UNDER The Retirement Villages Act 2003

In the matter of a dispute

BETWEEN **DORIS IRENE UPTON**
Applicant

AND **OCEANIA VILLAGE COMPANY (NO. 2) LIMITED**
Respondent

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DECISION OF DISPUTES PANEL

APPOINTMENT OF DISPUTES PANEL

1. An agreement for provision of services under Part IV of the Retirement Villages Act 2003 ("the Act") was signed on 29 March 2010 and the Disputes Panel was appointed.

BACKGROUND

2. The Applicant, **DORIS IRENE UPTON** ("**MRS UPTON**") signed a Licence to Occupy ("the Licence") Unit 28 at Totara Park Village, Warkworth between herself and Presbyterian Support Services (Northern). She commenced occupation some where between 1996 and approximately 26 April 1997. The copy of the Licence available to the Panel is only signed by **MRS UPTON** and is undated, but no issue is taken with its validity.

3. Sometime after April 2003 the operation of Totara Park was transferred to QualCare. Since September 2008 it has been operated by the Respondent **OCEANIA VILLAGE COMPANY (NO. 2) LIMITED** ("**OCEANIA**") who is also the Licensor.

4. In early 2003, **MRS UPTON** considered terminating the Licence for Unit 28 and pursuant to the Licence, Presbyterian Support Services provided **MRS UPTON** with a valuation of the Unit.

5. In a letter dated 14 April 2003 Presbyterian Support Services, Property Manager **MR CHRIS BROWN** advised **MRS UPTON** as follows:

"Attached for your information is a copy of the valuation and the preliminary refund assessment. This indicates a refund of $128,133 should you terminate and such refund would be paid out following the resale of the cottage to another Licensee..." The letter had an attached refund calculation sheet.

6. **MRS UPTON** did not proceed with the termination of the Licence in 2003.

7. **MRS UPTON** signed a Notice of Termination of the Licence on 20 May 2008 pursuant to clause 2 of the Licence which states:

> *"2. **Termination***
>
> *2.1 This Licence shall terminate:*
>
> *2.1.1 upon either party giving two (2) months written notice of termination to the other;*

8. The date of termination of the licence is 20 July 2008 being the expiry of the notice period.

9. Upon termination of the licence clause 22.1 of the Licence applies it states:

> *"22.1 Upon termination of this licence:*
>
> *(a) The Licensor shall appoint a Registered Valuer to assess the Unit's current market value (but excluding therefrom the right to use and enjoy all the common areas and community facilities associated with the Village). If the Licensee disagrees with the valuation then a second valuation shall be obtained from a valuer nominated by the chairman for the time being of the New Zealand Institute of Valuers, to determine the current market value for the Unit (but excluding therefrom the right to use and enjoy the Facilities). The first valuation, or if a second valuation is obtained then the second, shall be "Market Value" for the purposes of this Licence."*

10. A valuation report of Unit 28 dated 5 June 2008 was obtained from **BARKER & MORSE LIMITED** Registered Valuers and Property Consultants, Orewa, Whangaparaoa.

11. Unit 28 was relicensed in April 2009 for a price of $270,000. This was after refurbishment at a reported cost to **OCEANIA** *"in excess of $31,000"* receipts for the refurbishment are provided in the sum of $24,147.68.

THE DISPUTE NOTICE

12. **MRS UPTON** filed a Dispute Notice dated 25 January 2010 under s.56 of the Act.

13. Section 52 of the Act sets out the requirements for a dispute to be referred to the Disputes Panel under the Act, It states:

> **52 Resident or Operator may require dispute resolution**

(1) A resident or the Operator may require that a dispute be resolved by a disputes Panel by giving the other party or parties a dispute notice.

(2) A resident may not require resolution of a dispute (other than a dispute referred to in section 53(3)) by a disputes Panel unless—

(a) the dispute has earlier been referred to the complaints facility; and

(b) 20 working days have elapsed since referral to the complaints facility.

14. The current Occupation Licence used by **OCEANIA** is appended to **MR JEREMY LEACH**'s statement of evidence as Exhibit "A". It sets out the complaint facility which must be undertaken before a dispute can be referred to the Panel. It states:

"COMPLAINTS FACILITY AND DISPUTES RESOLUTION

65. Dispute Resolution (Except A Dispute Regarding Disposal Of Residential Unit)

65.1 Notwithstanding any other provision in this Licence, any complaint or dispute (except a dispute regarding the disposal of your Residential Unit) shall be dealt with in accordance with this clause 65.

Your complaint

65.2 We have established written complaints policies and procedures for dealing with complaints by Village residents. These policies and procedures are available to you on request.

65.3 If you have a complaint you must first refer the complaint to us as set out in the complaints policies or procedures.

65.4 20 Working Days after you referred the complaint to us, you may require the matter to be resolved by a disputes panel established under the Retirement Villages Act 2003 by giving us and/or any other party a dispute notice."

15. The Panel has not been provided with a copy of the complaints policies or procedures but neither party submits that **MS UPTON** has not complied with s.52. The dispute has been dealt with by way of correspondence between the parties Counsel, commencing by way of letter from **WEBSTER MALCOLM**, solicitors dated 23 October 2009 outlining the dispute. The Operator replied on 3 November 2009. 20 working days had lapsed since the raising of the dispute before it was progressed by way of Dispute Notice.

