IN THE MATTER	of a dispute under the Retirement Villages Act 2003
AND IN THE MATTER	of Summerset by the Course
BETWEEN	**CONSTANCE ETHEL HANNAH CATLEY** by her Attorney **NICHOLAS BENTLEY** Complainant
AND	**SUMMERSET MANAGEMENT GROUP** Respondent

Disputes Panel Member	Mr N J Dunlop, Barrister, Christchurch
Complainant's Representative	Mr Bentley
Respondent's Representative	Mr Conroy
Date of Dispute Notice	23 January 2007
Date of Dispute Hearing	8 June 2007
Place of Hearing	Summerset by the Course, Racecourse Road, Trentham, Wellington
Date of Decision	12 June 2007

DECISION

Introduction

1) This dispute relates to the internal transfer of a retirement village resident from independent accommodation to more supported accommodation. More particularly, it relates to the transfer of Mrs Catley from villa 59 at Summerset by the Course to serviced apartment 119.

2) Mrs Catley is 80 years of age. The dispute notice was lodged on her behalf by her son Mr Bentley who is her attorney pursuant to an enduring power of attorney in relation to property dated 12 December 2006. Such agency is authorised by s49 of the Retirement Villages Act 2003 ("the Act"). Section 49 is in Part 4 of the Act which deals with dispute resolution. It states that:

> *"Any right conferred by this Part on a resident may be exercised by his or her personal representative."*

3) The dispute notice given by Mr Bentley on behalf of his mother stated that the dispute was about the "…ethics, charges and process associated with…" Mrs Catley's transfer from villa 59 to apartment 119. A reply to dispute notice was duly given by the operator Summerset Holdings Limited / Summerset Management Group ("Summerset").

4) The complainant disputes charges totalling $34,489.99. She seeks:

> *"…a refund of the majority of these charges, plus interest and compensation…".*

5) A pre-hearing telephone conference was held on 26 April 2007 attended by Mr Bentley on behalf of the complainant and Mr Conroy on behalf of the Respondent, Summerset and the Panel Member. Such pre-hearing meetings are authorised by regulation 13 of the Retirement Villages (Disputes Panel) Regulations 2006 ("the Regulations"). Before hearing a dispute, a disputes panel must consult the parties on the most appropriate procedure for resolving the dispute (regulation 13(1) of the Regulations). A pre-hearing telephone conference is one means of undertaking that consultation. Such a consultation is directed towards ensuring that the hearing of the dispute is conducted:

> *"…in a manner that is most likely to ensure the fair and expeditious resolution of the dispute". (regulation 20(1))*

Undisputed Background

6) On 22 February 2002 Mrs Catley entered into an occupation licence agreement with Summerset ("the occupation licence"), The licence agreement granted Mrs Catley the right to occupy Villa 59, Summerset Village, Racecourse Road, Trentham from 22 February 2002. The occupation licence was a standard form document.

7) Under the occupation licence, Mrs Catley was required to make an initial payment of $150,000.00. This sum comprised the following:

Deposit	$123,000.00
Community facility fee	$ 27,000.00
Total cost	$150,000.00

8) Pursuant to the occupation licence, the deposit of $123,000.00 was repayable (without interest) to Mrs Catley on termination of the occupancy, as was the community facility fee. The amount of the community facility fee repayable to Mrs Catley was however subject to amortisation (progressive reduction) at the rate of 16.67% per year (or part thereof). 16.67% of $27,000.00 amounts to $4,500.00. At that rate, the $27,000.00 would have fully amortised in 6 years (6 x $4,500.00 = $27,000.00). The effect of this is that Mrs Catley incurred a charge of $4,500.00 per annum for a period of up to 6 years, after which she would no longer incur that charge.

9) On termination of the occupation licence, therefore, Mrs Catley was entitled to the un-expired portion of the community facility fee, but by the end of 6 years she would not have been entitled to any repayment.

