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

AND IN THE MATTER of Metlifecare Kapiti, 1 Henley Way, Paraparaumu

BETWEEN Kaye Kenward and Kathleen Knebel, applicants

AND Metlifecare Kapiti Limited, respondent.

Disputes Panel Member:	Mr N J Dunlop, Barrister, Auckland
Applicants' Representative:	Mr I D Brown
Respondent's Representative:	Mr A Peskett
Date of Dispute Notice:	30 July 2008
Date of appointment of Panel Member:	25 September 2008
Date of Dispute Hearing:	15 December 2008
Place of Hearing:	Metlifecare Kapiti, 1 Henley Way, Paraparaumu
Date of Decision:	16 January 2009.

DECISION

Introduction

1. Metlifecare Kapiti is an extensive retirement village in which the many residents reside in independent homes. Two of those residents are a couple, Mr Z and Ms L. They have been resident at Metlifecare Kapiti since February 2007.

2. Some time during 2007, Mr Z and Ms L set up a so-called cold smoker outside the backdoor of their residence. A cold smoker is a device to smoke and thereby flavour food. It does not cook the food, hence the description cold smoker.

3. On several occasions in late 2007 and early 2008 some half dozen other Village residents, whose homes were in the vicinity of that of Mr Z and Ms L, noticed smells in and around their homes, which they regarded as unpleasant. They attributed the smells to the cold smoker. These residents complained to the management of the Village. The first letter of complaint was received on 17 December 2007. The complaining residents requested the Village management to take steps to remove what they regarded to be the annoyance and nuisance of the cold smoker.

4. In response to these complaints, the Village management sought further information from the complainants and from Mr Z and Ms L. Management sought this information with a view to establishing whether or not the cold smoker was indeed responsible for the smells complained of and to establish the frequency of use of the smoker.

5. A series of correspondence passed between management and the various complainants, including the above named applicants. The complaints related to four dates, namely 19 November 2007, 16 December 2007, 11 April 2008 and 12 April 2008. During the course of this correspondence the Village management made a number of relevant enquiries, including to the Kapiti Coast District Council Environmental Health Control Officer, the Greater Wellington Regional Council and the New Zealand Institute of Environmental Health. Advice was also sought from a manufacturer and supplier of smokers.

6. On 22 April 2008 Mr Z and Ms L departed for overseas to spend the winter in Switzerland. Mr Z hails from that country. Ms L was away until mid August and Mr Z was away until mid October.

7. In view of the absence of Mr Z and Ms L from the Village, the Village Manager, Ms Lynda Hull, wrote to one of the applicants, Mrs Knebel, advising of her intention to address the complaints within fourteen days of the expected return date to the Village of Mr Z and Ms L. This time frame was not to the satisfaction of the above two applicants. In their view, the Village management was duty bound to determine their complaint without further delay.

8. In response to the perceived lack of progress by the Village management in addressing the complaints, the applicants lodged a Dispute Notice under the Retirement Villages Act dated 30 July 2008. They did so through their representative, Mr I D Brown, who is a fellow Village resident. He resides on the opposite side of the Village

to Mr Z and Ms L and the two applicants and is not one of the half dozen or so original complainants.

9. Following the filing of the Dispute Notice, Metlifecare filed a Reply to Dispute Notice dated 21 August 2008. Around this time the parties corresponded as to an agreed disputes panel member. Eventually it was agreed that the author be appointed. The documentation was finalised on 25 September 2008.

Process Followed

10. In order to expedite the hearing process, telephone conferences were held on 1 October (approximately 1 hour) and on 27 November (approximately 1 ½ hours). Those present during the telephone conferences were the Disputes Panel Member, the two applicants, their representative Mr Brown, and Metlifecare's legal counsel Mr Peskett. Certainly it was the hope of the Panel Member that these two conferences might result in the parties agreeing to a resolution of the dispute in a manner which would not require a hearing, or the need for the Panel Member to make a determination. To this end, the Panel Member permitted the parties to debate their respective cases during the telephone conferences. This debate occurred between Mr Brown and Mr Peskett. The two applicants themselves chose to listen rather than to speak. At times the discussion between Mr Brown and Mr Peskett became heated.

11. In a further attempt to resolve the dispute the Panel Member expressed, on numerous occasions, his reservations as to whether the applicants' case was capable of succeeding. The difficulties the Panel Member observed and commented on with regard to the applicants' case are referred to in paragraphs 16 to 33 below. These observations were made by the Panel Member during the course of the telephone conferences but also in a number of memoranda he issued and in correspondence as well.

