

IN THE MATTER

of a Dispute under the Retirement Villages Act 2003

BETWEEN

**NORMAN WILLERTON
MORRELL**

Applicant

AND

THE SELWYN FOUNDATION

Respondent

DECISION OF DISPUTES PANEL

Date of Dispute Notice: 7 January 2008

Date of Dispute Hearing: 7 & 8 May 2008

Date of Decision: 3 June 2008

Present at the Hearing

1. Mr Morrell, Applicant
2. Mr Hablous & Mr Pou for the Respondent
3. Residents of the Village

INTRODUCTION

1. The Applicant, Mr Morrell gave notification of a dispute against the Selwyn Foundation on 2 January 2008 pursuant to Section 53 of the Retirement Villages Act 2003 ("the Act"). The dispute notice is within the time limits set in sections 52 and 57 of the Act. An earlier hearing date was vacated due to Mr Morrell's health.

UNDISPUTED BACKGROUND

2. Mr and Mrs Morrell signed a Licence to Occupy a Dwelling ("Licence to Occupy") with the Selwyn Foundation on 2 May 2002. The contract sets out the legal terms on which Mr and Mrs Morrell occupy their serviced apartment at the Pt Chevalier site of Selwyn Village, and the obligations of the Selwyn Foundation towards Mr and Mrs Morrell.
3. At the time Mr and Mrs Morrell moved into the Selwyn Village on 27 April 2002, there was a hospital and three rest homes on the Pt Chevalier site.

4. In December 2002 the residents were notified, by various means, including a meeting and by a publication entitled "*Quality throughout Changes*", that the Selwyn Foundation intended to rebuild Christ's Hospital on the Pt Chevalier Selwyn Village site. That intention was expressed again in 2005 in a publication the "*Selwyn Scene*" and repeated until early 2007, when it was announced that the rest home Sarah Selwyn was to be converted to a hospital.
5. Mr Morrell and representatives of the Selwyn Foundation have had various meetings regarding his concerns about the need for a hospital, and after the conversion of Sarah Selwyn its return to a rest home.

MATTERS IN DISPUTE

6. Mr Morrell seeks:
 - (a) That the Selwyn Foundation build forthwith a hospital at the Pt Chevalier site, as was planned, and advised to the residents of Selwyn Village in 2002, and
 - (b) That the temporary hospital, Sarah Selwyn be restored to a rest home.
7. The Selwyn Foundation, states:
 - (a) Mr Morrell's dispute notice does not fit within section 53 of the Act.
 - (b) The panel member does not have power under section 69 of the Act to make the orders sought by Mr Morrell.
8. At the preliminary meeting in respect to this dispute, it was agreed that a third issue about nursing support had been resolved, and was not to be a part of this decision.

THE QUESTIONS

9. The questions which need to be answered by the panel member are as follows:
 - (a) Is this a dispute which comes within section 53 of the Act?
 - (b) If so, does the panel member have the power to order the Selwyn Foundation to build, or rebuild a hospital at the Pt Chevalier site of Selwyn Village, and restore Sarah Selwyn to a rest home pursuant to section 69 of the Act?

A. Does this Dispute come within Section 53(a) of the Act?

10. Section 53 of the Act states:

"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 Residents' occupation right or right to access services or facilities; or*

.....

(d) *relating to an alleged breach of a right referred to in the code of residents' rights or of the code of practice.*

11. Mr Morrell argues that this dispute does come within s53(a) of the Act. When he moved to Selwyn Village there was a hospital, in need of updating, and Sarah Selwyn was a rest home, Mr Morrell considers that provided him with a right to access those services, or a replacement for those services pursuant to clause 6.1(a) of his Licence to Occupy. Mr Morrell considers the Selwyn Foundation made a promise to residents to build the hospital in 2002, and it should abide by its promise. That would mean by extension, that Sarah Selwyn should be returned to its prior rest home status.

12. The Selwyn Foundation argues that this dispute is not a dispute that a resident may give a dispute notice for, pursuant to section 53(i)(a) of the Act. It is not a dispute concerning a resident's occupation right, or right to access services or facilities.

13. The Selwyn Foundation states that Mr Morrell's occupation right, and right to access services or facilities, is set out in his Licence to Occupy. The number of rest homes and hospitals on the site is not specified in the Licence to Occupy, and hence there is no guarantee of the number of rest homes and hospitals to be built or retained on the Selwyn Village site. Clause 6 of the Licence to Occupy does not even contain any guarantee of access to a rest home or a hospital on the Selwyn Village site, there is simply a guarantee of priority entry subject to various criteria.

