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## **YSP Podcast Transcript: 453 - Think NCAT Will Solve It? Listen to This First**

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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. I'm your host, strata lawyer Amanda Farmer. And today we are going to have a bit of a heart-to-heart about something that comes up a lot in my world as a lawyer serving strata owners, and that is litigation, or making the decision to commence litigation to file that application in your local Tribunal.

Whether that's NCAT, VCAT, ACAT, QCAT, whatever acronym the Tribunal might enjoy in your jurisdiction. We're going to talk about that decision. To kick things off now. It might sound strange to you because I am a lawyer, but this is something I usually do not recommend to my clients, certainly don't recommend it to my friends and family. Commencing litigation if there is another option that you haven't explored before going to the Tribunal, my guidance, my advice when I'm engaged to give legal advice is that that option should be explored.

Do not rush to file that application, even if it feels like it might be the only option and you feel like you're at the end of your tether and all you want is someone in a position of authority to sort it out. In my experience, most parties to litigation do not walk away at the end of the day feeling that everything has been nice and neatly sorted out.

In fact, they usually feel quite the opposite. So before you fill in that application form and lodge it, I am inviting you to tune in and consider these five reasons that I'm going to share with you. Five reasons why you might want to think twice about commencing strata litigation. Let's dive in.

Reason number one, it's expensive. Even if you win, taking a strata dispute to the Tribunal can cost you a lot, both in money and in time. Some of you might say insanity as well. We'll start with the obvious. The legal fees. Yes, we are supposed to have consumer-friendly, and lawyer-free Tribunals in each jurisdiction, but that is not always how it plays out in real life.

The other side might get a lawyer, so you might feel the pressure to get one too. They think they need a lawyer. I thought I'd be okay, but I don't really want to stand up at a hearing on my own when the other side is represented by a professional who knows what they're doing.

The other side might get a barrister. In addition to having a solicitor, you might decide you need to get a barrister too. I have been involved in a case where the owners corporation had a couple of lawyers and a senior counsel so, so my client thought, well, we better get a senior counsel as well, costs be damned. We don't want to look like we're on the back foot.

You might have a case that does actually involve a complicated legal issue where you need legal expertise. That's sometimes the reason lawyers get involved in strata litigation. There could be a lot of money on the line. You might be suing the owners corporation for years of lost rent, for example. That could add up to hundreds of thousands of dollars worth. Getting a lawyer, you think? Invest in some legal advice.

We strata lawyers do a lot of work in the Tribunal. So even though the preference of the Tribunal is for people to self-represent, and many of them do and do so successfully, the reality is that permission or leave, as the Tribunal calls it, is often granted to lawyers to appear on behalf of parties at the Tribunal. Something really important to bear in mind when an owners corporation engages lawyers when they're involved in litigation with a lot owner.

Even if you are the lot owner who is in dispute with the owners corporation, you're the lot owner who started the proceedings, you're the lot owner who's defending the proceedings. You are going to be contributing to the owners corporation's legal fees while the case is running. So the money that pays the lawyer's bills for the owners corporation is coming from the owners corporation's bank account. You have paid your levies, you've paid money into that bank account.

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Maybe there's even been a special levy raised specifically to pay the lawyer's costs. You have to pay that levy, you do have to contribute to that. So essentially you are funding the case against you, at least for a period of time. In New South Wales, the Strata Schemes Management Act does provide that where a lot owner is successful in litigation with an owners corporation, they cannot be required to contribute to the owners corporation's legal fees.

But the way that works out in practise is that it essentially gets sorted out at the conclusion of the proceedings. We need to know first of all that the lot owner has been successful. Once that's known, if the owners corporation has had legal fees, then the owners corporation needs to work out what proportion of those fees were paid by the successful lot owner. And then the lot owner and the owners corporation, in my experience, usually come to an agreement as to how that proportion will be refunded, will be credited, will be paid back to the lot owner.

But that mathematical exercise all happens at the end. So lot owners in litigation with your owners corporations, those owners corporations will where they are shelling out legal fees for lawyers, lot owners, you are contributing to the costs of the case against you. That is something to bear in mind if you're thinking about diving into the deep end of litigation. And please do be aware of the potential for legal costs to be awarded against you if the decision doesn't go your way.

