IN THE MATTER of the *Body Corporate and Community Management Act 1997* ("the Act")

and

IN THE MATTER of a Specialist Adjudication

BETWEEN:

Mr Graham and Mrs May Anderson and others

("The Applicants")

and

The Body Corporate for Cooloola Court

("The Respondent")

ADJUDICATORS ORDER

Pursuant to appointment by the Commissioner for Body Corporate and Community Management dated 5 May 2005.

DELIVERED BY:

WARREN D FISCHER

Civil Engineer, Graded Arbitrator, Registered Adjudicator and Accredited Mediator
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IN THE MATTER of a Specialist Adjudication

MR GRAHAM AND MRS MAY ANDERSON AND OTHERS v
BODY CORPORATE FOR COOLOOLA COURT

ORDER OF WARREN FISCHER
Specialist Adjudicator

CONTENTS

Adjudication regarding:

Adjustment of Contribution Lot Entitlement Schedule

View and Hearing Date:

10 June 2005

Delivered as an adjudicators order:

To the Commissioner for Body Corporate and Community Management on the Twentieth day of June 2005.

ORDER

I, Warren Fischer, appointed specialist adjudicator, order as follows:

The contribution schedule lot entitlement for all lots be adjusted to be equal, as is just and equitable in the circumstances. The contribution schedule of lot entitlements is to be adjusted so that each lot holds one (1) entitlement and the aggregate of the schedule is forty-five (45).

That in accordance with the provisions of Section 48(9) of the Act the body corporate as quickly as practicable lodge a request to record a new community management statement reflecting the adjustment ordered.

For the avoidance of doubt, pursuant to the provisions of Section 284 of the Act, this Order is to have the effect as a resolution without dissent.

That the Applicant's are responsible for the cost of the adjudication.

Signed

Warren Fischer
Specialist Adjudicator
20 June 2005

Witnessed

JE Fletcher

PARTIES AND REPRESENTATIVES

Parties	Representatives
Mr Graham and Mrs May Anderson Registered Owner of Lot 46 ("Anderson") First Applicant	**Self-represented and assisted by Ms Kaylene Arkcoll BSc QS AAIQS AIMM MAppLaw of Leary & Partners Pty Ltd ("Arkcoll") Expert**
Mr Keith and Mrs Rita Young Registered Owner of Lot 12 ("Young") Second Applicant	**Un-represented**
Ms Karen Ogborne Registered Owner of Lot 15 ("Ogborne") Third Applicant	**Un-represented**
The Body Corporate for Cooloola Court Community Titles Scheme 19626 Respondent	**Represented by Mr Colin Richardson Body Corporate Chairman ("Richardson") Ms Barbara Williams Body Corporate Secretary ("Williams") Ms Pam Lenton Body Corporate Manager ("Lenton")**

RECITAL OF RELEVANT EVENTS LEADING TO THE DISPUTE

1. The scheme land consists of the common property of Cooloola Court Community Titles Scheme 19626 ("the Scheme") and lots 1 to 25 on Group Titles Plan No. 3580 and lots 27 to 46 on Group Titles Plan No. 3974. The GTP No. 3974 was registered by the Registrar of Titles on 3 March 1994 and replaced lot 26 of GTP No. 3580 with lots 27 to 46. There are 45 lots in total numbered 1 to 46 but excluding 26.

2. The Scheme is located at 7A Copernicus Street, Wynnum.

3. The Scheme common areas are effectively restricted to roadways, lawns and gardens with little in the way of communal facilities. There are forty five (45) lots in the Scheme, all residential, the lots titled area varies from 161 sqm to 504 sqm. No lots have any exclusive use rights over common areas. The party submissions suggest that there are nineteen (19) two bedroom and twenty-six (26) three bedroom party wall townhouses. While the view confirmed for me that the scheme is in essence party wall townhouses, I have not been provided with any information to confirm whether they are two or three bedroom.

4. The current Community Management Statement was executed on 23 October 2001.

5. The contribution and interest lot entitlement schedules contained in the current Community Management Statement are identical and provide variations in lot entitlements between 5 (lots 6, 8, 9, 17, 22, 28 and 43) and 11 (lots 15 and 46) with an aggregate of 300.

6. An extraordinary general meeting of the Body Corporate for the Scheme was held on 12 January 2005. At that meeting a motion, proposed by Anderson, was considered to record a new Community Management Statement that altered the contribution lot entitlement schedule such that all contribution lot entitlements were equal. That motion failed.

7. Section 227(1)(b) of the Act provides:

   "227 Meaning of dispute

   (1) A dispute is a dispute between—

   (b) the body corporate for a community titles scheme and the owner or occupier of a lot included in the scheme"

8. The failure of the motion at the extraordinary general meeting of the Body Corporate for the Scheme, held on 12 January 2005, gives rise to a dispute as defined in the Act between Anderson and the Body Corporate for the Scheme.

9. On 11 February 2005 the Applicants lodged a Dispute Resolution Application ("the Application") for the adjustment of the contribution lot entitlement schedule for the Scheme with the Commissioner for Body Corporate and Community Management ("The Commissioner") under the provisions of Chapter 6 of the Act.