10) Additionally, the occupation licence required Mrs Catley to pay Village outgoings throughout her occupancy. These outgoings are essentially a pro rata share of all costs, charges, expenses, wages, salaries, fees and other

outgoings payable by Summerset in respect of the management, supervision and operation of the Village.

11) Mrs Catley was initially satisfactorily accommodated in villa 59. The villa accorded her considerable independence. However, in late 2005 or early 2006, Summerset was approached by Mrs Catley's family who expressed concern about Mrs Catley's health and ability to remain in a villa. It was agreed Mrs Catley would be happier if she were to transfer to a serviced apartment which would provide her with greater companionship and support. Such an apartment was not immediately available.

12) In April 2006 apartment 122 became available. In the event, Mrs Catley did not wish to move into that apartment. However, in the context of the discussions that occurred at this time, a draft termination/transfer statement was supplied to Mr Bentley and Mrs A. The statement recorded that the purchase price of apartment 122 was to be $120,000.00. Mrs Catley would be entitled to repayment of the $123,000.00 deposit referred to above together with the un-expired portion of the community facility fee. A deduction would be made for "re-sale costs on transfer" leaving a provisional balance refund of $5,948.64.

13) Some 3 weeks after Mrs Catley rejected apartment 122 she regretted that decision. Unfortunately, no other apartment became available until August 2006 when apartment 119 became available. That is the apartment which Mrs Catley subsequently purchased and resides in to this day.

14) A critical meeting occurred on 15 August 2006. It was on that date that a post occupation check of villa 59 was undertaken. Earlier that day, Mrs Catley had moved out of villa 59 into apartment 119. In the course of that post occupation inspection, Summerset identified the extent of undoubted or likely refurbishment required to be undertaken in villa 59 in readiness for the new purchasers, Mr and Mrs C.

15) Some relaxation of the usual transfer process was allowed in the case of Mrs Catley by Summerset in order to expedite her transfer into apartment 119 at the earliest opportunity. The documentation relating to the termination of the villa 59 occupation licence and the application for purchase of apartment 119 were not completed until September, well after 15 August 2006 when Mrs Catley moved from villa 59 into apartment 119.

16) In September, Mr Bentley was supplied with a termination/transfer statement and tax invoice ("termination statement") in relation to the termination of the villa 59 occupation licence and the purchase of the apartment 119 occupation licence. It read as follows:

Loan refundable (82% of purchase price of $150,000.00 for Villa 59		$123,000.00
Amortisation Fee over 6 years (18%) (Villa 59)		$27,000.00
Amortisation fee for 4 years 209 days (Villa 59) (22/02/02 to 19/09/06) (including GST of $82.30)	$20,576.71	
Resale costs on transfer (include GST of $383.40) [To be deducted on sale of Serviced Apartment 119]	[$5,250.00]	
Summerset Village Account (Any outstanding village fees and refurbishment costs)	$8,663.28	
Purchase price of the occupation licence for Serviced Apartment 119	$120,000.00	
Balance refundable	$760.01	
	$150,000.00	$150,000.00

17) With regard to the sum of $5,250.00 in the termination statement, paragraph 11.4 of the occupation licence provides that Summerset was entitled to charge Mrs Catley for:

> *"..the reasonable costs of [Summerset] incurred in the reissue of an occupation licence for the Dwelling including either:*
> *(i) real estate agents' commission (if any); or*
> *ii) an amount up to 3.5% of the total amount (Deposit plus Community Facility Fee) paid by [Mrs Catley] to acquire this Occupation licence".*

18) With regard to the sum of $8,663.28, paragraph 11.4 of the occupation licence provides that Summerset was entitled to charge Mrs Catley for:

> *"…the reasonable costs of refurbishment of the dwelling"*.