TYPES OF DISPUTE

16. There are a number of requirements under the Act for a dispute to be validly raised.

17. The types of dispute for which a resident may give a dispute notice are set out in s.53 of the Act.

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) ...

(b) ...

(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) ...

18. **MRS UPTON's** dispute notice dated 25 January 2010 is a dispute under s.53(c).

19. The next requirement under the Act is that the form of dispute complies with s.56

56 Form of dispute notice

(1) A dispute notice must—

(a) be written; and

(b) identify the decision or decisions, or matters, in respect of which it is made; and

(c) identify the person or persons in respect of whom it is made, if not the operator; and

(d) state the grounds on which it is made; and

(e) state the efforts that have been made to resolve the dispute.

(2) A dispute notice is valid if it substantially complies with subsection (1).

20. The Panel finds that the dispute notice does comply with s.56 of the Act.

21. Section 57 of the Act sets out the time for giving a dispute notice.

57 Time for giving Dispute Notice

(1) A dispute notice must be given within 6 months after the dispute was first referred to the complaints facility or, in the case of a [dispute notice given] by an operator, the resident concerned was first notified.

22. Section 57 has been complied with, in that the dispute notice is given within 6 months of the date on which the referral was made to the Complaints Facility on 23 October 2009.

23. On receipt of a notice of dispute the Operator must appoint a Disputes Panel.

24. Section 59 states:

59 Operator must appoint disputes panel

(1) The operator must appoint a disputes panel to resolve a dispute for which a dispute notice has been given.

(2) The operator must appoint the panel within 20 working days after—

(a) the operator has received the dispute notice, in the case of a notice given by a resident; or

(b) ...

25. Section 59 requires that the Operator must appoint the Disputes Panel within 20 working days after receiving the dispute notice. The date of the dispute notice is 25 January 2010. The Panel was appointed on 29 March 2010. An approach was made for me to accept appointment on 8 March 2010. There is no penalty if the Operator fails to appoint the Panel within 20 working days after receiving the dispute notice.

THE HEARING

26. A pretrial conference was convened on 30 April 2010 by teleconference and attended by the Panel, Counsel for the Applicant, and **MS ALEXANDER** and **MS JOHANNSEN** on behalf of **MRS UPTON**, Counsel for the Operator and **MR LEACH** for the Operator.

27. Various issues were discussed at that conference and directions given. Those were complied with by the parties.

28. Pursuant to s.65 of the Act, the Applicant and Respondent have agreed not to hold a hearing at which parties are to attend. Section 65 states:

65 Hearing must be held

(1) In the course of conducting a dispute resolution, the disputes panel must hold a hearing unless—

(a) the applicant withdraws the dispute resolution notice; or

(b) the applicant and respondent agree not to have a hearing; or

(c) ...

THE ISSUES

29. **MRS UPTON**'s dispute notice dated 25 January 2010 outlines two issues in dispute:

(a) *"the calculation of the amount that I am entitled to receive from the Operator on termination of my Licence to Occupy Cottage 28 at the Village".*

(b) *"The deduction of an amount for replacing carpets in the Cottage".*

30. The issue of the amount for replacing carpets in Unit 28 has been resolved. The Panel is not required to make a decision on that issue.

THE APPLICANT'S EVIDENCE

31. **MRS UPTON**'s evidence in respect to the purchase of Unit 28 is as follows:

"I spoke to the Manager or person in charge – whose name I don't remember – who explained to me the general scheme of the Occupation Rights Agreement. I understood that I would pay $138,000 for the Unit and would in turn be paid when I moved out of the Village or died. The explanation the Manager gave me for the

amount I would receive when I eventually left the Village was that the Village Operator would resell the Unit to an incoming resident and I would receive the market value for the Unit less 17.5% maximum. There was no explanation given to me at that time that the expression 'market value' meant anything other than the amount that the Village Operator obtained on re-selling the Unit after my departure. I therefore understood that I would receive the benefit of any increase in value of the Unit between the time I paid for it and the time I left the Village. I was not given the understanding that the expression 'market value' in the Licence Agreement meant anything different from what I – and anyone else – would expect it to mean.".

32. **MRS UPTON's** states she did not receive an explanation of "*market value*" from the Legal Executive she signed the Licence in front of. She understood that she would get the relicensing price less deductions when she vacated "*the Unit*".

33. **MRS UPTON's** view of what "*market value*" meant was confirmed when in 2003, she received a valuation from the then, Operator which set the value of the Cottage 28 at $195,000 which included:

• Building	$123,000
• Lump Sum/Village deposit	$70,000
• Chattels	$2,000
	$195,000

34. **MRS UPTON's** view that market value includes the land on which the Unit sits or curtilage was reinforced by the valuation by **BARKER & MORSE LIMITED** dated 5 June 2008 which included a land value.

Improvements	*$130,000*
Land value	*$130,000*
Chattels	*$ 2,000*
Market value	*$262,000*

35. **MRS UPTON** understands that Unit 28 was relicensed for the sum of $270,000 in April 2009.

SUMMARY OF MRS UPTON'S LEGAL SUBMISSIONS

36. Counsel for **MRS UPTON** submits that clause 22 of the Licence covers calculation and payment by the Licensor of the Licensee's entitlement on termination of the Licence. The Licensor is required to get a valuer to undertake a "*market value*" valuation of the Unit.

