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

and

IN THE MATTER of a Specialist Adjudication

BETWEEN:

Mr Wayne Stevens & Others

("The Applicants")

and

The Body Corporate for Atlantis West & Others

("The Respondents")

ADJUDICATORS ORDER

Pursuant to appointment by the Commissioner for Body Corporate and Community Management, dated 11 July 2007.

DELIVERED BY:

WARREN D FISCHER

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

MR WAYNE STEVENS & ORS v
THE BODY CORPORATE FOR ATLANTIS WEST

ORDER OF WARREN FISCHER
Specialist Adjudicator
CONTENTS

Adjudication regarding:

Amalgamation of Lots

Adjustment of Interest Lot Entitlement Schedule

Adjustment of Contribution Lot Entitlement Schedule

Preliminary Conference Date:

1 October 2007

Delivered as an adjudicators order:

To the Commissioner for Body Corporate and Community Management on the First day of February 2008.

ORDER

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

1) The body corporate consents to the amalgamation of:
   a) lots 102 and 103 on BUP 6435 to become lot 103 on SP 211890;
   b) lots 117 and 118 on BUP 6435 to become lot 118 on SP 211890;
   c) lots 144 and 145 on BUP 6435 to become lot 145 on SP 211890; and
   d) lots 164 and 165 on BUP 6435 to become lot 165 on SP 211890.

2) That Annexure A of the community management statement be amended to replace the reference to:
   a) lots 102 and 103 on BUP 6435 with lot 103 on SP 211890;
   b) lots 117 and 118 on BUP 6435 with lot 118 on SP 211890;
   c) lots 144 and 145 on BUP 6435 with lot 145 on SP 211890; and
   d) lots 164 and 165 on BUP 6435 with lot 165 on SP 211890,
   and the relevant amendments be made to the title references.

3) That Schedule A of the community management statement be amended such that the interest schedule lot entitlement for each of the new lots be recorded as follows:

Lot No	Interest Schedule Lot Entitlement	Lot No	Interest Schedule Lot Entitlement	Lot No	Interest Schedule Lot Entitlement	Lot No	Interest Schedule Lot Entitlement
103	399	118	422	145	454	165	462

   The interest schedule lot entitlements of the balance of the lots to remain unaltered and the aggregate of the interest schedule lot entitlements to remain unaltered at 37000.

4) That Schedule A of the community management statement be amended such that the contribution schedule lot entitlement for each lot in the Atlantis West Community Titles Scheme 8790 be adjusted to be equal except to the extent that is just and equitable in the circumstances, such that the contribution schedule of lot entitlements is as follows:

Lot No	Contribution Schedule Lot Entitlement	Lot No	Contribution Schedule Lot Entitlement	Lot No	Contribution Schedule Lot Entitlement	Lot No	Contribution Schedule Lot Entitlement
1	57	51	59	106	57	150	60
2	57	52	62	107	59	151	57
3	57	53	61	108	62	152	59
4	60	54	60	109	61	153	62
5	57	55	57	110	60	154	61
6	60	56	59	111	57	155	60
7	61	57	62	112	59	156	57
8	61	58	61	113	62	157	59
9	59	59	60	114	61	158	62
12	59	60	57	115	60	159	61
13	61	61	59	116	57	160	60
14	61	62	62	118	66	161	57
15	59	63	61	119	61	162	59

Lot No	Contribution Schedule Lot Entitlement	Lot No	Contribution Schedule Lot Entitlement	Lot No	Contribution Schedule Lot Entitlement	Lot No	Contribution Schedule Lot Entitlement
16	57	64	60	120	60	163	62
17	57	65	57	121	57	165	66
18	59	66	59	122	59	166	57
19	61	67	62	123	62	167	59
20	61	68	61	124	61	168	62
21	59	69	59	125	60	171	57
24	59	72	59	126	57	172	59
25	61	73	61	127	59	173	62
26	61	74	61	128	62	174	67
27	59	75	59	129	61	175	59
30	59	78	59	130	60	176	67
31	61	79	61	131	57	177	67
32	61	80	61	132	59	178	59
33	59	81	59	133	62	179	67
36	59	84	59	134	61	180	70
37	61	85	61	135	60	181	70
38	61	86	61	136	57	182	59
39	60	87	59	137	59	183	59
40	57	92	61	138	62	184	59
41	59	93	59	139	61	185	59
42	62	96	59	140	60	186	59
43	61	97	61	141	57	187	59
44	60	98	61	142	59	188	59
45	57	99	59	143	62	189	59
46	59	100	57	145	66	190	59
47	62	101	57	146	57	191	66
48	61	103	66	147	59	192	66
49	60	104	61	148	62	AGGREGATE 9986	
50	57	105	60	149	61		

5) That by-law 33 of the community management statement be amended to refer to only lot 118.

6) That by-law 35 of the community management statement be amended to refer to only lot 165.

7) That Schedule E of the community management statement be amended to replace the reference to lots:
   a) lots 102 and 103 on BUP 6435 with lot 103 on SP 211890;
   b) lots 117 and 118 on BUP 6435 with lot 118 on SP 211890;
   c) lots 144 and 145 on BUP 6435 with lot 145 on SP 211890; and
   d) lots 164 and 165 on BUP 6435 with lot 165 on SP 211890.

8) That the body corporate make any other necessary amendment to the community management statement required to give the full effect to the amalgamation of the lots.

9) That survey plan SP 211890 is to be included with the request to record a new community management statement.

10) That the Applicants provide any other information necessary to enable the body corporate to prepare a new community management statement complying with this Order.

11) That in accordance with the provisions of Sections 48(9) and 65(3) of the Act the body corporate as quickly as practicable and in any event within three (3) months of the date of this Order lodge a request to record a new community management statement reflecting the adjustment ordered.

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

13) That in accordance with the provisions of Sections 50 and 63 of the Act the Applicants are responsible for the costs of preparing and recording the new community management statement.

14) That the Applicants and Respondent are jointly and severally liable for the cost of the adjudication. As between themselves the Respondent is liable to pay the cost of the adjudication.

Signed

Warren Fischer
Specialist Adjudicator
1 February 2008

PARTIES AND REPRESENTATIVES

Parties	Representatives
Mr Wayne Stevens Registered Owner of Lots 144 and 145 ("Stevens") First Applicant	**Self-represented**
Marguerite Investments Pty Ltd Registered Owner of Lots 102 and 103 through Dr Morgan O'Brien ("O'Brien") Second Applicant	**Represented by Stevens**
Mr Murray Johnston Registered Owner of Lots 117 and 118 ("Johnston") Third Applicant	**Represented by Stevens**
Mr Zdzislaw Krawczyk & Ms Kay Allman Registered Owners of Lots 164 and 165 ("Krawczyk and Allman") Forth Applicant	**Represented by Stevens**
The Body Corporate for Atlantis West Community Titles Scheme 8790 c/- Body Corporate Services Mr David Gordon ("Gordon") Respondent	**Represented by Mr David Mackie Price & Roobottom Lawyers ("Mackie") instructed by Mr Ron Kilner ("Kilner")**

RECITAL OF RELEVANT EVENTS LEADING TO THE DISPUTE

1. In *Mr James Skenderis v The Body Corporate for Atlantis West [2006] QBCCMCmr 259*, I previously adjudicated an application for the adjustment of the contribution lot entitlement schedule for this scheme.

2. The scheme consists of the common property of Atlantis West Community Titles Scheme 8790 and lots 1 to 9, 12 to 21, 24 to 27, 30 to 33, 36 to 69, 72 to 75, 78 to 81, 84 to 87, 92, 93, 96 to 168 and 171 to 181 on Building Unit Plan ("BUP") No. 6435, lot 182 on BUP No. 7492, lot 183 on BUP No. 7466, lot 184 on BUP No. 7453, lot 185 to 190 on BUP No. 7485, lot 191 on BUP No. 11226 and lot 192 on BUP No. 11638 ("the Scheme"). The Scheme was first registered with BUP No. 6435 on 27 November 1984.

