

**IN THE DISTRICT COURT
AT AUCKLAND**

CIV-2011-004-002618

IN THE MATTER OF the Retirement Villages Act 2003

AND

IN THE MATTER OF an appeal against a decision of the
Disputes Panel pursuant to section 75
of the Act

BETWEEN JACQUELINE ROBINSON of
Auckland, School Teacher, and
STEPHANIE LOVEDAY of
Auckland, Homemaker, as executors
in the Estate of Marjorie Parker,
Deceased.

Appellants

AND

OCEANIA VILLAGE COMPANY
LIMITED

Respondent

Date of hearing: 28 February 2013

Appearances: Mr P Grace and Ms C.A.M. Blucher, counsel for Appellants
Ms E McGill and Ms K Baxter, counsel for Respondent

Judgment: 15 March 2013

RESERVED JUDGMENT OF JUDGE M E PERKINS

INTRODUCTION

[1] This is an appeal against the decision of the Disputes Panel (the panel) constituted under the Retirement Villages Act 2003 (the Act) and dated 15 November 2011. The panel was set up to consider a dispute pursuant to ss.53(1)(c) and s.54 of the Act.

[2] The Notice of Appeal was filed on 12 December 2011. There are two grounds upon which the appellants appeal against the decision of the panel. First, that the decision reached by the panel was incorrect in fact and law. Secondly, (and I summarise here) the panel was not entitled to set aside the valuation of an expert valuer witness duly appointed under a formal licence to occupy under which the late Mrs Parker held possession at the retirement village.

[3] As a preliminary matter to the appeal I noted that the appellant named in the intituling of the Notice of Appeal is not a legal entity. By consent, the personal representatives in the estate of the late Marjorie Parker were substituted for the appellant described in the intituling. It appears that since the decision of the panel in 2011, Marjorie Parker has died and this matter is being continued by her personal representatives.

[4] A further preliminary point is that from the file I note that prior to the hearing of the appeal, the appellants filed an application for leave to introduce new evidence on appeal. A Notice of Opposition was filed but the application has not been pursued.

BACKGROUND

[5] No evidence was led by the parties before the panel as they agreed to allow it to reach a decision on documents and submissions filed. In his well presented submissions presented at the appeal, Mr Grace has set out in succinct form the factual background to this dispute and I adopt that. In 1996 Mrs Marjorie Parker (now deceased) purchased and was granted the right to occupy Cottage No.42 in Elmwood Village, Manurewa, Auckland. At that time the licensor of the village was Presbyterian Support Services (Northern), a trust incorporated under the provisions of the Charitable Trusts Act 1957. Ownership of the village was subsequently transferred to the respondent. Mrs Parker occupied Cottage 42 pursuant to a licence to occupy dated 15 March 1996. Recital B of the formal licence reads as follows:

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 (the receipt of which payments the Licensor (acknowledges) 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.

[6] Mrs Parker paid the occupation amount and the lump sum at the outset and thereby procured the right to live in the cottage and to have access to the land and common areas. On 7 March 2007 Mrs Parker gave notice of termination of the licence. Clause 23 of the document thereby came into effect. Clause 23 of the licence contains provisions setting out what amount is to be repaid by the licensor to the licensee upon termination of the licence. That clause is as follows:

Upon termination of this licence:

- (a) The Unit shall be valued as at the date of termination 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 to determine a New Value for the Unit ("the New Value").
- (b) The Licensor shall be entitled to deduct from the New Value an amount calculated at the rate of 2.5 per centum of the New Value for each year or part thereof of occupancy by the Licensee of the Unit and also the cost of the valuation required to determine the New Value.
- (c) The Licensor shall pay to the Licensee the residue of the New Value after the deduction defined by sub-clause (b) preceding and in addition to the Lump Sum Amount upon that date being the earlier of the grant of a new license for the Unit to another licensee first approved by the Licensor (in its absolute discretion) or twelve (12) months after the date of termination of this Licence.

[7] After the execution of the licence by the parties, the terms of Clause 23(b) were varied to provide that the required deduction would be limited to a maximum of 17.5% of the new value.

