



A.T. Watson

17 October 2012

Research Director,
Legal Affairs and Community Safety Committee,
Parliament House,
George Street,
Brisbane Qld 4000

Dear Sir/Madam

Following the invitation from The Hon. Jarrod Bleijie MP, The Attorney-General and Minister for Justice regarding your deliberations on the Body Corporate and Community Management Other Legislation Amendment Bill 2012 I submit the following and enclosures to hopefully, assist your Committee to arrive at a fair and equitable conclusion.

It should be noted that this submission relates to the Rhode Island CTS 20573 on the Gold Coast and it is of importance to understand that the Body Corporate Committee is responsible only for the maintenance of the Scheme common property and common use facilities as described in my letter to The Premier, dated 1 August 2012. The Committee has no responsibility for any costs pertaining to the 172 Villas contained within the Scheme.

It is therefore obvious that the lot entitlements should be equal, as adjudged by the Specialist Adjudicator, Mr Garry F. Bugden in his Order Number 0073-2005 dated the 21 June 2005.

Enclosed are copies of my letter to The Premier, and Mr Bugden's Determination.

Yours Faithfully

A.T. Watson



The Hon Jarrod Bleijie MP
Attorney-General and Minister for Justice

In reply please quote: FTP-01630

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11 OCT 2012

Mr Alan Watson


Dear Mr Watson



You have previously written to me to express your concerns about the former Government's April 2011 changes to the system of contribution schedule lot entitlements in community titles schemes.

As a result of direct advocacy by yourself and many other concerned lot owners, I subsequently introduced the Body Corporate and Community Management and Other Legislation Amendment Bill 2012 into the Queensland Parliament on 14 September 2012.

The Bill reflects the Government's commitment to establishing a fairer system for sharing body corporate expenses between unit owners.

The amendments will provide lot owners adversely affected by the former Government's legislation with an opportunity to re-instate their scheme's contribution lot entitlements in accordance with previous lawful decisions made by independent courts, tribunals and specialist adjudicators.

A copy of the Bill and accompanying explanatory material can be obtained from the Queensland Legislation website at www.legislation.qld.gov.au.

The Bill has now been referred to the Parliamentary Legal Affairs and Community Safety Committee for its detailed consideration and report to the Parliament by 22 November 2012.

To assist in its deliberations, the committee has called for public submissions on the Bill by 19 October 2012.

I encourage you to consider sharing your views on body corporate lot entitlements with the committee. The committee's deliberations will play an important role in informing the final construction of the Bill.

(2)

Written submissions can be provided by email to lacsc@parliament.qld.gov.au or by post to the Research Director, Legal Affairs and Community Safety Committee, Parliament House, George Street, Brisbane Qld 4000.

You can find out more about the committee process, including further information about making submissions at www.parliament.qld.gov.au.

If you have questions about the Bill, you may wish to contact the information service provided by the Office of the Commissioner for Body Corporate and Community Management by telephoning 1800 060 199 or emailing bccm@justice.qld.gov.au.

Once again, thank you for bringing your concerns about body corporate lot entitlements to the Government's attention.

Yours sincerely



JARROD BLEIJIE MP
Attorney-General and Minister for Justice



1 August 2012

The Hon. Campbell Newman MP
Premier Queensland
PO Box 15185
City East Qld 4002

Dear Mr. Newman

I wish to bring to your attention the situation at Rhode Island (CTS 20573), on the Gold Coast in relation to the legislation regarding the reversion of lot entitlements.

Rhode Island is a gated community, comprising 172 Villa units. There are two types of unit, being A and B. The A units are larger in area than the B units, but all are 3 or 4 bedroom dwellings. The units are Strata Title and the Body Corporate has no responsibility for either maintenance, or repair of the Villas. All of these costs, including painting on a regular basis are the responsibility of the Villa owners. The Body Corporate is responsible for the upkeep and maintenance of the Common Property only.

The Common Property comprises extensive gardens, a swimming pool, club house, two tennis courts, gymnasium, sauna and barbeque area. The complex has on site, physical security which is also the responsibility of the Body Corporate. All of these facilities are shared by all property owners, their guests, or tenants,

Until 2005, each Villa, or lot, was subject to a various number of lot entitlements, set by the developer. Not all A type Villas were allocated the same number of lot entitlements, nor were the B Villas. In all cases the A Villa entitlements were higher than those allocated to the B Villas, even though the common property facilities were shared equally by all owners.

In 2005, due to a change in the legislation, a Special Adjudicator (Mr. Gary Bugden) was engaged by a number of A Villa owners to look into the possibility of equalisation of the lot entitlements. It was found by Mr. Bugden, that aside from individual property insurance costs, that the lot entitlements should be equal, therefore, one (1) entitlement per Villa. This eminently fair and equitable situation was adopted in 2005 and continued until the change in legislation introduced by the then incumbent Labor government, which allowed for one only proprietor, who was an owner on, or prior to, the equalization, to request a reversion to the previous inequitable level, with, effectively, no recourse for appeal against reversion.

