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

and

IN THE MATTER of a Specialist Adjudication

BETWEEN:

Ms Audrey Finch

("The Applicant")

and

The Body Corporate for River Park

Community Titles Scheme 14630

("The Respondent")

ADJUDICATORS ORDER

Pursuant to appointment by the Commissioner for Body Corporate and Community Management, dated 4 January 2007.

DELIVERED BY:

WARREN D FISCHER

Civil Engineer, Grade 2 Arbitrator, Registered Adjudicator and Accredited Mediator
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IN THE MATTER of a Specialist Adjudication

MS AUDREY FINCH v
THE BODY CORPORATE FOR RIVER PARK
COMMUNITY TITLES SCHEME 14630

ORDER OF WARREN FISCHER
Specialist Adjudicator

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Adjudication regarding:

Opposition to motions requiring resolution without dissent, whether opposition reasonable in the circumstances, exclusive use by-laws, adjustment of contribution lot entitlement schedule.

View and Hearing Date:

6 February 2007

Delivered as an adjudicators order:

To the Commissioner for Body Corporate and Community Management on the Twenty Third day of April 2007.

ORDER

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

1. that Schedule A of the Community Management Statement for the River Park Community Titles Scheme 14630 be amended such that the existing contribution lot entitlements are repealed and replaced by the following new contribution lot entitlements, which are equal except to the extent that is just and equitable in the circumstances:

Lot No	Contribution Schedule Lot Entitlement	Lot No	Contribution Schedule Lot Entitlement	Lot No	Contribution Schedule Lot Entitlement
1	12	16	23	32	23
2	23	17	23	33	22
3	22	18	22	34	23
4	23	19	23	35	25
5	23	20	23	36	23
6	22	21	22	37	23
7	23	22	23	38	22
8	23	24	22	39	23
9	22	25	23	40	23
10	23	26	23	41	22
11	23	27	22	42	23
12	22	28	23	43	25
13	23	29	23	44	23
14	23	30	22	45	23
15	22	31	23	Aggregate	992

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

2. that Schedule C of the Community Management Statement for the River Park Community Titles Scheme 14630 be amended such that the existing by-law 12 is repealed and replaced by the following new by-law 12:

"12. EXCLUSIVE USE OF COMMON PROPERTY - LOT 1

12.1 The Owner of Lot 1 from time to time shall be entitled to the exclusive use and enjoyment of the areas identified and prefixed "E" on the attached plans prepared by Michel Group Services and referred to in Schedule E.

12.2 The Owner of Lot 1 from time to time shall be responsible at their cost and expense for the demolition, reconstruction, maintenance and repair of all structures including foundation structures, essential supporting framework, load bearing walls, interior and exterior walls, ceilings, floors, windows, doors, stairs, fixtures and fittings, basement car park, fences, gates, driveway, all improvements including balconies, ground level and first floor level, roofing, rafters, fixtures and fittings ("Improvements") on Lot 1 and the exclusive use areas plus the fencing and gates erected by the Owner of Lot 1 on the Common Property.

12.3 The Owner of Lot 1 from time to time shall complete the demolition and reconstruction of the Improvements within twelve (12) months from commencement of the demolition in accordance with plans by Newruss Designs as attached as Annexure A to this By-Law and shall comply with all relevant authority requirements and obtain all necessary approvals and final inspection certificates and ensure the construction is completed in a workmanlike manner with all new materials and that the completed structure is in keeping with the design and appearance of the River Park Tower.

12.4 The Owner of Lot 1 from time to time from the completion of the reconstruction must not without first obtaining the written consent of the Body Corporate alter, renovate or make any addition to the Improvements made to Lot 1, the exclusive use area and fences and gates erected on the Common Property except to ensure the maintenance and repair of the Improvements which remains the responsibility of the Owner of Lot 1 and the Body Corporate shall not be responsible for nor be required to arrange or contribute to any maintenance or repair of any Improvements.

12.5 If the Owner of Lot 1 fails to comply with its obligations under this By Law, the Body Corporate may at its option and without obligation attend to any necessary maintenance and repairs and the cost will be recoverable from the Owner of Lot 1 from time to time as a liquidated debt."

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

3. that Schedule E of the Community Management Statement for the River Park Community Titles Scheme 14630 be amended such that the existing allocation for Lot 1 in BUP 436 is repealed and replaced by the following new allocation:

LOT	***AREA***
Lot 1 in BUP 436	*Areas marked E200 on the attached plans prepared by Michel Group Services Reference 8954-1 sheets 1 to 4 of 4 and Area marked E201 on the attached plan prepared by Michel Group Services Reference 8954-2 sheet 1 of 1*

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

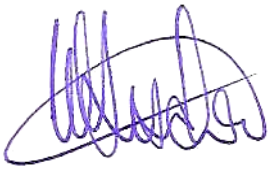
4. that in accordance with the provisions of sections 48(9) and 65 of the Act the body corporate as quickly as practicable, and in any event within three months, lodge a request to record a new community management statement reflecting the amendments ordered.

