Decision of disputes panel

Name of applicant in dispute: **ELSIE HEPBURN MADDOCKS**
Name of each respondent in dispute: **LCM 1941 LIMITED** and **ARGOSY TRUSTEE LIMITED** as Trustees of the **EPSOM VILLAGE PARTNERSHIP**
Date of dispute notice: **7 March 2014**

The disputes panel appointed under the Retirement Villages Act 2003 to resolve the dispute between the applicant and each respondent has decided on the dispute as follows:

**Matters in dispute;**

1) *The correct deduction for the village operator to make from the proceeds of sale of the relevant unit, the applicant claiming there should be no more than $11,690.33; and the village operator claiming it should be $25,000.00.*

2) *Costs.*

**Findings on material issues of fact**

Refer attached decision dated 21 August 2014

**Panel's decision**
The disputes panel finds fully in favour of the respondents, **LCM 1941 LIMITED** and **ARGOSY TRUSTEE LIMITED** as Trustees of the **EPSOM VILLAGE PARTNERSHIP** and makes the following orders:

1. Refer attached decision dated 21 August 2014. The village operator was entitled to deduct $25,000.00 from the proceeds of sale of that unit.

2. That the applicant pay the village operator the sum of $3,000.00 towards its legal costs.

**Reasons for decision**

Refer attached decision dated 21 August 2014

.....
Single member
21 August 2014

.....
Date of decision

**Note to parties**
You have the right to appeal against the decision of the disputes panel (or of the District Court sitting as a disputes panel) under section 75 of the Retirement Villages Act 2003. An appeal must be filed in the appropriate court within 20 working days of the panel's decision.

Any costs and expenses awarded by the disputes panel must be paid within 28 days.

## DECISION

## INDEX



### Dispute and appointment

1. The dispute notice dated 7 March 2014 referred to the vacation by the applicant of Apartment 55 in the Epsom Village operated by the respondents as village operator on or about 17 October 2012; the extensive

redesign and refurbishment of the unit by the respondents; the claim by the respondents to recover the sum of $25,000.00 from the applicant in relation to that refurbishment; and the applicant's dispute of that amount. Reference was made to an agreement for sale and purchase of the unit by the applicant dated 17 July 1997; and its reference to " … *the costs of repainting and recarpeting of the Apartment*"; the applicant's view that the cost of repainting and recarpeting would be approximately $7,000.00; the withholding by the respondents of the sum of $25,000.00 towards the cost of refurbishment; and the applicant's claim that that retention and cost was outside of the obligations that the applicant had to contribute to the cost of repainting and recarpeting.

2. The reply from the respondents dated 5 May 2014 referred to the actual cost of refurbishment of the Apartment 55 as being $73,381.09; the respondents' interpretation of the relevant documents and liabilities arising thereunder as mentioned below; and the entitlement claimed by the respondents to retain the sum of $25,000.00 towards the cost of refurbishment of the Apartment.

3. Following preliminary exchanges I conducted a pre-hearing telephone conference on 15 May 2014 in which issues were identified and in which the parties agreed that there would be no hearing but that the parties would rely on submissions and documents provided by counsel with the decision to follow (unless I had any further questions). Timetabling was provided and has been complied with.

4. The submissions from the applicant included her concession that the reasonable cost of painting and recarpeting totalled $11,690.33 (compared with the sum of $7,000.00 referred to in the dispute notice).

**Background**

5. By lease dated NO C057656.2 Vavasour Charitable Trust Board (Vavasour) leased to Marion Margaret Birch Principal Unit 1T on Unit Plan 126361 (Apartment 55) for 999 years commencing 6 October 1989. Clause 4.2 of that lease made provision concerning the state of repair of Apartment 55 on termination or surrender of the lease. Clause 12 contained provisions for calculation of the amount to be paid to the lessee on surrender or assignment of the Lease which included (and this was not varied in the Variation of Lease referred to below) deduction of "*any costs reasonably required to refurbish renovate or reinstate the Unit*".

6. By Agreement for Sale and Purchase (ASP) dated 7 July 1997 the then lessee, Granite Enterprises Limited (Granite) sold to the applicant (as to a one-half share) and the estate of the late Samuel John Maddocks (not a party to this dispute)(as to the other half-share) the leasehold interest in an Apartment 55 created by lease C057656.2 for the sum of $190,000.00. The ASP expressly described the interest being sold and included "*Subject to Variation of Lease (attached)*".

