UNDER the Retirement Villages Act 2003

In the Matter of disputes

BETWEEN **SIMON PERRY, MARLENE DOROTHY JULIAN, TIFFINEY PERRY** and **BARRY COOMBES** as Trustees of the **PERRY FOUNDATION**

Village Operator/Applicants

AND **PHILLIPPA WATERS** as Trustee of the Estate of **JEANNE WATERS**

First Respondent

AND **HILDA MURRAY**

Second Respondent

COSTS DECISION 20th DECEMBER 2013

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1. In the substantiative decision in these matters the disputes panel reserved, as it was requested to do, the question of costs; and timetabling was fixed for any application for costs.

2. The applicants, the village operator, have applied for costs. The respondents have not applied for costs other than to include the submission that costs should lie where they fall.

3. There have been submissions on behalf of the applicants in support of their application for costs, in reply on behalf of the respondents, and in reply to that on behalf of the applicants.

Applicable principles

4. 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.

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

6. It is to be noted first, however, that in none of the cases has the applicant been the village operator which has in turn sought costs against a resident as is the case in the present disputes.

Kenward and Knebel v Metlife Care Kapiti Ltd[1]

7. 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 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

[1] 16/1/09; N J Dunlop (Panel Member)

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. ".*

8. 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[2]

[2] 30/10/07 : D M Carden – Penal Member

9. 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*".

10. 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 [where] 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".*

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Van der Hulst v Dutch Village Trust[3]

11. 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.

[3] 18/4/07; C Elliott (Panel member)

12. The disputes panel is also aware of another recent decision in which costs were ordered to lie where they fell in a dispute concerning the interpretation of an occupation agreement as it affected the entitlement of the resident on termination of that agreement.

Application for costs and submissions

13. In summary the applicants submit:

13.1. First that there have been decisions substantially in favour of the applicants which entitles them to an order for costs under section 72(2)(a) of the RV Act.

13.2. That even if the decision is that the substantive decisions were not substantially in favour of the applicants there should be an award of costs in their favour pursuant to section 74(2)(b) of the RV Act.

13.3. That the most significant issue in dispute was entitlement to land value which the substantive decisions have found in favour of the applicants.

13.4. That although there has been some rejection of deductions which the applicants sought to make and there have been changes to resultant figures, these items were relatively insignificant such that it could not be said that the decisions were substantially in favour of the respondents.

13.5. That the conduct of the parties must be considered in the context of section 74(3)(b) the RV Act and that the conduct of the respondents in this matter, full details of which is given and are referred to below, must be taken into account and are such that they favour an award of costs in favour of the applicants or indeed militate in favour of an increased award.

13.6. That the costs incurred by the applicants are in excess of $129,504.00 including the disputes panel costs in the matter; that these costs were reasonably incurred; and that the conduct of the respondents has put the applicants to unnecessary cost.

13.7. That reference can be had to the relevant equivalent rules in the District Courts Rules 2009 rules 4.4 – 4.5 and Schedules 2 – 3, giving calculations which resulted in an entitlement, it is claimed, for $24,180.00; which amount does not include any allowance for the applicants' solicitor at the hearing or for significant email correspondence exchanges.

14. The respondents oppose any order for costs in favour of the applicants, submitting:

14.1. That the disputes panel has jurisdiction to make an award of costs to the applicants under section 74(2) of the RV Act if the dispute resolution decision is fully or substantially in favour of the applicants; and that, because the decision was not fully or substantially in their favour, there is no jurisdiction to award costs (with figures given showing the percentages involved in the outcome).

14.2. That because this was said to be a "*test case*", the consequences for other residents at the retirement village holding site agreements will result in a significant outcome for those residents and the applicants respectively.

