

UNDER

The Retirement Villages Act
2003

In the matter of a dispute

BETWEEN

**WILLIAM JOHN MICHAEL
KILLIAN**
Applicant

AND

**STONEHAVEN VILLAGE
TRUST**
Operator

DECISION OF DISPUTES PANEL

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CONTENTS

BACKGROUND	1
The Dispute	1
The Parties	1
The Licence to Occupy (LTO)	1
Building The Unit	1
Registration of the Village	1
Receivership	2
Service Charge Default	2
Repossession of Unit	2
Dispute Notice	2
ISSUES FOR THE PANEL	3
A. IS MR KILLIAN A VALID APPLICANT FOR A DISPUTE NOTICE	3
Mr Killian’s Position	3
The Trust’s Position	3
The Panel’s Decision	3
B. HAS MR KILLIAN’S LICENCE TO OCCUPY BEEN VALIDLY TERMINATED.....	4
Mr Killian’s Position	4
The Trust’s Position	5
The Panel’s Decision	5
<i>Operating Costs</i>	6
Excluded Operating Expenses	7
Administration Costs	7
Excluded Administration Costs	7
Depreciation	8
Trustees Expenditure	8
CONCLUSION	8
Has there been a Breach in Terms of Clause 2.1?	8
Was the Termination Process Correct?	9
C. WHAT FEES, IF ANY, IS MR KILLIAN DUE TO PAY UNDER THE LICENCE TO OCCUPY	10
Mr Killian’s Position	10
The Trust’s Position	11
The Panel’s Decision	11
Service Charges	11
Interest Charges	12
Legal Fees	12
Enforcement Fees	13
Storage Charges	13
Charges to Change Locks	13
Administration Charges	13
D. IS MR KILLIAN ENTITLED TO ANY COMPENSATION BEYOND THE SALE PRICE OF THE UNIT.....	14
Mr Killian’s Position	14
The Trust’s Position	15

The Panel’s Decision	15
Costs	16
Reasonableness of Legal Fees	16
Amount in Dispute	16
The Importance to the Parties	17
Conduct	17
The Panel’s Decision	17
SCHEDULE 1	18
SCHEDULE 2	23

DECISION OF DISPUTES PANEL

BACKGROUND

The Dispute

1. This is a Dispute under the Retirement Villages Act 2003 (“RVA”). The matter was heard on 11 April 2014 in Whangarei.

The Parties

2. The parties to the dispute are **WILLIAM JOHN MICHAEL KILLIAN** (“**MR KILLIAN**”) and the **STONEHAVEN VILLAGE TRUST** (“**THE TRUST**”). **MR KILLIAN** was a resident at the Stonehaven Retirement Village (“the Village”) by way of Licence to Occupy (LTO). **THE TRUST** which is a Charitable Trust incorporated on 11 June 1992, operates the Village.

The Licence to Occupy (LTO)

3. On or about 11 April 2005, **MR KILLIAN**’s daughter **CLAIRE KATHERINE TALENS** (“**MS TALENS**”) signed an LTO as Licensee, with **THE TRUST** as Licensor and **MR KILLIAN** as Occupier.

Building The Unit

4. As Licensee under the LTO, **MS TALENS**, but in reality, **MR KILLIAN** built a Unit on **THE TRUST**’s land. The LTO provided a restricted right to occupy the land, effectively on a month by month basis.
5. The Council building consent to commence building the Unit was issued on 15 February 2006. The construction of the Unit was a difficult process which from **MR KILLIAN**’s point of view soured his relationship with **THE TRUSTEES** of **THE TRUST**. By way of letter dated 12 October 2008 **MR KILLIAN** made a number of complaints about Village management issues, the process of registration for the Village under the RVA, and the impediments to sale of Units at the Village at 2008 prices. **MR KILLIAN** considered **THE TRUSTEES** did not try to resolve his complaints in 2008, and still had not resolved them to his satisfaction by the date of the hearing of his Dispute Notice on the 11th of April 2014.

Registration of the Village

6. In 2007 the RVA required a number of changes to the legal structures in place to enable Retirement Villages, including the Stonehaven Village to become registered under the RVA. With the late promulgating of Regulations and the Code of Practice (“the Code”) it was a slow and difficult process, often for reasons beyond their control, for not only the Stonehaven Village, but many Villages to become registered. The Stonehaven Village achieved registration on 7 June 2008. In the interim, Units in the Village could not be sold.

Receivership

7. To add to the difficulties on 5 December 2008 the Village was placed into Receivership by the then Statutory Supervisor. The Receivership ended on or about 1 March 2010, and new volunteer **TRUSTEES** were appointed. The Receivership also impeded sale of Units to some extent.

Service Charge Default

8. By way of protest at his 2008, and later complaints not being addressed to his satisfaction, in approximately December 2010 **MR KILLIAN** stopped paying the full amount of the service charge required to be paid by the Residents under clauses 2.1 and 3.1 the LTO. In December 2011, **MR KILLIAN** reduced payment of the service charge even further.
9. As a result of **MR KILLIAN**'s failure to pay the required service charge in full from December 2010 onwards, the **TRUSTEES** finally served a Notice of Intention to Terminate the LTO on **MR KILLIAN** on 5 August 2013. **MR KILLIAN** did not respond to the Notice of Intention to Terminate the LTO, and nor did he pay the arrears in service charges.
10. On 9 September 2013, the second required document to terminate the LTO, being a Notice of Termination was served on **MR KILLIAN**. The time for response to the Notice of Termination was 11 October 2013. That date expired without a response from **MR KILLIAN**.
11. An affidavit of service of both documents by **MR HEMMING**, process server was provided by the **TRUSTEES** to the Panel in the Bundle of Documents. At the hearing **MR KILLIAN** acknowledged receiving both documents required to terminate the LTO.