5. that the seal of the Body Corporate be affixed to the "Deed of Settlement" attached as "Annexure C" to motion one on the agenda for the Annual General Meeting of the River Park Community Titles Scheme 14630 held on Wednesday 31 May 2006.

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

6. that, pursuant to section 280(2) of the Act, the Respondent is liable for the costs of the adjudication.

Signed



Warren Fischer
Specialist Adjudicator
20 April 2007

PARTIES AND REPRESENTATIVES

Parties	Representatives
Ms Audrey Finch **Registered Owner of Lot 1** **("Finch")** **Applicant**	**Represented by Ms Nicole Martin** **Barrister** **("Martin")** **and by Stacks Gray Lawyers** **Mr McPherson and Ms Ding** **("McPherson") ("Ding")** **and by Ms Kaylene Arkcoll** **BSc QS AAIQS AIMM MAppLaw** **of Leary & Partners Pty Ltd** **("Arkcoll")** **Expert**
The Body Corporate for River Park Community Titles Scheme 14630 **("the Body Corporate")** **c/- Sargeant Strata** **Ms Carolyn Sargeant** **("Sargeant")** **Respondent**	**Represented by Ms Teresa Kearney** **Solicitor for the Body Corporate** **("Kearney")**

RECITAL OF RELEVANT EVENTS LEADING TO THE DISPUTE

1. The scheme consists of the common property of River Park Community Titles Scheme 14630, lot 1 (a two (2) storey detached dwelling) and lots 2 to 22 and 24 to 45 (contained in a fifteen (15) storey high-rise tower) on Building Unit Plan No. 436 ("the Scheme"). Building Unit Plan 436 was registered on 5 February 1970 ("the BUP").

2. The Scheme is located at 40 Watson Esplanade, Surfers Paradise, Queensland.

3. The Scheme common property includes driveway and set down areas, a swimming pool and associated toilets and showers, lawn, landscaping, entrance and lift lobbies, plant rooms, emergency stairs, etc.

4. There are forty four (44) lots in the Scheme, ranging from one to three bedrooms, all residential with titled areas from 790 sq.ft. to 2080 sq.ft (high-rise), 2390 sq.ft. (detached dwelling). The by-laws provide that lot 4 may also be used for the purposes of a manager's office and purposes ancillary to that use. All lots have attaching exclusive use rights over common property, typically for car parking.

5. The contribution and interest lot entitlement schedules contained in the current Community Management Statement ("CMS") executed on 2 August 2001 are identical. Those schedules provide variations in lot entitlements between 156 (lot 3) and 580 (lot 43) with an aggregate of 11,244.

6. Lot 1 was initially incorporated in the Scheme, and constructed for use, as a restaurant (by-law 13(b) of the BUP). The lot boundaries are novel; rather than being coincidental with, or external to, the dwellings walls the lot boundary in numerous locations makes an incursion into the interior of the dwelling. Approximately 50% of the internal area of the lower floor of the dwelling is affected in this way; approximately 5% of the internal area of the upper floor is similarly affected. The right of use of the areas of common property internal to the dwelling on the lower floor attach to lot 1 by an exclusive use by-law. There is presently no similar by-law in respect to the common property within the dwelling on the upper floor. Lot 1 also has exclusive use of a number of areas of common property external to the dwelling, for a storage shed and for balconies.

7. The dwelling, which utilises timber as one of its primary construction materials, has suffered severe and extensive termite attacks. The balconies have been affected, one has collapsed and the other is collapsing. It is also plainly apparent that a number of the internal and external walls of the dwelling and the roof structure have been affected.

8. A dispute between the Body Corporate and Finch arose regarding the responsibility for the repair and/or replacement of those areas that had been affected by the termite attack and a Dispute Resolution Application was lodged with the Commissioner for Body Corporate and Community Management ("the Commissioner") by the Body Corporate on 5 April 2001. An interim order of an adjudicator (Ref: 0221-2001) was published on 5 June 2001.

9. The dispute extended over the subsequent four years to also include painting, building and garden maintenance, roof repairs and protection against further termite infestation. The dwelling continued to deteriorate; the dwelling is stated in the submissions to now be uninhabitable, it is my view that statement is likely to be accurate.

