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

and

IN THE MATTER of a Specialist Adjudication

BETWEEN:

Mr John Armstrong and others

(“The Applicants”)

and

The Body Corporate for Acapulco and others

(“The Respondents”)

ADJUDICATORS ORDER

Pursuant to appointment by the Commissioner for Body Corporate and Community Management, dated 1 August 2007.

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 JOHN ARMSTRONG AND OTHERS v
THE BODY CORPORATE FOR ACAPULCO AND OTHERS

ORDER OF WARREN FISCHER
Specialist Adjudicator

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Adjudication regarding:

Adjustment of Contribution Lot Entitlement Schedule

View and Hearing Date:

29 October 2007

Delivered as an adjudicators order:

To the Commissioner for Body Corporate and Community Management on the Fifth day of November 2007.

ORDER

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

- 1) That the contribution schedule lot entitlement for each lot in the Acapulco Community Titles Scheme 10436 be adjusted to be equal except to the extent that is just and equitable in the circumstances, such that the contribution schedule of lot entitlements is as follows:

Lot No.	Contribution Schedule Lot Entitlement	Lot No.	Contribution Schedule Lot Entitlement	Lot No.	Contribution Schedule Lot Entitlement	Lot No.	Contribution Schedule Lot Entitlement
1	98	27	104	51	104	75	104
4	105	28	105	52	105	76	105
5	100	29	100	53	100	77	100
6	108	30	104	54	104	78	104
7	104	31	104	55	104	79	104
8	105	32	105	56	105	80	105
9	100	33	100	57	100	81	100
10	104	34	104	58	104	82	104
11	104	35	104	59	104	83	104
12	105	36	105	60	105	84	105
13	100	37	100	61	100	85	100
14	104	38	104	62	104	86	104
15	104	39	104	63	104	87	104
16	105	40	105	64	105	88	105
17	100	41	100	65	100	89	100
18	104	42	104	66	104	90	104
19	104	43	104	67	104	91	104
20	105	44	105	68	105	92	105
21	100	45	100	69	100	93	100
22	104	46	104	70	104	94	104
23	104	47	104	71	104	95	104
24	105	48	105	72	105	96	170
25	100	49	100	73	100	97	105
26	104	50	111	74	104	98	112
AGGREGATE				9995			

- 2) 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.
- 3) For the avoidance of doubt, pursuant to Section 284 of the Act, this Order is to have effect as a resolution without dissent.
- 4) That the Applicants are responsible for the cost of the adjudication.

Signed



Warren Fischer
Specialist Adjudicator
5 November 2007

PARTIES AND REPRESENTATIVES**Parties****Representatives**

Mr John Anderson
Registered Owner of Lot 90
("Anderson")
First Applicant

Self Represented
and assisted by Ms Kaylene Arkcoll
BSc QS AAIQS AIMM MAppLaw
of Leary & Partners Pty Ltd
("Arkkoll")
Expert

Ms Valerie Prosper
Registered Owner of Lot 14
("Prosper")
Second Applicant

Represented by Anderson

Druxton Pty Ltd ATF Irving Children Trust
Registered Owner of Lot 18
Nominee: Mr Rod Irving
("Irving")
Third Applicant

Represented by Anderson

Mr John and Mrs Gwendolyn Mills
Registered Owners of Lot 30
("Mills")
Fourth Applicant

Represented by Anderson

Mr Mark Gillard
Registered Co-owner of Lot 34
("Gillard")
Fifth Applicant

Represented by Anderson

Ms Steffi Bando
Registered Owner of Lot 42
("Bando")
Sixth Applicant

Represented by Anderson

Ms Diana Russell
Registered Owner of Lot 46
("Russell")
Seventh Applicant

Represented by Anderson

Clark Family Super Fund
Registered Owner of Lot 74
Co-Nominee: Mr John Clark
("Clark")
Eighth Applicant

Represented by Anderson

Kolmarden Pty Ltd ATF
Kolmarden Discretionary Trust
Registered Owner of Lot 78
Nominee: Mr Willian Tranberg
("Tranberg")
Ninth Applicant