37. The **BARKER & MORSE** valuation concludes the value of Unit 28 includes the building $130,000 and curtilage $130,000 including chattels of $2,000 totalling $262,000. The **BARKER & MORSE** valuation excludes the common areas and community facilities there being no reference in the valuation to them.

38. The existence of the "*Village Deposit*" is part of the occupation amount payable by the Licensee for the use and enjoyment of the land and facilities and is refundable in due course (clause 22.1(c)). It does not require the valuer to exclude the right to use of the curtilage.

39. Counsel for the Applicant submitted a comparison of valuations between 1996 being the date of occupation and 2008 is as follows:

	1996	**2003**	**2008**
Building, Land	113,000	123,000	130,000
Village Deposit	25,000	70,000	130,000
Total	**$138,000**	**$193,000**	**$260,000**
Percentage of Village Deposit	*18%*	*36.25%*	*50%*

This showed an increase in the Village Deposit component of the value from 18% in 1996 to 50% in 2008.

40. It was further submitted that there is no express provision in the Licence to state that the value of **MRS UPTON's** interest in the Village Deposit for the purposes of fixing a termination payment would be static between 1996 and 2008. It was on this basis that **MRS UPTON** assessed her perceived market value would be $213,200 in June 2008.

41. Counsel for **MRS UPTON** argues that the Operator's approach is to calculate the payment on the value of the building only interpreting "*market value*" pursuant to clause 22 of the Licence in that light. This is in spite of the Operator already having the benefit of various deductions. This is not what a plain reading of clause 22 states.

42. Counsel for **MRS UPTON** submits that the Operator has misinterpreted the refund calculation based on the "*market value*" of the Unit less deductions. The Operator's view is that with deductions **MRS UPTON** should receive $127,022.65 whereas Counsel for **MRS UPTON** submits **MRS UPTON** should receive $234,272.65.

43. **MRS UPTON's** uncontested evidence is that she was advised by the original Operator that she would receive the increased "*market value*" in the Unit on transfer of the Licence to another Licensee.

44. **MRS UPTON's** view is that the valuation she received from the Operator in 2003 of the then value of the Unit being $195,000 contributed to her current view of the value she should receive.

45. The valuation by **BARKER & MORSE** in 2008 values the building, curtilage and chattels excluding common land and community facilities. The incoming Licensee's purchase price on less favourable terms to that of **MRS UPTON** equates to roughly the **BARKER & MORSE** valuation.

46. The breakdown of the figure by the valuer is not given and no evidence has been provided as to how the valuer reached the view that is reached.

47. Counsel submits by calculating the payment in the way it does, the Operator is only taking into account the building rather than the value of the Unit which includes curtilage as assessed by the valuer. In clause 22 there is no reference to the value of

the curtilage being excluded from the valuation. The term "*market value*" if applied as the Operator assesses it, does not accord with the ordinary meaning of the term.

48. The interpretation of clause 22 accordingly does not take into account:

(a) The plain meaning of clause 22;

(b) Comment and case law about the definition of "*market value*";

(c) It is a distortion of the valuer's conclusions to value only the bricks and mortar as opposed to the building and curtilage.

49. Counsel refers to the House of Lords decision of **Investors Compensation Scheme Ltd v West Bromich Building Society** [1998] 1 All ER 98 stated in summary:

(a) Interpretation should be the meaning which the document would convey to a reasonable person, with all the background knowledge reasonably available at the time to the parties to the contract.

(b) Addresses the "*matrix of fact*".

(c) The meaning of a document which a reasonable man would assess is not always the same thing as the meaning of its words.

(d) The ordinary meaning test applies except where there is linguistic mistakes.

50. An application to clause 22 where there is no clearly expressed requirement to the contrary requires "*market value*" to include:

(a) The building;

(b) Curtilage; and

to exclude:

(c) Common areas and community facilities.

51. Counsel assert the questions to be answered by the Panel are:

(a) What is to be valued in terms of clause 22 of the Licence.

(b) Does the valuation by **BARKER & MORSE LIMITED** of June 2008 comply with the requirements of that clause.

(c) Does the refund calculation sheet issued by the Operator comply with that clause.

52. Counsel states the answers to the above questions are:

(a) What is to be valued is the right to occupy Cottage 28 on the same terms as in the Licence, but excluding the value of the right to use the common areas and facilities.

(b) The **BARKER & MORSE** valuation does value the building and curtilage, and excludes the common areas and facilities and therefore complies with the requirements of clause 22.

(c) The refund calculation only applies to the building value and therefore does not comply with clause 22.

53. To date **MRS UPTON** has received $108,179.93, she submits is entitled to receive $234,272.65 less $108,179.93 leaving a balance owed of $126,092.72.

54. Counsel argues if the Panel does not consider that the valuation of **BARKER & MORSE** complies with clause 22 of the Licence, then it has jurisdiction under s.69(1)(b) of the Act to order the Operator to provide an appropriate valuation. In those circumstances, Counsel seeks the parties have the opportunity to consider who should be appointed.

OCEANIA'S EVIDENCE

55. The Operator asserts clause 22 of the Licence establishes that **MRS UPTON** will receive a payment of "*current market value of the Unit*" at termination as assessed by a valuer after termination, less certain deductions.

