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

**and**

**IN THE MATTER of a Specialist Adjudication**

BETWEEN:

**Mr Roy Elliott and Others**

**Applicant**

**and**

**The Body Corporate for Surfers Links**

**First Respondent**

**and**

**Mr Mirosław and Mrs Grazyna Zyner**

**Second Respondent**

**ADJUDICATORS ORDER**

Pursuant to appointment by the Commissioner for  
Body Corporate and Community Management  
dated 8 December 2003.

DELIVERED BY:

**WARREN D FISCHER**

Civil Engineer, Graded Arbitrator and Mediator  
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**IN THE MATTER of a Specialist Adjudication**

MR ROY ELLIOTT AND OTHERS v  
BODY CORPORATE FOR SURFERS LINKS AND  
MR MIROSLAW & MRS GRAZYNA ZYNER

**ORDER OF WARREN FISCHER**  
**Specialist Adjudicator**

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**Adjudication regarding:**

Adjustment of Contribution Lot Entitlement Schedule

**Place of Preliminary Conference:**

Surfers Links Pool House – Southport – Queensland

**Submission Dates:**

January 7, January 19, February 5 and February 17 2004

**View and Hearing Date:**

27 February 2004

**Delivered as an adjudicators order:**

To the Commissioner for Body Corporate and Community Management on the  
Fourth day of March 2004

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**A PARTIES, REPRESENTATIVES AND PROCEDURAL STEPS**

**A1 Parties and representatives:**

<b>Parties</b>	<b>Representatives</b>
<b>Mr Roy Elliott Registered Owner of Lot 44 ("Elliott") Applicant</b>	<b>Self-represented and assisted by Ms Kaylene Arkcoll BSc QS AAIQS AIMM MAppLaw of Leary Partners Pty Ltd ("Arkkoll") Expert</b>
<b>Mr Thomas and Mrs Beatrice Sharwood Registered Owner of Lot 39 Second Applicant</b>	<b>Represented by Mr Roy Elliott</b>
<b>Ms Shirley Cross Registered Owner of Lot 41 Third Applicant</b>	<b>Represented by Mr Roy Elliott</b>
<b>Ms Dawn Beveridge Registered Owner of Lot 42 Fourth Applicant</b>	<b>Represented by Mr Roy Elliott</b>
<b>Mrs Noelene Armstrong Registered Owner of Lot 43 Fifth Applicant</b>	<b>Represented by Mr Roy Elliott</b>
<b>Mr George and Mrs Joy Hutchinson Registered Owner of Lot 45 Sixth Applicant</b>	<b>Represented by Mr Roy Elliott</b>
<b>Mr Algernon and Mrs Vera Rose Registered Owner of Lot 46 Seventh Applicant</b>	<b>Represented by Mr Roy Elliott</b>
<b>The Body Corporate for Surfers Links Community Titles Scheme 23400 Respondent</b>	<b>Un-represented</b>
<b>Mr Mirosław and Mrs Grazyna Zyner ("Zyner") Second Respondent</b>	<b>Self-represented</b>

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## A2 Procedural Steps:

- a. On 16 July 2003, Elliott lodged a Dispute Resolution Application with the Commissioner for Body Corporate and Community Management ("The Commissioner").
- b. On 12 August 2003, the Commissioner invited all lot owners in the Surfers Links Community Titles Scheme 23400 to make submissions on the Dispute Resolution Application by 9 September 2003 (ultimately extended until 8 December 2003).
- c. On 8 December 2003, my nomination as specialist adjudicator to resolve the dispute was made by the Commissioner.
- d. On 2 January 2004 a preliminary conference took place at which due inquiry was made and directions given for further submissions.
- e. Instead of formal pleadings, written submissions (attaching copies of documents) were prepared and delivered.
- f. On 7 January 2004, a written submission was made by Elliott.
- g. On 19 January 2004, a written submission in reply was made by Zyner.
- h. On 5 February 2004, further information in support of their submission in reply was provided by Zyner.
- i. On 17 February 2004, a written submission in reply was made by Elliott.
- j. In correspondence dated 23 February 2004, Elliott agreed to the conduct of an informal hearing at the conclusion of the view to be held on 27 February 2004.
- k. In correspondence dated 25 February 2004, Zyner agreed to the conduct of an informal hearing at the conclusion of the view to be held on 27 February 2004.
- l. On 27 February 2004, a view was made of the Surfers Links Community Titles Scheme 23400 in the presence of the parties and their assistants. During the view frequent discussion took place in the presence of all parties about the various features of the different lots all of which was recorded.
- m. On 27 February 2004, following the view an informal hearing was held which was attended by the Applicant Parties and their expert and the Second Respondent, Zyner.

