CITATION:	*MEEK v THE BODY CORPORATE FOR BRIDGEPORT APARTMENTS CTS 30266 AND ROYLE* [2008] CCT KL013-07
PARTIES:	MEEK Greg and Kerrie v THE BODY CORPORATE FOR BRIDGEPORT APARTMENTS CTS 30266, ROYLE Tae
APPLICATION NUMBER:	KL013-07
DELIVERED ON:	15 August 2008
DELIVERED AT:	Brisbane
HEARING DATE:	4 August 2008
DECISION OF:	Mr K D Dorney QC
CATCHWORDS:	Application to adjust contribution schedule – whether previous *"amalgamation"*, if any, of lots relevant – *Body Corporate and Community Management Act 1997*, sections 46, 48 and 49
REPRESENTATION:	
APPLICANT:	Mr W Fischer
FIRST RESPONDENT:	Mr P Skews
SECOND RESPONDENT:	Mr T Royle
DECISION CATEGORY CLASSIFICATION:	C
NUMBER OF PARAGRAPHS:	31

REASONS FOR DECISION

Introduction

1 This is an application for a *"Lot Entitlement Adjustment"* made pursuant to section 48 of the *Body Corporate and Community Management Act 1997* ("BCCM Act"), as facilitated by section 31 of the *Commercial and Consumer Tribunal Act 2003* ("CCT Act"). The original applicants to the application were Mr Richard Hartman and Mrs Judy Hartman. By order of the Tribunal made 4 June, 2008, the present applicants Mr Greg Meek and Mrs Kerrie Meek were substituted as applicants. This was a consequence of the ownership of the lot, Lot 54, which was the basis of the right that the original applicants had originally to commence the application, being transferred to the present applicants. The original application, filed 14 November, 2007, sought an adjustment to the Lot Entitlement Schedule relating to the Contribution Schedule in the Community Management Scheme known as *"Bridgeport Apartments Community Titles Scheme 30266".*

2 The first respondent, as mandated by section 48(2) of the BCCM Act*,* was the body corporate of the relevant Community Titles Scheme. Its defence was filed 6 December, 2007.

3 A further lot owner, Mr Tae Royle, made an application in the present proceeding filed 6 February, 2008. He sought to be included as a party pursuant to section 53(1)(b) of the CCT Act. He was, and is, the owner of Lot 37 in the scheme. By order of the Tribunal made 6 February, 2008, directions were given for a determination of whether joinder should be allowed. By further order of the Tribunal made 5 March, 2008, the Tribunal, upon consideration of correspondence received on behalf of the first respondent dated 4 March, 2008, made, by consent, an order that Mr. Tae Royle be included in the application and be known as the second respondent. On 6 March, 2008, the second respondent filed his defence.

4 The hearing of the application was on 4 August, 2008, with all parties appearing, either by themselves or their representative.

Legislation

5 Since the parties were in agreement as to the applicable legislation, only brief reference will be made to the provisions which are most relevant to this application.

6 Section 46 of the *BCCM Act*, which otherwise deals with defining what is a lot entitlement, what is a contribution schedule and what is a contribution schedule lot entitlement, states that, by section 46(7), for a contribution schedule for the scheme for which development approval is given after the commencement of section 46(7), the respective lot entitlements must be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal. While that provision does not directly apply to the present circumstances, the examples that are used may be of assistance in matters of statutory interpretation where exactly the same terms are used when considering an application for adjustment. By force of section 14(3) of the *Acts Interpretation Act 1954*, an *"example"* in an Act of the operation of a provision of the Act is part of the Act. Examples given in section 46(7) are circumstances in which it may be just and equitable for lot entitlements *"not to be equal".* They include: a layered arrangement of community titles schemes, the lots of which have different uses and different requirements of public access, maintenance or insurance; and a commercial community

titles scheme in which the owner of one lot uses a larger volume of water, or conducts a more dangerous or high risk industry, than the owners of other lots.

7 Section 48 of the BCCM Act, which deals with the adjustment of a lot entitlement schedule, provides, by section 48(5), that the order of the Tribunal must be consistent with, if the order is about the contribution schedule, the principle stated in section 48(6): see paragraph (a). In turn, section 48(6) states that, for the contribution schedule, 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.

