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

and

IN THE MATTER of a Specialist Adjudication

BETWEEN:

Mr Kjell and Mrs Wendy Kristoffersen

Applicant

and

The Body Corporate for Lido Deauville Apartments

Respondent

ADJUDICATORS ORDER

Pursuant to appointment by the Commissioner for Body Corporate and Community Management dated 12 March 2004.

DELIVERED BY:

WARREN D FISCHER

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

MR KJELL AND MRS WENDY KRISTOFFERSEN v
BODY CORPORATE FOR LIDO DEAUVILLE APARTMENTS

ORDER OF WARREN FISCHER
Specialist Adjudicator

CONTENTS

Adjudication regarding:

Adjustment of Contribution Lot Entitlement Schedule

Preliminary Conference Date:

23 April 2004

Place of Preliminary Conference:

Lido Deauville Apartments Games Room – Yorkeys Knob – Queensland

Submission Date:

26 April 2004

View and Hearing Date:

11 June 2004

Place of Hearing:

Lido Deauville Apartments Games Room – Yorkeys Knob – Queensland

Delivered as an adjudicators order:

To the Commissioner for Body Corporate and Community Management on the Seventh day of July 2004.

A PARTIES, REPRESENTATIVES AND PROCEDURAL STEPS

A1 Parties and representatives:

Parties	Representatives
Mr Kjell and Mrs Wendy Kristoffersen Registered Owner of Lot 18 ("Kristoffersen") Applicant	**Self-represented and assisted by Ms Kaylene Arkcoll BSc QS AAIQS AIMM MAppLaw of Leary & Partners Pty Ltd ("Arkcoll") Expert**
The Body Corporate for Lido Deauville Apartments Community Titles Scheme 15115 Respondent	**Represented by Mr Darrell O'Connor (O'Connor)**

A2 Procedural Steps:

a. On 4 November 2003, Kristoffersen lodged a Dispute Resolution Application with the Commissioner for Body Corporate and Community Management ("The Commissioner").

b. On 4 December 2003, the Commissioner invited all lot owners in the Lido Deauville Apartments Community Titles Scheme 15115 ("the Scheme") to make submissions on the Dispute Resolution Application by 15 January 2004.

c. Seven (7) submissions on behalf of eight (8) lots in the scheme were provided in response to the Commissioner invitation.

d. On 12 March 2004, my nomination as specialist adjudicator to resolve the dispute was made by the Commissioner.

e. On 23 April 2004, a preliminary conference took place at which due inquiry was made and directions given for further submissions. All parties were advised that any party wishing to be joined as a Respondent for the application was required to provide a written notice of that election in accordance with the provisions of Section 48(3) of the Act.

f. Instead of formal pleadings, written submissions (attaching copies of documents) were prepared and delivered.

g. On 26 April 2004, a written submission was made by Kristoffersen.

h. On 4 May 2004, a meeting of the Body Corporate Committee was held. The Committee resolved to take an active role in the application.

i. No written submission in reply was made by Body Corporate.

j. On 7 May 2004, a written notice of election to be joined as a respondent was received from Havenfritz Pty Ltd.

k. On 7 May 2004, a written submission in reply was made by Havenfritz Pty Ltd.

l. On 26 May 2004, a written submission in response was made by Kristoffersen.

m. In correspondence dated 1 June the parties were advised that an informal hearing would be conducted in conjunction with a view on 11 June 2004.

n. On 11 June 2004, an informal hearing was held at the Scheme which was attended by the Applicant, the Applicant's expert and the representatives of the Respondent and Havenfritz Pty Ltd. During the course of the hearing the representatives of Havenfritz Pty Ltd gave notice of the withdrawal of their submission and election to be joined. During the course of the hearing a view was made of the Scheme in the presence of the parties and their assistants. During the view frequent discussion took place in the presence of all parties about the various features of the different lots.

B ORDER

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

That the contribution lot entitlement schedule be adjusted to be equal to the extent that is just and equitable in the circumstances, such that the contribution lot entitlement schedule is as follows:

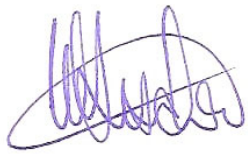
Lot No.	Contribution Lot Entitlement	Lot No.	Contribution Lot Entitlement
1	45	12	46
2	45	13	45
3	44	14	45
4	45	15	44
5	46	16	45
6	46	17	50
7	45	18	50
8	45	19	45
9	44	20	45
10	45	21	44
11	46	22	45
AGGREGATE		1,000	

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

For the avoidance of doubt, pursuant to the provisions of Section 284 of the Act, this Order is to have the effect as a resolution without dissent and be complied with within twenty-one (21) days from its date of publication.

