

**In the Matter of a Dispute under  
the Retirement Villages Act 2003**

BETWEEN

**Ian Brown**  
Applicant

AND

**Metlifecare Kapiti Ltd**  
Respondent

**Decision of Disputes Panel**

**Date of Dispute Notice:** 27 November 2006

**Date of Dispute Hearing:** 26 February 2007

**Date of Decision:** 22 March 2007

The disputes panel appointed under the Retirement Villages Act 2003 to resolve the dispute between the applicant and respondent has decided on the dispute as follows:

**Matters in dispute**

The dispute notice filed and response to the notice is repeated below.

The applicant:

The operator is dictating procedures applicable to the refurbishment requirements on termination of a license to Occupy, which are not in accordance with the resident's contractual rights and obligations as contained in their License to Occupy. [This is] a breach of actual and implied conditions of residents occupation agreement.

The respondent

It is accepted that with the change of ownership of the village the management of the refurbishment process has been refined. It is not accepted that the matter raised is a dispute for which a resident can give a dispute notice under section 53 of the Retirement Villages Act (2003). It is not accepted that the refurbishments process is in contravention of the applicant's licence to occupy

## Panel's decision

The dispute panel has found in favour of the applicant and orders, pursuant to subsection 69(1) (b), that Metlifecare Kapiti Ltd may not impose its preferred procedure for refurbishment as outlined in the *Village Voice* dated 1 October 2006 on Mr Brown.

Although the applicant has been successful no award of costs has been made. Mr Brown represented himself and I am unaware of any costs he has incurred other than his time.

## Reasons for Decision

### 1. Jurisdiction of Panel to hear dispute

The respondent Metlifecare Kapiti Ltd (Metlifecare) has submitted that the dispute is not one for which a resident can give a dispute notice under section 53. Notice was given by the panel member prior to the hearing that the issue of jurisdiction would not be determined prior to hearing on the basis that the wording of section 53(1) (a) in particular the word "affect" was broad and that the process communicated in the *Village Voice* newsletter was arguably a decision by the operator that affected or could affect Mr Brown's occupation right.

A second jurisdictional challenge, non-compliance with subsection 53(2), was withdrawn prior to the hearing.

Section 53 (1) reads:

#### **Types of Dispute for which resident may give dispute notice**

- (1) A resident may give a dispute notice for the resolution of a dispute concerning any of the operator's decisions—
- (a) affecting the resident's occupation right or right to access services or facilities; or
  - (b) relating to changes to charges for outgoings or access to services or facilities imposed or payable under the resident's occupation right agreement; or
  - (c) relating to the charges or deductions imposed as a result of the resident's occupation right coming to an end for any reason or relating to money due to the resident under the resident's occupation right agreement following termination or avoidance under section [31](#) of the resident's occupation right agreement; or
  - (d) relating to an alleged breach of a right referred to in the code of residents' rights or of the code of practice.

Subsection 53 (1) (a) is the sole ground that Mr Brown can rely on. There is no code of practice in force within the meaning of the Retirement Villages Act section 90(1) or (2). The Retirement Villages Association Code of Practice applies as between the parties (due to clause 11(a) of the licence to occupy) but it is not in force. The Code of Residents' Rights is not yet in force, potential costs on termination are not in the nature of charges for outgoings or access to services or facilities nor is the dispute about costs that have been imposed.

Metlifecare submits that as Mr Brown has not given or been given notice of termination that there is no decision made by the operator that affects his occupation right as required by section 53(1)(a).

Mr Brown's response at the hearing to this point is that the process affects his investment. His written submissions do not specifically refer to the objections to jurisdiction to hear the dispute. They focus on the substance of his complaint about the process notified in principle, and in practice. He produced a witness, Mr A, who experienced the refurbishment process under Metlifecare's tenure of the village.

The decision complained about by Mr Brown is the process outlined by Metlifecare that applies when a licence to occupy is terminated.

Metlifecare's objection leads to two possible questions:

1. Does the 'affect' have to be a present affect and if it does, is there a present affect on Mr Brown.
2. Can the 'affect' include a future affect and if so, will there be an affect on Mr Brown's licence to occupy.

Clause 4 (b) of the Licence to Occupy reads:

#### 4. RESIDENT'S UNDERTAKINGS AND OBLIGATIONS

The resident agrees and covenants and undertakes with the company as follows:

(a).....

**(b) To maintain the interior of the unit and chattels supplied by the company and discharge own costs of utilities**

The resident shall keep and maintain and at termination shall deliver up the interior of the Unit and the company's chattels and utilities in a good clean tidy repair order and condition (damage by fire, earthquake or other inevitable accident alone excepted) to the intent that the interior of the unit shall be delivered up to the company on termination in pristine condition suitable for sale.

