

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

BETWEEN SHIRLEY & ALEX OLIVER,
COLIN & ESMA FENN, CRAIG &
JOY SMITH, JACK SHEAHEN,
JAN BENSON, JIM LAIDLAW

Applicants

AND OCEANIA VILLAGE CO (No 2)
LTD

Respondent

DECISION OF DISPUTES PANEL CONCERNING

JURISDICTION TO DETERMINE DISPUTE
and

TRANSFER OF DISPUTE TO DISTRICT COURT

INTRODUCTION

The applicants are residents of the Hutt Gables Retirement Village in Upper Hutt. The Respondent is the operator of the retirement village. The applicants own the units in which they live under the Unit Titles Act 1972. The units were built in 2000-1 and purchased in 2001-2. The rights and obligations of the parties upon sale and purchase of the units were contained in Agreements for Sale and Purchase. One of the conditions included in the Agreements for Sale and Purchase (which the respondent accepts can be regarded as an occupation right agreement) requires them to pay a deferred management fee to the respondent of up to 20% of the sale price or the market value of their units upon sale. They claim that the services and facilities they were promised at the time they purchased their units have not all been provided by the operator and for this reason they should not be held to the condition to pay the deferred management fee.

The respondent submits that the Dispute Notice does not disclose a cause of action capable of determination or remedy. Alternatively it submits that if there is a cause of action the remedy is only capable of being awarded by the District Court and for that reason the dispute should be transferred to that court.

THE LAW

The applicants rely for their claim on s 53(1)(a),(c) and (d) Retirement Villages Act 2003.

Section 53(1) provides:

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.

The respondent relies on s 66 of the Act in the submission that the dispute should be transferred to the District Court.

Section 66 provides:

Panel may refuse to hear dispute

- (1) A disputes panel may refuse to hear, or continue to hear, a dispute if the panel considers, after consulting with the parties,—
- (a) that the dispute is frivolous or vexatious or an abuse of process; or
 - (b) that the dispute should be heard by a court of law; or
 - (c) that the panel should not hear it for any other sufficient reason.
- (2) When the panel consults the parties on a proposal to exercise any of its powers under subsection (1), the panel must advise the parties of the effect and implications of the proposal.
- (3) If the panel refuses to hear, or to continue to hear, a dispute under subsection (1)(b), the panel must refer the dispute to the nearest District Court for hearing.
- (4) A District Court to which a dispute is referred under subsection (3)—
- (a) must hear and determine the dispute as if it were a disputes panel, and has all the powers and duties of a disputes panel under this Act;
 - (b) in respect of any matter not otherwise provided for, may hear and determine the dispute in accordance with the [District Courts Act 1948](#) and the [District Courts Rules 1992](#).
- (5) The panel at its discretion may award costs for the hearing to the point that the panel refuses to continue to hear the dispute, and must take into account the conduct of the parties.
- (6) If the panel refuses to hear, or continue to hear, a dispute under subsection (1)(c), the operator must appoint another panel to hear the dispute.
- (7) Any person against whom costs are awarded under this section must pay them within 28 days of the decision to award them.

The respondent relies on s 69 of the Act in the submission that the panel cannot award the remedy sought by the applicants (cancellation of the requirement to pay the deferred management fee).

Section 69 provides:

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.

JURISDICTION ISSUE

The respondent submits that:

- Section 53(1)(a) does not apply to this dispute because the applicants do not seek rights of access to the services and facilities that have yet to be provided;
- Section 53(1)(c) does not apply because that provision is only triggered when the occupation right has ended and none of the applicants' occupation rights have ended or are about to end;
- Section 53(1)(d) does not apply because the Code of Residents Rights (the applicants rely on the right to have the services and benefits promised by the occupation right agreement) came into force on 1 October 2008 and cannot be the subject of the disputes notice. The applicants also do not seek the services and benefits promised, they want the deferred maintenance fee cancelled.

These submissions require the following decisions:

- Whether the dispute concerns access to services and facilities;
- Whether the dispute concerns charges or deductions imposed as a result of the applicants' occupation rights coming to an end;
- Whether the applicants can rely on any of the rights contained in the Code of Residents Rights.

Access to services and facilities

The Notice of Dispute listed the services and facilities to which the applicants do not have access as medical help on site, back-up services (meals and help for disabled

residents), library, hairdresser, gym, spa, and lounge. These (or some of them) were apparently promised prior to the sale of the units but have not been provided because the main building (from which services and facilities would come) has yet to be constructed. The respondent submits that because the remedy sought does not include having these services and facilities provided, there can be no issue about the failure to fulfil the promise to provide them.

