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

DECISION OF DISPUTES PANEL 20TH SEPTEMBER 2013

David M. Carden, LL M, FAMINZ,
Retirement Villages Dispute Panellist,
P O Box 133 136,
Eastridge,
Auckland 1146
Tele: (09) 307 469
email: david@carden.co.nz

INDEX

Introduction

1. The above-named Applicants have through their solicitor given a dispute notice under the Retirement Villages Act 2003 ("**the Act**") dated 20 July 2012 naming the above-named Village Operator/Respondent in respect of the Retirement Village at 396 Aberdeen Road Gisborne.

2. I was appointed as the disputes panel by the village operator and both parties signed Terms of Engagement accordingly.

3. There had been a dispute notice given to which reference will be made. There was no formal response to that under the Retirement Villages (Disputes Panel) Regulations 2006 ("**the Regulations**").

4. The village operator took the position that there was no dispute capable of resolution under the Act and that therefore the disputes panel had no jurisdiction to rule on the issues raised by the dispute notice. A preliminary ruling on that submission was given in the course of dealing with this matter in which it was found that at that stage the disputes panel did consider there was at least an argument that there was a dispute and that therefore had jurisdiction and the matter proceeded accordingly.

5. Following directions given as disputes panel there were submissions and statements of evidence prepared, filed with me and served and a one day hearing on 2 August 2013 was conducted at Gisborne. That hearing was attended by Mr David Sharp, counsel for the applicant and with him was present Mr Andrew Barnes. Also appearing was Mr Magnus Macfarlane as counsel for the village operator and two witnesses whom he called to give evidence as will be mentioned. The hearing was recorded on disk and a copy of the disk was sent under cover of a letter dated 3 September 2013.

The dispute notice

6. The dispute notice is dated 20 July 2012 but as sent to the disutes panel it had annexed a further dispute notice dated 6 July 2012. The hearing was advised by both parties that the earlier notice could be disregarded.

7. The dispute notice was given by the solicitor on behalf of the named applicants above referring to them as "*former residents*" of the appropriate unit in the village.

8. The dispute notice raised five matters:

> "*1) The correct legal interpretation of clause 17(ii) of the Occupation Agreement dated 28 November 1996 as to what should be subject to current valuation for the purpose of calculating the exit payment due at the end of occupation.*
>
> *2) If it is the "bricks and mortar" value of Unit 2 solely as a building as [the village operator claims], what is the correct method of arriving at the current valuation?*
>
> *3) If it is the current value of an occupation licence for a unit most like unit 2 as [the applicants] claim, what is this value?*
>
> *4) The [village operator] has failed to provide a copy of the Code of Practice & Code of Residents Rights to existing residents by 1 May 2008.*
>
> 5) *The [village operator] has failed to operate a Complaints Facility or has not advised of how to reach this facility when asked*".

9. There were grounds stated in the dispute notice referring to an occupation agreement, an interpretation which the village operator has apparently

applied and various factual matters. These are referred to to the extent necessary later.

10. As the matter was presented to me at the hearing items 4 and 5 in the dispute notice were no longer in contention because it was the preceding three issues, items 1, 2 and 3, that fell for determination.

11. There were a bundle of documents and a supplementary bundle produced to me by the applicants which were accepted on the normal basis of such documents namely, that, unless there was some objection, each document in the Bundle:

> (a) is what it purports to be on its face;
> (b) was signed by any purported signatory shown on its face;
> (c) was sent by any purported author to, and was received by, any purported addressee on its face; and
> (d) was produced from the custody of the party indicated in the index.

Background to disputes

12. The retirement village in question is situated at 396 Aberdeen Road, Gisborne, and is known as the Arohaina Retirement Village. The residence in question is known as unit 2. The village operator named above is the present owner of the land and operator of the village. The predecessor to the village operator was the Waiapu Anglican Social Services Trust Board ("**the Trustees**").

13. An agreement dated 18 November 1996 was entered into between the Trustees and the two persons named above as applicants "*as trustees of the Barnes Family Trust*" (who are in the agreement referred to as the "*Occupiers*").

14. That agreement, described as both an agreement and a deed, included:

14.1. That the Trustees granted to the applicants the right to hold the unit with all rights of access and parking for such period as the applicants should require commencing 30 March 1996 – substantive grant.

14.2. That the applicants would pay a levy towards various outgoings in respect of the property which could be varied from time to time at the sole discretion of the Trustees – clause 1.

14.3. For payments of a Capital Contribution and Unit Cost – refer clause 3 below.

14.4. For notice of intention to vacate in the event of the applicants' desire to vacate the unit; and, in the case of death provision for the payment of the levy for the period of two months from notice of death with provision for deduction – refer clause 5 below.

14.5. For enjoyment of the use of the allocated parking space – clause 7.

14.6. For certain payments to be made by the village operator to the applicant on cessation of occupation of the unit or after notice of death – refer clause 17 below.

14.7. For reference to arbitration of any question or difference arising from the agreement – clause 22.

15. Expressly clauses 3, 5, and 17 provided as follows:

> Clause 3: "*That the Occupier shall before occupying the unit paid to the Trustees a capital contribution of SEVENTY-EIGHT THOUSAND DOLLARS ($78,000), which is also the unit cost*"

> Clause 5: "*That if the Occupier desires to vacate the unit then the Occupier shall give the Trustees two calendar months notice of intention to vacate the unit and shall pay the levy set forth in clause 1 hereof until the expiry of such notice. In the case of death of the Occupier or the survivor of the Occupiers the levy shall be paid for a period of two months from notice of death and may be deducted by the Trustees from the capital contribution of the Occupier if the same has not been paid at the date upon which the capital contribution is to be refunded pursuant to clause 17 hereof.*"