10. In consequence of the interim order an agreement was reached between the Body Corporate and Finch for the resolution of the dispute. That agreement is documented in a Deed of Settlement ("the Deed"), which has been executed by Finch.

11. The Deed provides for, inter alia, the demolition of the existing dwelling, the construction of a new dwelling, changes to the exclusive use areas, contribution lot entitlement adjustments and financial consideration. The nature of the provisions in the Deed requires that the Body Corporate pass some motions which require resolution without dissent.

12. In the event those motions were put by the body corporate committee as Motions 1 and 2 at the annual general meeting of the Body Corporate which was held on 31 May 2006. Motion 1, contained five provisions: one provision was to execute the Deed, one provision was to amend the exclusive use by-law effecting Lot 1 giving effect to provisions within the Deed and the remaining three provisions were repetitive of provisions already contained within the Deed and, in my view, do not require any separate approval to that to execute the Deed. Motion 2 sought to vary the contribution schedule in accordance with an attached report of Leary and Partners and include that variation in the new CMS. Both of those motions failed (28 for, 1 against), the owner of lot 40 dissenting.

13. 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"*

14. The body corporate committee considered that the failure of the motion at the annual general meeting of the Body Corporate, held on 31 May 2006, gave rise to a dispute, as defined in Section 227(1)(b) of the Act, between the Body Corporate and the owner of lot 40.

15. The failure of body corporate committee's motions at the annual general meeting of the Body Corporate, held on 31 May 2006, also meant that the dispute between the Body Corporate and the owner of lot 1 was not resolved.

16. 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."*

17. On 24 August 2006, Kearney (for the Body Corporate) lodged a Dispute Resolution Application with the Commissioner pursuant to Chapter 6 of the Act seeking orders pursuant to sections 276 and 284.

18. On 1 September 2006, the Office of the Commissioner advised Kearney that as the Dispute Resolution Application included an adjustment to the contribution schedule the matter must be a Specialist Adjudication and the Body Corporate must be the respondent.

19. The submissions set out that Finch then intended to commence proceedings in the Supreme Court of Queensland.

20. On 13 October 2006, Ding (for Finch) lodged a Dispute Resolution Application ("the Application"), dated 10 October 2006, with the Commissioner pursuant to the provisions of Chapter 6 of the Act seeking orders pursuant to sections 276 and 284. The outcome sought and attached grounds were as initially lodged by Kearney.

21. These circumstances gave rise to the issue which I am required to consider, namely (sic):

"Order giving effect to the motions 1 and 2 of the annual general meeting of the body corporate for river park CTS 14630 as attached to the application held on 31 May 2006 returning a resolution without dissent that were not passed because of opposition being only 1 dissenting vote that in the circumstances is unreasonable and it is just and equitable in the circumstances to give effect to the motions of 1 and 2"

REFERENCE TO SPECIALIST ADJUDICATION

22. The Application includes, inter alia, an application for the adjustment of the contribution schedule of lot entitlements for the Scheme.

23. 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."*

24. 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."*

25. Therefore the Application is required to be decided by a specialist adjudicator. The Application, as lodged, did not include any nominee for appointment as the specialist adjudicator.

26. 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."*

27. The Application was amended, pursuant to Section 245 of the Act, on 20 November 2006 to provide my name as nominee for appointment as the specialist adjudicator.

28. 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."*

29. I was nominated as specialist adjudicator by the Commissioner in a letter, copied to the parties, dated 4 January 2007.

PROCEDURAL STEPS

30. On 13 October 2006, Ding (for Finch) lodged the Application with the Commissioner relying on the grounds and attachments therewith which included, inter alia, a copy of the Deed and a copy of the report produced by Kaylene Arkcoll of Leary and Partners Pty Ltd ("the Arkcoll Report").

31. On 18 October 2006, the Office of the Commissioner advised Ding that it was necessary that nomination of a Specialist Adjudicator be provided.

32. On 20 November 2006, the Application was amended to include the nomination of a Specialist Adjudicator and grounds for the nomination.

33. On 23 November 2006, the Commissioner provided to Sargeant a "Notice of Application and Invitation to make a Submission" which included instructions for further distribution. The invitation provided for submissions to be made by close of business on 14 December 2006.

34. On 24 November 2006, Sargeant confirmed distribution of the "Notice of Application and Invitation to make a Submission" in accordance with the Commissioners' instructions.

35. Seven (7) submissions were made, all supporting the application. No submission was made by the owner of lot 40.

36. On 4 January 2007, the Commissioner in a letter, copied to the parties, nominated me as specialist adjudicator.

37. On 5 January 2007, I wrote to Kearney seeking confirmation that she still acted for the Body Corporate and advising that if so I wished to arrange for her to be included in a teleconference to discuss the Application.

