Body Corporate & Community Management & Other Legislation Amendment Bill 2012 Submission 187

From: Alex Blair
To: Legal Affairs and Community Safety Committee
Subject: FW: Submission to Body Corporate Review Committee
Date: Thursday, 18 October 2012 11:26:52 AM
Attachments: Body Corp submission March 2004.pdf
Specialist Adjudication 2004.pdf

The Chairperson,
The Legal and Community Safety Committee,
Parliament House,
Brisbane.

Dear Sir or Madam,

I wish to make a submission, on behalf of the Body Corporate Committee of 181 The Esplanade CTS 518, to the Review of Body Corporate Entitlements as follows:

As the owner of a unit in a complex which last year had its Contribution Lot Entitlements reverted to those that applied from !990 to 2004, I wish to protest the hasty decision to nullify this change. Those original Entitlements were set by the developers and for those 14-years units were bought and sold without any problems. They were set to reflect the relative size, market value and position of each unit. Sometime during this period the legislation covering these Entitlements was amended and based on a legalistic edict that they be “equal unless they could be shown to be not equal.” On this basis our two penthouse owners, in 2004, successfully applied to have this change made and I refer you to the attachment for the adverse cost effects this had on the lower levels of our building. Both penthouse and many other current owners bought on the basis of the original legislation.

Apparently the justification for this legalistic definition is that all units should contribute equally to the costs of running a building, since all owners have more or less equal use of its facilities such as pools, gardens, car parking and so on. However if this argument was made concerning Council rates, since all ratepayers have the same access to roads, parks, pools and other facilities, I suggest that it would be laughed out of court.

Now you would be well aware of the problems caused by this issue, one that’s caused a lot of friction amongst unit owners in the past and will now be re-ignited by the action of cancelling the Reversion process. With respect I suggest that a more appropriate approach would have considered all sides of the story and attempt to work out a compromise solution. As I pointed out in the March 2004 attachment small increases in the lower level entitlements could result in significant reductions in the higher ones. Instead, the government could hardly wait to table retrospective legislation that adversely affects the majority of high-rise owners.

However I now draw the Committee’s attention to the attached Order, given by the Specialist Adjudicator on 29th June 2004, that made the changes.

Paragraphs 17-28 illustrate that when long-winded legal interpretations are applied to such issues commonsense seems to be in short supply.

Paragraphs 29-36 effectively dismiss all the factors that most people would consider to be relevant. In particular Para. 30, whilst it may have then been correct with regard to the roof areas it is certainly not so now, at least for one of the penthouses. Currently it now houses an office, an adjacent spa pool, timber deck and planting. The surfaces of of both penthouse roof areas are fully tiled and eminently useable. I further wish to point out that penthouses are the only two apartments on the 9th (and 10th) floor, while there are four on other floors. Hence, in a real manner they are using a greater portion of the common services.

Should this further, almost punitive, retrospective change be implemented the majority of owners will once again be paying virtually the same contributions as the two owners of the large two-level penthouses.

I therefore urge the Review Committee to give consideration to implementing legislation, which allows all owners in buildings so affected, to adopt more rational distributions of Contribution Entitlements. It is clear that the “one size fits all” approach will never be satisfactory for all circumstances. Some flexibility is needed to give individual buildings the opportunity for owners to discuss their individual circumstances and decide on satisfactory distributions, with these implemented by a majority vote. A period of say, 90-days to allow this to be done then,

if no consensus is achieved, the matter would proceed to arbitration.

Yours sincerely,

Alex Blair,

Secretary,
The Body Corporate for 181 The Esplanade CTS 518,
Cairns.

[redacted]

29th March 2004.

Mr. T Williams,
Office of the Commissioner for Body Corporate and Community Management,
GPO Box 1049
Brisbane 4001,

Dear Mr. Williams,

I hereby submit my objection to the changes proposed to the "181 The Esplanade" Community Titles Scheme, as set out in your letter of 12th March, as follows:

1. The current Titles Scheme has, presumably, been in operation since the building was first occupied some 15 years ago. All past and current owners, including the applicants, were fully aware of their allotments at the time of purchase and until now, have been satisfied with them. As a recent purchaser I carefully calculated the outgoings, as indeed I expect all other owners (including the applicants) did, before making the decision to buy.

2. I was not made aware of the fact that the lot entitlements for this building could be subject to change, in any of the searches or other information supplied to me.

3.The 2 penthouse units and associated exclusive rooftop spaces owned by the applicants have far greater areas and amenities than any other units. A study of the plans and elevations of the building would show that they have larger external wall surfaces, windows, balustrades and internal areas served by the common air conditioning plant.