Clause 17: "*At a time chosen by the Trustees being not later than three (3) calendar months after written notice is given that the Occupier wishes to cease to occupy the unit or after the Trustees have received notice of the death of the Occupier or the surviving Occupier as the case may be then the Trustees will repay to the Occupier or to his or her personal representative (whose sole responsibility it will be to prove their right to claim) an amount to be fixed on the following basis:-*

(i) The Occupier's percentage contribution shall be calculated in accordance with the following formula –

$$\frac{\text{Occupier's capital contribution (as stated in clause 3)}}{\text{Unit Cost (as stated in clause 3)}} \times 100\text{-}5\%$$

(ii) *The Occupier shall then be entitled to a sum equivalent to the percentage of the current value of the unit assessed as follows:-*

On vacation of a unit for any reason within one month of such notice the Trustees shall at their expense arrange for the units on the said land (but not the land on which they stand) to be valued by a competent person chosen by the Trustees and shall obtain advice from such person as to the then current value for the purposes of this agreement of each type of unit owned by the Trustees upon the said land such value of the type of unit most like the unit which is the subject of this Occupation Deed to be deemed to be the current value of the unit for the purpose of calculating any repayment due to the Occupier in terms of this clause."

16. On 2 April 2012 Mr Andrew Barnes, on behalf of the applicants, telephoned the village operator to advise that his parents were considering vacating the unit and sought a valuation.

17. The village operator commissioned a valuation from Evan Bowis Valuation. There were two versions of a valuation produced dated 3 April 2012, one apparently intended for any prospective purchaser and the other intended

by Mr Bowis for the purpose of calculating the amount due to the applicants.

18. A form of valuation was provided to Mr Andrew Barnes under cover of an email dated 23 April 2012 with the advice from the Property and Projects Manager of the village, Rita Sweetapple, that the exit payment figure of $85,880.00 had been calculated.

19. Mr Andrew Barnes replied by email dated 24 April 2012 raising his objections to the valuation. He referred to the expression in the valuation "*nominal land component*" saying that this "*didn't exist until December 1997*". He also referred to a "*Land levy value of $41,000*". Those references to me suggest that in fact it was the **first** form of valuation, that intended for a prospective purchaser, rather than the **second** form for the exit payment calculation for the applicants, that had been sent to Mr Andrew Barnes. There is no reference in the second form to those components. Mr Barnes did not give evidence and could not be asked about this.

20. In an email dated 30 April 2012 to Ms Sweetapple Mr Barnes again asked how the "*nominal land component*" was derived and said he believed it was "*fair to expect an explanation as to how 30% of a property's valuation is stripped away*". (That issue is alluded to also in the dispute notice which refers to the interpretation of the relevant clause as having produced "*a payment figure which benefits the [village] operator by approximately $50,000.00*."

21. Ms Sweetapple wrote by email dated 30 April 2012 to Mr Bowis asking for an explanation as to how the Normal Land value was derived.

22. Mr Bowis replied on 30 April 2012 in which he said that any element of "*nominal land component*" was not included in the original occupation agreement for the applicants and that he considered there did not need to

be any discussion about this with Mr Barnes. He also, for Ms Sweetapple's information, provided a copy of a letter dated 15 April 1997 outlining the then background basis adopted in establishing the "*normal land value*".

23. That date was, of course, after the occupation agreement had been entered into with the applicants. In that report Mr Bowis spoke of having investigated the possibility of incorporating a nominal land area associated with each unit and arriving at a basis for assessing the value to be attached to the nominal land area. There then followed certain stated criteria in Mr Bowis' assessment of the current market value of the base land area of 350 square metres to be $24,000.00 and reasons why 70% of this should be taken for all units except unit 4 and 60% for unit 4.

24. There were produced emails from Mr Bowis to Ms Sweetapple recording conversations he had had with one of the Trustees of the Barnes Family Trust and with Mr Andrew Barnes.

25. Further correspondence followed between the parties which in turn led to correspondence between their respective lawyers. In a letter dated 9 July 2012 from the lawyers for the village operator they said that the village operator's position included that the dispute process under the Act did not apply, the Act did not preclude arbitration and there was no power vested in a disputes panel to fix a valuation. They proposed arbitration but said that the valuation was independent and that the amount referred to therein would be paid immediately.

26. The applicants then chose to initiate the dispute notice procedure and under cover of a letter dated 11 July 2012 sent a dispute notice then apparently followed by a further letter dated 20 July 2012 (which I was not provided with) which included a dispute notice which was apparently the dispute notice dated 6 July 2012 which I was asked to disregard. (This is expressly stated in paragraph 4 of a letter dated 15 August 2012 from the lawyers for the village operator to the lawyers for the applicants).

27. There was further correspondence between the respective lawyers which is not relevant for the purpose of this dispute decision and the dispute notice dated 20 July 2012 was given.

28. The response to that from the village operator was to appoint the disputes panel but subject to its position that there was no dispute amenable to resolution by this process.

29. The parties agreed that the appointment should be made on that basis and that the disputes panel should proceed by giving a preliminary ruling on the question of whether there was a dispute amenable to dispute notice resolution procedure under the Act and Regulations. Submissions were made by both parties and considered the matter at length, resulting in a 27 page Ruling on the subject.

30. The conclusion was that it was not established that the disputes panel did not have jurisdiction to determine the disputes arising under the dispute notice dated 20 July 2012 but that following further presentation of evidence and/or submissions and/or a hearing the conclusion could be reached that the disputes panel did not have such jurisdiction to make the orders that had been sought and are available under section 69 of the Act.

31. One of the reasons was that there were matters of fact that had not been canvassed which could be said to have been relevant to the questions and issues raised by the dispute notice which would require some presentation of factual matters and submissions at a hearing.