3. The Scheme is located at 2 Admiralty Drive, Paradise Waters, Queensland.

4. The Scheme common property includes facilities shared with Atlantis East such as the driveway and set down areas, tennis court facilities, recreation facility containing pool, sauna, gym, entertainment room and security office, external visitors parking area, extensive lawns, landscaping and paving as well as non-shared facilities such as lawns, gardens, entrance and lift lobbies, plant rooms, emergency stairs, a further swimming pool, etc.

5. There are presently one hundred and seventy (170) lots in the Scheme, all residential, the lot titled areas vary from 102 sqm (lots 16, 17, 100 and 101) to 530 sqm (lot 180). All lots have some attaching exclusive use rights over common property, typically for car parking, though some also for entry foyers (lots 72, 73, 117, 118, 164 and 165).

6. Contingent upon this Order for the amalgamation of the Applicants lots the amended Scheme will consist of one hundred and sixty six (166) lots, all residential, the lot titled areas varying from 102 sqm to 530 sqm. All lots will have exclusive use rights over common property, typically for car parking, although lots 72, 73, 118 and 165 will also have exclusive use entry foyer areas.

7. The current Community Management Statement ("CMS") was executed on 15 August 2006. The contribution lot entitlement schedule therein accords with my Order in *Mr James Skenderis v The Body Corporate for Atlantis West [2006] QBCCMCmr 259.* The interest lot entitlement schedule accords with the original entitlements set out in BUP No 6435, registered on 27 November 1984, amended to aggregate the entitlements of those lots subsequently amalgamated *.

   (* lots 88 & 89 were amalgamated to become lot 182 by BUP 7492 registered on 18 August 1986; lots 94 & 95 were amalgamated to become lot 183 by BUP 7466 registered on 28 August 1986; lots 34 & 35 were amalgamated to become lot 184 by BUP 7453 also registered on 28 August 1986; lots 10 & 11, 22 & 23, 28 & 29, 70 & 71, 76 & 77, 82 & 83 were amalgamated to become lots 185, 186, 187, 188, 189 and 190 by BUP 7485 also registered on 28 August 1986; lots 169 & 170 were amalgamated to become lot 191 by BUP 11226 registered on 4 September 1991; lots 90 & 91 were amalgamated to become lot 192 by BUP 11638 registered on 5 March 1992).

8. Section 62 of the Act provides, inter alia:

   "***Body corporate to consent to recording of new statement***

   (1) This section provides for the form of the consent of the body corporate for a community titles scheme to the recording of a new community management

statement for the scheme in the place of the existing statement for the scheme.

…

(4) The consent to the recording of a new community management statement need not be in the form of a resolution without dissent or special resolution if the new statement is different from the existing statement only to the extent necessary for 1 or more of the following—

…

(h) amalgamating or subdividing lots included in the community titles scheme;

…

(5) However, subsection (4)(h) applies only if the associated plan of subdivision —

(a) does not affect the common property; and

(b) does not change—

(i) the contribution schedule lot entitlements, or interest schedule lot entitlements, for lots included in the scheme (other than the lots being amalgamated or subdivided under the plan); or

(ii) the total of the contribution schedule lot entitlements for the lots included in the scheme; or

(iii) the total of the interest schedule lot entitlements for the lots included in the scheme.

…

(7) A consent to which subsection (4) or (6) applies must be given by ordinary resolution if, under the regulation module applying to the scheme, the body corporate has engaged a body corporate manager to carry out the functions of a committee, and the executive members of a committee, for a body corporate.

..."

9. By correspondence dated 30 May 2006, Stevens requested the body corporate committee approve the amalgamation of his lots. As Stevens request, at that time, was limited to the amalgamation of his lots pursuant to Section 64(4)(h) of the Act and did not affect the common property or change the contribution or interest schedules otherwise then as permitted by Section 64(5)(b) of the Act and as there existed a committee, it was within the body corporate committee's authority to consider and if appropriate to approve the amalgamation as requested by Stevens as, pursuant to Section 64(7) of the Act, an ordinary resolution is not required in such circumstances.

10. At the body corporate committee meeting held on 2 June 2006, the committee determined not to consider Stevens' request and referred "owners" to the Titles Office.

11. Section 227(1)(b) of the Act provides:

"227 Meaning of dispute

(1) A dispute is a dispute between—

(b) the body corporate for a community titles scheme and the owner or occupier of a lot included in the scheme"

12. The failure of the committee to consider or to approve Steven's request at its meeting held on 2 June 2006 gave rise to a dispute as defined with Section 227(1)(b) of the Act between Stevens, the owner of lots 144 and 145, and the body corporate committee representing the body corporate.

13. Section 62 of the Act further provides, inter alia:

> *"…*
>
> *(2) The consent must be in the form of a resolution without dissent.*
>
> *(3) However, the consent may be in the form of a special resolution if the difference between the existing statement and the new statement is limited to the following—*
>
> *(a) differences in the by-laws (other than a difference in exclusive use by-laws);*
>
> *(b) the identification of a different regulation module to apply to the scheme.*
>
> *…*
>
> *(5) However, subsection (4)(h) applies only if the associated plan of subdivision —*
>
> *(a) does not affect the common property; and*
>
> *(b) does not change—*
>
> *(i) the contribution schedule lot entitlements, or interest schedule lot entitlements, for lots included in the scheme (other than the lots being amalgamated or subdivided under the plan); or*
>
> *(ii) the total of the contribution schedule lot entitlements for the lots included in the scheme; or*
>
> *(iii) the total of the interest schedule lot entitlements for the lots included in the scheme.*
>
> *…"*

14. Notwithstanding that a dispute already existed, Stevens proposed Motion 16 of the annual general meeting of the Body Corporate for the Scheme held on 15 March 2007. Motion 16 expanded the request for approval for the amalgamation of lots to include not only Stevens lots but also those of O'Brien, Johnston and Krawczyk & Allman. Motion 16 was required to be passed as a resolution without dissent pursuant to Section 62(2) of the Act as it not only proposed the amalgamation of lots but also, relevantly for the purposes of Section 62(5)(b)(ii), proposed, inter alia, to amend the contribution schedule lot entitlements in the Scheme. Motion 16 was ruled out of order by Kilner.

15. Notwithstanding that Kilner ruled the motion out of order, there were eighty one (81) voting papers recorded which were against the motion.

16. Section 227(1)(b) of the Act provides:

> *"227 Meaning of dispute*
>
> *(1) A dispute is a dispute between—*
>
> *(a) the owner or occupier of a lot included in a community titles scheme and the owner or occupier of another lot included in the scheme; or*

(b) the body corporate for a community titles scheme and the owner or occupier of a lot included in the scheme"

17. The voting papers submitted by owners against motion 16 gave rise to a dispute as defined with Section 227(1)(a) of the Act between the owners of lots 102 & 103, 117 & 118, 144 & 145 and 164 & 165 and those owners submitting voting papers against the motion or, alternatively, between the owners of lots 102 & 103, 117 & 118, 144 & 145 and 164 & 165 and the body corporate.

18. Section 238(1) of the Act provides:

"238 Who may make an application

(1) A person, including, if appropriate, the body corporate for a community titles scheme, may make an application if the person is a party to, or is directly concerned with, a dispute to which this chapter applies."

19. From 15 March 2007, an application could be made by any of the Applicants pursuant to Section 238 of the Act.

20. Section 48(1) of the Act provides:

"48 Adjustment of lot entitlement schedule

(1) The owner of a lot in a community titles scheme may apply —

(a) to the District Court for an order for the adjustment of a lot entitlement schedule; or

(b) under chapter 6, for an order of a specialist adjudicator for the adjustment of a lot entitlement schedule."

21. Section 48(1) of the Act provides for a clear election to be made by an owner in respect of an application for the adjustment of a lot entitlement schedule, either: pursuant to Section 48(1)(a) for an order of the Court; or pursuant to Section 48(1)(b) "*under chapter 6*" for an order of an Adjudicator.