14.3. That, with regard to the criteria set out in sections 74(3)(a) of the RV Act, the respondents have incurred their own costs and costs should therefore lie where they fall, with reference to the limited means of the respondents and the "*major importance*" of the

dispute result to them; the stated purposes of the RV Act being to protect the interests of residents; the "*substantial increased awards*" to the respondents and the unjustness if any part of those were "*taken back from the respondents*" by a costs order "*as this would effectively punish the respondents*"; and the election by the applicants for representation by "*an expensive legal team headed by senior counsel*"

14.4. That, with regard to the criteria set out in section 74(3)(b) of the RV Act, the amounts respectively awarded to the applicants "*were of great significance*" to the respondents, with reference to their means and personal circumstances; that the applicants should "*be expected to absorb their own costs*" having regard to the "*vast resources*" which it is said the applicants have committed to the dispute; a reference to this being a "*test case*" and the stated unjustness to the respondents of any award of costs made against them. It was said that throughout the dispute the respondents had "*acted honestly and diligently*"; "*extensive efforts*" had been made to comply with directions and time frames; the extensive stress for the respondents and families; that none of the "*numerous telephone conferences"* were requested by the respondents and they did not delay matters; that the disputes were of wide interest to other residents from whom the respondents had "*substantial support*"; that there was delay caused by the applicants; and that there was "*no precedent for a disputes panel to award costs against a resident in a case such as this and it would be unjust for that to occur*".

15. In reply to those submissions, the applicants said that the decision was substantially in their favour; that the fundamental issue in the disputes was entitlement to land value which had been decided in favour of the applicants; that it was necessary to look beyond the "*purely relative financial*" issues to the substance of the decision and the reasons behind

the figures; that the amounts awarded to the respondents were "*minor*"; submissions on jurisdiction under section 74(2) of the RV Act; objection to evidential matters proffered by counsel in submissions and the terminology used; that the applicants did not accept that the case was "*complex*"; that there was no evidence of certain matters included in the submissions for the respondent; that it was not a matter of "*punishing*" the respondents by any order for costs; and otherwise addressing the submissions made by the respondents to which reference will be made.

Costs – discussion

16. The disputes panel must address the application by the applicants for an order for costs in the context of the dispute notices, the responses to them, the issues raised by the parties and the outcome of the decision.

17. Although it may be said they were a number of residents present at the hearing, there was no evidence advanced concerning other residents or their entitlement. No other site agreement was advanced nor any evidence given of how settlement or payment of entitlements to other residents may have been handled to date; or is intended to be handled in the future.

18. There had been included in the Bundle of documents to which objection was taken produced by Ms Waters a bundle of statements from individuals and lawyers concerning alleged breach of rights which the disputes panel completely disregarded for the reasons set out[4]. The disputes panel is not prepared to infer that the outcome of the decisions in these disputes between the current parties has any consequences for those residents because there is simply no evidence of that.

19. Likewise the disputes panel cannot give any weight to the submission that there was "*substantial support*" for the stand taken by the two respondents because again there was no evidence of this (and indeed the implication

[4] Refer paragraphs 117 and 118 of Amended Reasons for Decisions dated 14 November 2013

may be that, if that were so, then there could be a funding source for costs from those other interested residents – but that is not an inference which the disputes panel does in fact draw).

20. In the view of the disputes panel 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.

21. Relevant statutory provisions include:

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

21.2. 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.

21.3. 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.

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

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

21.6. 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.

21.7. 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.

21.8. The obligation under regulation 9 of the RV Regulations to appoint a chair of a panel comprising more than 1 member.

22. The requirements of section 74 of the RV Act are a two-stage process; first to decide whether an applicant for costs is entitled to those costs having regard to the provisions of section 74(2); and secondly then to take into account the factors in section 74(3) to determine whether there should be an order for costs and, if so, the amount.

23. In this case the only applicable sub-paragraphs of section 74(2) are sub paragraphs (a) and (b).

24. The first question is whether the decision in the dispute is fully or substantially in favour of the applicants. The applicants submitted that it was the substance of the disputes that should be addressed rather than the detail of the figures and that, applying that test, the decision was substantially in favour of the applicants. The respondents relied on those items where there had been specific deduction by the applicants from the improvements value and sale price received for the respective units of the respondents. These were items of specific deduction which, in the case of the first respondent were dealt with at paragraphs 196 - 262 and, in the case of the second respondent at paragraphs 263 - 284 of the Amended Reasons for Decisions.

