

Publication Date: 21 September 2023
YSP Podcast Transcript: 379. The emails you wish you'd never sent

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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'm your host strata lawyer, Amanda Farmer, and it's my job here each week to do all that I can do to assist in demystifying the legal complexities of apartment living. Thank you for joining me.

Solo episode from me today. At the time I am recording this, I'm on holidays with my family overseas. We happen to be in Ireland at the moment. I was planning to publish something a little different for the podcast this week, but then I stumbled across a very recent decision of our New South Wales District Court. I was doing some research for a client of my legal practice, and as so often happens in the course of that research, I uncovered a case that I hadn't seen before, had to read through it and thought, wow, this one needs to be brought to your attention. Whether you are a strata manager, a committee member, an owner, there's something in this one for everyone.

The case is Read and Gittman, New South Wales District Court Case Decision, published on the 24th of August, 2023. There is a link to the written judgment for you to go over and have a read of. You'll find that on our website in the show notes for this episode, yourstrataproperty.com.au/podcasts. Just have a look for this episode number, click on through, and you'll find not just the show notes with the link to the case, but also your access to the transcript of today's episode. I know many of you prefer to read rather than listen and or want to share the episode with your own strata manager, with your fellow committee members, with your friends, with your neighbours, the transcript is often a good way of sharing all the goodness that we have here on the podcast.

So today we're having a look at the Read and Gittman case. I'm going to summarize the facts of the case for you, let you know the decision that was made, and share my top three key takeaways from this case. If nothing else, these are the three things that I hope will stick with you that you'll remember should you ever find yourself in a similar situation to the parties in this case.

So, to the facts, the plaintiff, Ms. Read, commenced proceedings against an Owners Corporation's strata manager, Mr. Gittman. In this case, Ms. Read alleged that Mr. Gittman had defamed her in three emails that he sent to all lot owners in a 12-unit strata building in Randwick in Sydney's East. He also sent the emails to property managers who were listed on the strata role and a tenant.

Ms. Read was not an owner in the building. It was actually her mother who owned the unit, but Ms. Read had been a committee member, a very hands-on committee member for many years. In the judgment, it said that she assisted with maintenance and building issues for her mother and for other residents. She is a retired lady but is said to have had a distinguished career as a lecturer in physics.

In defamation cases, it is often important to have an understanding of the plaintiff's occupation. The strata manager was appointed by the building in March 2019. They were a new strata manager taking over from a former agent. At the same meeting, the strata manager was appointed. Ms. Read was elected to the strata committee and was actually elected to all three office bearer positions, chairperson, secretary and treasurer.

So very much a hands-on committee member. Some of you may relate. Owners were clearly comfortable handing over all of these functions to Ms. Read. Shortly after the strata manager's appointment, we're told in the judgment, he made a series of errors much to the frustration of Ms. Read, especially. As you'll recall, he was a newly appointed strata manager and no doubt hopes were high that this agent would be an improvement on the previous.

What kinds of errors were made? The strata manager paid a plumber's invoice twice, had the financial records out of balance, entered into an insurance contract without consultation, put money in the wrong accounts, and turned a blind eye to the fact that there was an unlicensed handyman carrying out renovation work on behalf of a lot owner when the type of work that was carried out required a tradesperson who was licensed and insured.

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Those are the sins of the strata manager that the court found were made out. For all of these reasons, the relationship between Ms. Read and the strata manager deteriorated and just prior to the 2020 AGM, the strata manager sent three emails to everyone who had an email address listed on the strata roll. So that included lot owners, property managers, those who were looking after investment properties for owners and also a tenant. Those were the three emails that Ms. Read ultimately complained about to the court.

You can read the content of these emails in the judgment. I won't get into the detail here, but the court generally describes the emails as communications in which the strata manager alleges. Ms. Read had lied that she'd made false accusations of criminal conduct against the strata manager and that she was incompetent in the conduct of her own obligations to the owners corporation.

That was the thrust of the emails. Ms. Read twice sought an apology from the strata manager before commencing court proceedings. No response was received to her requests and court proceedings were commenced in April, 2021. Now, in a judgment that spans over 330 paragraphs, it is a relatively long one. The court finds that each of the three emails were defamatory and that the strata manager was not protected by the defence of qualified privilege.

Now, I want to say a little bit here about "qualified privilege" because it comes up a bit in these defamation cases involving strata communities. What is the defence of qualified privilege? Well, it allows a communication that would otherwise be defamatory to legally be made if the parties are in a certain type of relationship. A relationship where the person who is making the otherwise defamatory statement has a legal, a moral, or a social duty to make the statement and the people receiving the statement have an interest in hearing that information.

So, someone who is giving a reference for a job applicant may be protected by the defence of qualified privilege should they make a statement that would otherwise be defamatory. A person who is answering enquiries for the police communications between teachers and parents. Interestingly, are the types of relationships protected by this defence? The relationship of employer and employee can fall into this category. So, in this case, the strata manager said that he was only communicating in these three emails to the owners and the property managers of the Strata Plan, the type of information that was relevant to related to the management and administration of the Strata plan.

