BEFORE THE DISPUTES PANEL

UNDER	**The Retirement Villages Act 2003**
BETWEEN	**Oceania Village Company Limited** **Applicant**
AND	**Marjorie Parker** **Respondent**

Disputes Panel member: **Mr N J Dunlop**
Counsel for Applicant: **Mr M R Heron and Ms E McGill**
Counsel for Respondent: **Dr J R Gray and Ms C A M Blucher**

DECISION OF DISPUTES PANEL

15 November 2011

Solicitors for Applicant: **Russell McVeagh, Auckland**
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Decision of Disputes Panel

The Dispute

1. The Applicant ("Oceania") is the operator of a retirement village in which the Respondent ("Mrs Parker") occupied a cottage.

2. The dispute between the parties is whether or not a valuation obtained in relation to that cottage binds the parties.

3. The valuation was obtained with a view to ascertaining Mrs Parker's entitlement upon termination of her licence to occupy.

4. Oceania contends that the valuation should be disregarded and a new valuation obtained. It contends that the wrong entity was valued, and therefore the valuation is irrelevant to the assessment of Mrs Parker's termination entitlements.

5. Mrs Parker contends that the valuer has undertaken what was required of him, albeit applying a methodology with which Oceania disagrees. She says that whether or not the valuer arrived at the correct value is beside the point, and that the parties are bound by the outcome of the valuation whatever it might be.

6. The valuer valued the licence to occupy the cottage. Mrs Parker contends that it was open to him to do that. Oceania contends that he should have valued the physical cottage, and that it was not open to him to do otherwise.

Background Summary

7. In March 1996 Mrs Parker purchased and was granted the right to occupy cottage number 42 in Elmwood Village, Manurewa, Auckland.

8. The licence to occupy is dated 15 March 1996 ("the licence").

9. The licence was terminated on 7 March 2008.

10. Clause 23(a) of the licence deals with payment by the licensor (Oceania) on termination. It provides that: *"The Unit shall be valued as at the date of termination by a registered valuer…"*

11. In due course Mr Michael Gunn of CB Richard Ellis was appointed to undertake the valuation. He duly provided a valuation dated 7 July 2010.

12. Under clause 23, Mr Gunn was required "*… to determine a New Value for the Unit…*"

13. In his valuation, Mr Gunn states:
"*The drafting of the repayment obligation clause is open to interpretation as it does not clearly define on what basis the 'New Value' is to be assessed. This could include:*

    1. *Freehold land and building*
    2. *The improvements only*
    3. *The value on a licensed basis, i.e. a 'licence to occupy'".*

14. Mr Gunn goes on to state:

    "… Clause 23(a) states a requirement to assess a 'New Value' for the 'Unit'. 'Unit' is defined in Clause (sic) B as "…the right to occupy Cottage number 42 erected upon the Land ("the Unit") …""

    Later he states:

    "*While I am not qualified to form a legal opinion on the meaning of 'New Value', it is my interpretation that 'New Value' most [sic] mean the value of the 'Licence to Occupy' at the date of termination and that such licence would include the exclusive right to occupy Cottage 42. The value of the 'Licence to Occupy' most [sic] therefore also directly include a right to occupy the land as one can not occupy the cottage without also occupying the land in unison."*

15. Thus Mr Gunn adopted the third option referred to in paragraph 13 above. He considered that he was required to determine the value of the licence to occupy because of the definition of "the Unit" in recital B of the licence, and proceeded to do so.

16. Recital B more fully states:

    "This Licence records that in consideration of the sums of $75,000 ("the Occupation Amount") and of $23,000 ("the Lump Sum Amount") paid by the Licensee to the Licensor … and which are repayable in the manner specified in Clause 23 the Licensor hereby grants to the Licensee and the Licensee hereby accepts a grant of the right to occupy Cottage number 42 erected upon the Land ("the Unit") for the term and subject to the conditions and agreements recorded or implied in this Licence."

    Mr Gunn interpreted "the Unit" as referring to "the right to occupy", rather than to "Cottage number 42".