A number of A Villa owners did engage legal counsel to present an application to maintain the fair and entirely equitable situation of one entitlement per lot. This application has been rejected. The result is that A Villa owners will pay between \$850 and \$1,050 per annum more than the amount paid by B Villa owners, for the exact same Body Corporate services.

It is my contention that where a Body Corporate is responsible only for the common property expense and when common property is shared equally by all owners, then the principle of one (1) lot entitlement per unit should prevail.

In my opinion the current legislation is unfair and has been poorly thought out, and that schemes such as Rhode Island differ markedly from high rise, or other schemes, where the Body Corporate has expenditure and responsibility, for more than the upkeep of the common property. On behalf of the 60 plus A Villa owners in our complex, I seek your urgent assistance in returning fairness and equity to the legislation, something that the current, Labor legislation takes no heed of.

Yours sincerely

Alan Watson.

**Office of the Commissioner for Body Corporate and
Community Management**

**SPECIALIST ADJUDICATION
(Adjustment of Lot Entitlements)**

Number: 0073-2005

Applicants: GILLION & OTHERS

Respondent: BODY CORPORATE FOR *RHODE ISLAND*
COMMUNITY TITLES SCHEME 20573

ORDER

Body Corporate and Community Management Act 1997
(Sections 48 and 280)

I ORDER that:

- (a) the contribution lot entitlement schedule for community titles scheme 20573 be adjusted so that the allocation of entitlements among the lots is equal, by allocating to each lot an entitlement of one with an aggregate of 173; and
- (b) the interest lot entitlement schedule for community titles scheme 20573 be adjusted so that the allocation of entitlements among the lots is as shown in the columns headed "Proposed Interest Ent'ment" on the attached schedule; and
- (c) the costs of the specialist adjudication be shared equally by the Applicants and the Respondent.

Dated: 21 June 2005



G F Bugden
Specialist Adjudicator


Schedule

Lot No.	Current Entitlement	Proposed Interest Ent' ment	Lot No.	Current Entitlement	Proposed Interest Ent' ment
30	53	59	116	43	40
31	44	45	117	43	40
32	44	45	118	52	53
33	44	45	119	55	57
34	44	45	120	46	44
35	44	45	121	46	44
36	44	45	122	46	44
37	44	45	123	46	44
38	44	45	124	46	44
39	53	59	125	46	44
40	53	59	126	55	57
41	44	45	127	53	57
42	44	45	128	45	44
43	44	45	129	45	44
44	44	45	130	45	44
45	44	45	131	45	44
46	44	45	132	53	57
47	44	45	133	53	57
48	44	45	134	45	44
49	53	59	135	45	44
50	53	57	136	45	44
51	44	45	137	45	44
52	44	45	138	53	57
53	44	45	140	39	39
54	44	45	141	49	53
55	53	57	142	52	53
56	49	53	143	43	40
57	40	40	144	43	40
58	40	40	145	43	40
59	40	40	146	43	40
60	40	40	147	52	53
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83	40	40	170	55	57
84	50	53	171	55	57
85	52	57	172	46	44
86	52	57	173	46	44
87	54	57	174	55	57
88	45	44	175	52	53

L. H. Bruden

89	45	44	176	42	40
90	45	44	177	42	40
91	45	44	178	52	53
92	54	57	179	51	53
93	55	57	180	43	40
94	46	44	181	43	40
95	46	44	182	43	40
96	46	44	183	43	40
97	46	44	184	43	40
98	46	44	185	43	40
99	46	44	186	51	53
100	55	57	187	51	53
101	55	57	188	43	40
102	46	44	189	43	40
103	46	44	190	43	40
104	46	44	191	43	40
105	46	44	192	51	53
106	55	57	193	50	53
107	52	53	194	41	40
108	43	40	195	41	40
109	43	40	196	41	40
110	43	40	197	41	40
111	43	40	198	41	40
112	52	53	199	41	40
113	52	53	200	41	40
114	43	40	201	41	40
115	43	40	202	50	53
				7971	7971

THIS and the preceding page are the Schedule attached to my Order dated 21 June 2005 in the matter of *Gillion & Ors v. Body corporate for Rhode Island community titles scheme 20573*.