Repossession of Unit

12. On 13 November 2013, while **MR KILLIAN** was away from the Unit, the **TRUSTEES** took possession of the Unit, and changed the locks on the doors. **MR KILLIAN** is concerned that the **TRUSTEES** continue to hold items belonging to him which were in the Unit.
13. Some time after the expiry of the time to respond to the Notice of Termination, **MR KILLIAN** asked that the **TRUSTEES** reverse the decision to terminate the LTO. The **TRUSTEES** declined to do so because of the still unpaid service charges, **MR KILLIAN**'s alleged behaviour towards some **TRUSTEES**, and the reaction of some other residents to **MR KILLIAN**'s alleged actions.

Dispute Notice

14. On or about 11 October 2013 **MR KILLIAN** filed a Dispute Notice. The **TRUSTEES** responded on 17 October 2013.

ISSUES FOR THE PANEL

15. The parties agreed that there are 4 questions that the Panel is required to make a decision on:
- (a) Is **MR KILLIAN** a valid Applicant to file a Dispute Notice?
 - (b) Has **MR KILLIAN**'s LTO been validly terminated by **THE TRUST**?
 - (c) What if any sums does **MR KILLIAN** owe under the LTO?
 - (d) Is **MR KILLIAN** entitled to any compensation beyond the sale price of the Unit?

A. IS MR KILLIAN A VALID APPLICANT FOR A DISPUTE NOTICE

Mr Killian's Position

16. **MR KILLIAN**'s position is that as a Resident or former Resident of the Village, he is a valid Applicant for a Dispute Notice under the RVA.

The Trust's Position

17. **THE TRUST** submits that the key legally binding document between the parties and **MS TALENS** is the LTO. After commencement of the Panel's involvement, **THE TRUST** sought that **MS TALENS** as Licensee, sign a document to authorise **MR KILLIAN** to take any steps in respect to the LTO as he saw fit. It also provided for **MR KILLIAN** to receive any payments due to **MS TALENS** under the LTO, and to give good receipt for those payments. That document was produced at hearing as Exhibit "A" and is dated 6 March 2014.
18. During the hearing, **THE TRUST** accepted that **MR KILLIAN** was a valid Applicant for a Dispute Notice on the basis of the LTO, and was assisted in its decision by the document signed by **MS TALENS**.

The Panel's Decision

19. The applicable documents to decide if **MR KILLIAN** is a valid Applicant for a Dispute Notice are the LTO, the RVA and the Code.
20. **MR KILLIAN** is contractually an Occupier pursuant to the LTO. Clause 16 of the LTO refers to the joint and several liability of the Licensee and Occupier. As an Occupier **MR KILLIAN** resided at the Village until termination of the LTO.
21. A Resident is defined in s.48 of the RVA as a "*Resident or former Resident of a Retirement Village*". In the Code definitions a former resident includes a person "*who was a resident*" or whose Occupation Rights Agreement ("ORA") has terminated. **MR KILLIAN** was a Resident and is now a former Resident of the Village, after his LTO was terminated on or about 11 October 2013.

22. Section 52 of the RVA states that a Resident may give a Dispute Notice to the other party, after complying with an earlier referral of the dispute to the complaints facility, and the expiry of 20 working days since that referral. There is no dispute raised in this case about the form of Dispute Notice required by s.56, or the time constraints in s.57 of the RVA.
23. The Panel finds pursuant to the LTO, ss.48 and 52 of RVA and the Code that **MR KILLIAN** is a valid Applicant for a Dispute Notice. This position was acknowledged by both parties at the hearing.

B. HAS MR KILLIAN'S LICENCE TO OCCUPY BEEN VALIDLY TERMINATED

Mr Killian's Position

24. **MR KILLIAN's** position is that the LTO has not been validly terminated. His evidence is that the "*LTO should have been upgraded as the Retirement Villages Act supersedes the LTO*". **MR KILLIAN** considered that **THE TRUST** had an obligation under clause 15 of the LTO to amend the terms of it, to in **MR KILLIAN's** view, comply with the RVA. **MR KILLIAN** referred to the current form of ORA which the Village was currently using, but did not state in what way it should apply to him directly.
25. At the hearing **MR KILLIAN** disputed the validity of some of the charges incorporated in the service charge through clauses 2.1 and 3.1 of the LTO. **MR KILLIAN** submitted this was relevant to whether the service charge was a valid charge, and impacted on the validity of termination of the LTO.
26. **MR KILLIAN** further submitted that **THE TRUST** had no power to retain his goods, or to enter his Unit without notice to change locks, or to remove a vehicle from outside his Unit. **MR KILLIAN** was also of the view **THE TRUSTEES** had no right to show prospective purchasers through the Unit after changing the locks. **MR KILLIAN** was concerned that some of his possessions including his passport and information on his medication, was able to be seen during viewings.
27. **MR KILLIAN** also relied on a letter from **MR MCGEE** of Thomson Wilson Law to **MR KILLIAN** dated 8 October 2013 to show the termination of the LTO was invalid. At paragraph 6 the letter states:

"In terms of your occupation of the Unit, while the licence is advised as being terminated as of 5.00pm tomorrow, the reality of the situation is that the Trust will have to apply for a Court Order to have you removed from the village due to the termination of your licence. That being the case, you do not have to move out tomorrow. You confirmed you never intended to in any event."
28. **MR KILLIAN's** evidence was that he had not responded to either the Notice of Intention to Terminate the LTO, or the Notice of Termination as he did not consider either was valid, and hence he took no steps in respect to them. **MR KILLIAN**

acknowledged he had been served with both documents, and had had legal advice from time to time around the time they were served on him.

