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

AMENDED REASONS FOR DECISIONS ON BOTH DISPUTE NOTICES

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Introduction

1. Two dispute notices were given by the village operator, the trustees of the Perry Foundation named above (referred to as "**the Perry Foundation**" or "**the Foundation**") in respect of a retirement village at 711 Te Kowhai Road, Te Kowhai, near Hamilton, named Perrinpark. Both dispute notices were on similar terms concerning a dispute over the amount properly payable to the respective respondents from the proceeds of sale of units at Perrinpark.

2. The first respondent is the executor of the estate of the late Jeanne Waters, the former owner of the unit at 21 KingfisherWay, Perrinpark; and the second respondent was the owner of the unit at 32 Kingfisher Way, Perrinpark. Replies to the dispute notices were filed by the respective respondents and there were some extensive pre-hearing processes.

3. A hearing was finally conducted and submissions made. The respective respondents dispute the amount that the Perry Foundation says is due to them from those proceeds of sale of the respective units and raise certain issues in reply.

The process

4. The two dispute notices are both dated 17 November 2011. The village operator, the Perry Foundation, as it was obliged to do under section 59 of the Retirement Villages Act 2003 ("**the RV Act**") appointed me as the

disputes panel to determine those disputes and, once Terms of Engagement were completed, I accepted the appointment.

5. The respondents filed replies to those dispute notices primarily referring to, and relying on, proceedings that were anticipated to be brought, and were eventually brought, in the High Court of New Zealand at Hamilton. Various pre-hearing conferences were convened by me as disputes panel resulting in adjournments until certain interlocutory processes had been followed in the High Court proceedings which resulted in a decision being made in the court. The effect of the decision did not preclude my hearing the disputes as disputes panel and the Perry Foundation, as village operator, requested that I proceed to do so.

6. Amended replies were then filed by the respective respondents (and these were further amended in a way which is not controversial immediately prior to the hearing). During the course of pre-hearing conferences I gave certain directions for the process of filing and service of proposed statement of evidence.

7. The village operator provided two statements of evidence to which reference will be made; but on behalf of the respondents their lawyers provided a lengthy submission and a significant bundle of documents. More will be the said on that later. Objection was taken at the pre-hearing stage to the factual content of the submissions and to the admissibility and the relevance of many of the documents and I indicated that I would consider those objections at the hearing.

8. There was then filed and served a statement of evidence from Phillippa Mary Waters, the executrix of the estate of the late Jeanne Waters ("**Phillippa Waters**"). I shall refer to the first respondent throughout in her capacity as executor of the estate of the late Jeanne Waters as "**the Waters Estate**"; and I shall refer to the second respondent has "**Mrs Murray**".

9. After further pre-hearing conferences and consultations to which detail will be mentioned as necessary below the dispute notices were heard at Hamilton on 9 and 10 September 2011. The Perry Foundation was represented by Mr C Gudsell QC and Mr M Bindon and the two respondents were represented by Ms W Hendrikse. Ms Phillippa Waters was present at the hearing as was Mrs Murray's daughter and attorney, Mrs Helm.

10. Because there was sought to be relied on by the respective respondents the submissions that had been filed by their lawyer and the voluminous documents that had been presented to which objection had been taken, I was asked to accept those documents and to indicate that, if I were to take any part of them into account under the powers that I have under section 67(1) of the RV Act, I would give notice to the parties and the opportunity for any further submissions and, if necessary, reply evidence.

11. The question of costs was raised and I was asked to reserve costs which I proposed be on the basis that these be interim decisions leaving the question of costs for any further application and direction.

The dispute notices and replies

12. The respective dispute notices from the respondents dated 17 November 2011 read as follows:

Waters Estate Notice

"*Name of retirement village:*	***PERRINPARK***
Address of retirement village:	***711 TE KOWHAI ROAD, TE KOWHAI, HAMILTON***
Name of operator of retirement village:	***PERRY FOUNDATION***
Name of Applicant:	***PERRY FOUNDATION***

1. *I am the Solicitor for the operator of the retirement village.*

2. *I give notice of a dispute with the Estate of a former resident of the retirement village, namely **JEANNE WATERS**.*

3. *The dispute is about the following matters:*

    (a) *Money due to the Respondent under Mrs Waters' occupation right agreement, namely a Site Agreement dated 13 February 2003 ("the Site Agreement"), following termination of same upon Mrs Waters' death and the subsequent sale by the Applicant of 21 Kingfisher Way, containing the unit formerly occupied by Mrs Waters.*

4. *The grounds of the dispute are:*

    (a) *On 4 July 2011, in its capacity as attorney for the Respondent pursuant to clause 7.1 of the Site Agreement, the Applicant entered into an Agreement for Sale and Purchase for the sale of 21 Kingfisher Way to a third party purchaser, containing the unit formerly occupied by Mrs Waters.*

    (b) *Under clause 7.1 of the Site Agreement, the Applicant had the sole right of disposal of the Respondent's unit.*

    (c) *The total sale price under the Agreement for Sale and Purchase was $235,000.00 (inclusive of GST), which comprised:*

        (i) *$82,000.00 for the freehold land (which was at all material times owned by the Applicant); and*

        (ii) *$153,000.00 for improvements and chattels.*

    (d) *The Applicant claims that the sum of $122,561.19 is due to the Respondent in accordance with clause 7.3 of the Site Agreement, being the sale price of the improvements and chattels ($153,000.00) less deductions for:*

        (i) *Expenses incurred by the Applicant in preparing the unit for sale (clause 7.3(a) of the Site Agreement), in the sum of $2,834.63:*

            Particulars:

- *Repair toilet and wastemaster, $572.19;*
- *Replace garage door remote openers, $644.00;*
- *Replace garden shed, $1,227.05;*
- *Replace door locks as no keys provided, $391.39.*

(ii) Direct expenses incurred in the sale of the Respondent's unit (clause 7.3(b) of the Site Agreement), in the sum of $8,025.76:

Particulars:

- *Half valuation fee, $250.00;*
- *Real Estate Agent's commission (pro rata in proportion to the value of the unit to the total sale price) of $7,038.39;*
- *Solicitor's fee on sale of the Respondent's unit (also pro rata) of $737.37.*

(iii) Vendor's payment on sale, 12.5% of gross disposal proceeds for the unit (clause 7.3(c) of the Site Agreement), $19,125.00;

(iv) Outstanding resident's fees (clause 7.3(d) of the Site Agreement), $453.42.

(e) The Respondent claims the sum of $205,152.50, being the total sale price of $235,000.00 less deductions for:

(i) Exit fees of $29,375.00 (12.5% of the total sale price); and

(ii) Solicitor's fees of $472.50.

(f) The sale of 21 Kingfisher Way settled on 26 July 2011.

(g) The Applicant sought to have Covenant Trustees Limited, the Statutory Manager of Perrinpark under the Retirement Villages Act 2003 release its mortgage against the title to 21 Kingfisher Way. Covenant Trustees Limited declined to do so, because it considered there was a dispute between the Applicant and the Respondent as the respective payments due to each. At the request of the Respondent, and with the consent of the Applicant, Covenant Trustees Limited agreed to hold the net proceeds of sale amounting to

$205,152.50, pending resolution of the dispute between the Applicant and the Respondent as to how these funds should be distributed.

5. *The efforts that have been made to resolve the dispute are:*

   (a) *Correspondence has been entered into with the Solicitor for the Respondent with a view to resolving the dispute between the parties, including inviting the Respondent to appoint a valuer (the Applicant having already obtained a valuation).*

Dated at Hamilton this 17th day of November 2011"

Mrs Murray Notice

"Name of retirement village:	***PERRINPARK***
Address of retirement village:	***711 TE KOWHAI ROAD, TE KOWHAI, HAMILTON***
Name of operator of retirement village:	***PERRY FOUNDATION***
Name of Applicant:	***PERRY FOUNDATION***

1. *I am the Solicitor for the operator of the retirement village.*

2. *I give notice of a dispute with a former resident of the retirement village, namely* ***HILDA MURRAY****.*

3. *The dispute is about the following matters:*

   (a) *Money due to the Respondent under her occupation right agreement, namely a Site Agreement dated 23 May 2002 ("the Site Agreement"), following termination of same by the Respondent and the subsequent sale by the Applicant of 32 Kingfisher Way, containing the unit formerly occupied by the Respondent.*

4. *The grounds of the dispute are:*

   (a) *On 1 June 2011, in its capacity as attorney for the Respondent pursuant to clause 7.1 of the Site Agreement, the Applicant entered into an Agreement for Sale and Purchase for the sale of 32 Kingfisher Way to a third party purchaser, containing the unit formerly occupied by the Respondent.*

(b) Under clause 7.1 of the Site Agreement, the Applicant had the sole right of disposal of the Respondent's unit.

(c) The total sale price under the Agreement for Sale and Purchase was $170,000.00 (inclusive of GST), which comprised:

(i) $79,000.00 for the freehold land (which was at all material times owned by the Applicant); and

(ii) $91,000.00 for improvements and chattels.

(d) The Applicant claims that the sum of $71,698.05 is due to the Respondent in accordance with clause 7.3 of the Site Agreement, being the sale price of improvements and chattels ($91,000.00) less deductions for:

(i) Direct expenses incurred in the sale of the Respondent's unit (clause 7.3(b) of the Site Agreement), in the sum of $5,471.95:

Particulars:

- *Half valuation fee, $250.00;*
- *Solicitor's fee for the surrender of the Site Agreement of $472.50;*
- *Real Estate Agent's commission (pro rata in proportion to the value of the unit to the total sale price) of $4,186.05;*
- *Solicitor's fee on sale of the Respondent's unit (also pro rata) of $563.40.*

(ii) Vendor's payment on sale, 12.5% of gross disposal proceeds for the unit (clause 7.3(c) of the Site Agreement), of $11,375.00.

(iii) Outstanding service fees due to the Applicant (clause 7.3(d) of the Site Agreement) of $2,455.00.

(e) The Respondent claims that she is due the sum of $137,340.00, being the total sale price of $170,000 (for

both land and improvements and chattels), less deductions for:

(i) The Site Agreement fee of $12,500.00 payable by an incoming resident to whom a new Site Agreement is issued;

(ii) Exit fees of $19,687.50 (12.5% of $157,000);

(iii) Solicitors fees on the surrender of licence of $472.50.

(f) The sale of 32 Kingfisher Way settled on 22 July 2011.

(g) The Applicant sought to have Covenant Trustees Limited, the Statutory Manager of Perrinpark under the Retirement Villages Act 2003 release its mortgage against the title to 32 Kingfisher Way. Covenant Trustees Limited declined to do so, because it considered there was a dispute between the Applicant and the Respondent as the respective payments due to each. At the request of the Respondent, and with the consent of the Applicant, Covenant Trustees Limited agreed to hold the net proceeds of sale amounting to $160,316.50 as stakeholder, pending resolution of the dispute between the Applicant and the Respondent as to how these funds should be distributed.

5. The efforts that have been made to resolve the dispute are:

(a) Correspondence has been entered into with the Solicitor for the Respondent with a view to resolving the dispute between the parties, including inviting the Respondent to appoint a valuer (the Applicant having already obtained a valuation).

Dated at Hamilton this 17th day of November 2011"

13. The respective replies to those dispute notices by the respondents both dated 16 December 2011 and signed by their respective lawyer referred to certain High Court proceedings and effectively that the matter should be dealt with in those proceedings rather than as a disputes panel matter.

14. When the High Court proceedings had reached the stage of a decision effectively not preventing the disputes panel from dealing with the matter and the village operator requested that the disputes notices be determined by me as the disputes panel under the RV Act, the respondents filed and served amended replies dated 3 May 2013 signed by their respective lawyer.

15. These each comprised some 17 pages replying to the matters referred to in the respective dispute notices but also making significant submissions and containing statements of fact. Those notices also contained certain allegations which could be described as inflammatory. The respective replies were amended by amended notices dated 9 September 2011 immediately before the hearing commenced. The amended reply by the Waters Estate was signed by Phillippa Waters as executor and the amended reply on behalf of Mrs Murray was signed by her lawyer. The amendments were not objected to by the village operator and essentially amounted to the deletion of the inflammatory remarks that had earlier been contained. Again those amended replies contain submissions and significant statements of fact. The issues that are raised by those replies are dealt with substantively in the decisions which follow.