[8] Upon receipt of the notice to terminate and without obtaining Mrs Parker's agreement, the respondent unilaterally appointed Mr Malcolm Hardie of Seagar and Partners to determine a new value for the Unit. Mr Hardie's valuation has been included in a bundle of documents provided at the appeal. He has valued the cottage (including GST, if any) at \$185,000. This figure is divided between the various elements of \$83,500 for the building, \$100,000 lump sum village deposit and \$1,500 for chattels. Apart from the figures he has specified, his report, which is

dated 12 February 2008, does not set out the valuation methodology he has adopted and upon what basis he has chosen to value the interest in this way. Ms McGill at the appeal hearing indicated that Mr Hardie is often employed by the respondent for the purposes of valuing the units and in the majority of cases his valuations are not disputed.

[9] Mr Hardie's appointment was clearly not in accordance with Clause 23(a) and as a result of Mrs Parker's objection and in the absence of any further agreement being reached, the parties requested the New Zealand Institute of Valuers to appoint a new valuer. Mr Michael Gunn of CB Richard Ellis Limited was appointed. He prepared a valuation dated 7 July 2010 and again this valuation is contained in the bundle of documents. Mr Gunn adopted a new value of \$187,000 and after deducting an amount to reflect the number of years Mrs Parker had occupied the Unit and adding in her lump sum amount, he arrived at a repayment obligation of \$153,400. Mr Gunn, unlike Mr Hardie, set out in his report a consideration of the alternative valuation methodologies, which might be available to value property such as this. He decided that the appropriate methodology was not to value the cottage on the basis of freehold land and building or the improvements only but a value on a licensed basis, i.e. a "licence to occupy" basis.

[10] A dispute arose. After Mr Gunn's valuation and following discussions between the parties in order to try and resolve the matter, the respondent filed a dispute notice pursuant to ss.53(1)(c) and 54 of the Act. The grounds of the dispute notice were that Mr Gunn's valuation was fundamentally flawed because he had valued the wrong entity – he valued the right to occupy the Unit – whereas the respondent contended and still contends that he should have valued the physical building erected on the land.

[11] The hearing before the disputes panel took place on 15 November 2011 with, as I have indicated, the parties being content to have the panel making its determination on the papers.

[12] As a result of dissatisfaction with the panel's decision, the personal representatives in the estate of Mrs Parker have appealed to this Court pursuant to

s.75 of the Act. The Court must hear the appeal by way of rehearing and that section also provides that the decision on appeal is final and there is no further appeal. Part 14 of the District Courts Rules 2009 provides rules for the manner in which this Court is to hear such appeals. Specifically, Rule 14.23 sets out the powers of the Court when an appeal is allowed. It may set aside or quash the decision appealed from. It may substitute any decision that ought to have been given by the decision maker. The Court may make such further or other orders as the case may require.

[13] Alternatively, the Court may remit all or part of the matter to which the appeal relates back to the decision-maker for further consideration and determination. In doing it may advise the decision maker of the reasons for referring it back and give the decision-maker any direction that it thinks fit in the interests of justice relating to any rehearing, reconsideration or determination of all or part of the matter referred to it.

THE DISPUTE PANEL'S DECISION

[14] Following written submissions accompanied by a bundle of documents, and presumably legal authorities, the panel consisting of one member issued its decision. The panel accepted the submissions of counsel for the respondent and held that the unit referred to in the licence to occupy was simply the cottage itself. It held that Mr Gunn was required to solely value that and accordingly, Mr Gunn had not fulfilled his obligation and undertaken the valuation required of him. The panel stated that Mr Gunn had misidentified the object of the valuation by valuing the licence when he was required to value "bricks and mortar".

[15] The panel, in its decision, provided reasoning and analysis for reaching this conclusion. This consisted of not only a consideration of the Act but also legal authorities. They were not specifically on point with this particular issue but were of assistance. The panel also analysed what it regarded as relevant provisions of the licence itself.

[16] Having reached this view, the panel refused to make an order requiring the respondent to make a termination payment under the licence to Mrs Parker as

quantified by Mr Gunn's valuation. Inexplicably the panel accepted a submission from the respondent that Mrs Parker was required to "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". Effectively what the panel ordered was that the parties had to go through the appointment of a valuer again (presumably it would not be Mr Gunn although that is not specified) and that somehow the new valuer appointed would be required to adopt a valuation methodology different from that adopted by Mr Gunn. The panel set aside the opinion of an expert valuer properly appointed under the provisions of the licence and has established a procedure of its own for resolving the continuing dispute.