56. Counsel argues the Licence Agreement should be interpreted as giving **MRS UPTON** a right to occupy Unit 28, but no interest in the land on which the Unit sits, or the curtilage or any increase in value of the Unit.

57. The Operator interprets the 2003 valuation as entitling **MRS UPTON** to have the value of the building, the Village deposit and chattels less deductions.

58. The **BARKER & MORSE LIMITED** valuation dated 5 June 2008 values the Unit itself termed improvements at $130,000 and this is the basis on which the calculation of the exit payment should be established, less deductions, plus the Village Deposit.

59. The Operator agrees with the definition of "*market value*" in the **BARKER & MORSE** valuation report of 5 June 2008 which is:

> "*....the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller, in an arms length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion*".

60. There is a difference between "*market value*" and the relicensing value of the Unit as there was substantial refurbishment involved at the Operator's expense.

61. **OCEANIA** has always calculated the exit payments under this form of Licence Agreement in the same way as **MRS UPTON**'s exit payment has been calculated, which is current market value of the Unit only. It is not aware of any objection to that method of calculation of termination of a Licence either prior to **OCEANIA**'s management or since **OCEANIA**'s management.

SUMMARY OF OCEANIA'S LEGAL SUBMISSIONS

62. Counsel for **OCEANIA** accepts that the central matter for determination by the Disputes Panel is – What is to be valued for the purpose of calculating the redemption amount under **MRS UPTON**'s Licence.

63. The Disputes Panel must determine what is meant by "*market value*" which would involve interpretation of the meaning of "*the Units current market value*".

64. The Panel may consider whether the improvements component of the **BARKER & MORSE** valuation dated 5 June 2008 represents the "*market value*".

65. The valuer is required to value the Unit which is the physical building which accords with the meaning of the words in the Licence and the contractual definition of the word "*Unit*" contained in the Licence. The interpretation on behalf of **MRS UPTON** is a subjective interpretation of the contract and goes against the fundamental interpretation of an objective basis. If the direct meaning of "*market value*" is the building only, then the market value is $130,000.

Relevant Facts

66. The new Licence in April 2009 involved refurbishment of the Unit in excess of $31,000.

Relevant Legal Principles

67. In **Vector Gas Limited v Bay of Plenty Energy Limited** [2010] NZSC5 Justice Tipping said at [19]:

> "*The ultimate objective in contract interpretation disputes is to establish the meaning the parties intended their words to bear*".

68. In summary, the authorities show that contractual interpretation is to be an objective inquiry based on the words of the contract, considered in light of the surrounding circumstances. It is rare for the plain meaning of words to be altered.

Application Of Legal Principles

69. The starting point to interpret the contract is to consider the meaning of "*the Unit*". "*The Unit*" is defined in Recital B as:

> "*B. Dwelling No. 28 ("the Unit") is erected on the Land and forms part of the Village.*"

70. The above definition of Unit is consistent with a definition in the Shorter Oxford English Dictionary

> "*A private residence forming one of several in a large building or group of buildings; a flat.*"

71. Other examples of the term Unit equating to the building or dwelling include:

(a) Clause 1.1 confers "*a right to occupy the Unit*";

(b) Clause 4.2(a) refers to the operating expenses of the Unit which include the "*interior and exterior maintenance of the Unit*";

(c) Clause 6.1 requires the Licensee to "*maintain and keep the interior of the Unit in a good, clean, and tidy repair and condition*";

(d) Clause 7.1 requires the Licensor to "*keep the exterior of the Unit in good repair, order and condition having regard to the age of the Unit*";

(e) Clause 11.2 allows the Licensee to "*have a guest to stay in the Unit*";

(f) Clause 12 allows the Licensor to "*to enter the Unit*"; and

(g) Clause 14 permits the Licensee to "*peacefully enjoy the Unit (together with rights of access to and egress from it)*".

72. Further examples of excluding the Land from the Unit includes Recital A:

> "*A. The Licensor is the owner of a Retirement Village ("the Village") erected on that land ("the Land") which is described in the Schedule to this Licence.*"

73. Clause 22.1(a) makes no reference to the Land and therefore it is only the Unit that is subject to valuation.

Response to Mrs Upton's Position

74. The argument put forward for **MRS UPTON** that "*market value*" should mean "*the current market value of the right to occupy Cottage 28*" is based on the premise that **MRS UPTON** should be entitled to any "*increase in value*" of the Licence. This does not comply with clause 22.1(a).

75. The argument should be rejected for the following reasons:

(a) It ignores the plain meaning of the words in the contract and the process of determining Market Value set out in clause 22.1(a).

(b) There is no evidence to show the parties intended any different meaning to the plain meaning of the words, the meaning of "*The Unit*" and "*the right to occupy the Unit*" have different meanings. As set out by Tipping J in **Vector Gas** words cannot be construed as having a meaning which they cannot reasonably bear.

76. If the "*market value*" is determined by a valuer and not based on the price paid for the new Licence is further evidence that "*Market Value*" is not connected with an "*increase in value*" of the Licence.

77. The argument appears to be based on **MRS UPTON's** view of what she would receive on termination of the Licence. It is a case of "*never mind what I signed, this is what I really meant*".

78. There is no argument raised as to why the ordinary meaning of clause 22 should not be adhered to.

The Question For The Panel

79. The Panel must determine if the term "*the Unit's current Market Value*" in the Licence signed by **MRS UPTON** includes only the unit building (described as improvements in the valuation of **BARKER & MORSE LIMITED** dated 5 June 2008), or does it also include the land value on which the Unit sits.