22. The reference to "*under chapter 6*" makes it incumbent on an Adjudicator to act in accordance with the provisions of that Chapter and specifically I refer to Sections 269 and 271 of the Act which are contained in that Chapter. In contrast to the adversarial processes adopted by the Court, the process to be adopted by an Adjudicator as set out in Chapter 6 is of an inquisitorial nature.

23. Stevens lodged a Dispute Resolution Application ("the Application"), dated 11 April 2007, with the Commissioner pursuant to the provisions of Chapter 6 of the Act for the amalgamation of lots; the aggregation of the relevant interest schedule lot entitlements; the adjustment of the relevant contribution lot entitlements, and associated orders.

24. Section 354 of the Act provides:

354 Existing applications for an order of an adjudicator

(1) This section applies if an application for an order of an adjudicator made under the previous dispute resolution provisions has not been finally dealt with before the commencement of this section.

(2) The application may continue to be dealt with under the previous dispute resolution provisions, and by a person authorised to deal with the application immediately before the commencement, as if the Body Corporate and Community Management and Other Legislation Amendment Act 2003, other

than section 113 to the extent it inserts section 355, had not been enacted.

(3) In this section—

***previous dispute resolution provisions** means the dispute resolution provisions in force immediately before the commencement.*

25. The current dispute resolution provisions commenced on 1 July 2007. However, as the Application was made on 11 April 2007, pursuant to s354 of the Act, the Application may be dealt with as if the *Body Corporate and Community Management and Other Legislation Amendment Act 2003*, other than section 113 to the extent it inserts section 355, had not been enacted.

26. These circumstances gave rise to the issue which I was required to consider, namely, for each of lots 102 & 103, 117 & 118, 144 & 145 and 164 & 165 on BUP 6435 that a declaration be issued that the Body Corporate:

1. give approval in writing to the owners of the lots to amalgamate the adjoining lots under a single title.

2. consent to the recording of a new CMS for the Scheme to reflect the amalgamation and the new CMS for the Scheme will be identical to the existing CMS except for the following changes:

   a. the existing lots will no longer be shown as part of the Scheme;

   b. the amalgamated lots will instead be part of the Scheme;

   c. schedule A of the CMS will be amended so that the contribution lot entitlement for the amalgamated lots will be 65;

   d. schedule A of the CMS will be amended so that the interest lot entitlements be aggregated for the amalgamated lots (399 for lots 102/103, 422 for lots 117/118, 454 for lots 144/145, and 462 for lots 164/165); and

   e. schedule E of the CMS will be amended so that the exclusive use areas granted to the original lots will apply to the amalgamated lots.

3. consent to the affixing its seal to the new CMS provided that the owners of the amalgamated lots submit the new CMS to the Body Corporate and pay the costs of preparation and recording of that new CMS.

4. will do all other things necessary to give effect to the above.

REFERENCE TO SPECIALIST ADJUDICATION

27. Section 265(1)(c) of the Act provides:

"265 Specialist adjudication of particular disputes

(1) The adjudication of a dispute must be specialist adjudication if—

(c) another provision of this Act requires the adjudication to be specialist adjudication."

28. Section 48(1)(b) of the Act provides:

"48 Adjustment of lot entitlement schedule

(1) The owner of a lot in a community titles scheme may apply—

(b) under chapter 6, for an order of a specialist adjudicator for the adjustment of a lot entitlement schedule."

29. The Application includes, inter alia, a request for the adjustment of the contribution lot entitlement schedule.

30. Section 239(2)(d) of the Act provides:

"239 How to make an application

(2) The approved form for the application must provide for each of the following matters to be stated in the form—

(d) for an order about a dispute mentioned in section 265—the name and address of 1 or more persons—

(i) considered by the applicant as having the appropriate qualifications, experience or standing for acting as a specialist adjudicator for the application; and

(ii) nominated by the applicant for appointment as the specialist adjudicator."

31. The Application, lodged on 11 April 2007, provided my name as nominee for appointment as the specialist adjudicator.

32. Section 265(2) of the Act provides:

"265 Specialist adjudication of particular disputes

(2) The specialist adjudicator must be the person chosen by the commissioner, and need not be a person nominated by a party to the application."

33. I was nominated as specialist adjudicator by the Commissioner in a letter, copied to the parties, dated 11 July 2007.

PROCEDURAL STEPS

34. Stevens lodged the Application with the Commissioner, dated 11 April 2007, which relies inter alia on my Order, *Mr James Skenderis v The Body Corporate for Atlantis West [2006] QBCCMCmr 259*.

35. By correspondence, dated 30 April 2007, the Commissioner wrote to Stevens requesting "evidence of a dispute".

36. By correspondence, dated 2 May 2007, Stevens wrote to the Commissioner and identified:

    a) his letter to the body corporate committee, dated 30 May 2006, requesting approval to amalgamate his lots included with the Application;

    b) the minutes of the committee meeting held on 2 June 2006 recording that the committee "take no further action" in response to that request included with the Application;

    c) additionally, Stevens advised that 144 of the 147 votes typically recorded on each motion at the Annual General Meeting at which he had submitted his motion had been recorded by voting paper. Stevens further advised that he had reviewed the body corporate files which had disclosed that there were eighty one (81) dissenting votes against his motion recorded by voting paper.

37. By correspondence, dated 3 May 2007, the Commissioner wrote to Stevens requesting evidence of authority to act for the balance of owners named in the Application.

38. By correspondence, dated 15 May 2007, Stevens provided the Commissioner an amended application (to the extent that it listed, and was signed by, all co-applicants) and signed authorities from each of the other co-applicants.

39. By correspondence, dated 22 May 2007, the Commissioner notified all lot owners in the Scheme of receipt of the application and invited all lot owners to make submissions on the Application, which was attached to that notice, by 12 June 2007.

40. By correspondence, dated 22 May 2007, the Commissioner invited Stevens to provide a request, by 12 June 2007, to submit a reply to any submissions made.

41. By correspondence, dated 28 May 2007, Stevens submitted additional material amending the submissions made.

42. By correspondence, dated 29 May 2007, the Commissioner notified Stevens that the Applicants were responsible for the distribution of the additional material to all lot owners in the Scheme, and additionally provided a notice to be circulated with that material.

43. By correspondence, dated 2 June 2007, Stevens confirmed by Statutory Declaration that the further material, including the Commissioner's notice, had been circulated to all lot owners in the Scheme on 1 June 2007.

44. By correspondence, dated 5 June 2007, the Commissioner advised Stevens of an extension of the date to provide a request to submit a reply to any submissions made from 12 June 2007 to 19 June 2007.

45. By correspondence, dated 8 June 2007, the Commissioner required the Body Corporate to advise all owners that, consistently with the Commissioner's notice circulated by Stevens, the closing date for submissions was extended to 19 June 2007.

46. By correspondence, dated 14 June 2007, Stevens provided the Commissioner his request to submit a reply to any submissions made.

47. By correspondence, dated 21 June 2007, the Commissioner advised Stevens of the availability of the submissions made for his reply.

48. The following submissions were made:

a) The Body Corporate, 1 page of 5 paragraphs, dated 31 May 2007 but faxed on 18 June 2007;

b) Dr Sahhar, owner lot 8, 1 page of 1 paragraph, dated 12 June 2007;

c) Mrs Rossi, owner lot 174, 1 page of 3 paragraphs, dated 8 June 2007;

d) Mr & Mrs Brodie, owners lot 182, 1 page of 2 paragraphs, dated 5 June 2007;

e) Mr Beavis & Mrs Roach, owners lot 83, 1 page of 1 paragraph, dated 28 May 2007;

f) Mr & Mrs Tunbridge, owners lot 15, 1 page of 2 paragraphs, dated 25 May 2007;

Only the submissions of the Body Corporate and Mr & Mrs Tunbridge were against the application.

49. By correspondence, dated 26 June 2007, the Commissioner provided Stevens with copies of the submissions made for his reply and confirmed that any reply was to be made by 10 July 2007.