25. It is the view of the disputes panel that the decisions were substantially in favour of the applicants. By far the most significant and primary issue was entitlement to land value. This comprised a significant part of the content of the responses to the dispute notices; and the submissions and evidence for the respondents. Both in monetary terms and in respect of the focus and presentation of the cases, this question of entitlement to land value stood out as being by far the major issue and concern for the respondents.

26. That this was so is plainly evident from the voluminous content in the replies, the submissions and the evidence for the respondents on this issue and the extent to which the matter needed to be addressed in the Amended Reasons for Decisions.

27. The items in respect of which the respondents were successful were first in relation to the correct value and purchase price to be placed on the sale of the respective units and secondly in respect of certain deductions that were made. In all, having regard to monetary terms, time consumed in the hearing and process, and outcome in principle, these items were relatively minor. Indeed in respect of three of these, they were only changed in favour of the respective respondents because of the percentage recalculation based on the substantive issue determined (sale price of residential units).

28. The submissions for the applicants have highlighted that the result of the Amended Interim Decision was that the first respondent is entitled to $8,874.50 more than was claimed which is $73,716.81 less than was claimed; and the second respondent is entitled to $9,218.70 more than claimed which is $56,423.25 less than claimed. Those monetary figures alone indicate a substantial finding in favour of the applicants.

29. Accordingly the disputes panel finds that under section 74(2) of the RV Act there is scope for provision of a costs award in favour of the applicants.

The disputes panel rejects the respondents' submission that there is no jurisdiction to do so.

30. Furthermore, while it was argued for the respondents that there was no jurisdiction because section 74(2)(a) did not apply and the disputes panel finds that it does, those submissions did not also refer to section 74(2)(b) which allow for the award of costs and expenses in the event of a dispute resolution not being in favour of the applicant but where the applicant is found to have acted reasonably in applying for dispute resolution.

31. Even if that had not been the case that section 74(2)(a) did not apply (decision not fully or substantially in favour of the applicants) section 74(2)(b) would have applied, that is that the disputes panel finds that the applicants have acted reasonably in applying for the dispute resolution. As the disputes panel understands it the proceeds of sale of the respective units were ready for payment to the respective respondents but, because of claims made by them, these proceeds of sale were paid to the statutory supervisor on the basis that the applicants brought the dispute notice procedure as has occurred. In that case, it can hardly be said that the applicants have not acted reasonably.

32. That being so, in responding to the applicants' application for costs, the disputes panel **must** decide the matter under section 74(3) of the RV Act. That subsection addresses:

32.1. Whether to award costs and expenses and

32.2. The amount of any award.

33. It refers to certain matters which the disputes panel is required to **have regard** to (subsection 3(a)) and matters which the disputes panel must **take into account** (subsection 3(b)). (It also refers to any regulations

made under the RV Act for the purpose but the disputes panel does not understand there to have been any).

34. Submissions were not addressed to any differences between the two expressions, "*having regard*" and "*after taking into account*" but the issues that must be addressed in these two contexts are:

34.1. The reasonableness of the costs and expenses and the amount of any award incurred by the applicant.

34.2. The amount or value of the matters in dispute.

34.3. The relative importance of the matters in dispute to the parties and

34.4. The conduct of the parties.

35. Likewise there were no submissions addressed to the expression "*any award incurred by the applicant*" but the disputes panel perceives this to be referring first to the costs and expenses incurred by the applicant and secondly to the amount of any award.

The reasonableness of the costs and expenses and the amount of any award incurred by the applicant

36. The depiction of the importance of this case is different from both parties. The respondents depicted these disputes as a "*test case*", which the applicants deny and the respondents claim that the issues were complex and affect the potential outcome for other residents in the village.