4. The proposed changes to the lot entitlements would be grossly unfair to the large majority of other owners as the following list of approximate percentage changes show:

2	lot entitlements currently	20	+35%
7	" "	21	+29
4	" "	22	+23
4	" "	23	+17
4	" "	24	+13
4	" "	25	+8
2	" "	26	+4
2	" "	27	0
4	" "	28	-4
2	" "	29	-7
2	" "	80	-65

5. Should the applicants succeed completely in this matter their units would increase in value at the expense of the majority, which would decrease in value and/or be more difficult to sell. Hardly a just and equitable situation, in my opinion.

I submit, on the basis of the above, that the proposal is far from being just and equitable and thus I am strongly opposed to it being implemented at all. However, if the consensus is that some change is desirable, then I propose that a fairer way would be to decrease the applicants' allocations to say 40 each. All others would then be increased by about 10%.

This would result in allocations in the range of approximately 22-32 for the smaller units and 40 each for the two penthouses.

This way the majority of owners would not be subjected to the substantial increases contained in the proposal, whilst the applicants' allocations would also, I believe, still fairly reflect their situation in the building.

Yours sincerely,

Alex Blair.

[redacted]

1st September 2004.

BCCM Discussion Paper,
Policy Coordination Unit,
Department of Tourism, Fair Trading and Wine Industry Development.

I hereby submit my contribution to the above Discussion Paper, using the appropriate discussion point numbers, as follows:

1. I consider the current specialist adjudication arrangement to be unsatisfactory. In the case of the "181 The Esplanade community titles scheme 518", at the above address, an adjudicator was appointed by applicants wanting to change the lot entitlements to substantially benefit themselves. The cost of this person was quoted at $230/hour or $1500/day max. plus GST.

Office of the Commissioner for Body Corporate and Community Management

SPECIALIST ADJUDICATION
(Adjustment of Lot Entitlements)

Number: 0118/2004

Applicants: JONATHAN NOONAN and EVAN MORRISON

Respondent: BODY CORPORATE FOR *181 THE ESPLANADE* COMMUNITY TITLES SCHEME 518

DETERMINATION
29 June 2004

Application

1. This is a joint application under section 48 of the *Body Corporate and Community Management Act 1997* ("**Act**") by the Applicants, who are the owners of the 2 penthouses in a community titles scheme at Cairns, for adjustment of the contribution schedule lot entitlements. The Respondent is the "Body corporate for *181 The Esplanade* community titles scheme 518" ("**Body Corporate**") by virtue of section 48(2)(a) of the Act. An owner may elect under section 48(2)(b) of the Act to be joined as a respondent, but in this matter no such election has been made.

Historical background

2. The scheme has its genesis in building units plan No 71115 registered under the *Building Units and Group Titles Act 1980*. There are 37 lots on that plan and substantial areas of common property both within and outside the building. When the substantive provisions of the Act commenced on 13 July 1997 the building units plan became a community titles scheme and was allocated No 518 by the Registrar of Titles. The lots in the building units plan became lots in the community titles scheme and the schedule of lot entitlements in the building units plan was replaced by 2 schedules of lots entitlements:

   - Interest Schedule Lot Entitlements; and
   - Contribution Schedule Lot Entitlements.

3. The original allocation of lot entitlements on the building units plan was as follows -

Lot No	Entitlement	Lot No	Entitlement	Lot No	Entitlement
1	21	14	23	27	25
2	21	15	22	28	27
3	21	16	23	29	28
4	20	17	24	30	28
5	21	18	24	31	27
6	21	19	23	32	28
7	20	20	24	33	29
8	21	21	25	34	29
9	22	22	25	35	28
10	22	23	24	36	81
11	21	24	25	37	80
12	22	25	26		
13	23	26	26		

This allocation was replicated in both of the new schedules of lot entitlements with the result that the allocation in both schedules was the same as the above allocations.

4. The *Body Corporate and Community Management (Standard Module) Regulation 1997* (**"Standard Module"**) was applied to the scheme and the Standard Module still applies.

The scheme

5. Each lot in the scheme is represented by a residential apartment. Lots 1 to 35 each comprise 2 bedroom apartments while lots 36 and 37 (the penthouses) each comprise 3 bedroom apartments. The building has 12 levels and the common property includes a swimming pool, barbecue area and landscaped gardens.