10. The Applicants are the registered owners of the Scheme lots 12, 15 and 46.

11. Section 238(1) of the Act provides:

"238 Who may make an application

(1) A person, including, if appropriate, the body corporate for a community titles scheme, may make an application if the person is a party to, or is directly concerned with, a dispute to which this chapter applies."

12. Pursuant to Section 238 of the Act, Anderson is therefore entitled to make an application.

13. Section 48(1)(b) of the Act provides:

"48 Adjustment of lot entitlement schedule

(1) The owner of a lot in a community titles scheme may apply **[my underlining]** *—*

(b) under chapter 6, for an order of a specialist adjudicator for the adjustment of a lot entitlement schedule."

14. Pursuant to Section 48(1)(b), any owner in a scheme is entitled to make an application for the adjustment of a lot entitlement schedule. I consider that the reference in Section 48(1)(b) to "*under chapter 6*" is only a reference to the provisions set out in that chapter as to the method and form of application and procedures to be adopted by the Commissioner and Specialist Adjudicator. The right to make an application for the adjustment of a lot entitlement schedule is provided by Section 48(1). On that basis Ogborne and Young, who are both owners in the scheme, are entitled to be joined as applicants in the Application.

15. This gave rise to the issue which I was required to consider, namely, *"an adjustment of the Cooloola Court Contribution Lot Entitlement Schedule to make these charges equal as we believe there is no apparent reason for them not to be equal."*

REFERENCE TO SPECIALIST ADJUDICATION

16. Section 48(1)(b) of the Act provides:

"48 Adjustment of lot entitlement schedule

(1) The owner of a lot in a community titles scheme may apply—

(b) under chapter 6, for an order of a specialist adjudicator for the adjustment of a lot entitlement schedule."

17. Section 265(1)(c) of the Act provides:

"265 Specialist adjudication of particular disputes

(1) The adjudication of a dispute must be specialist adjudication if—

(c) another provision of this Act requires the adjudication to be specialist adjudication."

18. Section 239(2)(d) of the Act provides:

"239 How to make an application

(2) The approved form for the application must provide for each of the following matters to be stated in the form—

(d) for an order about a dispute mentioned in section 265—the name and address of 1 or more persons—

(i) considered by the applicant as having the appropriate qualifications, experience or standing for acting as a specialist adjudicator for the application; and

(ii) nominated by the applicant for appointment as the specialist adjudicator."

19. The Application, lodged by the Applicants on 11 February 2005, provided my name and address nominating me for appointment as the specialist adjudicator.

20. Section 265(2) of the Act provides:

"265 Specialist adjudication of particular disputes

(2) The specialist adjudicator must be the person chosen by the commissioner, and need not be a person nominated by a party to the application."

21. I was nominated as specialist adjudicator by the Commissioner in a letter, copied to the parties, dated 5 May 2005.

PROCEDURAL STEPS

22. On 23 March 2005, the Commissioner invited all lot owners in the Scheme to make submissions on the Application. The Commissioner ultimately extended the closing date for such submissions until 19 April 2005.

23. Twenty Two (22) submissions were provided in response to the Commissioner's invitation.

24. Section 48(2)(a) of the Act provides:

> *"48 Adjustment of lot entitlement schedule*
>
> *(2) Despite any other law or statutory instrument—*
>
> *(a) the respondent for an application mentioned in subsection (1) is the body corporate"*

25. By submission, dated 10 April 2005, the Body Corporate Committee advised that *"(i)n the circumstances it is not considered appropriate for the committee to respond either for or against the application"*.

26. Section 48(2)(b) of the Act provides:

> *"48 Adjustment of lot entitlement schedule*
>
> *(2) Despite any other law or statutory instrument—*
>
> *(b) at the election of another owner of a lot in the scheme, the other owner may be joined as a respondent for the application"*

27. Section 48(3) of the Act provides:

> *"48 Adjustment of lot entitlement schedule*
>
> *(3) An owner who elects, under subsection (2)(b), to become a respondent for the application must give written notice* **[my underlining]** *of the election to the body corporate."*

28. Following my instructions Lenton, on 13 May 2005, forwarded by post to all lot owners in the scheme my process notes and directions for the further conduct of the matter. Those notes and directions advised all owners that if wishing to be joined as a Respondent for the application a written notice of that election was to be provided in accordance with the provisions of Section 48(3) of the Act.

29. By correspondence, dated 1 June 2005, Lenton advised that no owners in the scheme had given written notice of their election to be joined as a Respondent for the application to the body corporate in accordance with the provisions of Section 48(3) of the Act.

30. By correspondence, dated 2 June 2005, the parties were advised that an informal hearing would be conducted in conjunction with a view of the Scheme on 10 June 2005.

31. On 10 June 2005, an informal hearing was held at the Scheme which was attended by Anderson, the Applicant's expert and representatives of the Respondent. During the course of the hearing a view was made of the Scheme with the represented parties. During the view frequent discussion took place in the presence of all parties about the various features of the different lots and the scheme.

