

UNDER: The Retirement Villages Act 2003

DECISION OF DISPUTES PANEL

Name of applicants in dispute: Colin Perry, John Emery and Peter Maunder

Name of each respondent in dispute: Waitakere Group Limited

Date of dispute notice: 1 August 2007

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

Matters in dispute

The applicants claimed that the respondent had failed to comply with Regulation 49(d) and (e) of the Retirement Villages (General) Regulations 2006 by failing to keep with one or more financial institutions accounts in the name of the village and failing to pay into any such account money received by the respondent as operator in connection with the village.

Findings on material issues of fact

1. I held a hearing on this dispute on 10 October, 2007. This was attended by the applicants, Colin Perry, John Emery and Peter

Maunder; and three persons representing the respondent namely Michael Oliver, Aidan Craig and Garth Taylor. I had had a pre-hearing meeting on 26 September 2007 after which I gave certain directions. I had been requested by the applicants to allow recording of the hearing which I agreed to do on the basis that a recording was made on behalf of the applicants and the tapes from the recording would be held as part of the record.

2. I had questioned the identity of the applicants because the Complaints Concerns and Compliments Form which started this dispute referred to the Residents Committee and was signed by Mr Perry. The letter dated 1 August 2007 requiring the dispute to be dealt with under the Retirement Villages (Disputes Panel) Regulations 2006 was from the Waitakere Gardens Residents Association Inc and was signed by the secretary thereof. The reply from Vision Senior Living Limited dated 8 August 2007 was addressed to that Association. I was told that the applicants were the three persons named.
3. I had also raised the question of the basis on which the dispute had been initiated which could be said to give me jurisdiction to deal with it and to rule on it. I referred to the express provisions of s.53 of the Retirement Villages Act 2003 which proscribe the types of dispute for which this process is available. This was a matter which was raised by the respondent in its letter to the Waitakere Gardens Residents Association Inc dated 13 August 2007. This question was also relevant to the powers I have under s. 69 of the Retirement Villages Act 2003.

4. Section 53 provides as follows:

“53 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.”

5. At the hearing Mr. Perry submitted to me that this dispute fell within the provisions of s.53(1)(b) above. He referred me to Schedule One to the Occupation Licence for residents of the village. Whereas an earlier form of that Schedule did not include it, a more recent version included:

“The Village Outgoings include (without limitation):

.....

(o) registration fees and levies relating to a membership of the Retirement Villages Association of New Zealand (Incorporated) or any similar association”.

He argued that that change to the Schedule qualified the dispute for dispute resolution by a disputes panel. The matter was not

aggressively argued at the hearing by the respondent; and I rather took it that it was acquiescing in my having jurisdiction to resolve the dispute. The respondent faced the substance of the complaint and defended its position as set out below. Jurisdiction cannot be conferred by consent. I have significant doubt that this dispute is one which falls within s.53. There is no suggestion that the new Schedule One has been imposed on any of the three applicants or that their rights are in any way compromised by the fact that there is now a new version of Schedule One for other occupants.

6. So far as any order that I can make as disputes panel is concerned, s.69 of the Retirement Villages Act 2003 provides:

“69 Powers of disputes panel

- (1) A disputes panel may—
- (a) amend an occupation right agreement so that it complies with any applicable code of practice or section [27\(1\)](#); or
 - (b) 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; or
 - (c) in the case of a dispute with the operator concerning the liability for, or payment of, any monetary amount, order the operator or, as the case may be, the resident to pay or refund all or part of the amount in dispute; or
 - (d) in the case of a dispute where the operator is not a party to the dispute,—
 - (i) order a party to return to the other party specific property not exceeding \$1,000 in value; or
 - (ii) order a party to pay the other party an amount by way of compensation not exceeding \$1,000; or

(e) not impose any other obligation other than in relation to the payment of costs on any party.

(2) For the avoidance of doubt, a disputes panel may amend an occupation right agreement to comply with a provision of the code of practice from which the operator of the retirement village is exempted from complying, but the disputes panel must make the amendment subject to that exemption while it is in force.”

