

**UNDER** the Retirement Villages Act 2003

**In the Matter** of a dispute

**BETWEEN** **A F and C BARNES** as residents on  
behalf of the **A F & C Barnes Family  
Trust**

**Applicants**

**AND** **ANGLICAN CARE (WAIAPU) LIMITED**

**Village Operator /Respondent**

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**COSTS DECISION OF DISPUTES PANEL 13 DECEMBER 2013**

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1. In the substantive decision dated 20 September 2013 the question of costs was reserved as had been requested by both parties. There have since been applications for costs from both parties. There have been submissions in reply in accordance with timetabling.

### **Applicable principles**

2. The statutory provision for costs in a dispute resolution process under the Retirement Villages Act 2003 (“**RV Act**”) is section 77 which reads as follows:

#### 74 Costs on dispute resolution

- (1) The operator that appoints a disputes panel is responsible for meeting all the costs incurred by the disputes panel in conducting a dispute resolution, whether or not the operator is a party to the dispute.

- (2) Whether or not there is a hearing, the disputes panel may—
- (a) award the applicant costs and expenses if the disputes panel makes a dispute resolution decision fully or substantially in favour of the applicant;
  - (b) award the applicant costs and expenses if the disputes panel does not make a dispute resolution decision in favour of the applicant but considers that the applicant acted reasonably in applying for the dispute resolution;
  - (c) award any other person costs and expenses if the disputes panel makes a dispute resolution decision fully or substantially in favour of that person;
  - (d) in a dispute where the operator is not a party to the dispute, award to the operator, by way of refund, all or part of the costs incurred by the disputes panel in conducting a dispute resolution.
- (3) The disputes panel must make a decision whether to award costs and expenses under this section and the amount of any award—
- (a) after having regard to the reasonableness of the costs and expenses and the amount of any award incurred by the applicant or other person in the circumstances of the particular case; and
  - (b) after taking into account the amount or value of the matters in dispute, the relative importance of the matters in dispute to the respective parties, and the conduct of the parties; and
  - (c) in accordance with, and subject to any limitations prescribed in, any regulations made under this Act for the purpose.
- (4) Any person against whom costs and expenses are awarded under this section must pay them within 28 days of the decision to award them.

3. Costs applications have been considered by the disputes panel in a number of previous disputes to which reference is now made:

*Kenward and Knebel v Metlife Care Kapiti Ltd*<sup>1</sup>

4. That case involved a dispute concerning an alleged failure by the village operator to control a fish smoker which another resident was using which, it was claimed, was causing a nuisance. The panel found the process fundamentally flawed because the other resident was not a party to the

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<sup>1</sup> 16/1/09; N J Dunlop (Panel Member)

dispute and the applicants were seeking to make the village operator enforce rights against that party. The remedy sought by the applicants was refused first because of that fundamental natural justice issue but also because the panel was not satisfied that the smoker was a nuisance and further was satisfied that the village operator had taken all reasonable steps to try to resolve the dispute. In dealing with a cost application from the village operator the panel first referred to, but dismissed, the apparent argument that section 74 may not apply to an application for costs by the village operator because there is no express reference to this. The panel said:

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

5. The village operator claimed internal management costs and external fees totalling \$12,945.00. The disputes panel member's costs approximated \$14,000.00 including airfares. Having taken various aggravating and

mitigating factors into account the disputes panel member ordered each of the two applicants to pay the village operator \$750.00 towards those costs.

*Perry & Others v Waitakerei Group Ltd<sup>2</sup>*

6. The dispute in that case concerned compliance by the village operator with the requirements of regulation 49 (d) and (e) of the Retirement Villages (General) Regulations 2006 which includes provision for the contents of a Deed of Supervision. There was further concern that the village operator had not been complying with the Deed of Supervision in the keeping of its accounts. The disputes panel ruled that there had been no failure to comply with the appropriate regulations. The village operator sought costs claiming that the dispute notice had been “*frivolous*”.
  
7. In ordering a contribution of \$1,000.00 towards the costs of the respondent including the disputes panel costs, the disputes panel in that case said:

*“36. It will be seen that the jurisdiction to order costs is discretionary (“may”). Any award that I may make would be under s.74(2)(c) because the respondent is in this regard an “other person”. Certainly my decision is fully in favour of the respondent”*

...