Represented by Anderson

The Body Corporate for Acapulco Community Titles Scheme 10436 c/- Body Corporate Services P/L Ms Lesley Fisher ("Fisher") First Respondent Applicant	Represented by Mr Martin Jackson Body Corporate Treasurer ("Jackson") and assisted by Mr Kent O'Brien B.Bldg (Q.S.) of K&G Strata Consultants Pty Ltd ("O'Brien") Expert
Mr Ian and Mrs Helen Clifford Registered Owners of Lot 4 ("Clifford") Second Respondent	Un-represented
Mr Norman Clare Registered Owner of Lot 9 ("Clare") Third Respondent	Un-represented
Mrs Flora and Ms Robyn Elleray Registered Owners of Lot 37 ("Elleray") Fourth Respondent	Un-represented
Mr Malcolm Duce Registered Owner of Lot 48 ("Duce") Fifth Respondent	Un-represented
Mr Gary Finger Registered Owner of Lots 56 ("Finger") Sixth Respondent	Un-represented
Lawrence Bros (Service Division) Pty Ltd Registered Owner of Lot 70 Nominee: Mr John Lubben ("Lubben") Seventh Respondent	Un-represented

RECITAL OF RELEVANT EVENTS LEADING TO THE DISPUTE

1. The scheme land consists of the common property of Acapulco Community Titles Scheme 10436 ("the Scheme") and lots 1 and 4 to 96 on Building Unit Plan No. 4754 and lots 97 and 98 on Building Unit Plan of Resubdivision No. 8455. Building Unit Plan No. 4754 was registered on 22 February 1982 and Building Unit Plan No. 8455 was registered on 21 February 1989.
2. The Scheme is located at 2 Thornton Street, Surfers Paradise, Queensland.
3. The Scheme common property includes driveways, lawn, gardens, entrance, reception, foyer, lift lobbies, plant rooms, emergency stairs, swimming pool, spa, sauna, games room, tennis courts, etc.
4. There are ninety six (96) lots in the Scheme, all residential, the lot titled areas vary from 120 sqm (various lots) to 868 sqm (lot 96). All lots, except lot 50 and 98, have some attaching exclusive use rights over common property. There are ninety five (95) two bedroom units and a penthouse.
5. The contribution and interest lot entitlement schedules contained in the current Community Management Statement ("CMS"), executed on 17 April 1999, are identical and provide variations in lot entitlements between 4 (various lots) and 8 (lot 96) with an aggregate of 458.
6. An annual general meeting of the Body Corporate for the Scheme was held on 21 June 2006. At that meeting a motion, proposed by lot 46 (Russell), was considered to record a new CMS that altered the contribution schedule lot entitlements such that the contribution schedule lot entitlements were all to be made 10 except for lot 96 which was to be made 12. That motion failed, 10 votes were recorded against the motion.
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 annual general meeting of the Body Corporate for the Scheme, held on 21 June 2006, gives rise to a dispute as defined in Section 227(1)(b) of the Act between the owners of lots 46 (Russell) and the body corporate for the Scheme.
9. 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."
10. From 21 June 2006, an application by the registered owners of lot 46 (Russell) could be made pursuant to Section 238 of the Act.