The Hearing

16. The hearing, which comprise two days, followed the course provided by regulation 23 of the Retirement Villages (Disputes Panel) Regulations 2006 ("**the RV Regulations**"), namely that the village operator, as applicant, stated its case and called evidence from the two persons whose statements have been provided, Ivan Craig Blackmore, and Antony James McLauchlan. Both were cross-examined by counsel for the respective respondents.

17. At the conclusion of that evidence counsel for the respondents stated the case for the respondents and called Phillippa Mary Waters to give

evidence in accordance with the written statement that had been provided. She was cross-examined. There was no evidence called expressly by or on behalf of Mrs Murray.

18. There was then presented the submissions that had earlier been filed and served and the bundle of documents. Objection from counsel for the village operator was repeated to the full content of those except to the extent that documents had been proved by Ms Waters and were accepted by me on the basis mentioned namely, that if I were to take any of those matters into account I would give the applicants further opportunity for response.

Background

19. The retirement village at Perrinpark is located at 711 Te Kowhai Road, Te Kowhai, approximately 15 k.m. north-west of Hamilton.

20. The land was purchased as a bare block of land for the purpose of a retirement village in 1980. Eventually 73 units were established there and the Perry Foundation appointed the New Zealand Guardian Trust Company Limited as trustee under a Deed of Participation.

21. Mr Blackmore said that at the early stage the Perry Foundation charged a one-off (lifetime) site fee to occupy parcels of land and the residents arranged for the construction of units/houses.

22. Both the late Mrs Waters and Mrs Murray became residents at Perrinpark. In the case of Mrs Murray she signed a site agreement dated 23 May 2002 and in the case of the late Mrs Waters she signed a site agreement dated 13 February 2003.

23. There was also produced the copy of an agreement for sale and purchase dated 13 February 2003 between the Perry Foundation and the late Mrs

Waters and counsel for the Perry Foundation in closing submissions said that there was a similar agreement in respect of the sale of Mrs Murray's unit.

24. In the case of the late Mrs Waters she made a payment or payments totalling $125,000.00. This comprised of a site fee payable under the site agreement, $12,500.00 and the further sum of $112,500.00 pursuant to the agreement for sale and purchase.

25. In the case of Mrs Murray, she paid the sum of $12,500.00 pursuant to the site agreement and the further sum of $97,500.00 pursuant to her agreement for sale and purchase.

26. I refer to the relevant terms of the respective agreements below.

27. When the RV Act came into force between 1 February and 1 May 2007 the the Covenant Trustee Company Limited became the "statutory supervisor" in place of the previous trustee.

28. The Perry Foundation moved to an agreement licence to occupy model in place of the site agreement formula, Mr Blackmore describing the licence as being that a payment was made "*of whatever the market would pay for a life entitlement to occupy the house and land*". That only applied to new incoming residents with existing residents retaining rights under the site agreements.

29. The late Mrs Waters continued on as occupant under her site agreement as did Mrs Murray.

30. The late Mrs Waters died on 13 December 2008 and Ms Phillippa Waters became the executor of her estate in due course. It is common ground that the death of the late Mrs Waters terminated her site agreement (although on a strict reading of the site agreement it could be argued that there needed to be some action on the part of the Perry Foundation to terminate the agreement following her death. Clause 6.1 E reads: "*The Foundation may terminate this agreement in the event that… the grantee dies or has abandoned the unit*" (referring, of course, to the late Mrs Waters as grantee)). I have not had to address this question because it is not raised, and it is common ground that the death of the late Mrs Waters terminated the site agreement.

31. Mr Blackmore said that in 2010 the Perry Foundation decided to explore the possibility of a freehold unit title model at Perrinpark and said that sales in the village had been very slow for some time and that the Perry Foundation was of the view that unit titles would broaden the appeal of Perrinpark and increased saleability. He said that has proven to be the case.

32. Mr Blackmore described what he had said was a consultation process concerning the proposed change to unit titles. That is controversial because the Waters estate and Mrs Murray have criticisms of the communications that took place and I shall mention those below.

33. At about this time Mrs Murray gave notice to the Perry Foundation of her intention to terminate her site agreement and on 8 October 2010 an Application for Disposal of that unit was signed by Mrs Valerie Joyce Helm as attorney for Mrs Murray.

34. Mr Blackmore gave evidence that in December 2010 all residents at Perrinpark were offered the opportunity to purchase the freehold applicable to the units and offers were made which contained certain discount on section value proposals should the existing resident take up the offer.

35. Mr Blackmore said that in late February 2011 a further letter was sent giving a final opportunity for freeholding; but that too was controversial because Ms Phillippa Waters, by then the owner of unit 21, denied that she received this and there was no evidence of its having been sent. Neither the Waters estate nor Mrs Murray took up that offer or became owners under the unit title Scheme.

36. The unit titling process proceeded and Mr Blackmore said that at the time of swearing his affidavit (17 May 2013) the freehold title to 39 of the 73 units had been sold to residents.

37. Eventually (and there is criticism about the time delay) a process was put in place for disposal of the unit of the late Mrs Waters and all interests that her estate had. An Application for Disposal form was completed and signed dated 13 August 2009 and signed by Ms Phillippa Waters on behalf of the Waters estate and signed on behalf of the Perry Foundation. I refer to the detail of that below.

38. The Perry Foundation entered into an agreement for sale and purchase of of the stratum in freehold estate under the Unit Titles Act in respect of 32 Kingfisher Way, Perrinpark Village, (formerly occupied by Mrs Murray) by agreement dated 1 June 2011 selling the stratum in freehold estate with the unit constructed thereon and listed chattels for $170,000.00. The agreement referred to that price being divided as to $79,000.00 for the freehold land and $91,000.00 for the improvements and chattels.

39. The Perry Foundation entered into an agreement for sale and purchase of of the stratum estate in freehold under the Unit Titles Act in respect of 21 Kingfisher Way, Perrinpark Village, (formerly occupied by the late Mrs Waters) by agreement dated 4 July 2011 selling the stratum in freehold estate with the unit constructed thereon and listed chattels for $235,000.00.

The agreement referred to that price being divided as to $82,000.00 for the freehold land and $153,000.00 for the improvements and chattels.

40. There have been further lengthy exchanges between the parties and their lawyers to which I shall refer but it is in respect of the proceeds of sale of the respective units that the dispute notices refer. In the case of the Waters estate the Perry Foundation, as village operator claims that the estate is entitled to the sum of $153,000.00 being the amount received on sale of number 21 Kingfisher Way for improvements and chattels but after deduction of the amounts referred to in the dispute notice being:

40.1. Sums totalling $2,834.63 for replacement of toilet and waste master, replacement of garage door remote openers, replacement of garden shed, and replacement of door locks

40.2. Expenses incurred in the sales totalling $8,025.76 comprising half a valuation fee, a proportionate share of the real estate agent's commission, and a proportionate share of the lawyer's fee on sale of that unit.

40.3. A percentage of the gross disposal proceeds of the unit under the site agreement, namely the maximum of 12.5% and

40.4. Outstanding resident's fee, $453.42.

41. In the case of Mrs Murray the Perry Foundation, as village operator, claims that Mrs Murray is entitled to the sum of $91,000.00 being the amount received on sale of 32 Kingfisher Way for improvements and chattels but after deduction of the amounts referred to in the dispute notice being

41.1. Sums totalling $5,471.95 described as direct expenses incurred in the sale,

41.2. The percentage of gross disposal proceeds at 12.5% under clause 7.3(c) of the site agreement, $11,375.00 and

41.3. Outstanding service fees totalling $2,455.00.

42. The dispute notices referred to the respective sums that the respective respondents say they are due from the proceeds of sale and respectively at 21 and 35 Kingfisher Way.

The Signed Documents

43. There was produced by the village operator:

43.1. A site agreement in respect of Lot 32 Kingfisher Way dated 23 May 2002 with Mrs Murray.

43.2. A site agreement in respect of Lot 21 Kingfisher Way dated 13 February 2003 with the late Mrs Jeanne Waters.

43.3. An agreement for sale and purchase between The Perry Foundation and the late Mrs Jeanne Waters dated 13 February 2003.

44. The two site agreements are substantially the same for the purposes of this dispute. The essential terms comprise:

44.1. A Grant of the site (defined to mean Lot 32 Kingfisher Way in the case of Mrs Murray and Lot 21 Kingfisher Way in the case of the late Mrs Waters) to those respective persons.

44.2. The consideration was stated to be $12,500.00 in each case.

44.3. The Grant was of a lifetime grant of the site to the Grantee so long as the agreement remained in force.

44.4. The Grant, for that same consideration, included the use in common with the occupiers of the other sites and other authorised persons of all communal buildings on the land and all amenities and facilities and services provided for residents.

44.5. Provision that, if there were no unit already erected on the site the **Grantee** (emphasis added) was to commence forthwith and with all diligence and expedition to erect a residential unit on the site in accordance with plans, specifications, site development policy and Local Authority Bylaws - Clause 1.

44.6. Provision for advance monthly payments of a service fee as fixed from time to time to cover rates and running costs at Perrinpark including those relating to roading, grounds maintenance, water, sewerage, refuse removal, street lighting, community and recreational amenities and facilities and services and staffing and management services - Clause 2.

44.7. Provision for the Grantee in each case to pay various charges and for maintenance and upkeep of the unit and the site - Clause 3.

44.8. The right for the Perry Foundation to terminate the agreement in the event of the death of the Grantee (applicable in the case of the late Mrs Waters) or for other stated reasons (applicable in the case of Mrs Murray) - Clause 6.1.

44.9. That the Grantee in each case remained liable for service fees for a period not exceeding one year from the date of termination or earlier commencement of an agreement in respect of the site with a new Grantee - Clause 6.4.

45. The express provisions of clause 7.1 and 7.2 of the agreement read:

"***7.1*** ***At*** *the end of the term of this Agreement the Foundation alone is entitled to dispose of the unit and as regards the interests of the Grantee is the attorney of the Grantee for that purpose.*

7.2 ***The*** *Grantee acknowledges that in relation to disposal of the unit:*

(a) The Foundation may itself at any time acquire the interest of the Grantee in the unit at the fair value of the unit as fixed by agreement or failing agreement by registered valuers one appointed by the Foundation and one by the Grantee or in the event of the failure of the valuers to agree then by a third valuer to be named by them before they make their valuations the cost or valuation being shared equally by the parties.

(c) [There was no (b)] The Foundation will take all reasonable steps to dispose of the unit on behalf of the Grantee.

(d) The Foundation and its agents and servants and prospective purchasers are entitled to access to the unit at all reasonable times.

(e) *The Foundation is entitled to charge and retain a fresh site fee from the new Grantee and to require the new Grantee to enter into a licence to occupy in such form as the Foundation sees fit*".

7.3 ***THE*** *Foundation shall pay to the Grantee or the personal representatives of the Grantee the proceeds of the disposal of the unit after deducting*

…

(c) A charge calculated at the rate of 2.5% per annum of the gross disposal proceeds for the unit for each year (or part thereof) of occupation of the site by the Grantee, up to a maximum charge of 12.5% of the gross proceeds of disposal. This amount is to be deducted and retained by the Foundation and applied for its own charitable purposes".

46. In clause 11 the expression "*the Site*" was defined to include, except where the context otherwise required:

46.1. "The residential units erected or to be erected upon the site.

46.2. The land below the surface of the site to the depth of the foundation of the unit".

47. The agreement for sale and purchase dated 13 February 2003 between the Perry Foundation and Jeanne Waters:

47.1 Recited that the Foundation was the owner of the land, that the Foundation had marked out on the land certain sites and that on the site a residential unit had been erected known as 21 Kingfisher Way.

47.2 Contained the agreement by Mrs Waters to purchase and the Foundation to sell the unit on that site for $112,500.00 inclusive of GST but exclusive of the site fee.

47.3 Contained the covenant by Mrs Waters to pay the Foundation the site fee of $12,500.00 and that the parties would enter into a site agreement in the normal form.

47.4 Contained other covenants not relevant to the current dispute.

48. I was not provided with a copy of any equivalent agreement for sale and purchase in the case of Mrs Murray but it seemed common ground that the same terms applied in that agreement with her.

Other documents

49. The applicants relied on two other documents:

49.1. A Prospectus dated 18 July 2000 and amended 31 July 2001.

49.2. An Investment Statement dated 1 August 2002.

50. Ms Phillippa Waters said that her mother relied on the Prospectus before she entered into the agreements referred to. She drew attention to the careful notes that her mother had made in the Prospectus with various highlighting. She said that her mother was careful person, having been a teacher, who read things carefully and questioned them in detail.