G F Bugden
Specialist Adjudicator

Office of the Commissioner for Body Corporate and
Community Management

SPECIALIST ADJUDICATION
(Adjustment of Lot Entitlements)

Number: 0073-2005

Applicants: GILLION & OTHERS

Respondent: BODY CORPORATE FOR *RHODE ISLAND*
COMMUNITY TITLES SCHEME 20573


AMENDED ORDER

Body Corporate and Community Management Act 1997
(Sections 48 and 280)

I ORDER that:

- (a) the contribution lot entitlement schedule for community titles scheme 20573 be adjusted so that the allocation of entitlements among the lots is equal, by allocating to each lot an entitlement of one with an aggregate of 172; and
- (b) the interest lot entitlement schedule for community titles scheme 20573 be adjusted so that the allocation of entitlements among the lots is as shown in the columns headed "Proposed Interest Ent'ment" on the attached schedule; and
- (c) the costs of the specialist adjudication be shared equally by the Applicants and the Respondent.

Dated: 1 August 2005

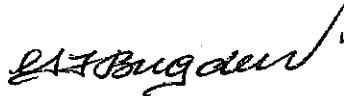

G F Bugden
Specialist Adjudicator

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38	44	45	124	46	44
39	53	59	125	46	44
40	53	59	126	55	57
41	44	45	127	53	57
42	44	45	128	45	44
43	44	45	129	45	44
44	44	45	130	45	44
45	44	45	131	45	44
46	44	45	132	53	57
47	44	45	133	53	57
48	44	45	134	45	44
49	53	59	135	45	44
50	53	57	136	45	44
51	44	45	137	45	44
52	44	45	138	53	57
53	44	45	140	39	39
54	44	45	141	49	53
55	53	57	142	52	53
56	49	53	143	43	40
57	40	40	144	43	40
58	40	40	145	43	40
59	40	40	146	43	40
60	40	40	147	52	53
61	49	52	148	52	53
62	49	53	149	43	40
63	40	40	150	43	40
64	40	40	151	43	40
65	49	53	152	43	40
66	50	52	153	52	53
67	42	40	154	52	53
68	42	40	155	43	40
69	42	40	156	43	40
70	42	40	157	42	40
71	42	40	158	43	40
72	42	40	159	43	40
73	50	53	160	52	53
74	50	53	161	52	53
75	41	40	162	42	40
76	41	40	163	52	53
77	50	53	164	49	53
78	50	53	165	55	57
79	41	40	166	46	44
80	41	40	167	46	44
81	50	53	168	46	44
82	50	53	169	46	44
83	40	40	170	55	57
84	50	53	171	55	57
85	52	57	172	46	44
86	52	57	173	46	44
87	54	57	174	55	57
88	45	44	175	52	53

89	45	44	176	42	40
90	45	44	177	42	40
91	45	44	178	52	53
92	54	57	179	51	53
93	55	57	180	43	40
94	46	44	181	43	40
95	46	44	182	43	40
96	46	44	183	43	40
97	46	44	184	43	40
98	46	44	185	43	40
99	46	44	186	51	53
100	55	57	187	51	53
101	55	57	188	43	40
102	46	44	189	43	40
103	46	44	190	43	40
104	46	44	191	43	40
105	46	44	192	51	53
106	55	57	193	50	53
107	52	53	194	41	40
108	43	40	195	41	40
109	43	40	196	41	40
110	43	40	197	41	40
111	43	40	198	41	40
112	52	53	199	41	40
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114	43	40	201	41	40
115	43	40	202	50	53
				7971	3936

THIS and the preceding page are the Schedule attached to my Amended Order dated 1 August 2005 in the matter of *Gillion & Ors v. Body corporate for Rhode Island community titles scheme 20573*.



G F Bugden
Specialist Adjudicator

Office of the Commissioner for Body Corporate and
Community Management

SPECIALIST ADJUDICATION
(Adjustment of Lot Entitlements)

Number: 0073-2005

Applicants: GILLION & OTHERS

Respondent: BODY CORPORATE FOR *RHODE ISLAND*
COMMUNITY TITLES SCHEME 20573

DETERMINATION

21 June 2005

Application

1. This is an application by a group of owners in community titles scheme 20573 ("**Scheme**") for adjustment of the contribution lot entitlement and the interest lot entitlement schedules for the scheme. The application is made under section 48 of the *Body Corporate and Community Management Act 1997* ("**Act**"). Before making the application the owners submitted a motion for consideration at an extraordinary general meeting of the body corporate seeking to amend the community management statement to achieve the adjustment of contribution schedule lot entitlements by consensus. That motion was defeated, thus making this application necessary, at least in relation to the contribution schedule.
2. The Applicants also seek an order "*that the Applicant and Respondent share the costs of the Specialist Adjudication as the Adjudicator deems just and equitable*".
3. The body corporate does not oppose the substantive relief sought by the application and has effectively submitted to the decision of the specialist adjudicator. However, it does oppose the making of any order that would impose a liability on it for costs. Its solicitor and the solicitor for the Applicants attended a meeting convened under section 271(1)(a) of the Act and both made formal submissions on the question of costs at that meeting.
4. No owner has elected to become a respondent to the application pursuant to section 48(2)(b) of the Act, although a number of owners made submissions to the Commissioner and some attended the meeting I have just referred to.