17. The valuation was not accepted by Oceania, which argued that Mr Gunn should not have valued the licence to occupy but Cottage number 42, being a physical cottage. Oceania argued that Mr Gunn was in error, and "the Unit" in Recital B refers to "Cottage number 42". Mrs Parker argued the valuation

was binding on Oceania whether or not Mr Gunn's interpretation of "the Unit" was correct. Efforts by the lawyers representing Oceania and Mrs Parker to resolve the dispute were unsuccessful. Oceania therefore issued a dispute notice under the Retirement Villages Act 2003 in order that the dispute be resolved. Its right to obtain a ruling from a disputes panel is contained in section 54(1) of the Act, by reference back to section 53(1)(c).

18. The disputes panel was duly appointed. The solicitors for the parties agreed that a hearing was not required and that the Disputes Panel could make a decision on the papers. The Disputes Panel was provided with an agreed bundle of documents together with a series of submissions and replies by counsel. Two teleconferences were held between the Disputes Panel and counsel. By 7 November 2011 the parties had agreed that there was nothing further for them to submit to the Dispute Panel member who thereupon proceeded to issue this decision.

The Arguments

19. Oceania argues that the valuation did not meet the requirements of clause 23(a) of the licence which, as already mentioned states that:

    "The Unit shall be valued as at the date of termination by a registered valuer … to determine a New Value for the Unit ("the New Value").

    Oceania argues that the New Value of the Unit has not been ascertained, but an irrelevant value.

20. Mrs Parker contends that Mr Gunn has in fact determined a New Value of the Unit, and that whether or not his methodology or conclusion were flawed is beside the point – both parties are bound to adhere to it.

21. Dr Gray on behalf of Mrs Parker submits that based on the applicable case law, there are no grounds available to Oceania to challenge the valuation. He submits that where a valuer has been appointed to act as an expert, the circumstances in which a court will be justified in setting aside a valuation are necessarily and properly restricted. He submits that in determining the circumstances in which a particular valuation might be challenged, the courts have drawn a distinction between mistakes as to the process of valuation, which are immune from judicial review, and those cases where the valuer has failed to actually undertake the type of valuation contemplated by the terms of the contract. He submits that unless valuers have departed from the question referred to them, as distinct from simply having made a mistake in the course of the valuation, the valuation cannot be set aside.

22. Dr Gray refers to a number of legal authorities to support these submissions. One such case was Legal & General Life of Australia Limited v. A Hudson

Pty Limited (1985) 1 NSWLR 314. In that case the court described the distinction referred to by Dr Gray in the following terms:

"While the mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or the certificate of valuation, nevertheless, the mistake may be of a kind which shows that the valuation is not in accordance with the contract. A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties. But a valuation which is the result of a mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. In each case, the critical question must always be: Was the valuation made in accordance with the terms of the contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract."

23. In Brown v. Rodd Cook Sportswear Limited (CA 260/91, 7 July 1992) the distinction is succinctly put:

"In the language of mistake, it is a distinction between a mistake made in the course of conducting a valuation and a mistake as to what constitutes a valuation in terms of the particular contract."

24. On behalf of Oceania, Mr Heron and Ms McGill do not dispute the law, but do dispute the application of the law to the facts at hand. They submit that Mr Gunn did not do what he was contracted to do.

25. In essence, Mr Heron and Ms McGill submit that Mr Gunn valued the wrong thing. He valued a licence to occupy rather than a physical cottage. They argue that this was an error as to what constituted the valuation, and therefore the valuation can and should be set aside. They submit that the object of the valuation, "the Unit", is correctly defined as meaning the physical cottage, rather than a licence to occupy the cottage.

26. On behalf of Mrs Parker, it is argued that whether or not Mr Gunn correctly interpreted the meaning of "the Unit" by reference to Recital B is beside the point. It is argued that he is an expert who, as was asked of him, assessed the "New Value" of "the Unit". It is argued, that the parties are bound by whatever meaning he attributed to those two terms. In essence, it is argued that Mr Gunn did in fact value "the Unit", albeit that he treated it as a licence to occupy rather than a physical cottage.