51. Ms Waters in her evidence referred to various extracts from the Prospectus and her interpretation of them. Those extracts include:

51.1. Paragraph 6.1(a) "*As the 11 residential units become available for sale they will be offered as part of the Scheme and the new residents will enter into a Site Agreement*."

51.2. Clause 9.3 which read: "*Risks relating to the Scheme.*

- *The price at which your unit will sell will be closely linked to the property market and dependent on fluctuations in the market from time to time. Accordingly the money paid by you for your unit may not be recoverable in full if the residential property market at the time of sale is below the level at the time of purchase*".

Ms Waters interpreted that as saying that her mother "*would receive all capital gains on the property and the only financial risk to her would be the normal risk involved in owning a residential property*".

51.3. Ms Waters also drew attention to the fact that the Prospectus did not make reference to any entitlement of the Perry Foundation "*to receive a price for the land on re-sale"*.

51.4. The Perry Foundation drew the attention to the extract from clause 6.3: "*The land will continue to be owned by the Foundation. The purchaser of a unit obtains a Licence to occupy a site, such*

Licence being the Site Agreement more particularly described on pages 4 to 6 and attached as Appendix B" (and Ms Phillippa Waters acknowledged that the provisions described in pages 4 to 6 "*replicate the provisions of the site agreement*").

52. The Investment Statement dated 1 August 2002 included:

> *"**2. What Sort Of An Investment Is This?***
> *The securities being offered are site agreements which allow the purchaser to occupy a site and the residential unit erected thereon, and use the services and facilities of Perrinpark retirement village at Te Kowhai, Frankton ("Perrinpark"). The resident becomes the beneficial owner of the unit.*
>
> *Under the site agreement, a prospective resident enters into a licence to occupy with the Perry Foundation under which the resident obtains a life interest to occupy a particular site and pays the current market price for the site and unit including a non refundable site fee. The prospective resident obtains the life interest by paying the price of such site and unit. The site agreement also gives the resident the right to use during the period of the site agreement, in common with the occupiers of other sites, any communal buildings on the land and Perrinpark and all amenities and facilities provided by Perrinpark for its residents and others".*

There is also:

> "***10. How Do I Cash In My Investment****?*
>
> *You may sell your unit at any time by giving notice to the Foundation. When the time comes for resale of your unit, this will involve the cancellation of the site licence and the Foundation issuing a licence to a new purchaser. The Foundation will assist by looking for a new unit owner and will advertise and promote the sale of the house similar to any other houses which are available at the time.*
>
> *…..*
>
> *The resident will not be entitled to any refund of the site fee paid. The amount repayable to the resident may be subject to certain deductions are set out in the site agreement.*

The Foundation will charge and retain a fresh site fee from the new resident and will require the new resident to enter into a new site agreement".

Applications for Disposal

53. There were completed in each case a document headed "Application for Disposal of a Perrinpark house". The evidence is that this was done in the case of the Waters estate by an application signed by Ms Phillippa Waters dated 13 August 2009 which was also signed on behalf of the Perry Foundation that day. In the case of Mrs Murray the Application for Disposal appears to have been signed by her or on her behalf but apparently not on behalf of the Perry Foundation. Nothing seems to hinge on the latter fact.

54. The respective Applications were in the same form and commence with the words: "*I/We wish to have the above named house placed on the market for resale under the terms of clause 7 of the site agreement*". There was provision for insertion of a date on which the resident's interest in the property was purchased which was completed in the case of Mrs Murray but not in the case of the Waters estate. In both cases there was reference to "*The agreed asking price for the residents interest in the above named property*" which, in the case of the Waters estate was $247,500.00 and in the case of Mrs Murray $172,500.00. There was also reference to "*Plus the site fee of $12,500.00*" showing a total, in the case of the Waters estate $260,000.00 and in the case of Mrs Murray $185,000.00.

55. There was reference in the applications to the deduction of commission from the resident's interest in the property "*(ie excluding the site fee)*" "*in line with the site agreement previously entered into between the parties and… this may vary depending on the sale price and dates*".

56. In each case there was a schedule headed "*Estimated Net Proceeds Calculation*" reading:

	Waters estate form	Murray form
Total sale price	*$260,000.00*	*$185,000.00*
Less site fee	*$12,500.00*	*$12,500.00*
Less Estimated Commission	*$30,937.50*	*$21,652.50*
Less Valuation fee (half)	*$0.00*	*$250.00*
Less Solicitor's fees	*$472.50*	*$472.50*
AMOUNT PAYABLE	***$216,090.00***	***$150,215.00***

The case for the village operator

57. The Perry Foundation claims that when the time for disposal of the units came about it was entitled to sell each unit and account for the proceeds of sale to the respective occupant. In the case of the late Mrs Waters this was consequent upon termination of the site agreement following her death; and in the case of Mrs Murray, at the time the appropriate notice had been given. Its entitlement to sell was as respective attorney for the two parties.

58. Emphasis was placed in respect of the respective Applications for Disposal on:

58.1. The reference to the "*agreed asking price for the resident's interest*", being exclusive of the site fee.

58.2. The reference in the Table of "Estimated Net Proceeds Calculation" to the deduction from the total sale price of the site fee, the estimated commission, the valuation fee and solicitor's fees. It was said that the expression "*Total sale price*" referred to the "agreed asking price" earlier in the form plus the site fee.

59. The Perry Foundation submits that the Applications for Disposal are not contractual or binding and that the Foundation was not bound to achieve the agreed asking price. There was no obligation, it was said, to consult with the outgoing residents regarding the sale but, despite this, the Foundation adopted the practice as a matter of courtesy.

60. As to the requirements of clause 51 of the Code of Practice 2008 which had been referred to by Ms Phillippa Waters in her affidavit for consultation and marketing, it was said by the Foundation that no dispute had been commenced by the respondents pursuant to section 53(1)(d) of the RV Act alleging any breach nor had any relief been sought in relation to such alleged breach. It was said that under section 54 of the RV Act, the Foundation did not have the ability to commence a dispute under section 53(1)(d).

61. The Foundation said that when the respective units were sold the improvements and chattels were sold, in the case of the unit of the late Mrs Waters for $153,000.00 and in the case of the Mrs Murray's unit for $91,000.00. These figures were taken from the respective agreements for sale and purchase. In the case of the Waters estate that agreement is dated 4 July 2011 and refers to the purchase price of $235,000.00 "being $82,000 for the freehold land and $153,000 for the improvements and chattels". In the case of Mrs Murray's unit the agreement is dated 1 June 2011 and has the same formulaic expression of the purchase price giving that figure, $91,000.00, for improvements and chattels. In both cases the agreement was in the name of the Perry Foundation as vendor and signed on its behalf. There was no evidence of any consultation between the Perry Foundation and either of the respondents as to the amount of the purchase price under the agreement or how this was divided between land and improvements and chattels.

62. The Foundation drew attention to the time that had elapsed between the completion of the Application for Disposal forms which, in the case of the Waters estate was nearly two years earlier and in the case of Mrs Murray's unit approximately eight months earlier. The Foundation relied on evidence from Mr McLauchlan that the agreed asking price specified by Ms Waters was unrealistic as demonstrated by the 23 months that has elapsed between the application and re-sale.

63. The disposal of the units was, the Foundation submitted, contemporaneous with the sale by the Foundation of its interest in the land, which by then had become an individual unit title in each case. It was said that the agreements for sale and purchase comprised "*two separate contractual arrangements, for reasons of convenience*" namely first the disposal of the respondents' units being improvements and chattels by the Foundation as attorney for the respective respondents and secondly the disposal by the Foundation as registered proprietor of its interest in the freehold land.

64. Despite the composite nature of the agreements for sale and purchase, it was submitted, the respondents were entitled to no more than the proceeds of sale of their respective resident's interest which comprised the improvements and chattels and not any interest in the freehold land.

65. Reliance was placed on the principles of contractual interpretation and various cases referred to in an earlier Disputes Panel decision[1].

66. The Foundation submitted that the expression "*the proceeds of the disposal of the unit*" in clause 7.3 of the site agreement is the actual price of the improvements and chattels as recorded in the agreement for sale and purchase. The land value, it was submitted, was not part of those proceeds because the respondents had never purchased any land under the site agreement or the agreement for sale and purchase but only

[1] *Upton v Oceania Village Company No 2 Limited*; 27/10/10; C. Elliott – Disputes Panel

acquired the right to occupy the unit and common areas during her lifetime. Reference was made to the various documents referred to above.

67. There was a clear distinction, it was said, between the "*unit*" and the "*site*" and that the Foundation did not dispose of its interest in the site at any time to either respondent. The division of the land component and the improvements and chattels component in the agreements for sale and purchase agreed, in the case of the Waters unit with a market valuation provided by Telfer Young in December 2010 and with the rating value of the property.

68. The Waters unit having been purchased by the late Mrs Waters for $112,500.00 in February 2030 and sold for $153,000.00 in July 2011 reflects, it was said, the "*capital gain*" resulting from expenditure of monies on renovations and any increase in the value of the unit as such over the eight year period in question.

69. The Perry Foundation submitted that there was no evidence that by converting the freehold into unit titles had any effect on the value of the unit. Ms Phillippa Waters had always been, it was said, unrealistic is the value of her late mother's unit evidenced by the original "*agreed asking price*".

70. The sales that took place were "*of a fundamentally different nature*" to the sale envisaged by the Applications for Disposal in that they included the land in addition to the unit. Reference was made to specific deductions which are dealt with below.

71. So far as the calculation of monies due to Mrs Murray is concerned the submissions addressed the deductions and noted that the unit decreased in value from what Mrs Murray had paid for it by about $6,500.00 and there was no evidence of as to any renovations carried out.

The case for the respondents

72. The replies to the dispute notices which the respondents had filed originally were lengthy and far reaching. Even the amended replies provided on the first day of hearing, 9 September 2013, comprised some 17 pages each. Likewise the submissions for on behalf of the respondents, which were also amended before the hearing, comprised some 61 pages. Those submissions were wide ranging. Objection was taken, as has been noted above, to the relevance of a lot of what is in those submissions; and to the fact that much of the content was unproven statement of fact.

73. The disputes panel has had to discern from those documents and the oral submissions make at the hearing the points that the respondents are making specifically in reply to the dispute notices. The jurisdiction of the disputes panel is only to deal with the issues as raised by the dispute notices and the replies thereto. Neither of the respondents have taken any steps to provide their own dispute notices in respect of some issues of concern to them.

74. The respondents relied on section 67 of the RV Act which provides:

> *"The disputes panel may admit any relevant evidence at the hearing from any person, whether or not the evidence would be admissible in a court and whether or not the person is present at the hearing"*.

75. It was said that that allowed the disputes panel to take account of factual matters in the submissions despite these not being more formally proved.

76. What the respondents rely on primarily is a stated allegation that in the past when a unit the subject of a site agreement was sold, the outgoing resident received the sale proceeds after deduction of an appropriate site fee, the appropriate percentage exit fee and other relevant charges. The respondents claim that historically that has created the obligation on the

part of the Perry Foundation to pay them a greater sum than is proposed to be paid namely, they claim entitlement to a sum calculated on the basis of the sale price after deduction of a relevant site fee, the exit fee and relevant charges.

77. They rely on clause 7.2(e) of the site agreement which referred, as noted above, to the entitlement on the part of the Perry Foundation to charge and retain a fresh site fee from the new Grantee of a site agreement and to require the new Grantee to enter into a licence to occupy.

78. In the case of the late Mrs Waters, her daughter, Phillippa Waters, said that her mother was punctilious about legal matters and had been through the Prospectus referred to above in detail, making notes in her handwriting, which Phillippa Waters identified, about the content. The respondents rely on the content of the Prospectus.

79. In particular they rely on an extract headed "*Nature of Tenure*" which included that on termination of a site agreement the Perry Foundation alone was entitled to dispose of the unit and included that "*The site agreement provides for :… (c) the Foundation will charge and retain a fresh site fee from the new grantee and will require the new grantee to enter into a licence to occupy in such form as the Foundation sees fit*".

80. That provision, it was said, made it obligatory on the Perry Foundation to proceed in that way on termination of the site agreements for the late Mrs Waters and Mrs Murray by entering into a new licence to occupy agreement and charging a site fee. This process, it was said, meant that both the Waters estate and Mrs Murray were respectively entitled to receive the net proceeds of that sale process after deduction of the relevant site fee and other fees and expenses.