These were emails that were sent out ahead of an AGM and the strata manager said, "This is the kind of information that I can and perhaps indeed should, in my role as a strata managing agent, circulate, distribute to owners so that they can make an informed decision at the upcoming AGM. A decision about whether this particular strata committee member is properly representing their interests is carrying out her functions with due diligence and in good faith."

On that basis, the strata manager attempted to argue that even if the emails were defamatory, he was protected by this defence of qualified privilege.

But here's the kicker, the defence of qualified privilege cannot be successful if it can be proven by a plaintiff that the defamatory communication was motivated by malice. Now, in this case, the strata manager did make out that the emails were sent on an occasion attracting qualified privilege, but the defence was not successful in this case because the court also found that the defamation was motivated by malice.

How was Malice made out in this case? Well, it was found that the strata manager knew when he sent out these emails that what he was saying in the emails was false. For example, you'll remember that one of the issues of dispute between Ms. Read and the manager was that the manager had double-paid a plumber's invoice, and in one of the emails speaking to this point, the strata manager accused the plumber of issuing their invoice twice for the same job. The strata manager said that he then spent six months chasing a refund.

When the court was taken to the documents about this particular issue, it was shown that the strata manager's position on this plumber's invoice was directly contradicted by the correspondence that he had in his file and by statements that were made to him by both Ms. Read and the relevant tradesmen who were involved. It was quite clear by looking at the file that only one invoice was

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ever issued by the plumber. It was paid four days later and there was never a six-month delay in chasing any refund.

When the double payment was finally identified, it was refunded by the plumber in less than a month. So not only were the statements false, the court found they were actually statements made for an improper purpose. That purpose being to have Ms. Read removed from the strata committee and to put blame on her to cover up the strata manager's own mistakes. And that is why the court found that the defamation was motivated by malice and therefore the defence of qualified privilege was not available. What was the ultimate decision?

Well, the court awarded \$35,000 in damages to the plaintiff, Ms. Read, the court found that she was clearly profoundly affected by the relevant events. She suffered a range of health issues arising from the emails. There wasn't just one offensive email. As we've seen in past defamation cases involving strata communities, there were three emails that was found to increase the seriousness of the conduct.

There was evidence that other owners responded adversely to Ms. Read after they had received the emails. They were unfriendly and there was evidence that her relationships with other owners had been detrimentally impacted. However, at the same time, the court recognised the limited extent of the publication. It wasn't something that appeared on the front page of the Sydney Morning Herald. It was an email sent to a closed group of people all with a common interest.

The court recognised that the email was sent in a certain context in the lead up to an AGM being the type of situation where conduct like this, these kinds of emails may be likely or more likely than not to be sent. For those reasons, the court said damages should be at the bottom of the range. So, a damages award of \$35,000 is the bottom of the range of damages that may be awarded in a defamation case. It was an amount sufficient to console the plaintiff, said the court, but otherwise at the bottom end of damages that are appropriate.

So those are the facts and the result in this case. What are my three key points that I want to make sure you take away with you today?

Well, firstly, I want to recognize the fact that Ms. Read, the plaintiff in this case was not a public figure. She was not a celebrity. She was not someone who you might immediately think has a reputation that could be damaged by emails of this type sent to a small group of owners all with a similar interest. She had been a respected university lecturer, but she was retired. None of that was a reason to deny her claim.

The court found that everyone has a reputation, good or bad, no matter how unimportant a plaintiff may seem. And the mere fact that these emails were sent in the context of a neighbourhood dispute, those were the court's words, doesn't mean that the damage done to Ms. Read's reputation was in any way trifling. You don't have to be a celebrity to have a reputation worth protecting or a reputation capable of damage.

A publication doesn't have to be on the front page of the Sydney Morning Herald to be considered public enough to ground a successful defamation action. And remember that although the defence of qualified privilege was available and was made out in this case, it did not succeed because the strata manager was found to have been motivated by malice and an improper purpose her honour, judge Gibson, who decided this case in the district court actually made this comment, "Neighbourliness is a matter of moment in Australian culture and its qualities highly prized as the name of Australia's most famous television soap opera suggests."

I think you'll all know which soap opera Judge Gibson is referring to there. So just because we might be in strata communities, strata managers, communicating to a unique specific group of people in the context of a neighbourhood dispute doesn't mean that there is no risk and communication will be found to be defamatory. Caution at all times is the best policy.

Second key takeaway. It is not just what you're saying in an email, it is the way you are saying it or perhaps more accurately the way you are typing it. In this case, the strata manager sent emails that included bold-type, underlined, and capitalized font. All

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owners were BCC'd, that's Blind Carbon Copied on the email. And each email had a heading in bold caps underlined confirming the fact that everyone was BCC'd. It was found that the bold type was arresting. It was designed to get attention. It was designed to convey the seriousness and the importance of this email. "Why are we being BCC'd?" owners likely thought, "Why do I have an email in my inbox with a dramatic headline?"