50. By correspondence, dated 1 July 2007, Stevens provided the Commissioner with his reply to the submissions made which inter alia reaffirmed his reliance on my Order, *Mr James Skenderis v The Body Corporate for Atlantis West [2006] QBCCMCmr 259*.

51. Sections 48(2) and 48(3) of the Act provide:

"48 Adjustment of lot entitlement schedule

(2) Despite any other law or statutory instrument—

(a) the respondent for an application mentioned in subsection (1) is the body corporate

(b) at the election of another owner of a lot in the scheme, the other owner may be joined as a respondent for the application; and

(c) each party to the application is responsible for the party's own costs of the application.

(3) An owner who elects, under subsection (2)(b), to become a respondent for the application must give written notice of the election to the body corporate."

52. By correspondence, dated 19 July 2007, I provided all parties that had made submissions with my directions for the determination of the Application. Those directions included, inter alia:

(i) that any party that had made a submission in respect of the adjustment of lot entitlements, other then the Body Corporate, was to provide written notice of their election to be joined in accordance with Section 48(3) of the Act by 27 July 2007;

(ii) a copy of the calculations from which I had determined the contribution lot entitlements in my previous Order, *Mr James Skenderis v The Body Corporate for Atlantis West [2006] QBCCMCmr 259*;

(iii) that the Applicants provide a copy of an expert report addressing the effect of an amalgamation on the respective market values of the lots.

53. No notice was provided to me of any election to be joined as a respondent pursuant to Section 48(3) of the Act by 27 July 2007. Therefore the only submissions to be considered in regard to the adjustment of lot entitlements are those of the body corporate, however any party's submission in regard to the amalgamation of the lots requires to be considered.

54. By correspondence, dated 3 August 2007, Stevens provided a copy of a report from CB Richard Ellis, dated 30 July 2007, which addressed the effect of an amalgamation on the respective market values of the lots in the Scheme.

55. By correspondence, dated 7 August 2007, I advised all parties that had made submissions that: as the expert report supported the Application; and as no submission that I am able to consider takes issue with the Application to aggregate the interest schedule lot entitlements for the amalgamated lots, that I considered that no hearing would be required and that I would proceed with the adjudication of the Application on the material available to me.

56. By correspondence, dated 9 August 2007, inter alia Gordon requested a preliminary hearing to *"define the issues to be adjudicated"* and requested that Kilner be copied in all correspondence.

57. By correspondence, dated 10 August 2007, I replied to Gordon advising, inter alia, that the Body Corporate had been provided with a full copy of the Application and an opportunity to make a submission. That it had done so with the delivery of its one (1) page letter, dated 31 May 2007 but delivered 18 June 2007, and that its submission would be considered when determining the Application. In such circumstances I could find no basis upon which it might be properly considered that a preliminary hearing was required.

58. By correspondence, dated 14 August 2007, inter alia Mackie repeated Gordon's request for a preliminary hearing and confirmed that he had been provided copies of various material, I note particularly that that material included:

a) a copy of the Application, dated 15 May 2007;

b) the Commissioner's invitation to make a submission, dated 22 May 2007;

c) the Commissioner's notice of an extension of time to make a submission, dated 8 June 2007;

d) the Body Corporate submission, dated 31 May 2007 but delivered 18 June 2007;

e) my correspondence, dated 19 July 2007 (which had included all the relevant calculations from my previous Order);

f) my previous Order, dated 24 May 2006, *Mr James Skenderis v The Body Corporate for Atlantis West [2006] QBCCMCmr 259*;

g) a valuation report prepared by CB Richard Ellis, dated 30 July 2007.

59. By correspondence, dated 16 August 2007, I advised that as a preliminary hearing would add to the cost of determining the Application I would hold a preliminary hearing subject to confirmation that the body corporate had properly authorised the expenditure and Mackie's appointment.

60. By correspondence, dated 17 August 2007, inter alia Mackie advised that *"authority of spending up to $125 per lot (in circumstances where there are 170 lots)"* had been authorised.

61. By correspondence, dated 17 August 2007, Gordon provided a copy of a "resolution passed outside a committee meeting" on 13 August 2007 which authorised Mackie's appointment.

62. By correspondence, dated 20 August 2007, I notified the parties of a preliminary hearing to be held on 25 August 2007.

63. Following further correspondence between the parties it was ultimately agreed that the preliminary conference would be held on 1 October 2007.

64. At the hearing, held on 1 October 2007, I gave directions for the further conduct of the adjudication. I was provided a copy of a "resolution passed outside a committee meeting" on 30 August 2007 that authorised Kilner accept a quotation from Del Linkhorn to conduct a review of the previous lot entitlement schedule reports (those provided by the parties in *Mr James Skenderis v The Body Corporate for Atlantis West [2006] QBCCMCmr 259*) along with a further report in respect of the present Application. I was also provided a copy of a circular to owners dated 7 September 2007.

65. By correspondence, dated 3 October 2007, Stevens raised issues associated with the Application.

66. By correspondence, dated 4 October 2007, Mackie raised issues associated with the Application.

67. By correspondence, dated 8 October 2007, Mackie raised issues associated with the Application.

68. By correspondence, dated 10 October 2007, Mackie raised other issues associated with the Application.

69. By correspondence, dated 15 October 2007, I replied to Mackie's correspondence dated 4, 8 and 10 October 2007.

70. By correspondence, dated 19 October 2007, Mackie advised that Counsel submissions would be provided to me by no later then 26 October 2007.

71. By correspondence, dated 19 October 2007, I replied to Mackie's correspondence of the same date, I also directed Stevens to provide a copy of the survey plans for the amalgamated lots.

72. By correspondence, dated 22 October 2007, I directed Gordon to provide a copy of the current Community Management Statement and the current sinking fund forecast.

73. By correspondence, dated 24 October 2007, Ms Jose (for Gordon) provided a copy of the current Community Management Statement and the current sinking fund forecast.

74. By correspondence, dated 26 October 2007, Mackie provided further submissions. I responded by correspondence, dated 30 October 2007.

75. By correspondence, dated 2 November 2007, Mackie raised other issues associated with the Application. I responded by correspondence, dated 2 November 2007.

76. By correspondence, dated 8 November 2007, Stevens provided a copy of the survey plans for the amalgamated lots.

77. By correspondence, dated 14 November 2007, Stevens provided an amended copy of the survey plans for the amalgamated lots.

78. By correspondence, dated 19 November 2007, Mackie provided further submissions. By correspondence, dated 22 November 2007, I responded to Mackie's correspondence, dated 19 November 2007, and provided the parties with calculations of the contribution schedule lot entitlements for the Scheme with the Applicants' lots amalgamated and invited their submissions on that material by 30 November 2007. I also invited the Respondent to make a submission in respect to the survey plans provided by Stevens and I invited the Applicants to make a submission in respect of the information provided by Ms Jose (for Gordon).

79. On 30 November 2007, the Respondent made further submissions. In respect of the survey plans, those submissions were that the survey plans had not been registered (and therefore the application was premature) as opposed to any submission relating to the survey itself such as boundary locations or measurements.

80. On 30 November 2007, the Applicants made a submission in respect of the CMS, that submission was in relation to an issue outside the scope of the Application and I am therefore unable to deal with it.

81. As no owners made an election to be joined as a Respondent pursuant to Section 48(3) of the Act the only submissions that I may consider in respect of any adjustment to the interest or contribution schedule lot entitlements are those of the Applicants and the Body Corporate. In respect of the amalgamation of the lots, as well as the Applicants and the Body Corporate there is a submission from Mr & Mrs Tunbridge, owners lot 15, 1 page of 2 paragraphs, dated 25 May 2007, which provides a submission against the amalgamation as follows:

"We are opposed to the change to the existing structure of the units as most joined units are still double identities that can be rented out separately at a disadvantage to the other rate payers in the building which is unfair.

Some of them are currently doing this. Renting separately or using half for an overseas home exchange."