80. The Panel must consider 2 issues:

(a) Statutory interpretation of the term "*the Unit's current market value*"; and

(b) Application of that interpretation to **MRS UPTON**'s contract.

Statutory Interpretation for Oceania

81. In **Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd** [2001] NZAR 789 McGechan J stated

> "*the best start to understanding a document is to read the words used, and to ascertain their natural and ordinary meaning in the context of the document as a whole. One then looks to the background*
>
> – *to "surrounding circumstances*
>
> – *to cross-check whether some other or modified meaning was intended. Apart from matters of previous negotiation, and matters of purely subjective intention as to meaning, both excluded on policy grounds, one looks at everything logically relevant. At some extremes, background can be compelling. If background shows natural and ordinary meaning flaunts common-sense, natural and ordinary meaning very probably must give way.*"

82. In the **Vector** gas case, Tipping J at para 24 endorsed the approach in **Pyne Gould** and said

> "*anyone reading a contractual document will naturally form at least a provisional view of what its words mean, simply by reading them. That view, in a sense, is then checked against the contractual context... the concept of cross-check is helpful in the affirming the point made earlier that a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit for, or be it that outcome will usually be difficult of achievement. Those attempting the exercise unsuccessfully may well have to pay for the additional costs caused by their attempt.*"

83. Tipping J stated earlier at para 20

> "*the common law focuses strongly on the agreement in its final form as representing the ultimate consensus of the parties. Hence it is regarded as irrelevant how the parties reached that consensus. To enquire into that process, would not be consistent with an objective enquiry into the meaning of the document which is generally designed to be the sole record of the final*

agreement. A party cannot be heard to say "never mind what I signed, this is what I really meant""

84. At para 19 Tipping J stated

> *"in order to be admissible, extrinsic evidence must be relevant to that question... Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time."*

85. In terms of statutory interpretation therefore the Supreme Court and the Court of Appeal have stated in summary that there must be something quite out of the ordinary for the Court to interpret a contract in a way which does not accord with the plain meaning of the words within it. This may include for instance whether parties have agreed to attribute a special meaning to a particular word or words within the contract, in which case evidence can be bought to that effect.

Plain Meaning Of The Words

86. The Licence states:

> **"RECITAL A**
>
> *A. The Licensor is the owner of a Retirement Village ("the Village") erected on that land ("the Land") which is described in the Schedule to this Licence.*

87. The Schedule states:

> *Totara Park:*
>
> *CT80C/378... 2.5991 hectares more or less being Lot 1 DP 136686 and being parts Allotment 49 Parish of Mahurangi excepting thereout all limestone, marl, clay, coal and other minerals stone or other earth formations in upon or under the said land as accepted by Transfer 448426.*

88. Recital B states:

> ***"RECITAL B***
>
> *B. Dwelling No. 28 ("the Unit") is erected on the land and forms part of the Village."*

89. The Licence then goes on to state:

> ***"OPERATIVE PART***
>
> *1.* ***Grant of Licence***
>
> *1.1 Upon and subject to the terms set out in this Licence, the Licensor grants and the Licensee accepts a right to occupy the Unit for a term commencing on ("the Commencement Date").*

1.2 The Licensee (and where there are two Licensees, then also the survivor of them) shall be entitled to occupy the Unit and have the right to use and enjoy all common areas and community facilities associated with the Village ("the Facilities") as the Licensor may permit from time to time."

90. The Licence then addresses the issue of payments to be made by the Licensee as follows:

*"3. **Payment***

3.1 In consideration for the grant of this Licence, the Licensee shall pay to the Licensor the sum of $138,000.00 ("the Occupation Amount").

3.2 It is acknowledged and agreed that the sum of $25,000.00 ("the Village Deposit") constitutes and forms part of the Occupation Amount. [The Village Deposit is a sum of money payable by the Licensee for the use and enjoyment of the Land and Facilities, and is refundable in due course pursuant to clause 22.1(c).]"

91. The Licence then addresses the issue of payment of outgoings as follows:

*"4. **Payment of Outgoings***

4.1 In addition to the Occupation Amount, the Licensee shall promptly make the following payments to the Licensor or if appropriate, as directed by the Licensor.

4.2 The payments for which the Licensee shall be responsible are:

(a) a proportionate share as shall be determined from time to time by the Licensor, of the operating expenses of the Unit and the Village; the operating expenses shall include but not be limited to matters such as rates, insurance, interior and exterior maintenance of the Unit, and management costs."

92. Finally in clause 24 the issue of registration is addressed as follows:

*"24 **Registration***

24.1 The Licensor shall not be required to do anything to enable this Licence to be registered or be required to obtain the consent of any mortgagee of the Land.

24.2 The Licensee shall not register a caveat against the title to the Land in respect of the Licensee's interest under or pursuant to this Licence."

THE PANEL'S DECISION

93. This is a dispute between **MRS UPTON** and **OCEANIA** as to the sum **MRS UPTON** should have received on termination of her Licence to Occupy Unit 28 at Totara Park Village, Warkworth.