29. One of **MR KILLIAN**'s major complaints was that **THE TRUSTEES** had not dealt with his complaints of 2008 and thereafter, and had not enabled sale of his Unit in a way which was acceptable to **MR KILLIAN**, when property prices were at a peak in 2008.

The Trust's Position

30. **THE TRUST**'s position is that clause 15 of the LTO gives **THE TRUST** the ability to seek a change of an LTO to an ORA if it wishes, but not for **MR KILLIAN** to require it. There had been no change from the LTO to an ORA in **MR KILLIAN**'s case.
31. **THE TRUST**'s submits it validly terminated **MR KILLIAN**'s LTO, for just cause, and in a manner which complied with the LTO and the Code. Clause 7 of the LTO sets out the situations in which the LTO may be terminated. The **TRUSTEES** rely on clause 7.2(a) in terminating **MR KILLIAN**'s LTO for non-payment of service charges.
32. The **TRUSTEES** consider they have provided proof that the service charges payable by **MR KILLIAN** under clauses 2.1 or 3.1 of the LTO had not been paid. The breaches were material breaches, as the service charge payments fund a significant part of the operation of the Village including the items in clause 2.1. The shortfall on the service charges owed by **MR KILLIAN** remained unpaid for a period of 8 weeks or more, as required under clause 7.2, before steps could be taken to terminate the LTO.
33. **THE TRUST** provided proof it had served a valid Notice of Intention to Terminate the LTO, and Notice of Termination of the LTO on **MR KILLIAN**, and the breaches had not been remedied by him.
- 33.1. **THE TRUST** considered that **MR KILLIAN** was trying to provoke **THE TRUST** to revoke the LTO by refusing to pay the service charges in full, on the basis that he would to get some financial gain from that approach. **THE TRUST**'s evidence is that **MR KILLIAN** ceased paying the full service charge from December 2010, and **THE TRUST** had shown considerable tolerance of **MR KILLIAN**'s failure to pay and his alleged behaviour towards some **TRUSTEES**.

The Panel's Decision

S.15 Argument

34. To ascertain whether **THE TRUST** terminated **MR KILLIAN**'s LTO validly the Panel must consider the requirements of the LTO, the RVA and the Code.
35. The Panel must firstly address **MR KILLIAN**'s submission that clause 15 of the LTO means that his occupation of the Unit was pursuant to the RVA, implying the later ORA, rather than the LTO. Clause 15.2 of the LTO states that the Licensee, being **MS TALENS**, agreed that if asked by **THE TRUST** she would surrender the terms

of the LTO, and become subject to an ORA. No request has been made by **THE TRUST** for **MS TALENS** to change from an LTO to an ORA, and **MR KILLIAN** cannot require that **THE TRUST** do so. The Panel therefore finds that **MR KILLIAN** remains under the provisions of the LTO.

The Service Charge

36. **MR KILLIAN** disputed at the hearing the validity of the service charge and the Panel is therefore required to address whether the service charge is valid. It is accepted by both **THE TRUST** and **MR KILLIAN** that the monthly sum of the service charge was set, and that **MR KILLIAN** did not pay it in full from 31 December 2010 onwards.
37. For **MR KILLIAN**'s LTO to be validly terminated, **THE TRUST** must comply with clause 7.2(a) of the LTO, and show that **MR KILLIAN** has failed to pay one of the charges detailed in clauses 2.1 or 3.1 of the LTO, and that amount remained unpaid for a period of 8 weeks.
38. Clause 2.1 of the LTO states that **MR KILLIAN** must pay a monthly service charge to **THE TRUST** which is based on his site's reasonable share of various costs and charges to the Village, being general rates and water rates, rubbish collection charges, maintenance of lawns, grounds, driveways and paths, power used for communal lighting, and "*any other reasonable costs or charges which may arise as a result of the licensee's use or enjoyment of the site and any unit built thereon*".
39. **MR MOYLE** a chartered accountant of some 43 years' experience gave evidence on behalf of **THE TRUST** that the items that are paid from the service charges, and other income of **THE TRUST**, are set out in the Bundle at No. 44 which is attached to this Decision as **Schedule 1**.