81. The respondents also relied on the extracts from the Investment Statement dated 1 August 2002 referred to above. They said that the document created an obligation on the part of the Perry Foundation on cancellation of

the site agreement in each case to issue a licence to a new purchaser. They said that the provision for exclusion of entitlement to refund of the site fee paid meant that the resident in each case was entitled to the proceeds of sale, that is the amount paid by the incoming resident after deduction of the site fee.

82. The respondents argue that what has occurred in the respective sales of the two units is that the purchase price has been divided by the Perry Foundation as vendor as a sum for the land and a sum for the improvements and chattels. They say that the value of the land in each case was fixed by reference to the valuations which had been provided by Telfer Young for unit title purposes. In the case of the late Mrs Waters' unit this was the sum of $82,000.00 and in the case of Mrs Murray's unit the sum of $79,000.00.

83. Those respective sums, it is argued, represent now the equivalent of the site fee paid by the incoming respective purchasers. Accordingly, the respondents argue, those sums, together with the amounts for improvements and chattels, should be the amounts now paid by the Perry Foundation to them after deduction of their existing site fees, $12,500.00 in each case, and other appropriate deductions. They argue that, had the Perry Foundation followed the correct course as it was contractually obliged to do under the various documents referred to, the respective units would have been disposed of to incoming residents who were required to pay the appropriate site fee and the value of improvements and chattels which is the equivalent of the price that has been paid.

Evidence for the respondents

84. Apart from reliance on certain documents provided in a Bundle and allegations of fact in the written submissions on behalf of the respondents,

evidence was given by Ms Phillippa Waters. There was no direct evidence on behalf of Mrs Murray.

85. Ms Waters gave evidence about the background to her mother's having entered into the site agreement with the Perry Foundation and said that before doing so her mother was given a copy of the Prospectus. As noted above, Ms Waters referred to her mother's careful consideration of the terms of the Prospectus. Ms Waters described her mother as "*an astute person who was familiar with retirement village ownership*".

86. Ms Waters said that her mother purchased the unit "*on the basis that when she wanted to sell it would be resold in the same way as when she had bought it*". She gave no particular basis for her knowledge of that fact.

87. Ms Waters said that the assurances were given by the Perry Foundation in the site agreement and the Prospectus that the village would remain under a site agreement/licence to occupy model and when her mother's unit was re-sold the sale proceeds would be dealt with in the same way as when she had bought the unit. Ms Waters gave no evidential basis for those alleged assurances other than references to various extracts from the documents. Her statements were largely of the nature of submissions.

88. Those references included clauses 7.2 and 7.3 from the site agreement as mentioned above and extracts from the Prospectus referring to the site agreement structure, the intention of the Perry Foundation to continue operating Perrinpark in the manner in which it has been operated previously with residential units disposed of in the manner described in the Prospectus and reference to the price at which the unit would be sold being "*closely linked to the property market independent on fluctuations in the market from time to time.*"

89. Ms Waters gave evidence of major improvements that she said had been carried out by her mother at the unit with stated costs totalling

approximately $48,050.00. No evidence to support those figures was given; but Ms Waters said that "[*a]ll this work was carried out on the basis that [her] mother was going to sell the property on the same terms as she acquired the property thereby getting any capital gain*". Again Ms Waters did not give any evidentiary basis on which she knew that that was the case. She said that at the time of buying the unit her mother was told that it was she, her mother, "*who set the selling price and would be in full control of the process throughout the selling process*".

90. After the late Mrs Waters died on 13 December 2008 Ms Phillippa Waters said that on June 16 June 2009 she was contacted by Mr White of the Perry Foundation advising that the Foundation was able to assist in the sale of the house. She said that he forwarded a spreadsheet detailing various sale values and indicating likely proceeds. She said there was nothing on the spreadsheet that "*suggests that the Foundation was going to deduct the land value or could be entitled to do so*". She produced an e-mail from Mr White setting out the steps for sale including that she, Ms Waters, set a value for the property, completed an application to sell which, once agreed, would be executed and then the process would continue for marketing and sales. The last step included the entry into formal contracts with the Perry Foundation and Ms Waters.

91. Ms Waters then referred to the completion of the Application for Disposal form referred to above and said that "*there is nothing on this form that refers to a land value [and nothing referring] to the Estate having to pay anything towards any direct costs of the sale apart from solicitor's fees …"*. She said she believed that the form was binding. Her basis for this was that it had been prepared by the Perry Foundation, it was its standard form, and it was signed by both parties. She further said that she believed that the only thing that would vary the amount payable to the estate was if she accepted a lower total price when the 12.5% exit fee would be lower calculated on the lower sale price. She said the form was accompanied by a spreadsheet but did not produce this.

92. Ms Waters said in her affidavit that she was

> *"satisfied that the Perry Foundation complied with [the requirement in the Code of Practice for consultation] and that the actual charges the estate would be liable to pay were rightfully stated in the original Application for Disposal form which was signed.… I therefore believe the terms of the original Application for Disposal form are enforceable by me as a contract against the Perry Foundation. I wish to enforce the contract."*

93. Ms Waters expressed the belief that ".. *due to the new Licence to Occupy that the Perry Foundation had introduced to the Park had a dramatic effect on the park reducing the viability of sales [sic]…*"

94. Ms Waters then described exchanges there were concerning unit title subdivision of Perrinpark. This included letters from the Perry Foundation's then lawyers which Ms Waters said she interpreted to mean that the unit titling and restructuring of Perrinpark was a "*fait accompli*" and that the Perry Foundation would continue to honour existing site agreements. She said she did not think that the unit titling would affect the sale of her mother's property.

95. In late December 2010, Ms Waters said, a letter was received from the Foundation outlining an offer to existing residents to freehold their properties by buying a unit title from the Foundation.

96. The letter from the Foundation was produced and referred to a recent valuation of the unit showing the section value at $82,000.00, improvement value including chattels at $158,000.00, and a total Current Market Value of $240,000.00. The offer was either to pay cash and receive a 50% discount on the total Current Market Value of the section or pay nothing and enter into an interest free first mortgage with the Foundation or a trust repayable on leaving the village and receiving a 25% discount on the CMV of the section.

97. The letter noted that all residents had the option to remain on existing site agreements and that the Foundation would continue to honour its obligations under those agreements.

98. Calculations of the amounts of "*potential financial advantages*" of the two offers were given which showed, in the case of the existing site fee scenario an estimated net receipt of $137,250.00; the freeholding unit title 50% discount basis $177,400.00; and the freehold unit title 25% discount basis $156,900.00.

99. The letter also pointed out that by taking up one of the offers a resident had the opportunity to avoid current exit fees, had the potential to receive a capital gain and would have greater control of the sales process.

100. Ms Waters had her criticisms of the letter and its motivations but said she did not take up that offer.

101. A letter dated 21 March 2011 from the Foundation was also produced which referred to emphasis from the Foundation that it would "*honour existing resident's current agreements*."

102. By a letter dated 20 May 2011 the Foundation advised the residents at Perrinpark that it had insured the house with NZI as a result of the unit titling subdivision of the village and asking that the resident cancel their own house insurance to avoid double cover. Ms Waters said that that appeared to her that the Foundation was not honouring current site agreements which included that the resident was to keep the unit insured for its for insurable value. She disregarded the letter and continued to keep the house insured.

103. Ms Waters said that around 10 July 2011 she received a letter from the lawyers for the Perry Foundation advising that there was a conditional

contract for sale of her mother's unit and enclosing a fresh Application for Disposal form which it was asked that she complete. The letter included the offer to update the valuation that had been supplied in December 2010 if the Ms Waters wished.

104. By way of comparison there is set out now the two schedules as had been contained in the original Application for Disposal and the fresh form sent to Ms Waters.

Original form		Replacement form	
The agreed asking price for the residents interest in the above named property is:	$257,500.00	The agreed asking price for the residents interest in the above named property is:	$153,000.00
Plus the site fee of:	$12,500.00	Plus the freehold section value of:	$82,000.00
Making a total of:	$260,000.00	Making a total of:	$235,000.00
Estimated net proceeds calculation:		**Estimated net proceeds calculation:**	
Total sale price	$260,000.00	Total sale price	$235,000.00
Less site fee	$12,500.00	Less freehold section value:	$82,000.00
Less Estimated Commission	$30,937.50	Less Estimated Commission	$19,125.00
Less Valuation fee (half)	$0.00	Less Valuation fee (half)	$250
Less Solicitor's fees	$472.50	Less Solicitor's fees	$472.50
AMOUNT PAYABLE:	**$216,090.00**	**AMOUNT PAYABLE:**	**$133,152.50**

105. Ms Waters did not sign a new application form enclosed with this letter as she "*thought it was grossly unfair*". She said that the letter gave her "*some*

grave concerns regarding whether the Perry Foundation were actually going to honour current agreements".

106. Ms Waters described the unfairness in her evidence. First the total sale price had been reduced from $260,000.00 to $235,000.00. Secondly, there was now a reference to a "*freehold section value*" of $82,000.00. Thirdly, she said, there had been a devaluation of her mother's interest in the property by $94,500.00 to $153,000.00 in that the asking price had been reduced from $247,500.00 to $153,000.00.

107. Ms Waters said it was "*not right*" for her to be required to sign an application asking the Perry Foundation to dispose of her mother's unit when the Foundation's lawyers were saying that the Foundation had already entered into a contract for sale.

108. Under cover of a letter dated 11 July 2011 the lawyers for the Perry Foundation sent to Ms Waters a Site Agreement Surrender Form asking her to sign it; but she did not do so as she "*felt that clarification was required on the amount the Estate was to receive from the process*".

109. Following an inquiry from Ms Waters' lawyers as to the basis for the Perry Foundations having entered into the contract for sale, the lawyers for the Perry Foundation by letter dated 20 July 2011 said that if the Application for Disposal was not returned promptly the Foundation may elect to cancel the agreement for sale of the property by virtue of non-satisfaction of a condition said to be in the purchase agreement to the effect that the transaction was subject to settlement of the terms of the site agreement on conditions acceptable to the Foundation and Ms Waters. Mr Waters said that she would not "*blindly*" sign an Application for Disposal form without a copy of the agreement for sale and purchase because she did not know what the sale price was and she had "*serious concerns*" with the contents of the new form as mentioned above.

110. On 28 July 2011 the lawyers for Ms Waters wrote to the lawyers for the Perry Foundation stating that Ms Waters would not consent to the sale unless a prior written agreement between the parties was in place showing the final sale price and the exact amount Ms Waters was to receive: and advising that Ms Waters had changed the locks on the house.

111. After further correspondence between the respective lawyers there was finally sent to Ms Waters by the Perry Foundation a copy of the agreement for sale and purchase dated 4 July 2011 that had been entered into. The details of that are set out above[2]. An email dated 2 August 2011 from Mr McLauchlan asked that all personal possessions be removed before 23 August 2011 and that the garden shed and letterbox be returned along with all keys for the locks that have been changed. In a further email dated 3 August 2011 Mr McLauchlan said that the chattels had been included in the agreement for sale and purchase and the valuation on which the sale prices had been based.

112. Ms Waters in her evidence drew attention to the fact that the valuation she had been provided with gave a total value of $240,000.00, made up of land value $82,000.00, improvements value of $152,000.00 and chattels value of $6,000.00. The total sale price under the agreement for sale and purchase was $235,000.00, which was $5,000.00 less than the valuation and that $5,000.00 reduction had been made to the value of improvements and chattels and not the land.

113. Ms Waters expressed the view that the agreement for sale and purchase should have referred to her late mother's interest in the unit and the sale of it by the Perry Foundation under the power of attorney. She said she did not believe that the Foundation had the right to force the sale against her wishes or without first consulting her or to refuse to disclose the sale price unless she first signed a fresh Application for Disposal form. She said she did not but believe the Foundation he had the right to refuse to honour the

[2] Paragraph 39

existing Application for Disposal form or to include chattels in the sale without first consultation and consent.

114. There was an alternative requirement, Ms Waters said, that before the Foundation could make an unconditional sale of this nature it would have to have purchased her late mother's interest. This was referred to in a condition that was in the agreement for sale and purchase by the Foundation. Ms Waters referred to there having been no documentation signed or provided referring to that acquisition of interest. The Foundation's position is that it waived the condition which was to its benefit; but Ms Walters believes that the inclusion of that clause is proof that the Foundation believed the sale could only proceed if she agreed on the sale price and the amount to be received by the estate.