The court found that an ordinary reasonable person receiving such an email would understand immediately that this must be serious indeed vital information, encouraging the reader to read it closely and to expect to hear information of concern. So, it wasn't just what was said in the email, it was the way that it was said, the format, the font that was used. If you find yourself hitting that caps lock key, underlining, bold, my suggestion to you is stop. Take a breath, have a think about why you're doing that. Is that necessary to get your point across? Is this one of those emails that needs to be saved to the drafts folder for 24 hours or so, one that you might need to check in with a colleague about, have them have a review of it before you hit that send button. I'd suggest it's a rare case where the content of an email is assisted by that kind of emphasis, especially in a situation like this that's ripe for conflict.

And finally, the court had something to say about the specific duties of a strata manager. If you're reading the case, I want to make sure that you don't overlook this part of the decision. I think it's one that we might see wheeled out in future cases.

You'll remember I said one of the issues in dispute between Ms. Read and the strata manager was that the manager was turning a blind eye - court's words, turning a blind eye to the fact that there was an unlicensed tradesperson carrying out major work on a lot owners property. Part of a renovation that was being carried out by a lot owner, that Tradesperson should have been licensed, should have been insured in order to meet the requirements of the Home Building Act.

Ms. Read discovered that this person was not so licensed and insured, let the strata manager know about it and nothing was done. Remember that Ms. Read holds all office bearer positions on the strata committee. Communications actually broke down between Ms. Read and the strata manager, and that's part of the reason nothing was done about this complaint.

The court asked the question, well, what exactly were the strata manager's duties and obligations to take steps to check the license details of tradespeople? And the court found that the strata manager had obligations to the owners corporation to ensure that major work being carried out at the property was being carried out by licensed builders. And it was certainly the strata manager's job once he was aware that the so-called builder was unlicensed to make sure that the work stopped, the strata manager was made aware of this by Ms. Read failed to do anything, and the court has found that that was a breach of one of the strata manager's duties to the Owners Corporation.

Now, I'm not sure that a finding in such clear terms on that particular issue has been made by our courts previously. I bear in mind that this is not a situation where a strata manager may have pointed out that unlicensed or uninsured work is being carried out on the property and the strata committee has instructed that strata manager not to do anything about it.

If that was the scenario, then the court's comments may have been different. This is a scenario where a committee member was complaining to a strata manager about unlicensed and uninsured work, and the strata manager simply did nothing, indeed stopped communicating with the committee member at all.

The court's judgment records, the strata manager as being dismissive of the plaintiff, identifying her as troublesome and simply saying that he refused to take any further instructions from her. Clearly, that relationship had completely broken down at the 2020 AGM, which took place after these three defamatory emails were sent, the strata manager gave the meeting attendees an ultimatum. He said, either Ms. Read goes or I do. If you re-elect Ms. Reed to the committee, then I'm going to resign. The transcript of the meeting was in evidence and the court found it to be painful reading.

Apparently, the strata manager repeatedly butted in, cut-off Ms. Read - muted her. In fact, the meeting was an electronic meeting and focused his efforts entirely on attempting to prevent her re-election to the strata committee.

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Now, this is something that I do cover in the education that I deliver for our strata managers. I'm often using examples of situations where managers might find committee members, owners, residents, somewhat difficult to communicate with, those who may be seen to be serial complainers, perhaps those who send a lot of emails, those who are constantly requesting, requiring the strata manager to rectify something, to respond, to explain.

Often those people are treated as troublemakers and often too often I think those people are ignored. The guidance that I give to strata managers who are trying to deal more helpfully with those types of situations is that ignoring these owners, ignoring these communications is never the answer. Someone who is seen as a troublemaker is often coming from a place of truth, of fact. Their complaints are based in something. Doing the work of identifying the basis for that complaint and attempting to solve it should be the first focus. And otherwise, where communications are unnecessarily repetitive, abusive, even unhelpful, pointing that out and making very clear your standards for future communication is important, and that's the path to walk. Ignoring someone, refusing to respond, attempting to have them removed from a committee, laying down ultimatums is never the way to go. And what we see here in this case is what a potential consequence can be for a strata manager who chooses that course.

So that's the Read and Gittman case. It's less than a month old at the time this episode is going to air. Do check it out. I've said it's a long one, but it is well worth the read. There are a few layers in there. If nothing else, have a read of those emails, those three emails that were sent by the strata manager, and just get a feel for the kind of language that the court found to be unacceptable, the kind of statements that were found to be defamatory.

And if you do as a time-poor, often stressed, I know, burdened strata manager, find yourself falling into that dangerous place of authoring such an email. Remember this case, this chat, this podcast episode, my words, stop reconsider, save it to drafts, have a chat to a colleague, whatever it takes to avoid the time, trouble, expense, and heartache of these types of court proceedings for everyone involved.

That's a wrap on this week's podcast episode. Thank you for joining me. I'll look forward to catching you all next time. Bye for now.

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