*38. There is one other matter that needs mention. The power to award costs under s.74(2)(c) refers to “costs and expenses”. This contrasts with the power to award costs under s.74(2)(d) in a dispute with the operator is not a party which speaks of a “refund ... of the costs incurred by the disputes panel in conducting a dispute resolution”. My view is that the power under s.74(2)(c) (applicable in this case) does include the costs **of** the disputes panel”.*

*Van der Hulst v Dutch Village Trust<sup>3</sup>*

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<sup>2</sup> 30/10/07 : D M Carden – Penal Member

<sup>3</sup> 18/4/07; C Elliott (Panel member)

8. Having found in favour of the applicant against the village operator on certain issues in dispute concerning repairs to the applicant's unit and unlawful access, the disputes panel awarded \$250.00 as contribution to costs of \$923.75 that the applicant had incurred.

### **Applications for costs and submissions**

9. In its application for costs the village operators sought a contribution of 66.6% of the total of the village operator's costs, the applicants' stated costs, and the disputes panel's fees and expenses. These were said to total the sum of \$46,000.00 and invoices were provided. As its submissions are understood, the village operator conceded that there should be an allowance from the total of some \$3,000.00 being costs in relation to a jurisdiction issue that it had raised and in respect of which it was unsuccessful. As the submissions are understood, therefore, the village operator is seeking an order for 66.6% of \$43,000.00 namely \$28,638.00.

10. The submissions for the village operator:

- 10.1. Referred to the significantly successful outcome for the village operator in respect of the matters in dispute.

- 10.2. Referred to the village operator's preference that the matter should have proceeded by arbitration as having first been selected by the applicants, the change to the dispute process having been, it was said, "*unnecessary*" and had "*engaged far greater expense, and some delay given the jurisdiction point*" which it is said "*would never have arisen under the contract if dealt with by the process the parties themselves agreed would be appropriate*". This matter was expounded in reply submissions for the village operator which outlined the background to the arbitration proposals and discussion between the parties; but said that if it had always been its position

*“that a well-managed arbitration directly focusing on the question of the application of the agreement with the right valuation outcome was by far the most efficient and sensible means of progressing matters”*. Those submissions also enclose include:

*“... experience tells parties and lawyers experienced in valuation case [sic] that they are usually far cheaper to run as arbitrations than in the Courts, or with respect, quasi-judicial bodies such as a Disputes Panel. If only the Applicants had consulted a valuer and taken and accepted valuation advice it is unlikely there would even have been the need for a hearing in an arbitration, but if an arbitration then more quickly and cheaply”*.

10.3. Referred to two different disputes notices and what were said to be *“many points”* raised in them.

10.4. Referred to the fact that the village operator is *“in essence the social arm of the Anglican Church”*, with every dollar spent in litigation having been *“lost to the Anglican community and the people it helps”*.

11. They were two documents filed by Mr Andrew Barnes apparently on behalf of the applicants. One was a response to the village operator’s application for costs and the other was his own submission on behalf of the applicants for costs. Mr Barnes authority on behalf of the applicants was questioned by counsel for the village operator, the applicants being trustees of a Trust and it being disputed that any Enduring Power of Attorney from Mr and Mrs Barnes senior did not constitute authority for Mr Andrew Barnes to make submissions for the trustees. The challenge question was not replied to by Mr Andrew Barnes.

12. I have taken the submissions that he has provided into account partly because it seems he may have authority from the trustees to speak on their behalf (because it seems that the counsel is no longer being used);

and partly because there has been nothing other from the applicants or counsel on their behalf in accordance with the timetabling made.

13. Both documents from Mr Andrew Barnes deal extensively with the issues raised by the dispute notice. He referred to his wish to clarify the applicants' arguments and he then proceeded to expound on what they were. He gave a lengthy presentation about the background as he described it and he repeated arguments in his response to the village operator's application for costs.
14. I have completely discounted all of the information and argument concerning the merits of the parties' position in respect of the dispute notice and the issues already dealt with by the substantive decision that he has presented. The applicants must realise that there has been a full process, a hearing and a decision made on the dispute notice. The law is that that is the end of the matter so far as consideration of the merits by the dispute panel is concerned. The applicants have rights of appeal if they wish to pursue them and if they consider there have been any misunderstandings of their position on the dispute notice or evidence as presented. That is not a matter for the disputes panel to comment on because it is the right of any party to a dispute under the RV Act.
15. Likewise, the applicants were represented throughout by counsel and submissions in writing and orally were made by him on their behalf. If it is said (and I am not suggesting that this may be the case) that counsel has not presented the case or arguments for the applicants as he had been instructed, then that is a matter between the applicants and their lawyers.
16. I am also mindful that no evidence was called on behalf of the applicants despite Mr Andrew Barnes' having been present at the hearing throughout and having listened to all that was said by counsel on behalf of the applicants.