12. Despite the Panel Member's efforts to have the matter resolved short of a hearing and determination (efforts which continued to within days of the hearing), a hearing became inevitable. Essentially, whilst Metlifecare was prepared to delay the formal resolution process and seek other resolution options, the applicants were insistent that the Panel Member make a determination. That is of course their statutory right.

13. Both before and during the hearing the Panel Member was supplied with copious documentation by the parties pertinent to the dispute. The hearing itself took place at the Village and inclusive of a break was

of four hours' duration, lasting from 10.15 a.m. to 2. 15 p.m. A considerable number of the Village residents were in attendance. It became quickly apparent to the Panel Member that the dispute had polarised opinions within the Village. Two newspaper reporters were present and indeed the dispute featured prominently in that morning's issue of the Dominion Post.

14. The hearing commenced with extensive oral and written submissions from Mr Brown on behalf of the applicants. The applicants did not give oral evidence but written statements by them were submitted. Both Mrs Kenward and Mrs Knebel were however present during the hearing. Mr Peskett then made submissions and called Ms L to give oral evidence. She was cross-examined by Mr Brown and questioned by the Panel Member. Mr Z did not give evidence although was present during the hearing. Closing submissions were heard firstly from Mr Peskett and then Mr Brown.

15. The issue of costs was discussed at the conclusion of the hearing. Metlifecare seeks an order for costs against the applicants. A timetable for the submissions of memoranda in that regard on behalf of the parties was agreed upon. Those written submissions were subsequently received and considered by the Panel Member.

The Panel Member's Expressed Reservations

16. The Dispute Notice is in the following terms:

"The dispute is about the following matters:
The Operator [Metlifecare Kapiti Limited] has failed to remedy a nuisance which has been created by the use of a "fish smoker" operated by another resident.

This nuisance created, is to the annoyance of other residents.

It denies the applicants of their right to the quiet use and enjoyment of their residence

The grounds for this dispute are:

1. *The operator has failed to ensure that the conditions of their contract with another resident have been adhered to.*

2. *The operator has refused to take any positive action to enforce the conditions of this contract and remove the nuisance.*
3. *The operator is in breach of actual and/or implied conditions of residents' occupation right agreements.*

4. *The operator is in breach of the Retirement Villages Act 2003, section 32(1) – Code of residents rights."*

17. In essence the applicants contend that in failing to remedy the alleged nuisance created by the smoker Metlifecare is in breach of its obligations to the applicants.

18. It was accepted by Metlifecare that Mr Z and Ms L's licence to occupy includes the provision (clause 4(e)) that:
"The Resident shall use the Unit as a private dwelling only and shall not do or permit to be done or suffer any act or omission upon or about the Unit or the Village which shall be or become a nuisance or annoyance to other residents of the Village …"

19. It is also common ground that Metlifecare may terminate a licence to occupy where:
"*The Resident has defaulted in the observance or performance of any terms covenants or conditions in this Agreement on the part of the Resident to be observed or performed and has failed to rectify the fault within a reasonable time after receiving written notice from the Company that the Company intends to terminate the Agreement unless such default or defaults shall be remedied …*" (clause 9(a)(1)(ii))

20. In their written submissions, the applicants state that:
"*Although these contracts are between the Respondent and the resident, the obligations imposed on the resident not to cause "a nuisance or annoyance to other residents" is clearly intended for the benefit of other residents.*

The applicants submit that there is an associated implied obligation on the Respondent to take all reasonable steps to protect their right to quiet enjoyment of their premises…

It is the applicants submission that the respondent has an implied obligation to take all reasonable steps to ensure that the applicants' implied right not to be subjected to a nuisance by another resident, is enforced by the respondent against a breaching resident."

21. The applicants' submissions go on to state:
"*In order to manage the nuisance the applicants could reasonably expect the operator to serve on the recalcitrant resident an abatement notice requiring them to:*
    (i) eliminate the nuisance or remove the smoker from the premises,
    (ii) not to introduce any similar device that would annoy, and
    (iii) details of the consequences of not complying with (i) and (ii) above.
The applicants seek an order that Metlifecare issue an abatement notice on the above terms in order to fulfil its implied obligation to manage the nuisance identified by the applicants."

22. From the outset, it seemed of fundamental significance to the Panel Member that Mr Z and Ms L were not parties to the dispute the Panel Member was being required to determine under the Act.