Operating Costs

40. In **Schedule 1** there are a number of expenses which come within those specified in clause 2.1 of the LTO. From the part of **Schedule 1** headed **Operating Costs** and in order, these expenses include electricity, lawns and grounds, rates and rubbish disposal. The Operating Costs which are not included in the specified items in clause 2.1 are cleaning and sewage, general (petty cash), insurance, licences and fees, vehicle expenses, and repairs to Village facilities, rental buildings, and plant and general.
41. The Panel needs to decide whether these charges come within the clause 2.1(v) "*any other reasonable costs or charges which may arise as a result of the licensee's use or enjoyment of the site and any unit built thereon*". To interpret what that clause means the Panel has applied the Concise Oxford Dictionary definition of "*reasonable*" which is defined as "*not greatly less or more than might be expected*". The word "*arise*" is defined as "*originating*", "*result*" is defined as a "*consequence*", "*use*" is defined as "*avail oneself of*", and "*enjoyment*" is defined as "*to have use of*".
42. To fit within the clause 2.1(v) definition, the Operating Costs of cleaning and sewage, general (petty cash), repairs to the Village facilities, rental buildings and plant and general, must firstly be reasonable in the amount that they are charged at. **MR MOYLE**'s evidence was that the charges were the actual costs to the Village, which

as a Charitable Trust **THE TRUST** did not aim to make a profit. The Panel finds as the costs included in the service charge are the actual costs, without any profit or addition they are not greatly more or less than expected, and hence are reasonable.

43. The second factor that **THE TRUST** needs to show is that the charges is **Schedule 1** which are not specified in clause 2.1(i) to (iv) originate because **MR KILLIAN** occupied the site and his Unit until termination of the LTO. Cleaning and sewage, insurance, licences and fees, and repairs all arise from the fact that the site and Unit previously occupied by **MR KILLIAN** are a part of a complex which must be maintained and serviced, for **MR KILLIAN** to be able to enjoy the use of the site and his Unit. Without any one of these items **MR KILLIAN** could not have satisfactory or safe use of the site and Unit. Some are safety issues and others legal requirements, but each results from **MR KILLIAN**'s occupation of the site and Unit.

Excluded Operating Expenses

44. The Panel does not accept that the vehicle expense in Operating Costs is necessarily one which arises as a result of **MR KILLIAN**'s occupation of the Unit, or indeed the site. The vehicle was used to transport people from the Village, and as such should be removed from the service charge. It is a minor amount in the total expenses which has not been charged at all in either 2013 or 2014.

Administration Costs

45. The second category of charges in **Schedule 1** is that of Administration Costs. **MR KILLIAN** objects to the Administration Costs being a part of the service charge on the basis that the Village is operated by a Charitable Trust, and that everyone should be providing their services free of charge. That submission is not accepted by the Panel. **THE TRUST** is obligated to run its enterprise in a manner which accords with the law. The accountancy fees, audit fees, bank fees, interest, legal compliance and statutory supervisor costs are legal requirements for **THE TRUST** to meet, and arise because of **MR KILLIAN**'s occupation of the site and his Unit.
46. **MR MOYLE**'s evidence once again in respect to Administration Costs was that they were the actual costs for those items. It is reasonable for **THE TRUST** to run an office to manage the Village which includes **MR KILLIAN**'s site and Unit, and the additional expenses of office rental, postage and stationery, staff training, telephone and wages are costs which flow from having an administration office. The advertising costs ensure that the Village is profiled for potential purchasers, and that is a reasonable activity when units do become available for sale or rent. As all of the above costs are reported by **MR MOYLE** to be actual costs, they come within the category of reasonable. They are essential for **MR KILLIAN**'s enjoyment of the site and Unit, and arise from his use of the same.

Excluded Administration Costs

47. It is unclear what the valuation costs referred to under Administration Costs apply to. If they relate to the sale of Units other than **MR KILLIAN**'s then they should not be included as they can be claimed against the individual vendor. If on the other hand the valuation fees are for a general valuation for the Village or contractually required under LTO/ORAs for some reason, then they should be included.

Depreciation

48. A further inclusion in the service charge under **Schedule 1** is Depreciation on the rental units, the LTO/ORAs and the Village facilities. It is a legal requirement that taxation be met, and it is usual accounting practice that depreciation is a part of the annual accounts. The rate is fixed by law, which makes it reasonable and only payable because **MR KILLIAN**'s site and Unit, is a part of an operation which is assessed for taxation. Clearly the taxation arises because of the presence of **MR KILLIAN**'s site and Unit in the Village. It is therefore a legitimate part of the service charge.

Trustees Expenditure

49. **THE TRUSTEES** are volunteers and **THE TRUSTEE** expenditure is actual expense. It comes again within the reasonable category and is a required expense because of **MR KILLIAN**'s use and enjoyment of the site and Unit. The Panel finds Trustee expenditure to be a valid expense within the service charge.

CONCLUSION

50. The Panel finds that the service charge claimed by **THE TRUST** against **MR KILLIAN** is a valid charge within clause 2.1 of the LTO, excluding the vehicle expenses and possibly the valuation expenses.
51. **MR KILLIAN** referred in his evidence to the ORA and stated he should have been subject to an ORA, rather than the LTO. The Panel notes that the ORA specifies that the service charge is a share of all of the expenses in the annual accounts which is broader than in the LTO.

Has there been a Breach in Terms of Clause 2.1?