6. An examination of the building units plan shows that the areas of the lots differ. They are as follows:

Lot 1 =119 m^2
Lot 2 =137 m^2
Lot 3 =133 m^2
Lots 4,7,8,11,12,15,16,19,20,23,24,27,28,31,32,35 =117 m^2
Lots 5,6,9,10,13,14,17,18,21,22,25,26,29,30,33,34 =123 m^2
Lot 36 = 401 m^2
Lot 37 = 393 m^2

7. It seems clear that the areas of the lots and the level of the building on which they are situated influenced the original allocation of lot entitlements. It follows that the original allocation of lot entitlements probably bears some relationship to the respective values of the lots, although it should be noted that while the penthouse areas are very large, the portion of the penthouses situated on the roof are outdoor areas and are not habitable.

8. There is also a substantial area of common property on the roof of the building, but this houses plant and equipment and is not generally accessible to any lot owners.

9. An examination of the last set of annual accounts of the body corporate reveals the type of services provided to lot owners through the body corporate, as well as the type of regular common property maintenance that is undertaken by the body corporate. I do not have the benefit of a sinking fund reserves study or specialist reports about how the various expense items relate to the respective lots.

10. With the possible exception of the elevator and air conditioning services, all lots appear to have equal use of the "services" provided by the body corporate and funded through the maintenance contribution process, such as electricity, excess water, pest control, security, fire protection, etc.. The position regarding the elevator service is the same as it is in all high rise buildings, namely, the lots on the higher floors arguably have greater need for and use of the elevator service. The air conditioning is dependant on a roof-top cooling tower that supplies chilled water to the lots. The larger the lot the more chilled water that is likely to be used. The habitable areas of the penthouse lots are twice the size of the habitable areas of most of the other lots.

11. As regards upkeep and maintenance of the building and common property generally, with the possible exception of the 2 penthouses, all units appear to benefit roughly the same from maintenance work such as external painting, window cleaning, roof maintenance, balcony railing maintenance, landscape maintenance, etc., as well as other expenses, such as electricity, excess water, fire protection. The 2 penthouses are slightly different in that they have more balcony and external wall areas, as well as more windows. However –

    (a) cleaning of the glass between the habitable areas and the balconies is the responsibility of the penthouse owners because that glass is part of the lot; and
    (b) cleaning and replacement of the glass in windows is the responsibility of individual lot owners because of by-law 29 of the scheme's by-laws.

12. Building insurances are a significant cost to the body corporate, but they are not directly relevant to this application because the Act (section 130 of the Standard Module):

    (a) requires a body corporate to use the interest schedule lot entitlements to distribute reinstatement insurance costs on lot owners; and
    (b) allows the body corporate to adjust the respective contributions of lot owners based on the standard of internal fit-out and/or the impact of lot use on insurance risk.

13. Similarly, the costs of utility services need not be taken into account if they are capable of separate measurement, because they are charged directly to lot owners based on usage (see section 47(4) of the Act). In the case of this scheme, there is no evidence before me that utility services are charged through the body corporate contribution levy process.

14. An examination of the by-laws reveals that:

    (a) lot 1 is designated as the on-site manager's lot with the potential for it to be used for a real estate letting business; and
    (b) all 47 car spaces in the building have been allocated to lot owners by means of grants of exclusive use and enjoyment of common property.

9. An examination of the last set of annual accounts of the body corporate reveals the type of services provided to lot owners through the body corporate, as well as the type of regular common property maintenance that is undertaken by the body corporate. I do not have the benefit of a sinking fund reserves study or specialist reports about how the various expense items relate to the respective lots.

10. With the possible exception of the elevator and air conditioning services, all lots appear to have equal use of the "services" provided by the body corporate and funded through the maintenance contribution process, such as electricity, excess water, pest control, security, fire protection, etc.. The position regarding the elevator service is the same as it is in all high rise buildings, namely, the lots on the higher floors arguably have greater need for and use of the elevator service. The air conditioning is dependant on a roof-top cooling tower that supplies chilled water to the lots. The larger the lot the more chilled water that is likely to be used. The habitable areas of the penthouse lots are twice the size of the habitable areas of most of the other lots.

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(a) cleaning of the glass between the habitable areas and the balconies is the responsibility of the penthouse owners because that glass is part of the lot; and
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13. Similarly, the costs of utility services need not be taken into account if they are capable of separate measurement, because they are charged directly to lot owners based on usage (see section 47(4) of the Act). In the case of this scheme, there is no evidence before me that utility services are charged through the body corporate contribution levy process.