The valuation in question

32. The version of the valuation carried out by Mr Bowis which is the subject of contention between the parties referred to a request from the village operator to provide "*the current market valuation of unit 2 under Version 1*

occupation agreement as the present occupiers are intending to vacate the unit". Mr Bowis said that the reference to "*Version 1 occupation agreement*" was a reference to the version of the occupation agreement referred to above. The valuation expressly mentioned that it was a valuation as at November 1996 and "*excludes Land Component – this did not commence until 1 December 1997*".

33. Under a heading "**Occupancy Agreements**" there was this:

> "*We have valued this Unit on the basis of the existing/terminating Occupation Agreement. This Occupational Deed grants the use and occupation of the unit together with rights of access and any allotted parking for such period as the occupier shall require for personal use.…*"

34. There was reference to responsibility for personal accounts and to a monthly maintenance levy for outgoings in respect of the unit and the whole property.

35. Under the heading "***Location***" there was express reference to unit 2 and the general location of the Arohaina Village.

36. There is a detailed description under the heading "***Unit 2***", its design features, outstanding maintenance items, room layout, fixtures and fittings window coverings, security doors and fixed floor coverings and an exterior steel garden shed.

37. In fixing the valuation Mr Bowis said:

"Unit 2 EA 77.4 sq. m.	
	90,400
Operators chattels	*1,800*
Occupier/resident non-standard chattels	*1,650*
	$93,850
	Including GST (if any)

38. In evidence Mr Bowis said that the expression "*EA*" stood for equivalent area based on a common unit measurement and referred to the equivalent expression in the recent local sales analyses he had made. He said that to reach the value of $90,400.00 he had taken the appropriate EA and applied what he thought was the reasonable net per square meterage rate from local sales which he had analysed and multiplied the EA of 77.4 square metres by $1,167.00.

39. There then followed a summary of the four items of occupier's chattels included in the sum of $1,650.00.

40. Under the heading "***Valuation Comment***" there is said:

> *"Concerning the "building value" this has remained relatively static/slight decline when comparing November 2006 to today – however the peak of the market was probably in 2007/2008. I have adopted similar level of values as used in the Valuation of Unit 1 (adjacent 2 bedroom) in early November 2011, making the necessary adjustments for time/market price movement since then – the market generally has been on the decline over this period particularly for this class of property*"

41. There then followed an analysis of other sales of ownership units said to be "*relevant*" and including the Palm Gardens residential units at 29 Carnarvon and 31 Disraeli Streets. There was also other comparative detail concerning recent local sales said to have been "*used as a basis*" for the valuation.

42. Under the heading: "***Other comments***" Mr Bowis said:

> *"Arohaina, Palm Gardens and Riverdean Park all have a repurchase clause which, in effect, guarantees the resale of the property and I consider that there is no need to consider discounting for this factor as there is a right of independent Current Market Value assessment built into the contracts. In the*

> *case of Arohaina, in the past there was generally a waiting list of people wanting the units and Anglican Care (Waiapu) Limited may consider the "social service" needs at the time of allocation*".

43. He then went on to refer to the changing market and the different nature of agreements in other residential villages where he said these are "*such that the occupier obtains a document in the form of a title which appears to some people to be more acceptable as a form of agreement*". He referred to the Arohaina units as being "*very comfortable and certainly not of inferior quality*" but did say they are "*generally smaller and older*" than in other villages.

44. In his **Conclusion** Mr Bowis referred to the volume of sales as being ".. *at a very low level - for the past 3 months 94 residential dwellings sold in Gisborne"* and the *"recent development of other villages with senior members [years] becoming more accepting of other than freehold or cross lease ownership and demand for existing units being very slow".*

45. He assessed the current market value of Unit 2 under Version 1 of the Occupation Agreement at $93,850.00 including GST "*for the building"*.

46. There was a list of various valuation policies that Mr Bowis had applied including that "*the subject property, Unit 2, has been valued on the "as is" basis of the current Arohaina complex."*

47. Mr Bowis gave evidence which included that he "*was not involved in valuing the particular unit the Barnes acquired under their occupation agreement dated 28 November 1996*" (by which I assume he is referring to the time when the applicants acquired the agreement in November 1996 rather than the present time) and noted that the capital contribution referred to the building only. He said that in June 1996 he first valued a Version 1 unit namely unit 10; and that in December 1997 he valued units 5, 8 and 10 (again) as outgoing interests and these were all under Version 1.

48. Mr Bowis said that in April 1997 he produced a report to the Trustees outlining a recommended basis for establishing a "*land component and associated value*" for the purpose of a different form of occupation agreement and the first licence to which this applied was unit 8 (later renumbered unit 9). He said that his approach to the valuation of units for the purpose of current valuation value was to consider and compare:

48.1. Other units that had sold within the Arohaina complex but only with the same Version of occupation agreement.

48.2. Other multiple housing developments, making adjustment for the ownership, structure, structure, age, size, condition, number of bedrooms, locality and other factors.

48.3. Stand alone or duplex-type flats often cross-lease units and making the same adjustments.

48.4. Stand alone dwellings with the same adjusting factors.

49. He said that he understood that the argument for the applicants included reference to "*average value*" which was not a term found in clause 17 of the Occupation Agreement but is something found in the building and some other segments of the Property Industry, particularly by real estate people as a generalisation.

50. He said that there were no other properties within Gisborne with a similar Occupation Agreement for which sales or information is publicly available.

The case for the applicants

51. The applicants submitted that clause 17(ii) of the occupation agreement required that there be a valuation of all units on the land on which the

subject unit is sited. They referred to the expression "… *the Trustees shall at their expense arrange for the* ***units*** *on the said land … to be valued by a competent person…"* (emphasis added).

52. The applicants submitted that the village operator is required to "*seek and take [advice]*". No reference for that expression was given and indeed does not appear in clause 17.

53. The applicants submitted that the respondent had the duty of fixing the current value, having taken the advice they submitted that it should have. They said that clause 17 did not delegate the valuation process to the valuer to fix the exit payment. The clause, it was said, required the respondent to fix the appropriate current value.

