

IN THE MATTER of a dispute under the Retirement Villages Act 2003

BETWEEN **CORNELIA VAN der HULST**

Applicant

AND **DUTCH VILLAGE TRUST**

Respondent

Decision of Disputes Panel

Date of Dispute Notice: 28 February 2007

Date of Dispute Hearing: 03 April 2007

Date of Decision: 18 April 2007

Present at the Hearing :

1. Ms C Van der Hulst, Applicant
2. Support people Mr & Mrs A
for the Applicant
3. Mr B as Trustee for the
Dutch Village Trust

Introduction:

1. The Applicant gave notification of a dispute on 28 February 2007 pursuant to Section 53 of the Retirement Villages Act 2003. The dispute notice is within the time limits set in the Act (Sections 52 and 57).
2. The dispute is one, which is able to be taken. The Applicant is a resident and she seeks resolution of disputes concerning the Operator's decisions:

“(a) affecting the resident's occupation right or right to access services or facilities or(Section 53 (1) (a).)

The Code of Practice 2006:

3. Although the powers of a Disputes Panel include the power to enforce compliance with the Code of Practice, the Code of Practice does not become compulsorily applicable until September 2007, unless Village Operators embrace the Code voluntarily before that date.
4. I am advised that the Dutch Village Trust (the Trust) has not implemented the Code of Practice formally at this time.

Tenancy for Life Agreement:

5. On 01 May 1996 the Applicant and the Trust signed a contract being a *Tenancy for Life Agreement*. The contract sets out the legal terms on which the Applicant occupies her unit, and the obligations of the Trust.

Matters In Dispute:

The Applicant:

6. The Applicant states the issues in dispute are:
 - (a) The length of time the Trust took to undertake repairs to the Applicant's unit. The Trust changed the doorbell to the Applicant's unit without consultation, and removed an internal garage key. The bell and key issues are now resolved. A claim is made for the cost of replacing a security door lock
 - (b) The Village Manager entered the Applicant's unit on 21 April 2006, and other unspecified dates without notice to the Applicant, or express consent from the Applicant. These entries are in breach of the Applicant's rights. The Applicant seeks a written apology from the Village Manager.
 - (c) The Village Manager has been intimidating, and hostile toward the Applicant and unapproachable to the Applicant. The Applicant seeks that the Village Manager be required to undertake a communications

course in her own time and at her own expense, and display, and copy out one hundred times a reminder of Villagers' rights.

- (d) Contractors to the Trust entered the Applicant's unit on 27 August 2006 when the Village Manager was specifically advised that this was not agreed to, while the Applicant was on holiday. The Applicant considers this breached her rights.
- (e) The Trust replaced the Applicant's bench top, hob and sink without consultation with the Applicant as to the type of replacement. The Applicant is dissatisfied with the bench, hob and sink and seeks a replacement into which she has input.
- (f) The Trust, or its employees or agents, moved some of the Applicant's property while the Applicant was on holiday. Any damage has been repaired.
- (g) The Village Manager abused her power and was disrespectful to the Applicant's support person Mr C. The Applicant seeks a written apology be made to Mr C.
- (h) The Applicant seeks that she, her family and supporters be treated with respect and courtesy at all times by the Trust, its employees and agents.
- (i) The Applicant seeks that all Village staff and contractors who need to enter her unit have appropriate identification, provide reasons for entry, and that appropriate notice be given for all future work.
- (j) The Applicant seeks ten thousand dollars (\$10,000.00) damages, and costs incurred of fifteen hundred and thirty dollars and sixty-four cents (\$1,530.64).

The Respondent:

7. The Respondent Trust did not provide a written response to the Dispute Notice.
8. The Respondent Trust, through its Trustee, who was authorised to give evidence on its behalf stated:
 - (a) The Trust did not agree to pay for the lock replacement. It had advised the Applicant she could replace the lock, but at her expense. All other issues in respect to repairs were resolved.
 - (b) The Trust acknowledged that the Village Manager had entered the Applicant's unit without appropriate notice on 21 April 2006, and agreed that the Trust would tender an apology in writing in respect to that incident. The Trust denied any other unauthorized entries into the Applicant's unit by it.
 - (c) The Trust did not consider it should require the Village Manager to undertake the actions requested by the Applicant of a communication course, or display of a reminder of villagers' rights.
 - (d) The Trust considers clause 22 of the *Tenancy for Life Agreement* authorised it to enter the Applicant's unit on 27 August 2007 and replace the bench, hob and taps, on giving of reasonable notice. The notice was given to the Applicant's authorised Agent, and was reasonable.
 - (e) The Trustee would recommend a replacement bench, hob and sink be provided to the Applicant by the Trust. The Trustee saw the bench as a symbol of the Applicant's discontent with the personal dispute between the Applicant and the Village Manager. The Trustee rightfully acknowledged better consultation may have avoided the dispute.
 - (f) All damage to the Applicant's property was repaired after Trust contractors entered the Applicant's unit on