FINDINGS AND REASONS

32. In addition to the documents submitted prior to my appointment as specialist adjudicator, the applicant also tendered copies of documents relied upon by them bearing on the issues, namely:

    a. The Community Management Statement;
    b. The Group Title Plans;
    c. The sinking fund analysis/forecast
    d. The current Sinking Fund Budget;
    e. The current Administrative Fund Budget; and
    f. The last three (3) years statements of account for the sinking and administrative funds.

33. Following my instructions Lenton, on 13 May 2005, forwarded by post to all lot owners in the scheme my process notes and directions for the further conduct of the matter. Those notes and directions provided directions for owners wishing to be joined as a Respondent for the application and their subsequent delivery of submissions in respect to the application.

34. No Respondent submissions were received. The represented parties attended a hearing to present their submissions and to hear the submissions of the other parties. The matter was determined on the hearing, taking into account the parties documents, written and oral submissions and a view of the Scheme.

35. The outcome sought in the Application is:

    "An adjustment to the Cooloola Court Contribution Lot Entitlement Schedule to make these charges equal as we believe there is no apparent reason for them not to be equal.

    We understand this falls within Section 48(5) and 49 of the Body Corporate & Community Management Act 1997 (BCCMA) to request an amendment to the existing contribution schedule via a decision of a Specialist Adjudicator"

Findings on the application for adjustment:

i. The existing contribution lot entitlement schedule is not equal.

ii. The existing contribution lot entitlement schedule is not just and equitable in the circumstances.

iii. An equal contribution lot entitlement schedule would be just and equitable in the circumstances.

Reasons

Legislative Considerations

36. Section 47(2) of the Act provides:

> *"47 Application of lot entitlements*
>
> *(2) The contribution schedule lot entitlement for a lot is the basis for calculating—*
>
> *(a) the lot owner's share of amounts levied by the body corporate,* **[my underlining]** *unless the extent of the lot owner's obligation to contribute to a levy for a particular purpose is specifically otherwise provided for in this Act;[1] and*
>
> *(b) the value of the lot owner's vote for voting on an ordinary resolution if a poll is conducted for voting on the resolution.*
>
> *[1] The regulation module applying to a community titles scheme might provide that a lot owner's contribution to some or all of the insurance required to be put in place by the body corporate is to be calculated on the basis of the lot's interest schedule lot entitlement.*

37. Consideration of Section 47(2) would suggest that, of those provisions set out, the only provision capable of quantative assessment, rather than on some idiosyncratic basis, is that regarding a lot owner's share of amounts levied by the body corporate.

38. It also makes some commercial sense for the value of a lot owner's vote (if polled) to be proportional to that lot owner's contribution to the body corporate levy.

39. On that basis, the proper determination of a lot owner's share of amounts levied by the body corporate, in satisfaction of Section 47(2)(a), would also satisfy Section 47(2)(b).

40. Accordingly, I consider that Section 47(2) requires that when determining a contribution lot entitlement, unless specifically otherwise provided for in the Act (such as some components of insurance premiums), regard should only be had to amounts levied upon the body corporate.

41. Section 48 of the Act provides that, for the contribution schedule, the order of a specialist adjudicator must be consistent with the principle that the respective lot entitlements should be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal. Section 48 of the Act provides:

42. Section 48(4)(a) of the Act provides:

> *"48 Adjustment of lot entitlement schedule*
>
> *(4) The order of the court or specialist adjudicator must be consistent* **[my underlining]** *with—*
>
> *(a) if the order is about the contribution schedule—the principle stated in subsection (5)"*

43. Section 48(4)(a) of the Act limits an adjudicators discretion as it requires that an adjudicators order must be consistent with the stated principles. It also implies that an adjudicator has a duty to ensure that any order made is consistent with the stated principles.

44. Section 48(5) of the Act provides:

"48 Adjustment of lot entitlement schedule

(5) For the contribution schedule, the respective lot entitlements should be equal **[my underlining]***, except to the extent to which it is just and equitable in the circumstances for them not to be equal."*

45. Given the provision in Section 48(5) of the Act, once an Applicant has established a prima facie' case that the existing schedule is unjust and unequal the onus then is on the Respondent to place material before me to prove that any departure from equal **in the existing** schedule is just and equitable in the circumstances.

46. Section 49 of the Act provides, inter alia:

"49 Criteria for deciding just and equitable circumstances

(2) This section sets out matters to which the court or specialist adjudicator may, and may not, have regard for deciding—

(a) for a contribution schedule—if it is just and equitable in the circumstances for the respective lot entitlements not to be equal; and

(3) However, the matters the court or specialist adjudicator may have regard to for deciding a matter mentioned in subsection (2) are not limited to the matters stated in this section.

(4) The court or specialist adjudicator may have regard to—

(a) how the community titles scheme is structured; and

(b) the nature, features and characteristics of the lots included in the scheme; and

(c) the purposes for which the lots are used.

(5) The court or specialist adjudicator may not have regard to any knowledge or understanding the applicant had, or any lack of knowledge or misunderstanding on the part of the applicant, at the relevant time, about—

(a) the lot entitlement for the subject lot or other lots included in the community titles scheme; or

(b) the purpose for which a lot entitlement is used.