The Scheme

5. The Scheme has its genesis in Group Titles Plan No 2345 ("**Plan**") registered under the *Building Units and Group Titles Act 1980* ("**1980 Act**") on 28 May 1990. The initial 29 lots in the Plan were progressively subdivided over a number

of years by Group Title Plans of Re-subdivision pursuant to the 1980 Act. After those re-subdivisions there were 173 lots numbered from 30 to 202, each comprising a residential villa. That is still the position in relation to the Scheme.

6. When the Act commenced on 13 July 1997:
 - (a) the Plan became the Scheme;
 - (b) the body corporate constituted under the 1980 Act was continued as a body corporate under the Act, which body corporate is the Respondent to this application by virtue of section 48(2)(a) of the Act;
 - (c) the lot entitlements allocated to the lots on the Plan were carried over, without change, to each of 2 new lot entitlement schedules created by the Act for the newly transitioned Scheme, namely the Contribution Schedule and the Interest Schedule; and
 - (d) the Act was otherwise applied to the Scheme.
7. Before the Plan was registered under the 1980 Act the allocation of lot entitlements to the lots, as shown on the Plan, were supported by the certification of a registered valuer. That certification confirmed that the lot entitlement of each lot (as nearly as practicable) bore to the aggregate lot entitlement of all lots the same proportion as the unimproved value of that lot bore to the unimproved values of all the lots contained in the plan. (Refer to section 19(2) and (3) of the 1980 Act.)
8. The Scheme is situated on Santa Cruz Boulevard at Clear Island Waters on the Gold Coast. It is a gated community with a security or caretaking agreement in place. The 173 residential villas are in small clusters, the 2 end ones in each cluster having one common wall and the internal ones in each cluster having 2 common walls. The common areas, including those surrounding these clusters, are heavily landscaped and the complex has a pleasant parkland appearance.
9. The clusters of villas were built progressively, although in 2 discernable stages. There are 4 different types of villas which I will categorize as follows:
 - Type A – having 3 bedrooms and 3 additional levels, each with an extra room (the use varying from villa to villa)
 - Type B – having 3 bedrooms but no extra levels or rooms
 - Type AA – being smaller than Type A, but having 3 bedrooms and the additional levels, one of which is a bedroom and en-suite
 - Type BB – being smaller than Type B, but having 3 bedrooms and no extra levels and rooms.

The Type A and Type AA villas are the ones at the end of the various clusters and the Type B and Type BB villas are the internal ones in the clusters.

10. The Type A and Type B villas were built as part of the first stage of the project and the Type AA and Type BB villas were built as part of the second stage of the project. There is another difference between the villas in the 2 stages, namely the type of construction. The first stage villas were built in concrete and steel while the second stage villas were built in timber. As a consequence, the replacement cost of the first stage villas will be higher than the second stage villas.

11. All of the villas are located entirely within the boundaries of their respective lots. Therefore maintenance of the villas themselves is the responsibility of the lot owners and not the body corporate. There is nothing in the by-laws that affects this position, but I will deal in more detail with the by-laws shortly.
12. The common property substantially comprises:
 - The extensive gardens and grounds, including significant water features
 - Internal road network
 - 2 tennis courts
 - 25 meter lap pool
 - Clubhouse (with a range of facilities, including gym and kitchen)
 - Perimeter fencing, security gates and guardhouse.
13. A number of submissions on the Commissioner's file point to very minor servicing issues as between some of the villas (e.g. the maintenance of small garden areas technically within lots), but none of them struck me as substantially impacting on body corporate operating costs. In any event, they appear to be informal arrangements that may or may not continue in the future, being arrangements that would not be appropriate for me to take into account.
14. The question of insurance also arose during the course of my consideration of the application. The differential cost of insuring the first and second stage villas because of their types of construction was mentioned in particular. However, I note that the Scheme is based on a standard format plan of subdivision and the equitable distribution of the cost of insurance should be dealt with under section 130(1)(b) and (2) of the Act and is not related to either the contribution or interest schedules.