While it is clear that the process outlined in the *Village Voice* applies at termination, my view is that it also has a present effect. While the standard of the premises required at termination is not changed by the process, after the resident has 'vacated' there is no allowance for any involvement by or consultation with the departing resident or their representatives. Without control or input there is greater uncertainty about likely costs and a decreased ability to control the costs that are imposed on termination. Costs on termination logically must affect the present value of the investment.

What the resident decides to do in relation to the on-going maintenance obligations (to the interior of the unit, chattels and utilities) and in maintaining the same "to the intent of delivering up the unit at termination in pristine condition" may also be affected by what control they have over the refurbishment required at termination. That is, Mr Brown may be required to make a decision now about a maintenance issue and that decision could well be influenced by the process that will be used to determine what work required for resale and depend on the degree of control he has over the decisions to be made.

A further example of a likely present effect is the change to policy in relation to washing machines and dryers also announced as part of the refurbishment process. What may happen

presently if repair or replacement is required prior to termination may be affected by Metlifecare's policy, new to this village, to not supply or retain ownership of these chattels.

I also take the view that an ordinary interpretation of section 53(1) is that an operator's decision about what will happen when Mr Brown vacates his unit and the license is terminated does have an 'affect' on his present occupation right(s). His rights and obligations of occupation are contained in the licence agreement and include terms about termination of the licence. A procedure imposed by one party which is arguably an additional requirement even if it was not considered a breach of the licence, can fairly be described as affecting a resident's occupation right.

Given I accept that there is a present affect, there is no need to determine whether the affect must be present or includes something in the future. It is clear that the refurbishment process outlined would have an affect in the future.

My finding is that there is jurisdiction to adjudicate on the substantive dispute because decisions about how the work required for resale will be assessed and carried out does affect Mr Brown's occupation right(s) despite the license not being terminated and no notice of termination being given.

## **2. Whether the procedure is a breach of a term or implied term of the Licence to Occupy.**

Mr Brown's submission, in summary, is that the procedure outlined is a breach of clause 4(b) because it takes away the resident's obligation and right to deliver up the premises in a condition suitable for resale.

Metlifecare submits the procedure does not breach the contractual rights of residents under the standard licences to occupy. It says they are identified as a guide and while it is the company's preferred process, it is not the only process. It says Mr Brown has been informed throughout these proceedings that residents are not prevented from undertaking the refurbishment work themselves.

To this Mr Brown says the statement that residents may undertake refurbishment themselves was not made until after his dispute notice was issued and the response to it was provided by Metlifecare. In his final submission he suggested an order be made by consent because of the acknowledgment by Metlifecare that its preferred process was not the only process. He referred to the communications prior to the dispute notice and response and says that residents that have left have been denied the right to undertake the refurbishment themselves.

The decision on this dispute has to be based on the situation that existed when the dispute notice was issued.

The wording in the *Village Voice* newsletter describes the process as the process without any suggestion that Metlifecare is promulgating its preferred process. Contrary to the operator's submission about the statement, it does not clearly identify that the outlined process is a guide or *only* a guide. There is no indication that an alternative process for residents to undertake any of the work themselves exists or that they have any say in relation to the decisions to be

made. The description of the process suggests it is mandatory and in the sole control of the operator. It also reads as if determining the process is the operator's right. To illustrate these points, some phrases from the text are repeated. The introduction says that the process is outlined to remove 'some uncertainty' and 'to clarify the situation' and:

'Following vacation we will inspect the unit and list all items requiring redecoration, removal.....'

"Non-standard fixtures and fittings such as ... will be removed if we deem they detract from the value of the unit."

"A quantity surveyor will review both the scope of work and the estimated or quoted costs we have obtained from contractors..."

In correspondence following the newsletter and Mr Brown's formal complaint dated 27 October 2006, Metlifecare Kapiti Ltd, in a letter dated 2 November 2006 addressed to Mr Brown stated:

While your Licence to Occupy clearly spells out that the resident is obligated to return the interior of the unit to the owner in pristine condition, it does not specify how this is to be done. How refurbishment is established and undertaken is a policy matter for the owner to determine, and the owner is not bound by the policy or processes of a previous owner. Accordingly, this change in process is not a contravention of the assurances made to all existing residents by Metlifecare that it would honour their existing Licence to Occupy provisions.

In the response to the dispute notice lodged by Mr Brown Metlifecare accepted that the refurbishment process had been refined but stated it did not accept that the refurbishment process contravened the applicant's Licence to Occupy.

