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YSP Podcast Transcript: Episode 345. Contractor in liquidation but still licensed? A cautionary tale for strata managers

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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. Happy New Year, Reena Van Aalst.

Reena Van Aalst: Have New Year to you too, Amanda.

Amanda Farmer: This is our first chat of 2023. It's great to be here with you. Have you got any resolutions for 2023? Do you have a word for the year that you're focused on? How do you kick off your new year?

Reena Van Aalst: Well, my focus this year Amanda, is to do less work, so...

Amanda Farmer: Do less work.

Reena Van Aalst: In strata, I'm not sure if that's a tautology, but anyway, we'll see how we go.

Amanda Farmer: I think that's a very good aim. Do less, make more is what some entrepreneurs say. Apparently, it's possible. I don't know. We'll watch and we'll see how you go.

Reena Van Aalst: Exactly.

Amanda Farmer: Let's kick off 2023 with our wins and our challenges. We'll start with your challenge for this week.

Reena Van Aalst: Well, this week my challenge, Amanda, arises from a strata scheme that we manage where the owners corporation had to do some work in an apartment. What had happened was that there was an open rooftop area where the waterproofing had failed and the owners corporation was trying to get quotes, with the Design Practitioners Act adding further complexity to getting quotes from people that had their accreditation.

This particular gentleman was found by one of the community members online. He's a builder. He said that he could do the work in between two jobs that he had and he was going to actually do a temporary roof structure that the strata committee thought might be a good idea in the meantime until we could get some quotes for the waterproofing and raise funds as well. And furthermore, there was a leak into the apartment below that wasn't able to be tenanted for over six months.

So there was two sort of main considerations: one was obviously stopping the water leaking and two was ensuring that the apartment could then become habitable because the owner was losing rent, a loss of rent claim has been approved by the owners corporation separate to this. Anyway, so as a result, this gentleman said, oh, he wouldn't send the proper contract. I said, "I need a contract." It wasn't over 20,000 so I didn't need Home Building Compensation Fund insurance.

Anyway, back and forth, back and forth, and he said he wanted 50% deposit. Now I said to the committee, that's not legal. The Act says 10%. Even the contract that we signed said 10%. But they said, "Oh no, Reena, he's in between jobs and you know how hard it's to get tradespeople. We can't get anyone to even give quotes and he's available." So I reluctantly agreed, obviously, I was instructed to do it.

And of course then what happened was he got sick and then he didn't start and then this and that and kept on following him up and finally, he started to do some work and the next minute wouldn't come back. He wouldn't turn up when he said he was going to turn up. And then he wanted more money for another part of the job because obviously, we wanted him to repair the unit below, and

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there was flooring issues there.

So we said, can he give a quote, he said, "I need more money." I said, "No, but you've already been paid for the job that you haven't even started." And he kept on ringing me at night and I said, "Here's the remittance advice. You can start." "Oh no, no, he's been burnt by strata before." I said, "You've got a remittance advice confirming the money's left the account."

Anyway, we found out later on that he was in liquidation. We did a search on the company, just by chance, to see what was happening. And then he didn't even tell us. We found out, we found who the liquidator was. We got in touch with them. We have to sort of put this proof of debt thing, which I mean obviously we're not going to get the money back.

Amanda Farmer: So he had entered liquidation at some point between signing the contract and then trying to get the work done?

Reena Van Aalst: Yes, about three weeks after he went into liquidation, I have to pay the deposit, even though we were still asking for the work to be done way after that, he still hadn't started. 'Cause also it was raining, you see, and that's the other thing that was causing delays. There was rain, so he couldn't start. So there's so many different factors, Amanda. Anyway, so I went on the Fair Trading website later I found he was actually in liquidation and of course, his license is still valid.

So I put a Home Building complaint in and all they told me to do was go to the liquidator and put a proof of debt. That's all they told me to do. They didn't remove his license or anything. So I don't know how Fair Trading licensing works in relation to someone's solvency, but it seems like they're not related.

Amanda Farmer: So are you saying the company is still the license holder or him individually as the person?

Reena Van Aalst: The company is.