Contribution schedule lot entitlements - Evidence

15. The Applicants have provided a report from Body Corporate Services dated July 2004 in support of an adjustment of the contribution schedule lot entitlements. The author of that report, Mr Craig Brennan, undertook a comprehensive examination of the expenses of the body corporate and divided those expenses into 2 categories – occupancy related expenses and non-occupancy related expenses. The occupancy related expenses accounted for 6.29% of the total and the non-occupancy related expenses accounted for the remaining 93.71%.
16. Mr Brannon then adopted the following methodology to arrive at an allocation of lot entitlements among the various lots in the Scheme:
 - (a) an occupancy factor was allocated to each lot (being either 4 or 5 persons depending upon potential accommodation);
 - (b) occupancy related costs were apportioned in dollar amounts among the lots in proportion to that occupancy factor;
 - (c) non-occupancy related costs were apportioned in dollar amounts among the lots equally;
 - (d) the 2 apportionments were totaled and the dollar amounts were converted to a percentage of the total dollar amounts; and

- (e) the resulting percentage amounts were rounded and converted into the proposed new contribution lot entitlement allocations.
17. The allocations were either 46 or 47, depending upon whether a lot had an occupancy factor of 4 or 5. The aggregate contribution schedule lot entitlement is 7,971, which equates to a maximum difference of 1/7,971 between a lot with an occupancy factor of 4 and a lot with an occupancy factor of 5.
18. It is also worth noting that Mr Brannon confirmed during my interview with him that:
- The expense items chosen as occupancy related were chosen based on usage, but the proportion of the expenses allocated as occupancy related were estimates only.
 - If he ignored potential occupancy when undertaking his analysis, then his recommendation would be that the interest schedule lot entitlements should be allocated equally among the lots.
19. I should also mention that Mr Brannon incorporated occupancy related expenses into his calculations because of an understanding on his part that the decision of the Court of Appeal in *Fischer & Ors v. Body corporate for Centrepont community titles scheme 7779* [2004] QCA 214 adopted the view that potential occupancy was a factor that should be taken into account.
20. Finally, an examination of the by-laws applying to the Scheme reveals that:
- (a) By-law 11 reinforces the obligation of lot owners to maintain their own villas and gives the body corporate the right in the event of default to undertake that maintenance at the owner's expense;
 - (b) By-law 17 purports to allow the body corporate to make certain binding determinations in relation to the painting of villas, but does not depart from the principle that the owner must bear the cost of the painting; and
 - (c) By-law 18 purports to allow similar determinations in relation to pest treatments, but again it does not depart from the principle that the costs must be paid by the lot owner.

Interest schedule lot entitlements – Evidence

21. The Applicants have provided a written valuation by H.J. & D.L. Jewell dated 5 June 2004. The valuer, Mr Jim Jewell, makes the point in his valuation that "*For "A" and "B" type units the contribution entitlements, which are mainly community usage or service factors, would have less variation than the interest entitlements which are mainly structure and site value factors*".
22. Mr Jewell estimated the fair unimproved valuations for each lot and allocated an interest schedule lot entitlement to the respective lots based on those valuations. The allocations differed slightly to those allocated by the valuer at the time of registration of the Plan. During my interview with him Mr Jewell explained the difference as arising because he had the benefit of seeing the built form and various aspects enjoyed by the lots whereas the valuer who provided the earlier certificate did not have the benefit of those factors and would have had to imagine the final outcome of the project.

23. During that interview I allowed those lot owners present at the meeting at which the interview took place to ask, through me, questions of Mr Jewell. The following issues were canvassed and, in my view, satisfactorily explained by Mr Jewell:

- The comparative value of waterfront lots and golf course frontage lots.
- The comparative value of enclosed water frontages and open water frontages.
- The comparative value of water frontages above and below the weir in the adjoining creek (which mainly centered around any rights to construct a jetty or pontoon).
- A pending application for redevelopment of the golf course.

24. On balance, I am therefore satisfied that the valuation is appropriate and reliable. It recommends the following allocation of interest schedule lot entitlements, which for convenience, I have reproduced adjacent to the current allocations:

Lot No.	Current Entitlement	Proposed Interest Ent'ment	Lot No.	Current Entitlement	Proposed Interest Ent'ment
30	53	59	116	43	40
31	44	45	117	43	40
32	44	45	118	52	53
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51	44	45	137	45	44
52	44	45	138	53	57
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54	44	45	141	49	53
55	53	57	142	52	53
56	49	53	143	43	40
57	40	40	144	43	40
58	40	40	145	43	40
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102	46	44	189	43	40
103	46	44	190	43	40
104	46	44	191	43	40
105	46	44	192	51	53
106	55	57	193	50	53
107	52	53	194	41	40
108	43	40	195	41	40
109	43	40	196	41	40
110	43	40	197	41	40
111	43	40	198	41	40
112	52	53	199	41	40
113	52	53	200	41	40
114	43	40	201	41	40
115	43	40	202	50	53
				7971	7971

Relevant law

25. Section 48(4)(a) of the Act provides:

“The order of the court or specialist adjudicator must be consistent with –

- (a) *if the order is about the contribution schedule – the principle stated in sub-section (5); or*
- (b) *if the order is about the interest schedule – the principle stated in subsection (6).”*

26. Section 48 (5) and (6) of the Act then provide:

- (5) *For the contribution schedule, the respective lot entitlements should be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal.*
- (6) *For the interest schedule, the respective lot entitlements should reflect the respective market values of the lots included in the scheme when the court or specialist adjudicator makes the order, except to the extent to which it is just and equitable in the*

circumstances for the individual lot entitlements to reflect other than the respective market values of the lots.”