94. **MRS UPTON** position is that she should be entitled to the amount the Unit was relicensed for less deductions, or alternately that she should be paid out for the current value of the building, curtilage and/or an increased value of the Village deposit, less deductions. **OCEANIA's** position is that the correct payout figure is the value of the building as assessed by a valuer plus the actual Village deposit paid by the Licensee less deductions.

95. The Panel needs to answer the following questions.

(a) What is the statutory interpretation of the term *"the Unit's current market value"* in the Licence to Occupy.

(b) What is **MRS UPTON** entitled to receive on termination of the Licence pursuant to clause 22.

(A) QUESTION 1 – What is the statutory interpretation of the term *"the Unit's current market value"* in the Licence to Occupy.

96. Pursuant to clause 22, on termination of the Licence **MRS UPTON** is entitled to receive *"the Unit's current market value (but excluding therefrom the right to use and enjoy all the common areas and community facilities associated with the Village).* The term *"the Unit's current market value"* is not defined in the Licence and statutory interpretation is therefore required.

Statutory Interpretation

97. Counsel have helpfully referred the Panel to the relevant legal principles and cases of statutory interpretation.

98. In the decision of **Investors Compensation Scheme Ltd v West Bromich Building Society** [1998] 1 All ER 98 Lord Hoffmann set out the proper approach to interpretation of contract documents and stated:

> *"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at, at the time of the contract."*

99. In the Court of Appeal decision of **Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd** [2001] NZAR 789 McGechan J stated:

> *"the best start to understanding a document is to read the words used, and to ascertain their natural and ordinary meaning in the context of the document as a whole. One then looks to the background to "surrounding circumstances" to cross-check whether some other or modified meaning was intended."*

100. In the Supreme Court decision of **Vector Gas Limited v Bay of Plenty Energy Limited** [2010] NZSC 5 Justice Tipping said at paragraph [19]:

"Legal principles

[19] The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear."

101. In summary the cases require a two step process, firstly that the plain meaning of the words in the contract be considered and secondly, that an assessment be made as to whether the parties jointly intended some modification to the ordinary meaning. In this case statutory interpretation is required of the term *"the Unit's current market value"*.

Defining the Terms

102. As there is no definition of the terms *"Unit"* or *"current market value"* within the Licence the Panel must look further afield. The Shorter Oxford English Dictionary provides a definition of the terms:

"Unit" - *"a private residence forming one of several in a large building or group of buildings: a flat";*

"current" - *"at the present time"*

"market value" - *"the amount for which something can be sold on a given market"*.

Unit and Land Defined

103. **MRS UPTON's** submission is that the definition of *"the Unit"* encompasses the curtilage by common sense meaning, and that she should be paid out the value of building and land as set out in the **BARKER & MORSE LIMITED's** valuation of 5 June 2008 or the relicensing amount paid for *"the Unit"*.

104. The Panel needs to consider whether the Licence gives any guidance as to meaning to ascertain whether the term *"the Unit"* includes the curtilage. The terms *"the Unit"* and *"Land"* are used throughout the Licence and examples include:

(a) Clause 1.1 which confirms *"a right to occupy the Unit"*.

(b) Clause 4.2(a) refers to payments to be made by the Licensee which include *"operating expenses of the Unit and the Village; the operating expenses shall include but not be limited to matters such as rates, insurance, interior and exterior maintenance of the Unit, and management costs"*.

(c) Clause 6.1 requires the Licensee to *"maintain and keep the interior of the Unit in a good, clean, and tidy repair and condition;..."*.

(d) Clause 7.1 requires the Licensor to *"keep the exterior of the Unit in good repair, order and condition in regard to the age of the Unit"*.

(e) Clause 8 states *"the Licensee shall not do anything or permit anything to be done on or around the Unit or Land which may cause a nuisance, damage or disturbance to the Licensor or any other Licensee, resident..."*.

(f) Clause 11.1 states "*the Licensee will not use or permit the Unit to be used for any purpose other than as a residence for the Licensee's personal use, occupation and enjoyment*".

(g) Clause 11.2 allows the Licensee to *"have a guest to stay in the Unit"* and "*the Licensee may keep pets in or about the Unit...*

Notwithstanding the giving of any consent, the Licensor shall retain the right to revoke or modify the terms of any such consent and at any time may require the guest to leave or as the case may be, any pet to be removed from, the Unit and the Land".

(h) Clause 14 permits the Licensee to "*peacefully enjoy the Unit (together with rights of access to and egress from it) and the Facilities, without interruption...".*

(i) Clause 15.1 "*if the Unit ... shall at any time during the term of this Licence be destroyed or damaged so as to render the Unit unfit for occupation and use by the Licensee, then this Licence will immediately terminate*".

(j) Clause 16.3 "*The Licensee shall recompense the Licensor for all expenses incurred by the Licensor in repairing any damage to the Unit or the Land resulting from any act or omission of the Licensee".*

(k) Clause 20 "*the Licensor shall have the right from time to time to improve, extend, add to or alter the existing facilities on the Land or in any other way develop or use the Land".*

105. Paragraphs (e), (g), (j) and (k) above refer to both the Unit and/or Land. It seems on an ordinary reading of those paragraphs that there is a distinction in the Licence between "*the Unit"* and "*the Land*".

106. "*The Land*" is in fact defined in the Schedule to the Licence being:

"*Totara Park CT 80C/378 being 2.5991 hectares more or less being Lot 1 DP 136686 and being parts allotment 49, Parish of Mahurangi, excepting thereout all limestone, marl, clay, coal and other mineral stone or other earth formations in upon or under the said land as accepted by Transfer 448426*".