(6) In this section—

relevant time means the time the applicant entered into a contract to buy the subject lot.

subject lot means the lot owned by the applicant."

47. Section 49 provides some criteria for deciding just and equitable circumstances for contribution schedule lot entitlements not to be equal. It enables an adjudicator to have regard to how the community titles scheme is structured, the nature features and characteristics of the lots included in the scheme and the purposes for which the lots are used but does not limited an adjudicators regard to only those matters.

48. Section 49(5) specifically prevents an adjudicator from having regard to any knowledge or understanding that the Applicant's had with respect to lot entitlements when they contracted to buy their lot.

49. Consistent with these conclusions, *Fischer & Ors v Body Corporate for Centrepoint Community Title Scheme 7779 [2005] QCA 214* relevantly provides the following at paras 26 to 33:

> *"[26] Although the Act gives no clear indication one way or the other, the preferable view is that a contribution schedule should provide for equal contributions by apartment owners, except insofar as some apartments can be shown to give rise to particular costs to the body corporate which other apartments do not. That question, whether a schedule should be adjusted, is to be answered with regard to the demand made on the services and amenities provided by a body corporate to the respective apartments, or their contribution to the costs incurred by the body corporate.* **[my underlining]** *More general considerations of amenity, value or history are to be disregarded. What is at issue is the 'equitable' distribution of the costs.*
>
> *[27] There are a number of reasons for this conclusion. The first is to be found in the terms of the Explanatory Notes which accompanied the 2003 Act and the content of the second reading speech when the Bill for it was debated. Because the meaning of the Act is unclear it is permissible to consult these materials.*
>
> *[28] Section 10 of the 2003 Act inserted s 46(7) which is in these terms:*
>
> > *'(7) For the contribution schedule for a scheme for which development approval is given after the commencement of this subsection, the respective lot entitlements must be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal.'*
>
> *This replaced an earlier provision, which was repealed by the 2003 Act, to the effect that upon registration a community titles scheme did not have to provide for equal contribution lot entitlements. Explaining the change the Note said:*
>
> > *'The change is intended to reinforce the concept that usually all lot owners are equally responsible for the cost of upkeep of common property and for the running costs of the community titles scheme. However, it is recognised that there are many valid instances where the contribution schedules do not have to be equal. The amendment provides that usually the numbers in this schedule are equal, unless it can be demonstrated that it is just and equitable for there to be inequality.*
> >
> > *The need for difference is best shown by examples.*
> > *…*
> > *Example 3 In a basic scheme, if all the lots are residential lots ranging in size from a small lot to a penthouse, the contribution schedule lot entitlements generally would be equal. However, the contribution schedule may be different if the penthouse has its own swimming pool and private lift. The contribution schedule should recognise this type of difference. The other lots in the scheme despite being of differing size or aspect would be expected to have equal contribution schedule lot entitlements.'*
>
> *[29] In the Second Reading Speech it was said:*
>
> > *'The issue of the nature of the contributions schedule for a body corporate scheme has created some discussion. The guiding principle for both setting and adjusting the contributions schedule is that it involves the equitable sharing of the costs of operating and maintaining the* ***common property****.* **[my underlining and emphasis]** *These costs should be borne in proportion to the benefit, not in*

> *proportion to the unit's value. It is not a contribution linked to an ability to pay, but as a payment for services.* **[my underlining]** … *There is not an argument … against the fact that, in terms of costs related to a property's value – costs such as rates and insurance – owners whose properties are worth more should pay more. But when we are talking about those parts of a property where the benefits are shared more or less equally, we cannot apply the same formula.'*
>
> *[30] These materials make it tolerably plain that the Act is intended to produce a contribution lot entitlement schedule which divides body corporate expenses equally except to the extent that the apartments disproportionately give rise to those expenses, or disproportionately consume services. That determination can only be made by reference to factors which have a financial impact or consequence on the body corporate.* **[my underlining]** *It cannot be affected by factors which go to an apartment's value or amenity.*
>
> *[31] Secondly, the nature of a contribution lot entitlement schedule itself suggests that the allocation of lot entitlements is to be made on the basis of the impact that individual apartments make upon the costs of operating and running a community titles scheme. Contribution lot entitlements determine the apartment's share of the outgoings. The starting point is that the entitlements should be equal. A departure from that principle is allowable only where it is just, or fair, to recognise inequality. The departure must take as its reference point the proposition, from which it departs, that apartment owners should contribute equally to the costs of the building. The focus of the inquiry is the extent to which an apartment unequally causes costs to the body corporate.* **[my underlining]**
>
> *[32] The third consideration is that if this principle not be the applicable one then there is no basis on which applications for adjustment of a contribution lot entitlement schedules can consistently be made. As the evidence in this application shows, if the inquiry is limited to the extent to which an apartment creates costs, or consumes services, above or below the average, one can readily determine what the contribution lot entitlement should be. The high degree of similarity in the reports of Mr Sheehan and Mr Linkhorn demonstrates this. If the inquiry be wider and include such nebulous criteria as the structure of the scheme, or the nature, features and characteristics of the apartments in the scheme, and the purposes for which they are used, there is no intelligible basis on which there could be a consistent and coherent determination of applications for adjustment of lot entitlements. Each case would be determined idiosyncratically and a vast variety of circumstances might be relied upon to depart from, and therefore erode, the principle said to be paramount, that there should be an equality of entitlements.*
>
> *[33] Accordingly I would construe s 49 of the Act, and in particular subsection (4), as meaning that those identified matters to which a court may have regard are to be regarded only to the extent, if any, that they affect the cost of operating a community title scheme.* **[my underlining]***"*