115. There then followed lengthy correspondence between the respective lawyers for the parties which Ms Waters has produced and which the disputes panel has taken into account to the extent this is relevant. Much of this correspondence repeats issues and arguments that had been raised earlier or have been raised in the context of these dispute notices.

116. Ms Waters then referred to specific deductions from the sale price as are mentioned below.

117. Ms Waters referred to extracts from the Code of Residents Rights and the Retirement Villages Code of Practice 2008. She expressed her view that there had been breaches of certain rights. She produced in that context a bundle of statements from individuals and lawyers concerning those alleged breach of rights.

118. The disputes panel has completely disregarded those statements (but not the Codes referred to). Insofar as they may have been statements by the authors of those documents about their interpretation or grievance concerning issues to which the dispute notices in these cases referred,

they are nothing more than a duplication and add no weight to the specific issues affecting the specific respondents.

119. Insofar as they may refer to other alleged breaches of rights, the proper course for any resident who has a dispute is to follow the disputes process prescribed by the RV Act including the giving of a dispute notice. There was no evidence that that had been done. The disputes panel can only deal with the disputes arising from the disputes notices in the individual cases.

120. Insofar as the Code of Practice 2008 is concerned there are allegations by Ms Waters of breaches of that Code. To the extent that these may be said to be issues that Ms Waters could have raised herself by way of dispute notice or other such procedure, the disputes panel disregards these for the same reason as mentioned above, namely that there has been no evidence of a dispute notice having been given concerning those allegations. The disputes panel does take into account, however, the relevant provisions of the Code of Practice 2008 insofar as they affect the disputes raised to which this decision refers as set out herein.

121. So far as they are allegations specific to the disputes in these cases, the disputes panel has read them as submissions and taken them into account as set out below.

Contract interpretation principles

122. Counsel for the Perry Foundation referred to, and relied on, the principles and authorities articulated in *Doris Upton v Oceania Village Company (No 2) Limited*[3].

123. That decision concerned the amounts to which Mrs Upton was entitled on termination of her licence to occupy a retirement village unit. On questions

[3] 27/10/10; Disputes Panel: C. Elliott

of interpretation the disputes panel referred to the well known cases of *Pyne Gould Guinness v Montgomery Watson (NZ) Limited*[4] and *Vector Gas Limited v Bay of Plenty Energy Limited*[5].

124. *Pyne Gould* has these extracts[6]:

> *"[17] … There was no dispute in this Court that the correct approach for the present case is in terms of Boat Park Limited*[7] *… with its quotation and adoption of the five proposition approach of the majority of the House per Lord Hoffman in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98, 114-115:*
>
> > *"My Lords,...I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in Prenn v Simmonds [1971] 3 All ER 237 at 240-242, [1971] 1 WLR 1381 at 1384 – 1386 and Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co [1976] 3 All ER 570, [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows.*
> >
> > *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
> >
> > *(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

[4] [2001] NZAR 789
[5] [2010] NZSC 5
[6] Per McGechan J
[7] [1999] 2 NZLR 74

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 3 All ER 352, [1997] 2 WLR 945).

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios at 233, [1985] AC 191 at 201:

'. . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'

[29] The best start to understanding a document is to read the words used, and to ascertain their natural and ordinary meaning in the context of the document as a whole. One then looks to the background – to "surrounding circumstances" – to cross-check whether some other or modified meaning was intended. Apart from matters of previous negotiation, and matters of purely subjective intention as to meaning, both excluded on policy grounds, one looks at everything logically relevant. At some extremes, background can be compelling. If background shows natural and ordinary meaning flouts common-sense, natural and ordinary meaning very probably must give way. So

much at least is evident from Boat Park supra, particularly proposition (5). We merely add the obvious point that (as in most areas involving human conduct) background factors all too often point in conflicting directions, and even after a balancing exercise may afford only uncertain if any guidance".

125. *Vector Gas* included[8]:

"[19] The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

[20] Although subjective evidence would be relevant if a subjective approach were taken to interpretation issues, the common law has consistently eschewed that approach. The common law focuses strongly on the agreement in its final form as representing the ultimate consensus of the parties. Hence it is regarded as irrelevant how the parties reached that consensus. To inquire into that process would not be consistent with an objective inquiry into the meaning of a document which is generally designed to be the sole record of the final agreement. A party cannot be heard to say – never mind what I signed, this is what I really meant.

….

[24] … Anyone reading a contractual document will naturally form at least a provisional view of what its words mean, simply by reading them. That view is, in a sense, then checked against the contractual context. This description of the process is valid, provided the initial view is provisional only and the reader is prepared to accept that the provisional meaning may be altered once context has been brought to account. The concept of cross-check is helpful in affirming the point made earlier that a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that

[8] Per Tipping J

outcome will usually be difficult of achievement. Those attempting the exercise unsuccessfully may well have to pay for the additional costs caused by their attempt".

126. In *Upton* the disputes panel summarised the principles[9]:

> *"In terms of statutory interpretation therefore the Supreme Court and the Court of Appeal have stated in summary that there must be something quite out of the ordinary for the court to interpret the contract in a way which does not accord with the plain meaning of the words in it. This may include for instance where the parties have agreed to attribute a special meaning to a particular word or words within the contract, in which case evidence can be brought to that effect."*

Entitlement – discussion

127. It is clear to the disputes panel that at the time the late Mrs Waters and Mrs Murray entered into agreements to enter the Perrinpark Retirement Village they did so on the basis of site agreements. There was express evidence of the entry also by the late Mrs Waters into the agreement for sale and purchase which provided for purchase of the residential unit on the site at 21 Kingfisher Way; and reference to a similar agreement for Mrs Murray.

128. Those agreements clearly referred to the only interest being acquired by the late Mrs Waters as being the right to occupy the site and ownership of the unit constructed thereon.

129. There was no express direct evidence concerning Mrs Murray's unit, but the disputes panel has assessed that there was a similar arrangements so far as she was concerned; and certainly there was no evidence on her behalf to the contrary.

130. The substantive grant in the site agreement was a grant of the "*site*" which was expressly defined in that agreement to refer to the residential unit erected and the land below the surface of the unit to the depth of the foundation of the unit.

[9] Paragraph 85

131. Correctly interpreted the site agreements as a whole referred to ownership of the residential unit and foundations but occupancy of the site, ownership of which remained with the Foundation which did not pass to the respective Grantees.

132. The agreement for sale and purchase in respect of the late Mrs Waters expressly referred to the sale and purchase of the residential unit on the site and the disputes panel interprets that agreement as expressly referring to the structure rather than any interest in the land itself.

133. The disputes panel finds that the Prospectus as such was not part of the contractual arrangement between the parties. Applying the principles of contractual interpretation referred to above, the primary documents were the site agreement and (at least in the case of the late Mrs Waters) the agreement for sale and purchase.

134. In any event, however, the disputes panel does not find that provisions in the Prospectus in any way altered the basic nature of the primary documents signed by the parties as has been argued. The Prospectus refers expressly to the nature of tenure being a life interest to occupy the site and pay a site fee.

135. The provisions in the Prospectus referring to the terms of the site agreement are consistent with the actual agreement entered into. Specifically in relation to termination of a site agreement, there is clear reference to the Foundation charging and retaining a fresh site fee from a new grantee and the requirement to enter into a licence to occupy. That is not in any way inconsistent with the provisions of the site agreement for the late Mrs Waters. In the description of the scheme and development there is express reference[10] to the principal assets being the land and the units

[10] Clause 6.3

and the express statement that "*the land will continue to be owned by the Foundation*".

136. Ms Waters relied on clause 9.3 of the Prospectus and its reference, in the context of "*Risks Relating to the Scheme*" to market fluctuations. She said that that could be interpreted as providing for "*capital gains*" to go to the resident, her late mother. The disputes panel does not accept that. First, this passage was in relation to risks; but secondly, and more importantly, the reference is only to market fluctuations in the sale of the "***unit***" and not the underlying freehold land. At that stage there was never any intention by the Perry Foundation to dispose of the freehold land.

137. The disputes panel finds no inconsistencies between the Prospectus and the site agreement in each case nor that there are any added rights which the Prospectus gave to the respective respondents over and above their rights under the site agreements.

138. So far as the Investment Statement dated 1 August 2002 is concerned that date is subsequent to the date of the site agreement for Mrs Murray and so could not be relied on by her.

139. It predates the date of the site agreement for the late Mrs Waters, 13 February 2003, and was argued to be relevant to her position. The disputes panel has noted that that Investment Statement was not produced as part of the voluminous preparation on behalf of the respondents in this matter but was produced to at the hearing by Ms Waters. That fact must be taken into account in assessing the stated reliance by the late Mrs Waters on that statement which Ms Phillippa Waters said she had. Clearly if there had been reliance, one would expect that this document would have been produced at an earlier stage.

140. In any event the disputes panel does not find that this document formed part of the contractual arrangements between the late Mrs Waters and the

Foundation. Those contracts are clear in themselves and do need to not call on the Investment Statement for any purposes of interpretation.

141. In any event, however, the disputes panel again finds that there is nothing inconsistent about what is said in the Investment Statement to the rights that the late Mrs Waters had. The Investment Statement refers to the resident being the beneficial owner of the unit with a life interest to occupy a particular site. There is reference to paying a "*current market price for the site and unit including a non refundable site fee*" but that must be considered in the context that the site agreement itself defines "*the site*" as mentioned above as being the unit and the land below the surface to the depth of the foundation.

142. The provisions concerning termination[11] are also consistent with the site agreement. There is reference to cancellation of the site agreement and the issue of a new licence to a new purchaser and the payment to which the resident would be entitled. Specifically it is said that the resident would not be entitled to any refund of the site fee paid and there is reference to certain deductions.

143. There is reference to the requirement for the Foundation to charge and retain a fresh site fee from the new resident and require the new resident to enter into a new site agreement. While it may be argued that that is an obligation and that that obligation were said to apply in the case of the contract with the late Mrs Waters (which the disputes panel has found there was not), that would not affect the entitlement that the estate of the late Mrs Waters has under the site agreement on termination of it.

144. The predominating document would have to be the site agreement and that agreement only refers to an **entitlement** to charge the fresh site fee and require the new licence to occupy. Even if the Investment Statement prevailed in the case of the Waters estate unit, any obligation on the

[11] Clause 10

Foundation to charge a site fee and enter into a new site agreement would have to be read in the context of the obligations that the Foundation had to the Waters estate.

145. The process of disposal of the unit in each case is clear from the site agreement. Under clause 7.1 it is the Foundation alone which is entitled to dispose of the unit and can do so as attorney for the resident.

146. The primary thrust of clause 7.2 is an acknowledgement by the resident of various things, namely the right of the Foundation to acquire the interests of the resident in the unit under a valuation process; the requirement for the Foundation to take all reasonable steps to dispose of the unit; the entitlement of the Foundation to access at reasonable times; and the entitlement to charge a fresh site fee and enter into a new licence agreement.

147. The disputes panel does not interpret any of that as meaning that the Foundation has any obligation to do any of those things (apart perhaps from taking reasonable steps to dispose of the unit) and those provisions do not add to what the resident can be entitled to expect from the proceeds of disposal of the unit under clause 7.3.

148. That clause obliges payment after the deductions mentioned namely, expense incurred in sale; direct expenses including valuation and legal fees; the deduction for charitable purposes calculated at 2.5% per annum up to 12.5%; and any sum due or owing by the resident to the Foundation.

149. What the respondents appear to have not been able to accept is that the Perry Foundation retained the ownership of the underlying land.

150. All of the documents, including in particular the contractual documents signed by the parties, make this very clear. Any disposal of the unit of

either respondent will therefore only involve the sale of the unit and receipt of the price or value of that unit. This could have been done if the Foundation had elected to exercise its right under clause 7.2 to acquire the interest of the resident in the unit as fixed by a valuer under clause 7.2(a) or by a sale of the unit by the Perry Foundation as attorney for of the resident under clause 7.1.

151. Either way, the Perry Foundation retained ownership of the land and was entitled to any increase in its value. The respondents are seeking an interpretation such that the Foundation was **obliged** to charge a fresh site; that the site fee had to have some relativity to, if not be the same as, the site fee that they had paid; and that any receipts over and above the new site fee would be the respondent's entitlement.