107. There are several other references to "*the Land*" as a separate entity to "*the Unit*" in the Licence. These references which include Recital A which states that the Licensor is the Owner of the Village erected on the Land described in the Schedule referred to above. Recital B then states that Unit 28 is erected on the Land and forms part of the Village, which the Licensor is the owner of. To further clarify the position in the Operative Part there is reference to the Licensee's right to occupy the Unit, and that she shall have the right to "*use and enjoy all common areas and community facilities associated with the Village*".

108. Adding to the argument the definition of "*the Land"* there is no reference to a division of "*the Land*" to attach to any of "*the Units"* anywhere in the Licence.

109. In clause 4 of the Licence it refers to payment of outgoings, and notes that the Occupier can be requested to make payments in a proportionate share for operating expenses of the Unit and the Village, including rates, insurance, interior and exterior maintenance of the Unit and management costs. The Panel finds that this clause does not give an interest in the Land as rates for instance are struck on the basis of the Land and improvements being the buildings and facilities. There is in any event no evidence before the Panel as to whether occupiers were assessed for rates, and the other items for which charges can be levied against the Licensee. The charges are indicative that the Licensee can be required to meet a share of effectively all running costs of the Village including management costs for example. The fact of payment of such costs does not indicate an interest in the assets such as a right to employ and/or control management.

110. There are a number of other examples of where the Unit and the Land are differentiated including in clause 14 which gives the Licensee peaceful occupation of the Unit (*"together with rights of access to and egress from it) and the Facilities..."*.

111. The final indication of a distinction between the concept of *"the Unit"* and *"the Land"* is set out in clause 24 of the Licence. The Licensor is not required to register the Licence or obtain the consent of any mortgagee of the Land, indicating the Licensee is not intended to have any interest in the Land. Further there is a prohibition on the Licensee being able to register a caveat against the title to the Land pursuant to the Licence.

112. The above examples indicate a differentiation between *"the Unit"* and *"the Land"* and certainly does not, for instance indicate that there is the right to individual use by the Unit occupier, of what may be referred to as the curtilage around Unit 28. The Licence contrasts this against the exclusive use of the Unit. The inclusion in clause 14 of *"a right of access to and egress from the Unit"* could also be read as indicating that the Licensee has no interest in the Land, and the right to enter is therefore specifically granted in the Licence. This limited right to the use of the Land for access only could be contrasted on a wider land use scale for instance where exclusive use areas are defined in cross leases.

113. There is a definition of *"Residential Unit or Unit"* in the Retirement Villages Act. It states:

> *"residential unit or unit means a building, or part of a building, that is a house, flat, townhouse, unit, serviced unit or apartment (whether or not it has cooking facilities), villa, or similar dwelling erected, or currently used, primarily and principally as a unit of accommodation; and includes any land, improvements, or appurtenances belonging to the unit or usually enjoyed with it"*

114. The current Act assists with defining the terms, but does not assist with defining the terms in this case. The Panel finds that this definition is generic in that it refers to all of the available options for residential units which are commonly found in retirement villages.

115. For this definition to be of assistance to this case, the Licence would still need to specify, or there be some surrounding factors which indicated that in **MRS UPTON's**

Licence there was either no differentiation between the Building and the Land or that there was a positive recognition of the curtilage in the Licence.

116. The Panel finds the term "*the Unit*" in the Licence refers only to the building and excludes the curtilage.

Current Market Value

117. There is nothing in the Licence which assists in establishing a meaning of "*current market value*". The meaning of the words according to the Shorter Oxford English Dictionary indicate that "*current market value*" is the amount for which something can be sold on a given market at the present time.

118. The valuation report from **BARKER & MORSE LIMITED** dated 5 June 2008 for Unit 28 defines "*market value*" in its general disclaimers:

"*Market value is defined as "the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller, in an arms length transaction after proper marketing wherein the parties at each act knowledgeably, prudently and without compulsion*".

119. The Panel therefore finds the ordinary meaning of the clause "*the Unit's current market value*" means the assessed value of the Unit as between a willing seller and buyer without compulsion, on the day of the valuation.

120. The Panel accepts that there is a difference between "*current market value*" assessed by a valuer, and the price received in an actual transfer of the Licence. The former and the later may occur at different times, in different circumstances and in different market climates.

121. Clause 22 of the Licence requires that the Licensor appoints a Registered Valuer to assess "*the Unit's current market value*" which was undertaken in this case. The plain words of the section do not require that the valuation be set by any relicense payment. In fact the clause goes on to set out a procedure to be followed if the first valuation is not accepted by the Licensee. Common sense may dictate that if the approach were that the Licensee was paid out on the value of the next Licence, then the Licensor would not be in a position to make improvements to the Unit without seeking recompense from the Licensee. There is no mechanism in the contract for that to occur. Further there would be no automatic need for a valuation if the relicensing sum was to be the basis for the payout figure.

122. An issue however which may raise confusion is that in clause 22.1(c) the Licensee does not have to be paid out until 7 days after the grant of a new licence for the Unit. That could lead to a view that what was going to be paid out would be dependent upon the value of the new Licence for the Unit.