7. I asked the applicants what relief they were seeking from me as disputes panel having regard to the provisions of s.69 as above. Mr. Perry said that they were seeking relief of the kind mentioned in subparagraph (b), namely an order that the respondent comply with its obligations. He said that it had obligations under the relevant regulations and was required to comply with those. He argued that I could order the respondent to do so under s.69(1)(b).

8. I do not accept that. The section is clear that I can only order compliance with 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. Quite apart from the question of whether the respondent is in fact complying with its obligations under Regulation 49 (d) and (e) of the Retirement Villages (General) Regulations 2006, that is an obligation that it has by virtue of those Regulations and is not an obligation owed under an occupation right agreement or a code of practice or a code of residents’ rights. Even had I found non-compliance with the Regulations, I would not have found that I had jurisdiction to make

any order that I am empowered by the Retirement Villages Act 2003 to make.

9. At the heart of this dispute is whether the respondent is complying with the provisions of Regulation 49 (d) and (e) of the Retirement Villages (General) Regulations 2006.

10. Those subparagraphs provide:

“49. A Deed of supervision ... must include provisions requiring the operator of the village -

...

(d) to keep 1 or more financial institutions accounts in the name of the village; and

(e) to pay into any such account money received by the operator in connection with the village; ...”

(emphasis added)

11. It will be seen first that the requirement of the Regulation is for what must be in the Deed of Supervision. I was provided with the Deed of Supervision and it was clear that that Deed did include exactly that provision. That was acknowledged by Mr. Perry and the applicants. That alone effectively disposes of the dispute.

12. What was of real concern to the applicants, however, was that the respondent was not complying with its obligations under **the Deed**, that is that although the Deed of Supervision included that provision the respondent, as operator of the village, did not in fact keep the accounts in the name of the village as required by the Deed of Supervision.

13. It was common ground that there are accounts kept with a bank (which is a financial institution as mentioned) but these were not in the name “of the village”. I was given a sample of the bank statement with that bank which showed the account in this name:

“Vision Waitakere Gardens
Waitakere Group Ltd”

14. I was also given a letter from the bank which stated:

“... to open a bank account the company must be a legal entity.”

15. I accept that entirely. It is basic banking, if not general, law that property, including a bank account, must be owned by a legal entity, that is a body recognised by law as a person. There is no legal entity as such named “Vision Waitakere Gardens” and it is unlikely to be possible in law for there to be a bank account owned in that name; it is certainly the case that with the bank in question it was not prepared to have a bank account owned in that name.
16. I was advised by the respondent that detailed accounts for the village are kept and significant details of the receipts of residents’ levies and the payments from these are provided to the residents annually and discussed with them.

17. The requirement of the Deed of Supervision (based on the Regulation) for an account in the name “of the village” is completely satisfied, in my opinion, by the arrangement that the respondent has with its bank for the account in the name shown above.

18. I am reinforced in that view by a letter which was sent to by the Statutory Supervisor to the respondent dated 24 August, 2007 confirming that in its view the requirements of Regulation 49 have been met with the arrangement above. Clearly at least the Statutory Supervisor is satisfied that the Deed of Supervision is being complied with. The applicants referred to an exchange of emails in May 2007 between the respondent and the Statutory Supervisor claiming that that had suggested that the Statutory Supervisor did not accept the banking arrangement as complying with the deed. They pointed to the fact that the Statutory Supervisor had sought some ruling on this issue from the Department of Building and Housing. My reading of those emails indicates that, while there was some exchange and discussion about the topic, eventually the Statutory Supervisor was satisfied with the position taken by the respondent.

19. It was argued for the applicants that there were funds being placed in the bank account in question other than residents’ levies. That was not denied by the respondent which argued that it was entitled to do so and that it would be completely impractical if it had to maintain separate bank accounts for different categories of funds that it was holding. While practicality cannot

be a defence to clear breaches of the regulations, I am not satisfied that the Regulations require a separate account for residents' levies. There is no inclusion of the word "only" in regulation 49 (e) and even then, the obligation is to pay money received by the operator in connection with the village and that does not in itself distinguish residents' levies from other monies received.