That the applicant is responsible for the cost of the adjudication.

Signed



Warren Fischer
Specialist Adjudicator
7 July 2004

Witnessed

JE Fletcher

C REFERENCE TO SPECIALIST ADJUDICATION

C1. Section 48(1)(b) of the Act provides that the owner of a lot in a community titles scheme may apply, under Chapter 6, for an order of a specialist adjudicator for the adjustment of a lot entitlement schedule.

C2. A Dispute Resolution Application was lodged by Kristoffersen with the Commissioner under the provisions of Chapter 6 of the Body Corporate and Community Management Act 1997 ("the Act") on 4 November 2003.

C3. Section 265(1)(c) of the Act provides that the adjudication of a dispute must be a specialist adjudication if another provision of the Act requires the adjudication to be specialist adjudication.

C4. Section 239 of the Act provides, inter alia, that for an order about a dispute mentioned in Section 265 the applicant must provide the name and address of one or more persons considered by the applicant as having the appropriate qualifications, experience or standing for acting as a specialist adjudicator for the application.

C5. My name and address was provided to act as specialist adjudicator by Kristoffersen in the Dispute Resolution Application lodged on 4 November 2003.

C6. Section 265(2) further provides that the specialist adjudicator must be the person chosen by the Commissioner and need not be a person nominated by a party to the application.

C7. I was nominated as specialist adjudicator by the Commissioner in a letter, copied to the parties, dated 12 March 2004.

D RECITAL OF RELEVANT EVENTS LEADING TO THE DISPUTE

D1. The Lido Deauville Apartments Building Units Plan No. 105844 was registered by the Registrar of Titles on 26 June 1997.

D2. The Scheme is located at 2 Deauville Close, Yorkeys Knob.

D3. The Scheme has extensive landscaped common areas and includes a pool, tennis court, putting green and games room. There are twenty two (22) lots in the Scheme, all residential, accommodated in two (2) buildings; four (4) two bedroom lots with titled area varying from 196 sqm to 202 sqm, sixteen (16) single level three bedroom lots with titled area varying from 199 sqm to 214 sqm and two (2) double level three bedroom residential lots with titled area of 328 sqm. No lots have any exclusive use rights over common areas.

D4. The current Community Management Statement was executed on 15 July 2000.

D5. The contribution and interest lot entitlement schedules contained in the current Community Management Statement are identical and provide variations in lot entitlements between 8 (2 bedroom lot), 10 (single level 3 bedroom lot) and 20 (two level 3 bedroom lot) with an aggregate of 232. These entitlements are as set out in the original Building Units Plan registered on 26 June 1997. When the Building Units Plan was registered there was legislative provision only for a single lot entitlement schedule and no legislative requirement regarding the consideration to be given in determining that lot entitlement schedule.

D6. When the relevant provisions of the Act commenced on 13 July 1997 it introduced two schedules, a contribution and an interest lot entitlement schedule. It also provided some guidance as to the consideration to be given in determining the lot entitlement schedules and introduced provisions for the adjustment of lot entitlement schedules by the District Court.

D7. The Act was further amended on 4 March 2003, this amendment provided further guidance as to the matters to be considered in determining the lot entitlement schedules and also widened the jurisdiction for adjustment of lot entitlement schedules to include specialist adjudicators.

D8. An annual general meeting of the Body Corporate was held on 17 July 2003. At that meeting a motion for a resolution without dissent was considered to record a new Community Management Statement that altered the contribution lot entitlement schedule. That motion failed.

D9. Section 48(1)(b) of the Act provides that the owner of a lot in a community titles scheme may apply, under Chapter 6, for an order of a specialist adjudicator for the adjustment of a lot entitlement schedule.

D10. Kristoffersen is the registered owner of lot 18 and lodged a dispute resolution application for adjustment of the contribution lot entitlement schedule with the Commissioner on 4 November 2003.

D11. Section 48(2)(a) of the Act provides that the respondent for such an application is the body corporate.

D12. At a meeting of the Body Corporate Committee held on 4 May 2004, the committee resolved to take an active role in the application, however the committee failed to make any written submission in accordance with the procedural directions given at the Preliminary Conference held on 23 April 2004.