54. It was submitted that the phrase "*current value for the purposes of this agreement*" in clause 17 required a valuation taking into account that the unit would be used for purposes similar to other existing occupation agreements; and had the requirement under clause 17 simply been the valuation of improvements, this could have been expressed without reference to other units.

55. Reference was made to clause 3 which referred to both the capital contribution and also the unit cost. Under clause 17(i) those two factors are taken into account in the formula equation referred to. It was said that the initial payment defined what was at that point the current value.

56. It was further submitted that the unit cost as defined in clause 3 included all the rights associated with the occupation rights; and was not simply a sale of improvements upon land in the form of a licence. Reference was made to rights of access, parking and other rights provided; along with the provisions for benefits such as external maintenance, ground maintenance, provision of appliances, carpets, certain internal maintenance, plumbing, internal wiring assistance and parking.

57. Relying on authority it was submitted that as a matter of contractual interpretation the words "*shall obtain advice from such person as the current value for the purposes of this agreement*" in clause 17(ii) required the respondent to obtain the advice from an appropriately qualified valuer and then to make its own decisions based on the advice received.

58. It was submitted that the expression "*current value*" is a figure which includes the value of the unit and all "*attendant benefits*". Although such items as rates, insurance and contributions to maintenance may be reflected in the monthly levy, it was submitted that some of the rights such as parking and provision of amenities are costs that would have been captured within the initial capital payment. It was said that the purchaser would benefit from these private capital payments that would be part of the amenities that would accompany a unit under the terms of any purchase of a unit.

59. Criticism was then made of the valuation itself. It was said that an "*improvements only*" valuation does not take into account any of external and internal maintenance, appliances, plumbing services, ground maintenance and outside furniture, use of common areas, fencing, parking provisions or rights of access to the units. It was submitted that the assessment of current value requires more than this.

60. The applicants further submitted that the methodology applied by the valuer does not take into account what a willing buyer would pay to a willing but not anxious seller with the parties being in possession of full knowledge and being without any compulsion operating.

61. It was submitted that the comparative sales relied on by the valuer reflect poorly on the likely figure that would have been paid by a potential purchaser of the unit and further that the valuation was downgraded on the basis that external maintenance items had been left in abeyance and that

the value of the unit should be discounted for the absence of such works. It was submitted that it was inequitable for the respondent to pay a lesser exit payment to the applicants because of the state of maintenance of the improvements when the respondent itself had the contractual responsibility for the upkeep of the external maintenance.

62. It was said that the deficiencies in process that the respondent had followed in respect of the applicants' unit was drawn to the respondent's attention by Mr Andrew Barnes but that the respondent has elected to rely upon the valuation despite those criticisms and has done so wrongly.

63. Counsel for the applicants referred to section 53(3) of the Act and said that the applicants rely on that subsection referring to the fact that a decision under that subsection affects relief. That matter was further canvassed during the hearing and is referred to below. Reference was also made to other Retirement Village Dispute Panel decisions which will also be referred to below.

The case for the respondent

64. The primary submission for the respondent was to repeat its position referred to in the earlier Ruling that there was no decision amenable to the dispute notice and resolution process.

65. The respondent submitted that the only dispute in this case is over the correctness of the valuation provided by Mr Bowis in respect of the exit payment for the applicants.

66. It was submitted that the purport of clause 17(ii) is to require a competent person to value the type of unit most like the applicants' unit. It was said that this does not preclude use of the applicants' unit itself for valuation but that did not matter. It was said that there was no room for Operator

decision by the respondent in clause 17(ii) which deems the value provided by the valuer to be the current value of the unit.

67. There were, it was said, in the Arohaina Village only two types of unit, one- or two- bedroom units and the applicants' was a two bedroom one.

68. It was submitted that although the word "*units*" appears in clause 17(ii) in the plural that makes no difference to the outcome nor is any such difference possible as proposed by the applicants.

69. Attention was drawn to if the provisions of clause 1 which describes the levy required to be paid by an occupier as:

> " *… the Occupier's contribution towards the rates payable in respect of the property, all insurance premiums payable, the maintenance and provision of carpets and all appliances supplied by the Trustees and the replacement by fair wear and tear, cost of maintaining the grounds and exterior of the buildings and any other outgoings payable by the Trustees*"

which is to be fixed at the Trustees' sole discretion.

70. It was submitted on authority[1] that the words in the occupation agreement should be interpreted and applied in context because there were no pre-contract negotiation issues to consider nor any post-contract issues. There was no sensible way in which there could be an evaluation of the items referred to above in paragraph 56 when these were effectively, and in some cases directly, provided for by the levy payable by the Occupier under clause 1.

71. Emphasis was placed on the requirement in clause 17(ii) for a valuation of the unit and not the rights of access and parking described separately in the opening words of the operative part of the agreement (" *to <u>HOLD</u> the*

[1] *Vector Gas Limited v Bay of Plenty Energy Limited* [2010] 2 NZLR 444

unit with all rights of access and parking allotted thereto"). The purpose, it was said, of clause 17 is to refund to the Occupier their capital contribution.

72. It was futile, it was said, to refer to comparable sales because there were no potential purchasers of the Unit upon the same terms as that of the Occupation Agreement that the applicants had because such agreements were no longer available at the time of valuation or since. It was argued that comparable unit sales are the starting point only and that the state of external maintenance of the units is not in issue.

73. Two witnesses were called by the respondent. The first was Mr Bowis whose evidence has been referred to above. The second was Mr Derek Morrison, the Chief Executive Officer of the respondent with responsibility for the Arohaina Retirement Village in Gisborne. He referred first to the two valuations obtained at the time for the applicants' occupation agreement was terminated, one being for the purpose of calculating the termination payment (as mentioned by Mr Bowis) and the other for any incoming occupant who would be occupying on different terms and conditions.