CONCLUSIONS

[17] The submissions of the respondent in this matter and their adoption by the panel demonstrate a misunderstanding of valuation principles and the requirements of the licence to occupy between Mrs Parker and the Respondent. As Mr Gunn has pointed out in his valuation report, the licensor of the village, which was originally Presbyterian Support Services (Northern) but now the respondent, retains the freehold interest in the land and the individual cottage whereas the licensee's interest is pursuant to the licence. I can understand why Mr Gunn considered there was some quandary as to how he should approach the valuation. He set out the three options. If he had valued the land and building in the same manner as Mr Hardie had done then that would have arrived at a valuation which effectively represented the respondent's freehold interest in the land and the cottage. Depending upon how the original consideration paid by a licensee was calculated that option or possibly a valuation of the cottage itself might in some circumstances be a valid methodology to adopt. However, in this particular case those two options would inappropriately result in a value inconsistent with the form of consideration originally paid by Mrs Parker for her asset (occupation amount and lump sum amount) as set out in recital B. Further, these methodologies would then deprive the licensee, Mrs Parker, of the value of her entitlement to also occupy the land upon which the cottage was erected and perhaps, surrounding common areas and benefits associated with her residence

at Elmwood Village. All of these issues need to be the subject of consideration by the panel after hearing expert valuation evidence.

[18] During the course of submissions Ms McGill submitted that the only possible interpretation of the words "the Unit" in the licence is the cottage itself. She based this on an analysis of recital B and clause 23 in the licence. I do not accept her submission in this regard. I regard the unit as being "the right to occupy Cottage No.42 erected upon the land". That seems to me to be a logical interpretation of the words contained in recital B. It incorporates both occupation rights of the cottage and the land and is also consistent with the consideration specified in the recital. Ms McGill conceded that the wording of the consideration, in recital B is somewhat inconvenient to her argument. Similarly, because the licence document is generally so poorly drafted there is also language inconsistent with the interpretation I have given. Therefore, it is necessary in my view to stand aside from the literal words in the licence and consider the actual interest of Mrs Parker, which needs to be fairly interpreted and valued having regard also to the statutory provisions and context.

[19] A fundamental misunderstanding has also occurred in this case, in respect of the statement that Mr Gunn has not valued the cottage. In fact, he has valued the cottage but used a methodology, which takes account of and values what Mrs Parker's interest really was at the village, that is, a right to occupy the cottage erected upon the land for the term and subject to the conditions and agreements recorded or implied in the licence. It is not for me to say finally what is the appropriate methodology to adopt in this case but upon the evidence before the panel it was the methodology the expert witness appointed by the parties had decided to adopt. Apart from Mr Hardie's valuation, which provided no basis of analysis at all, it was the only evidence the panel had before it arising out of the procedure provided in the licence for the obtaining of a valuation. The methodology of adopting the value of a licence to occupy in this way is similar to the valuation of a leasehold interest; some interest other than freehold title. Further, while this dispute is stated to have been referred to the panel pursuant to ss 53(1)(c) and 54 of the Act, it may, depending upon all the facts of this matter, also be a dispute covered by s 53(3). By setting aside Mr Gunn's valuation and without any evidence from Mr Hardie as to

the basis upon which he reached his valuation, the panel may also have disregarded the matters it is required to take into account under s 68.

[20] I agree with Mr Grace that the decision of the panel has resulted from an unwise decision imposed on it by the parties to deal with the matter solely on the papers. If a proper hearing had been conducted then in the face of Mr Gunn's valuation, the respondent, which clearly disputes his valuation, would have been given the opportunity to call up other expert valuation evidence to try and persuade the panel as to the appropriate valuation methodology. The analysis of the panel in trying to ascertain what should be the object of the valuation and on the basis of that finding then holding Mr Gunn's valuation invalid cannot be correct. It is a decision of the panel not based on evidence before it.

[21] Once Mr Gunn had decided that the valuation of the licence to occupy itself was the appropriate methodology, he then looked at what could be equated in normal circumstances to "comparative sales". The "comparative sales" he then had available to him, were sales of other cottages entered into between the respondent and other licence holders subsequent to the determination by Mrs Parker. Ms McGill, in her submissions, stated that the licences from which Mr Gunn drew guidance were sold under completely different terms to those contained in Mrs Parker's licence. Apparently, the consideration now paid by an occupier is the same consideration the occupier receives when the licence is terminated but incorporating any adjustments. I do not know whether Mr Gunn was informed of this fact. Even if he was, he may still have decided that for the purposes of valuing Mrs Parker's interest, this was the best evidence available to him and an indication of what the respondent presently regards as an appropriate and up to date value for the right to occupy a cottage at its village. Again, it is not for me to decide on that issue. It is a matter for expert valuer witnesses to consider and for the panel to then resolve upon evidence when the matter comes before it.

