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

And

IN THE MATTER of a Specialist Adjudication

BETWEEN:

Mr Peter Rogers

Claimant

and

The Body Corporate for Taree Lodge

First Respondent

and

Miss Beryl Hogan

Second Respondent

ADJUDICATORS ORDER

Pursuant to appointment by the Commissioner for
Body Corporate and Community Management
dated 28 July 2003.

DELIVERED BY:

WARREN D FISCHER

Civil Engineer, Graded Arbitrator and Mediator
30/69 Leichhardt Street,
SPRING HILL, QLD, 4000

Phone: (07) 3832 1701

Email: adrs@tpg.com.au

IN THE MATTER of a Specialist Adjudication

MR PETER ROGERS v
BODY CORPORATE FOR TAREE LODGE AND MISS BERYL HOGAN

ORDER OF WARREN FISCHER
Specialist Adjudicator

CONTENTS

Section	Subject	Page
A	Parties, representatives and relevant dates	3
B	Order	5
C	Reference to specialist adjudication	6
D	Recital of relevant events leading to the dispute	6
E	Findings and reasons	7
Appendix	Contribution Lot Entitlement	
	Calculation Summary Sheet	13

Determination regarding:

Adjustment of Contribution Lot Entitlement Schedule

Place of Preliminary Conference:

New Farm Community Centre – Brisbane – Queensland

Submission Dates:

August 31, September 23 (amended 31 October) and October 23 2003

View Date:

31 October 2003

Delivered as an adjudicators order:

To the Commissioner for Body Corporate and Community Management on the
Twenty First day of November 2003

A PARTIES, REPRESENTATIVES AND RELEVANT DATES

A1 Parties and representatives:

Parties	Representatives
Mr Peter Rogers Registered Owner of Lot 5 ("Rogers") Claimant	Self-represented and assisted by Ms Kaylene Arkcoll BSc QS AAIQS AIMM MAppLaw of Leary Partners Pty Ltd ("Arkkoll") Expert
The Body Corporate for Taree Lodge Community Titles Scheme 14551 Respondent	Un-represented
Miss Beryl Hogan ("Hogan") Second Respondent	Self-represented and assisted by Ms Valerie Schatz

A2 Procedural Steps:

- a. On 23 April 2003, Rogers lodged a Dispute Resolution Application with the Commissioner for Body Corporate and Community Management ("The Commissioner").
- b. On 6 June 2003, the Commissioner invited all lot owners in the Taree Lodge Community Titles Scheme 14551 to make submissions on the Dispute Resolution Application by 20 June 2003 (subsequently extended until 7 July 2003).
- c. On 7 July 2003, Rogers advised the Commissioner that he did not wish to make a response to any submissions made.
- d. On 28 July 2003, my nomination as specialist adjudicator to resolve the dispute was made by the Commissioner.
- e. On 25 August 2003 a preliminary conference took place at which due inquiry was made and directions given for further submissions.
- f. Instead of formal pleadings, written submissions (attaching copies of documents) were prepared and delivered.

-
- g. On 31 August 2003, a written submission was made by Rogers.
 - h. On 23 September 2003, an expert report of Arkcoll was provided by Rogers in support of his submission.
 - i. On 23 October 2003, a written submission in reply was made by Hogan.
 - j. On 31 October 2003, an amended expert report of Arkcoll was provided by Rogers in support of his submission. Calculation details were requested by Hogan.
 - k. On 31 October 2003, a view was made of the Taree Lodge Community Titles Scheme 14551 in the presence of the parties and their assistants. During the view frequent discussion took place in the presence of all parties about the various features of the different lots all of which was recorded.
 - l. On 31 October 2003, Rogers confirmed that he did not wish to make any further submissions, call anyone else to speak to his application or put any questions to Miss Hogan at a formal hearing.
 - m. On 6 November 2003, Rogers provided the further advice of Arkcoll as requested on 31 October 2003.
 - n. On 7 November 2003, further detail was requested by Hogan.
 - o. On 10 November 2003, Rogers provided the further advice of Arkcoll in reply to Hogan's request.
 - p. On 12 November 2003, Hogan advised that she had no further queries of the Arkcoll report, made a further submission in reply and confirmed that she did not require a formal hearing.