27 August 2006 and moved some of the Applicant's possessions.

- (g) If Mr C requested an apology the Trust would be consider tendering one.
- (h) The Trust would treat the Applicant, her family and supporters with respect and courtesy, and expected the same from the Applicant.
- (i) The Trust considered identification for all Trust employees or agents, reasons being given for an entry, and notice appropriate, for future entry to the Applicant's unit.
- (j) The Trustee disputes that either damages or costs should be awarded, especially in light of his intended recommendation to the Trust.

Findings:

A. Repairs:

- 9. The Applicant claims that there were a number of issues relating to repairs to her unit. At the hearing the Applicant acknowledged all repairs have now been satisfactorily completed. The only outstanding issue was the cost of replacing the security door lock.
- 10. The Applicant seeks reimbursement of one hundred and twenty one dollars and fifteen cents (\$121.15) to replace her security door lock. This was done so that the lock was similar to others in the complex, and so the Trust could easily access the Applicant's unit.
- 11. By letter dated 24 April 2006 the Village Manager indicates that the Trust authorised the replacement of the lock at the Applicant's expense.

Clause 21 of the *Tenancy for Life Agreement* requires the villagers to obtain consent of the Trust, for any structural or

other changes to units. It is implied and usual practice that the costs of such changes are to be met by the villagers.

12. The Applicant's evidence is that the Trust paid for unit X to have similar work done, but no independent evidence or details of this was presented, by the Applicant. The onus is on the Applicant to prove her case.
13. I decline to order the Trust to reimburse the Applicant the cost of the replacement of the security door lock.

B. Entry on 21 April 2006:

14. The Applicant claims the Trust's Village Manager entered the Applicant's unit without authority on 21 April 2006, and at other unspecified times.
15. Clause 22 of the *Tenancy for Life Agreement* states:

"The Resident shall (after having received reasonable notice and without claiming any charge, fee or compensation or payment of any sort) permit the Trust or its agents at all reasonable times to enter the unit for the purpose of executing repairs or alterations or for the purpose of inspecting any wiring, pipes, drains or ducts contained in the unit, provided that such work shall be carried out in a manner as disturbs the Resident as little as possible and any damage so caused shall be made good by the Trust."
16. The Applicant acknowledges that on or about 15 March 2006 there were discussions between herself and the Village Manager, about a faulty kitchen hob in her unit.
17. On 21 April 2006 the Village Manager and a kitchen supplier contracted by the Trust, entered the Applicant's unit without notifying the Applicant, and without her consent, and inspected the hob and bench. The Applicant formally complained about the entry into her unit to the Trust.

18. The Trust Chairman Mr D wrote to the Applicant on 21 January 2007 and stated:
 - (i) *“I will arrange for the Village Manager to provide a written apology for entering your Villa.”*
19. The evidence given at the hearing is that this letter was in respect to the entry into the Applicant’s unit on 21 April 2006.
20. No evidence was given by the Applicant to suggest any damage was done to the unit when the Trust employee and agent entered on 21 April 2006.
21. At the time of hearing no written apology had been tendered to the Applicant, but the Trust, through its Trustee, agreed a written apology was appropriate.
22. I find that the entry of unit Y on 21 April 2006 was in breach of clause 22 of the *Tenancy for Life Agreement* between the Applicant and the Trust. The Trust agreed at hearing to write a letter of apology to the Applicant which is the remedy she seeks. The letter should be provided to the Applicant within 14 days of this decision.
23. No other evidence was given by the Applicant to enable me to make a finding that the Trust or its employees, or agents had entered the Applicant’s unit on other specific occasions, without consent or notice.

C. The Village Manager:

24. The Applicant claims the Trust’s Village Manager has been intimidating, hostile and unapproachable towards the Applicant.
25. The Village Manager according to the Trust’s evidence has managed the Village for nearly two years. The Trustee gave evidence that in his opinion, the issue of the bench and other complaints were more a symptom of a personality difficulty between the Applicant and the Village Manager, rather than a cause of the dispute. The Trustee gave

evidence that perhaps the Manager had stuck to the letter of the law, rather than a more conciliatory approach, as a result of the personality differences. In saying that the Trustee believed that the Village Manager was professional in her dealings with village residents, but acknowledged that he was not present during the interaction between the Manager and the Applicant.

