Commercial and Consumer
Tribunal

Order

Section 50 Commercial and Consumer Tribunal Act 2003

APPLICATION NO: **KL018-08**

APPLICANTS: **David and Jean Barry**
C/- Alternative Dispute Resolutions
Attn: Mr W Fischer
PO Box 552
ASHGROVE QLD 4060

RESPONDENT: **The Body Corporate for Silverpoint**
C/- TEYS Legal
Attn: Ms R Janes
GPO Box 5256
BRISBANE QLD 4001

Upon hearing Mr Fischer on behalf of the applicants and Mr Green on behalf of the respondent, the Commercial and Consumer Tribunal makes the following orders:

1. The lot entitlement contribution schedule for the Silverpoint Community Titles Scheme 5844 be adjusted so that the respective contribution lot entitlements recorded in the Community Management Statement be in accordance with the conclusions reached by the Tribunal.

2. Both parties have liberty to apply to the Tribunal for finalisation of the order for adjustment. If both parties cannot agree what should be contained in the new Community Management Statement, the proceeding is to be listed for a further hearing.

COMMERCIAL AND CONSUMER TRIBUNAL

MR K D DORNEY QC
MEMBER
Commercial and Consumer Tribunal

Date: 11 November 2008

Commercial and Consumer
Tribunal

CITATION:	*BARRY V THE BODY CORPORATE FOR SILVERPOINT* [2008] CCT KL018-08
PARTIES:	BARRY David and Jean v THE BODY CORPORATE FOR SILVERPOINT
APPLICATION NUMBER:	KL018-08
DELIVERED ON:	11 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	21 October 2008
DECISION OF:	Mr K D Dorney QC
CATCHWORDS:	Adjustment of contribution lot entitlement schedule – Conflicting experts' reports about extent of adjustment for "inequality" – *Body Corporate and Community Management Act 1997*, sections 46, 47, 48 and 49
REPRESENTATION:	
APPLICANT:	Mr Fischer
RESPONDENT:	Mr Green
DECISION CATEGORY CLASSIFICATION:	C
NUMBER OF PARAGRAPHS:	26

REASONS FOR DECISION

Introduction

1 This application, filed 25 June, 2008, is for a lot entitlement adjustment of the contribution schedule for the Community Titles Scheme known as "Body Corporate for Silverpoint Community Titles Scheme 5844". The applicants are the joint tenants of Lot 50 in that CTS.

2 The respondent, being the relevant body corporate for the CTS, filed a defence on 4 August, 2008.

3 On 21 August, 2008, the Tribunal made a number of orders. When making the orders, the Tribunal noted that the parties agreed that the existing contribution lot entitlement schedule was not equal and that it was just and equitable that it ought to be adjusted, with the parties disagreeing as to extend of the adjustment that should be made. The actual orders required the delivery of relevant submissions and an additional expert report. Lastly, the orders provided that the expert for the applicants consult with the experts for the respondent and that a document be prepared identifying the areas of agreement and disagreement.

4 When the application came on for hearing on 21 October, 2008, the parties had complied with the orders and had, in particular, prepared tables identifying the areas in which there was such disagreement and the reasons for disagreement.

5 Because the only real point of dispute was between the experts, rather than have each expert called as a witness and cross-examined by a lay person, the Tribunal ordered that both sets of experts sit at the bar table and answer a series of questions from the Tribunal about their differences in approach. Subsequent to that aspect of the evidence being dealt with in that way, both parties were invited to, and took advantage of, orally addressing the Tribunal both as to factual matters and as to the relevant law.

6 It is the Tribunal's view that such an approach not only complied with section 47 of the *Commercial and Consumer Tribunal Act 2003* ("*CCT Act*") but also permitted a more expeditious and clearer examination of the real issues in dispute.

Legislation

7 Because of the narrowing of the issues involved, it is only necessary to refer to a few of the relevant provisions under the *Body Corporate and Community Management Act 1997* ("*BCCM Act*").

8 Section 46 of the *BCCM Act* which deals with lot entitlements defines the "contribution schedule lot entitlement", for a lot, as meaning the number allocated to the lot in the contribution schedule [which by section 46(6) must be a whole number and must not be zero].

9 By section 47(2) of the *BCCM Act*, the contribution schedule lot entitlement for a lot is the basis of calculating –

(a) the lot owner's share of amount levied by the body corporate; 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.

10 Section 47(4) provides that neither the contribution schedule lot entitlement nor the interest schedule lot entitlement for a lot is used for the calculation of the liability of the owner or occupier of the lot for the supply of a utility service to the lot if the amount of the utility service supplied to each lot is capable of separate measurement, and the owner or occupier is billed directed.