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**B ORDER**

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

**That contribution entitlements be adjusted to be equal for each of the 54 lots within Surfers Links 5 Bronberg Court Southport 4215.**

That the contribution lot entitlement schedule be adjusted to be equal, as is just and equitable in the circumstances. The contribution lot entitlement schedule is to be adjusted so that each lot holds one (1) entitlement and the aggregate of the schedule is fifty-four (54).

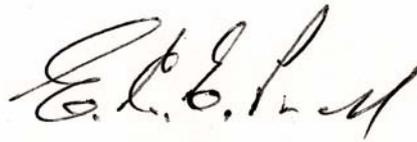
That in accordance with the provisions of Section 48(9) of the Act the body corporate as quickly as practicable lodge a request to record a new community management statement reflecting the adjustment ordered.

Signed



Warren Fischer  
Specialist Adjudicator  
3 March 2004

Witnessed



ECE Pratt QC

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## **C REFERENCE TO SPECIALIST ADJUDICATION**

- C1 A Dispute Resolution Application was lodged by Elliott with the Commissioner under the provisions of Chapter 6 of the Body Corporate and Community Management Act 1997 ("the Act"). Section 265(1)(c) of the Act provides that the adjudication of a dispute must be a specialist adjudication if another provision of the Act requires the adjudication to be specialist adjudication. Section 48(1)(b) of the Act provides that the owner of a lot in a community titles scheme may apply, under Chapter 6, for an order of a specialist adjudicator for the adjustment of a lot entitlement schedule.
- C2 Section 239 of the Act provides, inter alia, that for an order about a dispute mentioned in Section 265 the applicant must nominate for appointment the name and address of one or more persons considered by the applicant as having the appropriate qualifications, experience or standing for acting as a specialist adjudicator for the application. Section 265(2) further provides that the specialist adjudicator must be the person chosen by the Commissioner and need not be a person nominated by a party to the application.
- C3 I was nominated as specialist adjudicator by Elliott in the Dispute Resolution Application lodged on 16 July 2003.
- C4 I was nominated as specialist adjudicator by the Commissioner in a letter, copied to the parties, dated 8 December 2003.

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## **D RECITAL OF RELEVANT EVENTS LEADING TO THE DISPUTE**

- D1 Surfers Links Group Titles Plan 101858 was registered by the Registrar of Titles on 15 February 1995.
- D2 Surfers Links is located at 5 Bronberg Court, Southport.
- D3 Surfers Links consists of 54 lots all three bedroom but of three different designs; 32 No "Village Homes", 16 No "Links Homes" and 6 No "Bronberg Homes".
- D4 The current Community Management Statement was registered on 16 July 1999.
- D5 The contribution and interest lot entitlement schedules contained in the current Community Management Statement are identical and provide variations in lot entitlements from a minimum of 39 to a maximum of 78 with an aggregate of 2734. These entitlements are as set out in the original Group Titles Plan registered in 1994. When the Group Titles Plan was registered there was no legislative requirement regarding the consideration to be given in determining the lot entitlement schedule.
- D6 When the Act commenced in 1997 it introduced two schedules, a contribution and an interest lot entitlement schedule. It also provided some guidance as to the consideration to be given in determining the lot entitlement schedules and introduced provisions for the adjustment of lot entitlement schedules by the district court.
- D7 The Act was further amended on 4 March 2003, this further amendment included further guidance as to the matters to be considered in determining the lot entitlement schedules and also widened the jurisdiction for adjustment of lot entitlement schedules to include specialist adjudicators.
- D8 Section 48(1)(b) of the Act provides that the owner of a lot in a community titles scheme may apply, under Chapter 6, for an order of a specialist adjudicator for the adjustment of a lot entitlement schedule.
- D9 Elliott is the registered owner of lot 44 and lodged a dispute resolution application for adjustment of the contribution lot entitlement schedule with the Commissioner on 16 July 2003.
- D10 Section 48(2)(a) of the Act provides that the respondent for such an application is the body corporate.
- D11 At a meeting of the Body Corporate Committee held on 14 January 2004, the committee resolved not to take an active role in the application.
- D12 Section 48(2)(b) of the Act provides that at the election of another owner in the scheme, the other owner may be joined as a respondent for the application.
- D13 Zyner is the registered owner of lot 2 and gave written notice of their election to be joined as a respondent to the body corporate on 19 January 2004 in accordance with the provisions of Section 48(3) of the Act.
- D14 This gave rise to the issue which I was required to consider, namely, "that contribution entitlements be adjusted to be equal for each of the 54 lots within Surfers Links 5 Bronberg Court Southport 4215."