7. There were the following special conditions of sale:

> "*The Purchaser acknowledges that it is purchasing the Lease herein subject to the terms and conditions set forth in the Variation of Lease attached hereto and the Purchaser further acknowledges that the said Variation of Lease shall be registered prior to the registration of the transfer of the interest in the Lease to the Purchaser under this agreement and the Purchaser takes title subject thereto.*
>
> *"The Purchaser acknowledges that the effect of clauses 2.1 and 4.2 of the Lease (as varied) is that at the end of the occupation of the Unit by the Purchaser the Purchaser shall pay the lessor'* [sic] *costs of repainting and recarpeting the Apartment*".

8. By Variation of Lease dated 21 July 1997 the then lessor and lessee (in both cases Granite), agreed on certain Variations to Lease 057656.2 including clause 4.2 then providing:

> "*The Resident will on surrendering assigning or transferring this lease pursuant to clause 12 hereof or at the expiration or sooner determination of this lease surrender or yield up to the Lessor the whole of the Unit and every part thereof including the Lessor's fixtures and fittings* ***AND*** *will pay to the Lessor such sums as may be expended by the* ***Lessor in refurbishment costs in returning the Unit the fixtures and the fittings to the same condition the Unit was in at the commencement of the Lease including but not limited to repainting and recarpeting***" (emphasis added).

There was also variation to the formula in clause 12 but that variation is not relevant to matters at issue.

9. It appears common ground that, although the Variation of Lease was dated subsequently to the ASP, it was that document to which reference was made in the Special Conditions of the ASP.

10. There have been several changes of ownership of the Retirement Village since that time such that the respondents are now the village operators and owners and Lessors under the Lease as varied.

**The parties' claims and contentions**

**The applicant**

11. The Applicant claims effectively that the Special Condition concerning costs of repainting and recarpeting take priority over any other contractual provision.

12. She says that she is entitled to the contractual obligations and entitlements to which that special condition in the ASP refers and that the respondents are not entitled to deduct more than the cost of repainting and recarpeting from the proceeds of disposal of the Apartment.

13. She contends that that special condition was "*clearly intended to give comfort to the incoming purchaser and lessee*" such that the formal part of the Lease's broader terms should be limited to the obligation referred to in that clause and that there are "*was no other purpose it could serve*".

14. The applicant argues that the ASP, the Lease and the Variation comprise documents that constitute an Occupation Right Agreement as defined by section 5 of the Retirement Villages Act 2003 (the RV Act). The dispute, she claims, should be determined having regard to all of those three documents as they comprise her Occupation Right Agreement.

15. She submits that the special condition supercedes the provision of the Lease, specifically in its reference to clauses 2.1 and 4.2 of the Lease and to the Variation and "*seeks to reduce the effect of the amended clause 4.2*".

16. The applicant further submits that the formula prescribed in clause 12.2 of the Lease (which was also varied in the Variation) must be read subject to that special condition which supercedes the Lease and clarifies the obligation the applicant was required to meet at the end of occupation of her unit.

17. The applicant sought to rely on evidence from an affidavit provided in which it was said that the General Manager of the respondents confirmed their acceptance that there were bound by the ASP provisions. That is disputed by the respondents who filed an affidavit from the General Manager. I disregard that evidence entirely. Any discussions there were between those persons were in the context of the dispute as then pending in March 2014 and I interpret the affidavits as being that it was in an endeavour to reach a settlement that any discussion was held and concession may have been made. I accept the respondents' submissions

that those exchanges were privileged in that context and I disregard them. Even if I were to consider them, it would be a very strange result that the dispute would continue when the very essential item on which the respondent continues to rely was purportedly waived by the General Manager on their behalf.

**The respondents**

18. In reply the respondents submit first that they are not bound by the provisions of the ASP; on the basis that they were not a party to it and cannot as a matter of law therefore be bound by any commitment that the then contracting parties may have made to each other.

19. They dispute that the relevant provisions of the RV Act changed the substantive rights of the parties and contractual obligations, referring to them as "*essentially only procedural provisions intended to set out the situations in which the powers of the Dispute Panel are to apply; [and do] not do something so fundamental as to override basic contract law*".