Analysis

27. Given that the valuer was called upon by the parties to value "the Unit" referred to in clause 23(a) of the licence, it is surely of importance to identify "the Unit". Mr Gunn himself recognised that, which is why he relied on Recital B. Although clause 23 is silent on how the valuation is to be conducted, it does at least state what is to be valued. The identification of what is to be valued is surely a fundamental prerequisite of any valuation. A valuer cannot commence a valuation without knowing the entity to be valued.

28. The submissions on behalf of Oceania included a number of case law authorities on contractual interpretation. Counsel for Mrs Parker did not take issue with these authorities. For present purposes perhaps the most useful is that of McGechan J. in Pyne Gould Guinness Limited *v.* Montgomerie Watson (NZ) Limited *[2001] NZAR 789:*

"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."

29. The Disputes Panel respectfully agrees with counsel for Oceania that the application of the above test to the present case must result in the conclusion that "the Unit" means the physical cottage number 42. In Recital B (see paragraph 16) the term "the Unit" refers back not to "the right to occupy" but to "Cottage number 42".

30. The various references in the licence to "the Unit" compellingly support the contention that "the Unit" can only mean the physical cottage, and not the right to occupy it. Counsel for Oceania cited various mentions of "the Unit" in the licence as follows:

" *(a) Clause 1.1, which states that "The Licensee… shall be entitled to occupy the Unit". A person cannot occupy a "right to occupy", as this is intangible. The logical interpretation is that the Licensee shall be entitled to occupy the physical building.*

(b) Clause 2(b), which states that the Licensee shall make payments for "All charges or levies for water, gas, electricity, telephone and other utilities or services supplied to or used on the Unit". Utilities can be supplied to or used on a physical building. The same obviously cannot apply to an intangible right.

(c) Clause 3, which states that "the Licensee shall furnish the interior of the Unit in a tasteful and adequate manner". A right cannot be furnished, nor does it have an interior.

(d) Clause 4.1, which states that the Licensee shall clean and repaint the interior of the Unit to the satisfaction of the Licensor. Unlike a physical building, the right to occupy cannot be cleaned or painted."

31. There are many other references to "the Unit" in the licence which demonstrate beyond a shadow of doubt that "the Unit" means the physical cottage. These references include:

    - The licensee agreeing to "*vacate the Unit.*" (1.1)
    - "*The operating expenses of the Unit*". (2(a))
    - "*Fixtures, fittings, plant or equipment in the Unit*" and "*damage, risk or hazard to the Unit*" (4.4)
    - "*The exterior of the Unit*" (5)
    - "*The contents of the Unit*" (7.2)
    - Permitting "*contractors to enter upon the Unit or any part of the Unit … for the purpose of repairing, altering, maintaining or reconstructing the Unit…*"
    - The right of the licensee "*peacefully to enjoy the Unit and right of access and egress from the same.* (13)
    - Documents being served "*by delivering the same to the Unit.*" (17)
    - The licensee not keeping any pets "*in or about the Unit.*"(19)

32. It follows that "the Unit" for which Mr Gunn was required to determine "the New Value" was the physical cottage. Therefore the issue arises as to whether or not Mr Gunn has fulfilled his contractual obligation and in fact undertaken the valuation required of him.

33. It is the Disputes Panel's view that he has not. He has valued something entirely different to that which he was contracted to do. He has mis-identified the object of the valuation. He valued a licence, whereas he was required to value bricks and mortar. Licences relate to rights and permission. Physical buildings by contrast, are material things. A licence to occupy is an entirely different species to a physical building. The former is intangible, the latter tangible.

34. Although Mr Gunn when valuing the licence had regard to physical features of the cottage, that was part of the *methodology* which he adopted, and does not alter the fact that the *object* of his valuation was a licence.

35. The Disputes Panel concludes therefore, that Mr Gunn has made a mistake as to what constitutes a clause 23(a) valuation, which should therefore be set aside. There is no extant clause 23 evaluation. The parties sought one, but did not get one.

36. Ideally, the Disputes Panel would have wanted to test this conclusion against the meanings of "the Occupation Amount" and "the Lump Sum Amount" referred to in Recital B (paragraph 16 above).

37. Clause 23 provides that upon termination of the licence, the licensor (Oceania) is to pay the licensee (Mrs Parker) the New Value minus a deduction based on years of occupation, together with the Lump Sum Amount.