23. As is their right, the applicants chose to make a complaint against Metlifecare rather than Mr Z and Ms L. Section 53 of the Act provides that:

" A resident may bring a dispute notice for the resolution of a dispute concerning any of the operator's decisions –
"(a) affecting the resident's occupation right … or
(d) relating to an alleged breach of a right referred to in the code of residents' rights …"

24. The occupation right referred to in section 53 (1)(a) upon which the applicants rely is the implied right which they contend that Metlifecare owes to them to ensure that other residents comply with their licences to occupy where other residents would be otherwise adversely affected.

25. The rights in the code of residents' rights referred to in section 53(1)(d) upon which the applicants rely are set out in the applicants' submissions as follows:
" • *The right to services and other benefits promised to you in the occupation right agreement*
• *The right to a speedy and efficient process for resolving disputes …*
• *The right in your dealings with the operator … to involve a support person or a person to represent you, and*
• *The right to be treated with courtesy and have your rights respected by the operator…"*

(The code of residents' rights is contained in schedule 4 of the Act.)

26. With regard to the alleged breaches of the four rights referred to in the previous paragraph, the applicants contend respectively:

- Their own occupation right agreements carry the implied right that other residents' agreements will be appropriately enforced as already discussed in paragraphs 20 and 24 above.

- Metlifecare has been tardy in handling the complaints first received in December 2007 and should have resolved them within a matter of weeks in accordance with the Village's complaints policy.

- Metlifecare did not initially accept the right of Mr Brown to represent the applicants. (That was in fact the case).

- Metlifecare has not shown due courtesy and respect to the applicants and Mr Brown.

27. In the Panel Member's opinion however, the formulation of the applicants' arguments as outlined above, is fundamentally flawed. It is flawed because the applicants seek steps to be taken against Mr Z and Ms L without them being part of the formal dispute resolution process. The applicants are, in other words, requesting the Panel Member to make orders requiring Metlifecare to take steps which may be contrary to the rights and interests of persons who are not parties to proceedings. In the Panel Member's view, this violates one of the fundamental principles of natural justice, namely, that persons who might be adversely affected by judicial or quasi-judicial decision making are given the full opportunity to be heard. The opportunity to be heard includes the right of legal representation, to make submissions with regard to the process, to hear all the evidence, to challenge all the evidence and to make opening and closing submissions.

28. In the dispute Mr Z and Ms L had none of the rights just mentioned because the Dispute Notice was brought against Metlifecare rather than themselves. This is despite the fact that section 53 (4) provides that:
"*A resident may give a dispute notice for the resolution of a dispute affecting the resident's right agreement between the resident and any other person who is –*

(a) *another resident of the retirement village…*"

29. The real, underlying and primary dispute in this case is between the applicants and Mr Z and Ms L, not between the applicants and Metlifecare. It is Mr Z and Ms L who own and operate the smoker, not Metlifecare. It is fundamentally the smoker about which the applicants complain. In the Panel Member's view, they should have directed their Dispute Notice against Mr Z and Ms L rather than Metlifecare.

30. The remedy sought by the applicants is of significance in this context. The remedy they are seeking does not impinge the rights or interests of Metlifecare. It impinges on the rights and interests of Mr Z and Ms L. It is they who are the ultimate target of the applicants' Dispute Notice, not Metlifecare. Therefore Mr Z and Ms L were the appropriate respondents, not Metlifecare. Nothing however should be taken from this to suggest that the Panel Member considers that a dispute should

have been brought under the Act against Mr Z and Ms L. As is referred to in paragraphs 44 and 46, it is the Panel Member's view that the applicants should have engaged directly with Mr Z and Ms L to resolve their complaints, but failed to do so.

31. Apart from the natural justice difficulty with the applicants' case, there were further perceived difficulties. One of these difficulties is associated with the natural justice problem, and indeed illustrates the reason for the natural justice requirement. And that is, the applicants were asking the Panel Member to compel Metlifecare to take steps against Mr Z and Ms L, which might have been in breach of the latters' rights. In other words, were the Panel Member to require Metlifecare to issue the abatement notice as requested by the applicants, then in order to comply Metlifecare might breach its contractual and other obligations to Mr Z and Ms L. Metlifecare would potentially be placed in the untenable position of either breaching the order of a disputes panel member or breaching its obligations to Mr Z and Ms L.