82. The Body Corporate submissions provided in response to the Commissioner's invitation to make a submission in respect of the application are as follows:

617 55096677 Body Corporate Service BODY CORPORATE SERVICES P/L 13:53:41 18-06-2007 1 /1

Body Corporate Services Pty Limited
ABN 82 010 120 144

PO Box 444, Broadbeach, QLD 4218
DX 41504 Southport
bcs_goldcoast@bcssm.com.au
www.bcssm.com.au

Ph. 07 5509 6666
Fax. 07 5509 6677

CTIQ MEMBER COMMUNITY TITLES INSTITUTE QUEENSLAND

112S1 06/07 14

bcs Body Corporate Services

Email: david.gordon@bcssm.com.au
Direct line: 07 5509 6655

31 May 2007

Commissioner for Body Corporate & Community Management
GPO Box 1049
BRISBANE QLD 4001

Attention: Amy Ah Ben

Dear Commissioner

RE: NOTICE OF APPLICATION AND INVITATION TO MAKE A SUBMISSION ATLANTIS WEST CTS 8790 YOUR REF 0307A-2007/ML

We refer to the above matter and on behalf of the committee make the following response:

1. The Committee stands by its comment recorded in the minutes of committee meeting held on 02/06/06.

   The applicant/s should have sought qualified legal advice concerning procedures required.

2. Nothwithstanding the applicants right to submit their proposal to owners for resolution without dissent, the items for decision included changes to both the contribution schedule and interest schedule lot entitlements. No evidence was submitted that such changes were just and equitable as required by S.49 of the Act.

3. Whilst it was known that a substantial number of "No" votes were recorded from voting papers received which would, in any event have defeated the motion, the Chairman took the decision to rule the motion out of order in terms of S.47 (1) (SM) as being in conflict S.49 of the Act and S.39 of the Land Title Act, thus preventing a vote on an illegal motion.

4. Whilst proposed contribution entitlements are similar to those granted in terms of a recent lot entitlement review by specialist adjudication the interest entitlements are proposed to be substantially reduced by adopting a value of 65 which is the same as the contribution entitlement.

   This proposal is obviously not just and equitable and it is believed the Chairman took the correct decision in ruling AGM motion 16 out of order.

5. The Act details procedures that should be adopted for adjustment of lot entitlement schedule in S.48 and also for consenting to a new CMS to record amalgamation of lots in S.62. It is disappointing the applicant/s did not take appropriate advice which would likely have negated the need for this application.

Yours faithfully
for and on behalf of the body corporate for
ATLANTIS WEST CTS 8790

David Gordon
Body Corporate Manager

Trust us for service excellence today & beyond

18/06 2007 MON 15:06 [TX/RX NO 6017] ☑001

83. It is of note that whilst the letter is dated 31 May 2007 (prior to the initial closing date for submissions), the fax recorded header and footer both confirm the transmittal date as 18 June 2007 (the day prior to the extended closing date).

84. One of the reasons for that observation is that paragraph 4 makes reference to an interest entitlement value of 65. An amendment to the Application was distributed to all owners on 1 June 2007 (that was the reason for the extension of time to make a submission) to change the interest schedule lot entitlement values to the aggregate of the existing values for the lots proposed to be amalgamated. The Body Corporate made no amendment to its submissions to reflect the amendment to the Application.

85. As discussed earlier in this Order, it is my view that the position of the committee referred to at paragraph 1 of its submissions gave rise to a dispute within the meaning of Section 227(1)(b). This paragraph is not a relevant submission for the Application.

86. As to paragraph 2 of its submissions, the body corporate committee is misguided. There is nothing in Section 49 of the Act that requires any "evidence" of justice and equity to accompany a motion to a meeting of the body corporate for the adjustment of a lot entitlement schedule. Sub-section 49(1) of the Act makes clear that *"this section applies if an application is made for an order of the District Court or a specialist adjudicator for the adjustment of a lot entitlement schedule"*. This paragraph is not a relevant submission for the Application.

87. Paragraph 3 of the submissions moves partially in reliance on the error of the committee set out at paragraph 2 but also raises reference to the Land Title Act. As discussed when considering the application for amalgamation of the lots later in this Order it is my view that the committee was again misguided in its position on this provision. I do not consider that there is any proper basis to suggest that the Applicant's motion was *"an illegal motion"*. In my view the chairman's reliance on Section 49 of the Act and Section 39 of the Land Title Act to rule the motion out of order pursuant to Section 47(1) of the regulation was misplaced.

88. I accept the Respondent's submission that the procedure for the adjustment of lot entitlements is set out in Section 48 of the Act, with that caveat that that procedure is only for circumstances where the body corporate cannot agree. It is not mandatory to adjust a lot entitlement schedule by referral to the Court or Adjudication. I concur with the Respondent that Section 62 of the Act sets out the requirements for the consent to a new CMS for the amalgamation of lots.

FINDINGS AND REASONS

89. In this adjudication I have considered the relevant legislation, along with the documentation included in the file forwarded to me by the Commissioner and those documents subsequently supplied to me by Stevens, Ms Kaylene Arkcoll, Mackie and Gordon which bear on the issues, namely:

    a. the Dispute Resolution Application including all attachments thereto, including the submissions of:

        (i) the body corporate, 1 page of 5 paragraphs, dated 31 May 2007 but faxed on 18 June 2007;

        (ii) Mr & Mrs Tunbridge, owners lot 15, 1 page of 2 paragraphs, dated 25 May 2007;

        (iii) the Applicant's in Reply;

    b. the Community Management Statement 8790, executed 15 August 2006;

    c. Building Unit Plans 6435, 7453, 7466, 7485, 7492, 11226 and 11638;

    d. Survey Plan SP 211 890;

    e. the valuation report prepared by CB Richard Ellis, dated 30 July 2007;

    f. the contribution schedule lot entitlement calculations giving rise to my previous Order, *Mr James Skenderis v The Body Corporate for Atlantis West [2006] QBCCMCmr 259*, dated 24 May 2006 (provided to the parties with my correspondence, dated 19 July 2007);

    g. my Order, *Mr James Skenderis v The Body Corporate for Atlantis West [2006] QBCCMCmr 259*, dated 24 May 2006;

    h. the sinking fund forecast prepared by Star Building Management Services in January 2004;

    i. the amended contribution schedule lot entitlement calculations of Ms Kaylene Arkcoll, dated 30 July 2007; and

    j. I considered all of Mackie's submissions very carefully, but concluded that only his submissions dated 26 October and 30 November 2007 truly bore on any issues before me, the balance of his correspondence has already been dealt with in my replies.

90. The outcome sought in the Application is that for each of lots 102 & 103, 117 & 118, 144 & 145 and 164 & 165 on BUP 6435 a declaration be issued that the Body Corporate:

    1. give approval in writing to the owners of the lots to amalgamate the adjoining lots under a single title.

    2. consent to the recording of a new CMS for the Scheme to reflect the amalgamation and the new CMS for the Scheme will be identical to the existing CMS except for the following changes:

        a. the existing lots will no longer be shown as part of the Scheme;

        b. the amalgamated lots will instead be part of the Scheme;

        c. schedule A of the CMS will be amended so that the contribution lot entitlement for the amalgamated lots will be 65;

        d. schedule A of the CMS will be amended so that the interest lot entitlements for the amalgamated lots will be 65; and

e. schedule E of the CMS will be amended so that the exclusive use areas granted to the original lots will apply to the amalgamated lots.

3. consent to affixing its seal to the new CMS provided that the owners of the amalgamated lots submit the new CMS to the Body Corporate and pay the costs of preparation and recording of that new CMS.

4. will do all other things necessary to give effect to the above.

Findings on the application for amalgamation of the lots:

i. There has been no proper basis put forward to reject the Applicant's request to amalgamate their lots.

ii. There is no basis evident in the relevant legislation to reject the Applicant's request to amalgamate their lots.

iii. The Applicant's request for approval to amalgamate their lots should be granted.