52. The Panel must next consider whether **MR KILLIAN** had failed to pay one or more of the charges outlined in clause 2.1, and that charge or charges had remained unpaid for a period of 8 weeks or more.
53. The service charge is a set amount but is not divided into individual units such as electricity or lawns. However in **Schedule 1** the financial wheel on page 4 of the **Schedule** shows the percentage of the service charge for each of the expenses.
54. **MR KILLIAN** acknowledged in evidence that he failed to pay the service charges in full between December 2010, and the date on which the LTO terminated which was 11 October 2013. The non-payment was a sufficiently large proportion of the service charge, that even if one or two of the items claimed being the vehicle expenses and possibly valuation fees should not be a part of the service charge, the deficit in service charges paid by **MR KILLIAN** was a high percentage of the legitimate items for inclusion within the service charge.
55. The Panel finds that pursuant to clause 7.2 of the LTO **THE TRUST** had the right to give Notice of Termination of the LTO to **MR KILLIAN**, because he had failed to pay any one or more of the charges detailed in clause 2.1 of the LTO, and that the amount remained unpaid for a period of at least 8 weeks.

Was the Termination Process Correct?

56. The next matter for the Panel to determine is whether **THE TRUST** terminated the LTO in the manner set out in the LTO, RVA and the Code.
57. **MR KILLIAN** considers he operates under the RVA and Code rather than the LTO. **THE TRUST** argues the LTO, RVA and the Code apply. Section 48 of the Code provides the Operator with a discretion by the use of the word “*may*” in terminating an ORA/LTO. There is no discretion however as to the significance of breach that there must be by the Resident. It must be a “material” breach of the contractual document. The word “*material*” is used to show the breach must be “*important or essential*” (the Concise Oxford Dictionary New Edition).
58. The **TRUSTEES** stated that the non-payment of the service charge is a material breach because the **TRUSTEES** could not continue to run the Village without the funding from the service charges. **MR KILLIAN**’s response was that he did not consider the LTO was still in operation because he considered the RVA had taken over. The Panel finds however that even if **MR KILLIAN** was correct, which the Panel finds he is not, the requirements to meet service fees are set out with even less specificity in the ORA’s, which were implemented after the LTO’s at the Village.
59. Under the LTO at clause 7.1(c) **THE TRUST** has the right to give a Notice of Termination to **MR KILLIAN** if under clause 7.2(a) he has failed to pay any one of the charges detailed in clauses 2.1 or 3.1 of the LTO. As stated earlier in this Decision, the Panel finds that **MR KILLIAN** had failed to pay the full service charge, and all of the outgoings allocated except vehicle expenses and possibly valuation expenses are found to be legitimate inclusions in the service charge.
60. Returning to the Code, the Panel finds that the breach by **MR KILLIAN** of the LTO is a material breach and therefore **THE TRUST** is entitled to undertake the path set out in clause 49 of the Code to terminate. It is a material breach, in that payment of the full sum of the service charge by **MR KILLIAN** was essential to enable payment of **THE TRUST**’s debts for the items of expenditure set out in clauses 2.1 and 3.1 of the LTO.
61. Clause 49 of the Code sets out how the Notice of Intention to Terminate the LTO is to operate, what information is to be in it, timeframes and the remedy required. The Panel finds that the Notice of Intention to Terminate dated 5 August 2013 which was served on **MR KILLIAN** by **THE TRUST** is valid, and complies with clause 49(2) of the Code.
62. The next step required for valid termination of an LTO, is service of a Notice of Termination which in **MR KILLIAN**’s case is dated 9 September 2013. That document is dated later than one month from the date of the Notice of Intention to Terminate, and in fact over one month from the date that document was served on **MR KILLIAN**, as is required by the Code.
63. The Panel considered whether the Notice of Termination met the requirements in clause 49(3) of the Code. The requirements of termination are date of issue, grounds for termination, specific terms and conditions which entitle the Operator to terminate the LTO, the right of the Resident to give a Dispute Notice, requirements where there

is a dispute in relation to the LTO, and period of notice. The Notice of Termination served on **MR KILLIAN** which is No. 39 in the Bundle of Documents complies with the requirements set out above.

64. The Panel finds that the processes required under the LTO, RVA and the Code to terminate **MR KILLIAN**'s LTO have been undertaken in accordance with the requirements. The Panel therefore finds that **MR KILLIAN**'s LTO has been validly terminated on the basis that he failed to pay the service charge in full, for a period of more than 8 weeks and **MR KILLIAN** was served with the appropriate Notices to terminate his LTO.

C. WHAT FEES, IF ANY, IS MR KILLIAN DUE TO PAY UNDER THE LICENCE TO OCCUPY

Mr Killian's Position

65. **MR KILLIAN** accepts that pursuant to clauses 2.1 and 3.1 of the LTO, he was obligated to pay a service charge in respect to various items of expenditure to operate the Village. The dispute as to the validity of the service charge has been decided earlier in this Decision. **MR KILLIAN**'s next submission was that once there had been a breach of payment of the service charge, and 8 weeks had expired, thereafter the service charge should cease. The first breach appeared to be on or about 31 December 2010 which would mean the 8 weeks would expire on or about 18 February 2011.
66. **MR KILLIAN** disputes his obligation to pay the service charge requested by **THE TRUST** set out in **Schedule 2** of this Decision. In particular **MR KILLIAN** disputes the following payments sought by **THE TRUST**:
- (a) The majority of budget items charged by **THE TRUST** in the years 2011 to 2013, and the budgeted items for 2014 which formed the service charge as set out in **Schedule 1**
 - (b) Any service charge payment after 18 February 2011 and interest thereon;
 - (c) The additional administrative fees of \$100 charged monthly from 30 August 2012 to 31 October 2013 to cover the extra work undertaken in respect to **MR KILLIAN**'s dispute;
 - (d) The tree inspection fee of \$110 dated 30 November 2012;
 - (e) The fees for serving documents on **MR KILLIAN** of 5 August 2013 totalling \$224.25 and further document service fee of 30 December 2013 of \$191.87;
 - (f) Storage fees of \$40 per month from 31 December 2013 to 31 March 2014 being \$160 and continuing.