74. Mr Morrison did observe that the respondent had not been able to sell the unit in question and that overall sales of units in the village have been slow with a flat-to-declining market. He denied that there was any failure to maintain the applicants' unit as to the exterior or that this may have depressed the value and said that that unit was treated as all other units in the village with an appropriate programme for maintenance. He did not agree that the exterior was in such a condition as to have impact on the value within the retirement village as a whole.

75. Mr Morrison did produce (and there was no objection to this) the copy of a memorandum dated 30 January 1996 from the then Director of the Trust Board, Rev D F Macdonald, (presumably addressed to the Trustees) headed "DRAFT GUIDELINES – GISBORNE TRUST FOR THE

ELDERLY" which included as item 3 "*That in future valuations the value of the land needs to be taken into account*".

76. The memorandum appears to refer to another document insofar as it is described as "DRAFT GUIDELINES" and commences with the words: "*Here is a first draft of how would we might use this*". The reference to future valuations including land value are in the context of Rev Macdonald's drawing this to the attention of the recipients of the memorandum.

77. Although this letter predates the occupation agreement for the applicants, there was no evidence as to the content of those Guidelines or when, if ever, those Guidelines were implemented.

78. The assessment of the disputes panel is that the agreement referred to in the Memorandum from the meeting on 24 February 1996 related to future valuations intended to be made, but there may elsewhere have been reference to changes to terms of occupation agreements that may have affected the entitlement to land value inclusion.

79. Reference was also made by the applicants to a later form of occupation agreement (apparently the one referred to as a "*Version 4*") and the significantly different terms there are. The disputes panel has not found that to be helpful insofar as it deals with an entirely different contractual arrangement and the liability of the village operator cannot be assessed on the basis of what it may subsequently have agreed with residents.

80. There was also produced on cross-examination certain financial statements for the respondent . The significance of these was said to be an extract which referred to the respondent having a contingency liability for occupation licences which the statements say are dependent on the sale of the unit at a future date. The statements refer to the amount payable to the present occupier as being 85 – 95% of the future selling

price in respect of the majority of such units. While the village operator may have made this contingency allowance in its financial statements, that does not, in the view of the disputes panel, alter the contractual obligation it had under the occupation agreement with the applicants. It is one thing to have a liability; and another thing to make a contingency allowance for possible exposure under that liability.

Applicants' reply

81. In reply, the applicants said that the dispute was "*in respect of the application of contractual terms … [and] is not a valuation issue*". If the contract were correctly applied, it was said, the valuation produced would have been for a greater sum than that which Mr Bowis fixed. It was said that to reduce the amount of a valuation because other units may have different contractual terms associated with them is to apply a form of reverse logic that overlooks that the words of the contract are to be taken in their natural and ordinary meaning.

82. The expression "*the current value for the purposes of this agreement*" was said to equate with the future selling price not the improvement value of the buildings less land value and this would take into account other features. Current value, it was argued, is what the units would fetch without reference to the specific type of occupation agreement; and that what has occurred in this case is that an improvements value has been selected from which a deduction of a notional land value has been made. Because the units are to be valued excluding the land on which they stand, clause 17(ii) does not require deduction of a nominal land value.

Other relevant cases

83. I had earlier been referred to two earlier decisions of the disputes panel which are mentioned below. The disputes panel is not bound as such by

earlier decisions but they are certainly to be taken into account and there must be consistency if that can be achieved.

Oceania Village Company Limited *v Marjorie Parker* (Disputes Panel: N J Dunlop: 15/11/11)

84. In this case the challenge to jurisdiction had come from the resident and it was the village operator which had given the dispute notice. The resident claimed that the correct basis for valuation had been adopted by valuer in the case in question and sought to have this enforced through the appropriate processes. She argued that valuation had been obtained as required by the appropriate licence to occupy and the village operator was obliged to accept that and make payment accordingly. The village operator challenged this and sought the determination of the disputes panel. The question was whether the valuer that had been instructed by the village operator had applied the right basis for valuation. After a detailed analysis of the terms of the Occupation Agreement in that case the disputes panel found that he had not, with a direction being given for revaluation. The valuer had conducted a valuation of the "*licence to occupy*" rather than the physical cottage (bricks and mortar). Both parties had sought relief under section 69(1)(b). The disputes panel relied to an extent on the following[2]:

> *"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*

[2] *Legal & General Life of Australia Limited v. A Hudson Pty Limited* (1985) 1 NSWLR 314

is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract."

Doris Upton v Oceania Village Company (No 2) Limited: (Disputes Panel: C. Elliott: 27/10/10)

85. In this case the clause in question called for there to be a valuation; if this were challenged for there to be a second valuation; and for the first or second of those, as the case may be, to be the applicable valuation for the purpose of calculating the exit payment. The resident in that case was unhappy with the valuation that had been obtained and sought to have a ruling from the disputes panel. The village operator claimed that there had been compliance with the correct process; and that the valuer had determined the market value of the unit separately from the market value of the land. Having considered in detail the provisions of the Act and other applicable statutory provisions, the disputes panel concluded it was value of the building only and not including the curtilage that was to be paid to the applicant. The disputes panel directed the amount to which the resident was entitled. There appeared to be no discussion or reference in the decision to the basis on which jurisdiction on which the decision was founded.

Discussion

86. Dealing first with the interpretation of clause 17(ii) the disputes panel is of the view:

86.1. The overall purpose and intent of that sub-clause is for the village operator to obtain an independent valuation of the unit in question in the context of its categorisation in the village so that there can be a payment to the person entitled pursuant to that process.

86.2. Although the requirement is for the trustees to arrange for a valuation of the **units** on the land (and this word is clearly in the plural), that requirement is for classification by the person carrying out the valuation of the different types of unit such that the unit in question is valued as one of a category.