D13. Section 48(2)(b) of the Act provides that at the election of another owner in the scheme, the other owner may be joined as a respondent for the application.

D14. Havenfritz Pty Ltd is the registered owner of lot 1 within the scheme and gave written notice of their election to be joined as a respondent to the body corporate on 7 May 2004 in accordance with the provisions of Section 48(3) of the Act and provided with that notice a written submission in reply to the application. During the course of the hearing the representatives of Havenfritz Pty Ltd gave notice of the withdrawal of their submission and joinder.

D15. This gave rise to the issue which I was required to consider, namely, “An adjustment to the Contribution Entitlement of Unit Owners at Lido Deauville Apartments to equitably reflect the differences in maintenance in the Lots”.

E FINDINGS AND REASONS

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

An adjustment to the Contribution Entitlement of Unit Owners at Lido Deauville Apartments to equitably reflect the differences in maintenance in the Lots.

Findings:

i. The existing contribution lot entitlement schedule is not equal.

ii. The existing contribution lot entitlement schedule is not just and equitable in the circumstances.

iii. An equal contribution lot entitlement schedule would not be just and equitable in the circumstances.

iv. Some of the external facade painting, balustrade, smoke/heat detectors, roofing and associated materials and lifts for the buildings can be identified as beneficial to specific lots in the Scheme and those lots should therefore bear the cost burden of those elements on the body corporate in such a manner as may be measured and accurately determined.

v. Otherwise then in iv above all other body corporate expenditure should be allocated equally to each lot.

vi. 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 Lot Entitlement	Lot No.	Contribution Lot Entitlement
1	45	12	46
2	45	13	45
3	44	14	45
4	45	15	44
5	46	16	45
6	46	17	50
7	45	18	50
8	45	19	45
9	44	20	45
10	45	21	44
11	46	22	45
AGGREGATE		1,000	

Reasons:

E1. 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.

E2. Section 49 of the Act provides criteria for deciding just and equitable circumstances. It provides that a specialist adjudicator may have regard to how the community titles scheme is structured, the nature features and characteristics of the lots included in the scheme and the purposes for which the lots are used. It provides that matters a specialist adjudicator may have regard to are not limited to those matters, however, it also provides that a specialist adjudicator may not have regard to any knowledge or understanding the applicant had when they bought their lot about the lot entitlement schedules or their application.

E3. The Community Management Statement for the Scheme confirms that the Regulation Module applying to the Scheme is the Body Corporate and Community Management (Standard Module) Regulation 1997.

E4. The Scheme is a basic scheme, not part of a layered arrangement.

E5. The by-laws for the scheme are those set out in Schedule 4 of the Act. All lots within the scheme are designed and used for residential purposes.

E6. Kristoffersen provided the expert report of Arkcoll in support of their application for adjustment of the contribution lot entitlement schedule. Arkcoll has tertiary qualifications in quantity surveying and law along with significant experience with numerous aspects of Body Corporate planning and expenditure and I accept her report as that of an expert within her area of expertise for this application and therefore admissible. Havenfritz Pty Ltd (later withdrawn) and O'Connor were provided opportunity to make a submission as to why Arkcoll's report should not be accepted as expert evidence however no submission was made by either. 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.

E7. Directions were given during the preliminary conference for the conduct of the matter. The Respondent did not provide any submission in accordance with those interlocutory orders. Havenfritz did make a submission but that submission was withdrawn during the hearing.

E8. At the hearing both the Respondent, represented by O'Connor, and Havenfritz Pty Ltd conceded that they accepted the findings in the expert report of Arkcoll. Their concern was more to the effect as to whether those findings were relevant, what weight they should received and what other matters should be taken into account.

E9. On 25 June 2004, the Court of Appeal of the Supreme Court of Queensland delivered judgement and published reasons in the case, *Fischer & Ors v Body Corporate for Centrepoint Community Title Scheme 7779* [2004] QCA 214. Those reasons relevantly provide the following for applications of this type:

> [24] The point in issue is a narrow one. It is whether in determining an application for the adjustment of a contribution lot entitlement schedule and, in particular, in determining the extent to which it is just and equitable that respective lot entitlements not be equal, the enquiry is at large (save for the matter described in s 49(5)) or whether it is limited to matters which show how apartments differently effect the cost of running and maintaining a community title scheme. The learned trial judge took the first view and thought it appropriate to consider the application by reference to the affect of the change on the value of apartments, and the amenity of the apartments. His Honour did so because of the terms of s 49(4), which provides that the court may have regard to the structure of the community titles scheme and the nature, features and characteristics of the apartments in the scheme. His Honour took the view, not unnaturally, that amenity and location were features or characteristics of apartments.
>
> [25] The submission for the applicants is that this Part of the Act is concerned with the just and equitable distribution of body corporate expenses among apartment owners and that in making an adjustment of a lot entitlement schedule the court must pay regard only to the origin and allocation of body corporate expenditure.
>
> [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.