26. The Trust was not able to have the Village Manager give evidence at the hearing as she was on long-term sick leave. The Manager's sick leave was not to be reviewed for two or three weeks. Neither party wished the matter to be adjourned, part heard, to allow the Village Manager to give evidence.
27. The Applicant objected to the Village Manager having provided a statement outside of the time limit for evidence to be exchanged, as set at the Preliminary Conference. Ms E's statement was received at my office on 02 April 2007 at 2.22 p.m. Evidence was to be exchanged by 30 March 2007, with a hearing on 03 April 2007. The Applicant had not been given a copy of the statement and had not had the opportunity to read it, consider it, or prepare her response to it.
28. The Applicant stated she disputed much of what was in the statement, and the Village Manager was not available to confirm her evidence and be questioned upon it. She is unlikely to be available in the near future. Therefore I find the Village Manager's statement presented in a manner which was unfair to the Applicant. I do not rely upon the statement in making this decision.
29. Should the Village Manager return to work, the Trust does not agree to requests by the Applicant, that The Village Manager be directed to make an A4 poster, hang it in her office, and write 100 times "*the Right of Villagers living in Ons Dorp, to have quiet and peaceful habitation, without intrusion to their person, and their private space to be respected at all times.*" The Trust does not agree that the Village Manager should be required to undertake a

communication course in her own time, and at her own expense.

30. I do not have jurisdiction to direct the Trust to require the Village Manager to make the poster and write it out 100 times, or undertake the communication course. It is for the Trust to direct its employees as it sees fit in this instance.

D. Entry on 27 August 2006:

31. The Applicant considers the Trust entered her unit on 27 August 2006 without legal right.
32. The Applicant advised the Village Manager by way of letter dated 10 April 2006 from Mr C of Arahina Services as follows:

“Corrie Van der Hulst will be away from the Village from 23 April to 10 October 2006, visiting family in the Netherlands. While she is absent she does not wish anyone to enter her unit (No Y) except if necessary to attend to the emergency alarm bell and / or the smoke alarm system.

Please do not arrange for any maintenance or refurbishment to be carried out in her absence.”

33. The Trust’s evidence is that the Village Manager instructed Burke Melrose, Solicitors, to write to Mr C as Agent for the Applicant, advising its interpretation of clause 22 of the *Tenancy for Life Agreement* already quoted.
34. The Trust’s evidence was that Mr C, as the Applicant’s Agent, was then given notice on 31 July 2006 of an intention to enter the Applicant’s unit on 27 August 2006, pursuant to clause 22 of the *Tenancy for Life Agreement*. This was to replace the faulty hob and bench top
35. The Applicant did not have Mr C available as a witness to confirm, if and when, notice was given to him. The Applicant however did not dispute that Mr C was her Agent, and that he did agree to the Trust entering and undertaking the work in the kitchen. The Applicant states

however, that Mr C was manipulated by the Village Manager into that position. There was no evidence given to substantiate that allegation.

36. I find that the Trust had the authority to enter the Applicant's unit with notice. Such notice was given to Mr C, as Agent for the Applicant, on 31 July 2006 for an installation to occur on 27 August 2006. I find that the notice given from 31 July 2006 to 27 August 2006 was reasonable notice.
37. I therefore find there was no breach of the *Tenancy for Life Agreement* in respect to the entry to the Applicant's unit on 27 August 2007. The Trust had the right to enter the Applicant's unit with reasonable notice, which was given to the Applicant's Agent.

E. Replacing the Bench:

38. The Applicant considers she should have been consulted about whether the bench needed replacement, and at the very least had input into its replacement.
39. The Applicant consented to a viewing of the replacement bench during the hearing. The parties and myself also saw a bench in another unit, which was said to be similar to the bench the Applicant had previously had.

The Applicant finds the bench, hob and kitchen tap unsatisfactory, and refuses to use the new hob, which was covered with a cloth when we visited. The Applicant gave evidence that she is unable to use the hob for making preserves, that a bucket will not fit under the current kitchen tap, that there is no lip on the bench and liquids run off, and that there is a long and unsightly joint right across the bench. The Applicant wants a replacement bench, hob, sink and kitchen taps similar to her old ones, or at least with features which allow her to use the items to her satisfaction. The Applicant wishes to have input into the type of bench, hob and taps.

40. The *Tenancy for Life Agreement* between the Applicant and the Trust provides for rights of occupation only. In clause 19 of the Agreement, for instance, residents are able to make structural or other changes to the unit, but only with the written permission of the Trust. Clause 21 requires that on vacating the unit the Trust may require the unit to be restored to the position and condition it was in, prior to any approved alterations.