86.3. Although the clause refers to " *… advice … as to the then current value … of each type of unit …*", it is only the value of the category of unit in which the subject unit falls that is to be taken into account.

86.4. The valuation was to be of the unit only because there is the express exclusion "*but not the land on which they stand*".

86.5. The valuation was to be by a competent person chosen by the Trustees (and there seems no dispute that Mr Bowis was competent and had been chosen for the purpose).

86.6. The value was to be fixed by the valuer in the context of "*the purposes of this agreement*". That is, the valuer, in fixing the valuation of the unit in its category in the village, was to take the totality of the terms of the occupation agreement for the applicants' unit into account. That does not mean, in the view of the disputes panel, the valuer necessarily having to "add on" any valuation figure to the equivalent area assessment because of the total terms of the agreement, unless these affected the value.

86.7. The "*advice*" that the trustees was to obtain from the valuer was the valuer's assessment of the current value of the unit as one of a "*type*" or category on the land. The "*advice*" that the valuer was to give referred simply a communication by him of the results of his assessment, rather than some further advice about how the assessment should be applied in the particular case.

86.8. Following that communication, the value of the unit as fixed by the valuer's investigation and categorisation process was to be the current value for the purpose of calculations of repayment under clause 17. The disputes panel does not accept the submission that the village operator then had some overriding discretion as to the value to be taken for the purpose of calculating payment. There is no reference to that in the wording of clause 17 and there is no logical reason why the village operator would have that obligation or entitlement, given that rights and obligations were prescribed and any reassessment by the village operator would be entirely discretionary.

86.9. It was then for the Trustees to make the calculation of the percentage of the current value to which the applicants would have then been entitled; followed by payment.

87. The disputes panel is quite satisfied that the valuation should have been of the unit itself and not of any land or other content for these reasons:

87.1. The substantive Grant in the occupation agreement is a Grant of "*USE AND OCCUPATION unto the Occupier to HOLD the said unit*". In addition to that there is granted: "*all rights of access and parking allotted thereto*". Those expressions clearly confer the occupation use right only in respect of the unit and the appropriate access and parking.

87.2. The occupation levy under Clause 1 includes a contribution towards matters pertaining to the **land** including rates, insurance premia, maintaining the grounds and exterior of the buildings and "*any other outgoings payable by the Trustees*". That reinforces that the ownership of the land and therefore the primary liability for its outgoings lies with the respondent to be covered by a levy

contribution against occupants to the extent that it can. Although the levy does include "*the maintenance and provision of carpets and all appliances supplied by the Trustees and their replacement by fair wear and tear*," that does not alter the position. Although those are matters internal to the unit, the levy is limited to items supplied by the Trustees. There are the express obligations on the Trustees/respondent under clauses 13 – 16 to pay rates, insurance, maintenance, and various landscaping obligations.

87.3. Clause 3 of the occupation agreement calls for a payment of $78,000.00 as "*a capital contribution*" but this sum is described as "*also the unit cost*". It appears from the form that the words are "*which is also the unit cost*" have been added to a standard form. Certainly there is no comprehensive provision for reference to a unit cost. The matter is relevant under clause 17(i) where the percentage contribution takes into account in its formula the capital contribution divided by the unit cost x 95% as stated above and that provision would only be relevant if there were different sums for the capital contribution and unit cost. The references in both of those places in this particular occupation agreement appear to be add nothing.

87.4. The combined provisions of clauses 3 and 17 are that in this particular case the applicants are entitled to 95% of the current value of the Unit as fixed pursuant to clause 17(ii). The applicants argued that the "*unit cost*" covers "*all the rights associated with the occupation right*" such as rights of access, parking and other rights referred to above at paragraph 56.

87.5. The disputes panel rejects that on the basis that those are the rights conferred by the Grant and are paid for separately by levy under clause 1.

87.6. The interpretation on the difference between "*capital contribution*" and "*unit cost*" that the disputes panel places is that the cost of construction of the unit may have been different from the capital contribution which the incoming applicant was required to make.

87.7. Supposing, for example, that in this case the unit cost was $90,000.00 to construct the unit but the capital contributions sought from the applicants was only $78,000.00. This may have been because of the limited resources of the applicants or for some other valid reason under which the village operator chose to do so. The village operator, which is a not-for-profit organisation described by Mr Morrison as having been " *… set up [not] to profit but to ensure that the facility required for retirement in the form of a village can be maintained for older people in our communities*".

87.8. In that case, the formula in clause 17 would have resulted in a net figure of 86.66667 x 95% for the calculation in question, that is reducing the amount payable on termination of the occupancy agreement to a lesser sum than the value as fixed by the valuer to reflect the lesser contribution that had been made from the outset.

87.9. Conversely, if the unit cost was lower than the capital contribution for some reason, then on termination the resident would expect to receive proportionately higher in the termination payment.

87.10. The Tribunal does not accept that the capital contribution referred to in clauses 3 and 17 is, at least in the case of this occupation agreement, for anything more than the unit itself. The disputes panel rejects the submission that the capital contribution captured other rights of access and parking. The valuation for the purposes of clause 17(ii) was to enable the village operator to calculate the sum due to the applicants on cesser of occupation and termination of the occupation agreement. There was no express reference to

any amount which some incoming occupant may be required to pay as capital contribution or unit cost. The capital contribution in respect of this unit 2 for these applicants was equated to the unit cost.

87.11. Although addressing the question of deduction of outstanding levies, clause 5 expressly refers to the refund of the capital contribution pursuant to clause 17.

88. They were at least two categorisations of units in the village to which reference was made at the hearing. The first was the difference between the one – and two – bedroom units; and the second was in respect of the types of occupation agreement under which the different units were held.

89. Mr Bowis' has taken those two differentials into account. He has expressly referred to this unit as comprising two bedrooms[3] with specific reference to the Occupation agreement in question: "*Version 1*".