B ORDER

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

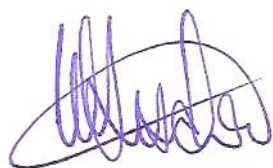
Equalisation of lot entitlements for the contribution schedule (ie 1/16 of the total contribution schedule to be applied to each lot)

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
1	613
2	613
3	612
4	795
5	612
6	612
7	612
8	617
9	612
10	612
11	612
12	623
13	611
14	610
15	612
16	<u>622</u>
TOTAL	10,000

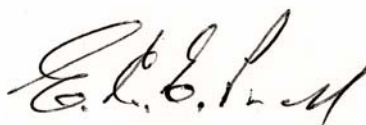
That in accordance with the provisions of Section 48(9) of the Act the body corporate as quickly as practicable lodge a request to record a new community management statement reflecting the adjustment ordered.

Signed



Warren Fischer
Specialist Adjudicator
20 November 2003

Witnessed



ECE Pratt QC

C REFERENCE TO SPECIALIST ADJUDICATION

- C1 A Dispute Resolution Application was lodged by Rogers with the Commissioner under Chapter 6 of the provisions of the Body Corporate and Community Management Act 1997 (“the Act”). Section 265(1)(c) of the Act provides that the adjudication of a dispute must be a specialist adjudication if another provision of the Act requires the adjudication to be specialist adjudication. Section 48(1)(b) of the Act provides that the owner of a lot in a community titles scheme may apply, under Chapter 6, for an order of a specialist adjudicator for the adjustment of a lot entitlement schedule.
- C2 Section 239 of the Act provides, inter alia, that for an order about a dispute mentioned in Section 265 the applicant must nominate for appointment the name and address of one or more persons considered by the applicant as having the appropriate qualifications, experience or standing for acting as a specialist adjudicator for the application. Section 265(2) further provides that the specialist adjudicator must be the person chosen by the Commissioner and need not be a person nominated by a party to the application.
- C3 I was nominated as specialist adjudicator by the Commissioner in a letter, copied to the parties, dated 28 July 2003.

D RECITAL OF RELEVANT EVENTS LEADING TO THE DISPUTE

- D1 Taree Lodge Building Unit Plan 520 was registered by the Registrar of Titles on 16 December 1970.
- D2 Taree Lodge consists of 16 lots, 8 two bedroom and 8 three bedroom and is located at 98 Moray Street, New Farm.
- D3 The current Community Management Statement was registered on 15 July 2000.
- D4 The Community Management Statement provides in both the contribution and interest lot entitlement schedules that lots 1, 3, 5, 7, 9, 11, 13, 15 each have 2 entitlements and lots 2, 4, 6, 8, 10, 12, 14, 16 each have 3 entitlements. These entitlements are as set out in the original Building Unit Plans registered in 1970. When the Building Unit Plans were registered there was no legislated requirement regarding the consideration to be given in determining the lot entitlement schedule.
- D5 When the Act commenced in 1997 it introduced two schedules, a contribution and an interest lot entitlement schedule. It also did provide 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.
- D6 The Act was further amended on 4 March 2003, this further amendment included further guidance on 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.

-
- D7 The body corporate for Taree Lodge has twice previously considered motions to adjust the contribution lot entitlement schedule, at an Annual General Meeting on 22 July 2002 and at an Extraordinary General Meeting on 25 February 2003, on both occasions the motion was lost.
- D8 Section 48(1)(b) of the Act provides that the owner of a lot in a community titles scheme may apply for an order of a specialist adjudicator for the adjustment of a lot entitlement schedule.
- D9 Rogers is the registered owner of lot 5 and lodged an application for adjustment of the lot entitlement schedules with the Commissioner on 23 April 2003.
- D10 Section 48(2)(a) of the Act provides that the respondent for such an application is the body corporate.
- D11 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.
- D12 Hogan is the registered owner of lot 3 and gave written notice of her election to be joined as a respondent to the body corporate on 1 September 2003 in accordance with the provisions of Section 48(3) of the Act.
- D13 This gave rise to the two issues which I was required to consider:
- i. Equalisation of lot entitlements for the contribution schedule (ie 1/16 of the total contribution schedule to be applied to each lot).
 - ii. The interest schedule to remain as reflected in the existing CMS 14551 dated 15 July 2000.
- D14 By his submission of 31 August 2003, Rogers revised his initial application of 23 April 2003 withdrawing his request for the adjustment of the interest schedule lot entitlements.

E FINDINGS AND REASONS

In addition to the documents submitted prior to my appointment as specialist adjudicator, the parties also tendered further submissions and copies of documents relied upon by them bearing on the issues. All parties were given an opportunity to provide submissions and submissions in reply. Inquiry was made of all parties of their wish for a hearing to present their submissions and to test the submissions of the other parties. All parties confirmed that they did not require a hearing and therefore no hearing, as such, was held to determine the matter. In accordance with the wishes of the parties, the matter was determined on the party's written submissions and documents and a view of the community titles scheme.