The above-mentioned clauses do not necessarily assist in that the Applicant did not want alterations done, and in fact opposed such alterations, at least while she was not present. The clauses do however show the limits of the Applicant's rights under the Agreement.

41. The Applicant gave evidence that other village residents, had had the opportunity to choose the style, and colour of their bench. They were even able to upgrade to a more expensive bench if they chose to pay the difference.
42. The Trustee at the hearing, did not know if other residents had had input into selecting benches, but considered it would be reasonable for such an approach to be taken.
43. I find there is no contractual right for the Applicant to have input into alterations such as replacing the bench except at the Trust's discretion.
44. I find the Trust has no contractual obligation to consult the Applicant regarding alterations such as replacing the Applicant's bench, hob and sink. However as the Applicant lives in the unit, it would have been good practice for the Trust to consult. Good public relations would also dictate that the Applicant should have had the same opportunities to be consulted as other residents, if they have been consulted in the past. Consultation with the Applicant about the bench, however difficult, may have reduced the Applicant's concern significantly, and the need for this hearing.
45. I hope for the Applicant's peace of mind, and the Trust's reputation with the Applicant and other residents, that the

Trust will consider favourably the Trustee's recommendations, that a replacement bench, hob and taps be provided to the Applicant, in consultation with her as to type. Once the Code of Practice 2006 is implemented in full it will be necessary for consultation pursuant to Schedule 4 of the Code.

F. Moving of Property:

46. The Applicant gave evidence that upon her return to her unit around 10 October 2006, she thought that she had been burgled. The microwave had been shifted from the bench to another space in the kitchen, some preserving jars which had been in the kitchen were lying on their sides in various parts of the lounge area, a screw had fallen out of an extending lamp which is attached by the entrance to the kitchen, and some personal papers were moved.
47. The Applicant alleges that there was sawdust in her cupboards, dust over many items in the house, and a leak underneath the sink where the new sink had been installed. A kitchen towel had been damaged.
48. The Applicant's evidence was that she cleaned up the mess, and that the Trust employed a plumber to fix the leak. The Applicant fixed the lamp herself, and the Trust replaced the damaged towel.
49. The Applicant's evidence was that she is unable to sleep and feels insecure because of the way she found her unit on her return, and the subsequent manner in which the Trust has dealt with the matter. No independent evidence was provided as to the link between the disturbance to the Applicant's possessions, and the Applicant's sleep loss or insecurity.
50. I consider, as acknowledged by the Trust at the hearing, that matters could have been handled more appropriately. When the Code of Practice comes into force in September 2007 the Trust will need to have in place more adequate arrangements to protect the village residents' rights.

51. There is no proof of damage to the unit, and insufficient evidence of the effect of the disturbance of possessions on the Applicants sleep pattern, or feelings of insecurity, to make a finding in the Applicant's favour, on the issue of the moved items.

G. Mr C:

52. The Applicant gave evidence that Mr C, her Agent was upset at his treatment by the Village Manager, when he gave consent as Agent for the bench replacement to occur. Mr C is a professional person, and there was no direct evidence of upset by him. Should Mr C contact the Trust, it has indicated it will respond to him.
53. I have no authority to order a letter of apology to Mr C, but am heartened by the Trustee's approach, who indicated if Mr C made contact, it would be dealt with in an appropriate manner.

H. Treatment of Applicant and Others:

54. The Applicant seeks she and her family and others be accorded respect by the Trust.
55. The Trust has agreed that all persons, including the Applicant, her family and support persons, should be treated with respect and courtesy at all times, and note that those courtesies should also be extended by the Applicant to the Trustees and the Trust's agents.
56. I cannot make orders to require respect, but certainly hope the hearing of this dispute will issue in a new era of co-operation. When the Code of Practice is in force, the Trust will be required to comply with the requirements in the Code of Residents' Rights, which includes the right to be treated with courtesy, and have rights respected.

I. Future Entry Process:

57. The Applicant seeks in future all Village staff and contractors should have appropriate identification if they wish to enter the Applicant's unit, that reasons be provided for the need to enter, and notice given.
58. The Trust accepts that is appropriate. I cannot make orders to this effect, but hope the Trust will abide by its undertaking, on the basis of it being good practice. Once the Code of Practice is in force more recognition will be available to residents in these areas of concern to the Applicant.