17. Other relevant points made by Mr Andrew Barnes on behalf of the applicants in his submissions on costs are:

17.1. An allegation that the village operator has pressed for “*a formal legal process*” from an early stage whereas the applicants would have been content to try more informally to resolve the matters in dispute.

17.2. Submissions that the dispute was not frivolous or brought without serious consideration and advice or attempts to find alternative less costly solutions.

17.3. Reference to the age of the applicants, the length of their marriage and the hardworking and humble lives that they have lived.

17.4. A submission that one of the purposes of the RV Act is to protect the interests and rights of residents of retirement villages who are often elderly and vulnerable persons without the resources to properly engage a dispute with a powerful organisation.

17.5. A submission that the RV Act makes the village operator responsible for paying the costs of the dispute panel.

17.6. A submission that in section 72(2)(c) of the RV Act (referred to above) the expression “*any other person*” does not apply to either the applicants or the village operator, the argument, as I understand it, being that there is no mechanism in section 74 for the respondent in a dispute between two residents or groups of residents to recover costs; and, if the village operator were included in the an expression “*any other person*” in sub-paragraph (c), then so must the applicant and in that case there would be “*no need for S74(2)(a) or the word “other”*”.

- 17.7. The applicants acted reasonably in bringing the dispute; and that the matter has been very important to the wellbeing of these “*very elderly and vulnerable people*”.
- 17.8. Reference to Mr Andrew Barnes’ own efforts and costs.
- 17.9. Reference to Mr Andrew Barnes’ understanding of the financial position of the respondent.
- 17.10. A request that the applicants be awarded costs and expenses “*of an amount to be determined taking into consideration all the matters above and that no costs or expenses be awarded against [the applicants]*”.
18. I do not need to consider the content of the reply submissions from the village operator insofar as the submissions of Mr Andrew Barnes referred to factual or legal issues concerning the merits of the dispute.
19. Otherwise, the reply submissions for the village operator:
- 19.1. Referred to efforts that had been made to resolve the dispute.
- 19.2. Referred to section 74 of the RV Act with the submissions
- 19.2.1. That the applicants did not act reasonably in applying for dispute resolution having earlier initiated an arbitration process;
- 19.2.2. That the applicants did not “*offer a coherent argument for any particular sum, or produce any valuation evidence. As a result the dispute was never capable of resolution, even after the Applicants were represented*”.

19.2.3. That section 74(2) does not exclude the village operator from the expression “*any other person*” in considering an award of costs;

19.2.4. That there was nothing advanced on behalf of the applicants to question the reasonableness of costs incurred by the village operator.

19.2.5. Questioning the need for the “*elaborate recording setup which the Applicants’ solicitors had arranged*”, submitting that a cheaper alternative recording method could have been used and seeking a direction for payment of invoices.

### **Costs – discussion**

20. It must be noted that the applicants are trustees of a family trust and not Mr and Mrs Barnes personally. Any reference to hardship for Mr and Mrs Barnes must be considered in that context.

21. The disputes panel discounts any references there have been to possible alternative methods of dispute resolution. The reality is that there has been a dispute notice which has been the subject of a decision under the RV Act and it is costs in relation to that process that must be considered.

22. The disputes panel notes, however, that there is a significant doubt that the arbitration alternative would have been, as counsel for the village operator has so forcefully submitted, a cheaper or quicker alternative. This is because:

22.1. First the disputes that have been raised are ones which relate to contractual interpretation and not valuation processes. Had the contract been clear, valuers may well have been able to address the issues and any differences between them such that these

could be arranged by a normal valuation arbitration. In this case, however, it was the interpretation of the relevant clauses of the occupation agreement that gave rise to the dispute and indeed it was the way in which the valuer, Mr Bowis, has applied his understanding of the clause that has contributed to the matters at issue. The disputes panel does not accept the village operator's categorisation of this as a "*valuation dispute*".

22.2. Secondly, the parties have been entirely unable to find any way of resolving the dispute other than by formal dispute resolution process.

22.3. Thirdly, an arbitration process would itself have involved much the same as has occurred in this case, the presentation of submissions, the hearing of evidence, and a formal decision; and it is hard to see that the cost of this would have been significantly different.

