

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Kousek & Anor v Body Corporate for Ocean Court Kirra*
CTS 25843 [2022] QCAT 56

PARTIES: **RACHEL KOUSEK**
(first applicant)

AND

BRADLEY DAVIS
(second applicant)

V

BODY CORPORATE FOR OCEAN COURT KIRRA
CTS 25843
(respondent)

APPLICATION NO/S: OCL280-20

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 7 February 2022

HEARD AT: Brisbane

DECISION OF: Member Lember

ORDERS: **The application for adjustment of a lot entitlement schedule – *Body Corporate and Community Management Act 1997 (Qld)* filed 27 August 2020 is dismissed.**

CATCHWORDS: REAL PROPERTY – STRATA AND RELATED TITLES
– VARIATION, TERMINATION AND RENEWAL –
OTHER MATTERS – Application for adjustment to
contribution schedule and interest schedule lot entitlement
– where Community Management Statement contains clear
error – where lot entitlements are unjust and inequitable –
whether grounds for application exist – no recognised
ground shown despite error and inequity – no evidence of
market value tendered

Body Corporate and Community Management Act 1997
(Qld), s 46A, s 47, s 47A, s 47AA, s 47B, s 48, s 379, s
381, s 382, s 383, s 384, s 385

Body Corporate and Community Management and Other
Legislation Amendment Act 2013 (Qld)

Heaton v. Body Corporate for “Windsong Apartments”
CTS 31804 [2012] QCAT 45

Higham v. The Body Corporate for the Palms No. 3
Warana CTS [2013] QCAT 228

Nunn v Body Corporate for Skye Gardens CTS 20379
 [2015] QCAT 8
Pitt v Body Corporate for Aqueous on Port CTS 33821
 [2014] QCAT 245
Thompson v Capricorn Pacific Apartments CTS 5587
 [2013] QCAT 227

**APPEARANCES &
 REPRESENTATION:**

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

REASONS FOR DECISION

What is this decision about?

- [1] The applicants own units in Ocean Court, contained within community title scheme 25843 (“the CTS”).
- [2] Ocean Court is comprised of twelve lots, being nine similarly sized two-bedroom two-bathroom units, and three smaller one-bedroom, one-bathroom units.
- [3] It is reasonably obvious from the material filed – and it was not expressly disputed by the Body Corporate – that an error was made when the CTS was established in that the Community Management Statement lodged 7 July 1998 (“the CMS”) appears to have inadvertently swapped Lot 3 for Lot 4, Lot 7 for 8 and Lot 11 for 12 with the effect that:
- (a) the units are incorrectly numbered (they do not correspond with their lot number); and
- (b) The relative size, and lot entitlements of the units are, according to the CMS as follows:

Lot No.	Size	Contribution Schedule	Interest Schedule
3	127m ²	130/1925	130/1925
4	82m ²	169/1925	169/1925
7	87m ²	128/1925	128/1925
8	63m ²	164/1925	164/1925
11	87m ²	131/1925	131/1925
12	63m ²	170/1925	170/1925

- [4] The error with respect to Lots 7 and 8 seems to have been discovered and purportedly corrected by handwritten arrows drawn on the CMS directing each lot’s entitlements to the other. However, Lots 3 and 4 and Lots 11 and 12 were not addressed and the handwritten notation for Lots 7 and 8 is certainly far from ideal.
- [5] The error has resulted in a situation where the owners of smaller units pay more for rates, body corporate levies and in special levy contributions, such as to a painting

project for the building. The situation is clearly unjust and inequitable and easily fixed by way of a Body Corporate resolution to correct the obvious error.

- [6] Unfortunately, the applicants say that the owners of the larger lots benefiting from the error refuse to pass a resolution to correct the situation. The question in these proceedings is whether the Tribunal has the power to adjust what the Body Corporate will not.
- [7] On 27 August 2020 Ms Kousek and Mr Davis filed an application for adjustment of a lot entitlement schedule – *Body Corporate and Community Management Act 1997* (Qld) (“BCCMA”) seeking adjustments to the contribution schedule and the interest schedule for the CTS on the basis that the existing entitlements set out in the CMS are neither just nor equitable and appear to in fact has been allocated in error.
- [8] The Boyd Corporate resists the orders sought on the grounds that lot owners within the CMS purchased lots with the benefit of disclosure of the existing entitlements and legal advice with respect to the same, and, accordingly, they should adhere to it.

What are lot entitlements and on what basis can they be adjusted?