Equalisation of lot entitlements for the contribution schedule (ie 1/16 of the total contribution schedule to be applied to each lot)

Findings:

- i. An equal contribution lot entitlement schedule would not be just and equitable in the circumstances.
- ii. The existing contribution lot entitlement schedule is not just and equitable in the circumstances.
- iii. The roof sheeting to the building can be specifically identified as beneficial to the garage of lots 1, 2, 3, 4, 5, 6, 7, 8 (part), 9, 10, 11, 13, 14 and 15 as well as to all the residential components of the lots. Therefore those garages should be included in the calculation of the apportionment of the maintenance costs attributable to that roof sheeting.
- iv. The waterproofing membrane to the podium slab, which acts as the balcony of lot 4 and also as the roof to the garage of lots 8 (part), 12 and 16, can be specifically identified as beneficial to those lots only. Therefore only those lots should be included in the calculation of the apportionment of the maintenance costs attributable to that waterproofing membrane.
- v. Other than to the extent of the contributions related to the elements in findings iii and iv, I find no reason to depart from the calculations in the expert report of Arkcoll.
- vi. That contribution schedule lot entitlements that are equal to the extent that it is just and equitable in the circumstances are as follows:

Lot No.	Contribution Lot Entitlement
1	613
2	613
3	612
4	795
5	612
6	612
7	612
8	617
9	612
10	612
11	612
12	623
13	611
14	610
15	612
<u>16</u>	<u>622</u>
TOTAL	10,000

Reasons:

- a. Section 48 of the Act provides that, for the contribution schedule, the order of a specialist adjudicator must be consistent with the principle that the respective lot entitlements should be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal.
- b. Section 49 of the Act provides criteria for deciding just and equitable circumstances. It provides that a specialist adjudicator may have regard to how the community titles scheme is structured, the nature features and characteristics of the lots included in the scheme and the purposes for which the lots are used. It provides that matters a specialist adjudicator may have regard to are not limited to those matters, however, it also provides that a specialist adjudicator may not have regard to any knowledge or understanding the applicant had when they bought their lot about the lot entitlement schedules or their application.
- c. The Community Management Statement for Taree Lodge confirms that the Regulation Module applying to the Community Titles Scheme is the Body Corporate and Community Management (Standard Module) Regulation 1997.
- d. Both parties confirmed that the Taree Lodge Community Titles Scheme is a basic scheme and not part of a layered scheme.
- e. Both parties confirmed that all lots included in the Taree Lodge Community Titles Scheme are used for residential purposes.
- f. Rogers provided the expert report of Arkcoll in support of his application for adjustment of the contribution lot entitlement schedule. Arkcoll has tertiary qualifications in quantity surveying and law and I accept her report as that of an expert within her area of expertise for this application and therefore admissible. The Arkcoll report concludes with a recommended contribution lot entitlement schedule significantly departing from the existing contribution lot entitlement schedule with typical adjustments in the order of 20%.
- g. Hogan did not provide any quantitative support with her submission against the adjustment of the contribution lot entitlement schedule or supporting the justice and equity of the existing contribution lot entitlement schedule.
- h. Hogan raised in her submission the need to prove that the existing contribution lot entitlements are inappropriate and that to do so the accuracy and reliability of the Leary & Partners Report is central to its value as evidence. When this matter was raised at the view on 31 October 2003, Arkcoll advised that she was the author of the report and of her qualifications and experience. Hogan was then provided opportunity to make a submission as to why Arkcoll's report should not be accepted as expert evidence. No submission was made by Hogan. I then informed the parties that I accepted Arkcoll's report as expert evidence.