152. That argument completely ignores several facts. Firstly, the site fee arrangement was not continued when a change was required by the provisions of the RV Act to become a licence to occupy arrangement. Secondly, the primary documents referred only to an entitlement to follow the course and not an obligation. Thirdly, even if there were a new site fee arrangement, the amount of this would be as fixed by the Foundation and indeed had changed from time to time in the past. Fourthly, the price that any incoming resident on a site agreement (even if there were one) would only be the market value for occupancy of the subject unit pursuant to the rights and obligations under the site agreement and there is no evidence at all as to what the market may have been.

153. The fact that the unit was sold under the unit title arrangement for a particular price does not mean at all that that is the value that would have been paid by an incoming resident under a site agreement had that still been available.

154. The disputes panel completely disregards such evidence as may have been tendered about the process by which the Perry Foundation converted

the freehold into unit title sites. Primarily, if there were any objection to the fairness of the process that could have been the subject of dispute notices by one or other or both of the respondents (or any other resident feeling aggrieved by that). The extensive allegations made by Ms Waters in her evidence were responded to by Mr McLauchlan in referring to the advice that the Perry Foundation had had from lawyers and to the approval that there had been from the statutory supervisor, Covenant Trustee Services Limited, which also took advice from its lawyers.

155. What the disputes panel must focus on is whether any part of that process impacted on the value of the residential units or the expected return to the respondents or either of them.

156. There appeared to be voluminous complaints about communication and about things that were being said by the Perry Foundation or its agents to residents which may be alleged to be untrue. Those are all disregarded for the reasons mentioned. They are not relevant to the question of whether the process impacted on value. There is no evidence from any registered valuer or otherwise that the conversion of the land into unit titles in any way impacted on the value of the individual residential units.

157. The residential units in each case had been constructed and had been sold to the respective respondent at an agreed price. The unit was included in a disposal (to which reference will be made) by the Perry Foundation. The respondents argued that there would have been a better return on the residential units had there been some other process followed; but there is simply no evidence whatsoever that that is so. Otherwise there is wild speculation to that effect.

158. The disputes panel finds that the process of conversion of the Perrinpark Retirement Village into unit titles has not been shown in any way by the evidence presented by any party to impact on the value of the individual

residential units on site. The only evidence was from Ms Waters who alleged this and from Mr McLauchlan who categorically rejected it.

159. Indeed, it may be said (although again there was no evidence of this) that the conversion into unit titles may have enhanced the value of the individual residential units. The disputes panel perceives that the marketability of the units under the licence to occupy a model that had applied before may have been dropping. There was a suggestion that the sales were not happening as quickly or for as good a price and the market on that basis had slowed down. There was also evidence that there were sales that occurred once the unit titling had been completed. If that were so, it may be that that has added to the value of the individual residential units but there was no evidence on this and any occlusion would only be conjectural.

160. The disputes panel does not find that the process followed for disposal of the respective units of the respondents in any way affected the return to either of them.

161. Again, the disputes panel cannot address the question of fairness of communication or process in the absence of any dispute notice on behalf of the estate and must only look at the disputes as contained in the dispute notices and replies thereto. That affects the amount due to the late Mrs Waters and to Mrs Murray in the sale of their respective residential units.

162. The Application for Disposal forms originally signed by Ms Phillippa Waters on behalf of the Waters estate and Mrs Murray expressly referred to the request to have to the home placed on the market in terms of clause 7 of the site agreement. There was express reference to "*The agreed asking price*" and this was for "*the resident's interest*" in the property. Both Ms Waters and Mrs Murray may have misunderstood what was being referred to or may have had their own preconceptions as to what was being sold on their behalf but that does not alter the legal entitlement that each had under

their respective site agreements to have the net proceeds of sale of the residential unit.

163. The disputes panel disregards any suggestion that either of them were misled about what that expression meant or that it induced them to apply for disposal at an unrealistically high price. There is simply no evidence of this at all.

164. The form is clear in itself and that refers to the asking price for the resident's interest only. The form does go on to give an estimated net proceeds calculation which includes deductions from the sale price as estimated to give a net figure but that does not alter the basic interpretation of that form that the asking price was the asking price for the sale of the residential unit from which there would be deducted the site fee and other deductions.

165. The expectations that Ms Waters and Mrs Murray may have had from the figures that were inserted in those Applications for Disposal forms may have been unrealistic and may have been the result of misunderstandings on their behalf or on what was being discussed with the representative for the Perry Foundation. Any misunderstandings there were do not, however, alter the fact that their entitlement was to the sale proceeds of the units and not the underlying land value.

166. Likewise, in the case of Ms Phillippa Waters' application the matter was not altered by, but was certainly not clarified by, the alternative form of Application for Disposal sent by the lawyers for the Perry Foundation to Ms Waters on 8 July 2011. That form, as noted above, included then the reference to the "*freehold section value*". That value, $82,000.00, was shown as being deducted from the total sale price such that, after certain other deductions were shown, there was a lesser amount payable to the estate then had been provided in the earlier form.

167. That form certainly was a confusion for Ms Waters because the covering letter dated 8 July 2011 referred to there being already a conditional contract for sale of the unit. The Perry Foundation's position has been that it was selling only the residential unit on behalf of, and as attorney for, the Waters estate and there was no reason to show the sale of the underlying freehold interest. Ms Waters can be forgiven for having been confused that this was required at all and certainly in a different format from earlier.

168. It is the view of the disputes panel, however, that the next form did not alter the primary obligations that there had been which, in the case of the Perry Foundation, was to disposal of the residential unit for its value and to account to the Waters estate (and Mrs Murray in her case) for the proceeds of sale of that unit after the agreed deductions.

169. The disputes panel does not regard the process that was undertaken about December 2010 for offers to existing residents to convert their residences into unit titles affects the position of the respective respondents at all. First there were two offers made at that time, neither of which either respondent took. Had they done so, the return to them could have been different and indeed may have been better; but that is speculative because it did not occur in that the both Ms Phillippa Waters and Mrs Murray chose not to take up either of those offers.

170. The offers do make clear, in the view of the disputes panel, that the Perry Foundation was quite clearly distinguishing the ownership of freehold interests from the ownership of the residential units. Any resident had the option to remain within an existing site agreement but the three scenarios presented in the letter, the first of which was the existing site fee scenario but the other two were alternative scenarios on the basis of an interest in the underlying freehold land value, made it quite clear that there could be a substantial return to the resident by participating in one or other option but also made clear that remaining with the site agreement option would not involve any return on the freehold interest in the land.

171. That was clear from the letter and the respondents chose not to pursue that course.

172. The disputes panel does not consider that the process followed by the Perry Foundation in disposing of either of the residential units of the respondents was improper. Certainly the Perry Foundation had two interests, namely, its interest as vendor and owner of the land or interest therein, and its interest as attorney for the resident in disposal of the residential unit and chattels. The agreements for sale and purchase did not make that clear.

173. That does not, however, in the view of the disputes panel, affect the outcome which was that both interests were sold by the Perry Foundation under the same agreement.

174. Likewise, there is no evidence that the respective sale prices were not at fair value. There had been two valuations made in December 2010 of the respective values of the units. Apparently this was for unit titling purposes and there were likely to have been other valuations of other residential units. When Ms Waters was advised by the lawyers for the Perry Foundation on 8 July 2011 that there was a conditional contract for sale in respect of her late mother's unit she was offered an updated valuation to that which had been conducted in December 2010; but apparently that was not taken up. Ms Waters in her evidence complained that they had not been compliance with Clause 51.8 of the Code of Practice 2008 which requires a valuation if a new occupation right agreement has not been entered into within six months, which she said was the case here. Given that the offer for an updated valuation was made and waived, she can hardly complain now of any such non-compliance.

175. The Perry Foundation, in its dual capacity as vendor, then went ahead with sales and made the decision on sale proceeds. This is all clearly recorded in the respective agreements for sale and purchase.

176. What is not satisfactory, however, is how the total purchase price was divided between the freehold interest in the land of the one hand and the residential unit and chattels on the other. The disputes panel assesses that there was a price agreed between vendor and purchaser which was divided for the purposes of the agreement between freehold land on the one hand and improvements and chattels on the other by taking the value of the freehold land as had been shown in the December 2010 valuation and deducting this from the agreed purchase price so as to give a figure for improvements and chattels. This was confirmed by Mr McLauchlan who said that it was the Perry Foundation as vendor that completed the division of the sale price into land and improvements and chattels respectively and that this was done based on the valuation that had been obtained.

177. Evidence was given of the then current notices of rating valuation from Waikato District Council which showed in respect of the late Mrs Waters unit a land value of $80,000.000 (compared with $82,000.000 in the Telfer Young valuation) and in respect of Mrs Murray's unit $75,000.00 (which contrasted with $79,000.00 in the Telfer Young valuation). There was no evidence as to whether those figures were available at the time but the disparity affirms the view of the disputes panel that the process of deduction of land value from agreed price to give an improvements and chattels value was the one that was followed.

178. The unsatisfactory outcome of that process, as is discerned by the disputes panel, is that the persons who suffered from the sale price being less than the value as fixed by the valuer was in each case the respondent, the owner of the improvements and chattels, rather than the Perry Foundation as vendor of the freehold interest in the land.

179. While this is what is stated in the agreement and could be said that that was the express agreement between the vendor and purchaser under the agreement respectively, that is nevertheless the unfortunate outcome for the respective respondents.

180. It is the view of the disputes panel that there should have been the alternative course followed, namely that the difference between the valuation as fixed and the agreed sale price as agreed should have been deducted from the land value. This is because the land value was likely to have been more variable and open to negotiation than the value of the improvements and chattels. The end result of the process would have been as follows:

Party	Total sale price	Improvements value	Land value
Waters estate	$235,000.00	$158,000.00	$77,000.00
Mrs Murray	$170,000.00	$101,000.00	$69,000.00

181. This compares with how the sums are shown in the respective agreements and for which the Perry Foundation wishes to account to the respondents:

Party	Improvements price	Improvements value
Waters estate	$153,000.00	$158,000.00
Mrs Murray	$91,000.00	$101,000.00

:

182. The reason for these differences is that the sale price in each case was less than the valuation but in both cases the Perry Foundation and the agreement for sale and purchase show the deduction as having come off the improvements and chattels rather than off the land value.

183. The disputes panel has taken note of the respective Notices of Rating Valuation from Waikato District Council. In the case of the late Mrs Waters that notice, dated 30 June 2011, showed the value of improvements at

$100,000.00. This is significantly different from the amount fixed by Telfer Young or had apparently agreed with the purchaser and is not of significant help. In the case of Mrs Murray, the Notice, also dated 30 June 2011, shows the value of improvements at $105,000.00 which is closer to the $101,000.00 mentioned above than the $91,000.00 as has been taken by the Perry Foundation.

184. Ms Waters in her evidence was critical that there had not been consultation about the sale process, particularly where the Perry Foundation was acting as attorney for her late mother's estate,. Had there been such consultation, there may have been a discussion about the division of the proceeds of sale between land on the one hand and improvements and chattels on the other.

185. She referred to, and relied on, Clause 51.4 of the Code of Practice 2008. That clause requires an operator to consult with a former resident about the marketing of the residential unit at least as to when the unit goes on the market, the general nature of the marketing plan, and actual charges relating to marketing and sales that the former resident is liable to pay. Ms Waters said that she was not consulted about the sale at all other than to be told when it had occurred and to be asked to sign the amended Application for Disposal form.

186. Although Ms Waters conceded[12] that the Perry Foundation had complied with requirements of clause 51.4 she did so in the context of the completion of the original Application for Disposal form; and her complaint was that consultation did not occur subsequently about changes or sale terms and the respondents are being asked to carry the difference in sale price from valuation as is mentioned. Mr McLauchlan said that each resident was happy with the real estate assessments that had been obtained because the market had fallen; and that in any event there were no sales of occupation rights agreements as such.

[12] Statement paragraph 58

187. I do not see that any of the sale process that the Perry Foundation followed to dispose of the respective residential units of the respondents is improper so far as obtaining a fair market price for the sale of the respective units is concerned.

188. There has been the intervening conversion of the underlying freehold into unit titles but there is no evidence that that has depreciated the value of the residential unit.

189. The sales were apparently at arm's length with the respective purchasers and the price received was in line with the value as had been fixed for unit titling purposes the previous December 2010.

