QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Tan & Ors v The Body Corporate for Paddington Boulevard CTS 8174* [2019] QCAT 374
PARTIES:	**DAVID TAN AND PECK EE LIM AS TRUSTEE FOR LTI SUPERANNUATION FUND AND MARIO CURRO** (applicants) **v** **BODY CORPORATE FOR PADDINGTON BOULEVARD CTS 8174** (respondent)
APPLICATION NO/S:	OCL077-18
MATTER TYPE:	Other civil dispute matters
DELIVERED ON:	4 December 2019
HEARING DATE:	16 September 2019
HEARD AT:	Brisbane
DECISION OF:	Member Olding
ORDERS:	**The application for adjustment of lot entitlement schedule is dismissed.**
CATCHWORDS:	REAL PROPERTY – STRATA AND RELATED TITLES – VARIATION, TERMINATION AND RENEWAL – OTHER MATTERS – where applicant sought order adjusting Contribution Schedule Lot Entitlements (‘CSLEs’) for a Community Titles Scheme – meaning of ‘material change’ - when CSLEs are ‘decided’ – whether recording Community Management Statement ‘decided’ CSLEs *Body Corporate and Community Management Act* 1997 (Qld), s 47B, s 51C *Heaton v Body Corporate for “Windsong Apartments” CTS 31804* [2012] QCAT 45 *Moses v Body Corporate for Rhode Island Community Title Scheme 205573* [2012] QCAT 322
APPEARANCES & REPRESENTATION:	
Applicant:	D Tan
Respondent:	JP Hastie of counsel, instructed by Hynes Legal

REASONS FOR DECISION

[1] The Applicants are lot owners in the Paddington Boulevard Community Titles Scheme 8174 ('the Scheme'). They consider that they are contributing disproportionately to the operating costs of the Scheme and seek an order adjusting the contribution schedule lot entitlements ('CSLEs') for the Scheme.

[2] The Body Corporate submits that, in the circumstances of this matter, the Tribunal has no power to make such an order, but advised that if the Tribunal were to decide that it does have the power to make an order, it would not seek to be heard further about whether the CSLEs should be adjusted.

Background

[3] This information about the Scheme is not in contention:

(a) The Scheme comprises 69 lots of which:

(i) 13 are commercial/retail lots;

(ii) 12 are units combined with exclusive use car spaces;

(iii) 41 are car spaces; and

(iv) 3 are storage spaces.

(b) A timeline of events relating to the Scheme includes:

(i) 28 November 1985 - Paddington Boulevard was registered as BUP 7063;

(ii) 15 February 1990 (on or about) - lot 58 and common property was subdivided to form new lot 70;

(iii) 12 January 1996 (on or about) - lot 67 was subdivided into lots 71-73 and lot 61 was subdivided into lots 74 and 75;

(iv) 15 July 2000 – a Community Management Scheme (CMS) for the Scheme was registered;

(v) 25 November 2004 - a new CMS was registered;

(vi) 12 September 2014 – the Body Corporate approved the amalgamation of lots 21, 46, 47 and 48 to create lot 76 on SP 273573 and to amend the CMS for the Scheme accordingly; and

(vii) 9 March 2015 - the current CMS was registered, reflecting the amalgamation that created lot 76.

(c) The CSLEs did not change as a consequence of the 2014 amalgamation or the recording of the 2015 CMS, other than that new lot 76 was allocated the total of the lot entitlements previously held by the four amalgamated lots.

The Tribunal's power to adjust CSLEs

[4] The Tribunal's power to adjust CSLEs is conferred by s 47B of the *Body Corporate and Community Management Act* 1997 (Qld).[1]

[5] For community titles schemes established after the commencement of s 47B, the owner of a lot who believes the CSLEs are not consistent with the 'deciding principle' may apply for an order for an adjustment of the contribution schedule for the scheme. There are separate provisions that may apply where a compulsory acquisition has occurred.

[6] However, for schemes established on or before the commencement of s 47B, it is s 47B(1) that determines whether the Tribunal has power to adjust a contribution schedule. Section 47B(1) provides:

> (1) This section applies if–
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> (a) a community titles scheme is affected by a material change that has happened since the last time the contribution schedule lot entitlements for the lots in the scheme were decided; and
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> (b) the owner of a lot included in the scheme believes an adjustment of the contribution schedule for the scheme is necessary because of the material change.

[7] The underlying philosophy appears to be that, for schemes established before the commencement of s 47B, a lot owner must take the CSLEs as they find them, unless there has been a relevant material change. That is to say, there is no general right to seek an order to ensure that CSLEs for such schemes are determined in accordance with a 'deciding principle'. Rather, it is only if there has been a material change since the CSLEs for the lots in the scheme were last decided that an order may be sought.

