

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Radchenko v Body Corporate for Richmond Apartments*
CTS 30240 [2018] QCAT 251

PARTIES: **POLINA RADCHENKO**
(applicant)
v
**BODY CORPORATE FOR RICHMOND
APARTMENTS CTS 30240**
(respondent)

APPLICATION NO: OCL002-17

MATTER TYPE: Other civil dispute matters

DELIVERED ON: 31 July 2018

HEARING DATES: 4 December 2017 and 5 December 2017

HEARD AT: Townsville

DECISION OF: Member Pennell

ORDERS:

- 1. The Applicant's application for an adjustment of the contribution schedule of the Community Title Scheme 30240 for Richmond Apartments is dismissed.**
- 2. There be an adjustment of the interest schedule for the Community Title Scheme 30240 for Richmond Apartments so that the respective schedule lot entitlements recorded in the community management statement for the interest scheme reflect the market value principle and are in accordance with the schedule to this order.**
- 3. Within 45 days of this order, the Body Corporate for Richmond Apartments is to lodge a new community management statement incorporating changes to the interest schedule lot entitlements for the lots included in the scheme in accordance with these orders.**
- 4. There be no order as to costs.**

CATCHWORDS: REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES adjustment of community title scheme – principles for deciding schedule lot entitlements – principles for setting and adjusting contributions schedule lot entitlements – principles for deciding interest schedule lot entitlements –

adjustment by tribunal of contribution schedule – no material change to a community title scheme – an adjustment of the interest schedule – criteria for deciding just and equitable circumstances – lodgement and recording of changes to interest schedule lot entitlements – costs – threshold for an award of costs

Body Corporate and Community Management Act 1997 (Qld), s 46A(1), s 46B, s 47B, s 47B(1), s 47B(1)(a), s 47B(7), s 47B(8), s 48(5), s 48(6), s 49, Schedule 6
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 100, s 102(1)

Burnitt Investments Pty Ltd v Body Corporate for St Andrews Community Titles Scheme 20508 [2002] QDC 6
Fischer v Body Corporate for Centrepont CTS 7779 [2004] QCA 214
Lidster v Body Corporate Parkhaven No 3 CTS 22556 [2007] QCCTBCCM 003
Mary & Chaplin v Body Corporate for Innisfail Light Industrial Centre [2010] QCAT 199
Sandhurst Trustees Ltd v Condah Bay Investments Pty Ltd & Ors [2003] QDC 438

APPEARANCES & REPRESENTATION:

Applicant: Salvatore Cardillo and Polina Radchenko
Respondent: Daniel Peters

REASONS FOR DECISION

- [1] The applicant is Polina Radchenko (“the applicant”). On 15 December 2015, the applicant purchased unit 2 of the Richmond Apartments (“the Richmond Apartments”).¹
- [2] The Richmond Apartments are a set of four ground level units situated at 7 Richmond Street, Hermit Park in Townsville. The complex was built in approximately 1980 and it was not until 20 March 2002 that the Community Title Scheme (“CTS”) for the property was executed.
- [3] The respondent is the Body Corporate for the Richmond Apartments CTS 30240 (“the respondent”).
- [4] When the CTS was executed, there was an allocation of equal shares between the four units for contributions and interest, namely –

Lot on Plan	Contribution	Interest
Lot 1 on SP 147799	1	1
Lot 2 on SP 147799	1	1
Lot 3 on SP 147799	1	1

¹ The purchase price was \$105,000.

Lot 4 on SP 147799	1	1
Totals	4	4

- [5] On 16 January 2017, the applicant filed an application with the tribunal for the adjustment of the interest schedule of the CTS. Orders were sought to adjust to the contribution and interest schedules of the CTS to a more equitable arrangement. The applicant said that the adjustment was necessary because at present, the schedule was not allocated in a just and equitable manner. The applicant later filed an amended application seeking orders to declare the CTS “null and void” and for the tribunal to adopt a just and equitable approach to change both the contribution schedule and the interest schedule.² The tribunal was asked to apply the criteria as provided for in section 49 of the *Body Corporate and Community Management Act 1997* (Qld) (“the Act”).
- [6] In seeking those adjustments, the applicant said that it was unfair that as the owner of the smallest unit in the unit complex, she was required to pay 25% of all body corporate contributions and fees.
- [7] To assist the tribunal, the applicant commissioned a valuation report by Taylor Byrne relating to the Richmond Apartments (“the Taylor Byrne report”). The purpose of the Taylor Byrne report was to undertake a direct valuation comparison of the units with the Richmond Apartments to other sales in the immediate area.
- [8] The Taylor Byrne report indicated that the overall specifications and valuations of the four units at the Richmond Apartments were –