11. 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.”*
12. On 26 April 2007, nine (9) owners (including the owner of lot 46) joined in lodging 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”) pursuant to the provisions of Section 48(1) and Chapter 6 of the Act..
13. Section 354 of the Act provides:
- 354 Existing applications for an order of an adjudicator*
- (1) This section applies if an application for an order of an adjudicator made under the previous dispute resolution provisions has not been finally dealt with before the commencement of this section.*
- (2) The application may continue to be dealt with under the previous dispute resolution provisions, and by a person authorised to deal with the application immediately before the commencement, as if the Body Corporate and Community Management and Other Legislation Amendment Act 2003, other than section 113 to the extent it inserts section 355, had not been enacted.*
- (3) In this section—*
- previous dispute resolution provisions** means the dispute resolution provisions in force immediately before the commencement.*
14. The current dispute resolution provisions commenced on 1 July 2007. However, as the Application was made on 26 April 2007, pursuant to s354 of the Act, the Application may be dealt with as if the *Body Corporate and Community Management and Other Legislation Amendment Act 2003*, other than section 113 to the extent it inserts section 355, had not been enacted.
15. These circumstances gave rise to the issue which I was required to consider, namely, *“to make the contribution lot entitlements more equitable by adopting the “Recommended Contribution Schedule A” (listed in Part B Table 5) in the “Contribution Lot Entitlement Schedule Analysis for Acapulco CTS 10436” prepared by Leary & Partners dated 24/4/2006 (see Attachment 3).”*

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 on 26 April 2007, provided my name and address as the nominee 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 1 August 2007.

PROCEDURAL STEPS

22. On 3 May 2007, the Commissioner invited all lot owners in the Scheme to make submissions on the Application by 24 May 2007. On 24 May 2007, the Commissioner extended the closing date for such submissions until 15 June 2007. On 5 June 2007, the Commissioner further extended the closing date for such submissions until 5 July 2007.
23. Eight (8) 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. A submission was made on behalf of the Body Corporate.
26. On 17 July 2007, the Commissioner provided the Applicants with a copy of the submissions made and invited the Applicants to respond to those submissions by 31 July 2007.
27. On 30 July 2007 the Applicants provided a response to the submissions made.
28. 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"
29. 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."
30. On 20 August 2007, I advised all parties that had made submissions on the Application that, if wishing to be joined as a Respondent for the Application, a written notice of election was to be provided in accordance with the provisions of Section 48(3) of the Act by 7 September 2007. I also advised that an informal hearing of the matter was provisionally set down for 5 October 2007.
31. By correspondence, dated 6 September 2007, Fisher provided copies of the written notices of election to be joined as a Respondent for the Application that had been provided to the body corporate in accordance with the provisions of Section 48(3) of the Act. That correspondence also confirmed that Jackson would attend the hearing as the Body Corporate representative and that the expert for the Body Corporate was available for the proposed hearing.
32. Section 48(3) notices were given by the Second to Seventh Respondents: Clifford, Elleray, Clare, Duce, Finger and Lawrence Bros (Service Division) Pty Ltd.

33. By correspondence, dated 18 September 2007, the parties were advised that the informal hearing would be conducted in conjunction with a view of the Scheme on 8 October 2007.
34. By correspondence, dated 25 September 2007, Fisher advised that the parties would not be available for an informal hearing on 8 October 2007.
35. By correspondence, dated 8 October 2007, the parties were advised that the informal hearing would be conducted in conjunction with a view of the Scheme on 29 October 2007.
36. On 29 October 2007, an informal hearing was held at the Scheme which was attended by Anderson and Arkcoll and Jackson and O'Brien. 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 various features of the different lots and the scheme.

FINDINGS AND REASONS

37. The documents considered in this adjudication include the relevant documentation included within the file forwarded to me by the Commissioner and those documents subsequently supplied by Fisher upon my request and bearing on the issues, namely:
- a. The Dispute Resolution Application including all attachments thereto;
 - b. The Body Corporate Submission including all attachments thereto;
 - c. The remaining Respondent's submissions;
 - d. Community Management Statement 10436;
 - e. Building Unit Plans 4754 and 8455;
 - f. Administrative Fund Expenditure for the periods to 31/03/03, 31/03/04, 31/03/05, 31/03/06 and 31/03/07;
 - g. The Administration Fund budget for the period ending 31/03/08;
 - h. The sinking fund forecast prepared by Star Building Management Services effective 12 April 2006;
 - i. The Letting Agreement, dated 26 February 2001;
 - j. The Caretaking Agreement, dated 26 February 2001.
38. Arkcoll's report identifies that in producing that report the following documents were relied upon:
- a. Community Management Statement 10436;
 - b. Building Unit Plans 4754 and 8455;
 - c. Administrative Fund Expenditure for the periods to 31/03/03, 31/03/04 and 31/03/05 and the anticipated budget to 31/03/06;
 - d. An updated copy of the sinking fund forecast prepared by Leary and Partners in April 2004;
 - e. Information collected during a site inspection of the development.
39. O'Brien's report identifies that in producing that report the following documents were used as reference material:
- a. Statement of accounts for the Administration and Sinking Funds for the periods to 31/03/05, 31/03/06 and 31/03/07 and the budget to 31/03/08;
 - b. The sinking fund forecast prepared by Star Building Management Services effective 12 April 2006;
 - c. Building Unit Plans No 4754;
 - d. Community Management Statement Schedule A - CSLE, C – Bylaws, D and E – Allocation of exclusive use area and plan A, B, C & D; and
 - e. Caretaking and Letting Agreements.
40. The represented parties attended an informal 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.