32. A further problem with the applicants' case was the effectiveness and enforceability of the orders sought. It was implied in the applicants' case that they not only wanted Metlifecare to issue an abatement notice but to follow up and enforce that notice, if necessary, by terminating the licence to occupy of Mr Z and Ms L. In effect, what the applicants were seeking from the Panel Member was an order that Metlifecare issue an abatement notice and take whatever further or other steps might be necessary to ensure that the smoker no longer constitutes a nuisance. Such an order, even if it were capable of formulation, would lack the necessary specificity to render it meaningful or enforceable. Such a "do what is necessary" order would not have effect and be enforceable in a court. In this regard, section 72(4) of the Act provides that:

"*An order made by a disputes panel –*
(a) has effect and is enforceable as if it were an order of -
(i) the District Court … or
(ii) *the High Court …*"

33. All these difficulties with the applicants' case were pointed out to them and Mr Brown on numerous occasions prior to the hearing. The Panel Member was somewhat disappointed and frustrated that the applicants and Mr Brown did not appear to have any regard to these difficulties. Nonetheless, the Panel Member entered the hearing with an open mind, prepared to be persuaded that these apparent difficulties were not difficulties after all.

Considered View

34. At the commencement of the hearing, Mr Brown was asked by the Panel Member to comment on the perceived difficulties in the applicants' case as outlined above. In response he said that the applicants had not asked the Village to take specific action in relation to the smoker, for example, have it removed. He said that rather, the applicants wanted specific undertakings given by the Village as to what they would do in relation to the complaints about the smoker.

35. In his closing submissions, Mr Brown said that the dispute under the Act is not with Mr Z and Ms L but with Metlifecare. He said that the dispute concerns Metlifecare's handling of the applicants' complaint and is not about the smoker per se.

36. The Village's complaints process is essentially to the effect that complaints are to be forwarded to management, promptly acknowledged and then updates provided at ten working day intervals about the progress of the complaint thereafter. The policy states that:
"*The outcome of a complaint discussion/investigation will be communicated to the Resident, in writing, within ten working days or an explanation as to progress in the investigation and reason for delay.*"

37. The applicants argue that there was not sufficiently good reason for Metlifecare to delay its investigation of the complaints pending the return of Mr Z and Ms L from overseas. On that basis, one would expect that the applicants would simply seek an order from the Panel Member that Metlifecare finalise its investigation of the complaints. That is not, however, what the applicants seek. They ask the Panel Member to make an order that Metlifecare finalise their investigations of the complaint in a <u>particular way</u>, namely by issuing the abatement notice. In other words, the applicants' dispute with Metlifecare is not limited to the *process* they have adopted but is concerned with the *outcome* of the complaints process. The applicants are not simply content that Metlifecare conclude the investigation of the complaints, in whatever way it considers fit. They want the investigation to have a result which restricts or prohibits the use of the smoker by Mr Z and Ms L.

38. Were this not the case, and the applicants were simply wanting Metlifecare to finalise its investigations of the complaints, then their arguments to the Panel Member that the use of the smoker constitutes a nuisance would be quite irrelevant. Whilst the applicants declare that their Dispute is with Metlifecare, in fact the way in which they have mounted and argued their case to the Panel Member is to the effect that:

(i) The use of the smoker constitutes a nuisance.
(ii) Metlifecare has failed to require Mr Z and Ms L to abate that nuisance.
(iii) The Panel Member is therefore asked to require Metlifecare to require Mr Z and Ms L to abate the nuisance.

39. Whilst it is true that it is part of the applicants' case that Metlifecare has not properly dealt with their complaint from a process point of view, that issue is secondary to the primary thrust of the case and only serves to confound the issues.

40. Section 69(1)(b) of the Act states that:

"*A disputes panel may –*
… order any party to comply with its obligations under an occupation right agreement…"

As discussed, the applicants request the Panel Member to order Metlifecare to comply with its implied obligations under its occupation right agreements with them by requiring Mr Z and Ms L to comply with the terms of their (Mr Z and Ms Ls') occupation right agreement.

41. The Panel Member is unable to avoid the conclusion that the applicants are asking the Panel Member to order a <u>non</u>-party to comply with its obligations under an occupation right agreement, namely Mr Z and Ms L. However, under section 69 a disputes panel does not have that power. It can only order a <u>party</u> to the dispute to comply with its obligations under an occupation right agreement. For good reason, the Act does not permit a disputes panel to order any <u>person</u> to comply with its obligations under an occupation right agreement. Section 69(1)(b) refers to a "party" rather than a "person" because if it were to refer to the latter, that would give rise to the natural justice and effectiveness and enforceability problems earlier alluded to. The Panel Member concludes therefore that he has no power to make the orders requested by the applicants. Even if he were to have the power, he would not exercise that power due to the natural justice effectiveness and enforceability problems.