Unit	Bedrooms	Building Area (including Exclusive Use Area)	Assessed Market Value	Market Value %
1	2	191m ²	\$170,000	32.08
2	1	84 m ²	95,000	17.92
3	2	105 m ²	\$125,000	23.58
4	2	184 m ²	\$140,000	26.42
Total		564 m²	\$530,000	100

- [9] The applicant relied upon those specifications to show that the market value of her unit equates to less than a quarter of the overall market value of the Richmond Apartments.

Adjusting the contribution schedule

- [10] The Act provides for two types of lot entitlement schedules; a contribution schedule and an interest schedule. The implementation of a CTS provides for the ownership and management of common property and body corporate assets. Arising from that are costs which are associated with living in a scheme being proportioned by a lot owner’s allocated lot entitlement.

² Amended application filed on 21 April 2017.

- [11] The principle for setting and adjusting contribution schedule lot entitlements is that they should be equal, except to the extent where it is just and equitable in the circumstances for them not to be equal.³
- [12] The Act⁴ allows the tribunal to adjust contribution schedule lot entitlements if a CTS is affected by a *material change*; or if a lot owner in the scheme believes the contribution schedule lot entitlements do not accurately reflect the deciding principle for the lots entitlements.⁵
- [13] Furthermore, the Act explicitly allows the tribunal to change the contribution schedule lot entitlements for lots within a CTS.⁶ However, if that approach is undertaken by the tribunal, the adjustments must be consistent with the just and equitable principle.⁷ If the tribunal orders an adjustment of the contribution schedule of the CTS, the body corporate must, as quickly as practicable, lodge a request to record a new CTS reflecting the contribution schedule lot entitlement adjustments.⁸
- [14] In arriving at a position to consider any application for an adjustment to a lot entitlement schedule, the tribunal is required to reach a decision based on the equity principle. This requires a determination of the facts and circumstances of the case. Any findings must be consistent with the criteria as laid out in Act.⁹
- [15] In *Fischer v Body Corporate for Centrepoint CTS 7779* (“the *Centrepoint* case”)¹⁰ the principle of just and equitable was discussed in respect to determining the apportionment of lot entitlements and their adjustment. The court commented that –
- “..... 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....What is at issue is the ‘equitable’ distribution of the costs”*
- [16] Having regard to the determination reached by the court in the *Centrepoint* case, any finding by the tribunal with regards to the equitable distribution of the costs depends upon the facts and circumstances of the case being determined. If the tribunal is asked for an adjustment based on the equality principle to the lot entitlement schedule, the Act specifically provides the criteria as to what the tribunal may or may not have regard to.¹¹
- [17] However, prior to reaching that position, there is an obligation upon the applicant to show that a material change has affected the CTS since the last time that the

³ *Body Corporate and Community Management Act 1997*, s 46A(1).

⁴ *Body Corporate and Community Management Act 1997*, s 47B.

⁵ This part relates to a CTS which was established after the commencement of this section.

⁶ *Body Corporate and Community Management Act 1997*, s 47B.

⁷ *Body Corporate and Community Management Act 1997*, s 47B(7).

⁸ *Body Corporate and Community Management Act 1997*, s 47B(8).

⁹ *Body Corporate and Community Management Act 1997*, s 49.

¹⁰ [2004] QCA 214 at [26] per Chesterman J.