The refurbishment costs were as follows:

Painting	$3,472.00
New carpet	$4,581.00
Cleaning	$ 391.00
General cleaning	$ 220.00
Total	$8,664.00

The Issues in Dispute

19) Whilst the dispute notice given by Mr Bentley comprised 10 points, they can be summarised as follows. He alleged:

(1) the refurbishment charge of $8,663.28 is excessive because:

(a) no refurbishment charges should have been incurred because Summerset told Mr Bentley that "there would be no cost of transfer" from villa 59 to apartment 119;

(b) in any event the carpet:

i. did not need replacing;

ii. even if replacement was necessary the cost should have been covered by Summerset's own insurance;

(c) and in any event the villa did not require a complete repaint;

(2) the re-sale costs on transfer figure of $5,250.00 should not have been charged and in any event is excessive;

(3) the occupation licence should be overturned as its terms are oppressive and unconscionably unfavourable to Mrs Catley, having regard, amongst other things, to Summerset's profitability.

Refurbishment Costs

20) Mr Bentley's first line of argument was that his mother should not have incurred refurbishment costs because Summerset had represented to him that "there would be no cost of transfer" for his mother from a villa to an apartment.

21) Summerset deny that such a representation was ever made.

22) Mr Bentley's evidence in this regard was in documentary form, confirmed by him in his oral evidence. The Summerset contrary evidence was given at the hearing by Mr John B, the Village Coordinator. He has been the Coordinator at Summerset on the Course since January 2004 and has been involved in all Village re-sales since then. He acknowledged telling Mrs A in April 2006 when apartment 122 was on offer that there would be no shortfall between the repayment sum Mrs Catley would receive in respect of villa 59 and the purchase price she would be required to pay in respect of apartment 119. He said that he would have referred to refurbishment costs at the time because refurbishment costs of some degree are incurred in respect of every transfer.

He said one of the two discussions he had with Mrs Bentley at this time took place in villa 59 and it was evident to him from casual inspection that significant refurbishment would be required.

23) The Panel Member found Mr B to be a reliable and credible witness. The Panel Member accepts that Mr B would not have made any representation to the effect that refurbishment costs would not be incurred by Mrs Catley. Mr B knew that they would be incurred and had no reason to suggest otherwise. The Panel Member finds therefore that there was not a representation by Summerset that either impliedly or specifically stated that refurbishment costs would not be incurred. What Mrs Bentley was told was that Mrs Catley would not be required to find additional cash in order to purchase the apartment. That was in fact the case. As the termination statement referred to in paragraph 16 states there was a credit balance in favour of Mrs Catley resulting from the transfer of $760.01.

24) Mr Bentley's next line of argument was that the carpet which was replaced at the cost of $4,581.00 did not in fact need replacing.

25) In this regard, Mr Bentley's son gave evidence at the hearing that on 15 August 2006 when helping his grandmother move out of villa 59 he had observed just one stain on the carpet, it being near the wall dividing the kitchen from the lounge. He said that in his presence his father had reacted with shock when told that the carpet would need replacing. Mr Bentley produced a letter from the current owners of villa 59, Mr and Mrs C, which states, in part:

> *"There were two minor stains in the living room but the rest of the carpet in the house was in good condition. We thought that a good carpet cleaning would remove the stains".*

Unusually, Mr and Mrs C were in occupation of villa 59 for a short period prior to the carpet refurbishment and so were in a position to observe the state of the carpet.

26) Mr B stated in his oral evidence however that in August 2006 Mr and Mrs C had responded to his statement that the carpet might have to be replaced by words to the effect of “that’s good because it’s not really up to scratch”.

27) Oral evidence was heard from Mr D who like Mr B has been in employment at Summerset on the Park since January 2004. He is the handyman and like Mr B is involved in post-occupation checks. He noticed three stains, namely an orange stain of approximately 100mm x 200mm/300mm in the hallway, a smaller orange stain near the wall separating the kitchen and lounge and a third stain, being the largest of all, in front of the sliding doors. This last mentioned stain was however the least prominent. He anticipated that the two orange stains would come out with cleaning but the one by the sliding door would not.