37. The applicants depicted the disputes as straightforward and involving no more than application of standard contractual principles to the unit value content of the respective sales and that it is only because of complications raised by the respondents both in the way the responses have been conducted and in their content that there has been complexity created.

38. Accordingly, it is in that context that the respondents challenge the reasonableness of costs incurred by the applicants and the applicants say that cost is justified.

39. The respondents protested throughout about the use by the applicants of senior counsel in the matter and needed to be reminded that it was the applicants' choice as to whether counsel or senior counsel should be employed. That is the right of every litigant including before a disputes panel under the RV Act.

40. That does not, however, mean that the applicants were reasonable in employing senior counsel in respect of these disputes under the RV Act. It may well be that the outcome of these two disputes will affect how other residents' unit sales are dealt with and proceeds divided but there is no evidence that justifies any suggestion of a precedent effect. Likewise, there is no evidence as to whether any other resident has contributed to the costs for the respondents (and there is no evidence about the amount of those costs, but certainly the disputes panel perceives that there has been substantial time put in by the lawyers for the respondents which may have resulted in cost for them. There is simply no evidence of this).

41. The conclusion that the disputes panel has reached is that costs for the applicants which are said to be in excess of $100,000.00 is more than is reasonable in the circumstances of the dispute notices, even having regard to the allegations that were made and the conduct of the respondents and their lawyers referred to below. It may be said that there is a concession of this insofar as, in trying to quantify the amount of any award that should be ordered, reference has been made to the equivalent District Courts Rules.

The amount or value of the matters in dispute

42. The submissions for the applicant summarise the critical monetary sums in question in Appendix A. These show that the balance claimed as due to the first respondents by the applicants was $122,561.19, but the balance claimed by the first respondents was $205,152.50 and that the Amended Interim Decision in favour of the first respondent was $131,435.63. In the case of the second respondent the amount claimed as due was $71,698.05, the balance claimed by the second respondent as due was $137,340.00, and the an Interim Decision for the second respondent resulted in $80,916.75. The respondents submit that in the case of the first respondent this amounts to an increase of 7.2% and, in the case of the second respondent, an increase of 12.9%, with the unsubstantiated allegation that the respondents "*have only meagre funds*" and the increases are therefore significant.

43. There was no real evidence about the means of the parties or the extent to which sums of this nature were of substantial or only minor importance to them. There could be an inference drawn that, because these persons were elderly residents in a modest retirement village, this was their major asset; but there was no evidence about this.

44. The disputes panel perceives that there was perhaps an element of "*principle*" in the way these dispute notices were handled on behalf of the respondents. Conduct is referred to below. The disputes panel draws the inference that, while the monetary amounts were of importance to the respective respondents, some of the allegations made and the way in which the responses to the disputes notices were conducted meant that there was more at stake for the respondents (or perhaps their lawyers) than just the monetary sums involved.

45. The disputes panel has taken these items into account.

The relative importance of the matters in dispute to the parties

46. The issues under consideration here overlap to a large extent to what is said elsewhere. Questions of principle have entered into the dispute. The allegations made on behalf of the respondents in direct response to the dispute notices contained inflammatory allegations against the applicants. Although these were later withdrawn, they set a bad environment for cost effective disposal of the dispute notices.

47. The respondents did not bring any dispute notices of their own in respect of matters where they said there was unfairness on the part of the applicants. Instead they chose to bring litigation in the High Court (and the disputes panel is not aware of what stage the litigation has reached or whether it will be pursued but that is for the parties).

48. All that indicates to the disputes panel, however, that, as stated above, although monetary amounts were of importance to the respondents, there were also issues of principle and allegations of unfairness which played a part in their motivation and conduct in respect of the disputes in question and the dispute notices in particular.