8 Section 49 of the BCCM Act, which states the criteria for deciding just and equitable circumstances, provides, by section 49(2), that section 49 sets out some matters to which the Tribunal may, and may not, have regard to for deciding, for a contribution schedule, if it is just and equitable in the circumstances for the respective lot entitlements not to be equal: see paragraph (a). Subject to section 49(3), which does not limit the matters to be considered to those expressly stated in section 49, provides, by section 49(4), that the Tribunal *"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.

Issues

9 After some exchange between the parties and the Tribunal, no party sought to lead oral evidence or sought to cross-examine the deponent to an affidavit or the author of any material that had been filed. Each party was content to address the Tribunal on the matters contained in the documents filed with the Tribunal.

10 The orders sought in the application were to the effect that the current contribution schedule be changed to show that the interest schedule lot entitlement for each of the designated lots in the Community Titles Scheme be those whole numbers, other than 0, set out in Table 5 of the report set out next. There was an alternative order sought that the contribution schedule be adjusted *"as the Tribunal thinks fit".*

11 The application had attached to it a report of Leary & Partners Pty Ltd, dated 19 January 2007, the author of which was Ms Kaylene Arkcoll.

12 The application also had attached to it the relevant Community Management Statement.

13 As the submissions progressed, it became clear that the only real issue in dispute was as to the effect of what was called the *"amalgamation"* of certain lots. What appears to have happened is that before the relevant Survey Plan (which was the survey plan which provided the basis of the issuing of titles for the relevant lots, being SP 138454) was prepared, the developers, Stencraft Pty Ltd, enlarged certain originally proposed lots such that what eventually was constructed and became lots 54, 58, 62, 65, 70 and 82 were somewhere near double the size of the originally proposed lots and lots 61 and 79 were somewhere near triple the size of the originally proposed lots. What is clear beyond argument is that, when the relevant Survey Plan was registered for the purpose of issuing titles to the lots, the contribution schedule for the particular Scheme was that which was then and is now in the Community Management Statement. That is, from the very beginning of the statutory application of the relevant Community Management Statement,

the present lots were exactly the same as those lots in the scheme for which development approval was given.

14 What is also clear beyond argument is that, even if what was just stated were not to be correct, at the time when the present application was filed, the contribution schedule only encompassed those particular lots that are contained in the present Community Management Statement.

15 Before going to consider the various arguments, it needs to be noted: that the present Community Titles Scheme is residential (save that Lot 4 is designed for use as a management lot); that section 66(1)(f) and section 66(1)(g) are not engaged (meaning that neither was there any intention to develop the scheme progressively nor was the scheme intended to form part of, or be the basis for, a layered arrangement); and, as shown by Schedule E to the Community Management Statement, there were and are, no allocated exclusive use areas of common property. Expressed another way, this particular Community Titles Scheme is purely residential.

Relevant Principles

16 It is to be acknowledged that there is no decision either at Tribunal level or at any level higher in the appellate structure that applies to this Tribunal which deals with any issue of *"amalgamation"* of lots in the context of adjustment to the contribution schedule. For reasons addressed here, the Tribunal considers that the *"amalgamation"* issue is irrelevant to the task to be undertaken by the Tribunal.

17 But *Fisher v Body Corporate for Centrepoint Community Titles Scheme 7779* [2004] 2 Qd R 638, a decision of the Queensland Court of Appeal, is both directly on point and is binding on this Tribunal.

18 For present purposes, *Fisher* decided that where, as here, inequality is obvious from the contribution schedule contained in the Community Management Scheme, the real issue for determination is whether the relevant circumstances exist for the Tribunal to decide that an adjustment should be made to each of the interest schedule lot entitlements such that the lots not be equal because it is *"just and equitable"* in the circumstances for inequality to prevail.