- [9] Lot entitlements in community titles schemes set out each owner’s:
- (a) body corporate costs and voting rights;
 - (b) share of common property and other assets; and
 - (c) lot value for calculating government rates and other charges.
- [10] Lot entitlements are set by the original owner (usually the developer) and recorded in the CMS when the community titles scheme is established.
- [11] The contribution schedule lot entitlements are used to calculate:
- (a) each owner’s share of most body corporate costs (some costs, like building insurance premiums, may be divided in a different way); and
 - (b) the value of an owner’s vote if a ‘poll’ is called for when voting on an ordinary resolution.
- [12] The interest schedule lot entitlements are used to calculate:
- (a) each owner’s share of the common property and body corporate assets if the scheme ends (e.g. a scheme could be terminated if all lot owners agreed to dispose of the scheme because they wanted to redevelop); and
 - (b) the value of the lot for calculating local government rates and charges, and other costs.
- [13] The *Body Corporate and Community Management and Other Legislation Amendment Act 2013* (Qld) amended the BCCMA relevantly in relation to adjustment of lot entitlements such that:
- (a) the Tribunal’s power to order an adjustment is quite limited;¹ and

¹ As observed in *Thompson v. Capricorn Pacific Apartments CTS 5587* [2013] QCAT 227 and *Higham v. The Body Corporate for the Palms No. 3 Warana CTS* [2013] QCAT 228.

- (b) the applicants can only apply under the BCCMA for the Tribunal to adjust the lot entitlements if the following circumstances exist.²

To adjust contribution lot entitlements

- (i) If the Body Corporate passes a motion without dissent to change the entitlements³ – in this particular case the Body Corporate in fact has refused to pass a motion to change the entitlements;
- (ii) If the scheme is affected by a material change since the last time entitlements were decided⁴ – in this case, there is no evidence of a change to the CMS since the CTS was established (“material change” meaning a physical change such as the building of units or the partial demolition of the scheme);⁵
- (iii) If the scheme is established after the commencement of section 47B(2) of the BCCMA⁶ and there has been no prescribed change to contribution entitlements - in this case, the CMS was established in 1998, well prior to the commencement of section 47B(2) so this ground cannot form a basis for the current application;
- (iv) If there has been a change to contribution entitlements because of a formal acquisition affecting the scheme⁷ – there is no evidence of an acquisition affecting the CTS in these proceedings;
- (v) To reflect pre-Adjustment Order entitlements following a motion proposing adjustment,⁸ a decision of the Body Corporate or committee about the adjustment,⁹ and a subdivision,¹⁰ amalgamation,¹¹ lot boundary change¹² or material change¹³ since the Adjustment Order – again, there was no evidence tendered or a change to the CMS since the CTS was established.

To adjust interest lot entitlements

- (vi) If the interest lot entitlements do not reflect market values of the lots,¹⁴ applying the “market value principle”,¹⁵ namely that lot entitlements must reflect the respective market values of the lots except to the extent to which it is just and equitable for them not to reflect respective market

² Summarised by then Member Hughes in *Pitt v Body Corporate for Aqueous on Port CTS 33821* [2014] QCAT 245 at [4] to [15].

³ BCCMA, section 47AA.

⁴ *Ibid*, section 47B(1).

⁵ *Heaton v. Body Corporate for “Windsong Apartments” CTS 31804* [2012] QCAT 45 at [5], [6], [9] and [10].

⁶ Namely, after 14 April 2011.

⁷ BCCMA, section 47B(2A).

⁸ *Ibid*, section 379.

⁹ *Ibid*, section 385.

¹⁰ *Ibid*, section 381.

¹¹ *Ibid*, section 382.

¹² *Ibid*, section 383.

¹³ *Ibid*, section 384.

¹⁴ *Ibid*, section 48.

¹⁵ *Ibid*, section 46B(1).

values – this is the only ground upon which the application for an adjustment might proceed.

Should the interest entitlements be adjusted applying the market value principle?

- [14] The applicants bear the onus of satisfying the Tribunal that the current interest lot entitlements are not consistent with the market values of the various lots.¹⁶
- [15] No evidence was led at all in relation to market values, not of the impacted lots nor of the benefited lots, nor of the correctly entitled lots within the complex.
- [16] Accordingly, there is therefore insufficient evidence to allow me to determine whether the interest schedule lot entitlements are consistent with market values of the various lots.

Decision

- [17] As there are no grounds to adjust the contribution schedule lot entitlements and no evidence or submissions that would permit an adjustment of the interest schedule lot entitlements, the application for adjustment of a lot entitlement schedule – *Body Corporate and Community Management Act 1997* must unfortunately be dismissed.

¹⁶ *Nunn v Body Corporate for Skye Gardens CTS 20379* [2015] QCAT 8 at [11].