It's one of the most painful situations to be in. In litigation, you have paid your lawyer, you have sadly lost the case and a cost order has been made against you. So you are also having to contribute to the costs of the other side. Ouch! Yes, we do hear that our Tribunals are no-cost jurisdictions. Cost orders are not a given. But despite that, we do see cost orders made quite regularly.

There is provision for a Tribunal to exercise its discretion to award costs. Often when there are lawyers involved on both sides, costs may be awarded. So you're definitely not immune or protected from those kinds of orders if you are in the Tribunal. Even if lawyers are not engaged, there are still going to be fees costs involved in litigation. There are application and filing fees. There may be expert reports that you have to have prepared.

These reports I've seen run to tens of thousands of dollars for specialist remedial engineers to inspect a property, to prepare a report to then turn up, be available at the hearing to give evidence. They do get very expensive. Your time has a price tag, especially if you own a business and you're taking time out to run this case, or you need to take time off work, time away from your family while this case takes over your life.

That all comes at a cost. And here's the kicker. Even if you do win and you get a cost order in your favour for your own legal costs, you are not going to get back everything you spent. That is just not the way cost orders work. They do not reimburse you dollar for dollar. Anyone who's been involved in that process feeling pretty good after a victory, then getting the cost order, feeling even better, then realising that after a process of negotiation or even costs assessment, they end up only getting maybe 60%, 70% of their actual costs reimbursed to them.

So they are still out of pocket. These are all things to be aware of. They are things. I'm talking to my cl when they come to me saying, "Amanda, I'm ready to file that application." Before you lodge that application, ask yourself, "Do I have the financial wherewithal for this? Is it worth the financial pressure? Is it worth the risk?" That's a big reason to rethink Litigation. Another reason I say to avoid the Tribunal if you can.

It is a process that is usually very slow and very draining. Tribunal proceedings are not quick fixes. If you want a quick fix, you better go take matters into your own hands. Tribunal is not going to deliver a quick fix for you. Litigation takes time, months at least, sometimes even years. You will face delays, some of them unexpected, unanticipated. There will be requests for adjournment. Hearings will take months to be listed.

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You'll be drowning under a mountain of paperwork. You'll have the stress of preparing for these hearings. Unless you are someone who is very commercial, or maybe very used to conflict, disputes, even legal proceedings, this is going to be emotionally draining for you. Have a think. Have a hard think about whether that energy could be better spent on finding a solution to the problem outside of the Tribunal process.

And of course, while you're waiting for the litigation to conclude, you're waiting for the other side to file their material, your filing material in reply. You're sitting back and waiting for the Tribunal to list the case for hearing, which in my experience is taking longer and longer these days. While you are waiting, your situation is getting worse. The building perhaps is getting worse. The leaking roof is still leaking.

The broken lift is still broken. Your mental health is probably not getting any better. Legal proceedings is not an overnight fix. You're not going to go before the Tribunal member at the very first listing of the case and have the Tribunal member look at your application and say from on high, "Yes, applicant, you are right. Respondent is wrong. Case closed." That is not how it works. This is a months-long process, if not years-long in the most complex of cases.

So be ready. Just be ready to set aside that time and that emotional energy. The third reason you might want to avoid legal proceedings, you might not get the outcome you want. Here's the harsh truth. The Tribunal doesn't wave magic wands. And yes, both sides think they have the best or better argument. Otherwise, you wouldn't be there. Plenty of great arguments I've wanted to take to the Tribunal in my years of practise, but those cases have settled before we got anywhere near litigation.

Why? Because I had a great argument and the other side knew it. So of course we were never going to litigate that case. If you are litigating, it is often because there is merit on both sides. Both sides have a good argument. It's a tough one. So you are certainly not guaranteed a win. Bear in mind that while the Tribunal can make orders to Resolve a dispute.

Those orders might not give you the outcome you are hoping for. The decision might not fully address the problem. The Tribunal might not even have the jurisdiction to deliver exactly what it is you want. Remember I said the Tribunal doesn't have that magic wand. You might, for example, be out of time to make your claim for damages. The Tribunal's hands are tied there. If you haven't met relevant time frames, it can't help you.