19 As posed by *Fisher*, the 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 be respective lots, or their contribution to the costs incurred by the body corporate; and *"more general considerations of amenity, value or history are to be disregarded*" (emphasis added) because what is at issue is the *"equitable"* distribution of the costs: at 644 [26]. It was also made clear by the Court of Appeal that if the inquiry were to be wider than being limited to the extent to which a lot creates costs, or consumes services, above or below the average, and were to include *"such nebulous criteria"* as the structure of the scheme, or the nature, features and characteristics of the apartments in the scheme, and the purposes for which they are used, *"there would be no intelligible basis on which the vast variety of circumstances might be relied upon to depart from, and therefore erode, the principle said to be paramount, that there should be an equality of entitlements"*: at 645 [32].

20 Specifically with respect to section 49(4), *Fisher* held that it was to be construed 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 titles scheme".

Discussion of Issues

21 It is to be noted that section 49(4)(c) encompasses *"the purposes for which the lots are used"* and that section 49(4)(b) encompasses the *"nature, features and characteristics"* of the relevant lots. As dictated by *Fisher*, regard can be had to those but only to the extent, *"if any"*, that they affect the cost of operating a community titles scheme. The inevitable consequence of that approach must be that this Tribunal cannot look at any individual lot and say that, merely because of its size, whether it be some 2 or even 3 times bigger than other lots, that must necessarily have a consequence on the contribution schedule lot entitlement for that lot. As just canvassed, size or a characteristic, of such a lot is only relevant for present purposes to the extent *"if any"* that relevant costs generated or caused by it affect the operation of the relevant scheme.

22 Before turning to a consideration of how the Tribunal should approach any adjustment of the contribution schedule, it can be seen from the above analysis that the issue of *"amalgamation"* is of itself irrelevant to the present consideration. It is irrelevant not only because of the matters just discussed about the affectation on costs being the sole criterion, but also because this Tribunal is dealing with these lots as at the time, and thereafter, the application is made. So much is clear from section 48(1)(b) of the BCCM Act. It states that the owner of a lot in a community titles scheme may apply under the *CCT Act* for an order of the Tribunal *"for the adjustment of a lot entitlement schedule"*. The only relevant lot entitlement schedule must be that that exists at the date of application, or possibly thereafter (if changed and still within the Tribunal's jurisdiction). That, as already noted, is the Schedule which is contained in the present Community Management Statement.

23 Another way to test the relevance, if any, of *"amalgamation"* is to postulate a set of circumstances where, unlike the present circumstances, it was never intended by the developer to do other than erect a building which would be eventually divided into lots such as these in circumstances where some lots had a size which was, say, to be even 10 times as big as most, if not all, of the other lots. It would be just as irrelevant in those circumstances to consider the adjustment of the contribution schedule simply on the basis of size. As noted by *Fisher*, size and other identified matters set out in section 49(4) of the BCCM Act are relevant *"only"* to the extent, if any, that they affect the cost of operating a community titles scheme.

24 Thus, there is just no way in which this Tribunal, acting according to the dictates of the legislation in question and is guided by relevant authority, can consider the issue of *"amalgamation"* as an issue that must be considered of itself. Necessarily, if there was evidence that the particular disputed units did affect the cost of operation in a relevant way, then that would be required to be taken into account.

25 To deal, briefly, with one further point raised by the second respondent concerning the *"amalgamation"* issue, it is incorrect to attempt to find an analogy between *"exclusive use"* and the size of particular units. The only similarity between the two matters is that each may, or may not, depending on the evidence led and accepted by the Tribunal, affect costs in a relevant way. To the extent that such affectation occurs, it would be relevant; but for that purpose only.

26 As pointed out by the applicant, in *Fisher,* the Court of Appeal specifically referred to the Explanatory Notes which accompanied the 2003 Act and, in particular, noted Example 3 which was to the effect that, in a basic scheme, if all the lots are residential lots *"ranging in size from a small lot to a penthouse"*, the contribution schedule entitlements *"generally would be equal"*: at 644-645 [28].

Relevant Adjustments

27 As remarked in *Fisher*, a report such as the present one produced under the authorship of Ms Arkcoll is, to a large extent, a mechanical exercise of identifying the relevant costs, characterising them and then allocating them among the lot owners: at 641 [14]. Such relevant expertise as Ms Arkcoll brings is limited to, as her CV points out, quantity surveying. Given the approach by all parties to the report, the Tribunal is content to accept her expertise in that area and to accept the very great assistance she gives to the Tribunal in the mechanical exercise that she does perform.