50. The Court of Appeal has clearly stated that the Act is intended to produce a contribution lot entitlement schedule which divides body corporate expenses equally except to the extent that lots disproportionately give rise to those expenses, or disproportionately consume services. That determination can only be made by reference to factors which have a financial impact or consequence on the body corporate, this judgment is binding not only on me, but on any adjudicator or single judge in Queensland.

Scheme Considerations

51. I now turn to consideration of the matters the legislation requires to be considered in respect of the Scheme.

52. The Applicant's grounds for the Application are set out as follows:

"The contribution lot entitlement schedule within Cooloola Court ranges from charges based on 5, 6, 7, 9 to 11 lots.

Because of this there is a very large variance in the charges to the owners with no apparent difference in level of service carried out on the common property itself.

The latest changes to the Body Corporate and Community Management Act say that lot entitlements should be equal unless it can be shown that it is just and equitable for them not to be equal.

Based on this we have raised the matter through a motion at an EGM to have the contribution lot entitlement schedule changed to be equal amongst all owners. This motion was rejected and we therefore have a dispute.

We now make this application through the Commissioners Office to request a contribution lot entitlement adjustment adjudication.

We have employed Leahy & Partners to conduct a survey of Cooloola Court and to put forward their recommendations. The report is attached."

53. Section 49(4) of the Act provides:

"49 Criteria for deciding just and equitable circumstances

(4) The court or specialist adjudicator may have regard to—

(a) how the community titles scheme is structured; and

(b) the nature, features and characteristics of the lots included in the scheme; and

(c) the purposes for which the lots are used."

54. The Community Management Statement for the Scheme confirms that the Regulation Module applying to the Scheme is the Body Corporate and Community Management (Standard Module) Regulation 1997.

55. The Scheme is a basic scheme, not part of a layered arrangement.

56. No submissions have been made, in regard to Section 49(4)(a), which provide any reason for depart from equal. Based on the circumstances in the Scheme there is no apparent basis for departure from equal on the face of the documentation arising out of this provision.

57. The by-laws for the scheme are set out in the Community Management Statement. All lots within the scheme are designed and used for residential purposes.

58. No submissions have been made, in regard to Section 49(4)(c), which provide any reason for depart from equal. Based on the circumstances in the Scheme there is no apparent basis for departure from equal on the face of the documentation arising out of this provision.

59. In regard to matters which may be regarded by virtue of Section 49(4)(b), the Applicant's provided a report titled "Contribution Lot Entitlement Schedule Analysis for Cooloola Court CTS 19626" dated 28 January 2005, hereafter referred to as the "Arkcoll Report", in support of their application for adjustment of the contribution lot entitlement schedule.

60. Arkcoll, the author of the Arkcoll Report, has tertiary qualifications in quantity surveying and law along with significant experience with numerous aspects of Body Corporate planning and expenditure. The Respondent, at hearing through Richardson and Williams, were provided opportunity to make a submission as to why the Arkcoll Report should not be accepted as expert evidence however no submission was made.

61. I accept the Arkcoll Report as that of an expert within their area of expertise for this application and therefore find that it is admissible. The Arkcoll Report considers the cost burden of the lots within the scheme on the body corporate expenditure and concludes with a recommended contribution lot entitlement schedule which varies from the existing contribution lot entitlement schedule by making all contribution lot entitlements equal.

62. I reviewed the following information regarding the scheme;

    a. The Community Management Statement;
    b. The Group Title Plans;
    c. The sinking fund analysis/forecast, dated 28 July 2003.
    d. The current Sinking Fund Budget (to 31 May 2005);
    e. The current Administrative Fund Budget (to 31 May 2005); and
    f. The last three (3) years statements of account for the sinking and administrative funds (years ended 31 May 2002, 31 May 2003 and 31 May 2004).

63. The Respondent did not raise objection to the cost estimates in the administration or sinking funds or the life expectancies and physical measurements for the sinking fund elements as utilised in the Arkcoll Report. I have considered those matters and I accept that the administration and sinking fund costs and the life expectancies and physical measurements for the various elements included in the sinking fund and as adopted in the Arkcoll Report are reasonable.

64. The administration fund, once excluding matters such as insurance which are specifically otherwise provided for in the Act, accounts for 86% of the total costs to the body corporate to which I have had regard and is comprised of:

    "Gardening" being, I understand, the lawn and garden maintenance of the common property only and forming 55% of the total administration fund item costs to be considered; and

    "Body corporate administration" being, I understand, the Body Corporate Managers fees and forming 24% of the total administration fund item costs to be considered; and

    "Repairs and maintenance" being, I understand, repairs and maintenance of common property only and forming 8% of the total administration fund item costs to be considered; and

    "Printing, postage, stationary and telephone" being, I understand, the expenses charged by the Body Corporate Manager for those items and forming 7% of the total administration fund item costs to be considered; and

Numerous other minor miscellaneous administrative items forming the remaining 6% of the total administration fund item costs to be considered.