20. The respondents submit that the clause of the Lease as amended by the Variation overrides any contractual obligations that Granite may have had with the applicant. They further submit that the purpose of Special Condition 2 in the ASP was merely to record the applicant's awareness and acknowledgement that refurbishment would include the cost of repainting and recarpeting but not intended as a limitation to the words of clause 4.2 of the Lease. They point to the absence of any evidence that the insertion in the Special Condition 2 in the ASP was to reassure the applicant and argue that more would have been said had that been the case.

**Correct deduction – discussion**

21. It is the view of the disputes panel that the overriding provision was the Lease as varied and that its provisions are not subject to, or superceded by, the special conditions in the ASP.

22. Under clause 14 of the Lease as varied by the Variation the respondents were entitled to deduct from the sums otherwise due to the applicant on termination of the Lease the total cost of refurbishment to reinstate the Apartment into the condition it was in at the commencement of the Lease and its entitlement to recovery is not limited to the cost of repainting and recarpeting as claimed.

23. There appeared no dispute that the respondents had spent at least $25,000.00 on the refurbishment and indeed there was evidence of the total cost having been much higher than that. Because the respondents are only seeking to deduct the sum of $25,000.00, that is an appropriate deduction.

24. I note that there is reference in the submissions (Paragraph 34) to the respondents' being willing to reduce their claim "*only for the purposes of reaching settlement, and the matter has now progressed beyond this*", but I perceive that in fact the respondents only wish to deduct the sum of $25,000.00; and if I am wrong in that, that is the appropriate amount that should be deducted.

25. There was a formal lease between the then parties. There was negotiation with the applicant (and the estate of the late Mr Maddocks) at the time they purchased the Apartment from the previous owner. That negotiation was made with the then owner of the premises, the village operator, Granite. That negotiation included reference expressly to the fact that the lease would be varied so far as the amount that would be deducted on

surrender or termination of the lease for refurbishment costs to the Apartment. The variation was expressly recorded in a Variation of Lease entered into at the time. The Variation and its terms were expressly recorded in the ASP entered into between Granite and the applicant (and the estate of the late Mr Maddocks).

26. I have decided that the applicant must have been aware that Granite was insisting on the Variation and its terms being applicable in the context of the purchase of the Apartment by the applicant and the estate of Mr Maddocks. Although there is reference in the special conditions in the ASP to the cost of repainting and recarpeting only, there is also express reference to the terms of the lease and its Variation. Had it been intended that the Variation would be superceded by the provisions of Special Condition 2, that, in my view, would have been clearly expressed.

27. It is certainly an interpretation of the Special Condition that that is only an emphasis of parts of the deductions that **could** be made to underline that the cost would be included in the deductions for refurbishment.

28. Special Condition 2 is an acknowledgement by the applicant (and the estate of the late Mr Maddocks); it is not a covenant on the part of the vendor, Granite, which I would expect to be more likely if the express provisions of the varied lease were to be altered by agreement between the then parties.

29. The registered document, the Lease and its Variation, must take precedence over any private contractual arrangement that the applicant had with Granite. I do not accept that the respondents are bound by a private contractual provision to which they were not a party and of which there is no evidence of their having been given notice.

30. The definition of "*Occupation Right Agreement*" in section 5 of the RV Act includes that it refers to any written agreement or combination of documents that "*specifies any terms or conditions to which [the right to occupy a residential unit] is subject*". I do not consider that the procedural provisions concerning dispute notices and their resolution in later parts of the RV Act alter that definition. It is begging the question in the definition to rely on the same to argue that the Occupation Right Agreement includes the ASP in this case. The applicant can only say there is some ambiguity or disparity between the ASP and the varied Lease and argue that one supercedes the other. The fact that they all may be part of the Occupation Right Agreement as argued does not resolve the ambiguity or difficulty of interpretation that the case involves.

31. The conclusion is that the respondents are entitled to rely on the clauses of the Lease as varied by the Variation of Lease and were entitled to deduct the cost of refurbishment of the Apartment from the proceeds of its disposal. They have limited that claim to $25,000.00 towards the cost and in the opinion of the disputes panel, they are entitled to do so.