41. The outcome sought in the Application is:

“to make the contribution lot entitlements more equitable by adopting the “Recommended Contribution Schedule A” (listed in Part B Table 5) in the “Contribution Lot Entitlement Schedule Analysis for Acapulco CTS 10436” prepared by Leary & Partners dated 24/4/2006 (see Attachment 3).”

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 not be just and equitable in the circumstances.
- iv. That contribution schedule lot entitlements that are equal, except to the extent that it is just and equitable in the circumstances, are as follows:

Lot No.	Contribution Schedule Lot Entitlement	Lot No.	Contribution Schedule Lot Entitlement	Lot No.	Contribution Schedule Lot Entitlement	Lot No.	Contribution Schedule Lot Entitlement
1	98	27	104	51	104	75	104
4	105	28	105	52	105	76	105
5	100	29	100	53	100	77	100
6	108	30	104	54	104	78	104
7	104	31	104	55	104	79	104
8	105	32	105	56	105	80	105
9	100	33	100	57	100	81	100
10	104	34	104	58	104	82	104
11	104	35	104	59	104	83	104
12	105	36	105	60	105	84	105
13	100	37	100	61	100	85	100
14	104	38	104	62	104	86	104
15	104	39	104	63	104	87	104
16	105	40	105	64	105	88	105
17	100	41	100	65	100	89	100
18	104	42	104	66	104	90	104
19	104	43	104	67	104	91	104
20	105	44	105	68	105	92	105
21	100	45	100	69	100	93	100
22	104	46	104	70	104	94	104
23	104	47	104	71	104	95	104
24	105	48	105	72	105	96	170
25	100	49	100	73	100	97	105
26	104	50	111	74	104	98	112
AGGREGATE				9995			

Reasons

Legislative Considerations

42. 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.*

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

44. 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 share of amounts levied by the body corporate.

45. 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).

46. 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 relevant amounts for which the body corporate is liable.

47. 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:

48. 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)”

49. 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.

50. 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.”

51. 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.

52. 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.”

53. 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. However, when considering the earlier analysis of Section 47(2) of the Act, those considerations set out in Section 49 can only be in respect of the impact of those criteria on relevant body corporate expenditure.

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

55. Consistent with these conclusions, *Fischer & Ors v Body Corporate for Centrepoint Community Title Scheme 7779 [2004] QCA 214* relevantly provides the following at paras 26 and 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. More general considerations of amenity, value or history are to be disregarded. What is at issue is the ‘equitable’ distribution of the costs.

...

[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.”

56. 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

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

58. The Applicant’s grounds for the Application are set out as follows:

“The contribution lot entitlements at Acapulco were registered in 1982 and are not equitable as they do not reflect the relative costs incurred by various units. Under the BCCM Act 1997 contribution lot entitlements should be calculated to reflect the direct cost impact of each lot on the body corporate’s expenditure. Owners of units in older schemes have the right to ask that the entitlements be brought into line with the new calculation principles.

The owners of the "B" type units pay 50% more than in levies than owners of "C" and "D" type units although all are 2 bedroom and share similar facilities.