38. On 10 January 2007, I wrote to Sargeant seeking advice as to whether Kearney still acted for the Body Corporate. In reply, Sargeant confirmed that Kearney did so act.

39. On 11 January 2007, Kearney wrote to me confirming that she still acted for the Body Corporate and advising her availability for the teleconference to discuss the Application.

40. At 10:30 am on 12 January 2007, I conducted a teleconference at which Martin, Ding, Kearney and Sargeant were present. At that conference I directed that an informal hearing and view of the Scheme would take place on 6 February 2007 at 10:00 am and that any experts should attend that conference. The adequacy of the Application in addressing the "reasonableness" of the dissenting vote was also touched upon. I gave leave pursuant to sections 269 and 271(1)(a)(i) of the Act for the parties to file supplementary submissions on that issue, those submissions to be filed prior to the informal hearing on 6 February 2007.

41. On 6 February 2007, I duly attended and undertook a view of the Scheme and informal hearing. The Applicant's representatives, Martin and McPherson and expert, Arkcoll, attended along with the Respondent's representatives, Kearney and Sargeant.

42. No supplementary submissions were provided prior to the hearing, but at the hearing Martin sought leave to subsequently file those submissions. Kearney consented to that request. I therefore gave leave pursuant to sections 269 and 271(1)(a)(i) of the Act for the supplementary submissions to be subsequently filed.

43. On 22 February 2007, Martin filed the supplementary submissions.

44. On 23 February 2007, I provided the supplementary submissions to the owner of lot 40 along with an invitation to make a submission in reply. Any such submission to be received by me by 5:00 pm on 12 March 2007.

45. The owner of lot 40 did not make any submissions in reply by 5:00 pm on 12 March 2007, or subsequently. Neither did the owner of lot 40 request any extension of time to do so.

46. I now turn to decide the Application.

FINDINGS AND REASONS

47. The documents considered in this adjudication include the relevant documentation included within the file forwarded to me by the Commissioner, those documents subsequently supplied by Sargeant upon my request and bearing on the issues and the supplementary submissions of Martin, namely:

    a. The Application and submissions including all attachments thereto including, inter alia;

        (i) seven (7) pages of grounds;

        (ii) the Drawings of Michel Group Services;

        (iii) the Drawings of Newruss Designs;

        (iv) the Deed;

        (v) the minutes of the annual general meeting of the Body Corporate, held on 31 May 2006; and

        (vi) the Arkcoll Report.

    b. The CMS, executed on 2 August 2001;

    c. Building Unit Plan 436, registered on 5 February 1970 and amended by the plan of resubdivision 103623 on 18 January 1996;

    d. The statement of income and expenditure for the Administration Fund for the periods ended 28/02/2003, 29/02/2004, 28/02/2005 and 28/02/2006;

    e. The Administration Fund budget for the period ending 28/02/2007;

    f. The statement of income and expenditure for the Sinking Fund for the periods ended 28/02/2003, 29/02/2004, 28/02/2005 and 28/02/2006;

    g. The Sinking Fund budget for the period ended 28/02/2007;

    h. The Letting Authorisation Agreement, undated but commencing 6 May 2006;

    i. The Management Agreement, undated but commencing 6 May 2006; and

    j. The five (5) page Supplementary Submissions of Martin dated 22 February 2007.

48. The Arkcoll Report identifies that in producing that report the following documents were relied upon:

    (vii) The CMS;

    (viii) Building Unit Plan 436 and plan of resubdivision 103623;

    (ix) A copy of the Administrative Fund expenditure for the periods to 28/02/2003, 29/02/2004, 28/02/2005 and 28/02/2006 and the budget to 28/02/2006;

    (x) An updated version of the sinking fund forecast originally prepared by Leary and Partners Pty Ltd on 2 February 2001;

    (xi) A copy of the caretaking agreement;

    (xii) Information collected during a site inspection of the development;

    (xiii) A copy of the Newruss Designs drawings showing the proposed redevelopment of lot 1; and

    (xiv) Advice from Martin about the scope of the Deed.

49. The represented parties attended an informal hearing to present their submissions and to hear the submissions of the other party. The matter was determined on the hearing, the party's documents, the written and oral submissions and a view of the Scheme.