Other Reasons

42. Quite apart from the fact that the Act does not permit the remedy sought by the applicants and that there are insuperable natural justice and other difficulties with their case, there are additional reasons why the Panel Member declines to make any order in favour of the applicants.

43. The first is that the Panel Member is not satisfied that the smoker does in fact constitute a nuisance. There was conflicting evidence in this regard, which the Panel Member would not be able to resolve without hearing further evidence. On the one hand, the applicants maintain that the smoker generates an unpleasant stench. On the other hand, Mr Z and Ms L maintain that the smoker is odourless save for an initial (pleasant) puff of manuka sawdust when it is fired up. The applicants and some other residents maintain that the smoker impinges on their quality of life whereas other neighbouring residents say that it does not. There is also the issue of whether the smoker could ever be regarded as a nuisance having regard to the infrequency of its use. The uncontested evidence of Ms L was to the effect that it is only used perhaps on three or four occasions a year.

44. A further reason why the Panel Member declines any remedy for the applicants is that they have failed to address their concerns directly with Mr Z and Ms L who are, after all, their near neighbours. Again, the evidence of Ms L, to the effect that she and her husband have never been approached by the applicants with their complaints, is undisputed. In the Panel Member's opinion, it behoves retirement village residents to endeavour if at all possible to resolve difficulties by direct communication.

45. Yet another reason why the Panel Member declines to provide any remedy for the applicants is that in his view, Metlifecare's handling of the initial complaints was perfectly reasonable. It is apparent from the correspondence that two sound principles underlay Metlifecare's actions. Firstly, it wanted its investigations to be effective. It was for that reason that it sought additional information not only from the complainants and Mr Z and Ms L but also from external authorities. Secondly, Metlifecare was at pains to be fair to all concerned, including Mr Z and Ms L. Applying these two principles, it was perfectly reasonable that Metlifecare should delay the outcome of its investigations pending the return of Mr Z and Ms L to New Zealand. After all, as Ms Lynda Hull, the Kapiti Manager pointed out to the applicants, the delay did not prejudice them at all because in the meantime the smoker would not be used. The Panel Member is somewhat bemused why the applicants and their representative, Mr Brown, should have been so insistent on a decision from Metlifecare in the absence of Mr Z and Ms L when, throughout that period of

absence, the alleged nuisance would not occur. There is certainly some force to Mr Peskett's argument that the applicants and Mr Brown have adopted an unduly legalistic and unconstructive approach to this entire matter.

The Way Forward

46. The Panel Member fully expects Metlifecare to continue its efforts to resolve this matter. But it does seem to the Panel Member that the applicants and Mr Brown should put aside their litigious attitude to this matter and seek a sensible resolution with Mr Z and Ms L. The latter have indicated their preparedness to talk with the applicants and to address any reasonable concerns that they might have. Ms L in her evidence, for example, suggested the possibility of the smoker being used at times which suit the applicants, when, for example, they might be away from the Village. The parties to this dispute and Mr Z and Ms L should give consideration to mediating matters. The Panel Member made that suggestion prior to the hearing but it was not taken up.

Costs

47. Metlifecare seeks an order for costs against the applicants. In this regard it relies on section 74(2)(c) of the Act.

48. Section 74(2) of the Act states that:

"*Whether or not there is a hearing, the disputes panel may –*

a. award the applicant costs and expenses…

b. award the applicant costs and expenses …

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 …*"

49. It could be argued that section 74(2)(c) does not apply to retirement village operators and so there is no jurisdiction to make an award in favour of an operator. That is because section 74(1) of the Act provides that:
"*The operator that appoints a disputes panel is responsible for meeting all the costs incurred by the disputes panel in conducting a disputes resolution, whether or not the operator is a party to the dispute.*"