[8] As noted above, a new Community Management Scheme ('CMS') recorded[2] in 2015 reflected the 2014 amalgamation of 21, 46, 47 and 48 to create new lot 76. The Body Corporate's primary submission is that the CDLEs were 'decided' at that time. Since the Applicants do not suggest any material change occurred after the 2014 amalgamation, the Body Corporate says it must follow that the Tribunal's power to make an order adjusting CSLEs is not engaged.

[9] Mr Tan, who represented himself and the other Applicant, submitted that, since the 2014 decision on the amalgamation only affected the amalgamated lots, the 2015 CMS in which is reflected is not an appropriate base from which to determine whether any material change has occurred.

[10] In view of the conclusion I have reached – explained below – that there has not been a relevant 'material change', it is not strictly necessary for me to decide which of these submissions is correct. However, since the Body Corporate's submissions relied primarily on the view that the CSLEs were last decided when the 2015 CMS was recorded, I have set out my observations on this issue below.

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[1] All legislative references are to this Act unless otherwise indicated.

[2] It appears to be customary to refer to 'registration' of a CMS. However, the Act refers, for example in s 52, to a CMS being 'recorded'.

When is the last time the CSLEs were 'decided'?

[11] This application raises a point of construction or characterisation that does not appear to have been confronted directly by any of the previous decisions brought to my attention by Mr Hastie, who appeared for the Body Corporate. That is, whether it is correct to characterise the recording of a new CMS reflecting changes in CSLEs for some but not all lots in a scheme as *necessarily* leading to the conclusion that the 'contribution schedule lot entitlements for the lots in the scheme were decided' at that time for the purposes of s 47B(1). It is implicit in the Body Corporate's submission that CSLEs for the lots in a scheme are 'decided' by a change of this kind upon recording of the CMS.

[12] The context in which the question arises in this matter brings it into sharp focus. The only change in the CSLEs reflected in the new (2015) CMS is that the contributions of the four previous lots became collectively the contribution of the single lot. There was no practical impact on the CSLEs of the 60-plus other lots in the scheme.

[13] Could it be said that CSLEs for *the lots* in the scheme were 'decided' by the minor change reflected in the recording of the 2015 CMS affecting only four out of the 72 pre-amalgamation lots, and having no aggregate impact on the lot holder of the amalgamated lot? It clearly did not change the CSLEs for *all* of the lots. Nor could it be said that the change affected the lots as a whole. But to so state is not to answer the statutory question: whether the CSLEs 'for the lots in the scheme were decided' by the recording of the 2015 CMS.

[14] There is nothing in the context of the provision or the explanatory notes to the bill[3] introducing s 47B that directly casts any light on this question.

[15] There is some attraction to the view that a minor change to lot entitlements cannot be said to decide the CSLEs *for the lots* in the Scheme. On the other hand, it would not be surprising if a decision adopting changes affecting a significant proportion although not all lots in a scheme, say 90% of lots, were characterised as deciding the CSLEs for the lots in a scheme, although that would beg other questions: What proportion of lots would be sufficient? How would that be determined? Is the answer ultimately impressionistic?

[16] However, lot entitlements following amalgamation of lots are governed by s 51C, which provides:

> **51C Limited adjustment of lot entitlement schedule—after amalgamation of lots**
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> (1) This section applies if 2 or more lots in a community titles scheme (the ***pre-amalgamation lots***) are amalgamated into 1 lot (the ***post-amalgamation lot***).
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> (2) The lot entitlement for the post-amalgamation lot is the total of the lot entitlements for the pre-amalgamation lots.

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[3] *Body Corporate and Community Management and Other Legislation Bill* 2010.

(3) The owner of the post-amalgamation lot must give the body corporate written notice of the lot entitlement for the post-amalgamation lot.

(4) If the body corporate is given written notice under subsection (3), the body corporate must, as quickly as practicable, lodge a request to record a new community management statement incorporating the change.

Maximum penalty—100 penalty units.

(5) The new community management statement must be prepared and recorded at the expense of the owners of the pre-amalgamation lots.

[17] Two aspects of s 51C are notable in the current context. First, there is no element of decision-making in the determination of the lot entitlement for the post-amalgamation lot, which is determined by operation of s 51C(2). Secondly, nor is there any decision-making in the incorporation of the new lot entitlement in a new CMS nor the request to record the new CMS, as this occurs pursuant to statutory command: ss 51C(3)-(5).