Amanda Farmer: Right. Okay.

Reena Van Aalst: The company always was the license holder.

Amanda Farmer: Yes.

Reena Van Aalst: And all Fair Trading told me to do, Amanda, after I lodged all the documentation, the paperwork, was just to lodge a proof of debt. And just obviously the details were on the form that we downloaded from ASIC and so that they even referred to him by name. It's like, I don't really need them to tell me that, I gave them that information.

Amanda Farmer: So Fair Trading does not automatically or immediately revoke or suspend a home building license where the builder, building company has entered liquidation. Interesting.

Reena Van Aalst: That's what I thought. So I thought there may be some other listeners or strata managers out there might have had some similar experiences. I don't know if it's quite common or uncommon, but I think it's something people should be aware of. Perhaps for a company now, apart from doing your normal checks of whether they're licensed and that they have the correct insurances, et cetera, you have to now do a company search of any company. Now the amount we've lost I think is about \$15,000, which for a small scheme is significant. But even if the deposit was the correct amount of 10%, some deposits, depending on how big the job is, could be much higher than that.

Amanda Farmer: Yes. So you're saying your process as a strata manager is to do a license check, to make sure these people are licensed, you make sure that there's insurance if there needs to be, there didn't have to be in this case, but you don't take that step of going to the ASIC register as a rule and checking that the corporation is actually operating, registered and so on. So that is what you'll be doing from now on. Is that right? And what you suggest that other strata managers do?

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Reena Van Aalst: Yes, I think so, Amanda. And never ever take any pressure from your clients to pay 50% deposit. At the end of the day it was their decision and in the same building, then I was asked, the flooring had to be done in that apartment and the property manager got a quote for the flooring. And again, the guy wanted 50% 'cause he wanted the materials to be paid. And I just said, "No, I'm not doing it." I said, "You pay for it and you'll be reimbursed when the work is done." And that's what we did. We paid the owner. He said, he'll pay it. And I said, "That's fine." I said, "You can do whatever you want. Once the work is completed and everyone's happy, then we'll reimburse you," which we did.

Amanda Farmer: This is interesting. I wonder if this is something that's becoming more common now as contractors are more in demand, there's less of them qualified to do work. And I always use the example of waterproofing work. That seems to be the one where we're finding it hard to get qualified contractors. I wonder if it's just becoming a normal course of business for contractors to ask for significant deposits to secure the job?

Reena Van Aalst: Well, I think in this case, Amanda, 'cause it was flooring and I know there is obviously the material cost, which probably is significant, but the issue is, the Act still says you can't do it. So this apartment, we're losing \$900 a week in rent. So every week that it's not being rented out, it's costing the owners corporation money, which is part of the reason that they had agreed to the 50% deposit because they said, "Well, we're losing all this money. The owner's losing money, the owners corporation has to reimburse that owner." So if this gentleman can do the work in between jobs, and again, I think he found him on Air Task or something like that, but again, all the checks and balances came through. License was valid, all his public liability was valid. All the other insurances that were required were valid.

Amanda Farmer: Just to fill in any listeners who may not be familiar with the legislation that Reena's talking about, the requirement for a maximum 10% deposit is in the Home Building Act in New South Wales. Section 8 says that the maximum amount for a deposit for residential building work is 10% of the contract price. That is for work, let me just check, but I think that's for work where the contract is up to \$20,000. Higher than that, more than \$20,000, the maximum deposit is 5%. So important to be aware of that. And that's a good section that you can be quoting to your committees when they want to pay more of a deposit. And perhaps you can go back to the contractor and say, "Sorry, against the law."

Reena Van Aalst: Yes, well I did say that, but they didn't want... And the reason we paid 15 was, doing the ceiling was one job and the roof structure was another job. So they were two separate jobs. And again, I think many managers might find that some contractors try and split the jobs so that the amounts come in under 20,000 to avoid the Home Building Compensation Fund insurance. Because these works were quite different, one was for a structure, one was for a ceiling, that was the damaged ceiling in the unit below that was suffering the water penetration.