14. Clause 6 of the Licence to Occupy between the Selwyn Foundation and Mr Morrell, states:

"6. FOUNDATION'S COVENANTS

6.1 *The Foundation covenants and undertakes with the Licensee that:*

Common Facilities

(a) *During the term of this Licence, the Licensee shall have the right in addition to the occupation of the Dwelling, to use in common with other licensees any communal buildings forming part of the Village and all amenities and facilities provided by the Foundation for the benefit*

of the licensees of the Village as notified by the Foundation.

Transfer from Dwelling to Residential Care or Hospital

(b) If:

(i) the Licensee makes a request to be transferred to residential care, and subject to any determination under clause 13.2, the Licensee satisfies the current criteria set and determined by the Foundation in its sole discretion, including the availability of such facilities and priorities in the case of real need or emergency; or

(ii) the Foundation of its own volition makes a determination under clause 13.2 that the Licensee shall be transferred to residential care;

then:

(iii) the Foundation shall transfer the Licensee to residential care at a location (which may be within the Village, or at another Foundation Village, or at another location) as determined under clause 13.2..."

15. Clause 6 of the Licence to Occupy refers to "common facilities", there is no definition of "common facilities" in the interpretation section of the Licence to Occupy but common areas are defined:

"common areas – means those parts of the Village provided from time to time by the Foundation for common use by Licensees in the Village;"

16. The Selwyn Foundation argues that the common facilities referred to in the Licence to Occupy exclude residential facilities which are, by definition, not common facilities. The rest home and hospital areas are not common facilities as there is no absolute right of use of either the hospital or rest home. Clause 6(1)(b)(i) of the Licence to Occupy sets out the criteria for admission to, or a transfer to residential care:

"including the availability of such facilities and priorities in the case of real need or emergency".

17. For Mr Morrell to succeed under s.53(a) the panel member must consider if he has an occupation right in respect to the hospital or rest home.

18. The term occupation is not defined in the Licence to Occupy or Act. The Concise Oxford Dictionary defines it as "occupying or taking or

holding possession". Mr Morrell has a right to occupancy of his unit pursuant to clause 2.1 of his Licence to Occupy. He is not seeking a right of occupancy of a hospital or rest home.

19. For Mr Morrell's dispute to succeed he must show that the failure to build the hospital or restore Sarah Selwyn to a rest home affects his occupancy or access to services or facilities.
20. The term "*services*" is defined in the Act as:

"Services means services provided at a Retirement Village of one or more of the following kinds –

(b) nursing or medical services

(j) other services for the care of benefit of residents"

I find the term "*services*" to encompass practical assistance. The Concise Oxford Dictionary states that a *service* is:

"provision of what is necessary for operation"

The examples of services given in the Act include provision of meals, gardening maintenance, shops, laundries, hairdressing, transport, recreation and other services.

21. The term "*facilities*" is also defined in the Act:

"Facilities, in relation to a Retirement Village, means facilities of a shared or communal kind provided in the Retirement Village for the benefit of residents of the Retirement Village and includes recreational facilities and amenities."

22. The term "*facilities*" encompasses those facilities which are able to be used by each resident, and an example of recreational facilities is provided in the Act. These are, of course, open to use by all residents, in contrast to, for instance, the residential units. Facilities do not include a rest home or a hospital facility, which are only open to occupation on the terms in Mr Morrell's Licence to Occupy. These rights are set out in paragraph 6.1(b) of the Licence and provide in summary that the Selwyn Foundation has the sole right to allow occupation of residential care, or hospital facilities.

23. The term "*amenities*" is not defined within the Act but in the Concise Oxford Dictionary it states:

"Amenity/bed available in hospital to give more privacy for small payment".

24. The Selwyn Foundation also argues that the Prospectus for the Selwyn Foundation dated 20 September 2001 which was in force at the time Mr Morrell moved to the Village, does not provide any guarantee of

continued provision of a hospital or rest home. It states on pages 6 and 14:

"Subject to availability and criteria set by the Selwyn Foundation, they can expect preference of entry to the Selwyn Foundation's rest homes and hospital if they ever require such facilities... all residents of the Selwyn Foundation Retirement Villages are entitled to priority access to the Selwyn Village care facilities subject to availability and the resident meeting any assessment criteria."