In early 2006, 19 owners commissioned a report by Kaylene Arkcoll of Leary & Partners to analyse the cost impact of lots in Acapulco and if appropriate recommend a more equitable contribution lot entitlement schedule. The report concludes that the current schedule cannot be justified on the basis of cost impact and recommends "Recommended Contribution Schedule A ... as a fair and equitable reflection of the cost impact of the various lots." (refer Part B Table 5 in Attachment 3 - Leary & Partners report). This report also shows the likely impact of adoption of the recommended Schedule on each lot.

The owner of Lot 46 (B Russell) put a motion (Motion 11) to the Acapulco AGM on 21/6/2006 to make the lot entitlements more equitable by adopting "Recommended Contribution Schedule B" of the Leary Report (Part B Table 5). The motion was lost (voting: yes 35, no 10, abstain 2). (refer Attachment 5 for a copy of the minutes of the AGM, and the notes to the motion put to the AGM but not included in the minutes).

The applicants seek to have the contribution lot entitlement schedule recommended by Leary & Partners (Scheduled A in Part B Table 5) adopted by the body corporate for reasons of equity.

We seek to have the dispute resolved by a specialist adjudicator through the dispute resolution process."

59. The Applicants rely upon the Leary Report in the grounds for their Application.
60. Arkcoll, the author of the Leary Report, has tertiary qualifications in quantity surveying and law along with significant experience with numerous aspects of body corporate planning and expenditure. The Respondents did not in their written submissions, or at hearing through Jackson, make any submission as to why Arkcoll should not be accepted as an expert.
61. I accept the Leary Report as that of an expert within their area of expertise for this application and therefore find that it is admissible as expert evidence. The Leary 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.
62. The Respondent Body Corporate, in its submissions, rely upon the K&G Strata Report.
63. O'Brien, the author of the K&G Strata Report, has tertiary qualifications in building (quantity surveying) and some experience with aspects of body corporate management. The Applicants did not in any submissions, including at hearing, make any submission as to why O'Brien should not be accepted as an expert.
64. I accept the K&G Strata Report as that of an expert within their area of expertise for this application and therefore find that it is admissible as expert evidence. The K&G Strata 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.
65. For the purposes of determining the relevant body corporate expenditure, I reviewed the following information regarding the scheme;
 - a. The sinking fund forecast prepared by Star Building Management Services effective 12 April 2006;
 - b. The administrative fund expenditure for the periods to 31/03/03, 31/03/04, 31/03/05, 31/03/06 and 31/03/07;
 - c. The Administration Fund budget for the period ending 31/03/08;
66. The expert reports largely agreed. There was only one material difference in the cost estimates, namely, non-building replacement insurance allowances.
67. The Applicants, in their written response to the submissions made, provided a further report from Leary which addressed the differences in the reports. In that further report, Arkcoll agreed with the non-building replacement insurance allowance made

- by O'Brien, noting that the relevant information had not been available at the time of her report. I also agree with that allowance.
68. No other Respondents took issue with the cost estimates adopted by the experts.
69. I have considered the cost estimates in the administration fund and sinking fund forecasts and the life expectancies and physical measurements for the sinking fund elements as utilised in the expert reports and I am satisfied that they are representative of those costs ascertainable from the Scheme records, and therefore, are reasonable to adopt.
70. For the purposes of determining the impact of the various criteria, for deciding just and equitable circumstances, I reviewed the following information regarding the scheme;
- d. The Community Management Statement;
 - e. The Building Unit Plan; and
 - f. The Caretaking and Letting Agreements.
71. 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.”*

72. The CMS for the Scheme confirms that the Regulation Module applying to the Scheme is the Body Corporate and Community Management (Accommodation Module) Regulation 1997.

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

74. 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 and on the face of the documentation there is no apparent basis for departure from equal arising out of this provision.