14. An examination of the by-laws reveals that:

(a) lot 1 is designated as the on-site manager's lot with the potential for it to be used for a real estate letting business; and
(b) all 47 car spaces in the building have been allocated to lot owners by means of grants of exclusive use and enjoyment of common property.

15. In relation to the exclusive use of car spaces, the exclusive use by-law makes no provision about responsibility for maintenance of the relevant areas of common property. Therefore, under section 123(2) of the Standard Module, the lot owners who have the rights of exclusive use of the car spaces have responsibility for their maintenance. In this application there is therefore no need for me to take those costs into account.

16. An examination of sinking fund expenditure for the period ending 29 February 2004 shows 19 heads of expenditure. To me they all appear to be common in nature and none of them appear to relate more or less to individual lots in any substantial sense, with the possible exception of the penthouses. It could be argued that the penthouses contribute a little more to air conditioning replacement costs and external finish renewals.

Relevant law

17. As I said, this is an application under section 48 of the Act for the adjustment of the contribution schedule lot entitlements that apply to the scheme. A number of sections in the Act are relevant to the application. Section 46(7) and (8) provide:

> "*(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.*"

18. Section 46(7) and (8) make it clear that upon registration of a plan the presumption is in favour of equal contribution schedule lot entitlements. This is in contrast to the position that existed before the commencement of the *Body Corporate and Community Management and Other Legislation Amendment Act 2003* ("**2003 Act**") on 4 March 2003. Section 45(4) of the Act (as it then was) said it "*is not a requirement for a community management statement for a community titles scheme that the contribution schedule lot entitlements be equal for each lot included in the scheme, ...*".

19. Section 47(2) then provides:

"*(2)* *The contribution schedule lot entitlement for a lot is the basis for calculating—*

(a) *the lot owner's share of amounts levied by the body corporate, unless the extent of the lot owner's obligation to contribute to a levy for a particular purpose is specifically otherwise provided for in this Act; and*

(b) *the value of the lot owner's vote for voting on an ordinary resolution if a poll is conducted for voting on the resolution.*"

20. Section 48(4) and (5) provide:

"*(4)* *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 subsection (5); or*

(b) .....

(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.*"

21. Section 49 sets out the criteria that must be taken into account by the court or a specialist adjudicator for deciding what is just and equitable. The following sub-sections of section 49 are particularly relevant:

"*(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) .....

(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."*

22. In *Burnitt Investments Pty Ltd v. Body Corporate for St Andrews Community Titles Scheme 20508* [2002] QDC 6 Brabazon QC DCJ said at [17] citing *Re Kurilpa Protestant Hall Pty Ltd* (1946) SR Qd 170 of 183:

"The words "just and equitable" are words of the widest significance and do not limit the jurisdiction of the court. It is a question of fact. Each case must depend upon its own circumstances."

23. Since that decision, the 2003 Act inserted section 49 (quoted above) into the Act. While the matter is still a question of fact to be decided having regard to the circumstances of each case, the court or a specialist adjudicator must now have regard to the criteria set out in section 49.

24. In *Fisher v. Body Corporate for Centre Point Community Titles Scheme 7799* [2004] QCA 214 the Court of Appeal held that the relevant factor to consider is the demand made by the respective lots on the services and amenities provided by the body corporate. Chesterman J (with whom McPherson JA and Atkinson J agreed) said [at 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."

25. In that case the Court of Appeal had the benefit of two comprehensive analyses of body corporate expenditure undertaken by industry experts. It is particularly relevant to this application that both experts allocated elevator costs equally among the various lots irrespective of their location within the building and the Court appeared to accept that approach.

26. What the Court did not determine in that case is the point at which justice and equity demands a departure from the strong policy of equality that is reflected in the Act. A case for departure can probably be made out for even the simplest scheme. Take for example a three storey walk-up building containing 6 apartments that are of equal size. The 2 apartments on the ground floor can rightly claim that they should not contribute to replacement of the carpet on the stairs or the painting of the walls of the stairs beyond the ground floor. They may also argue that the external painting above the ground level is more expensive because of the need for scaffolding. At what point do these types of factors become so significant that, in the interests of justice and equity, they warrant a departure from equality?

27. In *Fisher's case* (supra) the Court saw the need to refer to the Explanatory Notes that accompanied the Bill for the 2003 Act, as well as the second reading speech on the Bill. The following is an extract from the Court's decision [at 28-31]:

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

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

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

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

In the Second Reading Speech it was said:

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

These materials make it tolerably plain that the Act is intended to produce a contribution lot entitlement schedule which divides body corporate expenses equally except to the extent

that the apartments disproportionately give rise to those expenses, or disproportionately consume services. That determination can only be made by reference to factors which have a financial impact or consequence on the body corporate. It cannot be affected by factors which go to an apartment's value or amenity.