38. Oceania contends that the Occupation Amount referred to in Recital B refers to the value of the physical cottage whereas the Lump Sum Amount referred to in Recital B refers to the value of the land upon which the cottage is situated. It says therefore that the intent of clause 23 is that Mrs Parker upon termination should receive payment for the building at a value that reflects both usage and change of value over time, and is simply repaid the Lump Sum Amount. In other words, the termination payment reflects changes in the value of the building and the duration of its usage, but does not reflect any changes in the value of the land.

39. This leads Oceania to argue that if the New Value was of the licence to occupy, then an absurdity would result. The licence to occupy would take account of the value of the land, but additionally Mrs Parker would receive back the Lump Sum Amount reflecting the original value of the land. In other words, it is said by Oceania that if Mr Gunn's valuation is upheld then Mrs Parker will be twice compensated for the value of the land (under both the New Value and the Lump Sum Amount) when the intent was that she simply receive back the original Lump Sum Amount.

40. Unfortunately, there is no extant documentation which counsel for either Oceania or Mrs Parker can identify, which identifies how the Occupation Amount and the Lump Sum Amount were calculated when the licence was entered into in 1996. That is because at that time the licensor was Presbyterian Support Services (Northern). Oceania subsequently purchased the village and became licensor. The licences it uses are quite different from those which were used by Presbyterian Support Services (Northern).

41. Were the derivation of the Occupation Amount and Lump Sum Amount figures in the licence known by Oceania and Mrs Parker, then in all likelihood this dispute would not exist.

42. The best that can be said is that some credence is leant to Oceania's arguments by their unsubstantiated belief that the original Occupation Amount equates to the value of the building and the original Lump Sum Amount equates to the land value. It is a belief which fits with what is known. And it fits with the Disputes Panel's interpretation of "the Unit" and "New Value". Mrs Parker is not in a position to either agree or disagree with Oceania's belief. She simply does not know.

Result

43. Mrs Parker seeks an order that the valuation is an expert determination not subject to review. In practical terms, such an order would be made pursuant to section 69(1)(b) requiring Oceania to comply with its obligations under an occupation agreement, most particularly, making a termination payment under the licence on the basis determined by Mr Gunn. For the reasons set out above, the Disputes Panel is not prepared to make such an order.

44. For its part, Oceania seeks an order under section 69(1)(b) that Mrs Parker comply with her obligations under an occupation right agreement, more particularly that she agree to activate the appointment procedures of clause 23(a) to obtain a valuation of the Unit which meets the requirements of that clause, including that the valuation relate to the physical cottage. For the reasons set out above the Disputes Panel agrees to make such an order.

45. Clause 23(a) refers to the valuation being undertaken "*by a registered valuer agreed upon by the licensor and the licensee, and failing agreement, to be nominated by the Chairman for the time being of the Institute of Valuers…*"

46. Accordingly, it is hereby ordered that the parties engage a registered valuer agreed upon by them, or failing agreement to be nominated by the Chairman for the time being of the Institute of Valuers, on the basis that the object of the valuation is the physical cottage number 42 as at 7 March 2008, and otherwise in accordance with the requirements of clause 23(a).

Costs

47. Section 74(2)(a) of the Act provides that whether or not there is a hearing, the disputes panel may award the applicant costs and expenses if the disputes panel makes a disputes resolution decision fully or substantially in favour of the applicant. The parties agree not to make submissions with regard to costs until after the delivery of this decision.

48. The parties are directed to make written submissions on the issue of costs within seven days of the date of this decision. Those submissions are to be presented contemporaneously. Each party has the right of reply in writing to the submissions of the other no later than seven days after the date of the contemporaneous costs submissions. The Disputes Panel will thereupon rule on the issue of costs.

Conclusion

49. The Disputes Panel thanks counsel for their clear and thorough submissions. It also thanks counsel for agreeing between themselves on an efficient process in order to expedite the resolution of this matter.

50. The arguments presented to the Disputes Panel have been many, detailed and wide-ranging. Although they are not recorded in this decision, the Disputes Panel has had careful regard to all of them.

N J Dunlop
Disputes Panel

Date