11 Section 48 of the *BCCM Act* deals with the adjustment of a lot entitlement schedule. As the parties are in agreement about the present contribution schedule lot entitlements not being equal, it is to section 48(6) that attention is directed for the determination of what is "just and equitable in the circumstances for them not to be equal".

12 Section 49 of the *BCCM Act* then sets out, particularly in section 49(4) what the Tribunal may have regard to – which factors are not limited to the matters stated by the force of section 49(3) – as being –

(a) how the community title scheme is structured;

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

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

13 Lastly, it should be noted by the respondent that if the Tribunal orders an adjustment of a lot entitlement schedule, section 48(10) of the *BCCM Act* requires the body corporate, as quickly as practicable, to lodge a request to record a new community management statement reflecting the adjustment ordered.

Relevant principles

14 Again, to a large extent, the parties were in agreement about the relevant legal principles.

15 Since there was some difference in approach concerning what was called "*support and shelter*", it is necessary, briefly, to consider *Fischer v Body Corporate for Centrepoint Community Titles Scheme 7779* [2004] 2 Qd R 638. There, the Court of Appeal through the decision of Chesterman J, with whom McPherson JA and Atkinson J agreed, set out the relevant governing principles. Relevantly, for present purposes, they are:

- the contribution schedule should provide for equal contributions by lot owners, except insofar as some lots "can be shown" to give rise to particular costs to the body corporate which other lots do not: at 644 [26];
- 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 lots for their contribution to the costs incurred by the body corporate, with general considerations of amenity, value or history to be disregarded: at 644 [26];
- the focus of the inquiry about where it is just, or fair, to recognise inequality is the extent to which a lot unequally "causes" costs to the body corporate: at 645 [31]; and

- that inquiry should be limited to the extent to which a lot "*creates*" costs, or "*consumes*" services, above or below the average, because it is from this that one can "readily determine" what the contribution lot entitlement should be: at 645 [32].

16 It is my view that there is no separate principle that is universally applicable to "*support and shelter*" costs. Certainly, if there were two separate buildings, then the support and shelter for each might well be seen to be limited to those lots to which such support and shelter obtained. But where, as here, there is but one building, particularly where the roof, or more particularly the roof membrane, is the consideration in question, it is difficult to see why larger lots, for instance, disproportionately give rise to the expense of repairs or replacement. For instance, in a multi-level building, it might well be said that those lots at the bottom of the building, except where a major catastrophe might occur and the whole building were to be flooded, would not be significantly adversely affected by faulty roof tiles. But it could hardly be argued that lots in such a position should not pay their equal share of the "shelter" that such a roof gave to the whole of the building for the purpose of repair or replacement. Thus, in a case such as this, the Tribunal finds that there is no clear nexus between the cost of the replacement or repair to roofing and the area of any particular lot on any level. As for the painting of external walls, replacement and cleaning of aluminium window frames (and the glass constituting such windows), since such things can be accurately measured and since such things disproportionately give rise to such expenses, it is appropriate to determine differentially such costs according to the measurement of such matters as each lot contributes. Furthermore, it is difficult to see how the actual areas constituted by exclusive use car parks affect the painting of external walls and matters of a similar kind.

17 A similar measurement approach should be adopted with respect to the replacement, or repair or painting of powder coated balustrades to balconies.

18 As to car park surfaces, including the repainting of lines to various bays, since there are significant areas in car parks that are not exclusive use areas and since it makes little sense to divide the cost between repainting the actual lines of car park bays and that of the general surface, the Tribunal finds that the determining factor is the combination of the total number of car parks and the total number of lots (without regard to the area of each lot). Painting to previously painted surfaces of walls and ceilings in basements and car parks should be approached on an equal basis because the Tribunal finds that there is only a minimal connection between the area of painting and the area of the actual car park spaces.

19 Insofar as costs of motors to basement shutters, and similar items, are concerned, the appropriate way is to determine such equally, because there is no logical connection between the number of car park spaces and the actual use of the shutter.

20 The last matter for general consideration is whether the actual cost should be divided in a way such that the lot entitlements for the contribution lot entitlement schedule should be calculated to the second decimal point or whether a more basic rounding down is acceptable. In essence, the difference is whether the total of the contribution lot entitlements in the contribution lot entitlement schedule should be almost 10,000 (being, in fact, 9,998) or almost 1,000 (being, in fact, 988).