75. The by-laws for the scheme are set out in the CMS. By-law 16 provides, subject to any contrary by-law, that all lots shall only be utilised as private residence. By-law 32 provides that the owner of lot 2 (sic) may use that lot for both residential and services related to the management of the building [the management of the building operates from lot 1].

76. By-laws 33, 34, 35, 36 and 37 set out various exclusive use entitlements attaching to lots in the Scheme. By-laws 33 and 34 both deal with carparking areas. By-law 35 deals with the use of a storage and a foyer area by lot 1. By-law 36 deals with exclusive use areas for lot 96. By-law 37 deal with the “exclusive use” (right) of the proprietor of lot 96 to keep pets on that lot or on common property.

77. The Leary Report specifically considers the effects of the exclusive use entitlements when considering the apportionment of costs in the Scheme. No separate submissions were made by the Respondents, in regard to Section 49(4)(c).

78. Another point of difference between the experts was the apportionment of the costs incurred by the body corporate in the maintenance of the two external lock up garages (on title of lots 50 and 98). Arkcoll had apportioned those costs against each of the lots whereas O'Brien had apportioned them equally between all lots. O'Brien set out his basis for doing so as *"using external garages do not have the same degree of security and amenity as the basement parking lots and as such should not be expected to carry the burden of all of the costs in relation to the external garage.."* To my mind, the issues the O'Brien raises might be relevant to consideration of the interest schedule but not the contribution schedule. At hearing O'Brien agreed that other than the owners of lots 50 and 98, no other lot obtained any benefit from the maintenance of the external garages. I consider that this is an exception of the type the Court of Appeal had in mind when it determined¹ that the *"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"* (my emphasis). A subsequent judgment of Forde DCJ² similarly makes clear that ignoring differences in body corporate expenditure on individual lots is to be discouraged.

1 *Fischer & Ors v Body Corporate for Centrepont Community Title Scheme 7779 [2004] QCA 214* at [26].

2 *Woodley & Anor v The Proprietors of Quay West Community Title Scheme 16610 [2006] QDC 277* at [16]-[17]

His Honour said:

[16] *Where there is access to the common property the costs should be shared equally, as the costs are equally beneficial to all of the lots in the scheme.³⁰ Contributions in accordance with the interest schedule may reflect ownership of the common property and assets. 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 usage or access'.³¹ The learned adjudicator made the following observation with which I agree:*

[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.*

³⁰ per Adjudicator Fischer in *Cooloola Court [2005] QBCCMCmr 319* at [66].

³¹ *Ibid.*[92]

[17] *In another case, the number of car parks did not reflect the cost of maintaining the movement of the roller door.³² In another case the cost of gardening and cutting footpath areas were of more direct benefit to one unit rather than others but the cost was shared equally.³³ In considering certain items as part of sinking fund expenses, the approach adopted was to look at the floor area. The costs of an automatic door opener were dealt with on an equal basis in the Ocean Side case.³⁴ Adjudicator Bugden commented that apportioning wash down costs and repainting of the façade on a wall space basis rather than equally was ‘splitting hairs’. That latter approach is to discouraged.”*

³² *Marquise* [2004] ABCCMCmr 271 per Adjudicator Savage SC at [30].

³³ *St. Lucia Manors* [2006] QBCCMCmr 104 per Gallagher QC at [74].

³⁴ *Ocean Side* [2005] QBCCMCmr 148 at [16] to [23] per Adjudicator Bugden.