28) Summerset had the carpet commercially cleaned (at the cost of $391.00) but a flooring specialist, Robert Malcolm, in a letter to Summerset dated 20 November 2006 stated:

> *“As requested, I recently inspected the carpet installed in villa 59 in the Summerset Village located at Racecourse Road, Trentham.*
>
> *I understand that prior to my inspection the carpet had been professionally cleaned. However, bad staining is still apparent in various areas of the carpet.*
>
> *The overall appearance and condition of the carpet has deteriorated to the extent that in my opinion replacement of the carpet is now required, and there would be no residual value in this carpet.”*

29) Summerset proceeded to replace the carpet based on this opinion, an opinion which reflected the views at the time of both Mr B and Mr D that cleaning the carpet may not obviate the need to replace it.

30) The Panel Member finds that the carpet did need to be replaced, despite professional cleaning. The opinion of the carpet expert came as no surprise to either Mr B or Mr D. It is noteworthy that carpet replacement is the exception rather than the rule and so both Mr B and Mr D considered the state of this particular carpet to be out of the ordinary. The observations of these three men arose out of their employment duties. They were required to turn their minds to the issue of replacement of the carpet. That was not the case with Mr and Mrs C who in any event, wrote the letter referred to above very recently and whose earlier comments appear to be contradicted to some degree. Mr Bentley's son was in the villa on 15 August not to carry out an inspection (as were Mr B and Mr D) but to assist his grandmother in shifting to the apartment. His observations were therefore of a casual nature. Mr Bentley (senior) for his part did not have the considerable combined experience of Mr B and Mr D when making his assessment about the state of the carpet.

31) Mr Bentley's next line of argument was that the cost of replacing the carpet should have been met from Summerset's insurance. But Summerset's evidence in that regard was that they did in fact make a claim and it was not accepted.

32) There were similar differences of opinion between Mr Bentley and his son on the one hand and Mr B and Mr D on the other hand with regard to whether the villa needed to be repainted, as there were with regard to whether the carpet needed replacing. It was undisputed that Mrs Catley had many family photographs hung on the walls and that these inevitably left holes in the wall. Mr Bentley regarded this use of the walls as perfectly normal and did not regard the state of the walls as being untoward. Once again, Mr B and Mr D have the real advantage of comparing the state of this villa with other villas and apartments in the Village upon termination of occupancy over a 2 ½ year period. They were both adamant that the villa needed repainting. They both referred to some plastering over of the holes on the wall which had served to worsen rather than improve the overall effect. The Panel Member finds their evidence to be persuasive. In this regard the Panel Member prefers their evidence to that of Mr Bentley and his son. That is not to say that the latter

two were untruthful in their evidence. It is to say that they lacked the experience and perspective of the former two witnesses.

33) It could be said, both in respect of the carpet and the repainting that the decision of Summerset to refurbish in that regard reflected their wish to maintain a high standard of accommodation for its residents. They undoubtedly wish their residents to move into clean and fresh units rather than tired and dull ones.

Re-Sale Costs on Transfer

34) The relevant provision of the occupation licence is referred to in paragraph 17 above.

35) In relation to the sum of $5,250.00, the Panel Member, like Mr Bentley, found the documentation to be less than perfectly clear. It will be seen from the termination statement referred to in paragraph 16 above that the figure of $5,250.00 is in parentheses, because as is also stated in that document, the sum is to be deducted on the sale of apartment 119, whenever that occurs. Paragraph 11.4 however would suggest that the deduction take place on termination of the occupation licence of villa 59. Mrs E, the Group Chief Executive of Summerset said in her oral evidence at the hearing that it was a matter of firm policy to delay the deduction of transfer fees until the time residents leave the Village. This policy is clearly to the benefit of the residents rather than Summerset. However, this policy does not follow through into the subsequent occupation licence agreement which Mrs Catley entered into on 27 September 2006. Paragraph 10.3(c) of the latest occupation licence does state that from the repayment sum otherwise due to Mrs Catley in respect of apartment 119, Summerset may set off any other monies properly due and owing to it. That would presumably include the $5,250.00. It is arguably less than satisfactory however that the sum of $5,250.00 is not specifically referred to in the occupation licence dated 27 September 2006. The Panel Member refers to another perhaps unusual feature of the 27 September 2006 document in paragraph 49 below. But to revert to the termination statement, the principal confusing feature of it is, that

at first blush it appears to be one of the figures making up the $150,000.00 total, when in fact it is completely extraneous to the balance sheet.