190. The Perry Foundation is accounting to the respective respondents for the proceeds of sale of the residential units and chattels and I see no objection to that course whatsoever.

191. As to dealing how the difference in price between price and valuation is dealt with, however, my view is that there should have been some discussion and negotiation about that.

192. There was no direct evidence that there was express agreement between the respective purchasers of the units and the Perry Foundation as vendor as to the division of the sale price between land value and improvements and chattels and Mr McLauchlan's evidence was ortherwise.

193. I am not prepared to accept that the respondent in each case should be bound by the division simply because that was what was agreed between those parties; especially in the absence of any consultation with the respondents.

Sums available to respondents from sales from which deductions to be made

194. Accordingly, the amount to which each respondent is entitled from the respective sales of land, unit improvements and chattels is taken as the amount for the value of same as fixed by Telfer Young in the respective valuations dated December 2010, namely:

J Waters estate - $158,000.00
Mrs H Murray - $101,000.00

195. The balance of the net proceeds of those respective sales is available to be applied by the Perry Foundation to its interest in the underlying freehold land under the Unit Titles Act.

Specific deductions from proceeds – Waters estate

Expenses in sale – clause 7.3(a)

196. The Perry Foundation claims four items of expenditure should be deducted under clause 7.3(a) of the site agreement namely:

196.1. Repair toilet and waste master, $572.19.
196.2. Repair garage door remote openers, $644.00.
196.3. Repair garden shed, $1,227.05.
196.4. Repair door locks as no keys provided, $391.39.

197. That clause entitles the Foundation to deduct: "*[a]ny charge made by the Foundation or expense incurred by it in preparing the unit so that in the opinion of the Foundation it is in a proper state for disposal*".

198. No submission was made on the interpretation of that clause but the disputes panel notes that there is reference to the "opinion" of the Foundation which makes the subject somewhat discretionary.

Repair toilet and waste master, $572.19

199. The first item is for repair of a toilet and waste master where Mr Blackmore produced an invoice for the amount, $572.19. He made no comment about the invoice. Ms Waters in her affidavit referred to the invoice having been dated more than a month after settlement date and argued that the expense could not have been incurred "*in preparing the unit*" as mentioned in clause 7.3(a).

200. Ms Waters did, however, in cross-examination acknowledge that, the repairs having been done on 30 and 31 August 2011, this was only a few days after settlement. She did not dispute that locks had earlier been changed. There would have been no access to the property before settlement to carry out these necessary repairs.

201. The disputes panel is prepared to accept that that is a **proper deduction**.

Repair garage door remote openers, $644.00

202. Mr Waters produced an invoice from Waikato Door Specialists Limited for the sum of $644.00 including GST for supplying and installing an auto unit with two remotes.

203. In reply Ms Waters said that an automatic garage door opener was not even listed in the chattels in the agreement for sale and purchase. She said in evidence that the door opener was broken at the time of the valuation and had been for a long time; and that it was continually breaking down. She said she did not remove the opening mechanism or the remotes.

204. Mr Blackmore was not asked in cross examination about the situation concerning garage door mechanisms or the remotes.

205. The remotes were not mentioned in emails which were exchanged in August 2011. In particular, in an email from Mr McLauchlan to Ms Waters dated 2 August 2011 he expressly referred to return of the garden shed and letterbox which had been removed and provision of all keys for locks that had been changed but made no reference to remote openers or the garage door mechanism. The same occurred in a letter dated 17 August 2011 from the lawyers for the Perry Foundation where again there was reference to specific items but no reference to remotes.

206. It is noted that, by contrast to the agreement for sale and purchase of Mrs Murray's unit which did include reference in the chattels to two remote door openers, the chattels list in the agreement for sale and purchase of the late Mrs Waters' unit did not include such mention.

207. The conclusion that the disputes panel has reached is that there may have been an automatic garage door unit and remotes for the late Mrs Waters' unit at some stage. Indeed, it may be said that this would have been almost an essential for a retirement village unit garage.

208. There having been no evidence that there had been in the unit a garage door mechanism with remotes and working before the sale, there can be no obligation for the Waters estate to meet the cost of replacing these. Likewise, there is no direct evidence that any mechanism that was present at the time needed repair in preparation for a sale.

209. Accordingly this deduction is **disallowed** by the disputes panel.

Repair garden shed, $1,227.05

210. There was produced by Mr Blackmore an invoice from Stu Banks Builders Limited for $1,974.55 for replacing an old shed. Mr Blackmore said that this shed was the same as the one that had been removed and was "*necessary because Phillippa Waters removed the existing she had*". Ms

Waters said that to the Perry Foundation "*had no right to sell something that did not belong to them*".

211. Ms Waters did acknowledge in her evidence that there had been a garden shed left on site and it was still there on 4 July 2011 when the agreement for sale and purchase was signed. She acknowledged it had been included in the Telfer Young valuation and was included in the chattels list to the agreement for sale and purchase. She said she thought she had told the real estate agents that she would be removing this.

212. The email exchanges in August 2011 included express reference to the requirement for return of the garden shed along with the letterbox and keys and Mr McLauchlan pointed out to Ms Waters in the email dated 3 August 2011 that chattels that had been included in the agreement for sale and purchase and since removed would need to be replaced if not returned.

213. The disputes panel is satisfied that the garden shed had been included as part of the chattels sold by the Perry Foundation on behalf of the late Mrs Waters estate and that it was required to account to her for this. If the shed had been removed, as the disputes panel finds that it had been, then the appropriate amount would need to be reimbursed to the Perry Foundation so that in due course the Foundation could account to the estate for the proceeds of sale of all improvements.

214. Put another way, as things stand at the moment, the Perry Foundation is due to reimburse the estate for the value of all the improvements that were sold for which it has received payment but one of those items was not present at the time of sale and needed to be replaced and in any event is held by (or was earlier held by) Ms Waters to her own benefit. She cannot have it both ways.

215. As to the amount, however, the invoice makes it clear that the purchaser has had more than could reasonably have been expected. If the shed was

on site at the time of inspection and when the agreement for sale and purchase was entered into that was all that the purchaser could have expected.

216. The invoice, however, indicates that there has been replacement with a new shed with new concrete slab and new kit set which gave the total cost of $1,974.55 including GST. The invoice notes (as the contractor must have been requested to do): "*Cost of just replacing old shed with same was $650 plus GST*". There has been a notation made on the invoice (but no evidence was given by whom that was made) referring to the Perry Foundation paying $650.00 and the balance paid by the Waters estate.

217. The assessment by the disputes panel is that the only deduction that should be made is the cost of replacing the old shed. Ms Waters said that the old shed had only cost her mother $190.00, but that was some time previously and no supporting evidence was provided. The old shed was apparently the only expectation of the purchaser. Rather than compensate the purchaser for that cost, the Perry Foundation has chosen to spend more money on a new shed.

218. That is not something that, in the opinion of the disputes panel, should be borne by the estate.

219. Accordingly the deduction that should be **allowed** is $650 plus GST, that is **$747.50.**

Repair door locks as no keys provided, $391.39

220. Mr Blackmore said that Ms Waters had declined to hand over the keys and produced an invoice for $391.39 for attending the premises and replacing the locks and keys. The invoice refers to 24 Kingfisher Way.

221. Mrs Waters objected that the invoice did not refer to her late mother's property and therefore there should be no deduction. She also referred to the 10 weeks between settlement date and the date of the invoice, 11 October 2011. Mr Blackmore in oral evidence he said he had checked this with the manager and this was in error and should have referred to No 21 Kingfisher Way.

222. The evidence was quite clear that locks had been changed and keys retained by Ms Waters. Her lawyers' letter of 28 July 2011 expressly said that *"[a]s a precautionary measure, our client has today changed the locks on the house and is prepared to take any other steps necessary to see this matter through to a final conclusion*". The stated reasons in that letter concerned the sale process to which this decision refers in more detail above.

223. Subsequent emails from the Foundation to Ms Waters and in particular the email dated 2 August 2011 referred to provision of the locks and keys before settlement. In cross-examination Ms Waters acknowledged that she had refused to hand over the keys.

224. The disputes panel has assessed this matter. The evidence was clear that the keys were removed. Settlement of the sale occurred or was pending and there needed to be access provided to the purchaser. Ms Waters refused to hand over the keys. Her reasons related to the process of sale.

225. The Perry Foundation is entitled to deduct the cost of replacing locks and keys. The apparent error in the invoice as to the address and the time lapse that have occurred do not alter the principle.

226. This item is **allowed** as a deduction.

Direct expenses – clause 7.3(b)

227. There are three items claimed under this category:

227.1. Half valuation fee, $250.00.
227.2. Real estate agent's commission (pro rata in proportion to the value of the unit to the total sale price) of $7,038.39.
227.3. Solicitors fee on the respondent's unit (also pro rata) of $737.37.

228. Clause 7.3(b) permits the Foundation to deduct from the proceeds of disposal of the unit: "*any direct expense incurred by the Foundation in selling or purchasing the unit including valuation and legal fees*…".

Half valuation fee, $250.00

229. Mr Blackmore in relation to this item, as with Mrs Murray's deductions, said that the valuation fee was an estimate provided by the valuers and that it had been the Perry Foundation's practice to deduct only half the estimated valuation fee from residents. Otherwise there was no evidence given as to what any fee paid to Telfer Young had been.

230. In reply Ms Waters raised two issues, the first being that the Telfer Young valuation was obtained, not as a direct expense for the sale of the unit but rather for the Foundation's own unit titling purposes; and secondly that there had been a $0.00 amount provided in the Application for Disposal form dated 13 August 2009.

231. On these points in reply Mr McLauchlan said that the Telfer Young valuation was obtained first for determining values of every property following unit titling and secondly for the purpose of making an offer to each resident to acquire the freehold/land interest. He said that the Foundation only sought to deduct half of the valuation fee. As to the Application for Disposal form, he said that the fee had not been incurred at the time and in any event the Foundation was not bound by the deduction specified in the document.

232. The assessment that the disputes panel makes is that the valuation fee incurred by the Perry Foundation with Telfer Young was entirely for its own purposes. It had decided to proceed with unit titling. (There were the process objections that residents, including Ms Waters, raised but these are discounted for present purposes by the disputes panel). It needed valuations for entirely for that purpose, including fixing "*unit entitlement*".

233. The Perry Foundation chose to use those valuations for the purpose of sales of the units of both the late Mrs Waters and Mrs Murray. Although it offered to obtain further updated valuations (7 months later), this was not taken up and that expense was not incurred.

234. The Perry Foundation proceeded with the respective sales using those valuations for the purpose and without having to incur any further expense. Ms Waters has said that by purporting to deduct a proportion of the valuation fee in this way, the Foundation has sought to have the resident subsidise its unit titling process.

235. The disputes panel finds that that is a consequence of the process in that there was no need for a valuation once a relatively current valuation had been obtained and there was no requirement for the resident to contribute to the estimated valuation fee obtained for earlier and other purposes.

236. That item is **disallowed**.

Real estate agent's commission (pro rata in proportion to the value of the unit to the total sale price) of $7,038.39

237. The sum of $7,038.39 is claimed by the Perry Foundation as being the relevant proportion of an invoice from the real estate agent for $10,810.00 including GST in respect of the sale through that agent of the unit of the late Mrs Waters.

238. An invoice was produced by Mr Blackmore and it was he who referred to the proportionate calculation, although he stated that the proportion of improvements and chattels to the total price was 53%. Ms Waters in her evidence referred to this as being incorrect, the correct percentage being 65% and Mr McLauchlan acknowledged this and the disputes panel accepts this.

239. In her evidence Ms Waters referred to there having been no provision for deduction of real estate agent's commission in the original Application for Disposal form that was signed and that as a consequence the Foundation had no right to deduct that sum. She also said it was not a direct cost incurred in selling her mother's unit but rather a cost in selling the unit title.

240. Mr McLauchlan in reply referred to the continued position of the Foundation that it was not bound by the Application for Disposal and referred to the fact that both the unit and the land was sold.

241. The conclusion that the disputes panel has reached on this item is that there was a sale of the land, the improvements and chattels for the total sale price of $235,000.00. This included the improvements and chattels for which, as found above, the Waters estate is entitled to $158,000.00. As a percentage of the total sale price, therefore, those improvements are 67.23%.

242. The incurring of real estate agent's commission in the sale of the total package was reasonable and it is reasonable that the agent's commission should be apportioned between the respective parties for their respective interests in the sale and its proceeds.