The Trust's Position

67. **THE TRUST** seeks payments from **MR KILLIAN** as set out in **Schedule 2** totalling \$43,891 plus April's legal fees.
68. **THE TRUST's** position in respect to the items in **Schedule 2** is that the service charge is payable pursuant to clauses 2.1, 3.1 and 3.2 of the LTO. The document services fees were for service of the Notice of Intention to Terminate the LTO, and the Notice to Terminate the LTO and, are claimed pursuant to clause 3.2 as enforcement costs. The storage fees are an estimate by a Trustee in the storage business, of the cost to store **MR KILLIAN's** remaining possessions. **THE TRUST** states that the administrative fees of \$100 per month were justified because of the extra time it took the administration assistant to process matters in respect to **MR KILLIAN**. At the hearing **THE TRUST** withdrew its request for payment of \$110 for a tree inspection dated 30 November 2012. The legal fees incurred are for matters relating to **MR KILLIAN** solely. **THE TRUST** provided copies of invoices with time recording for legal fees, at the hearing.
69. **THE TRUST** disputed it was appropriate to compare service charges with other Retirement Villages, all of which are structured differently financially, but all need to meet similar costs.
70. **THE TRUST** also disputed the service charge should stop 8 weeks after the first breach. **THE TRUST's** position is that pursuant to clause 7.2, only **THE TRUST** had a discretion as to when, or even if it chose to take enforcement steps.

The Panel's Decision

Service Charges

71. For **THE TRUST** to have a justified claim for payment of arrears in service charges by **MR KILLIAN**, it must show that each of the sums claimed fits within the criteria in clauses 2.1, 3.1 or 3.2 of the LTO. That issue was been dealt with earlier in this Decision.
72. The Panel does not accept **MR KILLIAN's** submission that the service charge stops 8 weeks after a breach. The position is that **THE TRUST** had a discretion as to whether, or if it takes enforcement proceedings for breach, with the use of "may" in clause 7.2 of the LTO. Clauses 7.3 and 7.4 of the LTO are clear that the service charge is payable to the date of termination of the LTO.
73. **MR KILLIAN** disputed at the hearing that **THE TRUST** was justified in charging the service charges that it did, in comparison with other nearby Retirement Villages. **MR MOYLE** in evidence explained the differing financial arrangements between the Villages named by **MR KILLIAN**, but in essence stated the Villages all had to meet similar costs of operation, it was a matter of how the finances were structured as to how, rather than if, the Residents paid the outgoings. The Panel accepts **MR MOYLES'** evidence.

74. In summary the Panel finds the unpaid service charges claimed by **THE TRUST** from 31 December 2010 to 11 October 2013 are validly claimed, less the vehicle charge and possibly valuation charge.

Interest Charges

75. **THE TRUST** in **Schedule 2** claims interest on various items. Clause 3.2 of the LTO states that interest can only be charged on money expended by **THE TRUST** to enforce the service charges outstanding. It does not allow for interest to be charged on the service fees, or administration fees for instance. There must be an adjustment to remove all of the interest charges from **THE TRUST**'s claim except for enforcement matters. Interest may be charged on legal fees and other matters which have been incurred as a result of enforcement proceedings to "*make good such default*". **THE TRUSTEES** may charge 1.5% per annum interest over the call rate of the Licensor's bankers rate.

Legal Fees

76. The invoices for legal fees charged to **THE TRUST** were provided to the Panel as Exhibit "I". The charge out rates were reasonable, but the accounts cover more than the enforcement proceedings. As there are time records attached, it has been possible for the Panel to separate out the work which has been undertaken in respect to enforcement only against **MR KILLIAN**. It will exclude, for instance, work on possible defamation and the potential sale of **MR KILLIAN**'s Unit. Legal work which has been completed in respect to the hearing of this matter, is not able to be claimed under clause 3.2 of the LTO, but can be subject to a costs order in respect to the hearing.
77. From the letters between solicitors included in the Bundle of Documents, the first discussion about enforcement made available to the Panel, is by way of letter dated 22 February 2013 from Henderson Reeves, Solicitors to Thomson Wilson, Solicitors which states:

"Our client has a straight forward remedy to terminate your client's Licence and pay the market price. Your client is in clear breach of his Licence to Occupy for failure to pay his weekly fee. If our client chose to proceed on that basis then, unless your client remedied those breaches (including paying all fees up to date) and thereafter complied with its terms, termination would be inevitable."

78. The Panel therefore finds that any legal accounts prior to 22 February 2013 are not in respect to enforcement. The first account which can be claimed in full therefore is invoice No. 23981, 28 February 2013. Invoice No 24168 can also be paid in full. Deductions should be made from subsequent accounts as follows:
- (a) Invoice No 26410 dated 29 August 2013 for the work on defamation and a singles social organisation from 24 July to 5 August totalling \$549.
 - (b) Invoice No 26745 19 to 23 September for the work on the sale process totalling \$132;

- (c) Invoice No 26410 for the work of 20 August which relates to defamation work totalling \$358;
- (d) Invoice No 27229 from 21 to 24 October 2013 including work about valuations totalling \$290;
- (e) Invoice No 27667 and thereafter are accounts which relate to this proceeding which can be claimed by way of costs on the hearing.