123. That clause does not state however that the date of payment is in any way related to the value of the relicense. It simply states that the former Licensee may not be paid out until the Unit is relicensed, presumably put in for the exclusive benefit of the Operator and saving the Operator paying out before receiving funds. It does not establish a nexus between the value and pay out date.

124. The letter from the **MACPHERSON GROUP** of 14 April 2003 is an example that the refund calculation is established before for instance any possible advertising of the availability of the Unit for relicensing had occurred, since the Licensee did not continue with the termination of the Licence at that time yet the payout was already calculated.

Any Modification of the Words

125. **MRS UPTON's** evidence is that she understood she would receive the amount the Village Operator resold the Unit for to an incoming resident, less deductions. She therefore believed that she would receive any increase in value for the Unit over the time that she occupied it. **OCEANIA** has no direct knowledge of the negotiations on the Licence between **MRS UPTON** and **PRESBYTERIAN SUPPORT SERVICES** as it was not a party to them.

126. In 2003 **MRS UPTON** considered relinquishing her Licence and the valuation from **MALCOLM HARDY** Registered Valuer sets the valuation of the Unit at $195,000 including:

Building	$123,000
Lump Sum/Village deposit	$ 70,000
Chattels	$ 2,000
Total	$195,000

127. The letter from the **MACPHERSON GROUP (PRESBYTERIAN SUPPORT)**, dated 14 April 2003 and accompanying refund calculation sheet, however assessed the value of **MRS UPTON's** interest as:

Building	$123,000
Plus Lump Sum amount	$ 25,000
Chattels	$ 2,000
Less deductions	----

128. The Panel accepts that the Licence is inadequately drafted. It is the Panel's view however that the Licence does differentiate between the Unit and the Land, as set out earlier in this decision. This view is reinforced by the assessment by the **MCPHERSON GROUP** in 2003 which only valued the building. **MRS UPTON's** submission that *"the Unit"* encompasses the curtilage can not therefore reflect the parties joint intention when they signed the Licence.

129. There is no evidence provided that the parties jointly interpreted the terms *"the Unit's current market value"* in a manner which is different to the ordinary meaning of those terms within the Licence.

130. **MRS UPTON** submits that based on the valuation from **MALCOLM HARDY** dated 7 April 2003 which assesses a lump sum/Village deposit of $70,000 that this is indicative that it was intended that the Village deposit would increase in value from 1996 at 18% to 50% in 2008. **MRS UPTON's** argument is that because there is no express provision in the Licence to say the Village deposit will remain static, then she should benefit from an increase in that sum. There is no mechanism in the Licence to ascertain how the Village deposit would be increased in value, and both letters from

the different Operators in 2003 and 2008 set out the Village deposit at the amount originally paid.

131. In the absence of any evidence being provided to the Panel that the parties intended the plain meaning in clause 3.2 of the Licence to say that the Village deposit of $25,000 was to be refunded on termination of the Licence with an increase in value then that submission must fail.

(B) QUESTION 2 – What is MRS UPTON entitled to receive on termination pursuant to clause 22 of the Licence.

132. For the reasons set out above, the Panel finds that the plain meaning of the term *"the Unit"* is the building itself which is valued in the **BARKER & MORSE LIMITED** valuation of 5 June 2008 at $130,000. *"The Unit"* does not include the curtilage which is included in the parcel of land on which the Village sits, rather than defining any individual plot associated with Unit 28.

133. The Panel finds that **MRS UPTON** is not entitled to the value of the Unit being assessed at any sum paid by any new Licensee, on the basis that clause 22 of the Licence provides for a valuer's assessment at value at termination. It is not pegged to the resale of the Licence.

134. The Panel finds that the clear meaning in **MRS UPTON's** Licence is that the Village Deposit will be refunded on termination, and that the sum to be refunded is what has been paid, without any increase. **MRS UPTON** is entitled to a $25,000 refund of the Village deposit.

135. There is no dispute about payment of the $2,000 sum for chattels if they have all been left in the Unit.

136. Similarly, there has been no dispute raised about the deductions.

CONCLUSION

137. The Panel finds that the amounts that **MRS UPTON** is entitled to receive on termination of her Licence to Unit 28 at Totara Park Village, Warkworth is:

(a)	Unit	$130,000
(b)	Village deposit	$ 25,000
(c)	Chattels (if they have been left in the Unit)	$ 2,000
		$157,000
(d)	Less deductions as agreed	

COSTS

138. In the event that costs are sought written submissions should be made within 14 days.

COMMENT FROM THE PANEL

139. Disputes of this kind are always difficult particularly for the Licensee who in **MRS UPTON**'s case, is in her nineties. The contract which **MRS UPTON** signed in 1996/1997 did not have the clarity which more recent contracts have, which no doubt has caused difficulties for **MRS UPTON**. **MRS UPTON** may have had conflicting or too little information given to her on signing the Licence but she did receive advise from a law firm albeit a Legal Executive.

140. The Panel also notes that the form of valuation the previous and current Operator obtained from the two separate valuers did not assist **MRS UPTON.** Both valuations indicated a curtilage value or lump sum which the Panel finds was outside of what was to be valued under the Licence. The Operators did not intend to pay out either sum so they should have instructed the valuers properly so neither sum was put in the valuation.

Dated at Auckland this **27** day of October 2010

Claudia Elliott
Disputes Panel