[18] For completeness, I note that in the course of oral submissions, in response to questioning by me, Mr Hastie submitted that CSLEs could be 'decided' without there being a change at all and that 'a decision can be made in relation to something that involves a decision not to change it'. The difficulty with that submission is that there is no decision, even of that character, that can be identified in relation to the 2015 CMS.

[19] Mr Hastie also submitted that the reasoning in *Moses v Body Corporate for Rhode Island Community Title Scheme 205573*[4] provided support for the view that recording a CMS to reflect changes brought about by a subdivision or amalgamation constituted a decision on CSLEs for the lots in a scheme. However, on my reading of the reasons for that decision, the state of the evidence meant that the time the CSLEs were last decided could not be determined with precision and there was no direct discussion of the issue raised by the Body Corporate's primary submission in this case.

[20] Having regard to the contextual considerations indicated above, I would conclude that the recording of a new CMS, which did no more than incorporate a change in lot entitlements arising by operation of the statute upon amalgamation of four out of 72 lots, cannot mark 'the last time the contribution schedule lot entitlements for the lots in the scheme were decided' for the purposes of s 47B.

[21] Determining precisely when the CSLEs were last decided is not without difficulty. The Body Corporate, having relied on its primary submission, did not make any alternative submissions on when the CSLEs were last decided. However, in view of my conclusion below in relation to whether any of the events put forward by Mr Tan constituted a 'material change', it is not necessary to consider this further.

Has there been a relevant material change?

[22] The definition of 'material change' in the Dictionary in Schedule 6 to the Act is relevantly as follows:

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4 [2012] QCAT 322.

> 1 A *material change*, for a community titles scheme, is a change that has, or may have, a significant effect on the contribution lot entitlements for the lots included in the scheme, including, for example-
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> (a) the addition of one or more lots, other than by a subdivision not involving the addition of a subsidiary scheme; or
>
> (b) the removal of one or more lots, other than by amalgamation.

[23] Mr Tan pointed out, with respect correctly, that the express reference to addition and removal of lots in the definition does not preclude other changes that have or may have a significant effect on contribution lot entitlements from being material changes. The Tribunal in previous cases has concluded that the defined expression is confined to changes of a physical nature, such as addition or removal of lots, boundary changes and physical damage or changes to premises.[5]

[24] With this understanding of the definition in mind, I examine the matters Mr Tan submitted constitute material changes.

[25] The first referred to earlier subdivisions. Mr Tan referred, in one case, to the lot entitlements for a pre-subdivision lot being divided equally between the new lots even though the lots were different from one another and, in another, to the lot entitlements for the new lots being apportioned on the basis of floor area.

[26] The difficulty with this submission is that the definition of 'material change', extracted above, expressly excludes subdivisions. The exclusion is for the addition of one or more lots by a subdivision. Although not articulated in such terms, perhaps Mr Tan would argue that the exclusion of the addition of a lot by a subdivision does not exclude the apportionment of the new lot entitlements following the subdivision from being a material change. However, the determination of lot entitlements upon subdivision of a lot is part and parcel of the process of subdivision. It would defeat the exclusion of the addition of a lot by a subdivision, from being a change that has or may have a significant effect on lot entitlements, if changes to lot entitlements as a direct consequence of the subdivision were to be treated as having such an effect.

[27] The second matter raised by Mr Tan was an allegation relating to changes to a wall/window in one lot resulting in it protruding onto common property without an adjustment to the lot entitlement. There is no evidence that there was ever any change to the boundary of this lot registered. An unauthorised encroachment cannot be a material change and in any case I am not satisfied that the aspect to which Mr Tan referred would have a 'significant effect' on CSLEs.

[28] Finally, Mr Tan submitted that change of use of a lot from a restaurant to an office was a 'material change'. Due to the effluxion of time, there was no clear evidence on whether there had been such a change in the course of the history of the lot in question. But in any case a change of use is not a change of the physical kind the Tribunal has previously decided is contemplated by the definition of 'material change'. It would be

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5 *Heaton v Body Corporate for "Windsong Apartments" CTS 31804* [2012] QCAT 45; *Moses v Body Corporate for Rhode Island Community Title Scheme 205573* [2012] QCAT 322.

surprising if a lot owner in a scheme could seek an adjustment to CSLEs any time a change of use of a lot occurred.

[29] These responses to Mr Tan’s submissions are sufficient to conclude that there has been no relevant ‘material change’. It follows that the Tribunal has no power to make the orders sought by the Applicants.

Costs

[30] The Applicants sought an award of costs. Having regard to the outcome of the matter, there is no basis on which such an order might be made.