27. Section 48(8) of the Act applies to lots created under a standard format plan of subdivision. That subsection applies to the lots in the Scheme because the Plan that relates to the Scheme was a group titles plan and section 331(3) of the 1980 Act provides, inter alia, that a former group titles plan is taken to be a standard format plan of subdivision. Section 48(8) provides:

“For establishing the market value of a lot created under a standard format plan of subdivision, buildings and improvements on the lot are to be disregarded.”

28. Section 49 of the Act then sets out the criteria for deciding just and equitable. It provides:

“(1) 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.

(2) This section sets out matters to which the court or specialist adjudicator may, and may not, have regard for deciding—

(a) for a contribution schedule—if it is just and equitable in the circumstances for the respective lot entitlements not to be equal; and

(b) for an interest schedule—if it is just and equitable in the circumstances for the individual lot entitlements to reflect other than the respective market values of the lots.

(3) However, the matters the court or specialist adjudicator may have regard to for deciding a matter mentioned in subsection (2) are not limited to the matters stated in this section.

(4) The court or specialist adjudicator may have regard to—

(a) how the community titles scheme is structured; and

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

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

(5) The court or specialist adjudicator may not have regard to any knowledge or understanding the applicant had, or any lack of knowledge or misunderstanding on the part of the applicant, at the relevant time, about—

(a) the lot entitlement for the subject lot or other lots included in the community titles scheme; or

(b) the purpose for which a lot entitlement is used.

(6) *In this section—*

“relevant time” means the time the applicant entered into a contract to buy the subject lot.

“subject lot” means the lot owned by the applicant.”

20. There are other provisions of the Act that are not directly relevant to this application, but which serves as a guide to what is just and equitable in the circumstances. Sub-section 46(7) and (8) are such provisions. They say:

“(7) For the contribution schedule for a scheme for which development approval is given after the commencement of this subsection, the respective lot entitlements must be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal.

Examples for subsection (7) of circumstances in which it may be just and equitable for lot entitlements not to be equal—

1. A layered arrangement of community titles schemes, the lots of which have different uses (including, for example, car parking, commercial, hotel and residential uses) and different requirements for public access, maintenance or insurance.

2. A commercial community titles scheme in which the owner of 1 lot uses a larger volume of water or conducts a more dangerous or a higher risk industry than the owners of the other lots.

(8) In deciding the contribution schedule lot entitlements and interest schedule lot entitlements for a scheme mentioned in subsection (7), regard must be had to—

(a) how the scheme is structured; and

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

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

29. Those sub-sections were inserted by the *Body Corporate and Community Management and Other Legislation Amendment Act 2003* (“**Amending Act**”) which commenced on 4 March 2003, so they had no application to the Scheme. However, they do give further indication of what might be “*just and equitable in the circumstances*” for interest schedule lot entitlements not to be equal. One effect of these provisions is to make it clear that the legislature had a strong bias in favour of equality of contribution schedule lot entitlements unless justice and equity demanded otherwise.

30. As regards section 46(8) of the Act:

(a) there is nothing special about the way the Scheme is structured that would be relevant to this application;

(b) all of the lots in the Scheme are used for the same purpose, namely for a residential purpose; and

- (c) there are differences in the “*nature, features and characteristics*” of the lots in the Scheme and it needs to be determined whether these differences warrant special consideration in relation to the adjustment of either the contribution schedule or interest schedule lot entitlements.

31. A change to the contribution schedule lot entitlements will affect the voting rights of the respective lot owners (vide section 47(2)(b) of the Act) but, given the size of this Scheme, I do not regard that as a significant factor.

Contribution schedule

32. As regards the “*nature, features and characteristics*” test referred to above, in the past the District Court and specialist adjudicators have had regard to a wide range of matters when determining applications in relation to contribution schedule lot entitlements. However, the decision of the Court of Appeal in the *Centrepont case* has substantially restricted the range of matters that can be taken into account. In that case Chesterman J (with whom McPherson JA and Atkinson J agreed) said [at paras. 25 and 26]:

“The submission for the applicants is that this Part of the Act is concerned with the just and equitable distribution of body corporate expenses among apartment owners and that in making an adjustment of a lot entitlement schedule the court must pay regard only to the origin and allocation of body corporate expenditure.

Although the Act gives no clear indication one way or the other, the preferable view is that a contribution schedule should provide for equal contributions by apartment owners, except insofar as some apartments can be shown to give rise to particular costs to the body corporate which other apartments do not. That question, whether a schedule should be adjusted, is to be answered with regard to the demand made on the services and amenities provided by a body corporate to the respective apartments, or their contribution to the costs incurred by the body corporate. More general considerations of amenity, value or history are to be disregarded. What is at issue is the ‘equitable’ distribution of the costs.”