50. The outcome sought in the Application is (sic):

"Order giving effect to the motions 1 and 2 of the annual general meeting of the body corporate for river park CTS 14630 as attached to the application held on 31 May 2006 returning a resolution without dissent that were not passed because of opposition being only 1 dissenting vote that in the circumstances is unreasonable and it is just and equitable in the circumstances to give effect to the motions of 1 and 2"

Findings on the Application in respect of Motion 2:

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
1	12	16	23	32	23
2	23	17	23	33	22
3	22	18	22	34	23
4	23	19	23	35	25
5	23	20	23	36	23
6	22	21	22	37	23
7	23	22	23	38	22
8	23	24	22	39	23
9	22	25	23	40	23
10	23	26	23	41	22
11	23	27	22	42	23
12	22	28	23	43	25
13	23	29	23	44	23
14	23	30	22	45	23
15	22	31	23	Aggregate	992

v. The dissent to Motion 2 of the annual general meeting of the Body Corporate, held on 31 May 2006, by the owner of lot 40 was unreasonable in the circumstances.

Reasons

Legislative Considerations

51. 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.*

52. 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.

53. 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.

54. 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).

55. 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.

56. 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:

57. 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)"*

58. 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. For this reason an adjudicator may not, for example, make a consent order.

59. 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."*

60. 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 is just and equitable in the circumstances.

61. 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."*

62. 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 limit an adjudicator to have 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.

63. 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.

64. Consistent with these conclusions, *Fischer & Ors v Body Corporate for Centrepoint Community Title Scheme 7779 [2004] QCA 214* relevantly provides the following at paragraph 26 and paragraph 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."*

65. The Court of Appeal has 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

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

67. The Applicant relies on the Arkcoll Report in support of the proposed adjustment.

68. 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, through Kearney, accepted at the informal hearing that Arkcoll was an expert in contribution lot entitlement calculation.

69. 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 as expert evidence. 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.

70. The express purpose of the Arkcoll Report was to determine a contribution lot entitlement schedule providing for the equitable distribution of costs on the basis that lot 1 was reconstructed in accordance with the Newruss Designs drawings and the maintenance of the areas associated with lot 1, including that maintenance which would otherwise be the responsibility of the Body Corporate, was the responsibility of the owner of lot 1 as set out in the Deed.

71. The Arkcoll Report considers, in extensive detail, the cost burden that the nature, features and characteristics of the lots within the Scheme would place on the body corporate expenditure.

72. The Arkcoll Report determines that the existing contribution lot entitlement schedule would not be just and equitable in the circumstances and concludes with a recommended contribution lot entitlement schedule which varies from the existing contribution lot entitlement schedule.

73. For the purposes of determining the relevant body corporate expenditure, I reviewed the following information regarding the scheme;

(i) The statement of income and expenditure for the Administration Fund for the periods ended 28/02/2003, 29/02/2004, 28/02/2005 and 28/02/2006;

(ii) The Administration Fund budget for the period ending 28/02/2007;

(iii) The statement of income and expenditure for the Sinking Fund for the periods ended 28/02/2003, 29/02/2004, 28/02/2005 and 28/02/2006;

(iv) The Sinking Fund budget for the period ended 28/02/2007;

(v) The excerpt of the Leary and Partners Pty Ltd sinking fund forecast provided in Part E of the Arkcoll Report; and

(vi) The Arkcoll Report.

74. 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;

(i) The CMS, executed on 2 August 2001;

(ii) Building Unit Plan 436, registered on 5 February 1970 and amended by the plan of resubdivision 103623 on 18 January 1996;

(iii) the Drawings of Michel Group Services;

(iv) the Drawings of Newruss Designs;

(v) the Deed;

(vi) The Letting Authorisation Agreement, undated but commencing 6 May 2006;

(vii) The Management Agreement, undated but commencing 6 May 2006; and

(viii) The Arkcoll Report.

75. 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."

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

77. The Scheme is not part of a layered arrangement.

78. The by-laws for the scheme are set out in Schedule C of the CMS. By-law 14 provides that all lots shall only be used for residential purposes except lot 4 which may also be used to for the purposes of management of the building, for the sale and letting of lots in the building and for purposes ancillary and incidental to such use.

79. By-laws 12 and 13 address exclusive use entitlements attaching to lots in the Scheme and Schedule E of the CMS identifies the relevant areas for which exclusive use attaches to the lots.

80. For present purposes, I will consider by-law 12 and Schedule E as if amended in the manner intended by Motion 1.

81. The Arkcoll Report, at the outset, outlines the methodology it adopts and the factors it considers should influence the calculation of the contribution schedule lot entitlements.

82. For the Administration Fund items, the Arkcoll Report typically adopted either the budget allowance or an averaged allowance for the purposes of the assessment. Where an item of administration fund expenditure progressively increased from year to year, or where it was a new budget item, the budget amount was adopted for the purpose of the analysis. If an item of administration fund expenditure fluctuated sporadically, an average expense over the period was used for the purpose of the analysis.