Reasons

91. The Act includes a requirement for the body corporate to consent to the recording of a new CMS at Section 62 including, by sub-section 62(4)(h), for the amalgamation of lots. The Act does not set out any basis upon which a lot owner, or the body corporate, might object to a request for the amalgamation of lots.

92. I have reviewed all of the submissions made on the Application and only the body corporate and Mr and Mrs Tunbridge object to the amalgamation of the lots requested by the Applicants.

93. Mr and Mrs Tunbridge objection is that:

"We are opposed to the change to the existing structure of the units as most joined units are still double identities that can be rented out separately at a disadvantage to the other rate payers in the building which is unfair.

Some of them are currently doing this. Renting separately or using half for an overseas home exchange."

94. The Applicant's, in their Reply, identify that there is no restriction on such use in the by-laws and that such use is not a function of the amalgamation of the lots in any event.

95. I agree with the Applicant's, I do not consider the objection raised by Mr and Mrs Tunbridge to be relevant to an application for the amalgamation of lots. Furthermore, their submission that the units are *"still double identities"* is not correct, once amalgamated the lots will only be able to be transferred as a single entity.

96. The objection of the body corporate to the amalgamation of lots appears to be that the committee considers the application for amalgamation is premature. While not clear from its submission, dated 31 May 2007, in its later submissions, dated 30 November 2007, Mackie asserts *"… the plan of amalgamation has still not been registered in the Titles Office. Until that plan is registered there should be no decision made by the Adjudicator. It is not up to the adjudicator to order the plan to be registered. He should determine the application on the state of affairs as they exist, and not as they might if and when the plans of amalgamation are registered…"*

97. The Applicants sets out in their submissions with the Application that *"(e)nquiries at the Titles Office revealed that under the provisions of the Body Corporate and Community Titles Act that approval to amalgamate must be given by the Body Corporate. Further yet, the Body Corporate must execute under seal the new Community Management Statement that reflects changes to the scheme due to the amalgamation"*.

98. My own enquiries of the Titles Offices met with similar advice. At the hearing held on 1 October 2007, I drew Mackie's attention to that submission by the Applicants and my own receipt of similar advice. I enquired of Mackie whether he had made any enquiry of the Titles Office himself that had resulted in advice that supported the body corporate proposition, he advised that he had not.

99. It is relevant to again consider Section 62 of the Act which relevantly provides:

> *"(4) The consent to the recording of a new community management statement need not be in the form of a resolution without dissent or special resolution if the new statement is different from the existing statement only to the extent necessary for 1 or more of the following—*
>
> *…*
>
> *(h) amalgamating (my underlining) or subdividing lots included in the community titles scheme;*
>
> *…*
>
> *(5) However, subsection (4)(h) applies only if the associated plan of subdivision (my underlining) —*
>
> *…*
>
> *(b) does not change—*
>
> *(i) the contribution schedule lot entitlements, or interest schedule lot entitlements, for lots included in the scheme (other than the lots being amalgamated (my underlining) or subdivided under the plan); or*
>
> *…*
>
> *(8) In this section—*
>
> ***associated plan of subdivision**, for a proposed new community management statement, means the plan of subdivision proposed (my underlining) to be lodged with the request to record the statement."*

100. Both subsections 4 and 5 are written in the present tense, "amalgamating" and "being amalgamated", if Mackie's assertions were correct then I would expect these subsections to be written in past tense. Similarly, subsection 8, which defines the associated plan of subdivision applying to both subsections 4 and 5, speaks of a "proposed" new CMS and the associated plan of subdivision "proposed" to be lodged.

101. Furthermore, Section 59(1) of the Act provides:

> *"A community management statement takes effect under the Land Title Act, section 115L(3)."*

Section 115L(3) of the *Land Title Act 1994* provides:

> *"The community management statement takes effect when it is recorded by the registrar as the community management statement for the scheme."*

and Section 115J(1) of the *Land Title Act 1994* provides:

"A request to record a new community management statement for a community titles scheme must be lodged when a new plan of subdivision affecting the scheme (including affecting a lot in, or the common property for, the scheme) is lodged."

102. Section 115J of the *Land Titles Act* makes abundantly clear that a request to record a new CMS must accompany a new plan of subdivision when lodged.

103. Despite raising the Titles Office advice with Mackie at the hearing on 1 October 2007, no submissions have be made by the body corporate which set out the bases for its assertions. In my view the assertions of the body corporate and Mackie are clearly wrong.

104. The CMS includes by-laws to prevent an owner from obstructing the lawful use of common property or acting in a way that is likely to interfere with the peaceful enjoyment of a person lawfully on another lot or using common property. The CMS also includes by-laws that govern the use of lots and the construction of lot interiors.

105. No submission has been made, and neither is it evident from the survey plan, that the proposed amalgamations will interfere with common property or the use of lots contrary to the by-laws included in the CMS.

106. The following table sets out the details of the previously amalgamated lots in the Scheme:

Lot no.	Amalgamated lot no.	Date of Amalgamation	Current contribution lot entitlement	Original * interest lot entitlement	Amalgamated interest lot entitlement
88	182	18/08/1986	58	140	278
89				138	
94	183	28/08/1986	58	141	280
95				139	
34	184	28/08/1986	58	127	252
35				125	
10	185	28/08/1986	58	123	244
11				121	
22	186	28/08/1986	58	125	248
23				123	
28	187	28/08/1986	58	126	250
29				124	
70	188	28/08/1986	58	137	272
71				135	
76	189	28/08/1986	58	138	274
77				136	
82	190	28/08/1986	58	139	276
83				137	
169	191	04/09/1991	65	217	464
170				247	
90	192	05/03/1992	65	205	395
91				190	

* Original, means when the Scheme was first registered with BUP No. 6435 on 27 November 1984.

107. There is a clear history of amalgamations in the Scheme, I find that no relevant submissions have been made and I can find no other reason why the Applicant's request for amalgamation should not be given body corporate consent. I order accordingly.

Findings on the application for adjustment of the interest schedule lot entitlements:

i. Consequent upon the registration of the plans of amalgamation of lots 102 & 103, 117 & 118, 144 & 145 and 164 & 165 on BUP 6435 the existing interest lot entitlement schedule will no longer reflect the structure of the Scheme.

ii. That the interest schedule lot entitlements that reflect the respective market values of the proposed amalgamated lots are properly determined by the aggregation of the existing interest schedule lot entitlements.

iii. That interest schedule lot entitlements that reflect the respective market values of the lots included in the scheme, except to the extent that it is just and equitable in the circumstances for them not to reflect the respective market values of the lots, subsequent to the amalgamation of the lots are as follows:

Lot No	Interest Schedule Lot Entitlement	Lot No	Interest Schedule Lot Entitlement	Lot No	Interest Schedule Lot Entitlement	Lot No	Interest Schedule Lot Entitlement
103	399	118	422	145	454	165	462

The interest schedule lot entitlements of the balance of the lots to remain unaltered and the aggregate of the interest schedule lot entitlements to remain unaltered at 37000.

Reasons

108. The Applicants amended the Application, on 28 May 2007, to correct a typographical error in the orders sought wherein the interest schedule lot entitlements now sought for the amalgamated lots are *".. the aggregate of the Interest of the Lots as now stand in the current CMS .."* and not 65 as set out in the initial application.

109. There is potential for it to be argued that the relevant provision of the Act is Section 50, that Section provides, inter alia:

"This section applies if the owners of 2 or more lots included in a community titles scheme—

(a) agree in writing to change the lot entitlements of the lots; and

(b) under the agreed change (the change), the total lot entitlements of the lots subject to the change (the changing lots) is not affected; and

(c) the registered mortgagee and lessee (if any) of each of the changing lots has consented to the change; and

(d) the owners of the changing lots have advised the body corporate in writing of the change."

110. The aggregation of the interest schedule lot entitlements would largely satisfy Section 50 of the Act, however Section 50 does not expressly address the extinguishment of a lot and refers only to "the lots" and "the changing lots". Out of an abundance of caution I therefore directed the Applicants to provide me with an expert report valuing the existing and proposed amalgamated lots and, if that report suggested that the values of the proposed lots would be other then the aggregate of the existing lots, a report to encompass the valuation of all of the lots, as proposed, in the Scheme.