33. That is not to say that other factors are irrelevant, but rather, in the absence of other factors, the proper test is the demand the respective lots make on the services and amenities provided by the body corporate.
34. In virtually every case there will be an argument that one or more lots draw on the body corporate funds to a greater extent than other lots. The question is whether the extent to which that occurs is material enough to make it just and equitable to depart from the principal of equality. This question must be decided on a case-by-case basis.
35. In the case of this Scheme the question arises in relation to the potential occupancy component taken into account by Mr Brannon in his report. First, there is the question whether potential occupancy should be taken into account at all. If it should, then the second question is whether a difference of 1/7,971 over a total current day budget of a little over \$600,000 is material enough to be taken into account. The difference is around \$75 per annum on current figures.

36. On the first question I think the *Centrepoint case* supports the proposition that a potential occupancy difference of 1 person out of 5 should not be taken into account. I think I am also supported in this conclusion by the explanatory notes to the Amending Act (which tightened up this requirement for equality of contribution schedule lot entitlements). In dealing with amendments to the current section 46 (i.e. the old section 44 before the sections were re-numbered) the notes say:

“Clause 10 amends section 44 to change the requirements for the number that is allocated for the contribution schedule lot entitlement.

The change is intended to reinforce the concept that usually all lot owners are equally responsible for the cost of upkeep of common property and for the running costs of the community titles scheme. However, it is recognised that there are many valid instances where the contribution schedules do not have to be equal. The amendment provides that usually the numbers in this schedule are equal, unless it can be demonstrated that it is just and equitable for there to be inequality.

The need for difference is best shown by examples.

Example 1 Where a basic community titles scheme contains lots having different uses, for example a combination of residential and business lots (restaurants, small shops and the like) the contribution schedule can be different to reflect the higher maintenance and utilities use of the shops in comparison to lower requirements for the residential lots.

Example 2 In a layered scheme there may be a difference in the contribution schedule of each basic scheme in the layered arrangement depending on the nature of each of the basic schemes. If the layered scheme was a building that comprised a number of basic schemes including a car park, shopping centre, hotel and residential schemes, the contribution schedule would be different between, for example, the car park and the shopping centre to reflect the different service needs, the different levels of consumption of utilities and the different maintenance and refurbishment costs. A similar difference would exist between the hotel and the residential schemes.

Example 3 In a basic scheme, if all the lots are residential lots ranging in size from a small lot to a penthouse, the contribution schedule lot entitlements generally would be equal. However, the contribution schedule may be different if the penthouse has its own swimming pool and private lift. The contribution schedule should recognise this type of difference. The other lots in the scheme despite being of differing size or aspect would be expected to have equal contribution schedule lot entitlements.

The clause also includes basic principles to be applied by the developer when first determining the lot entitlements for the community titles scheme.

For example it is not uncommon for a developer to assign a high contribution schedule lot entitlement to a small lot in comparison to that for a larger lot in the scheme. The contribution should not be based on lot size or value. The developer must consider all the factors included in section 44.”

37. Example 3 is particularly relevant. It suggests:

- In the absence of significant difference (e.g. a private swimming pool **and** private lift) the entitlement for a penthouse would generally be the same as the entitlements for the other residential units in the building. In other words, size of the unit in itself is not the deciding factor. (This is confirmed by the two last sentences in the above quotation.)
- Even if the entitlement for the penthouse is different, the entitlements for the other lots would be expected to be equal, notwithstanding they are of different size and value.

38. All of this leads to a strong argument that, in the case of the Scheme, the contribution schedule lot entitlements should be equal.

Interest schedule

39. As regards the interest schedule and section 46(8) of the Act, there are differences in the “*nature, features and characteristics*” of the lots in the Scheme and those differences can have an effect on the respective unimproved values of the lots in the Scheme. The evidence of the valuer is that he took such things into account when he arrived at his valuation. It follows that I can rely on his valuation in this regard.

Findings

40. I find in relation to the Scheme that:

- (a) the contribution schedule lot entitlements are not equal;
- (b) the contribution schedule lot entitlements should be equal because it is not just and equitable for them not to be equal;
- (c) the respective interest schedule lot entitlements do not reflect the respective unimproved land market values of the lots in the Scheme as at today’s date; and
- (d) it is not just and equitable in the circumstances applying to this Scheme that the allocation of interest schedule lot entitlements to lots should reflect other than those values.

41. I therefore propose to make an order:

- (a) adjusting the contribution schedule lot entitlements in the Scheme so that they are equal; and
- (b) adjusting the interest schedule lot entitlements to conform with the recommendations of the valuer in his valuation.