65. The Body Corporate By-laws place no impediment, by exclusive use rights or otherwise, to any lot owner's right to the use and enjoyment of the common property.

66. I agree with Arkcoll's apportionment of the administration fund costs on an equal basis between all lots. The Respondent, at hearing through Richardson and Williams, did not raise any objection to any of the costs apportionments made by Arkcoll. It is clear that these costs are equally beneficial to all of the lots within the scheme.

67. The sinking fund, accounts for the remaining 14% of the total costs to the body corporate to which I have had regard and is comprised of::

"Replace timber paling fence" being, I understand, the replacement of that timber paling fence for which the Body Corporate is liable and also the Body Corporate contribution toward the replacement of timber paling fence for which the Body Corporate has some liability and forming 37% of the total sinking fund item costs; and

"Replace concrete paving" being, I understand, the replacement of the common property concrete roadway and forming 28% of the total sinking fund item costs; and

"Contingency" being, I understand, unscheduled repairs and maintenance of common property not included in the administration fund "Repairs and maintenance" item and forming 15% of the total sinking fund item costs; and

Numerous other minor miscellaneous sinking fund items forming the remaining 20% of the total sinking fund item costs.

68. I agree with Arkcoll's apportionment of the sinking fund costs on an equal basis between all lots. The Respondent, at hearing through Richardson and Williams, did not raise objection to any of those cost apportionments made by Arkcoll. It is clear that these costs are all items of expenditure relating to common property elements which can be identified as beneficial either equally to all lots, or alternatively, to particular lots within the Scheme but in such a manner as may be measured and the cost burden on the body corporate by each lot accurately determined and found to be minimal.

69. At this point I confirm that I express no opinion in respect of the statement in the Arkcoll Report that *"(i)f the fencing is located on the boundary between a private lot and common property, the lot owner and the body corporate are jointly responsible for its maintenance"*.

70. Sections 311(1) and (3) of the Act provide:

> *"311 Body corporate to be taken to be owner of parcel for certain Acts etc.*
>
> *(1) The body corporate for a community titles scheme is taken to be the owner of the scheme land for the following Acts—*
>
> *• Dividing Fences Act 1953*
>
> *• Land Act 1994.*
>
> *(3) However, for the Dividing Fences Act 1953, owners of adjoining lots* **[my underlining]** *included in a community titles scheme are taken to be the owners of adjoining land."*

71. Therefore, for the purpose of determining the liability for fencing under the *Dividing Fences Act 1953* the Body Corporate is taken to be the owner of the land with the exception of fencing between adjoining lots included in the scheme.

72. The Dictionary for the Act, Schedule 6, provides:

*"**lot** means—*

(a) a lot under the Land Title Act, but if the lot is included in a community titles scheme other than a basic scheme, the lot could be another community titles scheme; or

(b) for chapter 5, part 3, see section 220."

73. Section 311 of the Act is in Chapter 7 and therefore the relevant definition is that in the Land Title Act.

74. Section 115B of the *Land Title Act 1994* provides:

"115B Meaning of "community titles scheme"

(1) A "community titles scheme" is--

(a) a single community management statement recorded by the registrar identifying land (the "scheme land"); and

(b) the scheme land.

(2) Land may be identified as scheme land if it consists of--

(a) 2 or more lots; and

(b) other land (the "common property" for the community titles scheme) that is not included in a lot mentioned in paragraph (a)."

75. Section 115B(2)(b) makes it clear that the "common property" for a community titles scheme is not a "lot" but rather "other land".

76. Therefore a fence between a lot and common property does not appear to be captured by Sections 311(3) of the Act and liability would appear to remain with the Body Corporate as provided by Section 311(1).

77. The consequence of this difference, in the circumstances of the Scheme, is marginal and does not alter my view with respect to how the associated costs should be borne.

78. The Respondent, represented at hearing through Richardson and Williams, raised no further matters for my consideration.

79. Having given due consideration to the relevant matters pursuant to Section 49 of the Act, I consider that an adjustment to the contribution lot entitlement schedule such that all lots are equal would reflect the just and equitable contribution of each lot to the ongoing administration and maintenance of the Scheme.

80. Although it is not strictly necessary for the purpose of my decision, as the relevant owners did not elect to be joined as respondents in the matter, I now briefly address the three issues that dominated the 22 submissions made to the Commissioner.

81. Issue One: that the owners of the properties with higher lot entitlements were already significantly advantaged because the local authority levies a minimum rate charge, which is higher then the majority of lots in the scheme and therefore those lots are already subsidising the larger lots:

Charie Tomas, lot 20 "I would like to mention that the larger properties attract the same rates as the smaller lots, which means there is a large saving for owners of bigger lots."