23. The disputes panel accepts the submission that an award of costs can be made in favour of the village operator in respect of the application which has been brought on behalf of the applicants/residents. It is of the view that the expression "*any other person*" in section 74(2)(c) of the RV Act does include a village operator, taking all relevant factors into account. The disputes panel in this case respectfully agrees with the views expressed above in paragraphs 4 and 7 in the cases of *Kenward and Knebel v Metlife Care Kapiti Ltd* and *Perry & Others v Waitakerei Group Ltd*.

24. As to the recording costs, there were two invoices provided by the recording company, one for \$828.00 (including GST) for the hire of the equipment and the other for \$509.45 (including GST) for various preliminary attendances and provision of DVD recordings. Both are

addressed to the lawyers for the applicants and it is in respect of these that the village operator seeks a direction for payment.

25. The question of recording of the evidence was canvassed with counsel for both parties in preliminary telephone conferences and both parties agreed through counsel to there being recording of evidence and for this to be arranged by the lawyers for the applicants. If the village operator or its lawyers had wanted some cheaper and modified version of recording, then that should have been conveyed to the lawyers for the applicants before the recording device was arranged. In any event, I found the recording that in fact took place was not clear to hear and I strongly suspect that any cheaper version of recording such as was suggested by counsel for the village operator ("*a simple Dictaphone sized digital device*") may have made reproduction even more difficult. The purposes of recording are for the use of the decision writer and so that there can be a transcript in the event of any appeal and for those purposes the recording must be clear. .
26. It is not for me to say whether or not those invoices should be paid nor giving any direction for payment as sought by the village operator; but my immediate reaction is that this is an expensive operation, particularly given the high cost of preliminary matters and it may be that, if the accounts have not already been paid, the parties through their lawyers can challenge the quantum of those accounts direct from the supplier and installer of the equipment.
27. So far as the parties are concerned, however, costs orders are dealt with below.
28. Sections 74(2)(a) of the RV Act does not apply as the dispute resolution decision did not fully or substantially find in favour of the applicants.
29. The remaining questions for the disputes panel are therefore whether, despite not having made a decision in favour of the applicants, the disputes

panel considers that the applicants acted reasonably in applying for dispute resolution and so qualify for an award; or, perhaps conversely, whether, because the dispute resolution decision was substantially in favour of the village operator there should be an award to the village operator of certain costs and expenses.

30. In my view the primary responsibility for carrying the cost of the dispute resolution process, no matter who the parties are and no matter what the outcome, lies with the village operator. The purposes of the RV Act in section 3 include the protection of the interests of residents and the enabling of the development of retirement villages under a legal framework readily understandable by residents. This includes provision of an environment of security and protection of rights for residents.

31. Relevant statutory provisions include:

31.1. Section 50 of the RV Act which requires that in any retirement village there be both complaints facility and dispute resolution.

31.2. That under section 52(3) a village operator may not require resolution of a dispute by a disputes panel without having first notified the resident and having made reasonable efforts to resolve the dispute.

31.3. Under section 55 that the village operator forward to the statutory supervisor (if there is one) a copy of any dispute notice as soon as practicable, advising the parties that that has been done.

31.4. The obligation on the village operator under section 59 to appoint a disputes panel in a timely manner.

31.5. The duty under section 62 to secure the independence of a disputes panel to resolve a dispute notice.

- 31.6. The obligation (mentioned above) under section 74 to meet the costs of the disputes panel in conducting the dispute resolution whether or not the village operator is a party to the dispute.
- 31.7. The obligation under regulation 6 of the Retirement Villages (Disputes Panel) Regulations 2006 (“**the RV Regulations**”) to give notice in writing to each party to the dispute of the appointment of the disputes panel and, under regulation 7, to supply details to the Retirement Commissioner.
- 31.8. The obligation under regulation 9 of the RV Regulations to appoint a chair of a panel comprising more than 1 member.
32. Relevant considerations in respect of the respective applications for costs in this dispute are:
- 32.1. That there was significant ambiguity about the provisions of clause 17 of the Occupation Agreement in question and about whether the village operator had proceeded correctly under the provisions of that agreement and that clause in carrying out the valuation of the unit in this case. This included:
- 32.1.1. That the clause called for a valuation of “*the units*” on the land which did not occur in this case and in respect of which an interpretation was given in the decision of the disputes panel dated 20 September 2013.
- 32.1.2. .Clause 17 called for the Trustees to “*obtain advice*” which could have meant simply notification (as the disputes panel found was meant) but could also have meant (as argued for the applicants) some form of qualitative assessment and guidance.