In respect to the Selwyn Village Pt Chevalier, the Prospectus states:

"the present accommodation at Selwyn Village includes 42 units for which licences are issued, rental flats and cottages, 4 rest homes and a hospital. An integral part of Selwyn Village is Christ's Hospital (an 80 bed unit)..."

FINDING

25. I find that Mr Morrell's dispute notice is not a dispute in respect to an occupancy right or a right to access services or facilities or amenities. The dispute is about the provision of a hospital and restoration of a rest home which do not fall within the definition of a right to occupancy or access to services, facilities or amenities.
26. I therefore find that Mr Morrell's dispute notice does not come within section 53(a) of the Act.

B. Does this Dispute come within Section 53(2) of the Act?

27. The Selwyn Foundation argues that even if the panel member finds that this is a dispute for which a dispute notice may be given by Mr Morrell, pursuant to section 53(1)(a), then section 53 (2) excludes the dispute from the panel member's jurisdiction.
28. Section 53(2) states
 - (2) *Nothing in subsection (1) enables a resident to give a dispute notice concerning any health services or disability services, or any facilities to which the Code of Health and Disability Services Consumers' Rights under the Health and Disability Commissioner Act 1994 applies."*
29. The Code of Health & Disabilities Services Consumers Rights states

"the Code gives rights to all consumers, and places obligations on people and organisations providing services. It covers a wide range of providers (whether public or private) including:... hospitals, rest homes.... The Commissioners

jurisdiction is restricted to the quality of care, it does not cover issues of funding or entitlement to a service."

FINDING

30. I find that s53(2) does not apply to this dispute. The argument is not about quality of care of a rest home or hospital, but rather the provision of the same.

C. Does the dispute come within Section 53(d) of the Act?

31. The next question is whether the dispute for which Mr Morrell has given a dispute notice, comes within section 53(d) of the Act. To come within that section, the matters in dispute must be a breach of a right referred to in the Code of Residents' Rights, or of the Code of Practice.
32. The Retirement Villages Code of Practice 2006 has been declared invalid in a judgment of France J *The Retirement Villages Association of NZ Inc v The Minister for Building & Construction* (CIV 2007-485-2139 Wellington Registry).
33. There was evidence given by both parties about an earlier lack of communication between the Selwyn Foundation and some of its residents on the hospital, rest home issue. Mr Morrell has put his considerable skill and energy into communicating with the Selwyn Foundation about an issue which is obviously of great concern to himself and others. Mr Morrell stated that his purpose in entering the Selwyn Village was three-fold, namely warmth, security of person and property and future care. I consider Mr Morrell has taken up a concern which he shares with other residents, for the benefit of all. Three other residents attended the hearing indicating a shared concern.
34. It is unfortunate that from a meeting on 19 December 2002 until 2007 the Selwyn Foundation led residents to believe that a new hospital would be built, then informed residents that the Sarah Selwyn Rest Home was to be converted into a hospital instead. Residents thereby lost the opportunity to utilise Sarah Selwyn as a rest home as well as not having the benefit of a new hospital.
35. Mr Morrell, and no doubt others at Litchfield Towers, considered that Sarah Selwyn was the most appropriate rest home for Litchfield residents to move into, it being most closely related in terms of facilities to Litchfield Towers.
36. To meet the criteria under section 53(d), Mr Morrell must rely on the Selwyn Foundation's own Code of Residents' Rights or the Act, since the Retirement Village Code of Practice 2006 has been declared invalid.
37. There is nothing in the Selwyn Foundation's own Code of Residents' Rights which provides for Mr Morrell to be more than informed of

matters affecting his terms and conditions of residency and providing a right to complain, and to speedy and efficient dispute resolution.

38. Section 32 of the Act also provides a Code of Residents' Rights. These rights are set out in Schedule 4 and s.34 of the Act.

39. The relevant rights in Schedule 4 are:

"Information

2. *You have the right to information relating to any matters affecting, or likely to affect, the terms or conditions of your residency.*

Consultation

3. *You have the right to be consulted by the operator about any proposed changes in the services and benefits provided or the charges that you pay that will or might have a material impact on your:*

(a) *occupancy; or*

(b) *ability to pay for the services and benefits provided."*

40. The terms residency and occupancy are not defined in the Act. The Concise Oxford Dictionary states:

"Residency – place where one resides"

Earlier in this decision occupancy has been defined as *"Occupancy – occupying or taking or holding possession"*

41. Schedule 4 does not assist Mr Morrell's case, in that his dispute notice is not about residency, or occupancy.

42. Section 34 of the Act states:

"34 Right to be supplied with information relevant to occupancy

(2) *The operator of a retirement village must, -*

(a) *if the village has a statutory supervisor, promptly notify the statutory supervisor and, if the statutory supervisor do directs, each resident and intending resident of the retirement village of the matters referred to in subsection (3); or*

...