-
- i. Hogan also raised in her submission that she was unable to validate any of the claims made in the Arkcoll report as she did not possess the original data. When this matter was raised at the view on 31 October 2003, Arkcoll advised that she would provide that data. This was subsequently done in the submissions of Rogers on 6 November 2003 and 10 November 2003 (following further query by Hogan). Hogan made no subsequent submission as to the validity of the claims made in the Arkcoll report.
 - j. I prefer the submission of Rogers, by way of the Arkcoll report, to that of Hogan that the existing respective lot entitlements are not just and equitable in the circumstances. I consider that Rogers has proven on the balance of probabilities that to comply with the provisions of the Act the contribution lot entitlement schedule should be adjusted.
 - k. I reviewed the following information regarding the scheme as provided by Rogers (as Body Corporate Secretary); the last three years accounts (years ended 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, the community management statement including the by-laws and the building unit plans. These are no caretaking or letting agreements for the scheme.
 - l. I accept Arkcoll's cost assumptions regarding the expenditure on each of those elements within the administration fund, which are based on a mix of budget and previous expenditure. Hogan has not raised any objection to any of those costs assumptions made by Arkcoll.
 - m. I accept Arkcoll's apportionment of the administration fund costs on an equal basis between all lots. Hogan has raised an objection that Arkcoll has not provided any statistical support for her assumptions, however Hogan has not herself provided any evidence to suggest that these costs should be apportioned otherwise than equally. It is the prima facie position of the Act that costs should be apportioned equally and it is apparent when considering each of the elements within that fund that the expenditure is unable to be reliably identified as incurred by individual lots. Indeed it does appear that it could be anticipated that usually the expenditure from this fund would be equally beneficial to all lots. I prefer the expert opinion of Arkcoll as to the apportionment of these costs.
 - n. The Arkcoll report confirms that the total insurance premium has been excluded from her analysis. Hogan's submission suggests that no evidence has been provided to change the existing situation. The regulation module applying to the scheme provides that the body corporate must insure the common property, the body corporate assets and each building included in the scheme and that the owner of each lot in the scheme is liable to reimburse the body corporate for the proportion of the premium that reflects the interest schedule lot entitlement of the lot. As this application is in respect of the contribution lot entitlement schedule, it is apparent that these insurance costs should be excluded from consideration (therefore also the existing situation will not change).

-
- o. I accept Arkcoll's assessment of the estimated overall life for the various elements included in the sinking fund. Hogan has not raised any objection to any of those assumptions made by Arkcoll. Hogan confirmed during the view of 31 October 2003 that she fully supported the ongoing maintenance program for the scheme (and that it was only on where the cost should lie that she wished to make her submission).
 - p. I accept Arkcoll's estimated replacement costs for the various elements included in the sinking fund. Hogan has not raised any objection to any of the costs estimates made by Arkcoll.
 - q. I accept Arkcoll's physical measurement of the various elements included in the sinking fund. Hogan has not raised any objection to any of those measurements made by Arkcoll.
 - r. Hogan submitted that the larger units will have a larger maintenance cost, this may well be correct, it is apparent however that Hogan has missed the subtle difference between maintenance of a lot and maintenance of the common property. Lot owners remain responsible for the maintenance of the interior of their lots. When calculating the contribution of the lots to the Body Corporate maintenance obligations Arkcoll has given regard to the extent to which each of the lots measurably contribute to those obligations and typically the larger lots do contribute more.
 - s. Hogan submitted that there are special usage rights within the scheme, some of the areas being small and one substantial, but does not provide any further detail. Arkcoll states that there are not any special usage rights over common property. During the view, Hogan stated that she thought the balcony to lot 4 was common property, the Building Unit Plans confirm that this area is, in fact, on title. However, the body corporate maintenance obligations associated with the balcony to lot 4 (podium slab) should be specifically identified and any associated costs should be attributed to those lots that benefit from that expenditure. I also observed some small areas of common property that have been "fenced off", however the Community Management Statement does not provide any lot with exclusive use rights to these areas and therefore all lots do have equal right to access them.
 - t. Hogan submitted that there was a significant difference in the potential number of occupants between the two and three bedroom lots and that should be taken into account when determining contributions, no quantitative submission was made as to the affect of that difference. The Arkcoll report considered this factor and concludes that lot occupant numbers or usage levels do not affect the majority of items in the sinking fund forecast, but rather they are affected by exposure to the elements or have a fixed service life. Arkcoll notes that there were a very small number of items that might be affected by occupant usage however she suggests that the affect would be very small and not possible to quantifiably determine. I prefer the submission of Arkcoll that in this instance occupancy should be discounted as a factor from further consideration.
 - u. The Arkcoll report does not include the garage areas in the calculation for the cost apportionment from the maintenance of the roof sheeting. Arkcoll confirmed this at the view.