90. As a valuation of unit 2 on its own, the valuation by Mr Bowis does comply with the obligations under clause 17. He simply had to value the unit but not the land on which it stood. He has comprehensively described the unit; he has given comparative analyses of other units on which he has based his valuation and his conclusion is his assessment of the current market value including GST for the building which is $93,850.00.

91. The focus on the obligations of the respondent to the applicant under the occupation agreement appears to have been diverted by the apparent provision to Mr Andrew Barnes of the wrong version of the valuation in question which included reference to a nominal land value and deduction of the sum of $41,000.00 (as he describes it). If that is so and had that not occurred, he would have been given the version from Mr Bowis which does

[3] Valuation page 5

not include those references and deals simply with Mr Bowis' opinion of the value of the unit excluding land.

92. It is likely that, because Mr Andrew Barnes had the wrong version of the valuation which referred to a Version 4 occupation agreement and added the "*nominal land component associated value*" to the valuation of the Version 1 occupation agreement, the submission was made on the applicants' behalf that an improvements value has been selected from which a deduction of a notional land value has been made[4].

93. Mr Bowis did say that the version intended for incoming occupants was the first valuation that he completed and that he then edited that into the second version, intended for the exit payment calculation for the applicants. That reinforces that there was no deduction as submitted.

94. The disputes panel does not accept the submission for the applicants that it was the expected market sale price that the village operator would expect to receive for the sale of unit 2 that should have been fixed as the value by Mr Bowis. First there could be no comparative value placed on the basis that a "*Version 1*" occupation agreement was being used because those had become obsolete. Secondly, the comparative market analysis that Mr Bowis has undertaken appears to have substantially covered the market so far as comparable sales were concerned and it was on the basis of these that Mr Bowis has valued the unit in question. Thirdly, there is[5] an express reference to the definition of "*market value"* as being "*the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion*".

[4] Paragraph 82 above
[5] Page 8

95. The disputes panel does not accept the submission that the valuation has been downgraded because external maintenance items have been left in abeyance. There is reference in the valuation report to "*outstanding maintenance items*" and the concluding assessment is predicated with: "*Given the overall presentation and standard of Improvements*…". It does not, however, seem that Mr Bowis has devalued the unit 2 as a consequence in that he has taken fixed a value based on a square meterage rate and in his valuation comments has made no reference to depreciated value from want of maintenance. In his comparative analysis with other valuation material he has expressly referred to the Arohaina units as being "*very comfortable and certainly not of inferior quality*", which suggests that there has been no depreciation for want of maintenance.

96. The disputes panel has considered the position from the alternative interpretation of clause 17 argued by the applicants and concludes:

96.1. If the village operator was required at its expense to arrange for all of the units on the land to be valued, this would have involved a substantial cost.

96.2. It would also have involved a significant amount of duplication because many units in the same categorisation or type may have the same value; or at least there may be differences between units in the same category that would require explanation and differentiation.

96.3. Many of the units that would have had to be valued would have been of a different categorisation or type from the subject unit and the valuation of those would have been completely wasted cost and effort.

96.4. Once the valuer had carried out the total valuation exercise and advised the village operator of the result of that, the decision would

have had to have been made either by the valuer or by the village operator as to "*the type of unit most like*" the unit in question.

96.5. If that assessment had been made by the valuer, the village operator would have accepted that assessment. If made by the village operator, the outcome would most likely have been the same.

96.6. The net result of that, however, would have been that the valuer or the village operator would have fixed the value of the subject unit for the purpose of calculating the amount payable to the applicants by reference to the specific market value placed on the subject unit in the category of units to which it was found to have belonged.

96.7. The end result of all that expensive and time-consuming exercise would have been the same as described above.

96.8. I do not think that outcome and scenario was in the contemplation of parties or intended by them.

97. Finally, the disputes panel notes the outcome of the two cases referred to earlier. Each case is very dependent on its own facts and each of those cases involved the careful consideration of the interpretation of the particular wording and clauses in the relevant agreements.

Application of section 53(3)

98. This topic was first raised by the disputes panel at an earlier preliminary stage. It was then questioned whether there was any argument that section 53(3) applied. The position for the village operator is that this subsection does not apply and it has only appointed a single disputes panel to resolve the dispute notice.

99. At the hearing, as noted above, counsel for the applicant did say that the applicant was relying on section 53(3) because the alleged breach of the occupation licence raised issues as to the disposal of the unit and particularly where there was delay in disposal. At that stage counsel said that section 53(3) would affect relief, this being a reference to the additional powers afforded by section 70 of the Act. Counsel resiled from that position in closing submissions.

100. It is the view of the disputes panel that section 53(3) does not apply. That subsection reads:

> *"(3) A resident may give a dispute notice for resolution of a dispute concerning the operator's breach of the resident's occupation right agreement or code of practice in disposing of a residential unit in a retirement village formerly occupied by the resident"*

101. It refers to an alleged breach of an occupation right agreement or code of practice. That alleged breach must relate to **disposal** of the residential unit formerly occupied by the resident.

102. The consequential effects of a dispute to which section 53(3) applies are first in the composition of the disputes panel under section 60(4) which include that there must be at least three members of the panel, and in the relief provisions of section 70 which expressly refer to a dispute referred to in section 53(3).

103. The case for the applicants for in this matter is that they are entitled to a payment calculated in terms of clause 17(ii) of the occupation agreement on termination thereof. They say they are entitled to a sum which is greater than the amount which the village operator says they are entitled to. The village operator says that the amount to be paid is the amount as fixed by the valuer and that is the substance of the dispute including whether there is in fact any dispute.

104. The obligation on the part of the village operator to make a payment under clause 17(ii) arises within one month of vacation of the unit and is an obligation to make payment quite independently of any disposal of the unit by another occupation agreement or in any other way.