[27] There are a number of reasons for this conclusion. The first is to be found in the terms of the Explanatory Notes which accompanied the 2003 Act and the content of the second reading speech when the Bill for it was debated. Because the meaning of the Act is unclear it is permissible to consult these materials.

[28] Section 10 of the 2003 Act inserted s 46(7) which is in these terms:

> '(7) For the contribution schedule for a scheme for which development approval is given after the commencement of this subsection, 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.'

This replaced an earlier provision, which was repealed by the 2003 Act, to the effect that upon registration a community titles scheme did not have to provide for equal contribution lot entitlements. Explaining the change the Note said:

> 'The change is intended to reinforce the concept that usually all lot owners are equally responsible for the cost of upkeep of common property and for the running costs of the community titles scheme. However, it is recognised that there are many valid instances where the contribution schedules do not have to be equal. The amendment provides that usually the numbers in this schedule are equal, unless it can be demonstrated that it is just and equitable for there to be inequality.
>
> The need for difference is best shown by examples.
>
> …
>
> Example 3 In a basic scheme, if all the lots are residential lots ranging in size from a small lot to a penthouse, the contribution schedule lot entitlements generally would be equal. However, the contribution schedule may be different if the penthouse has its own swimming pool and private lift. The contribution schedule should recognise this type of difference. The other lots in the scheme despite being of differing size or aspect would be expected to have equal contribution schedule lot entitlements.'

[29] In the Second Reading Speech it was said:

> 'The issue of the nature of the contributions schedule for a body corporate scheme has created some discussion. The guiding principle for both setting and adjusting the contributions schedule is that it involves the equitable sharing of the costs of operating and maintaining the common property. These costs should be borne in proportion to the benefit, not in proportion to the unit's value. It is not a contribution linked to an ability to pay, but as a payment for services. … There is not an argument … against the fact that, in terms of costs related to a property's value – costs such as rates and insurance – owners whose properties are worth more should pay more. But when we are talking about those parts of a property where the benefits are shared more or less equally, we cannot apply the same formula.'

[30] These materials make it tolerably plain that the Act is intended to produce a contribution lot entitlement schedule which divides body corporate expenses equally except to the extent that the apartments 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. It cannot be affected by factors which go to an apartment's value or amenity.

[31] Secondly, the nature of a contribution lot entitlement schedule itself suggests that the allocation of lot entitlements is to be made on the basis of the impact that individual apartments make upon the costs of operating and running a community titles scheme. Contribution lot entitlements determine the apartment's share of the outgoings. The starting point is that the entitlements should be equal. A departure from that principle is allowable only where it is just, or fair, to recognise inequality. The departure must take as its reference point the proposition, from which it departs, that apartment owners should contribute equally to the costs of the building. The focus of the inquiry is the extent to which an apartment unequally causes costs to the body corporate.

> [32] The third consideration is that if this principle not be the applicable one then there is no basis on which applications for adjustment of a contribution lot entitlement schedules can consistently be made. As the evidence in this application shows, if the inquiry is limited to the extent to which an apartment creates costs, or consumes services, above or below the average, one can readily determine what the contribution lot entitlement should be. The high degree of similarity in the reports of Mr Sheehan and Mr Linkhorn demonstrates this. If the inquiry be wider and 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 is no intelligible basis on which there could be a consistent and coherent determination of applications for adjustment of lot entitlements. Each case would be determined idiosyncratically and a 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.
>
> [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.

E10. I reviewed the following information regarding the scheme; the last four years accounts (years ended 31 May 2000, 31 May 2001, 31 May 2002 and 31 May 2003) and the current budgets for both, the sinking and administration funds, the sinking fund forecast dated 3 September 2003, the community management statement including the by-laws (as contained in Schedule 4 of the Act) and the building units plan.

E11. Neither the Respondent, represented by O'Connor, or Havenfritz Pty Ltd raised objection to the cost estimates in the administration or sinking funds or the life expectancies and physical measurements for the sinking fund elements as utilised by Arkcoll in the compilation of her report. I accept the administration and sinking fund costs and the life expectancies and physical measurements for the various elements included in the sinking fund and as adopted in Arkcoll's assessment.