**Costs**

32. The applicant has sought a contribution towards her for legal costs, $9,800.00. That claim is rejected on the basis of the outcome.

33. The respondents in their submissions say that they accept that they are obliged to meet the costs of the disputes panel under sections 74(1) and (2)(d) of the RV Act. In fact there have been decisions of the disputes panel where it has been said that the obligation under section 74(1) is the primary obligation of the village operator in the first instance but that there made be consideration of recovery of costs incurred by the village operator in payments to the disputes panel.

34. The respondents seek an award of costs and expenses towards its costs if the decision is fully or substantially in their favour. They say that their costs and estimated further costs total some $13,140.00 plus GST. They seek an order for payment of costs in that sum.

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

> ***"74 Costs on dispute resolution***
>
> *(1) The operator that appoints a disputes panel is responsible for meeting all the costs incurred by the disputes panel in conducting a dispute resolution, whether or not the operator is a party to the dispute.*
>
> *(2) Whether or not there is a hearing, the disputes panel may—*
>
> *(a) award the applicant costs and expenses if the disputes panel makes a dispute resolution decision fully or substantially in favour of the applicant:*
>
> *(b) award the applicant costs and expenses if the disputes panel does not make a dispute resolution decision in favour of the applicant but considers that the applicant acted reasonably in applying for the dispute resolution:*
>
> *(c) award any other person costs and expenses if the disputes panel makes a dispute resolution decision fully or substantially in favour of that person:*
>
> *(d) in a dispute where the operator is not a party to the dispute, award to the operator, by way of refund, all or part of the costs incurred by the disputes panel in conducting a dispute resolution.*
>
> *(3) The disputes panel must make a decision whether to award costs and expenses under this section and the amount of any award—*
>
> *(a) after having regard to the reasonableness of the costs and expenses and the amount of any award incurred by the applicant or other person in the circumstances of the particular case; and*
>
> *(b) after taking into account the amount or value of the matters in dispute, the relative importance of the matters in dispute to the respective parties, and the conduct of the parties; and*

*(c) in accordance with, and subject to any limitations prescribed in, any regulations made under this Act for the purpose.*

*(4) Any person against whom costs and expenses are awarded under this section must pay them within 28 days of the decision to award them".*

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

*Kenward and Knebel v Metlife Care Kapiti Ltd*[1]

37. That case involved a dispute concerning an alleged failure by the village operator to control a fish smoker which another resident was using which, it was claimed, was causing a nuisance. The panel found the process fundamentally flawed because the other resident was not a party to the dispute and the applicants were seeking to make the village operator enforce rights against that party. The remedy sought by the applicants was refused first because of that fundamental natural justice issue but also because the panel was not satisfied that the smoker was a nuisance and further was satisfied that the village operator had taken all reasonable steps to try to resolve the dispute. In dealing with a cost application from the village operator the panel first referred to, but dismissed, the apparent argument that section 74 may not apply to an application for costs by the village operator because there is no express reference to this. The panel said:

> *"50 … The operator is indeed required to meet all the costs incurred by the disputes panel. That does not mean however that applicants cannot be required to reimburse or compensate the operator for some of those costs. Should an order for costs be made against an applicant in favour of an operator, the operator continues to be responsible under section 74(1) for payment of the costs incurred by the disputes panel. The applicants would not directly be paying any of those costs although that might be the indirect result. An order for*

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

*costs relates not only to the costs incurred by the operator in relation to the disputes panel. Such an order may also relate to other costs incurred by the operator in respect of being a party to the dispute … A further indication that an award of costs can be made in favour of an operator under section 74(2)(c) is that paragraph (d) permits an operator to be reimbursed for part of the costs incurred by the disputes panel in a situation where the operator is not a party. It could be argued that an operator should only receive a refund where it is not a party, otherwise applicants might be unduly discouraged from bringing disputes against operators. But the Panel Member prefers the opposite argument which is that it is unlikely that the legislature would have intended that an operator could be refunded all or part of costs incurred where it is not a party, but could not receive an award of costs in its favour where it is a party and has presumably incurred greater expense than if it were not a party."*

38. The village operator claimed internal management costs and external fees totalling $12,945.00. The disputes panel member's costs approximated $14,000.00 including airfares. Having taken various aggravating and mitigating factors into account the disputes panel member ordered each of the two applicants to pay the village operator $750.00 towards those costs.