Enforcement Fees

79. **THE TRUST** may claim the documentation service fees of \$224.25 and \$209.88 under s.3.2 of the LTO. These were for service of the Notice of Intention to Terminate the LTO and the Termination Notice respectively on **MR KILLIAN**. They are valid claims as part of the enforcement process. Interest is also payable on those sums.

Storage Charges

80. **MR KILLIAN** disputes the storage charges, but clauses 9.1 and 9.2 of the LTO enable **THE TRUST** to remove personal belongings and chattels, and arrange storage at **MR KILLIAN**'s expense.
81. The Panel therefore finds the storage charges are able to be claimed by **THE TRUST** against **MR KILLIAN**. **MR KILLIAN** has been invited to uplift his items most recently on the first teleconference before this hearing. The storage charges from 31 December 2013 to 31 March 2014 total \$160. No interest is claimable on this sum, but the charge will continue until **MR KILLIAN** uplifts his items in full.

Charges to Change Locks

82. Clause 3.2 of the LTO enables **THE TRUST** to "*take all such steps to make good a default*" and payment of charges incurred in the process. The Panel therefore finds that the claim for changing the locks by Sutherland Security of \$191.87 plus interest is claimable.

Administration Charges

83. There is no authority for **THE TRUST** to charge **MR KILLIAN** the \$100 per month administration charge. The evidence at the hearing was that that was an arbitrary charge which was not based on actual time, but on the general extra work that staff had to undertake to deal with **MR KILLIAN**'s various matters. That charge does not fall within clause 2.1 or any other section of the LTO. That charge is therefore not allowed. The total of \$1,400 is to be deducted from the sum claimed by **THE TRUST** against **MR KILLIAN**.

D. IS MR KILLIAN ENTITLED TO ANY COMPENSATION BEYOND THE SALE PRICE OF THE UNIT

Mr Killian's Position

84. **MR KILLIAN** seeks compensation from **THE TRUST** on the basis that **THE TRUST** encouraged investors in the Village by false advertising and kept the service charges too low initially to entice people into the Village, but then increased them beyond what was necessary. **THE TRUST** also reduced the LTO initial payment from \$14,000 to \$7,000 hence reducing **THE TRUST's** income, and increasing the amount the Residents are required to pay to meet the running costs of the Village by the service charge. **THE TRUST** also inhibited **MR KILLIAN** selling the Unit in 2008 when prices were high.

85. **MR KILLIAN** therefore seeks recompense from **THE TRUST** for the sum of \$179,215.60 which was calculated on the basis of estimated and actual costs of building his Unit, and associated costs as outlined below:

- | | | |
|-----|---|--------------|
| (a) | The LTO's initial payment of: | \$7,000.00 |
| (b) | An estimate for site preparation for MR KILLIAN's work and time; | \$5,000.00 |
| (c) | Legal costs on signing of the LTO (no account was available); | \$765.00 |
| (d) | Insurance estimate to build per square metre of MR KILLIAN's Unit plus an adjustment for plumbing and electrics which MR KILLIAN assisted with; | \$153,000.00 |
| (e) | District Council inspections fees; | \$1,100.00 |
| (f) | Additional drainage to MR KILLIAN's site as opposed to other sites; | \$4,962.60 |
| (g) | Additional sum for a difficult utility connection; | \$800.00 |
| (h) | Replacement of a pillar box (MR KILLIAN was offered half of that sum but did not accept it); | \$1,820.00 |
| (i) | Cost of the wood burner; | \$3,894.00 |
| (j) | Telephone connection; | \$724.00 |
| (k) | Miscellaneous costs; | \$150.00 |
| (l) | An additional sum for the electrics of the garage door | \$600.00 |
| (m) | Interest on all sums at the same percentage THE TRUST is charging MR KILLIAN for late payment being 1.5% over | |

the call rate of **THE TRUST**'s bank.

- | | | |
|-----|--|------------|
| (n) | Legal fees in respect to this dispute | \$6,613.39 |
| (o) | Compensation for rent of \$100 paid since 1 October 2013 to the date of hearing being 26 weeks | \$2,600.00 |
86. The costs above total \$189,028.99 plus interest which appears to be **MR KILLIAN**'s updated total claim.

The Trust's Position

87. **THE TRUST** disputes that **MR KILLIAN** is entitled to any compensation from **THE TRUST** beyond the net sale price of the Unit, less any sum ordered, plus other sums pursuant to clause 12 of the LTO. **THE TRUST**'s view is that none of **MR KILLIAN**'s requests for compensation are justified. **THE TRUST** submits there is a clear process for sale of the Unit set out in clause 12 of the LTO. **THE TRUST** advises that **MR KILLIAN** has not signed any documentation required to authorise **THE TRUST** to sell the Unit. **THE TRUST** is therefore obligated to act on the basis of its termination of the LTO, on or about 13 October 2013.
88. The compensation to be paid to **MR KILLIAN** under clause 12 of the LTO is either:
- (a) The net proceeds of sale, if there is a new licensee prepared to purchase the Unit before the first anniversary of the termination of the LTO; or
 - (b) **THE TRUST** after the first anniversary of the termination of the LTO paying out **MR KILLIAN** "*the fair market value of the Unit as determined by mutual agreement or by the arbitration of two arbitrators and their umpire, such to be determined pursuant to the provisions of the Arbitration Act 1996. In any such arbitration the value of the Unit shall not include anything to cover the site.*"