79. I consider the Arkcoll's apportionment of the costs 'where they fall' for the car parks is consistent with the principles set out in the Act as interpreted by the Court of Appeal.
80. No other Respondents took issue with the basis of apportionment of the body corporate cost estimates.
81. I have considered the apportionment of the body corporate cost estimates as utilised in the expert reports and I am satisfied that the bases of those apportionments are reasonable to adopt.
82. The further report from Leary provided by the Applicants in their written response to the submissions made enclosed an amended "table 5". That amended schedule reflected the addition of the non-building replacement insurance allowance but maintained the cost estimates for the garages against lots 50 and 98 rather than equally. That schedule is consistent with my determination of the relevant cost estimates and bases of apportionment.
83. The submissions made by Duce and Finger raise matters to which I may have regard by virtue of Section 49(3) of the Act. The question is one of policy and commercial common sense; how large might a variation in a lot's contributions determined by lot entitlement verse the expense incurred by that lot be before it might be considered unjust or inequitable?
84. The submission made by Duce (which records his agreement with an equitable change) is, primarily that: *"In my view, the Recommended Contribution Schedule A in the Leary Report is not a correct result from the analysis of expenses in the Leary Report, and consequently, Schedule A, as stated, introduces a significant inequity disadvantaging the D lots."* The grounds for that submission are that *"the effect of these unnecessary roundings significantly distorts the contributions entitlements against the D lots"*. Duce is not alone in his view, Finger's submission (which records his agreement with the principles of the legislation) is similarly targeted at *"rounding"*.
85. In the present circumstances, the aggregate lot entitlements proposed by the experts equate to approximately \$500 per lot entitlement per year. The experts, in the process of rounding off the costs assessed to be incurred by each lot for the purposes of determining the lot entitlements, it happens that some lots have been rounded up 0.5 of a lot entitlement and others rounded down 0.4 of a lot entitlement. The result is that some lots would, upon adoption, 'over contribute' in the order of \$273 per year and others would, upon adoption, 'under contribute' in the order of

- \$178 per year. Two Respondents, both Duce and Finger, submit that a variation of that order is not just and equitable.
86. The Scheme is an established scheme with extensive historical expenditure records upon which forward assessments have been made by the experts. The cost estimates adopted in the Leary Report calculations are typically drawn from at least four years records (including the current budget). Whilst occasional extraordinary expense may undoubtedly arise and the cost estimates may require differing indexing, in general terms the relative proportions of each of the heads of cost might be, it seems to me, considered mature and likely to remain relatively consistent over the longer term.
87. The experts have agreed that at least 86% of the anticipated Body Corporate expenditure should be shared equally. Therefore if an extraordinary expense item was to occur its effect would be severely limited. If that expense was an 'equal expenditure item' it might draw the lot expenses marginally closer together (in percentage terms), or, if a 'non-equal expenditure item' it might draw them marginally further apart (in percentage terms). The converse would apply for a extraordinary decrease in expenditure.
88. Given the maturity of the Scheme and the high degree of equal expenditure I consider that a greater accuracy might be applied to the determination of the lot entitlements. Whilst from year to year one lot or another might incur a greater or lesser expense, I am satisfied that in the longer term the cumulative effect of such variations will diminish. In any event, the cumulative variation will more then likely be less then the annual +\$273 to -\$178 base variation which would endure if the experts proposed schedule was to be adopted.
89. The solution then becomes quite simple, by increasing the aggregate lot entitlements the value of each lot entitlement is reduced. If I was to determine that the lot entitlements were to be the anticipated cost incurred by each lot in relative percentage terms then multiplied by 100 (as opposed to by 10 as in the expert's case), the value of a single lot entitlement drops from approximately \$500 per year to approximately \$50 per year. I determine accordingly.
90. Clifford's appears to have two submissions, Clifford did not attend the hearing to clarify. The first seems to be that some of the lots are of different sizes; that is a feature of the lots that the experts have given consideration in their reports. The other is to do with capital improvement and capital value; that was dealt with by the Court of Appeal in the following terms "*More general considerations of amenity, value or history are to be disregarded*" (my emphasis).
91. Clare's two paragraphs of submission are: "the current rating system has been in force for over 20 years" and "my unit is classified as a 1 brm & study. Why should I pay the same fee as the people with 2 brms & 2 balconies. The first of these was dealt with in the Court of Appeal in the following terms "*More general considerations of amenity, value or history are to be disregarded*" (my emphasis). The second point is address in the manner in which the experts have assessed the costs imposed by each lot on the Body Corporate expenditure.
92. Elleray did not attend the hearing to explain their submissions, a significant part of which relate to assertions of a lack of information provided to them by both the Body Corporate and the Body Corporate Committee. That is not a matter for me to determine in the present application. They then move to talk about floor space and surface areas which is a feature of the lots that the experts have given consideration in their reports. They conclude that "*it is also interesting to note*" that the Applicants have not submitted an application to reflect the same changes in the interest

schedule lot entitlements. That submission simply portrays a lack of understanding of the provisions of the legislation, the principles for determining contribution and interest entitlements are distinctly different and therefore it is unlikely that, properly determined, they would be the same. In any event, as they have noted such an application has not been made.