20. The applicants referred to various sections of the Retirement Villages Act 2003 including s.3, which they said placed major emphasis on the protection of the interests of residents. They referred to the requirement for operation of a village in a legal frame work which is readily understandable. They referred to the right under s.34 for a resident to be supplied with information relevant to the charges levied on the resident; and to s.7 obliging an operator to perform obligations imposed under the Act. They submitted that non-compliance with Regulation 49 by the respondent led to a failure to protect the interests of residents as required by s.3 and placed the operator in breach of s.7. While I am mindful of those sections and the various protections for residents of retirement villages under the Act, I am also mindful that the scheme of the Act includes the requirement for a Statutory Supervisor and for the supervision by that Statutory Supervisor of the operation of the village by the operator. For example the obligation in s.42(b) is for the Statutory Supervisor to monitor the financial position of the retirement village. It is in that context that there are the

various requirements for what is to be included in a Deed of Supervision.

21. The applicants also referred me to certain events in the past. They referred me to the Deed of Participation dated 24 April, 1998 and various of its terms. So far as the applicants are concerned, that Deed has been replaced by a Deed of Supervision dated 17 May, 2007 between various parties but including the respondent and the present Statutory Supervisor. Under clause 27 of that Deed of Supervision certain rights are preserved in this way:

“27. ... This deed amends by way of replacement the Original Deed of Participation ..., provided that any term in the Original Deed of Participation which, in the opinion of the Statutory Supervisor, is materially more favourable to Residents shall be deemed to be incorporated in this deed and shall prevail over the provisions of this Deed, but only in relation to the Residents of the Village in occupation prior to the date of this deed.”

22. It was argued for the applicants that that clause 27 preserved certain relevant provisions of the 24 April, 1998 Deed of Participation. It was accepted by the respondent that each of the applicants was entitled to the benefit of clause 27, they all having been residents of the village prior to the date of the Deed of Supervision, 17 May, 2007.

23. The terms of the Deed of Participation dated 24 April, 1998 on which the applicants rely are first clause 3.10 which reads:

“The company will establish, and maintain at all times, a separate account at a registered bank that is used only for the collection and

distribution of maintenance costs of the Scheme for which the Occupiers are liable and will pay into and distribute from that separate account all receipts and payments on account of those maintenance costs”.

24. The expression “Scheme” is defined in clause 17.1 of that deed as meaning:

“... The scheme for the management and operation of the Village in providing accommodation and related facilities and services for men and women generally not less than fifty-five (55) years of age”

25. The applicants also referred me to clause 3.3 (f) and (j) of the Deed of Participation. In reading the subparagraph of a clause, just as with the subparagraph of a regulation, it is necessary to read the opening words as well. The relevant provisions of clause 3.3 relied on by the applicants are therefore:

“3.3 The Company covenants with the Statutory Supervisor that it will carry out the management of the Scheme to the best of its ability and in particular that:-

.....

- (f) It will give the Occupiers free of charge on request, a copy of the most recent financial statements of the Scheme and on [sic] the company, and a copy of any registered prospectus for the Scheme.

.....

- (j) It will establish an account to be kept in the name of the Scheme at such bank as it may decide and shall ensure that all money received on behalf of the Scheme is paid into the bank account as soon as practicable.”

26. In reliance on all those provisions, the applicants argued:

26.1. The provisions from clauses 3.3 and 3.10 of the Deed of Participation dated 24 April, 1998 which I have cited are provisions which are “materially more favourable to the residents” and therefore are, or should be, deemed to be incorporated in the Deed of Supervision dated 17 May, 2007.

26.2. Those provisions, especially clause 3.10, oblige the respondent to have a separate bank account for collection and distribution of maintenance costs of the Scheme (as defined in clause 17 and set out above).

26.3. The precise definition of the word “Scheme” and the requirement of clause 3.10 mean that the operator is in breach of its covenants under the Deed of Participation insofar as it has a bank account which has **more** than funds for maintenance costs.

27. In reply the operator argued:

27.1. This was not an issue which had been raised by the dispute notice and therefore could not be the subject of any ruling from me.