You might want your neighbour to pay you compensation because of all the loud parties they're having to send you an apology letter for printing something defamatory about you. That is not going to happen in the Tribunal. You're not going to get those orders from the Tribunal. Tribunal orders are very different from reaching an agreement. And we're going to talk a little bit about that later. Where you're reaching an agreement, you have the freedom to set your own terms and to solve the specific problem you are faced with.

When you're before the Tribunal, you are bound by the legislation. Both the strata legislation and the legislation that dictates what it is the Tribunal can and can't do. Its procedural rules and its jurisdictional boundaries. And even if the Tribunal sides with you, gives you the orders that you require, enforcing those orders can be another uphill battle. And you still haven't got the outcome that you wanted. I've been working with an owner now who is about to go before the Tribunal for a third time.

First time around, self-represented, that owner was successful in getting orders that the owners corporation fix the common property concrete slab in her backyard in separate proceedings. She was also successful before the appeal panel in invalidating some by-laws. But she's now going back a third time because the owners corporation still hasn't complied with the very first order to fix her backyard. I'm not suggesting she necessarily has a choice if she wants to get her yard fixed in this situation.

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But this is someone who has got the outcome she wanted on a couple of occasions. And she's still in a situation where she is having to put up with defective common property. This comes as a surprise to people who go to the Tribunal. Assuming that the Tribunal is going to resolve their cases fully and finally put a full stop underline under it, they will never have to go back.

That is not always the case. And it's important to realise that going in, you might not get the outcome you want. Even if you do get the outcome you want, it might not be the end of this particular battle.

Reason number four for avoiding the Tribunal. It can worsen the conflict. Litigation is an adversarial process. It is us versus them. And once you go down that road, relationships can fracture. This is not a commercial or business dispute. This is not you suing a faceless company because they sold you a defective item. There are real people involved and these real people are probably your neighbours. They may even be people who are or maybe now, by the time you get to the Tribunal, used to be your friends. And in these situations, I always make sure my clients know things are going to get a lot worse before they get better.

If you've started the proceedings and you're an owner, you are now public enemy number one in your building. I know some of you will relate to this. You are the reason all other owners are now facing additional management fees and maybe even legal fees. Your legal proceedings are on the agenda of every meeting. Your fellow owners are usually only getting the committee's side of the story. And you can bet that's not a story that's going to be favourable to you.

So the neighbour who used to smile at you in the lift, now they won't get in the lift if you're in it. You don't get the invites to Friday night drinks anymore. You've been booted off the committee because you are now the problem owner. If you're an owners corporation that has commenced proceedings against a lot owner committee members, you will need to justify the cost. Owners are going to want to know why their money isn't better spent elsewhere.

Do we really need to do this? What if we just let it go? Is this such a big deal? If the proceedings are complicated from a legal perspective, they will need to be explained to owners. The lawyer's advice will need to be translated and relayed in a way that's understandable, but still doesn't waive your legal professional privilege. These conflicts don't magically disappear after a Tribunal decision is handed down.

Especially if you are that single owner party to the proceedings and you are successful. If the decision is favourable to you. If the owners corporation has to pay a cost order, that's your fault. It is definitely not natural for humans to admit defeat, to reflect on their actions, to understand why this happened and to take responsibility instead. People get angry and all they can see is that they've ended up with this outcome.

Perhaps having to do some expensive work, perhaps having to pay legal costs as well. Because you decided to take action against the owners corporation. How dare you and owners think that once they have the decision, everyone will see how badly behaved the committee really has been, and they will have a radical transformation. They will start to understand where I've been coming from. They will support me. That hasn't been my experience.

In all cases, people can be loyal to those they have elected to serve them. And as I said, we do find it hard to admit when we're wrong and find reasons to justify our behaviour, however bad the Tribunal might have said it was. So, even with a win, you are probably not going to get an apology. And I know, because I've worked with many of you who have asked me, that this is what you really want.