Dulcie Alcorn, lot 2 *"With regards to rates I feel you should know we all pay the same amount regardless of the size of land so larger properties are receiving great benefits."*

Dellphine McDonough, lot 6 *"This has been voted on at meetings and defeated by a big majority each time and as I and many others have been paying the same rates as these other bigger properties to my disadvantage for 12 years they have benefited in this region."*

Dulcie McArthur, lot 8 *"I would also mention that the larger properties pay exactly the same rates as the smaller lots as Brisbane City Council charge a minimum of $30,000 land valuation, That means that those with the larger lots make a larger saving."*

Eben and Glenda Cumming, lot 10 *"We think it is unfair that we all have to pay the same rates irrespective of the size of our property."*

Patrick and Vera McNamara, lot 16 *"The fact that we all pay the same rates due to valuations set by the Brisbane City Council is an added advantage for owners with larger properties, which they seem to forget."*

June Gray, lot 17 *"Would like to point out that the unit owners with big properties pay the same rates as I do on a 5 lot unit."*

Melinda Muncey, lot 31 *"It is noticed that we pay the same rates as the larger blocks when really they should be paying more than us due to the difference in size."*

Audrey Prestridge, lot 33 *"The Complainants also benefit in the rates, irrespective of the size of the property we all pay the same rates which is a large saving for those with larger properties."*

Norma Harrison, lot 34 *"Another point I would like to mention are the rates, we all pay the same irrespective of the size of the property. I don't think that this is fair."*

Dawn Lawrence, lot 39 *"The Brisbane City Council use a minimum land valuation of $30,000 so that each of the 45 villas in "Cooloola Court" pay exactly the same rates. In this instance it is a substantial gain for Owners with larger property."*

James and May McHardy, lot 43 *"I have also been informed that we all pay the same rates irrespective of the size of the property so surely that is a large benefit to those with larger properties."*

82. Section 47(3)(c) of the Act provides:

"(3) The interest schedule lot entitlement for a lot is the basis for calculating—

(c) the unimproved value of the lot, for the purpose of a charge, levy, rate or tax that is payable directly to a local government, the commissioner of land tax or other authority and that is calculated and imposed on the basis of unimproved value."

83. Section 47(3)(c) of the Act specifically provides that a charge, levy, rate or tax made upon the basis of the unimproved value of a lot is to be considered when determining the interest schedule lot entitlement. It therefore follows that these matters are not a matter for consideration when determining the contribution schedule lot entitlement. In any event it is difficult to foresee circumstances where a local authorities 'minimum charges' could, or should, be addressed in an interest schedule.

84. It is also of note that this charge is levied directly upon lots by the local authority rather than on the Body Corporate and therefore is not a Body Corporate expense.

85. Therefore this submission is not a relevant matter that an adjudicator should consider when determining a just and equitable contribution lot entitlement schedule.

86. Second Issue: that the Applicant's knew what they were buying into and therefore should now be unable to seek a change.

Dulcie Alcorn, lot 2 *"Even though my property is 7 lots I would benefit a little if the lot entitlement was equal, I still feel that on purchasing our villas we were fully aware of the Body Corporate fees, we ere told the fees for every unit so people buying big blocks of land knew what the charges were."*

Dulcie McArthur, lot 8 *"In my opinion it was their choice to buy a Villa with a larger block of land."*

Eben and Glenda Cumming, lot 10 *"The people with larger lots are doing very nicely at the expense of people with smaller lots. We are strongly against subsidising people with larger lots. They knew what they were buying. All they want is more icing on the cake to suit their greedy needs at the expense of others."*

Patrick and Vera McNamara, lot 16 *"We feel that it is the choice of the individual whether they bought a villa on a small or large block."*

Audrey Prestridge, lot 33 *"I feel it was their choice when they purchased a Villa on a larger property."*

Colin Richardson, lot 36 *"Purchasers of the larger lots would have been advised of the charges applicable at the time and obviously accepted these when entering into their contracts."*

Dawn Lawrence, lot 39 *"When the Owner purchased his villa, it was his choice to choose one which was situated on a larger block of land. On purchasing a villa, everyone was informed of the amount that the Body Corporate Fees would be. If they were not told this on site, it should have been the responsibility of the Solicitor handling the transaction to inform them."*

Alison Johnston, lot 40 *"Other purchasers chose larger lots & now I do not see why I and (pension) owners of smaller lots should have to boost the finances of larger property owners who must have known the situation when they purchased."*

James and May McHardy, lot 43 *"We feel that it is everyone's choice whether they buy a villa on a small or large block."*

87. Section 49(5) of the Act provides:

"49 Criteria for deciding just and equitable circumstances

(5) The court or specialist adjudicator may not have regard to any knowledge or understanding the applicant had, or any lack of knowledge or misunderstanding on the part of the applicant, at the relevant time, about—

(a) the lot entitlement for the subject lot or other lots included in the community titles scheme; or

(b) the purpose for which a lot entitlement is used.

(6) In this section—

relevant time means the time the applicant entered into a contract to buy the subject lot.

subject lot means the lot owned by the applicant."

88. Section 49(5) of the Act specifically prevents an adjudicator from having regard to any knowledge or understanding that the Applicant's had with respect to lot entitlements when they contracted to buy their lot.