27.2. The totality of the Scheme referred to in the Deed of Participation dated 24 April, 1998 must be considered to

determine the respective obligations of the parties to that Deed and in particular those mentioned in the clauses in question. It emphasised that clauses 2 and 3 outlined the obligations on the part of the operator and the entitlements on the part of the residents.

28. In my view this issue is not one which has been raised by the dispute notice. The dispute notice clearly refers to the failure of the respondent to comply with obligations under the Regulations. That is the question that I have been asked to rule upon. Questions of compliance with the provisions of the current Deed of Supervision dated 17 May, 2007 and terms in the earlier Deed which may or may not have been carried through by virtue of clause 27 are outside that dispute. For me to be able to determine that question I would need first to decide the obligations under the Deed of Participation dated 24 April, 1998, secondly whether these are “materially more favourable to Residents” than the provisions of the current Deed of Supervision dated 17 May, 2007, and thirdly whether there has been a breach of those obligations.
29. Not only that but there is the question of who has the right to complain about any alleged breach. The application of clause 27 of the Deed of Supervision dated 17 May, 2007 lies with the Statutory Supervisor. It is for that party to determine whether the provisions of the original deed are “materially more favourable to Residents”. Furthermore the residents are not parties to either deed and questions of the breach of the terms of the deeds lie

primarily with the parties to it (although I acknowledge that the applicants may have rights under the Contracts (Privity) Act 1982). The Statutory Supervisor has not taken any issue with the respondent on this question. These questions are a far cry from the dispute that I have been appointed to resolve.

30. Even if this question had been properly put to me, I would not have been satisfied that there has been a breach by the respondent of its obligations under the respective Deeds. The contractual obligation in clause 3.10 was for the respondent to establish a separate account “for the collection and distribution of maintenance costs of the Scheme”. Although the word “Scheme” is defined in clause 17 as set out above, that is a general definition referring to “the management and operation of the Village in providing accommodation and related facilities and services”. The account that the respondent has with Westpac Bank and into which residents’ levies and other monies are paid is apparently only used for the management and operation of the Village. Although there are other monies than residents’ levies paid into that account, the monies paid in are apparently only used for that purpose, that is for the purposes of the “Scheme” as defined. Even if I had to decide the matter (and it is for the Statutory Supervisor), I could not have said that the provisions of clause 3.10 were materially more favourable to residents than clauses in the new Deed of Participation, particularly having regard to the statutory and regulatory requirements that are imposed on village operators.

31. Taking all these matters into account, I have decided this dispute in favour of the respondent, Waitakere Group Limited, that is, that it is complying with regulation 49(d) and (e) of the Retirement Villages (General) Regulations 2006. The Deed of Supervision does contain provisions required by those Regulations. In my view the respondent is complying with the provisions of that Deed by keeping with one or more financial institutions accounts in the name of the village and by paying into any such account money received by the operator in connection with the village.
32. I think that the applicants perceived the weakness of their position because at the hearing Mr. Perry referred to “other options which could be pursued to give compliance” which he said referred to a joint approach from the respondent and the residents for an amendment to Regulation 49. That seems to me to be a clear acceptance that there has presently been no breach of Regulation 49 as it presently stands.

Costs

33. The respondent has sought costs against the applicants. The provision for costs under the Retirement Villages Act 2003 is in s.74 which reads:

“Costs on dispute resolution

- (1) The operator that appoints a disputes panel is responsible for meeting all the costs incurred by the disputes panel in conducting a dispute resolution, whether or not the operator is a party to the dispute.

- (2) Whether or not there is a hearing, the disputes panel may—
- (a) award the applicant costs and expenses if the disputes panel makes a dispute resolution decision fully or substantially in favour of the applicant:
 - (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 the dispute resolution:
 - (c) award any other person costs and expenses if the disputes panel makes a dispute resolution decision fully or substantially in favour of that person:
 - (d) in a dispute where the operator is not a party to the dispute, award to the operator, by way of refund, all or part of the costs incurred by the disputes panel in conducting a 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 matters 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 28 days of the decision to award them.”

34. The respondent argued that the dispute was frivolous; that there had been a high level of consultation; and that the respondent had

acted in good faith. Its submissions referred to “a minority belief” but I do not know the extent to which the applicants represent other residents in the views they have expressed.