111. The Applicants provided a report from C B Richard Ellis that supports the Applicants submission that the interest schedule lot entitlements of the proposed amalgamated lots should be the aggregate of the existing lots.

112. The Report sets out the author's opinion of the current market values of each of the lots and the market values of the amalgamated lots. Importantly in compiling the report the author has considered current market evidence and lists numerous recent sales in Atlantis West, relevantly of both small and large lots with sales dates subsequent to the current CMS (with the present lot entitlements).

113. As mentioned earlier, the Respondent's initial submissions in respect of the interest schedule lot entitlements reflected the Orders sought in the original application. The Respondent's made no apparent attempt to make any submission in respect of the amended Orders sought in the Application.

114. The Respondent has however in its submissions, dated 26 October 2007, submitted that *"(h)aving specific regard to the proposed adjustments to the interest schedule lot entitlements in the Atlantis West complex, it is our client's position that the values of all units in the complex would be adversely affected by the proposed adjustments being made to the contribution schedule entitlements. That is because of the negative impact (in terms of unit values and increased contributions to both the Administrative Fund and Sinking Fund levies) that this Application will have upon all lot owners in the complex other than the Applicants. If the process being pursued by the Applicants was done properly, then it follows that there would need to be adjustments made to the interest schedule lot entitlements, as pursuant to Section 48(6) of the Act "...For the interest schedule, the respective lot entitlements should reflect the respective market value of the lots included in the scheme...". To that end no evidence has been placed before you by the Applicants addressing the question of what the adjusted market values of the other units in the complex might be. All that has been placed before you to date by the Applicants is the Valuation Report dated 30 July 2007 prepared by CBRE Richard Ellis. With respect, that report tells you nothing substantive or material, as the valuations and market values referred to in it are undertaken in a remarkably unsophisticated manner. The market values reached by the author of that report simply involve adding together the values of the lots in respect of which amalgamations are being sought. That approach cannot be sustainable when consideration is given to the appropriate manner in which the interest schedule lot entitlements should be adjusted in this case."*

115. The Respondents have not however provided any alternate expert report for my review. Further to which its assertions as to the CB Richard Ellis Report are simply wrong as the report included recent sales within the Scheme of both small and large lots. Potentially realising their mistake the Respondents included a further submission on the Valuation Report with their submissions on 30 November 2007 when they said *"the valuation report of Richard Ellis makes no mention of the alteration to the contribution schedule affecting the value of the amalgamated apartments. Clearly this is a relevant factor and should have been raised. The comparisons set out paragraph 11 make no mention of contribution schedules or amounts that are in the sinking funds of the various bodies corporate, and to the extent at least are deficient in a material way."*

116. Again I cannot agree with the Respondents assertions. As I set out earlier, in compiling the report the author has considered current market evidence and lists four recent sales in Atlantis West, ranging from small (lot 81, 140 square metres) to large (lot 176, 335 square metres) lots. The sales dates are subsequent to the current CMS and therefore the contribution schedule lot entitlements that would have been considered by purchasers are the present lot entitlements. That is, the impact in the change of the contribution schedule lot entitlements is taken into account in the Valuation Report as it was a factor in those sales, lot 81 has a contribution schedule lot entitlement of 58 whilst the larger lot 176 has a contribution schedule lot entitlement of 65. As to the amount in the sinking fund, as the sales dates are all close in point of time it could be anticipated that the variation in the sinking fund account balances would be of negligible, if any, impact to the purchasers consideration. And finally, as to the assertion by Mackie that these considerations would have a material impact, as the adjustment to the contribution schedule lot entitlements equates to a variation in the contributions of most of the lots of less then $100 per annum, I do not consider that to be material against an average purchase price in excess of $750,000.

117. Having considered all of the submissions made, I accept the opinion of Mr Dalgamo AAPI, a certified practising valuer registration number 1949, of CB Richard Ellis that *"in regard to the Schedule of Lot Entitlements the existing relativity of interest entitlements will not change due to the amalgamation"* and that *"there is no change in the overall value of the existing lots when amalgamated"*. I do not accept the Respondents submissions that the amalgamation will materially negatively impact on the value of the balance of the lots in the Scheme. I consider that an aggregation of the interest schedule lot entitlements (as potentially permitted by Section 50 of the Act) provides fair and equitable interest schedule lot entitlements for the amalgamated lots.

118. Having given due consideration to the relevant matters pursuant to Section 49 of the Act, I consider that an adjustment to the interest schedule lot entitlements that would reflect the relative market values of the lots in the Scheme is set out in my findings on the application for adjustment above.

Findings on the application for adjustment of the contribution schedule lot entitlements:

i. Consequent upon the registration of the plans of amalgamation of lots 102 & 103, 117 & 118, 144 & 145 and 164 & 165 on BUP 6435 the existing contribution lot entitlement schedule will no longer reflect the structure of the Scheme.

ii. That contribution schedule lot entitlements that are equal, except to the extent that it is just and equitable in the circumstances for them not to be equal, subsequent to the amalgamation of the lots are as follows:

Lot No	Contribution Schedule Lot Entitlement	Lot No	Contribution Schedule Lot Entitlement	Lot No	Contribution Schedule Lot Entitlement	Lot No	Contribution Schedule Lot Entitlement
1	57	51	59	106	57	150	60
2	57	52	62	107	59	151	57
3	57	53	61	108	62	152	59
4	60	54	60	109	61	153	62
5	57	55	57	110	60	154	61
6	60	56	59	111	57	155	60
7	61	57	62	112	59	156	57
8	61	58	61	113	62	157	59
9	59	59	60	114	61	158	62
12	59	60	57	115	60	159	61
13	61	61	59	116	57	160	60
14	61	62	62	118	66	161	57
15	59	63	61	119	61	162	59
16	57	64	60	120	60	163	62
17	57	65	57	121	57	165	66
18	59	66	59	122	59	166	57
19	61	67	62	123	62	167	59
20	61	68	61	124	61	168	62
21	59	69	59	125	60	171	57
24	59	72	59	126	57	172	59
25	61	73	61	127	59	173	62
26	61	74	61	128	62	174	67
27	59	75	59	129	61	175	59
30	59	78	59	130	60	176	67
31	61	79	61	131	57	177	67
32	61	80	61	132	59	178	59
33	59	81	59	133	62	179	67
36	59	84	59	134	61	180	70
37	61	85	61	135	60	181	70
38	61	86	61	136	57	182	59
39	60	87	59	137	59	183	59
40	57	92	61	138	62	184	59
41	59	93	59	139	61	185	59
42	62	96	59	140	60	186	59
43	61	97	61	141	57	187	59

Lot No	Contribution Schedule Lot Entitlement	Lot No	Contribution Schedule Lot Entitlement	Lot No	Contribution Schedule Lot Entitlement	Lot No	Contribution Schedule Lot Entitlement
44	60	98	61	142	59	188	59
45	57	99	59	143	62	189	59
46	59	100	57	145	66	190	59
47	62	101	57	146	57	191	66
48	61	103	66	147	59	192	66
49	60	104	61	148	62	AGGREGATE 9986	
50	57	105	60	149	61		

Reasons

119. I set out the primary considerations, both legislative and of the Scheme, in *Mr James Skenderis v The Body Corporate for Atlantis West [2006] QBCCMCmr 259*. The legislative considerations, at least, have not changed and I therefore do not intend to repeat them here.