83. For the Sinking Fund items, the allowances adopted for the purposes of the assessment were those which the sinking fund forecast provided, being amounts determined by consideration of the replacement cost of the Body Corporate assets, the expected life of those assets and the forecast replacement year.

84. I consider these methods of determining allowances to be appropriate in the circumstances.

85. The Arkcoll Report identifies that the Act provides that insurance, other than building replacement insurance, is to be shared on the basis of the contribution lot entitlement schedule it does not make any allowance for that insurance when undertaking the assessment.

86. The Arkcoll Report, considers the principles for the allocation of costs in the following general areas:

> Administration Fund, administrative items (10 items)
>
> Administration Fund, non-administrative items (19 items)
>
> Sinking Fund items (82 items)

87. The Arkcoll report provides that all administrative items in the administration fund (such as body corporate administration fees, bank charges and audit fees) should be proportioned equally amongst all lot owners.

88. I have reviewed the Arkcoll Report and additionally the management and letting agreements and find nothing in those agreements to conclude differently to Arkcoll that all administrative expenses should be proportioned equally amongst all lots. Neither Arkcoll nor the Respondent raised, nor could I locate, any provisions which would suggest that any lot owner(s) received any additional benefit to any other lot owner(s) in regard to the administrative items in the body corporate budget.

89. I therefore concur with the apportionment of these costs equally between all lots as there is no apparent basis upon which one might depart from the prima facie position that expenses should be proportioned equally amongst all lots.

90. In regard to non-administrative items in the administration fund (such as window cleaning, electricity and maintenance of the building, pool and plant & equipment) Arkcoll considered each of these items individually to determine how the expenditure should be allocated, a number of sections of the Arkcoll Report address some of these expenditure items in detail. Some of the expenditure is allocated equally between all lots, some is equally between tower lots only, some is apportioned on a quantity per lot basis or some specifically discussed method of allocation.

91. Having reviewed the Arkcoll Report I find no basis to conclude differently to Arkcoll on the allocation of the non-administrative items. The Respondent did not raise, nor could I locate, any provisions which would suggest that any lot owner(s) received any benefit in a different proportion to that determined by Arkcoll.

92. I therefore concur with the apportionment of these costs as set out in the Arkcoll Report as there is no apparent basis upon which one might depart from the analysis of the basis upon which the expenses should be apportioned between the lots.

93. With regard to items in the sinking fund expense allowances, Arkcoll considered each of these items individually to determine how the expenditure should be allocated, a number of sections of the Arkcoll Report address some of these expenditure items in detail. Some of the expenditure is allocated equally between all lots, some is equally between tower lots only, some is apportioned on a quantity per lot basis or some specifically discussed method of allocation which reflects the proportion of benefit obtained by each of the lots.

94. I am of the view that when a cost is incurred that is readily identified as being incurred in proportion to the size, or length or area or number of items, then if available, the most appropriate method of apportionment is in accordance with the measurement of that size, or length or area or number of items. Accordingly, I concur with the apportionment of such cost items in accordance with the measurement of each of those items beneficially to each lot (or where not beneficial to a lot then equally).

95. The Respondent did not raise, nor could I locate, any provisions which would suggest that any lot owner(s) received any benefit in a different proportion to that determined by Arkcoll. I therefore concur with the apportionment of these costs as set out in the Arkcoll Report as there is no apparent basis upon which one might depart from the analysis of the basis upon which the expenses should be apportioned between the lots.

96. 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 as set out in the Arkcoll Report and repeated in my findings on Motion 2. I order adjustment to the contribution schedule accordingly.

97. If there was any question (and I consider there is not) that to satisfy section 276 of the Act (specifically Item 10 of Schedule 5) I ought also consider, in addition to the justice and equity of the adjustment proposed, whether dissent by the owner of lot 40, in respect to Motion 2, was reasonable in the circumstances I observe the following. Although twice given opportunity, the owner of lot 40 made no submissions in respect of this question. It seems the only obvious practical affect upon the rights of the owner of lot 40 of Motion 2 are in regard to the proportion of the ongoing liability for the Body Corporate costs. The proposed contribution lot entitlement adjustment reduces the proportion of the liability of lot 40 for Body Corporate costs from 2.60% to 2.32%. On that basis, the passing of Motion 2 would be beneficial to lot 40, its ongoing liability for Body Corporate costs reducing in excess of 10%. I fail to see how dissent by a lot owner to a motion of beneficial effect to that lot owner might be considered reasonable by an ordinary person, in the circumstances I consider it unreasonable.