243. Accordingly, the view of the Tribunal disputes panel is that the Foundation is **entitled** to deduct 67.23% of the commission including GST, that is **$7,268.00**.

Solicitors fee on the respondent's unit (also pro rata) of $737.37

244. Mr Blackmore produced an invoice from the lawyers for the Perry Foundation for sums totalling $737.37 in relation to the sale of the unit and a pro rata proportion of that sum was claimed. In his subsequent evidence Mr Blackmore acknowledged that there were included on that invoice certain charges relating to LINZ which related solely to the Perry Foundation's ownership of the freehold and should be deducted giving a credit of $240.00.

245. Ms Waters again referred to the original Application for Disposal form which referred to a different sum for legal fees, $472.50. Again Mr McLauchlan rejected any binding nature in that form.

246. The assessment of the disputes panel is that legal fees for the sale of the unit with land, improvements and chattels, did require legal assistance and that the lawyers' fees (after deducting items which were solely the liability of the Foundation, the LINZ entries, $240.00) should be divided proportionately between the parties and that therefore, as is calculated above, the percentage payable by the Waters estate is 68% which can be properly deducted. The net account after deduction of the disbursements of $240.00 is $892.50 of which 67.23% is $600.06.

247. The disputes panel **allows** a deduction of **$600.06**.

Percentage deduction for charitable trust purposes - clause 7.3(c)

248. The Foundation claims to deduct the summer of $19,125.00 being 12.5% of the gross disposal proceeds, this being the maximum rate, the late Mrs Waters having occupied her site for at least 5 years.

249. It appears that the deduction is not disputed in principle. Ms Waters gave no evidence to the contrary.

250. Accordingly, applying the amended net proceeds of sale $158,000.00, the correct deduction at that 12.5% is **$19,750.00** which is **allowed** by the disputes panel.

Outstanding resident's fees – clause 7.3(d)

251. The Perry Foundation claimed to deduct the sum of $453.42 for which Mr Blackmore gave a breakdown in a schedule. In evidence, however, he acknowledged that there was only an obligation to pay for 12 months from termination of the agreement (which it was common ground between the parties was the date of death of the late Mrs Waters). This is a concession properly made having regard to clause 6.4(b) of the site agreement.

252. Mr Blackmore said that on his calculations rather than an underpayment of $453.42, having regard to that maximum period provision, there had been an overpayment of $1,805.94. He produced a schedule showing that there had been 18 months paid from December 2008 to June 2010 totalling $5,585.40. He said that there should have been six months at $310.30 totalling $1,861.80; and six months at $319.61 totalling $1,917.66. That left an overpayment of $1,805.94 conceded by the applicants.

253. Ms Waters, however, raised a further issue. She said that under clause 54.2 of the Code of Practice 2008 outgoings charged must be reduced by at least 50% after 6 months and therefore the liability for outstanding service fees should have been for the first six months at the full rates but for the remaining six months at 50% of the full rate.

254. Clause 54.2 of the Code of Practice 2008 reads:

> *"The operator must reduce by at least 50 percent the outgoings charged to the former resident if no new occupation right agreement has been entered into for a former resident's unit by the later of:*
>
> *a. Six months after the termination date or*
> *b. the date the former resident stops living in the residential unit and removes all their possessions."*

Clearly the latter provision does not apply and Ms Waters relies on the first part.

255. On that basis, the calculations that Ms Waters made was that there was, Ms Waters claimed, instead of the sum of $5,895.70 paid for service fees, only the sum of $3,140.24 due and therefore there was a refund credit due of $2,755.46.

256. Mr McLauchlan did not respond to this point in his evidence.

257. It is the opinion of the disputes panel that the Code of Practice 2008 is relevant to this issue. It came into force on 2 October 2009. Its stated purpose was to set out the minimum requirements that operators of retirement villages must carry out. Under section 92(2)(b) of the RV Act the Code of Practice prevails over any less favourable provision in an occupation right agreement; and this is recognised in clause 6.2 of the Code of Practice 2008 itself.

258. Part 3 of the Code covered minimum requirements to be given effect to in any occupation right agreement on the 10 topics set out in schedule 5 of the RV Act, one of which was "*Termination of occupation rights agreement by operator or resident*". Clause 9 of Schedule 5 of the RV Act required that a Code of Practice must address "*requirements relating to payments due when an occupation right agreement is terminated … including the period for which charges will continue to be imposed after termination*…"

259. Clause 54.2 of the Code of Practice 2008 is clear in its obligation on the operator to reduce by at least 50% the outgoings charged if no new occupation right agreement had been entered into within six months after the termination date.

260. Those provisions apply in this case.

261. The dispute panel is satisfied that there should have been a reduction by 50% in the service fees charged by the Perry Foundation to the late Mrs Waters estate following six months after her death.

262. Accordingly, in the view of the disputes panel, there was payable the first six months from December 2008 to May 2009 at $310.30, totalling $1,861.80 which should be allowed but only 50% of the amount claimed between June 2009 in November 2009 at $319.61 per month totalling $958.83. Deducting these sums from the amount paid, $5,585.40 leaves a **credit** due of **$2,764.77**.

Specific deductions from proceeds – H Murray

263. The deductions that the Perry Foundation seeks to make from the proceeds of sale of the improvements and chattels for Mrs Murray are:

Direct expenses – clause 7.3(b)

263.1. Half valuation fee, $250.00.
263.2. Solicitor's fee for the surrender of the site agreement, $472.50.
263.3. Real estate agent's commission (pro rata in proportion to the value of the unit to the total sale price) of $4,186.05.
263.4. Solicitors fee on the respondent's unit (also pro rata) of $563.40.

264. There was no evidence tendered for Mrs Murray concerning these issues at all and the disputes panel discerns that reliance is placed on the evidence of Ms Waters as to matters of principle.

265. The considerations concerning the half valuation fee, $250.00, the real estate agent's commission apportioned at $4,186.05 and the solicitors fee also proportioned at $563.40 are the same as apply in the case of the Waters estate and the same conclusion is reached. The half valuation fee, $250.00, is **disallowed**.

266. The real estate agent's commission is allowed but in correct proportion to the amount which the disputes panel has found should have been paid to Mrs Murray for her unit and chattels. The sale price was $170,000.00. The improvements and chattels should have been shown at $101,000.00. That represents the percentage of 59.4%. The agent's commission was $7,820.00. Of that sum, $7,820.00, 59.4% is **$4,646.00**. This is the correct amount that should be deducted from the proceeds of sale for Mrs Murray. That amount is **allowed**.

267. The solicitor's fees on the sale totalled $1,052.50. That included $160.00 for LINZ registration fees. Although Mr Blackmore did not expressly concede this in his evidence when he was referring to similar fees in relation to the Waters estate unit sale, I perceive that they also apply to Mrs Murray's unit and should be deducted.

268. Accordingly the net total fees after deduction of those two items is $892.50 of which 59.4% is **$530.25** and that sum is **allowed**.

269. No basis was advanced either in evidence or submission from either party concerning the liability of Mrs Murray to pay a solicitor's fee on surrender of the site agreement. Mr Broadmore did refer to that fee's having been incurred and produced the invoice from the lawyers.

270. Clause 6.3 of the site agreement allowed Mrs Murray to terminate the site agreement after giving one month's written notice to the Foundation and clause 6.4 referred to her remaining liability for any service fees for a period not exceeding one year.

271. There is no reference there, however, to Mrs Murray as Grantee under that site agreement having to meet any liability for solicitor's fees incurred by the Perry Foundation on termination of the agreement.

272. Indeed there is no reference even to the requirement for a surrender in the event of termination.

273. Accordingly that sum is **disallowed**.

Percentage deduction for charitable trust purposes - clause 7.3(c)

274. Again no evidence was tendered on behalf of Mrs Murray nor any submission made concerning this item.

275. The assessment of the disputes panel on this issue is the same as for the Waters estate, namely that there is 12.5% of the gross proceeds of sale of the unit deductible under clause 7.3(c) of the site agreement but that this must be that percentage of the actual unit value and amount to which Mrs Murray has been found entitled, namely $101,000.00.

276. Of that sum, $101,000.00, 12.5% is **$12,625.00** and that sum is **allowed** as a deduction.

Outstanding resident's fees – clause 7.3(d) - $2,455.00

277. The Perry Foundation claims to deduct the sum of $2,455.00 under clause 7.3(d) of the site agreement as outstanding service fees and Mr Blackmore

produced by a statement said to show how that sum is made up (although in fact referring to a total of $2,608.00).

278. The statement comprises $326.00 per month for eight months from 1 November 2010 to 1 June 2011. No further commentary is made by Mr Blackmore in his affidavit about this other than that it is claimed.

279. No evidence was given by or on behalf of Mrs Murray about this claim. Her reply to the dispute notice does not refer to any deduction for these amounts.

280. For the reasons mentioned above it is the view of the disputes panel that clause 54 of the Code of Practice 2008 applies in the circumstances. Under clause 54.1 the Perry Foundation was required to stop charging for personal services on the date Mrs Murray stopped living permanently in the residential unit; and, as noted above, under clause 54.2 after six months after termination the outgoings charged to her would require to be reduced by at least 50%.

281. The relevant dates for Mrs Murray were that she gave notice of intention to terminate the site agreement and her daughter on her behalf entered into the Application for Disposal on 8 October 2010. The property was sold by agreement dated 1 June 2011 with settlement 22 July 2011.

282. The disputes panel has no evidence as to when Mrs Murray stopped living permanently in the residential unit and therefore the date from which clause 54.1 of the Code of Practice runs. If this was the date of the Application for Disposal, 8 October 2010, there would be no fees payable six months from that date. She may, however, have occupied the residential unit for some period of time up until settlement on 22 July 2011. The format of the statement indicates that she may have remained in occupation until 30 June 2011. In that case there is payable by her the

appropriate service fees for that period. There would, however, be under clause 54.2 a reduction after six months to 50%.

283. The disputes panel has worked on that basis but, in the absence of express information about this, reserves to the respondent, Mrs Murray, the opportunity to provide evidence as to when she stopped living permanently in the unit if this alters the situation and the parties are unable to agree on any amendments.

284. On that basis the amount payable for the first six months of the period is therefore $1,956.00; and for the remaining two months $326.00, a total of **$2,282.00**. The disputes panel **allows** a deduction, subject to the leave reserved as mentioned above, that sum.

Result

285. Accordingly it is the view of the disputes panel that the amounts payable to the respective respondents pursuant to the sale of their residential units and chattels is as follows:

Mrs J Waters estate	**Amount**
Sale of unit (improvements) and chattels	$158,000.00
Less: Repair toilet and wastemaster	$572.19
Less: Adjusted replace garden shed	$747.50
Less: Replace door locks	$391.39
Less: Corrected proportion real estate agents commission	$7,268.00
Less: Corrected proportion solicitor's fee on sale	$600.06
Less: Corrected 12.5% gross sale deduction	$19,750.00
Plus: Corrected credit overpaid resident's fees	$2,764.77
Balance due to first respondent, J Waters estate	**$131,435.63**

Mrs H Murray	Amount
Sale of unit (improvements) and chattels	$101,000.00
Less: Corrected proportion real estate agents commission	$4,646.00
Less: Corrected proportion solicitor's fee on sale	$530.25
Less: Corrected 12.5% gross sale deduction	$12,625.00
Less: Outstanding resident's fees	$2,282.00
Balance due to second respondent, Mrs H Murray	**$80,916.75**

286. The respective proceeds of sale have been held on trust in an interest-bearing account. The parties are agreed that the interest that has accrued on the respective sums should be apportioned between the parties in accordance with this result. I now **direct** accordingly. I reserve leave to any party to apply further in the event that any disagreement about the amounts cannot be resolved between the parties.

287. Those are the interim findings of the dispute panel on the respective dispute notices between the applicants and the respondents dated 17 November 2011.

288. I was also asked to reserve the question of costs pending the outcome, which I had done.

289. Any application for costs by any party is to be made within **15 working days** of the receipt of the original decision dated 25 October 2013. It is to be made in writing to me and copied to the other party. Any submissions or evidence in opposition are to be made within **10 working days** thereafter. The applicant for costs must make any reply within **5 working days** thereafter. I will then rule on the matter unless I have been asked to, and there is good reason for, a further hearing or further submissions.

Dated this 14th day of November 2013

DAVID M. CARDEN
Disputes Panel