120. In *Mr James Skenderis v The Body Corporate for Atlantis West [2006] QBCCMCmr 259*, I participated in an expert conclave with Ms Kaylene Arkcoll (for Skenderis) and Mr Kent O'Brien (for the body corporate for Atlantis West) to consider their respective reports and resolve the most appropriate method of assessment for the contribution schedule lot entitlements at Admiralty West when considering the various features of the lots and the scheme in accordance with the requirements of Sections 48 and 49 of the Act. The most appropriate method of assessment and all of the various elements to be considered in that assessment were resolved during that conclave. The output of that conclave was a set of calculations

121. The Applicant's grounds for the Application provide, inter alia:

"9 Furthermore, the applicant says that it is reasonable that where an owner resides in two lots that form one apartment and he amalgamates those two lots into one lot and that the amalgamated lot takes the equivalent form and size to that of a sub-penthouse lot, then the corresponding entitlement factor should be adjusted to reflect its equality with that of a sub-penthouse lot.

10 On 24 May 2006 a "Notice of an Adjudicator's Order 0383-2005-Atlantis West" was issued by the Commissioner for Body Corporate and Community Management ordering that the contribution schedule for lot entitlement be adjusted to make the contribution factors just & equitable. (refer annexure D for a copy of the notice) The highest contribution factor across the Scheme in the order was 69 and it applied to each of the two penthouses. A contribution factor of 65 applied to each of the sub-penthouses.

11 Based on the fact that the existing amalgamated lots all have contribution factors of 65 or less and two of those lots namely lots 191 and 192 are of equivalent form and size to that of a sub-penthouse lot which also has a contribution factor of 65, then the Applicant says it is fair and just to apply the same consideration to all subsequently amalgamated lots that are of equivalent form and size to that of a sub-penthouse lot.

12 Accordingly, the applicant says that based on how the previously amalgamated lots have been dealt with, it is reasonable to expect that the lots be approved for amalgamation and the amalgamated lots be allocated a contribution factor of 65. That is, the Body Corporate should give full approval to the "Motion for

Amalgamation of Lots" as described in 4 above

13 The applicant says that had lots 144/145, 117/118, 164/1 65 and 102/103 been amalgamated prior to 24 May 2006, the date the Commissioner issued "Notice of an Adjudicator's Order 0380-2005-Atlantis West" the resultant amalgamated lot or lots would have applied contribution schedule lot entitlement of 65 as is the case with lots 191 and 192."

122. The Applicants rely inter alia on my previous Order in *Mr James Skenderis v The Body Corporate for Atlantis West [2006] QBCCMCmr 259*.

123. The Respondent on numerous occasions put it to me that I could not consider my previous Order. I hold an opposing view to the Respondent on that point, I consider that it is incumbent on me to consider any previous relevant Order given in the Scheme unless that Order has been subsequently overturned on Appeal, to do otherwise could readily lead to injustice and an abuse of the process.

124. At the preliminary hearing held on 1 October 2007, I invited Mackie to make a submission to me by 8 October 2007 as to any material changes in the Scheme since my previous Order that would effect the allocation of costs as between the lots.

125. In those submissions, ultimately dated 26 October 2007, Mackie did not make any assertions or provide any material to suggest that there had been any material changes in the Scheme since my previous Order that would effect the allocation of costs as between the lots. The submissions made bear little, if any, relevance to the matters I have to consider in determining any adjustment to the contribution schedule lot entitlements.

126. Similarly, Mackie's submissions dated 30 November 2007 did not make any assertions or provide any material to suggest that there had been any material changes in the Scheme since my previous Order that would effect the allocation of costs as between the lots. The submissions made bear little, if any, relevance to the matters I have to consider in determining any adjustment to the contribution schedule lot entitlements.

127. Gordon, by e-mail attachment dated 24 October 2007, confirmed that the sinking fund forecast had remained unchanged since my previous Order.

128. Therefore, based on the material before me, the only material change proposed in the Scheme is the amalgamation of the Applicant's lots. It follows that the only further consideration required in respect of my previous Order then is the effect that the amalgamation of the Applicant's lots would have on the allocation of costs as between all of the lots in the Scheme.

129. Section 271(1)(a)(i) of the Act provides that:

"When investigating the application, the adjudicator may do all or any of the following—

(a) require a party to the application, or someone else the adjudicator considers may be able to help resolve issues raised by the application—

(i) to obtain, and give to the adjudicator, a report or other information"

130. On 30 July 2007, pursuant to Section 271(1)(a)(i), I requested Arkcoll run the model for Atlantis West determined in my previous Order as if the Applicants lots were amalgamated. On 30 July 2007 Arkcoll provided me with the schedules produced by the model when run on that basis. Those schedules generally support the Applicant's position in this Application, though wider amendments to the schedule are required to reflect a just and equitable sharing of the costs incurred by the body corporate due to each lot.

131. I provided those schedules, along with my instructions to Arkcoll and her reply, to the parties on 22 November 2007 and invited their submissions by 30 November 2007.

132. The Applicants reply raised an issue regarding the introduction of a new by-law for the exclusive use of lots 144 and 145. That submission was outside of the scope of both my invitation and the Application and I am therefore unable to deal with it.

133. The Respondent's reply complained that they were unable to understand the material provided as it referred to other material to which it was not privy. That assertion is wrong, any material referenced had all been previously supplied to the body corporate either with the invitation issued on 22 November 2007 or prior Mackie's letter, dated 14 August 2007, which confirmed, inter alia, that he had been provided copies of various material including:

a) my correspondence, dated 19 July 2007 (which had included all the relevant calculations from my previous Order);

b) my previous Order, dated 24 May 2006, *Mr James Skenderis v The Body Corporate for Atlantis West [2006] QBCCMCmr 259*;

134. Both parties were provided the same information by me on 22 November 2007, the Applicant's made no complaint about being unable to understand the material or that there was a lack of necessary material provided. The only additional material necessary to fully understand the material provided is my previous Order and the relevant calculations for it (which were attached to my correspondence to the parties dated 19 July 2007).

135. Given that the amended schedule provided by Arkcoll has been produced from the cost analysis model for Atlantis West previously agreed with, inter alia, the then body corporate expert and given that the Respondent has failed to provide any submission that there has been any material change in the cost burdens of each of the lots on the body corporate since the time of that Order. I see no reason that that schedule should not be adopted by me.

136. Having given due consideration to the relevant matters pursuant to Section 49 of the Act, I consider that an adjustment to the contribution schedule lot entitlements that would reflect the just and equitable contribution of each lot to the ongoing administration and maintenance of the Scheme is set out in my findings on the application for adjustment above.

COSTS

Findings:

i. That the Respondent is responsible for the cost of the adjudication.

Reasons:

137. Section 265(1)(c) of the Act provides:

"265 Specialist adjudication of particular disputes

(1) The adjudication of a dispute must be specialist adjudication if—

(c) another provision of this Act requires the adjudication to be specialist adjudication."

138. Section 48(1)(b) of the Act provides:

"48 Adjustment of lot entitlement schedule

(1) The owner of a lot in a community titles scheme may apply—

(b) under chapter 6, for an order of a specialist adjudicator for the adjustment of a lot entitlement schedule."

139. Section 280 of the Act provides:

"280 Costs of specialist adjudication

(1) This section applies to an application dealt with by specialist adjudication mentioned in section 265.

(2) Unless the adjudicator otherwise orders, the applicant is responsible for the costs of the adjudication."

140. Thus the prima facie' position is that the applicant is responsible for the cost of a specialist adjudication. There must exist some reason for the adjudicator to exercise their discretion to otherwise order.

141. Section 48(2)(a) of the Act provides:

"48 Adjustment of lot entitlement schedule

(2) Despite any other law or statutory instrument—

(a) the respondent for an application mentioned in subsection (1) is the body corporate"

142. The Respondent added very significantly to the costs of the Adjudication. The vast majority of my time was spent responding to the Respondent's ongoing correspondence with me. As I set out in my replies, the majority of that correspondence was baseless and repetitive. The Respondent was obdurate in continually demonstrating its misunderstanding of the difference between an adversarial process as applies in the Court and an inquisitorial process as was applicable by s269 and s 271 of the Act.

143. Given that I have upheld the Application, the highly disproportioned amount of my time spent responding to the Body Corporate and the Applicant's contribution to the body corporate cost by way of levies, I exercise my discretion and order that the Body Corporate is responsible for the costs of the adjudication.