Findings on the Application in respect of Motion 1:

i. The dissent to Motion 1 of the annual general meeting of the Body Corporate, held on 31 May 2006, by the owner of lot 40 was unreasonable in the circumstances.

ii. That orders should be made which give effect to Motion 1

Reasons:

Legislative Considerations

98. The Application has been made under Chapter 6, seeking orders of an adjudicator pursuant to sections 276 and 284 of the Act. Schedule 5 of the Act, which is called up by Section 276, expressly provides at item 10 that:

"If satisfied a motion (other than a motion for reinstatement of scheme land or termination or amalgamation of the scheme) considered by a general meeting of the body corporate and requiring a resolution without dissent was not passed because of opposition that in the circumstances is <u>unreasonable</u> **[my underlining]** *— an order giving effect to the motion as proposed, <u>or a variation of the motion as proposed</u>.* **[my underlining]***"*

99. Consideration of Schedule 5, item 10, would suggest that the primary matter for consideration by an adjudicator prior to giving effect to a defeated motion requiring a without dissent resolution is whether the opposition was unreasonable in the circumstances. I see one of the primary considerations in drawing such a conclusion would be the effect on the rights or entitlements of the disaffected lot, if any, and the quid quo pro, if any.

Application Considerations

100. Motion 1 contained five provisions: one provision was to execute the Deed, one provision was to amend the exclusive use by-law effecting Lot 1 giving effect to provisions within the Deed and the remaining three provisions were repetitive of provisions already contained within the Deed and, in my view, do not require any separate approval to that to execute the Deed.

101. For present purposes it is sufficient in my view to consider whether it was unreasonable to dissent to the Deed, the balance of the provisions of the Motion are either repeated in the Deed or give effect to it.

102. The operative provisions of the Deed deal with the following issues:

(a) Restrictions on further proceedings, subject to:

(i) Adjustment to Lot 1's attached exclusive use rights;

(ii) Approval of the demolition of the existing structure and construction of a new structure on Lot 1 and some of its attached exclusive use areas;

(iii) Adjustment of the Contribution Schedule (This is dealt with by Motion 2 and I considered it there prior to dealing with Motion 1);

(iv) Preparation and lodgement of a new CMS; and

(v) Waiving of some fees.

(b) Costs associated with all the preceding provisions;

(c) Time within which the demolition and reconstruction must take place;

(d) Restrictions on further alterations or improvements;

(e) Responsibility for maintenance and repair;

(f) Time for payment of outstanding levies;

(g) Obligations on transfer of the lot; and

(h) Liability for non-compliance with the Deed

103. The provisions referred to at (a)(iv) and (b) to (h) above are ancillary to those at (a)(i), (a)(ii), (a)(iii) and (a)(v). The provision at (a)(iii) is dealt with elsewhere in this order when dealing with Motion 2. Consideration of provisions regarding the exclusive use rights, reconstruction of the dwelling and waiving of some fees follows.

104. The parties initial submissions, originally those of the Body Corporate but subsequently adopted by Finch, include a number of assertions as to why the owner of lot 40 may have dissented. Those assertions relate to a different dispute between the owner of lot 40 and the Body Corporate and I do not consider them relevant in the present dispute to my determination whether the dissent of the owner of lot 40 was unreasonable.

105. The supplementary submissions, from Martin, more squarely deal with some of the relevant considerations for my determination whether the dissent of the owner of lot 40 was unreasonable.

Exclusive Use Rights

106. The most significant change to exclusive use areas in area terms is the new area proposed to be created below the dwelling for basement parking. Being solid earth below the lot, this is an area which is not presently accessible to any member of the Body Corporate. The creation of the new basement carpark would have the aesthetic benefit of removing from the view of lot owners vehicles presently parked at the front of the lot. The rights of the other lot owners are unaffected by this amendment and I consider that dissent to this change would be unreasonable.

107. Some of the change to exclusive use areas is to expand those areas to include some small areas that are enclosed within the structural walls of the dwelling; that enclosure apparently part of the conversion of the premises from a restaurant to a residence. It is an area that is already inaccessible to other lots in the scheme, it being necessary to cross exclusive use areas to obtain access. The granting of exclusive use over this area reduces the body corporate liability for maintenance and must therefore be beneficial for all lots in the scheme. For all practical purposes the rights of the other lot owners are unaffected by this amendment and I consider that dissent to this change would be unreasonable.