36) As already shown in paragraph 17 above, paragraph 11.4 of the occupation licence refers to "the reasonable costs of [Summerset] incurred in the reissue of an occupation licence for the dwelling…". That wording suggests that an *individualised* calculation is to be undertaken so that in this case, the *actual* costs incurred *specifically* in relation to Mrs Catley would be determined, but limited to an amount of up to 3.5% of the deposit and community facility fee.

37) It emerged in the evidence of Mrs E however that Summerset calculates the reasonable costs incurred in the reissue of an occupation licence by means of a *universal* calculation by which such costs across all of Summerset's Villages are *averaged* out. The Panel Member's view is that paragraph 11.4 is capable of the interpretation applied by Summerset but the paragraph could be worded more felicitously. Despite the shortcoming, the Panel Member rules that Summerset was entitled to deduct the $5,250.00 (3.5% x $150,000.00) and then delay that deduction indefinitely to the date of sale of apartment 119 (whenever that occurs).

Unconscionability

38) Mr Bentley characterised his arguments as to refurbishment and costs on transfer as his "micro arguments". His "macro argument" is to the effect that the occupation licence is so weighted in favour of Summerset that it should be ameliorated in some way by the Panel Member.

39) Mr Bentley acknowledged at the hearing that his mother had been legally advised at the time she entered into the occupation licence. Indeed, the solicitors concerned are nearby Upper Hutt solicitors who, according to Summerset evidence, are well familiar with the form of contract concerned. The same solicitors represented Mrs Catley in respect of the more recent occupation licence dated 27 September 2006 which is broadly in the same terms.

40) Mr Bentley was forced to concede at the conclusion of the hearing that Suumerset had not breached the licence agreement.

41) Section 69(1)(a) of the Act states that a Disputes Panel may:

> *"…amend an occupation right agreement so that it complies with any applicable code of practice or s27(1)…"*

Section 69(1)(b) of the Act similarly empowers a Disputes Panel to:

> *"…order any party to comply with its obligations under an occupation right agreement or the code of practice, or to give effect to a right referred to in the code of residents' rights…"*

42) Clause 8 of the code of residents' rights (contained in schedule 4 of the Act) came into force on 1 May 2007 and is a right not to be exploited.

43) The Retirement Villages' Code of Practice 2006 issued by the Minster for Building Issues pursuant to s89 of the Act on 25 September 2006 does not come into force until 25 September 2007.

44) Nonetheless, the above provisions suggest that a remedy might be available in some cases of unconscionability. The common law with regard to unconscionable dealing might also be applicable. The most recent decision of the Court of Appeal in that regard is Gustav & Co Ltd v Macfield (CA, 24/5/07: William Young, Chambers and Arnold JJ, CA 168/05 [2007] NZCA 205).

45) Even if the Code of Practice 2006 were in force, however, it would be far from easy for a complainant to successfully mount such a broad based argument as Mr Bentley endeavoured to do in a circumstance where the resident entered into the occupation licence following legal advice. Further, Mr Bentley offered no expert economic or accounting evidence to support his contentions that Summerset has engaged in what amounts to profiteering. Nor did he offer any evidence comparing the terms of Summerset occupation

licences with those of other retirement villages. Such evidence would be necessary to sustain the type of argument Mr Bentley mounted. He sought to make specious comparisons between the capital gains his son might achieve from purchasing a conventional apartment in contrast to the apparent capital loss arising from his mother purchasing a Summerset apartment.