¹¹ *Body Corporate and Community Management Act 1997*, s 49.

contribution schedule lot entitlements in the scheme were decided.¹² The period relevant to these proceedings is after 20 March 2002 when the CTS was executed.¹³

- [18] In undertaking an analysis into whether a material change has occurred which affects the CTS, the elements to be considered would be –
- (a) the CTS must be affected by a material change;
 - (b) if there has been a material change, that change must have happened since the last time the lot entitlements for the CTS were decided; and
 - (c) the owner of a lot has a belief that an adjustment is necessary because of that material change.
- [19] In analysing the evidence in this matter, the important determination involves a question of whether there has been a material change since the schedule lot entitlements were executed on 20 March 2002. If there has been a material change, does the effect of the material change necessitate an adjustment of the contribution schedule lot entitlements. Notwithstanding that, if there has been no material change, then the criteria for an adjustment by the tribunal to the contribution schedule is not satisfied pursuant to section 47B(1) of the Act.
- [20] Material change is a change that has, or may have, a significant effect on the contribution schedule lot entitlements for the lots included in the scheme. Examples can be that there was an addition of one or more lots, other than by a subdivision not involving the addition of a subsidiary scheme; or the removal of one or more lots, other than by an amalgamation. However, if the CTS is intended to be developed progressively, a change arising from development proposed in the CTS for the scheme is not a material change for the scheme.¹⁴
- [21] Although the respondent has conceded that there has been renovations undertaken within two of the units of the Richmond Apartments since the CTS was executed, it seems that those renovations resulted in no expense to the other owners in terms of the renovation costs or maintenance. The respondent also conceded that the renovations did not alter the exterior walls and the overall floor and roof space of the lots.
- [22] Whilst there has been alterations to the interiors of two of the units, those renovations are not to the extent where they have affected or undertaken a material change to the individual lot sizes; or involved the overall removal or addition of more lots to the Richmond Apartments.
- [23] The applicant has conceded, and certainly the evidence in this matter supports that concession, that since the CTS was executed, there has been no material change or any change to the total lot sizes of the units contained within the Richmond Apartments.

¹² *Body Corporate and Community Management Act 1997*, s 47B(1)(a).

¹³ The establishment of the CTS for the Richmond Apartments is clearly prior to the commencement of section 47B of the *Body Corporate and Community Management Act 1997*. Section 47B was only inserted into the *Body Corporate and Community Management Act 1997* on 14 April 2011.

¹⁴ *Body Corporate and Community Management Act 1997*, Schedule 6 – Dictionary.

- [24] By applying the definition of what a material change is to the circumstances of the applicant's application, it is clear that no material change has occurred since the contribution schedule lot entitlements were included in the CTS.¹⁵ Because there has been no material change, the criteria for an adjustment to the contribution schedule is not satisfied.¹⁶ Therefore, the applicant's application for an adjustment for the contribution schedule must fail.

Adjusting the interest schedule

- [25] When the applicant purchased a unit at the Richmond Apartments, the existence of the CTS would have been known. It is apparent that the applicant purchased the unit notwithstanding that the CTS attributed equal quarter shares to each unit for both the contribution schedule and the interest schedule.
- [26] Further to my earlier discussions about the just and equitable principle, in *Burnitt Investments Pty Ltd v Body Corporate for St Andrews Community Titles Scheme 20508*,¹⁷ the court discussed what was just and equitable and determined that –

“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 on its own circumstances It should also be accepted that the “just and equitable” exception should not necessarily be confined to a consideration of the lots and the rights and obligations that go with them. Those aspects of property and the history of the building will usually be the dominant considerations”.

- [27] Arriving at a just and equitable position requires an analysis of the facts and circumstances of the case. If any consideration is given to an adjustment of the interest schedule, that adjustment must be consistent with the market value principle in regard to the respective current market values of the lots included in the CTS.¹⁸ Any finding must be determined on, and be consistent with, the just and equitable principle. What flows from that is the individual lot entitlements should reflect the respective principles of equality or market value.¹⁹
- [28] In *Sandhurst Trustees Ltd v Condah Bay Investments Pty Ltd & Ors*,²⁰ the court reached a position that –

“.....applications such as the present should not be approached on the footing that there is a single “just and equitable” solution. There may be many views open, subtly, even glaringly different, which could reasonably be seen as ‘just and equitable.’ If there is very little to distinguish the lots – is unlikely the equality principle could be displaced”

- [29] Although the Act does not provide for the onus of proof, the tribunal has in the past accepted that the onus rests with the applicant to show that there should be an

¹⁵ Executed on 20 March 2002.