J. Damages and Costs:

59. The Applicant seeks damages of ten thousand dollars (\$10,000.00) and costs of one thousand five hundred and thirty dollars and sixty-three cents (\$1,530.63).
60. The Trust opposes such orders and states that there were no specifics given as to why damages should be ordered. In respect to costs the Trust stated that many of the costs sought were not reasonable to claim, such as accommodation for the Applicant while visiting her support persons in Hamilton, bus fares to and from Hamilton, and her support person's time and costs and toll calls with various people.

Costs:

61. The costs the Applicant seeks are as follows:

(i)	Solicitor's costs	\$923.75
(ii)	Toll calls to the Trust & employees	1.44
(iii)	Power used in unit	1.50
(iv)	Photograph costs for evidence purposes	5.80
(v)	Photocopying	40.00
(vi)	Stamps to the Statutory supervisor & faxes	2.00
(vii)	Toll calls, faxes and stamps to Retirement Village association	2.90

(viii)	Letters to the Trust & bus fare to deliver Dispute notice	12.90
(ix)	Letters & toll calls to support person	16.50
(x)	Payment to support persons	50.00
(xi)	Bus fares to / from Hamilton to visit s/person	33.30
(xii)	Accommodation in Hamilton	50.00
(xiii)	Support person's time at hearing & Petrol	260.00
(xiv)	Replacement of security door lock	121.15

Total: \$1,530.64

62. Section 74 of the Retirement Villages Act 2003 states:

“Section 74 – Costs on Dispute Resolution.....

(2) *whether or not there is a hearing, the disputes panel may --*

(b) award the applicant costs and expenses if the Disputes Panel does not make a dispute resolution decision in favour of the Applicant but considers that the applicant acted reasonably in applying for dispute resolution.....

(3) *The disputes panel must make a decision whether to award costs and expenses under this Section and the amount of any award –*

(a) after having regard to the reasonableness of the costs and expenses and the amount of any award incurred by the applicant or other person in the circumstances of the particular case; and

(b) after taking into account the amount or value of the matter that is in dispute, the relative importance of the matters in dispute to the respective parties, and the conduct of the parties; and

(c) in accordance with, and subject to any limitations prescribed in, any regulations made under this Act for the purpose.....

(4) any person against whom costs and expenses are awarded under this Section must pay them within twenty-eight (28) days of the decision to award them.”

63. The Applicant claims various sums to pay for consultation and costs in respect to her support people who attended the hearing with her. The Code of Residents' Rights, yet to be implemented, states that support people's costs are to met by the Applicant.
64. I decline to make an order for costs for the support people, or the sums sought by the Applicant to consult her support people. I consider those expenses were the choice of the Applicant, and she should meet them accordingly.
65. Some of the other expenses claimed do not specifically relate to this hearing, such as communication with the Retirement Village Association and Statutory Supervisor. I therefore decline those claims.
66. The costs of the photographs should be met by the Applicant, as an expense she chose to make. There was no evidence presented of the need for 200 pages of photocopying, and hence that cost is refused.
67. The replacement for the security door lock has been addressed earlier in this decision.
68. The Applicant was not represented by a Solicitor at the hearing. She seeks the sum of nine hundred and twenty three dollars and seventy five cents (\$923.75) for consulting a Solicitor in respect to this dispute.
69. I order the sum of two hundred and fifty dollars (\$250.00), as a contribution to the Applicant's legal costs.
70. Pursuant to Section 74 (4) of the Retirement Villages Act 2003 the Trust must pay the awarded costs within twenty-eight (28) days of this decision.

Damages:

71. The Applicant seeks the sum of ten thousand dollars (\$10,000.00) damages for “*breach of rights, humiliation, disgraceful treatment, adding injury to insult, causing considerable damage to my health and well being.*”
72. At hearing the Applicant was not able to give greater detail than she had already provided, or specify in any way, how she has assessed the damages claim. It is understandable that the Applicant does not have legal knowledge of the manner in which damages can be sought and ordered. The Applicant’s claim appeared to relate to all issues before the Panel.
73. Section 69 of the Retirement Villages Act 2003 states:
- “69 Powers of Dispute Panel (1) a disputes panel may....
(e) not impose any other obligation other than in relation to the payment of costs on any party...”*
- I do not consider I have authority to entertain a claim for damages.
74. The Court of Appeal in **Paper Reclaim Ltd v Aotearoa International Ltd** [2006] 3NZLR 188 discussed the trend of overseas authorities against availability of exemplary damages in breach of contract cases. The Court held it was appropriate that New Zealand should conform to that trend.
75. I decline the Applicant’s application for damages.

Claudia Elliott
Panel Member

26/3/07
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 Dispute Panel) of Section 75 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.