108. The final amendment to the exclusive use area is a small expansion of courtyard area, it is an area only visible from very limited areas within the scheme and to which access for other lots is already both difficult and, it would seem, pointless. This is the only area that I observe that there might be some minimal reduction in the rights of other lot owners, although the purpose of any access is certainly not clear. The quid quo pro is that in giving exclusive use to this area in accordance with the Deed any reduction in rights is compensated by the transfer of the maintenance responsibilities from the Body Corporate to Finch. It appears to me that the proposed resolution of the matter is reasonable; on hearing the motion twenty eight lot owners voted in favour, seven submissions have been made on the Application all in favour, I have been provided with no submissions as to why the proposed resolution might be considered unreasonable. On this issue, any effect on the rights of lot 40 equally affects all other lots within the Scheme, except for lot 1. I find that the dissent of the owner of lot 40 would be unreasonable.

Demolition and Reconstruction of Dwelling

109. In the absence of any submissions from the owner of lot 40, I am unable to determine how it might be detrimental to his rights to remove a dilapidated and potentially dangerous building and replace it with a pristine new building. There have been no submissions made against the replacement of the dwelling. It would seem that the replacement of the dwelling would add to the visual amenity of the scheme, which would beneficial to all lots. It would also appear to significantly reduce ongoing liability of the Body Corporate in respect of the dwelling. Under the provisions of the Deed, Finch would be solely responsible for the cost of demolition reconstruction and, importantly, the ongoing maintenance of the dwelling. In all of the circumstances, I find that dissent of the owner of lot 40 would be unreasonable.

Waiving of Fees

110. The resolution of the dispute is likely to save the Body Corporate (including the owner of lot 40) significant expenditure in defending the matter. There is potential that the Body Corporate would be required to make contribution to the cost of reinstatement of the property, the reinstatement also likely to come at very considerable cost. The submissions set out that other equitable remedies would also be sought. The total cost to the Body Corporate might potentially be in the hundreds of thousands (the damage to the exclusive use property alone are stated to exceed $250,000). It appears that the Body Corporate may have already conceded liability for some of this cost.

111. The benefit to the scheme generally in resolving the matter in the manner proposed appears overwhelming. I have received no submissions against the proposal; all submissions have been in favour. Although twice given opportunity, the owner of lot 40 made no submissions in respect of this question, or at all.

112. It appears to me that the proposed resolution of the matter is reasonable; on hearing the motion twenty eight lot owners voted in favour, seven submissions have been made on the Application all in favour. On this issue, any effect on the rights of lot 40 equally affects all other lots within the Scheme, except for lot 1. I have been provided with no submissions as to why the proposed resolution might be considered unreasonable. I find that the dissent of the owner of lot 40 would be unreasonable.

Conclusion

113. In all of the circumstances, I find that the dissent of the owner of lot 40 was unreasonable and I make orders that give effect to Motion 1.

114. In making those orders, I pause to note that the original Motion 1 makes reference to by-law 44. The by-law to which it refers was included in the BUP but was replaced by by-law 13 when the CMS was registered. Schedule 5 item 10, makes it clear that I am able to give effect to a variation of a motion as proposed. I have therefore made the necessary amendments to the by-law to coincide with amendment to the CMS as opposed to the BUP. I settled the proposed by-law with Martin and Kearney prior to making formal orders.

COSTS

Findings:

The Respondent is responsible for the cost of the adjudication.

Reasons:

Legislative Considerations

115. 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."*

116. 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—*
>
> *(a) to the District Court for an order for the adjustment of a lot entitlement schedule; or*
>
> *(b) under chapter 6, for an order of a specialist adjudicator for the adjustment of a lot entitlement schedule."*

117. Section 48 of the Act therefore requires that the adjustment of lot entitlements may only be ordered by the District Court or a specialist adjudicator. Therefore, Section 265 of the Act applies to restrict adjudication, as opposed to litigation, of such a dispute to specialist adjudication.

118. 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."

119. Thus Section 280 of the Act applies and, while the prima facie' position is that the applicant is responsible for the cost of the adjudication; the adjudicator has a discretion to make orders in respect of the costs of the adjudication.

Application Considerations

120. The original dispute resolution application was made by the Body Corporate.

121. 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"

122. Because of the provision in Section 48(2)(a) that the body corporate must be the respondent for the application, the Office of the Commissioner advised the Body Corporate that the application must be dealt with by a specialist adjudicator and that the application could not be submitted with the Body Corporate as the applicant.

123. The application was subsequently resubmitted by Finch, adopting the material submitted by the Body Corporate.

124. I was instructed by the parties that they have agreed that the Body Corporate be responsible for the cost of the adjudication. In all the circumstances, I am prepared to exercise my discretion in accordance with the parties' agreement and so order.