(3) *The matters required to be notified under subsection (2) are -*

(a) *any proposal by the operator to develop or redevelop any part of the land on which the retirement village is situated or to acquire any contiguous land for development”*

43. In summary, section 34 provides that the operator has an obligation to notify the statutory supervisor, or in the absence of the statutory supervisor, or at the direction of the statutory supervisor, each resident of any proposal to develop or redevelop any part of the land on which the Retirement Village is situated.
44. Mr Morrell was notified by the Selwyn Foundation of its intention to build a hospital in 2002. There was not a specific obligation on the Selwyn Foundation pursuant to section 34 to advise that it no longer intended to continue with the building, as no development, or redevelopment had occurred.
45. What is clear from the legislation is that the Selwyn Foundation only had an obligation to notify Mr Morrell of both the proposal for the hospital, and possibly the change of Sarah Selwyn to a hospital from a rest home. The legislation does not give Mr Morrell any right to object beyond, of course, any legal rights of any citizen in these situations. Mr Morrell did not take any legal steps beyond this dispute notice in respect to the proposal, or indeed failure to build the hospital, or the changing of or refusal to return Sarah Selwyn to a rest home.
46. Although the level of information from the Selwyn Foundation to Mr Morrell about the hospital was, from Mr Morrell's perspective, not always ideal, he does not dispute that communication or notification did occur by way of newsletters, meetings for the residents, and even a private meeting between Mr Morrell and the CEO.
47. The Selwyn Foundation gave evidence at the hearing of the efforts it is making to further improve communication with residents.

FINDING

48. I find that Mr Morrell may issue a dispute notice relating to an alleged breach of a right referred to in s.34(2) and (3) of the Act, in that he is entitled to be notified about any development, or redevelopment to any part of the land on which the Retirement Village is situated. This would include a new hospital and possibly the redevelopment of Sarah Selwyn.
49. I find that Mr Morrell was notified in various ways of the intention by the Selwyn Foundation to build a new hospital, and to a lesser extent to convert Sarah Selwyn to a rest home as required under s.34(3) of the Act.

D. Is the remedy Mr Morrell seeks available under Section 69 Retirement Villages Act?

50. As I find a dispute notice is able to be given in respect to the issues raised by Mr Morrell, I am able to consider remedies. The remedies that a panel member may give are set out in s.69 of the Act.

51. The powers of the Dispute Panel are.

“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

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

52. Section 69 allows me to address issues which effect Mr Morrell's Licence to Occupy so that it complies with any applicable code of practice or section 27(1) of the Act. In effect, that section provides for amendment of the Licence to Occupy so that it complies with minimum standards. The panel member does not have the authority to amend an Occupation Rights Agreement in any other manner.

53. The second power that the panel member has is to order any party to comply with its obligations under an Occupation Right Agreement or Code of Practice or Code of Residents' Rights.

54. The only relevant right is for Mr Morrell to be notified of the proposal to build a hospital. He must also have been notified of the change of Sarah Selwyn from a rest home into a hospital, if it affected the land on which Sarah Selwyn was situated, rather than just the interior of the building.

55. Although the notification given to Mr Morrell in respect to the changed plans, was perhaps less than might be ideal from Mr Morrell's perspective, I find he was notified of the proposed changes, both publically and privately.


56. The Selwyn Foundation appeared to listen carefully to Mr Morrell's suggestions at the hearing of how notification could be given more effectively. The Selwyn Foundation is intending to employ a consultant to advise it in this area, which may assist Mr Morrell, and no doubt, other residents for the future.

FINDING

57. I do not have the power under s69 to require the Selwyn Foundation to provide the remedies that Mr Morrell seeks, namely to build a new hospital, and to return Sarah Selwyn to a rest home.
58. I thank the parties for the way each of them dealt with the issues at hand in a professional manner.

NOTE TO PARTIES

59. You have the right to appeal against the Decision of the Disputes Panel (or of the District Court sitting as a disputes panel) of section 75 of the Retirement Villages Act 2003. An appeal must be filed in the appropriate Court within 20 (twenty) working days of the panels decision.



Panel Member

Date: 3 June 2008