In that case, I suppose, you could say that they're two separate types of work. They're not sort of related. They're not trying to split the same job into three sections, which I think lawyers used to do that too when it came to getting the cost agreements approved, the general meetings, they'd split them up just below the threshold.

Amanda Farmer: Oh yes. When we had that new legislation come in where legal costs above a certain amount have to be approved by a general meeting, we definitely saw those staged cost agreements, sometimes artificially staged cost agreements to keep them under that threshold. Well thank you for sharing that, Reena, as a community service announcement, I think to put our managers, our committees on notice that this is something to be alert to. That practice of Fair Trading, not necessarily giving any notice on the register if a company is in liquidation, not revoking their license, at least not straight away. And I, too, would encourage managers, committees to be checking the ASIC registers when you're about to engage certainly a corporate contractor.

My challenge for this week, perhaps a little lighter, I hope, I have heard a story, let's say. A story from a colleague of mine that relates to the hanging of artwork in a common property hallway. Reasonably large building, many lots, residents who want to make their home as welcoming, as modern, as stylish as possible, have got together and purchased some artwork, and they have hung that artwork on the wall of the common property corridor leading to their apartments. Only to find out a couple of days later that someone from the committee has come along and removed that artwork because the residents didn't have approval to hang that

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artwork on the wall. And I don't know all the details of what happened from there. A little bit of back and forth, a little bit of politicking I think.

I don't think the artwork is there now, but it got me thinking, Reena, about cosmetic work. And I spoke about this on the podcast only last week, the meaning of cosmetic work in our New South Wales legislation and whether indeed it might cover this kind of situation. I'm talking about Section 109 in our Strata Schemes Management Act, which says that an owner of a lot may carry out cosmetic work to the common property, in connection with the owner's lot without the approval of the owners corporation. And Section 109 tells us that cosmetic work includes installing hooks, nails, screws for the purpose of hanging paintings or other things on walls.

Now look, a fairly objective reading of that section would tell us that if the owner can say, "Well, I'm hanging this artwork on the common property wall of the corridor leading to my lot, that is cosmetic work in connection with my lot." We can debate this. Reena just gave me raised eyebrows. We can debate this. Do you think this is work that owners can do without approval from the owners corporation?

Reena Van Aalst: Well, my experience, Amanda, has been in most buildings that normally, the owner will ask the committee, I'd like to beautify my corridor. I have a painting or whatever. Or sometimes people put a vase with a stand or a picture end, a vase and a stand or a little nice sort of chair type thing where people can sit while they're waiting for the lifts.

So I think my sort of take on this and perhaps my view is that really, you don't own the common property hallway and therefore if everyone decided to put things there, then I suppose it would become a bit unwieldy in terms of managing different tastes, different expectations. People then could put things, you're talking about a painting, but it could be anything. People could put chairs, they could put anything there.

Once you start I think allowing people without consent to do something like that, then I think it does open a bit of a Pandora's Box. So my view is that I have no issue with it, as long as the person asks, the committee usually say yes. I've never had the committee ever say no, to be honest, in these circumstances. But then again, there's always the first time for everything.

Amanda Farmer: Yes, I think if you read further through Section 109, it does say that work that changes the external appearance of the lot is work that will not be considered cosmetic work. And it does push it to a higher threshold of approval. And if you haven't caught last week's episode, episode number 344, then check that out because I discussed that in a little bit more detail there. That might be the way that a committee can say, "Look, sorry, at first glance, this may be cosmetic work, but because it changes the external appearance of the lot," and I can see from your examples, Reena, if you're putting a chair and table out there, a bunch of flowers, some furniture out in the corridor at the front door, then yes, that would be the case.

The painting is an interesting one because the question is whether it changes the external appearance of the lot in particular, and it may well be on a wall that's not anywhere near the lot or otherwise connected to the lot. But then I suppose you might not have that nexus, I guess, of work that is done in connection with the lot at all. So it falls outside of Section 109.