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

28. In my opinion, it is clear (particularly since the amendments introduced by the 2003 Act) that it is the exception rather than the rule that interest schedule lot entitlements should not be equal. Each case must be looked at to determine whether there are sufficient factors, in the interests of justice and equity, to justify a departure from the principle of equality.

Factors supporting unequal contributions

29. In this case the only factors that may support the proposition of unequal contribution schedule lot entitlements are:

(a) the different floor areas of the lots;
(b) the additional external wall areas of the larger lots;
(c) the fact that the penthouses each have an extra bedroom;
(d) the fact that the penthouses potentially use more chilled water for air conditioning than many of the other lots;
(e) the argument that the higher a lot in the building, the more it contributes to the cost of the elevator service; and
(f) the use of lot 1 for quasi-commercial purposes, namely caretaking and, at least potentially, the operation of a letting service.

30. While the 2 penthouses have much larger floor areas, I have already pointed out that a significant part of this area is on the roof and is uninhabitable area. Furthermore, it must be cleaned and generally maintained by the penthouse owners. Even allowing for the uninhabitable area, the penthouses (at 250 m^2 of habitable area) are more than twice the size of most other units. Clearly this will potentially require greater use of water cooling equipment for air conditioning and greater external maintenance.

31. From the point of view of demand on services, while there is a significant difference between the floor areas of the penthouses and the floor areas of the other lots, there is not a significant difference in the floor areas of the non-penthouse lots. Similarly, there is nothing before me to suggest that the elevator usage is significantly higher in the case of lots higher up in the building. In any event, I am prepared to accept that this is not significant, as apparently did the Court of Appeal in *Fisher's case* (supra). One also needs to exercise

caution in relation to the external maintenance issue because the additional external wall areas in the overall scheme of things, are not that significant.

32. In relation to the commercial use associated with lot 1, that use benefits all of the other lots in that they all share, or have the ability to share, in the benefit of having an on-site caretaker and letting agent. Furthermore, there is nothing before me that suggests the use or potential use of lot 1 contributes to a greater use of services provided by the body corporate. Therefore, there does not appear to be any justification for treating lot 1 any differently to the other lots.

33. I note that there is nothing special about the structure of this particular community titles scheme. It is a single tier or "basic" scheme with no abnormal title, subdivision or other arrangements.

34. I also note that I cannot take into account the fact that the applicants may have been aware of the lot entitlement position, including its impact on maintenance contributions, at the time they purchased their lots. This is because section 49(5), which I have quoted above, expressly precludes me from taking that into account.

35. In relating to voting rights, there is no evidence before me that suggests that they should not be shared equally by all lots in the scheme.

36. Finally, one of the submissions made in relation to the application was that a change in entitlements will result in some lots (particularly the penthouses) increasing in value while other lots will decrease in value. In *Fischer's case* (supra) the Court of Appeal made it clear that this is not a relevant matter for this type of application.

Decision

37. It now remains for me to determine whether:

    (a) the factors that I have discussed above are sufficient to justify a departure from the principle of equality; and
    (b) if so, whether, on the evidence before me, the current allocation of contribution schedule lot entitlements is appropriate, or whether some other allocation is more appropriate.

38. In my view, this is a marginal case for departure from equality. On one point of view this case is similar to Example 3 (quoted above) given in the Explanatory Notes to the 2003 Act. The question is whether the circumstances in this case are such that, in the interest of justice and equity, a departure from equality is necessary.

39. On balance, I am inclined to the view that a departure is necessary. Therefore, in the case of this scheme my findings of fact are:

    (a) the contribution schedule lot entitlements should not be equal;
    (b) the current allocation of contribution schedule lot entitlements among the lots is not just and equitable; and

(c) the contribution schedule lot entitlements for lots 1 to 35 should be equal while those for lots 36 and 37 should be marginally higher to take account of the factors that I have already identified.

40. I propose to make an order varying the contribution schedule lot entitlements in community titles scheme 518 to the following:

Lots 1 to 35	– 27 each
Lots 36 and 37	- 30 each
Aggregate	- 1,005

41. Under section 280(2) of the Act, the applicants are responsible for the costs of the adjudication unless I order otherwise. It seems fitting to me that the applicants should bear the costs of the adjudication in this matter, so I do not propose to make any order with respect to those costs.

Gary Bugden

Gary Bugden
Specialist Adjudicator