50. In the Panel Member's view, section 74(1) and 74(2)(c) are not in conflict. The operator is indeed required to meet all the costs incurred by the disputes panel. That does not mean however that applicants cannot be required to reimburse or compensate the operator for some of those costs. Should an order for costs be made against an applicant in favour of an operator, the operator continues to be responsible under section 74(1) for payment of the costs incurred by the disputes panel. The applicants would not directly be paying any of those costs although that might be the indirect result. An order for costs relates not only to the costs incurred by the operator in relation to the disputes panel. Such an order may also relate to other costs incurred by the operator in respect of being a party to the dispute. An order for costs is likely to be a global sum. Although it may reflect differing costs incurred by the operator, it would not ordinarily in its terms specify those differing costs, albeit that it might reflect them in its composition. A further indication that an award of costs can be made in favour of an operator under section 74(2)(c) is that paragraph (d) permits an operator to be reimbursed for part of the costs incurred by the disputes panel in a situation where the operator is *not* a party. It could be argued that an operator should only receive a refund where it is not a party, otherwise applicants might be unduly discouraged from bringing disputes against operators. But the Panel Member prefers the opposite argument which is that it is unlikely that the legislature would have intended that an operator could be refunded all or part of costs incurred where it is not a party, but could not receive an award of costs in its favour where it is a party and has presumably incurred greater expense than if it were not a party. Therefore, in the Panel Member's view, section 74(2)(c) does give him jurisdiction in this case to make an order for costs against the applicants in favour of Metlifecare.

51. Section 74(3) of the Act states that:
"*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;

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

52. There are no regulations made under the Act with respect to paragraph (c) of section 74(3).

53. Metlifecare advises that it has incurred external fees totally $1395 in respect of the dispute and internal management costs of $11,550. The Panel Member infers that these costs, which together amount to $12,945, are costs incurred from the date the complaints were first made, that is to say, from December 2007. Metlifecare seeks "a reasonable portion" of the $12,945. It also seeks "a reasonable portion" of the Panel Member's costs, which it will be required to pay. These costs will approximate $14,000, a sum which reflects the considerable number of hours required to be expended by the Panel Member on the case and expenses incurred by the Panel Member, such as air fares.

54. Court costs do not normally reflect the internal costs of corporate bodies incurred in litigation. They normally reflect the cost of legal representation and actual expenses (disbursements) incurred. In the Panel Member's view, an award for costs in this case should not have regard to the general internal costs incurred by Metlifecare with respect to this dispute. Nor should costs reflect time and expenses prior to 30 July 2008 when the Dispute Notice was issued. In short, costs should reflect:

    - The time devoted by Metlifecare's legal counsel, Mr Peskett, in representing Metlifecare in the dispute subsequent to 30 July 2008; it does not matter that Mr Peskett is inhouse counsel.

    - The costs which Metlifecare will incur in paying the Panel Member; this is the equivalent in the court context to the losing party being reimbursed for the various court fees paid by the winning party; such fees in large part reflect the cost of having judges rule on disputes.

55. Reasons in favour of costs being awarded against the applicants are as follows:

    (a) Their case failing to succeed and being without merit.

    (b) Their failing to take heed of repeated warnings by the Panel Member prior to the hearing that their case might well face insuperable difficulties.

    (c) Their failure to endeavour to resolve their complaints about the smoker directly with Mr Z and Ms L.

(d) Their unreasonable stance in asserting that Metlifecare should proceed to finalise its investigations in the absence of Mr Z and Ms L.

(e) Their elevating the issues to matters of high principle and seriousness and accordingly pursuing the dispute in a litigious manner.

56. Reasons against an order for costs or at least moderating an order for costs are as follows:

(a) The courtesy and co-operation extended by the applicants and Mr Brown to the Panel Member throughout the process and Mr Brown's promptitude and efficiency.

(b) The importance of retirement village residents not being deterred from bringing disputes under the Act out of fear of costs being awarded against them.

(c) Allied to (b) above, the importance to residents of retirement villages having the ability to lead lives free of unnecessary or unreasonable control, interference, nuisance or conflict, and hence the importance of the Act's dispute resolution processes (these considerations apply to all parties to this dispute together with Mr Z and Ms L and other residents of the Village).

(d) The relative financial strength of the parties.

(e) The fact that the Act imposes the primary cost of dispute resolution on operators.

57. After having given this matter very careful consideration, the Panel Member determines that each of the applicants should pay Metlifecare $750 costs. Section 74(4) requires those costs to be paid within twenty-eight days of the date of this Decision.

Outcomes

58. The Panel Member:

(a) Dismisses the dispute brought by the applicants.

(b) Orders each of the two applicants to pay Metlifecare the sum of $750 costs within twenty-eight days (a total of $1500).

N J Dunlop
Panel Member

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) under section 75 of the Retirement Villages Act 2003. An appeal must be filed in the appropriate court within twenty working days of the panel's decision. Any costs and expenses awarded by the disputes panel must be paid within twenty-eight days.