- 32.1.3. Consequential upon that issue, the argument for the applicants that the “*advice*” to the Trustees then required them to make some qualitative assessment.
- 32.1.4. The reference in clauses 3 and 17(ii) to the “*unit cost*” and how this impacted on the formula in clause 17(i) in that that expression was not defined in the agreement and, under clause 3, was the same amount as the “*capital contribution*”.
- 32.1.5. Because of that lack of definition, the implication argued for the applicants that the “*unit cost*” included other rights associated with the occupation rights.
- 32.1.6. The absence of any definition of “*current value*” for the purposes of clause 17 which led to the submission that this included “*attendant benefits*”<sup>4</sup>.
- 32.2. That it appeared to the disputes panel that there had been sent to Mr Andrew Barnes the valuation carried out by the valuer in the form intended for a prospective purchaser rather than the form for the exit payment calculation<sup>5</sup>.
- 32.3. That in the Memorandum dated 30 January 1996 from the then Director of the Trust Board there was reference to future valuations including the value of the land as a consideration<sup>6</sup>. Although the decision of the disputes panel ultimately rejected the relevance of that Memorandum, it was nevertheless a factor influencing the applicants in their consideration of the issues at stake.

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<sup>4</sup> Refer decision paragraph 58

<sup>5</sup> Refer decision paragraph 19

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- 32.4. That the village operator elected to use the resources of the disputes panel in, and therefore incur the cost of, a challenge to jurisdiction from the outset. This was despite the fact that there had been a dispute notice presented; that that notice followed a previous dispute notice; and that those two notices had followed some extensive exchange of correspondence between the parties. There was clearly a dispute raised by the notice which needed resolution, but the village operator chose to incur the cost of challenging the jurisdiction of the disputes panel. Although the challenge was rejected at the time, the issues raised by it, which included conferencing, submissions on both sides and replies, took time and cost; which may be said to have been unnecessary.
33. The question of the applicability of section 53(3) of the RV Act (which would then have required a disputes panel of at least three members) was advanced but then later withdrawn; and ultimately rejected by the disputes panel. It cannot be said that the raising of that issue substantially contributed to further cost.
34. As the disputes panel understands the respective costs incurred by the parties to date, these are:
- 34.1. The applicants<sup>7</sup> \$8,384.78.
- 34.2. The village operator, including the disputes panel costs, valuer (witness) costs, hearing recording and venue hire<sup>8</sup>, \$37,858.47.
35. Taking into account the issues referred to in paragraph 32 above and the respective costs incurred by the parties referred to in paragraph 33 above, the disputes panel has concluded:

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<sup>7</sup> Submission as to Costs (undated) Paragraph 57

<sup>8</sup> Submissions for village operator 24 October 2013 Paragraph 6.

- 35.1. That: there was sufficient merit in the applicants' bringing the dispute notice such that there should be no order for costs against the applicants.
- 35.2. By the same token, having regard to the cost already incurred by the village operator, there should be no order made for contribution by the village operator towards the applicants' costs.
- 35.3. That there is no proper basis for any order that the applicants contribute to the costs of the village operator.
- 35.4. That costs should therefore lie where they fall.
36. So far as the recording costs are concerned, it is for the parties and counsel to resolve any issues with the recording company as to the quantum of costs incurred (because that arrangement was made by counsel on behalf of the parties). Those costs, subject to any adjustment as to quantum, should be met by the village operator in accordance with the rulings referred to above.
37. So far as the costs on this further decision are concerned, these are to be met primarily by the village operator and, for the same reasons, it is not appropriate that the applicants be ordered to contribute to those costs. The parties have raised issues in relation to costs that have been considered. The primary obligation for meeting the costs of resolution of the dispute lie with village operator. Although Mr Andrew Barnes has presented significant material concerning the merits of the decision, this has been ignored by the disputes panel for the reasons mentioned and has not therefore added significantly to the cost. There is nothing in the principles for costs in a retirement village dispute that require that the applicants contribute to the costs of the village operator in relation to this further decision.

38. This decision should conclude all matters between the parties raised by the disputes notice.

Dated at Auckland this 18<sup>th</sup> day of December 2013



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David M Carden  
Disputes Panel