89. Therefore an adjudicator is would be unable to consider such a submission when determining a just and equitable contribution lot entitlement schedule.

90. Third issue: that owners should contribute to the maintenance of the common property in proportion to their interest lot entitlement.

Colin Richardson, lot 36 "*Surely it is just and equitable for owners of the larger share of the total property and assets to contribute a greater proportion towards current maintenance and future replacement costs.*"

91. Sections 127 (1) and (4) of the *Body Corporate And Community Management (Standard Module) Regulation 1997* provide:

"127 Insurance of common property and body corporate assets

(1) The body corporate must insure, to full replacement value—

(a) the common property; and

(b) the body corporate assets.

(4) The owner of each lot that is included in the scheme is liable to pay a contribution levied by the body corporate that is a proportionate amount of the premium for a policy of insurance taken out under this section that reflects the interest schedule lot entitlement of the lot."

92. It is therefore clear that with respect to insurance for the replacement of the common property and assets each lot is to contribute in proportion to its interest schedule lot entitlement. Such a contribution reflects each lots ultimate 'ownership' of the common property and assets. However, it does not follow that 'ownership' has any correlation to the costs of repair and maintenance incurred for the common property and assets, particularly when all of the common property and assets are equally accessible by all occupiers and 'owners' are unable to place any restriction on useage or access.

93. By-law 3 for CTS19626 provides:

"Obstruction

The occupier of a lot must not obstruct the lawful use of the common property by someone else."

94. Schedule E of the Community Management Statement for the Scheme provides:

"Description of lots allocated exclusive use areas of common property

Nil"

95. It is clear that there are no areas of common property from which occupants are restricted by virtue of any exclusive use entitlement in favour of a particular lot. By virtue of By-law 3, neither are any occupants permitted to obstruct the lawful use of common property by others. Therefore all occupants within the scheme have equal right of access to all parts of the common property.

96. I consider it logical that the cost of repair and maintenance of the common property, for that property subject to deterioration by direct usage (such as paved areas), would have some relationship to its level of use. It would also seem logical that, for instance, the benefit derived by each lot from the provision of lighting to the common areas would be equally beneficial to all lots. I do not consider that there is any direct relationship between the 'ownership' of larger shares of the common property and assets by particular lots, particularly when all occupiers have equal access to those areas, and the need for repair and maintenance of it.

97. It would seem reasonable to conclude that the appearance and proper function of the common property is beneficial to all that use it or obtain other benefit from it, such as security in the instance of fencing.

98. I consider it just and equitable that the cost of repair and maintenance of the common property should be borne by lots in proportion to their use, or benefit from, that property.

99. For those items included in Body Corporate expenditure for which no specific additional benefit is able to be attributed to any one lot more than any other, and as there is no restriction on the use of the common property by any owner or occupier in the Scheme, I consider that it is just and equitable for those items of expenditure to be borne equally by all lots.

COSTS

Findings:

i. No costs should be ordered against the Body Corporate.

ii. That the Applicant is responsible for the cost of the adjudication.

Reasons:

Legislative Considerations

100. Section 265(1)(c) of the Act provides:

"265 Specialist adjudication of particular disputes

(1) The adjudication of a dispute must be specialist adjudication if—

(c) another provision of this Act requires the adjudication to be specialist adjudication."

101. Section 48(1)(b) of the Act provides:

"48 Adjustment of lot entitlement schedule

(1) The owner of a lot in a community titles scheme may apply—

(b) under chapter 6, for an order of a specialist adjudicator for the adjustment of a lot entitlement schedule."

102. Section 280 of the Act provides:

"280 Costs of specialist adjudication

(1) This section applies to an application dealt with by specialist adjudication mentioned in section 265.

(2) Unless the adjudicator otherwise orders, the applicant is responsible for the costs of the adjudication."

103. Thus the prima facie' position is that the applicant is responsible for the cost of the adjudication. There must exist some reason for the adjudicator to exercise their discretion to otherwise order.

Application Considerations

104. Section 48(2)(a) of the Act provides:

"48 Adjustment of lot entitlement schedule

(2) Despite any other law or statutory instrument—

(a) the respondent for an application mentioned in subsection (1) is the body corporate"

105. In this instance the Body Corporate Committee, by submission to the Commissioner dated 10 April 2005, advised that *"(i)n the circumstances it is not considered appropriate for the committee to respond either for or against the application"* and made no other submission at the hearing of the matter. Therefore no costs should be ordered against the Body Corporate by virtue of that position.

106. Section 48(2)(b) of the Act provides:

> *"48 Adjustment of lot entitlement schedule*
>
> *(2) Despite any other law or statutory instrument—*
>
> *(b) at the election of another owner of a lot in the scheme, the other owner may be joined as a respondent for the application"*

107. In this matter no owner(s) elected to be joined as a Respondent. Therefore no costs could be ordered against another owner by virtue of those facts.

108. As the conduct of the body corporate and the individual owners has been such as to not give rise to any additional cost in the application, there exists no reason for the adjudicator to exercise the available discretion to depart from the prima facie position that the Applicant be responsible for the cost of the adjudication.