105. The disputes panel does not consider that therefore this is a case concerning the village operator's breach of the occupation agreement as to disposal of the unit and therefore section 53(3) does not apply.

106. Consequentially, the powers afforded by section 70 are not available to the disputes panel.

107. In fact that section underlines that the interpretation that has been made. That section refers to the additional powers to order:

107.1. That the operator market the residential unit in a particular way or at a particular price.

107.2. That the operator pay the resident a sum in "*compensation*" which suggests some sort of damages for delay.

107.3. That the operator pay the resident interest (again implying compensation for delay).

107.4. That, if the resident has a legal or equitable estate or interest in the unit the operator must buy the resident's interest on terms or, in any other case, that the operator pay the resident a sum fixed by the panel.

108. Those powers clearly indicate that the type of dispute to which they are addressed is one concerning an alleged failure in disposal of a unit thereby depriving the resident of monies tied up in that unit. In any such case the disputes panel, comprising at least three persons, can make those

additional orders (in addition to the orders empowered by section 69 (see section 70(3)). These are clearly therefore addressed to issues concerning disposal which do not arise in this case, essentially because the village operator never had any obligation to dispose of the unit in question but conversely had the obligation to make payment to the applicants as former residents in a timely fashion after the unit was vacated following cesser of occupation.

No jurisdiction

109. The submission made for the village operator that the disputes panel had no jurisdiction to entertain the dispute notice needs to be dealt with.

110. Essentially that submission was that, because the process prescribed by clause 17(ii) of the occupation agreement had been followed and a sum fixed by the valuer which the village operator was prepared to pay the applicants without demur, there was no dispute amenable to a dispute notice.

111. The disputes panel does not accept that submission. It is clear from this decision that there was dispute raised about the way in which the village operator went about complying with clause 17(ii) and there was dispute about how the process required by that sub-clause was to be interpreted and whether that interpretation had been followed. That is, in the disputes panel's view, a dispute amenable to a dispute notice.

112. Accordingly, the disputes panel finds there is jurisdiction to determine the dispute notice.

Result

113. In specific reference to the disputes as articulated in the dispute notice dated 20 July 2012 the response from the disputes panel is as follows:

Dispute No 1

> *"The correct legal interpretation of clause 17(ii) of the Occupation Agreement dated 28 November 1996 as to what should be subject to current valuation for the purpose of calculating the exit payment due at the end of occupation*".

114. Reference is made to the earlier text explaining this interpretation but in summary, it was in order for the village operator to obtain from a competent person a specific valuation of the unit in question with advice from that person as to the then current value of that unit as part of a category of units most like the subject unit; and the value as fixed by the valuer, provided he has followed the right valuation criteria (which it is found he has) is the value for the purpose of calculating the payment due to the applicants.

Dispute No 2

> "*If it is the "bricks and mortar" value of Unit 2 solely as a building as [the Village Operator claims], what is the correct method of arriving at the current valuation?*"

115. If by the expression "*bricks and mortar*" is meant valuation of the then value of the subject unit in the way that it was valued by Mr Bowis, that is by applying a square meterage rate to the square meterage of unit 2, by reference to the market factors that Mr Bowis has taken into account (especially by his adoption of a similar level of values as used in the valuation of unit 1 in early November 2011 to which paragraph 40 above refers), that is the correct method of arriving at the current valuation.

Dispute No 3

> *"If it is the current value of an occupation licence for a unit most like unit 2 as [the applicants] claim, what is this value?"*

116. This question does not now require answer. The applicants' claim has been rejected.

Disputes No 4 and 5

> *The [Village Operator] has failed to provide a copy of the Code of Practice & Code of Residents Rights to existing residents by 1 May 2008*.
>
> *The [Village Operator] has failed to operate a Complaints Facility or has not advised of how to reach this facility when asked*".

117. The applicants abandoned these two disputes at the hearing and I do not need to rule on them.

118. In terms of the express, but proscribed, powers that the disputes panel has under section 69 of the Act, the village operator seeks an order under section 69(1)(c) that it pay the applicants as former residents a monetary amount. The monetary amount to which the applicants are entitled is that which the village operator has calculated and any accrued interest. That appears to comprise:

Value of unit 2	$90,400.00
95% thereof	$85,800.00

119. That sum appears to be inclusive of GST . There will be accrued interest thereon to which the applicants are entitled. I am not sure whether there should be included any sum for the applicants' "*non-standard chattels*" valued by Mr Bowis at $1,650.00, but, if these have been purchased by the village operator or were left in the unit, that may also be payable. Mr Bowis describes these chattels at page 1 of his report to include screen doors, fly-screens, curtains, drapes, blinds and a garden shed which he says "*are to be sold separately and the price negotiated between [the applicants] and the new occupier*".

120. If the village operator makes any claim for costs and these are awarded, those costs are to be deducted; and if the applicants make any claim for costs and these are awarded, such costs are to be added (but I emphasise that is not in any way to prejudge any entitlement to costs questions).

121. The disputes panel now directs that the appropriate sum be paid to the applicants as soon as the costs applications have been determined or, if there are no costs applications, as soon as the time for applying for costs as set out below has passed.

122. Leave is reserved to the parties to apply further if there cannot be agreement on the amount properly to be paid.

Costs

123. The disputes panel was asked by both parties through counsel to reserve the question of costs until the substantive decision was known. This is done now with time-tabling of any application for costs from either party.

124. The parties are given sufficient time to resolve the matter between themselves if they can. If there is any application for costs this is to be made in writing with reasons by no later than **4.00 pm on Friday, 25 October 2013**.

125. If there is any such application for costs, the other party is to reply to that in writing with reasons by no later than **4.00 pm on 8 November 2013**.

126. Any reply from the claimant for costs is to be made by no later than **4.00 pm on 15 November 2013**. The matter will then be considered.

Dated at Auckland this 20th day of September 2013

_____

David M Carden
Disputes Panel