or we could move out. And we spent five years looking for this property, it's a to-die for unit, and we are now having to think about having to move out to something that could be the same in the next property.

So has it been worth it? It's probably worth it at this end of it, of just trying to allow the government an opportunity to just ban something that is so hard to fight, that everyone in this position would probably say, "I don't want to be in this position," and either they move out or they just put up with it. And it's something that shouldn't be put up by anybody. I mean, people can do their own things, but you can't impact on other people.

Amanda Farmer: Now, the orders that were ultimately made by the tribunal were that the respondents must not smoke on the balcony of their lot, they must not cause or permit any other person to smoke on the balcony of their lot, and that they must not cause or permit smoke fumes or odour to be emitted from the interior of their lot into the applicant's lot. Your lot. Now I think what I've heard you just say there, Brenton is that this smoke drift is continuing past the date of these orders. Are you aware that now that you have the benefit of these orders, you do have other avenues that have opened up to you to enforce these orders, which can include a financial penalty to the respondents if they are in breach?

Brenton Pittman: Yes, we are. In fact, we've got two avenues we can go now. And having waited for the appeal period, which finished yesterday, we sent off to the strata manager a notice to comply to be issued to these people under the owners corporation. And even though we currently don't have a registered smoke by-law in our by-laws, we do have, and every unit block has got it, is that there's a by-law to say that the owners corporation cannot permit a law to be broken within one of the units. So if there's something that's been prohibited, the owners corporation's got a responsibility to make sure that there's no prohibited activity. Well, smoke drift now we are receiving and is in breach of that by-law that we've got there inhibiting a law to be broken. So we've asked for a notice to comply there, which then puts a responsibility back on our owners corporation to do something about it.

Secondly, we can go back on the penalty side of it as well against the individual respondents and do that. A case came down only just recently that the penalty for something else, an air condition malfunction or whatever, was finally awarded for 3,850, but they can't decide where the money is to go. We're not into this financially, I can tell you, but we do have that avenue as well. So we are now trying on both. And if the owners corporation don't perform their duties, we will consider what our actions are under Section 106 of the SSMA, which is the owners corporation have got a responsibility to the building. And we knew nothing about strata six years ago, and now we know every by-law possible.

Amanda Farmer: Well, that's what I call a baptism by fire, pun intended. Can you leave us with some key messages for our listeners? One, a few, if you can't narrow it down to one, for anyone who may be suffering nuisance or hazard in their community?

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Brenton Pittman: Keep good diary notes, escalate the activity you are doing in small bites, polite conversations. Just stick to the issue, escalate it if you get no response to the polite conversations and emails, escalate it to your owners corporation, escalate it to your strata manager. Use the services of mediation organisations to do it as well. So escalate it properly so that you don't have any gaps there about doing it. And surely before it gets to court that reasonable respondents will do something about the issue. That's probably the key one, doing what the court requires. Hopefully, no one gets there, but it is just a matter of don't give up on it. But most people out there are reasonable, I'm sure, and will do something they can negotiate on that. And get your strata body to make sure they enforce the strata body rules including smoking, and if it's not in there, try and do it at the next general meeting.

Amanda Farmer: Well, you and Lynette have certainly blazed an important trail here for our apartment residents. It's not the first decision along these lines in the context of smoke and smoke drift as a nuisance. And those who go and read the decision will see that the senior member quite thoroughly reviews those earlier decisions. But it certainly adds a very helpful precedent to that catalogue of cases and will be relied on, I'm sure, by others in a similarly difficult position.

So I hope that as much as this has been a burden and you're not quite sure yet whether it's all been worth it, you and Lynette can receive that thanks and that congratulations knowing that you've done a good thing for other apartment residents. So on behalf of them, thank you.

Brenton Pittman: Thanks, 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 via the show notes at www.yourstrataproperty.com.au. You can also ask questions in the comment section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?