E12. I agree with Arkcoll's apportionment of the administration fund costs on an equal basis between all lots. Neither the Respondent, represented by O'Connor, or Havenfritz Pty Ltd raised objection to any of the costs apportionments made by Arkcoll. It is clear that these costs are equally beneficial to all of the lots within the scheme.

E13. I did not agree with the apportionment of the roof and gutter maintenance costs based on the floor area of the units. I therefore raised this issue during the view with both parties and suggested that the roof and gutters provided benefit to the lots within a building in proportion to their contiguous footprint, as the number of stories of a free standing lot does not impact upon the required size of roof – that size is governed by the footprint of the lot, and that therefore the cost of the roof and gutter maintenance should be attributed proportionately between all lots within a building in accordance with their footprint. Neither the Applicant nor the Respondent, represented by O'Connor, raised any objection to the reapportionment of those costs as proposed.

E14. I did not agree with the apportionment of the building end wall painting to only the end lots in each building as recommended by Arkcoll. I therefore raised this issue during the view with both parties and suggested that the end walls provided benefit to all of the lots within a building, as an end wall was always required irrespective of the number of lots, and that therefore the cost of the end wall painting should be attributed equally to all lots within a building on a floor by floor basis. Neither the Applicant nor the Respondent, represented by O'Connor, raised any objection to the reapportionment of those costs as proposed.

E15. I did not agree with the apportionment of the lift costs as recommended by Arkcoll as the number of lots serviced by each lift varied. I therefore raised this issue during the view with both parties and suggested that the lifts primarily provided benefit to those lots that they directly serviced and, therefore, the cost of the lifts should be attributed equally between all lots that they service. Neither the Applicant nor the Respondent, represented by O'Connor, raised any objection to the reapportionment of those costs as proposed.

E16. I agree with the remaining apportionments of the sinking fund costs as recommended by Arkcoll. The Respondent, represented by O'Connor, did not raise objection to any of those costs apportionments made by Arkcoll. It is clear that those costs are all items of expenditure relating to common property elements which can be identified as beneficial either equally to all lots, or alternatively, to particular lots within the scheme in such a manner as may be measured and the cost burden on the body corporate by each lot accurately determined.

E17. The Respondent, represented by O'Connor, raised no further matters for my consideration.

E18. Having given due consideration to the relevant matters pursuant to Section 49 of the Act, I consider that the adjusted contribution lot entitlement schedule provided in my findings above would reflect the fair and equitable contribution of each lot to the ongoing administration and maintenance of the scheme.

Costs

Findings:

i. No costs should be ordered against the Body Corporate.

ii. No costs should be ordered against Havenfritz Pty Ltd.

iii. That the Applicant is responsible for the cost of the adjudication.

Reasons:

E19. Section 280(2) of the Act provides that for specialist adjudications under Section 265 of the Act (which this is), unless the adjudicator otherwise orders, the applicant is responsible for the cost of the adjudication.

E20. Such a provision suggests that, as the prima facie position is that the applicant is responsible for the cost of the adjudication, there must exist some reason for the adjudicator to exercise their discretion to otherwise order.

E21. Section 48(2)(a) of the Act provides that the Body Corporate is the statutory respondent for such an application.

E22. In this instance the Body Corporate Committee, at a meeting held on 4 May 2004, resolved to take an active role in the application however the committee failed to make any written submission in accordance with the procedural directions given at the Preliminary Conference held on 23 April 2004 and made no other submission at the hearing of the matter. Therefore no costs should be ordered against the Body Corporate by virtue of that position.

E23. Section (48)(2)(b) provides that at the election of an owner they may be joined as a respondent for the application.

E24. In this matter an owner, Havenfritz Pty Ltd, elected to be joined as a Respondent and made a submission, however that owner withdrew that election prior to the hearing of their submissions on the matter.

E25. In considering the steps taken in the resolution of this matter there is nothing that Havenfritz Pty Ltd did that contributed to any material increase in cost in the resolution of the application over that cost that would have been incurred if they had failed to be joined in the matter in its entirety. Therefore no costs should be ordered against them by virtue of those facts.

E26. As the conduct of the body corporate and Havenfritz Pty Ltd has been such as to not give rise to any additional cost in the application, there exists no reason for the adjudicator to exercise the discretion to depart from the prima facie position that the Applicant be responsible for the cost of the adjudication.