The Panel's Decision

89. Any rights to payment of sums claimed by **MR KILLIAN** must be set out either primarily in the LTO, or in the RVA or the Code. Clause 12 of the LTO sets out the compensation available to the Licensee upon termination. There is no requirement for **THE TRUST** to pay more than what would be calculated in terms of clause 12.
90. The Code sets out at clauses 51 to 54 what must happen to sell a unit after termination of the LTO. That is not the subject of this Decision, but clause 54 assists in stating what is due the Resident on termination, or end of occupation. The paragraph includes firstly that the Operator must stop charging the Resident for personal services on the date the Resident stops living permanently in the Unit, and must reduce by at least 50% the outgoings charged to the former Resident, if no new ORA has been entered into by the latter of 6 months after termination, or the date the former Resident stops living in the residential unit, and removes all possessions.
91. **MR KILLIAN**'s service charge has stopped and this Decision addresses the other payments sought by **THE TRUST**. **MR KILLIAN** needs to collect his possessions to stop the storage fee.

92. The Panel finds that there is no compensation available for **MR KILLIAN** in the amount he seeks of the cost or estimated cost of building the Unit, as it has no legal basis.

COSTS

93. Both parties seek costs on the hearing against the other. Section 74 of the RVA sets out the requirements for an Order for costs to be made.
94. There have been a number of costs Decisions made in respect to the RVA including most recently **Perry Foundation v Waters and Murray** dated 20 December 2013. That Decision refers to other costs decisions under the RVA.
95. Section 74 establishes there is a discretion for the Panel to award costs if the Decision is fully or substantially in favour of one party. The factors that are to be taken into account include the reasonableness of costs sought, the amount of any award, the amount or value of the matters in dispute, the relative importance of matters in dispute to the parties, and the conduct of the parties.
96. This Decision is substantially in favour of **THE TRUST**.

Reasonableness of Legal Fees

97. **THE TRUST** seeks legal costs, copies of legal accounts owed by **THE TRUST** are set out in Exhibit "I" of the Bundle of Documents. The legal costs in respect to this proceeding commenced in invoice No 27667 on 29 October 2013. The costs excluding that of the actual hearing are invoice No 27667 for \$2,239.50, invoice No 28060 for \$480.40, invoice No 28428 for \$1,374.80, invoice No 28844 for \$3,914.60, and invoice No 29302 for \$4,181.40 totalling \$16,512.70 up until 18 March 2014. The rate set in the accounts equates to \$360 per hour which is reasonable for a principal of a firm.
98. The Panel is not aware of any other costs that could be sought by **THE TRUST** apart from legal costs. The Panel estimates that there would be another \$2,160 of legal costs for the actual hearing, and if the usual estimate of 1.5 hours preparation for each hour of hearing is adhered to then a further \$3,240 in costs would be incurred taking the total of legal fees to \$21,912.70. The Panel finds the legal costs claimed as reasonable taking into account the number of issues in dispute. **THE TRUST** is also obligated to meet the Panel's fees and expenses.

Amount in Dispute

99. In respect to the amount or value of the matters in dispute, **MR KILLIAN** seeks a sum between \$179,215.60 plus interest and \$189,028.99 plus interest. **THE TRUST** seeks the sum of \$43,781 plus April's legal fees.
100. The amount awarded to **THE TRUST** in the Decision is less than \$43,000 with a minor deduction of vehicle expenses in the service fees of 2010 and 2011 and possibly valuation fees, and reduction of some legal fees, interest and the additional administration fees.

The Importance to the Parties

101. **MR KILLIAN** is retired and has limited resources, with the Unit possibly being his major asset. **THE TRUST** is a Charitable Trust which does not enable profit making. There is therefore importance of the matters in dispute to both of the parties because of their respectively limited assets.

Conduct

102. **THE TRUST** submitted that **MR KILLIAN**'s Dispute Notice was unreasonable and not founded in law. For **MR KILLIAN** his dispute with **THE TRUST** has festered since 2008. The Bundle of documents includes a number of documents which are not strictly relevant to the proceedings, but reflect the level of discord between the parties.
103. Both parties participated in an appropriate manner at the hearing. **MR KILLIAN**'s claim was largely unfounded as to sums he claimed were owed to him, but that part of the hearing did not take significant hearing time, as **MR KILLIAN** was well prepared as to the sums he sought. **MR KILLIAN**'s objection to the service charges took some time at the hearing. **THE TRUST** during the hearing acknowledged **MR KILLIAN** was a valid Applicant.

The Panel's Decision

104. The Panel finds that there is a basis for ordering a contribution to costs by **MR KILLIAN** to **THE TRUST**. This is primarily because the application by **MR KILLIAN** against **THE TRUST** could not succeed as his monetary claim did not have legal foundation, **MR KILLIAN** did not appear to have legal advice in preparation for the hearing, or at the hearing.
105. The award for costs against **MR KILLIAN** is not to be seen as punishment. It is simply a conclusion reached after all the factors the law requires to be taken into account are considered.
106. In all the circumstances, the Panel orders that **MR KILLIAN** shall pay **THE TRUST** the sum of \$2,000 by way of costs of the hearing.

Dated at Auckland this **23** day of May 2014



Claudia Elliott
Disputes Panel