The conduct of the parties

49. It is in respect of the conduct of the respondents that the applicants rely heavily. They referred to the conduct during the early processes of the disputes notices, that the original responses to the dispute notices did not comply with the RV Regulations, the "*inflammatory remarks*" in the responses which were later deleted immediately prior to the hearing, the High Court proceedings which the respondents had brought, the conferences and memoranda that have consequentially been required, the filing with the disputes panel of unsigned submissions and approximately 850 pages of annexures without any index or schedule or evidence, irrelevant matters contained in the submissions and affidavit, and the

inappropriate factual content of submissions on behalf of the respondents including the Reply on their behalf to the application for costs.

50. Submissions for the respondents did not directly address this issue, despite its having been raised initially in the application for costs. The respondents referred to the background to the disputes process having commenced because of the funds being held by the statutory supervisor and claimed that they had acted "*honestly and diligently*" without causing any delays. They emphasised how they had made "*extensive efforts*" to comply with directions and timetabling; and claimed they were "*anxious to receive a fair hearing*". Reference was made to the wide interest in the matter of other residents. It was alleged by the respondents that the applicants had sought to delay the matter "*by requiring time to be spent on the correction of numerous errors in their evidence*".

51. It is the view of the disputes panel that the dispute notices in these cases received substantially more attention and cost than was necessary.

52. The primary issue concerned the entitlement of the respondents to a share in the proceeds of sale of the respective properties.

53. The deductions that had been made were of relatively minor importance and could have been dealt with speedily by a dispute resolution process, if not even by proper negotiation between the parties. Some items were direct mathematical calculations based on a percentage of the entitlement from the sale of the respective units and were dependent on the outcome of that issue. Otherwise, however, the deductions related to relatively minor matters.

54. The disputes panel perceives that there was intransigence on the part of the first respondent in relation to those minor matters because of the perception by Ms Phillippa Waters that she had greater entitlement from

the proceeds of sale of the property and was not prepared to co-operate in the process of settlement, such as with the handing over of keys.

55. So far as the substantive issue was concerned, this involved questions of contractual interpretation of the two primary documents, the Site Agreement and the Agreement for Sale and Purchase in each case. That issue was widened by reference to the Prospectus and then further by reference at a late stage (during the evidence of Ms Waters almost seemingly as an afterthought) to the Investment Statement dated 1 August 2002.

56. Issues concerning contractual interpretation and specifically in relation to all four of those documents would have been relatively straightforwardly dealt with by a disputes panel even possibly on the basis of the papers, given that the submissions could have been made in writing and considered. There were essentially no questions of fact relating to those interpretations.

57. It was Ms Phillippa Waters' background evidence about the expectations of her late mother and the like which created the necessity for evidence and cross-examination. Outstanding issues concerning the deductions had not been addressed in any way that lead to resolution and those too needed to be the subject of factual hearing.

58. More importantly, it was because of the way in which the responses were advanced as matters of principle that complications arose. As to the content of those issues, there was extensive documentation provided and allegations made about the fairness of the process of conversion of the units in the village into unit titles and all of the implications of that fairness process on the respondents and other residents.

59. Fairness of process was not an issue raised by the dispute notices and the respondents had their own remedies by way of their own disputes notices if they had thought there was ground for complaint.

60. So far as the process was concerned, the lawyers for the respondents prepared and took responsibility for the responses to the disputes notices. These contained significant reference to matters outside the issues raised by the disputes notices and indeed contained remarks which were later deleted and had been referred to in the substantiative decision as "*inflammatory*".

61. Despite the attempts from counsel for the applicants and, to the extent this was available to the disputes panel, the disputes panel, to refocus attention on the issues arising from the disputes notices as such, the lawyers for the respondents then provided the 850 pages of unindexed background material and significant submissions referring to the issues which were irrelevant to the disputes raised by the dispute notices.

62. Effectively all of that material was objected to by counsel for the applicants and, as it turns out, disregarded by the disputes panel.

63. Significant objection was raised by counsel for the applicants to submissions insofar as there were factual allegations made by the lawyers for the respondents without sworn evidence and in conflict with the role that was apparently being taken by counsel for the respondents at the same time. This required direction from the disputes panel in no uncertain terms as to what was required of counsel and the impropriety of counsel in a case also giving evidence. Counsel for the respondents frankly admitted that she was not a lawyer involved in litigation.