[22] Mr Grace also made the submission that the method by which the panel, having made its findings, decided to resolve the matter, was entirely without jurisdiction under the empowering provisions in the Act. Mr Grace referred to s.69 of the Act, which sets out the powers of the disputes panel. He submitted that those

powers could not encompass the action the panel took in making orders purported to be under s.69(1)(b) of the Act. There was no power to order Mrs Parker to again comply with obligations of the kind specified when she had already done so. Nevertheless, the panel does have quite wide powers contained in ss 69 and 70. However, I agree with Mr Grace that the panel exceeded its powers and certainly had no entitlement to set aside Mr Gunn's valuation and force the parties to once again go through the process of appointing a valuer if they could not agree.

[23] In saying all of that, I understand the difficulties the panel would have faced in this matter as a result of being left with having to consider the matter on the papers when the more appropriate way of dealing with it was to conduct a hearing and allow witnesses to give evidence. The panel would then have been in a position to make an informed decision on what the dispute is really about and that is the proper valuation method to adopt and then to determine the value of Mrs Parker's interest in the unit.

[24] Mr Grace submitted that if I decided in favour of the appellant and allowed the appeal there were several options. These of course are the options specified in the District Courts Rules. Mr Grace referred me to legal authorities of assistance in this regard and in particular the statements of Lord Denning in *Campbell v Edwards* [1976] 1 WLR 403 (CA). That authority was also adopted by Justice Priestley in *The Home Mortgage Company v AON Consulting (NZ) Limited* (HC Auckland, CP 584 SDOO, 13 December 2001). Those decisions held that as a matter of principle when parties have agreed upon a valuer who gives a valuation honestly and in good faith then even if a mistake has been made, they are bound by it. In my view that would be an inappropriate imposition on the parties in this case. The respondent in particular would be deprived of a proper hearing having adopted the dispute process under the Act. It might have been the appropriate procedure if the only basis for resolving value was Clause 23 of the licence. But in this case there is the overlay of the Act with the right to refer any dispute of this nature to the panel after the valuation process provided in the licence has been effected and thence the right of appeal to this Court.

[25] Another reason why I consider it inappropriate to simply enforce Mr Gunn's valuation is that if there is indeed a substantial difference between Mrs Parker's licence to occupy and the licences subsisting in the "comparative sales" he used then Mr Gunn should be given an opportunity to reconsider his valuation. He may well decide that it makes no difference but on the other hand, if it does, then as a matter of natural justice, that should be reconsidered.

[26] Finally, having indicated that I do not think that it was appropriate for this case to be dealt with on the papers, I would be doing the same thing and compounding the error if I simply substituted my own decision for that of the panel. That, it seems to me, would be an abrogation of proper process provided by the Act

DISPOSITION

[27] In view of the findings I have made in this judgment, the appeal is allowed. I raised with Mr Grace and Ms McGill the issue of costs at the conclusion of the hearing and it was suggested that costs should be reserved pending the outcome of this matter upon its merits. Accordingly, costs are reserved.

[28] The matter is remitted back in its entirety to the panel so that a full hearing can be conducted. Before the matter is reheard, the parties should be given the opportunity of procuring further expert valuation evidence should they decide to do so. Obviously Mr Gunn remains as the primary valuer witness and I would consider it likely that he would be called at the hearing by the appellant. In view of the indications given as to the form of the licences of more recent occupiers of units at the village, Mr Gunn may wish to reconsider his valuation but that is a matter for him to decide. This process will also give the panel the opportunity to hear evidence on the matters it is required to take into account under s 68 of the Act if the parties agree that this is a dispute to which s 53(3) also applies.

[29] So far as the composition of the disputes panel is concerned, I note that only those persons, whose names appear on the Retirement Commissioner's list under s.58 (1) of the Act, may be appointed. It would be preferable for there to be at least one member of the panel who has land valuation experience. That may or may not

be possible depending upon the names appearing on the Retirement Commissioner's list.

Printed Name of Plaintiff

Printed Name of Defendant

[30] I make these suggestions for the assistance of the dispute panel having regard to the interests of justice to the respective parties.

Dated this 15th day of March 2013 at 9:30 am/pm



M E Perkins
DISTRICT COURT JUDGE