46) In the face of this wholesale attack, Summerset responded in a dignified and restrained manner. Mrs E, the Chief Executive, made reference to retirement villages offering "a bundle of services and assistance" to their residents. She said that restricting the analysis of resident interests to purely financial issues is unrealistic and amongst other things, does not take account of many intangible benefits which might result from retirement village occupancy.

47) Mrs E made the perhaps telling observation that Mrs Catley had chosen to continue to remain a resident at Summerset by the Course and indeed, the Panel Member took from the evidence of Mr Bentley that apart from the matters he has raised in this dispute, he agrees that his mother has been well cared for by Summerset. His criticisms appear to be aimed at the entire retirement village sector, rather than at Summerset itself.

48) The Panel Member does not discount the possibility that a Disputes Panel might in an appropriate case provide a suitable remedy to a complainant in the face of what lawyers refer to as unconscionable dealing. In this case however, the Panel Member has heard no sound evidence whatsoever to suggest that Mrs Catley has been treated other than fairly throughout. In this regard the Panel Member heard evidence from F who is a legal executive based in the head office of Summerset who completes the legal documentation relating to the occupation licences for Summerset's many retirement villages throughout the North Island. She impressed the Panel Member as a witness. Her evidence was to the effect that there was nothing out of the ordinary whatsoever in terms of the legal formalities which had been gone through in relation to Mrs Catley, in respect of both occupation licences she has entered into. Nor was there anything out of the ordinary in terms of the content of those licences. And she said that documentation sent

to Mrs Catley's lawyer made reference both to the re-sale costs and to refurbishment costs (at that point unascertained). The lawyers confirmed in writing that:

> *"The terms of this investment statement and of the proposed form of occupation licence are in all respects acceptable to and understood by the Applicant".*

49) There is mention in paragraph 35 above of a further matter pertinent to the documentation. That relates to paragraph 4.4 of the original occupation licence. It provides in essence that in the event of a transfer from a villa to an apartment, any remaining un-expired portion of the community facility fee roles over into the new occupation licence arrangements such that in the subsequent occupation licence the community facility fee amortises upon the terms and at the same rate as in the earlier occupation licence. However, the effect of paragraph 4.4 does not appear to be recorded in the occupation licence dated 27 September 2006 which purports to record a deferred management fee of a proportion (20%), amount ($24,000.00), amortisation rate ($4,800.00) and amortisation period (5 years) all differing from that referred to in the licence agreement dated 22 February 2002. It would be in the interests of future certainty and clarity that the favourable terms of paragraph 4.4 be recorded in subsequent occupation licences.

Conclusion

50) For the reasons set out above, the Disputes Panel does not uphold any of the complaints.

51) At the conclusion of the hearing, at the request of Summerset, the Dispute Panel made an order pursuant to regulation 19(2)(c) prohibiting any publication of any description of all or part of the proceedings at the hearing, except this Decision of the Panel. That was because the Disputes Panel gave Mr Bentley full opportunity to present his self-styled "macro arguments" in circumstances where the Disputes Panel might have been justified in restricting his arguments and evidence on the grounds of relevancy and lack

of evidence. Summerset were quite rightly concerned that piecemeal reports of the hearing might be reported and unfairly reflect upon the integrity of Summerset. That order remains in full force and effect.

52) No application for costs was made in this case and no order is made. It is recorded that both parties extended their cooperation to the Panel Member throughout the process and each prepared their cases with considerable thoroughness. The Disputes Panel expects that Summerset will give some consideration to the three points of possible improvement raised in paragraphs 35-37 and 49. above. In this regard, the Disputes Panel records that Summerset at the hearing was admirably frank in acknowledging aspects of its documentation which might be less than perfect, and indicated a preparedness and resolve to consider the matters that were raised during the hearing.

……

N J Dunlop

Single Member of Disputes Panel

……

Date

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) of s75 of the Retirement Villages Act 2003. An appeal must be filed in the appropriate Court within twenty (20) working days of the Panel's Decision