21 It is contended that taking costs to the second decimal point provides a more accurate division of actual costs between lots. The response to that is contended to be

that rounding does not decrease the equity of the outcome, if only because there is, in essence, an approximation of all the figures chosen, given that they are with respect to a budget, even though that budget is based upon previous costings. In the end, despite the strength of both sets of arguments, and despite the fact that the larger lot entitlement total probably gives only an apparent aura of greater equality, the Tribunal decides that the lot entitlements for this CTS should be based upon a total entitlement of 9,998. This is not to say that in other cases, particularly those that involve many fewer lots, the alternative approach might well prove more attractive. For instance, it is not unimportant that the contribution schedule lot entitlement is the base of calculating the value of particular votes if a poll is conducted for voting on a particular resolution, which should not be made any more difficult than the circumstances demand.

Determination

22 Since the parties have set out their differences in what the Tribunal will call Table A and Table B, it is appropriate to use those same Tables, make decisions about them and, because there is no acceptance by the Tribunal of only one particular approach, it will be necessary for the experts to meet again to agree as to what the consequences for the lot entitlement contribution schedule should be. The consequential orders will provide that if the experts for each of the parties cannot agree, then the matter should be listed again before the Tribunal for a breaking of whatever deadlock should exist.

23 Therefore, the Tribunal makes the following determinations with respect to Table A:

- as electricity is a cost that can be variable, though it usually does rise, averaging, on balance, is not preferred and therefore the costing of $41,000.00 is accepted;
- since the rebates for electricity do not appear to be an ongoing budget item, it should be set at $0.00;
- insurance (non-building replacement premium) should be set at $0.00, both because no actual premiums have been made available and because of the complications that arise with respect to insurance concerning interest schedule lot entitlements only;
- insurance claims/reimbursements should be set at $0.00, since such can vary widely (and even be zero), depending on the particular year;
- for the reasons advanced above, the insurance claims/excess should be set at $0.00;
- the prior year adjustment should be set at $0.00, since it is accounting adjustment that has not occurred every year;
- the amount for security should be set at $0.00, because, even though in most schemes there is an allowance for security, it is not shown for this scheme that it is an ongoing budget item in fact;
- replacing dual cold water booster pumps in the basement should be set at $842.00;
- for those items in which the difference in costs allocated to each lot is $0.00, the Tribunal will make no further comment;
- for replacement wallpaper, the amount should be set at $1,342.92, if only because if wallpaper were not to be persisted with, the walls would probably need to be painted instead which would itself involve some cost;
- with respect to the differences in the Totals of the Administrative Budget and the Sinking Fund Budget, since the onus is on the applicants and since the applicants have relied upon the Leary & Partners Pty Ltd's Report (which I

generally have preferred overall), any differences which those Totals generate in terms of the calculation of lot entitlements are, subject to the other decisions on specific items made above, those which appear in the Leary & Partners Pty Ltd's Report.

24 With respect to Table B, the following determinations, with the assistance of the photo (exhibit 1), are made:

- in accordance with the analysis conducted above, the method adopted by Leary & Partners Pty Ltd's Report is to be preferred for all items except for the next two;
- for the recoating of the car park concrete surface (together with repainting the lines to the car park bays), since neither Expert Report is accepted for that exception, the experts will have to meet to resolve the specific sharing based upon the figure 1 being allocated to each lot and the further figure 1 being allocated to each of the actual car parks held by each lot in order to provide the relevant denominator;
- the replacement motor for the basement shutter should be based upon equality between lots.

25 The Tribunal sees no rational basis upon which to determine that the actual demand made on services and amenities provided by the body corporate to Lots 28, 45, 46, 47, 48, 49, 50 and 51 is capable of being differentiated from other Lots. Of course, to the extent to which each lot has different external areas for painting and balustrade use, then each is required to contribute more than lots which may have a total floor area which is smaller. But, taking the fact that *Fischer* itself referred to the Explanatory Note which used as an example "equality" for lots ranging in size from a small lot to a penthouse (at 644-645 [28]), since it has not been shown that such lots are not in fact paying for such exclusive use features that they have, it cannot be determined that relevant inequality exists. Necessarily, if there were to be evidence that all lots were contributing to such an exclusive feature as a domestic high water pressure pumping system or a private swimming pool system or an additional facility exclusive to such lots, then the Tribunal would be able to ascertain such additional matters and sheet home to such lots such actual costs as were to be proved.

Orders

26 The orders that will be made will reflect the fact that it will be necessary for the various experts to confer to produce an agreed schedule for the contribution lot entitlements and, failing such agreement, for the matter to be referred back to the Tribunal.

COMMERCIAL AND CONSUMER TRIBUNAL

MR K D DORNEY QC
MEMBER
Commercial and Consumer Tribunal