You're not going to get that kind of order from a Tribunal. So if you do feel you've got no other option but to proceed to the Tribunal, please do know that it is likely to get worse before it gets better. Be ready for that. And finally, reason number five that I'm sharing today for why I think you should. If you can stay away from litigation, there may be a simpler solution that costs less and works better.

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Now, I know it doesn't always feel like it, but the Tribunal is meant to be a last resort. Before you get to that point, there are other tools in the toolkit that I want to make sure you are aware of. Mediation. Mediation is mandatory in most cases anyway. Before the Tribunal will accept your application, you have to have attempted some form of mediation. And the beauty of mediation is that it is collaborative, it is not adversarial, or at least that's how it is intended to be.

You are working together with the other side to find a solution. You're not fighting it out in a courtroom-style setting with all of the rules of procedure that go with that. You've got the opportunity to speak to each other like human beings, like the friends that maybe you used to be. Often, mediation can lead to some creative solutions that you might not have considered, and the types of creative solutions that the Tribunal cannot give you.

So you might agree on a payment plan for levies or a time frame for fixing defects. Maybe you'll agree to take a phased approach to the very expensive Rectification Works Programme. Whereas if you went before the Tribunal, the Tribunal would simply say everything needs to be done by a certain date, otherwise you'll be in breach of orders. You don't have those restrictions on you in mediation. You can come up with a solution that suits both of you.

Maybe there needs to be a change to a by-law so that it works better for everyone. These are outcomes that are certainly faster, cheaper and less stressful than a Tribunal order. Now, I was on a phone call to a strata manager only this morning, setting out some negotiated terms that my client would be happy to accept to resolve a particular dispute and avoid going back to the Tribunal.

And the terms I was laying out are terms that the Tribunal could not otherwise have considered. Tribunal would not have jurisdiction to resolve the dispute in the way that I was suggesting, with instructions to the strata manager, it could be resolved. This was a resolution that would be a win-win for my client and the owners corporation and hopefully we'll get to that sensible resolution. But if this particular case ends up before the Tribunal, it is just not going to be a solution that the Tribunal has the power to order.

So these alternative processes can lead to better outcomes than a Tribunal could ever get to, and it helps preserve relationships within the building. Remember, you still probably have to live next door to these people. So having an agreed outcome, rather than a mandated forced outcome from the Tribunal, which could come with all sorts of pain, suffering, cost orders, delay, emotional stress, that's got to be a better result.

Sometimes it is about stepping back, cooling down, trying a different approach, an approach that recognises and prioritises the relationships that you have, rather than having a winner-takes-all mentality. Too often I see these disputes blow into something major after a simple misunderstanding, an unclear communication, a lack of information, a lack of transparency in a community.

So before going legal, ask, "Have I exhausted every informal avenue? Have I made a phone call, perhaps to the strata manager, to the committee members? Have I inspected the books and records and found some answers in there? Have I tried mediation? Have I even invited my neighbour out for a coffee, or invited them over, or knocked on their door and had a conversation to perhaps understand what's going on for them?"

Sometimes the simplest solutions are the best and they definitely avoid the emotional and financial strain of litigation. So those are my five reasons why you might not want to take your strata dispute to the Tribunal. Number one, it's expensive even if you win. Number two, the process is slow and draining. Number three, you might not get the outcome you want. Number four, litigation can worsen the conflict. And number five, there are better, simpler solutions out there that cost less. Now, does this all mean that you should never go to the Tribunal? Of course not. If that was the case, I wouldn't have a legal practise.

I wouldn't have much of one anyway. There are certainly occasions when it is appropriate, it is necessary, in fact, that legal proceedings be commenced. In our next episode, I'm going to share with you 5 reasons why I think you must go to the Tribunal in certain situations. But for today, I hope I've given you some food for thought before you rush off to file that application. Or at least if you feel that you have no choice and you intend to do that anyway, you might have a bit of an idea of what you're in for.

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Remember, sometimes the best solution is the one that doesn't end up in front of a Tribunal member. That's certainly been my experience in my 20-plus years of practise in this area. Thank you for tuning in. I'll be sure to catch up with you in our next episode. Bye for now.

**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 [yourstrataproperty.com.au](http://yourstrataproperty.com.au).