Anyway, look, a fun one that I was contemplating earlier this week when that scenario was drawn to my attention, it probably is a situation where it is better to ask for permission rather than forgiveness, especially if you're going to be investing some money in artwork. And I think that's where the owners, the residents who came a cropper with their committee about this were a bit surprised. They had actually paid for this artwork. They felt like they were doing a good thing for the community and they felt that it was a bit of a slap in the face from the committee to just remove their artwork, such is the nature of community living hey?

Reena Van Aalst: Yes, like I said, on the face of it's a good idea. Beautification it improves the value I think for everyone. The amenity, improving where you live. But I suppose sometimes it's more about how people do things that affects the reaction they receive as opposed to what they're doing.

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Amanda Farmer: Yes. I think you're right about that. Your win for this week, Reena?

Reena Van Aalst: Yes, this is another interesting one, Amanda, which I've never run into again. In strata sometimes you think you've really come across everything, but I haven't come across this one, where someone had bought an apartment in 2012 in a large scheme, and these apartments come with a car space, but also some apartments come with a storage cage. And apparently, the storage cage was mislabeled. I don't know by whom, at what time this occurred, but then for some reason, I don't know what happened, and then the building manager writes to me and says, "Where is the storage cage for this particular apartment?" I said, "Well, here's the strata plan, it should be here."

And then we realised that apparently someone else has been using it for all these years, over 10 years, and I think she's not been using one or I don't know exactly the circumstances, because the department had been rented. So I'm not sure if she's moving back in. And then she's asked me to try and help her remove the items from the storage cage, which is really not an issue that we can get involved in as such because it's obviously within the lot. And it's like me coming to someone's apartment and saying, "Get your stuff out of here. You're in the wrong apartment."

But anyway, so we did liaise with the other resident and we were able to successfully arrange for an exchange of goods between the two storage cages. But having something mislabeled, it's just really strange. I don't know how that happens, to be honest. Maybe at the time a developer did it, but apparently, the development's more than 10 years old, so I don't know if it was something that had been done in the beginning or there was ever some work done or someone's just done it maliciously. It's really hard to know sometimes how these things happen. But yes, it's just interesting. So it was good to help someone.

Amanda Farmer: Yes. Good on you for sorting that one out. This is not the first time that I have heard of this happening, interestingly. I was given the outline of a very similar situation. Ultimately, I wasn't briefed on the case. I think perhaps my fees were a bit much for the owner to contemplate, but a newer building where I believe storage spaces had been swapped. There was some kind of agreement between the original owner and the neighbour, but in that case, there was a difference in the sizes of the spaces and someone had a more valuable space.

There was no by-law, there was no change to the strata plan. This was all a bit of a handshake deal. And the new purchaser who'd come in and realised, hey, they've got my big storage space that I thought I was paying for and that my conveyancer told me, this is yours, this is on the plan, this is attached to your lot. I get there, someone else's stuff is in there, and I get told there's this deal where I was never able to access it anyway. I'm not sure how that situation rolled out. Sounds a little bit different to yours. Where the storage spaces in your situation identical?

Reena Van Aalst: Yes, I think they were the same. Yes. I don't think it was a developer thing. It was one of those big developers like but one of those big developers. So it wasn't sort of the sweetheart deal type of arrangement.

Amanda Farmer: Yes, and so I suppose it was easy to say, "Look, it's like for like. Just get your stuff out, let's swap. I'm really supposed to have that one, not this one." Whereas in the case I'm talking about, someone actually stood to lose what they felt was value that they had received or they were getting and they were going to get a smaller space, so then it can get really sticky.

Reena Van Aalst: Yes. God, I've never heard that one, Amanda. There you go. There's always something.

Amanda Farmer: Yes. Well, there may be others listening, managers, committee members, who have had this experience before or may be familiar with what Reena and I are talking about. We'd love to hear from you. Just pop a comment under this episode if you've got a similar experience to share. I think that it just goes to show how important it is when purchasers are buying these properties, to A, get good advice from their conveyancer or their strata lawyer who is used to advising on the purchase of strata properties. Get good advice about what they own on the strata plan, but then also be going to the property with that plan in hand, with that advice in hand and be pointing out, this is what I believe is mine, and does that match the plan and what I've been told? And if you're not sure, to be getting guidance from someone who is able to read a strata plan. It seems like a lot of effort. It seems

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like a bit of extra money that you might have to pay to get that additional advice, but absolutely worth it if down the track you find out that you don't actually own what you paid for.