-
- v. The garage areas below the roof sheeting benefit from the roof sheeting in the same manner as the residential component of the lots and therefore the apportionment of the associated costs should also be treated in the same manner.
 - w. The Arkcoll report apportioned the cost of the podium waterproofing membrane equally across all lots. I enquired of Arkcoll at the view if she had taken any engineering considerations into account when determining the purpose of this waterproofing membrane. Arkcoll advised that she considered that its sole purpose was to provide weather protection to the areas beneath the slab.
 - x. I then queried Arkcoll as to why, if that was the case, the common balcony slabs had a waterproofing membrane as, being fully exposed to the weather, it would not provide any protection to the areas beneath the slab. Arkcoll stated that, in her opinion, the waterproofing membrane to the common balcony slabs served no purpose. I do not accept this opinion.
 - y. Arkcoll is not a qualified engineer and the purpose of the waterproofing membrane is not a subject that I consider to be within her area of expertise.
 - z. It is my engineering opinion that both the common balcony slabs and the podium slab are slabs that retain their structural integrity, in part, due to the existence of reinforcing steel within them.
 - aa. It is my engineering opinion that the purpose of the waterproofing membrane is to prevent the ingress of water into the slab, rather than through it, so as to provide protection to the reinforcing steel within the slab against corrosion and thereby ensuring the long term structural integrity of the slab.
 - bb. I consider that the purpose of the waterproofing membrane to the podium slab is to ensure the long term integrity of that slab. The cost of maintaining this waterproofing membrane can therefore be specifically identified as beneficial to lots 8, 12 and 16 for which the slab provides a roof for their garage and lot 4 for which the slab serves as a balcony.
 - cc. Subject to adjustments for the fair and equitable contribution by each of those lots able to be specifically identified as benefiting from the waterproofing membrane to the podium slab and those lots whose garages are able to be specifically identified as benefiting from the roof sheeting, I accept the remainder of the Arkcoll report calculations as reflecting the fair and equitable contribution of each lot to the ongoing administration and maintenance of the scheme having given due consideration to the relevant matters pursuant to Section 49 of the Act.

APPENDIX

CONTRIBUTION LOT ENTITLEMENT CALCULATION SUMMARY SHEET

Cost impact assessment and adjusted contribution lot entitlement schedule

Lot No	Administration Fund costs allocated equally	Sinking Fund costs allocated equally	Balustrade replacement	Painting	Replace roof sheeting	Replace podium slab waterproofing membrane	TOTAL ALLOCATED ANNUAL PROVISIONS	ADJUSTED LOT ENTITLEMENT SCHEDULE
amount to be allocated	\$13,795.78	\$4,149.13	\$965.80	\$4,031.89	\$270.10	\$119.78	\$23,332.48	
1	\$862.236	\$259.321	\$53.236	\$237.588	\$18.953	\$0.000	\$1,431.33	613
2	\$862.236	\$259.321	\$52.549	\$236.180	\$18.777	\$0.000	\$1,429.06	613
3	\$862.236	\$259.321	\$53.726	\$236.425	\$16.254	\$0.000	\$1,427.96	612
4	\$862.236	\$259.321	\$166.576	\$486.199	\$18.425	\$62.487	\$1,855.24	795
5	\$862.236	\$259.321	\$53.236	\$237.588	\$16.547	\$0.000	\$1,428.93	612
6	\$862.236	\$259.321	\$52.549	\$236.180	\$17.545	\$0.000	\$1,427.83	612
7	\$862.236	\$259.321	\$53.726	\$236.425	\$15.843	\$0.000	\$1,427.55	612
8	\$862.236	\$259.321	\$53.726	\$238.485	\$17.020	\$9.782	\$1,440.57	617
9	\$862.236	\$259.321	\$53.236	\$237.588	\$16.606	\$0.000	\$1,428.99	612
10	\$862.236	\$259.321	\$52.549	\$236.180	\$17.486	\$0.000	\$1,427.77	612
11	\$862.236	\$259.321	\$53.726	\$236.425	\$15.843	\$0.000	\$1,427.55	612
12	\$862.236	\$259.321	\$53.726	\$238.485	\$15.432	\$23.756	\$1,452.96	623
13	\$862.236	\$259.321	\$53.236	\$234.331	\$16.606	\$0.000	\$1,425.73	611
14	\$862.236	\$259.321	\$52.549	\$232.424	\$17.486	\$0.000	\$1,424.02	610
15	\$862.236	\$259.321	\$53.726	\$235.693	\$15.843	\$0.000	\$1,426.82	612
16	\$862.236	\$259.321	\$53.726	\$235.693	\$15.432	\$23.756	\$1,450.16	622
Total	\$13,795.78	\$4,149.13	\$965.80	\$4,031.89	\$270.10	\$119.78	\$23,332.48	10,000