Costs of the adjudication

42. That brings me to the question of costs of the adjudication. As I said before, the Applicants seek an order for the costs of the adjudication to be shared between the Applicants and the body corporate in the proportions I determine as being just and equitable and the body corporate opposes such an order.
43. The Applicants, at the time of submitting motions to an extraordinary general meeting of the body corporate proposing a change to the lot entitlements foreshadowed this application for costs in the event that the motions were defeated. The motions were defeated at the meeting.
44. Sections 48 and 280 of the Act are relevant to this question. Section 48(1) and (2)(c) provide:
- “48(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.*
- (2) *Despite any other law or statutory instrument –*
- (a)
- (b)
- (c) *each party to the application is responsible for the party’s own costs of the application.”*
45. Section 280 provides:
- “280(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.”*
46. Mr Webber for the body corporate submitted that the legislature has given a clear intention that each party should bear their own costs and in this regard pointed to the words “*despite any other law or statutory instrument*” in section 48(2) of the Act. He submitted that the effect of section 280(2) is to identify the specialist adjudicator’s costs as being part of the applicant’s costs of the application for the purpose of section 48(2) and an order varying the impost of costs should only be made in extraordinary or special circumstances. The advance notice by the Applicants that an order for costs would be sought would not, in his submission, be sufficient extraordinary or special circumstances.
47. Mr Glenister for the Applicants submitted that the Act draws a distinction between the “*costs of the application*” (being the costs referred to in section 48(2)) and the “*costs of the adjudication*” (being the costs referred to in section 280(2)). He conceded that the Applicants cannot seek an order in relation to the costs of making the application but maintained that they are clearly able to seek an order in relation to the costs of the adjudication. He submitted that the Applicants put the body corporate and all lot owners on notice that a costs order would be sought if the lot entitlements were not voluntarily adjusted and that

those circumstances were enough to entitle the Applicants to an order. He also submitted that a substantial number of other lot owners, apart from the Applicants, will benefit from an order and the body corporate will itself benefit by having a fairer allocation of lot entitlements.

48. It seems clear to me that section 48(2) and section 280(2) are referring to 2 different types of costs. Section 48(2) is referring to the costs of making the application, which would include legal costs and costs associated with evidence, such as expert reports and valuations. Section 280(2) is referring to the adjudicator's costs. This is consistent with the decision of McGill DCJ in *Woodrange Pty Ltd v. Le Grande Broadwater body corporate* [2004] QDC 215 where His Honor said at [42]:

“Overall, although the considerations are not all one way, my conclusion is that, when s 280 is seen in the context of the legislation as a whole, and in particular of chapter 6 as a whole, and importantly in the light of the legislative history, the reference to “a cost of the adjudication” is properly seen as a reference to the amount payable to the specialist adjudicator, and does not include legal expenses incurred by either party in connection with the adjudication.”

49. The emphasis in section 48(2) *“despite any other law or statutory instrument”* is, in my view, intended to exclude the power of the District Court to make costs orders under its general jurisdiction to order costs rather than to reinforce the provisions of section 280(2). The 2 types of costs are separately dealt with by the Act and I accept that it is open to me to make an order relating to my costs as the specialist adjudicator.
50. The next question is what circumstances should exist before an order under section 280(2) of the Act is made. Should they be *“extraordinary or special”* as submitted by Mr Webber, or something less significant. Unfortunately, there does not appear to be any authority to assist me in this regard.
51. I know from other applications of this type that I have dealt with that it is common for applicants to first propose a motion to a meeting of their body corporate seeking voluntary adjustment of lot entitlements. This is a practice that can remove the need for an application to be made and as such should be encouraged. One way to encourage bodies corporate to seriously consider meritorious proposals for adjustment of lot entitlements is to impose a risk of liability for costs.
52. Therefore, as a matter of public interest, if an applicant seeks an order under section 280(2) the Court and specialist adjudicators should be prepared to make such an order if the body corporate is given advance notice of the intended application and despite that notice rejects a proposal for adjustment of lot entitlements that, on its face, is a reasonable proposal supported by credible evidence. There may even be other circumstances in which an order should be made under section 280(2). However, the mere fact that the body corporate and other lot owners will benefit from an order adjusting the lot entitlements would not, of itself, be sufficient to justify the making of a costs order.
53. In this case the Applicants did attempt to have the body corporate act to adjust the contribution schedule lot entitlements and it declined to do so. The motion proposing the adjustment was supported by credible evidence and, if I may say so,

it was reasonably clear on the basis of the current law that an adjustment was required. Furthermore, the body corporate was warned that rejection of the proposal would result in the current application for costs. In these circumstances the Applicants are at least entitled to a contribution by the body corporate towards the costs of the adjudication.

54. I therefore propose to make an order under section 280(2) that the Applicants and the body corporate share the costs of the adjudication equally.



G F Bugden
Specialist Adjudicator