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## **E FINDINGS AND REASONS**

In addition to the documents submitted prior to my appointment as specialist adjudicator, the parties also tendered further submissions and copies of documents relied upon by them bearing on the issues. All parties were given an opportunity to provide submissions and submissions in reply. The represented parties attended a hearing to present their submissions and to test the submissions of the other parties. The matter was determined on the hearing, the party's written submissions and documents and a view of the community titles scheme.

**That contribution entitlements be adjusted to be equal for each of the 54 lots within Surfers Links 5 Bronberg Court Southport 4215.**

### **Findings:**

- 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:**

- a. 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.
- b. Section 49 of the Act provides criteria for deciding just and equitable circumstances. It provides that a specialist adjudicator may 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. It provides that matters a specialist adjudicator may have regard to are not limited to those matters, however, it also provides that a specialist adjudicator may not have regard to any knowledge or understanding the applicant had when they bought their lot about the lot entitlement schedules or their application.
- c. The Community Management Statement for Surfers Links confirms that the Regulation Module applying to the Community Titles Scheme is the Body Corporate and Community Management (Standard Module) Regulation 1997.
- d. The Surfers Links Community Titles Scheme is a basic scheme, not part of a layered arrangement.
- e. The Community Management Statement for Surfers Links confirms in Schedule C, by-law 2, that a lot can be used for residential purposes only.

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- f. Elliott provided the expert report of Arkcoll in support of his application for adjustment of the contribution lot entitlement schedule. Arkcoll has tertiary qualifications in quantity surveying and law and I accept her report as that of an expert within her area of expertise for this application and therefore admissible. Zyner was provided opportunity to make a submission as to why Arkcoll's report should not be accepted as expert evidence however no submission was made by Zyner. The Arkcoll report considers the cost imposts of the lots within the scheme on the body corporate expenditure and concludes that those imposts are equal for each of the lots.
  - g. Zyner did not provide any quantitative support with their submission against the expert report of Arkcoll. Indeed, Zyner conceded that they agreed with the findings of the report to the extent that it represented the cost impost of the lots on the body corporate expenditure.
  - h. Zyner provided quantitative support with their submission of a converse argument which, in their view, supported the justice and equity of the existing contribution lot entitlement schedule.
  - i. Zyner's argument was based on a proposal that the body corporate costs should be apportioned on the basis of the area consumed by a lot, rather than the direct cost impact of a lot. The reasoning developed was that the required common area for the scheme was dictated by town planning requirements and was based on the overall area of the scheme rather than the number of lots – that is, the common area would be a prescribed size irrespective of the number of lots. The Zyner argument went on to highlight that by having incorporated larger "links homes" (av 235 sqm) and "bronberg homes" (av 412 sqm) within the scheme this reduced the overall number of available lots to contribute to the body corporate expenses associated with the maintenance of the common property. The Zyner argument was that if the scheme had consisted entirely of "village homes" (av 165 sqm) then 70 lots could have been constructed within the area currently consisting of only 54 lots and in consequence the levies for each lot in that circumstance would, while equal, be in the order of that currently existing. The same argument was advanced for the "bronberg homes" and "links homes" drawing the same conclusions.
  - j. What Zyner failed to address is that the legislation requires, when adjusting a contribution lot entitlement schedule, that adjustment to reflect the costs imposed by each lot on the body corporate expenditure.