28 Although it was urged on the Tribunal that it may be appropriate to adjust the contribution schedule such that all lots be equal, the Tribunal is satisfied from the Leary & Partners' report that it has been shown that there are areas, if limited, where certain lots creates costs, or consume services, above or below the average. In particular, as identified by Ms Arkcoll in Tables 2 and 3, there is demonstrated inequality in the cleaning of windows, the painting and wallpapering to external walls, the painting and wallpapering of balcony soffits, the rendering for external repair, the roofing, and the replacement of glazed unit balustrading. The Tribunal is not convinced that the costs relevant to roller shutters and entry gates, at least insofar as the costs are relevant to the automatic opening by basement door motors, should be determined according to car spaces allocated to each lot. In this context, it is noted that repair to entry gates has been allocated equally. One might consider such repair should be a function of use. The problem with allocating usage of shutters and gates according to car space allocation is a similar problem encountered with respect to lifts which convey persons within a building itself. With respect to the costs of lifts, although different reasoning is used for allocating equality to the repair and maintenance of them, there is no distinction, based upon any expert consideration, which shows why one should be not affected by a variable thing such as use, but the other should, when there is no evidence at all that there is a direct relationship between the ownership of a car space and the use to which such shutters and gates are put. It may well be that some lot owners and occupiers use their cars much more than others and it may well be that those who might have more than one car space do not use the other car space very much at all. In the absence of evidence as to such factors, the Tribunal cannot do other than determine equality, if only because, as required by *Fisher*, one must be able to *"readily determine"* what the contribution lot entitlement should be *"from the way in which"* any particular lot creates costs, or consumes services, above or below the average: at 645 [32].

29 Therefore, it will be necessary for all parties to review what is in Table 5 to the Leary & Partners' report in light of the conclusions that the Tribunal has reached. Once all parties agree, then an appropriate order can be made. If the parties cannot agree, then the proceeding will have to be listed, once again, before the Tribunal so that the Tribunal itself can make the relevant determination after submissions.

Costs

30 Although costs have not been raised in argument, the Tribunal forms the tentative view that the principles set out by the Court of Appeal in *Tamawood Ltd v Paans* [2005] 2 Qd R 101 should inevitably mean that there should be no order as to costs. Nevertheless, since the final orders made in this proceeding are yet to be determined, all parties have a limited time, set out in the orders made, to make any submissions as to costs, bearing in mind the indication just given by the Tribunal.

Orders

31 In summary, the relevant orders that should be made are:

(a) the contribution schedule lot entitlements contained in the contribution schedule which is Schedule "A" to the Community Management Statement of "Bridgeport Apartments Community Titles Scheme 30266" are adjusted, such that the contribution schedule lot entitlement allocated to each lot is that which the parties agree is the consequence of the conclusions that the Tribunal has reached about equal, and unequal, respective lot entitlements for that contribution schedule;

(b) if the parties cannot agree as to the process, or results, of applying the conclusions of the Tribunal as reached [which must account for compliance with the requirement under section 46(6) of the *Body Corporate and Community Management Act 1997* that such lot entitlements must each be a whole number and must not be 0], then liberty is granted to each party to have this proceeding relisted for the Tribunal's further consideration – but, if the parties can agree as to the result of what the new contribution schedule lot entitlements should be which would constitute the new contribution schedule, then the parties can inform the Tribunal of the same in writing, whereupon the Tribunal will make a specific order to the effect of that result;

(c) such liberty to apply must, if necessary, be exercised within 28 days from the date of delivery of these orders – and failing such application being made, or information being given, to the Tribunal at or before the expiry of that time, the further hearing of this proceeding is to be listed before the Tribunal and all parties are to be notified of the further hearing date;

(d) each party is given liberty to file in the registry one copy and e-mail to cct@tribunals.qld.gov.au and deliver to each other party one copy of submissions as to costs, if any, by 4:00pm on 9 September 2008.

MR K D DORNEY QC
MEMBER
Commercial and Consumer Tribunal