Reena Van Aalst: Yes, no, I think in this case, Amanda, the building manager told me that the owner was shown that incorrect space by the sales agent. Sometimes the sales agents don't even have a clue, or the property managers, they'll say, "Oh, where's the storage cage for this apartment?" It's like, "Well, why don't you know, you're acting for the owner, you should know where their storage space is." But anyway...

Amanda Farmer: Yes, an obligation then for vendors, for those who are selling to make sure that they're properly briefing their agents. My win for this week comes from a small building, only about six lots, I believe it was. I was working with one of the owners towards the end of last year. The building had saved up for some significant remedial work that needed to be done to balconies. And throughout the course of the year, it was agreed at a general meeting that all balconies in the building would be remediated. That means removing the tiles, new waterproofing, new balcony tiles, older style building hadn't ever been done before. And everybody was looking forward to having new tiles that would prevent water from affecting others in the building and affecting the basement car parking, which is what had been happening.

My client came to me because she discovered that when the contracts for the work were ultimately signed towards the end of last year, her unit was excluded from the project, the only unit to be excluded. And she came across a set of committee meeting minutes where the committee had decided that her unit would not be included in the project because her balcony tiles weren't that bad. They were not in the poor condition that others were in, notwithstanding there was some evidence of water penetration and it was too expensive to include her unit for various reasons. Its location, its size, and the cost of the project had blown out. It had been more than the owners corporation had expected. And so they just decided, well, if we take this unit off the project, we're going to be saving some money and hers can be done down the track. And a key aspect of this fact scenario, it's important I say, is that my client is an elderly woman.

She's actually in her 90s, and she and her family were quite concerned that the committee had taken this position because they thought my client wouldn't do anything about it, or perhaps my client wouldn't be in the building for much longer, and therefore there was no point doing her unit at this point in time. Yes, I got eyebrows from Reena there again. Now, this all sounds terrible, right before Christmas, very distressing for my client and her family.

It is in the win basket today, because after a letter from me to the owners corporation, some discussion among the committee, some discussion with the contractor engaged to do the work in January, my client's unit is now back on the list and part of the project, which is great news.

Reena Van Aalst: That's fantastic, Amanda. I think that it's obviously one of these sort of penny wise, pound foolish decisions, because at the end of the day, if all the others are being done and you leave one out, it's going to age and deteriorate at different times and different levels, and the water penetration was still occurring. So even though it's going to be expensive, it's still cheaper to do it at this time, every year that you keep putting repairs and upgrades off, they just cost more and more in the future. So the guy's there already, the same tiles would be used, it'd be uniform.

Amanda Farmer: Absolutely. Access issues, scaffolding, all of that was all going to be there. And I agree, I think it was a very shortsighted position on the part of that committee. The owners were nervous about the costs. The committee felt that they had already gone to the owners and approved costs at a certain level. They didn't want to go back and perhaps raise a special levy or get a loan for the cost blowout. And I know many buildings are facing that at the moment with construction costs increasing rapidly, but it wasn't on, that was not the way to handle the situation. And it's not every case.

It is a few, but it's not every case that once an owners corporation's legal obligation is clarified, perhaps by a strata lawyer or by a strata manager, that the committee changes its position so promptly. But I am very pleased for my client and her family that they were able to get that result and she will have the nice new balcony tiling that she's entitled to.

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Reena Van Aalst: Yes, and I'm sure she's been probably an owner there for a long time and paid levies over the years.

Amanda Farmer: Oh yes.

Reena Van Aalst: And I think just deserved to be included in the project, especially when she does have water penetration issues.

Amanda Farmer: Yes, absolutely. Great chat, Reena. We've covered a lot today. Thank you for your time here. I'll send you out into another busy week.

Reena Van Aalst: Happy New Year again, Amanda.

Amanda Farmer: Happy New Year. Talk to you soon.

Reena Van Aalst: Bye.

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 comments section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?