*Perry & Others v Waitakerei Group Ltd*[2]

39. The dispute in that case concerned compliance by the village operator with the requirements of regulation 49 (d) and (e) of the Retirement Villages (General) Regulations 2006 which includes provision for the contents of a Deed of Supervision. There was further concern that the village operator had not been complying with the Deed of Supervision in the keeping of its accounts. The disputes panel ruled that there had been no failure to comply with the appropriate regulations. The village operator sought costs claiming that the dispute notice had been "*frivolous*".

40. In ordering a contribution of $1,000.00 towards the costs of the respondent including the disputes panel costs, the disputes panel in that case said:

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

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

*…*

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

*Perry Foundation v Waters Estate and Murray*[3]

41. An order for costs In favour of the village operator/applicant was made in that case for a contribution of $8,000.00 towards the costs that the village operator had incurred both in its own costs and in respect of the dispute panel costs.

42. It was said[4]:

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

*A F and C Barnes v Anglican Care (Waiapu) Limited*[5]

43. An order for costs was declined in an application made by the successful village operator in this case. It was accepted that there was jurisdiction to

[3] 20/12/13; D M Carden – Panel Member
[4] Paragraph 22
[5] 13/12/13; D M Carden – Panel Member

order costs under section 74(2)(c) of the RV Act but it was considered that there had been sufficient merit in the arguments advanced by the claimants/applicants in support of the dispute notice that there should be no order for costs against them even although those arguments were rejected.

44. The disputes panel **must** decide the matter under section 74(3) of the RV Act. That subsection addresses:

44.1. Whether to award costs and expenses and

44.2. The amount of any award.

45. There are to certain matters which the disputes panel is required to **have regard** to (subsection 3(a)) and matters which the disputes panel must **take into account** (subsection 3(b)).

46. **Reasonableness of costs claimed** The respondents gave no information about the costs they had incurred other than a statement from counsel on their behalf that these had to that time totalled $10,140.00 plus GST and that there were anticipated further costs of approximately $3,000.00 plus GST . I cannot assess the reasonableness of those costs in the absence of better information. I note that the applicant is only claiming costs totalling $9,800.00 and that is a factor to take into account. My assessment is that a reasonable amount to consider when calculating an award of costs would be $9,500.00 inclusive of GST.

47. **Amount or Value of Dispute and of Award** That is self-evident from the figures above, namely the difference between the amount claimed as correct deduction by the applicant, $11,690.33, and by the respondent, $25,000.00, namely $13,309.67.

48. **Relative importance to the Parties** I do not perceive that the matter was any more relevant or important to the applicant or the respondents. It might be said there was an issue of "*principle*" on one side or the other or both, but neither party presented the dispute as being one of significant importance. There may be some "*flow on*" effect for the village operator if there are other parties aware of the circumstances and are in a similar position, but there was no evidence of this.

49. **Conduct of the parties** **T**here was nothing in the conduct of the parties or their counsel which would militate in favour of, or against, any normal award of costs.

**Outcome and ruling**

50. I think that the respondents are entitled to a contribution to their costs.

51. The primary responsibility for disposal of disputes under the RV Act lies with the village operator including the initial responsibility for payment of the disputes panel costs. In this case the village operator/respondents have met the disputes panel costs in full and are not seeking a contribution.

52. There was not significant merit in the arguments advanced for the applicant. The documents presented were crystal clear as to their meaning and it was significantly optimistic on the part of the applicant to think that part of the contractual documents could be an enforced while other parts (those which referred expressly to the Variation of Lease and its terms) could be ignored.

53. It is axiomatic rule of law that a person cannot be bound to a contract who is not a party to it.

54. In her submissions in support of her claim for costs (which would assume success on the part of her arguments), the applicant relied on applicable High Court Rules (rather than the express provisions of the RV Act) and argued that she would have been entitled to approximately 2/3 actual costs incurred by her. That too might be said to be a "*yardstick*" by which I might assess the respondents' entitlement to costs and it is a factor I have taken into account.

55. Accordingly I order that the applicant contribute $3,000.00 inclusive of GST to the costs of the respondents in this matter.