64. It was hard for the disputes panel to perceive what outcome the lawyer for the respondents was seeking given the extensive allegations of unfairness by the applicants and given the clear direction in the RV Act and the RV

Regulations for compliance with the principles of natural justice and specifically the provisions of regulation 23 of the RV Regulations as to process.

65. Had there been careful consideration of the requirements of the regulation from the outset, the matter may well have been differently addressed by the lawyers for the respondents.

66. The disputes panel has concluded that there has been extra cost incurred by the applicants as a direct result of the conduct of these disputes by the lawyers and counsel for the respondents.

67. The disputes panel also finds that Ms Phillippa Waters pursued the allegations of unfairness and other matters referred to above as irrelevant to the disputes notices and may well have further instructed her lawyers accordingly.

68. Conversely, Mrs Murray played little part in the total process. She was represented by her daughter who is also her attorney who was present at the hearing. The allegations made specifically relating to Mrs Murray's entitlement from the proceeds of sale of her residential unit were directly focused on the matters at issue, questions of the entitlement to any land value and aspects of certain specific deductions; and the disputes panel finds that there was no activity on her part which added to the time or cost of the resolution of the dispute notice on her behalf.

69. Specifically, the disputes panel notes that the response and the amended response on behalf of Mrs Murray were both signed by her lawyer and that the submissions and bundle of documents provided when this was not called for were provided by Mrs Murray's lawyer.

Conclusion

70. The disputes panel does find that there is a basis for order for contribution to costs from the first respondent. This is primarily because of the conduct of Ms Phillippa Waters, the executor of the estate of the late Mrs Waters; and of the lawyers and counsel on her behalf.

71. The fact that there were High Court proceedings which intervened is not a matter which the disputes panel finds is a basis for any further costs. It was the entitlement of the plaintiffs in the High Court proceeding to bring those proceedings and any costs involved in that process will be (and the disputes panel perceives may already have been) a question of costs in that Court. The adjournments to the disputes panel process while the court process was under way were effectively done by consent and did not add significantly to the cost of the disputes panel resolution.

72. The disputes panel does not find that it is a factor to be taken into account that the applicants used senior counsel and the solicitor for the applicants in presentation of the disputes notices and at the hearing. That is their choice and they may have perceived significant reason on their own part for making that choice, but it is not something which needs to be visited upon either of the respondents. Specifically, the disputes within the parameters that the applicants argue applied and which the disputes panel has found applied, were such as could have been dealt with without the necessity for senior counsel.

73. Responsibility for the content of the responses to the dispute notices including the "*inflammatory*" allegations and statements originally made, and for the provision of the submissions not called for and eventually not taken into account must lie with the lawyers for the first respondent except to the extent that this may have been done on instructions from their client (and the disputes panel has no evidence about this which must be a matter between the first respondent and her lawyers).

74. Any award for costs against a respondent is not in any way a "*punishment*" of the respondent. It is simply a reflection of the all factors that go into a consideration of an obligation to contribute to costs as is outlined above. Specifically in this case, an award for costs against the first respondent is primarily reflective of the exacerbation of the issues by her and her lawyer.

75. Having regard to all of the criteria referred to in section 74(3) of the RV Act, the disputes panel has concluded that the first respondent should make a contribution of $8,000.00 to the costs of the applicants in this manner (including the disputes panel fees and expenses) and orders accordingly.

76. The disputes panel does not find there is any basis on which to order any contribution for costs from Mrs Murray.

77. So far as the costs of this further decision on costs are concerned, the disputes panel is of the view that these costs should lie where they fall. The parties have made their respective submissions which have been taken into account and none of the criteria which might otherwise justify some contribution to costs from one or the other pursuant to section 74 have been raised.

78. That should conclude all matters pertaining to these dispute notices.

Dated this 20th day of December 2013

DAVID M. CARDEN
Disputes Panel