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- k. I put to Zyner that when publishing an order that it is necessary to ensure that order is in accordance with the legislative provisions. I conveyed the provisions of s14B of the *Acts Interpretation Act 1954* and then from the explanatory notes for Clause 10 of the *Body Corporate and Community Management and other Legislation Amendment Bill 2002* “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” and that “the contribution should not be based on lot size or value”. I inquired of Zyner as to how, if finding in his favour, these considerations might be addressed – Zyner conceded that he did not know.
- l. There is a provision, by-law 5.3, which if valid could provide a just and equitable reason for the contribution lot entitlements to be other than equal as it represents that the body corporate is responsible for the maintenance and repair of elements of the lots. This by-law was identified as a matter for consideration at the preliminary conference and all parties were requested when making their submissions to address this by-law.
- m. In the event only Elliott made a submission addressing this by-law and provided an earlier adjudicators order (042-1999) in support of that submission. That adjudicators order addressed a similar provision in a previous by-law 5.2(a), that by-law also sought to vary the scheme of the legislation regarding property maintenance responsibilities. That adjudicator considered whether the body corporate had the power to make the by-law and found that it did not. Having reviewed that order and the current provisions of the Act, I find that position has not materially altered and it is my view that the entire by-law 5.3 is invalid. I do not intend to include in my order the removal of this by-law in isolation, I reiterate the previous adjudicator’s recommendation that the body corporate should undertake a review of all of its by-laws and, for the benefit of owners and others relying on its by-laws, alter them accordingly. The body corporate committee at their meeting of 14 January 2004 did resolve to commence such action.
- n. I reviewed the following information regarding the scheme; the last four years accounts (years ended 31 March 2000, 31 March 2001, 31 March 2002 and 31 March 2003) and the current budgets for both, the sinking and administration funds, the sinking fund forecasts dated 24 March 1998 and 1 April 2002, the community management statement including the by-laws, the group titles plan and the management agreement for the scheme.
- o. I agree with Arkcoll’s apportionment of the administration fund costs on an equal basis between all lots. Zyner did not raise 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.
- p. I agree with Arkcoll’s apportionment of the sinking fund costs on an equal basis between all lots. Zyner did not raise objection to any of the costs apportionments made by Arkcoll. It is clear that these costs all items of expenditure on common property elements which are equally beneficial to all of the lots within the scheme.

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- q. Zyner made no objection to the amount of the costs extracted from the body corporates various records and contained in the Arkcoll report for either the administration fund or sinking fund. The amount of those costs would not impact on the contribution schedule lot entitlement if all apportioned on an equal basis in any event.
  - r. Having given due consideration to the relevant matters pursuant to Section 49 of the Act, I consider that an equal contribution lot entitlement schedule would reflect the fair and equitable contribution of each lot to the ongoing administration and maintenance of the scheme.
  - s. Elliott also requested at the hearing that I order an amendment to by-law 5.2 to make it clear that the owner of a lot was responsible for the cost of painting their lot and that this was not a body corporate expense. This by-law has already been amended following the adjudicators order 042-1999.

By-law 5.1 provides, in part;

“Every Owner or Occupier must:

(a) Maintain in good condition and repair the exterior of his Dwelling including (without limitation) all walls, windows, sidewalls, walkways and driveways within his lot;”

By-law 5.2 then provides;

“An owner, when carrying out their duties under by-law 5.1 or otherwise under the Act or Regulations, must not paint the external surfaces of the Dwellings in a colour scheme other than such colour scheme as presently exists for the Dwelling or such other uniform colour scheme as may be approved from time to time by the Body Corporate in General Meeting.”

I consider that it is clear within the existing by-laws that the only matter for the Body Corporate with respect to painting of lots is the approval of a uniform colour scheme other than such colour scheme as presently exists. I consider that it is already clear within the by-laws as they exist that it is the lot owner that is responsible for the cost of painting their lot.

I therefore make no order to amend by-law 5.2.