¹⁶ *Body Corporate and Community Management Act 1997*, s 47B(1).

¹⁷ [2002] QDC 6 at [17] per Brabazon QC DCJ.

¹⁸ *Body Corporate and Community Management Act 1997*, s 48(5).

¹⁹ *Body Corporate and Community Management Act 1997*, s 49.

²⁰ [2003] QDC 438 at [14] per Robin QC DCJ.

adjustment to the scheme in the CTS. It is then incumbent upon the respondent to show why it is just and equitable for the entitlements to remain equal.²¹

- [30] The Taylor Byrne report gave an overall valuation of \$530,000 for all four units at the Richmond Apartments. The portion of that valuation attributed to the applicant's unit is \$95,000, which equates to 17.92% of total value of the unit complex.
- [31] I have already determined that the current form of the CTS should not be altered in regard to the contribution scheme. However, having regard to the features and characteristics of this matter, I do not hold the same view with respect to the interest schedule.
- [32] The Taylor Byrne report, so far as it relates to the just and equitable principle for the interest schedule, persuades me that there should be an adjustment to that interest schedule of the CTS. With that in mind, I am satisfied that the applicant has discharged her onus and shown that an adjustment should be applied to the interest schedule. I am equally satisfied that the respondent has not shown why the interest contributions should remain equal.
- [33] There is a duty imposed upon the tribunal that the making of any order to adjust the interest schedule must be consistent with the market value principle.²² Pursuant to the Act, the market value principle is the principle in which the lot entitlements must reflect the respective market values of the lots.²³
- [34] I earlier commented that there should be no adjustment to the contribution scheme. However, in regard to the interest schedule and the facts and circumstances of this matter, I am satisfied that the market value principle should be applied to the interest schedule and an appropriate adjustment should follow.
- [35] Therefore, the appropriate adjustment for the schedule for the lot entitlements shall be as follows –

Lot on Plan	Contribution	Interest
Lot 1 on SP 147799	1	3208
Lot 2 on SP 147799	1	1792
Lot 3 on SP 147799	1	2358
Lot 4 on SP 147799	1	2642
Totals	4	10000

Costs

- [36] The *Queensland Civil and Administrative Tribunal Act 2009* (“the QCAT Act”) provides that the starting point for any award for costs is that each party must bear their own costs for the proceeding.²⁴ However, the QCAT Act provides the tribunal with the discretion to require a party to the proceeding to pay all or part of the costs

²¹ *Mary & Chaplin v Body Corporate for Innisfail Light Industrial Centre* [2010] QCAT 199 where the tribunal cited *Lidster v Body Corporate Parkhaven No 3 CTS 22556* [2007] QCCTBCCM 003.

²² *Body Corporate and Community Management Act 1997*, s 48(5).

²³ *Body Corporate and Community Management Act 1997*, s 46B.

²⁴ *Queensland Civil and Administrative Tribunal Act 2009*, s 100.

of another party. In saying this, that can only be undertaken if the tribunal applies the “*in the interests of justice*” principle.²⁵

- [37] I am not satisfied that it is in the interests of justice to make the order for costs and I hold the view that the threshold for the tribunal to exercise its discretion has not been reached. There will be no order as to costs to either party.

Decision

- [38] The tribunal orders that –

1. The Applicant’s application for an adjustment of the contribution schedule of the Community Title Scheme 30240 for Richmond Apartments is dismissed.
2. There be an adjustment of the interest schedule for the Community Title Scheme 30240 for Richmond Apartments so that the respective schedule lot entitlements recorded in the community management statement for the interest scheme reflect the market value principle and are in accordance with the schedule to this order.
3. Within 45 days of this order, the body corporate for Richmond Apartments is to lodge a new community management statement incorporating changes to the interest schedule lot entitlements for the lots included in the scheme in accordance with these orders.
4. There be no order as to costs.

²⁵ *Queensland Civil and Administrative Tribunal Act 2009*, s 102(1).