The next document on the issue, prepared prior to the pre-hearing meeting by Metlifecare titled *Position statement – Disputes Process*, describes the process in paragraph 3 as "...guidelines as to how the resident's obligation may be carried out." In paragraph 4 it is stated for the first time that:

While a resident is at liberty to undertake his/her refurbishment work to satisfy the terms of this provision yet the nature and quality of the work must conform to the terms of the obligation. The Company accepts that if a Resident wishes to carry out the work using his own contractor then this is in order subject to the terms of Clause 4(b) being satisfied.

Once Metlifecare made it clear that it accepted that residents were entitled to undertake their own refurbishment process the potential for the dispute to be resolved by consultation or negotiation was apparent. However, the matter was not resolved by a withdrawal of the dispute notice and there were still differences between the parties about the legitimacy of Mr Brown's dispute notice and whether the earlier announcement about the refurbishment process did in fact constitute a breach of the occupation right agreement. It therefore had to proceed to hearing.

In the submissions provided for the hearing Metlifecare, in paragraph 21(a), states the guidelines were clearly identified as a guide and that they were the operator's preferred process.

While I accept that the information is a guide in the sense that it is informing residents about how refurbishment will be undertaken by the operator, I do not accept that it was clearly

identified as a guide in the sense of it being an optional process that residents could elect to use to meet their obligations. I also do not accept that it was clear that the process outlined was the operator's *preferred* process as opposed to *the* process.

Metlifecare further states that the refurbishment process is not 'contractual' and that it therefore cannot override any contractual right of the resident.

The Licence to Occupy does not specify a process for refurbishment or specify how a dispute over the most likely area of difference, the condition in which the unit is returned to the company, will be resolved. Clause 4 (b) clearly puts the on-going maintenance obligation on the resident and the obligation to return the unit to the company in pristine condition suitable for resale. The words "delivered up to the company on termination" makes it clear the Resident has the obligation to ensure the condition is pristine and is inconsistent with the operator taking complete control of the process. If the refurbishment process complained about is undertaken without the consent of a resident it would be a breach of that term. For example, the process purports to allow the operator to have the sole right to determine what work is done, and by who, which is in conflict with the contractual obligation being on the resident to ensure the work required, is done.

While the process does not inevitably prevent the resident doing the work he or she assesses necessary prior to vacating the unit, undertaking work opens the resident to a risk of expending time and/or money on work which the operator may deem inadequate and redo. Because it allows for no resident involvement, except to pay the company's costs of undertaking the work, the company could, of its own accord and without prior notice to the resident completely redecorate and re-carpet a room that had, for example, its carpet cleaned, holes in walls repaired and paint touched up prior to vacation,

The acceptance by the operator that its preferred process cannot override the terms of the contract does not mean its earlier announcement of the process was not in fact a breach of the contract. Had the imposition of the process been accepted as legitimate, Mr Brown's rights and obligations under his licence would be altered.

### **3. Other Matters Raised**

#### Meaning of Pristine

Mr Brown has requested that the Panel consider the meaning properly attributable to the word 'pristine' in Clause 4(b) of the Licence to Occupy. He says the appropriate definition should be ascertained from the context of the clause as a whole and with reference to his original application and the Investment Statement/Prospectus. He has sought an amendment to the Licence to Occupy by replacing the words "pristine condition" to "as when the resident entered it, less allowance for fair wear and tear". I have declined to consider this matter because the request, while related to the issue in the dispute notice, is outside the terms of the dispute that was referred to me. In any event, the power to amend an occupation right agreement under the Retirement Villages Act subsection 69(1) (a) is only to have it comply with an applicable code of practice or section 27(1).

Consultation

Mr Brown also has raised the Retirement Villages Association Code of Practice requirement in Clause 6.1 about structures for consultation and village residents' ability to participate and influence management decision where appropriate. No decision is required on this point because Mr Brown has been successful in his submission that the operator's preferred process, if imposed, is a breach of his licence to occupy. Both parties are aware that occupation right agreements will have to include all the arrangements that apply on termination if or when the Retirement Villages Act Code of Practice comes into force.

.....  
Robyn Wilson  
Single member of disputes panel

22 March 2007  
Date of decision

**Note to parties**

You have the right to appeal against the decision of the disputes panel (or of the District Court sitting as a disputes panel) under section 75 of the Retirement Villages Act 2003. An appeal must be filed in the appropriate court within 20 working days of the panel's decision.

Any costs and expenses awarded by the disputes panel must be paid within 28 days.