This submission appears to accept that certain services and facilities were promised but not provided. If that is the case then the issue of whether the applicants have access to services and facilities is a live one. It forms the basis of the complaint. The applicants' position appears to be that they agreed to pay the deferred maintenance fee when their occupation rights ended as consideration for the services and facilities that were promised them. They appear to have waited for the past 7-8 years for those services and facilities to materialise. Were they to materialise the applicants would have to accept that they were receiving what they paid for.

In the event that a claim is proved, the remedy sought is not necessarily determinative of the remedy awarded. Remedies sought may also change over the course of a dispute as more information becomes available to the parties. The issue whether jurisdiction exists in a statutory dispute resolution mechanism concerns the powers to hear and determine claims made. Only once a claim has been determined in favour of the party seeking a remedy does the issue of the power to award the remedy sought arise. In other words the remedy the applicants claim is not determinative of whether jurisdiction exists to hear and determine the claim. That power is dependent on whether the claim is specified as subject to a dispute resolution process. In this case a claim concerning rights to access services and facilities promised but not delivered clearly falls within s53(1)(a) of the Act.

This is not to accept that the remedy sought is within the power of the Panel – that is an issue for further argument.

For these reasons it is clear that the dispute concerns access to services and facilities that the Disputes Panel has jurisdiction to hear and determine.

Deductions on termination of occupation right agreement

The respondent submits that a dispute about the deferred maintenance fee could only be considered when an occupation right has terminated, or is about to terminate, and a demand for the fee has been made. The respondent is correct that the parties have agreed to charge and pay a deferred maintenance fee and that no decision to enforce payment of the fee is cited in the Notice of Dispute.

The applicants appear to believe that the agreement, as it currently stands, will be enforced by the operator on termination of their occupation rights. It is arguable that s 53(1)(c) is restricted to demands for payment and, given the Notice of Dispute appears to have been prepared without the benefit of legal advice, it is not currently clear whether

decisions have been made about the fee that raise the expectation that the applicants' agreements will be enforced.

Against this background it would be premature to accept that the Panel lacks jurisdiction to consider a claim under s 53(1)(c).

Code of Residents Rights

The respondent submits that the right on which the applicants rely (the right to services and benefits promised) in the Code of Residents Rights is not available to them because the Code did not come into force until 1 October 2008. In any event the respondent says this claim is simply a reprise of the claim under s 53(1)(a).

The Code of Residents Rights is contained in Schedule 4 of the Retirement Villages Act 2003. It is a summary of residents rights contained in the Act. It therefore came into force when the Act came into force. This was some time prior to the Notice of Dispute.

It is clear that the Panel has jurisdiction to consider a claim based on the alleged breach of a right contained in the Code.

TRANSFER ISSUE

The respondent submits that the Panel lacks the power to award the remedy sought by the applicants (cancellation of the deferred management fee) but that the District Court may have the power to award the remedy under legislation over which it has jurisdiction (e.g. the Contractual Remedies Act). For this reason the Panel should transfer the dispute to the District Court.

The process by which a dispute is transferred to the District Court is specified in s 69 of the Act. If the Panel considers that the dispute should be heard in a court of law it is required to consult with the parties first, explain the ramifications of a potential transfer and, presumably, take their views into account before deciding whether to transfer the dispute.

It is unnecessary to pursue this process at this stage. The claim concerns the provision of services and facilities. That is a relatively straight forward matter of evidence, and well within the expertise of the Panel. The power to transfer the dispute is a continuing one. If it later appears that it should be transferred, on the grounds, for example, that both parties accept that the District Court has the power to grant a remedy that is not within the power of the Panel then further consideration can be given to a transfer. A transfer at this stage is not warranted by the claim that is specified in the Notice of Dispute.

CONCLUSIONS

For these reasons the Panel has jurisdiction to hear and determine the claims that services and facilities promised at the time the parties agreed on the payment of the deferred

management fee have not been provided. The Panel will not transfer the dispute to the District Court at this stage of the dispute but remains open to the possibility of transfer if issues of remedy arise.

The process from this point on is as follows:

- The applicant residents will file and copy to Oceania (via Dale Smith) the evidence in support of the issues raised in the Dispute Notice by 5 p.m. Friday 20 November 2009;
- Oceania will file and serve on the Residents (via email to Shirley Oliver and Jim Laidlaw) its evidence by 5 p.m. Friday 4 December 2009
- The hearing of the dispute will take place on Wednesday 16 December 2009 at 10.30 at the Upper Hutt Cosmopolitan Club in the Quiet Room (this venue has now been booked).

This decision is dated at WELLINGTON this 6th day of November 2009.

“S C Robson”

SC Robson
Disputes Panel