



**CITATION:** *FERNANDEZ AND 8 ORS v THE BODY CORPORATE FOR THE ISLAND THE PINES CTS 21837* [2009] CCT KL051-08

**PARTIES:** FERNANDEZ Chris and other residents  
V  
THE BODY CORPORATE FOR THE ISLAND  
THE PINES CTS 21837

**APPLICATION NUMBER:** KL051-08

**DELIVERED ON:** 13 July 2009

**DELIVERED AT:** Brisbane

**HEARING DATE:** 9 July 2009

**DECISION OF:** Mr K D Dorney QC

**CATCHWORDS:** Adjustment of contribution schedule in community management statement – schedule existed since 1980 – lots and common property entirely on island, and separate improvements to each parcel of land containing one lot only

**REPRESENTATION:**

**APPLICANT:** Mr Fernandez

**RESPONDENT:** Mr McDonnell

**DECISION CATEGORY CLASSIFICATION:** C

**NUMBER OF PARAGRAPHS:** 29

## REASONS FOR DECISION

### Introduction

1 This application was filed 5 December 2008. It seeks an adjustment of the lot entitlements in the contribution schedule for the community titles scheme known as “*The Island The Pines*” Community Titles Scheme 21837 (“CTS”).

2 The applicants are 9 of the Lot owners of the 28 Lots in the CTS.

3 The defendant, as required by section 48(2) of the *Body Corporate and Community Management Act 1997* (“*BCCM Act*”), is the Body Corporate of the CTS.

4 The defence of the respondent was filed 23 February 2009.

5 The proceeding was set down for hearing on 9 July 2009 when Mr Fernandez appeared on behalf of the applicants (being one of the applicants himself) and Mr McDonnell appeared on behalf of the respondent.

### Relevant legislation

6 The relevant legislation is contained in Part 5 of Chapter 2 of the *BCCM Act*. Significant parts of this Part were amended by the *Body Corporate and Community Management and Other Legislation Amendment Act 2003* which came into force on 4 March 2003. Those changes affected all existing schemes, no matter when they commenced.

7 As section 47(1) of the *BCCM Act* notes, section 47 states the general principles for the application of lot entitlements to a community titles scheme, but has effect subject to provisions of the *BCCM Act* providing more specifically for the application of lot entitlements. Section 47(2) states that 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 the *BCCM 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.

8 Section 48(5) of the *BCCM Act* states that the order of the Tribunal must be consistent with, if the order is about the contribution schedule, the “*principle*” stated in section 48(6): see paragraph (a). In turn, section 48(6) states that, 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*” (emphasis added).

9 Section 49(1) of the *BCCM Act* states that section 49 applies if an application is made for an order of the Tribunal for the adjustment of a lot entitlement schedule. Pursuant to section 49(2)(a) of the *BCCM Act*, the Tribunal may have regard to, for deciding, for a contribution schedule, if it is just and equitable in the circumstances that the respective lot entitlements “*not to be equal*” –

- a) how the community titles scheme is structured;

- b) the nature, features and characteristics of the lots included in the scheme; and
- c) the purposes for which the lots are used.

10 Section 49(3) of the BCCM Act states that, however, the matters that the Tribunal may have regard to, for such purposes, are not limited to the matters stated in section 49.

11 But section 49(5) states that the Tribunal “*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 time the applicant entered into a contract to buy the lot owned by the applicant*”, about –

- a) the lot entitlement for that lot, or other lots included in the CTS; or
- b) the purpose for which a lot entitlement is used (emphasis added).

12 Finally, section 48(10) states that, if the Tribunal orders an adjustment of a lot entitlement schedule, the body corporate, must, as quickly as practicable, lodge a request to record a new community management statement reflecting the adjustment ordered.

### Relevant legal principles

13 The Court of Appeal in Queensland has laid down the principles that this Tribunal must follow in an application for an adjustment such as this of the contribution schedule. In *Fischer v Body Corporate for Centrepoint Community Titles Scheme 7779* [2004] 2 Qd R 638, Chesterman J, with whom McPherson JA and Atkinson J expressly agreed, held that:

- a contribution schedule should provide for equal contributions by lot owners, except insofar as some lots “*can be shown to give rise to particular cost to the body corporate which other (lots) do not*”: at 644 [26];
- the question whether a contribution 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 lots, or their contribution to the costs incurred by the body corporate: at 644 [26];
- the more general considerations of “*amenity, value or history are to be disregarded*” (emphasis added): at 644 [26];
- what is at issue is the “*equitable*” distribution of the costs: at 644 [26];
- in the Explanatory Notes which accompanied the 2003 Act it was stated, as an example, that, in a basic scheme, if all lots are residential lots ranging in size from a small lot to a penthouse, the contribution schedule lot entitlements “*generally would be equal*” (emphasis added): at 644-645 [28];
- the BCCM Act is intended to produce a contribution lot entitlement schedule which divides body corporate expenses equally except to the extent that the lots “*disproportionately*” give rise to those expenses, or “*disproportionately*” consume services, and that determination can only be made by reference to factors which have a “*financial impact or consequence*” on the body corporate (emphasis added): at 645 [30];
- such a determination “*cannot*” be affected by factors which go to a lot’s value or amenity: at 645 [30];
- the starting point for the allocation of lot entitlements is that the entitlements “*should be equal*”, and a departure from that principle is allowable only where it is just, or fair, to recognise inequality, with the departure taking as its reference point the proposition, from which it departs, that lot owners “*should contribute*

*equally to the costs of the building*”, with the focus of the inquiry being the extent to which a lot *“unequally causes costs to the body corporate”*: at 645 [31];

- if the inquiry that is done when an adjustment application is made is *“limited”* to the extent to which a lot creates costs, or consumes services, *“above or below the average”*, one can readily determine what the contribution lot entitlement should be: at 645 [32];
- if such an inquiry were to be wider and were to include such *“nebulous criteria”* as the structure of the scheme, or the nature, features and characteristics of the lots in the scheme, and the purposes for which they are used, there is *“no intelligible basis”* on which a vast variety of circumstances might be relied upon to depart from, and therefore erode, the principle said to be *“paramount”*, namely, *“that there should be an equality of entitlements”*: at 645 [32]; and
- section 49 of the BCCM Act, and in particular section 49(4), should be construed as meaning that those identified matters to which a Tribunal may have regard are to be regarded *“only to the extent, if any, that they affect the cost of operating a community titles scheme”* (emphasis added): at 646 [33].

### Relevant facts

14 Although there was attached both to the Statement of Claim and the Defence certain material, the Tribunal has paid primary regard to statements provided, as a result of orders made in Directions Hearings, which were filed by both the applicants and the respondent.

15 At the beginning of the hearing, the Tribunal sought from both parties whether there was any further material on the *“facts”* which was to be led besides those contained in the filed material. After the Tribunal was satisfied that there was nothing further by way of factual material which the parties wished to put before the Tribunal, the Tribunal then moved to a consideration of the submissions made by both parties about how the legal principles ought to be applied to those particular facts.

16 Both parties handed up to the Tribunal, at the end of oral submissions, brief written outlines of their respective positions.

17 The essential facts of this CTS are:

- the 28 Lots, not surprisingly given the title to the CTS, are individually situated, along with the common property, on their own island;
- each of the Lots is a residential block of land on which is erected, as an improvement, a single detached residential dwelling, with each block having its own water frontage;
- the current schedule of lot entitlements for the Contribution Schedule ranges from 300, for Lot 28, to 500, for Lots 9, 10, 11 and 12;
- those Lot entitlements have been in existence since mid-1980;
- as a Google Earth map contained in the material shows, there is a short bridge access to the island, a gated entry, a circular road around the centre of the island and vegetation planted in the centre of the circular roadway as it makes its way past and every Lot;
- each Lot has its own water and power meters and the utility charges are made directly to the Lot owners;
- each Lot owner is responsible for the Lot’s own property insurance and for the maintenance of the improvements and surrounds within their individual Lots;

- there are no common property exclusive use areas on the island;
- external parties who provide the mail service and the rubbish collection have access to the island to service each Lot individually; and
- the common property comprises the balance on the island which is not constituted by 28 individuals Lots.

18 In the respondent's material there was an attached Discussion Paper on "*lot entitlements*" under the BCCM Act, dated December 2008 and issued by the Department of Justice and Attorney-General. Also attached was a brochure from a scheme presumably to be known as "*Reflection Tower Two*" which showed, in Annexure B to it, a contribution schedule where the lot entitlements were stated as not equal.

19 The Tribunal will comment, in more detail, on both those documents soon. But, for the moment, given the legal principles canvassed above, it is clear that the Tribunal cannot have regard to any history of what occurred at, for example, General Meetings of the Body Corporate or what different Lot owners thought about the lot entitlement of the lot they were buying, or even of other Lots in the CTS, or the purpose for which lot entitlements were then used. Moreover, aspects of amenity and value are to be disregarded. Therefore, all "*facts*" which address such issues and which are contained in the material filed on behalf of both parties are irrelevant for present purposes.