35. The applicants disputed that the claim was vexatious. They said that they had tried many times to obtain the information that they sought and to which they said they were entitled.
36. It will be seen that the jurisdiction to order costs is discretionary (“may”). Any award that I may make would be under s.74(2)(c) because the respondent is in this regard an “other person”. Certainly my decision is fully in favour of the respondent.
37. There is one ancillary matter, and that is whether I have jurisdiction to order costs at all. Clearly if this is not in fact or in law a dispute of the type for which a dispute notice may be given under s.53, then not only do I have no jurisdiction to determine the dispute but I also have no jurisdiction to order costs. As I have said above, the claimants certainly claim I have jurisdiction and the respondent appears to have acquiesced in my deciding the dispute. The claimants cannot claim jurisdiction to resolve the dispute on the one hand but dispute jurisdiction to order costs on the other. Likewise, the respondent, having responded to the dispute notice and faced the substantive issue at the hearing can now properly seek costs.
38. There is one other matter that needs mention. The power to award costs under s.74(2)(c) refers to “costs and expenses”. This

contrasts with the power to award costs under s.74(2)(d) in a dispute with the operator is not a party which speaks of a “refund ... of the costs incurred by the disputes panel in conducting a dispute resolution”. My view is that the power under s.74(2)(c) (applicable in this case) does include the costs **of** the disputes panel.

39. In considering costs I am obliged to take into account the three matters listed in s.74(3) above and I make these comments:

39.1. The respondent did not refer to any specific costs and expenses that it had incurred and I take it that it is only seeking reimbursement of my costs and expenses as dispute panel and I (perhaps inevitably) consider these are reasonable.

39.2. There is no monetary amount or value on the matters in dispute in this case. Certainly the matter appears to have significant importance to the applicants. While the respondent referred to the claim as being “frivolous”, I perceived that the matter was of importance to it first because of any general principle and secondly because it considered that it was significantly complying with its obligations, and indeed exceeding those obligations. I cannot speak too highly of the conduct of both parties in relation to this dispute. The pre-hearing meeting I had and the hearing itself were conducted succinctly, comprehensively and with focus.

- 39.3. I am not aware of any limitations prescribed by regulations.
40. One comment made to me by Mr. Perry which I thought was relevant to the question of costs was near the conclusion of the hearing and he said that the applicants were merely seeking an independent opinion on this issue and they had brought the dispute notice accordingly. Of course, there was an alternative which was for the applicants to have sought, at their own cost, a legal opinion on the matter. What they are effectively doing is seeking to obtain that opinion at the cost of the respondent.
41. In my view the dispute notice procedures prescribed by the Retirement Villages Act 2003 is for the resolution of all disputes of an appropriate qualifying kind. The procedures are certainly there to protect residents of retirement villages and in my view residents should not be discouraged from bringing disputes to a disputes panel from fear of adverse costs awards. That is not to say that disputes should be encouraged.
42. The question of accountability by the respondent to the residents for the use of their levies is of significant importance to the applicants in this case. It is an issue which many residents of retirement villages are conscious of. Concerns had been raised with the respondent about this issue and every attempt had been made by the respondent to allay those concerns. The view of the Statutory Supervisor had been sought and that party supported the view taken by the respondent.

43. On balance I think he is appropriate that the applicants **do** make a small contribution to the costs of this process. I fix that amount at \$1,000.00. This represents less than 15% of the cost of this process to the respondent. I **ORDER**, pursuant to s.74 of the Retirement Villages Act 2003, that the applicants pay the respondent that sum of \$1,000.00 towards the costs of this dispute. Whether the respondent chooses to enforce that order, because it is entitled to payment within 28 days under s.74(4), is a matter for it.

Panel's decision

The disputes panel:

- (a). finds in favour of the respondent and dismisses the dispute.
- (b). awards \$1,000.00 costs and expenses to the respondent payable by the applicants and each of them.

Reasons for decision

These are all as set out above.

.....
 David M Carden
 Single member

Date of decision: 30 October 2007

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.