93. Lubben's two sentences of submission were in support of the Application, it is therefore not clear to me why Lubben elected to be joined as a Respondent. Lubben was not present at the hearing to make any further submission. There is nothing to be dealt with in the submission made.
94. Having given due consideration to the relevant matters pursuant to Section 49 of the Act, I consider that an adjustment to the contribution schedule lot entitlements that would reflect the just and equitable contribution of each lot to the ongoing administration and maintenance of the Scheme is set out in my findings on the application for adjustment above.

COSTS

Findings:

- i. That the Applicant is liable for the cost of the adjudication.

Reasons:

Legislative Considerations

95. 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."

96. 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."

97. 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."

98. 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

99. 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”

100. In this instance the Body Corporate made a submission and participated at the hearing of the matter. The Body Corporate largely agreed with the Application but raised two points of difference. The Body Corporate succeeded on one of its points of difference but failed on the other.

101. 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”

102. In this matter six (6) owners elected to be joined as Respondents.

103. The Second and Third Respondents, Clifford and Clare would normally be at jeopardy for costs by virtue of their joinder. They either raised concerns addressed in the Leary Report but produced no contrary evidence or raised matters dealt with by the Court of Appeal (matters for consideration in an application for adjustment of the interest schedule lot entitlements). However their submissions are brief (less than 1 page) and unsupported and they did not attend the hearing to press their case. Their conduct was such as to not give rise to any additional cost for the Application and therefore no reason exists for me to exercise my discretion.

104. The Fourth Respondent, Elleray, would normally be at jeopardy for costs by virtue of their joinder. They complain, inter alia, of a lack of provision of information by the Body Corporate (to which two pages of attachments relate), however that is not the subject of the Application. Otherwise they raise concerns which are addressed in both the expert reports. Their submissions are brief (one page in addition to the above two pages of attachments) and they did not attend the hearing to press their case. Their conduct was such as to not give rise to any additional cost for the Application and therefore no reason exists for me to exercise my discretion.

105. The Fifth Respondent, Duce, submissions had some merit, while Duce did not attend the hearing his submissions were sufficiently set-out to understand the issue raised (3 pages plus a four page attachment). Duce accepted an adjustment might be due but took issue with the inequity caused by the rounding of the experts for the purposes of determining an aggregate lot entitlement. I accepted Duce's submissions and made an appropriate adjustment to the expert reports, the necessary adjustment was simple and did not give rise to any additional cost for the Application. No reason exists for me to exercise my discretion.

106. The Sixth Respondent, Finger, submissions were brief (less than one page), Finger did not attend the hearing to press his case. Although brief and with little explanation it was readily apparent that Finger's submissions supported the principles set out in the Act and accepted an adjustment might be due but took issue with the inequity caused by the rounding of the experts for the purposes of determining an aggregate lot entitlement. In this regard, Finger's submissions supported those of Duce. Finger's conduct was such as to not give rise to any additional cost for the Application and therefore no reason exists for me to exercise my discretion.
107. The Seventh Respondent, Lubben, should not have joined as a Respondent, its submission was also brief (less than one page), but in favour of the Application, it also did not attend the hearing. Lubben's conduct was such as to not give rise to any additional cost for the Application and therefore no reason exists for me to exercise my discretion.
108. Considering all of the circumstances, I cannot say that any of the Respondents, including the Body Corporate, added materially to the cost of the Application. Therefore, I leave the cost of the adjudication with the Applicants.