20 Turning, then, to the first of the documents mentioned. The "*Discussion Paper*" is just that. This Tribunal cannot anticipate what Parliament might do as a result of submissions received as a result of the circulation of that Discussion Paper. It would be the height of folly for the Tribunal to anticipate what Parliament might enact, if it enacted anything at all, concerning an amendment to the relevant legislative provisions. Consequently, matters raised in the Discussion Paper are simply that; and are irrelevant for present purposes.

21 The second document (namely, the brochure) was led for the contended purpose of establishing that "*property developers are still marketing developments with unequal contributions schedules*" and, therefore, raise questions about how "*the rules and regulations*" are being "*effectively enforced*" so as to ensure consumers are protected. The first part of that contention shows of itself that it must be irrelevant to the present proceeding, because the facts of some other community titles scheme are irrelevant to the determination of the facts that are relevant to this community titles scheme. As to the latter, it is irrelevant for present purposes how the "*rules and regulations*" are being enforced because, if there are such rules and regulations, they ought be enforced and the Tribunal ought to take the view that they ought to be, whether or not they are. Besides, with respect to the brochure itself, the fact that unequal lot entitlements are shown may simply be a reflection that there are, truly, just and equitable reasons "*in the circumstances*" for such inequality.

## **Discussion**

22 There is simply no evidence before the Tribunal that any individual lot, or even any combination of individual lots, disproportionately gives rise to body corporate expenses or disproportionately consumes services provided by the body corporate. Take, for example, the road itself. It would be impossible to require each lot owner to be responsible for the costs of repair and maintenance of the roadway immediately adjacent to that lot, because, for instance, those parts of the roadway nearest to the bridge would undoubtedly suffer much more wear and tear than any part outside the lots at the end of the island opposite

the bridge. It would, therefore, be unfair, rather than just and equitable. In any event, there is no logical reason why those lots nearest to the bridge should be required to be liable for costs relevant to maintenance and repair of that discrete section. Quite obviously, the roadway is for the benefit of all Lot owners. Moreover, there is no necessary connection between the positioning of the lots and use of the roadway. It may well be that some lots have more than one car that accesses the roadway. How would it be possible to make any just and equitable division without knowing exactly what use was made of the roadway by each and every individual car that uses the roadway? In any event, the analysis should be an objective one and should not depend upon what lot owners at any particular time have by way of motor transport located on their individual lots. Another factor negating inequality would be the fact that all lots have the benefit of utility services provided and therefore access by utility service providers, as well as by the providers of post and garage collection services.

23 In the end, it is just impossible to justly and equitably decide that, in the circumstances of this particular proceeding, the lot entitlements should “*not*” be equal.

24 Dealing with the issues of unfairness which are contended to result from the changes to the legislation in 2003 and the fact that, for this particular CTS, the contribution schedule has been unchanged since 1980, it must be understood that Part 5 contains no “*compensation*” provisions for any “*loss*” which might theoretically be able to be established. But, more importantly, it is clear from section 49(5), as informed by section 49(6), of the *BCCM Act*, that knowledge or understanding that any applicant, and implicitly any other lot owner in any community titles scheme, should have is irrelevant for the present determination. If any “*loss*” exists – a conclusion that cannot be reached by the Tribunal in this proceeding – the remedies either lie elsewhere or, as all things in the political area ultimately are, in individual lot owner’s lawful political agitation.

25 Ultimately, as *Fischer* instructs, any factor that is brought into play must be a factor which affects the “*cost*” of operating the particular community titles scheme: and that alone.

26 Finally, in order to allay any fears about the independence of this Tribunal from any part of the Executive Government, section 8(2) of the *Commercial and Consumer Tribunal Act 2003* states that, in exercising its jurisdiction, the Tribunal “*is not subject to direction or control, other than as provided under*” the *BCCM Act* itself (emphasis added).

## Orders

27 Since:

- the existing respective lot entitlements in the Contribution Schedule are not equal, they should *prima facie* be equal;
- in the circumstances of this proceeding, it is not just and equitable for those respective lot entitlements not to be equal; and
- consequently, the order of the Tribunal must be that they be equal.

28 Since section 46(6) of the *BCCM Act* states that a lot entitlement must be a whole number, but must not be 0, and given that section 47(2)(b) states that the contribution schedule lot entitlement for a lot is the basis for calculating the value of the lot owner’s vote in certain circumstances, it would appear to be logical that the number allocated to each lot entitlement be the figure “1”. It will be so ordered.

29 It is important for the respondent Body Corporate to note section 48(10) of the *BCCM Act*, set out earlier. It requires the respondent as quickly as practicable to lodge a request to record a new community management statement reflecting the adjustment ordered.

---

MR K D DORNEY QC  
**MEMBER**  
**Commercial and Consumer Tribunal**