In respect of a Disputes Notice dated 11 November 2013 under the Retirement Villages Act 2003

BETWEEN **Prema Devadatta, Guy Duindam and Edith Malloy**

Applicants

AND

Summer Homes Ltd

Respondent

DECISION OF THE DISPUTES PANEL MEMBER (R WILSON)

Acre Court Retirement Village Dispute

The Disputes Panel appointed under the Retirement Villages Act 2003 has determined the dispute between the applicants and the respondent as follows:

Presentation of Financial Information

(i) In relation to insurance held by the respondent; that the applicants are entitled to see the invoice and/or any such other document/s which evidences the premium payable and any and all documents which show how that premium is broken down to the amount attributed to the applicants' individual units.

(ii) In relation to financial information generally, including information about the specific amounts for the three other types of insurance that make up the calculation of the weekly fees: that the applicants are entitled to see all invoices for items that are included in the calculations for the weekly fees and in relation to budget figures, an itemisation of what is included within each item, as is reasonably practicable.

Insurance

(iii) The Panel has found that the applicants' claim that they have paid costs that are properly payable by the Madhvans, or either of their entities being the respondent (Summer Homes Ltd) or Seven Star Services Ltd is dismissed on the basis that there has been no breach of the applicants' Occupation Right Agreements ("the Management Deeds") or any other applicable provisions in respect of the fees that the applicants are required to pay.

Mismatch of Insurance and Retirement Villages financial year

(iv) The claim for the insurance year and Village financial year to be aligned is dismissed**.**

The Use of the Communal lounge/dining area

(v) The claim that the respondent has breached its obligation to make the communal area available to the applicants is dismissed.

Changes to Communal Area

(vi) The respondent is ordered to consult with the applicants about its decision to place a mini gym and additional television set with Sky TV in the lounge/dining area.

Introduction

1. The applicants are residents at Acre Court Retirement Village ("the Village") in Epuni, Lower Hutt.

2. The respondent is the owner and manager of the Village and is the Operator. Mr Edwin Madhvan is the manager and director of the respondent (Summer Homes Ltd).

3. The applicants initiated the Retirement Village Act 2003 ("the RVA") disputes procedures by the filing of a Dispute Notice dated 11 November 2013 ("the Dispute Notice").

4. Prior to the filing of the Dispute Notice the applicants and their legal advisors (Gibson Sheat) made complaints and requests for information which have not all been resolved. The respondent takes the view that these remaining matters do not meet the criteria for the filing of a Dispute Notice under s. 53 of RVA and accordingly says they cannot be subject of a Dispute Notice. Further, the respondent denies it has breached the RVA, its regulations, Code of Practice and Code of Residents' Rights, and the Management Deed[1] in the manner alleged by the applicants.

5. Following a pre-hearing meeting on 26 May 2014 the Disputes Panel resolved that the following matters would go forward to a hearing:
   (i) Presentation of financial information;
   (ii) Information about the insurance policy, and costs relating to insurance including a concern that the applicants were paying more than they should for insurance;
   (iii) The use of the communal facilities; and
   (iv) Maintenance procedures around the repairs to a hot water system.

Events pre-Disputes Notice and hearing

6. This information is provided by way of background as there have been procedural concerns expressed by the respondent about the changing nature of the applicants'

[1] Under the Retirement Villages Act the Management Deed is referred to as an Occupation Right Agreement (ORA). Other residents in Acre Court Village have different Occupation Right Agreements to these applicants and those other residents are not parties to these proceedings.

complaints, as well as concerns expressed by both parties about delays. There have also been applications made for costs, by both parties.

7. The applicants made a complaint to the respondent on 2 April 2013. The complaint included the alleged lack of detailed information about legal fees and maintenance expenses presented at the 2012 AGM that appeared to be included in the expenses that the applicants are required to pay. The applicants also sought Information about the insurance premium(s) and the insurance policy.

8. The respondent responded on 22 April 2013. The respondent maintained that the information about maintenance and legal costs had been requested but not provided by the previous owner so therefore, could not be provided to the applicants. The respondent stated that information it was required to provide about the insurance policy had been provided but that if more information 'relevant to your [the applicants] policy' was required then the policy could be viewed in Mr Madhvan's office.

9. The statutory manager, Ms Cooper, also emailed a response dated 6 May 2013 reiterating that the new operator did not have the information about legal expenses and maintenance costs and was not responsible for the previous operator's actions. She also maintained that there was no requirement for an operator to consult with residents about every item of expenditure. She commented that the legal costs may have been incurred due to the sale of the Village but that they did appear to have been included in the weekly fees that the residents pay; however when the total costs were compared to the revenue from the residents' weekly payments, even with the legal fees and insurance (check) excluded, the respondent's income from fees was $5,683.00 less than its expenditure. That is, even if it appeared that the applicants were paying the legal costs, because there was a still a deficit of income to pay (the expenses when those two sums were removed as expenses) the residents were not in effect, paying those costs.

10. On 9 August 2013 the respondent was sent a complaint formulated by the applicants' legal advisors about matters of management by the previous and present operator. The applicants claimed that the new operator (the respondent) was responsible for the actions of the previous owner by virtue of the Deed of Supervision. The practise of billing insurance separately was questioned along with a lack of clarity about what went into the

weekly fees. The applicants maintained that residents should have copies of forecasts of expenses and time to peruse, consider and query the amounts involved; also that they should be consulted about any increases in the weekly fees. There were further requests made in relation to viewing the insurance policy and the timing of premium payments to the insurer, with reference to when Mr Dunindam paid his share. Information showing the insured value of the each unit was requested and the applicants also queried what, in addition to the insurance for the buildings, was included in the insurance policy. There was also a complaint made about the manner in which AGM was run; and a complaint about non-owners voting and the recognition of the applicants as a residents' committee. The issue of use of the communal facilities along with changes to the area was also raised. The applicants suggested there should be a meeting to discuss these issues. In addition it was suggested that Mr Madhvan should join the Retirement Villages Association to better inform himself of the industry.

11. A meeting was held at the applicants request but this did not resolve the issues which the applicants had raised. The applicants then filed their formal Dispute Notice on 11 November 2013. The respondent provided its response to the Dispute Notice by letter dated 12 February 2014. The respondent provided a commentary on its understanding of the complaints, however sought to be provided with more clarity about the matters in dispute. The respondent provided the names of two panel members that might be approached to resolve the dispute. The respondent then appointed a member of the Disputes Panel to adjudicate on the unresolved issues.

Reasons for Decision

Jurisdiction

12. The respondent maintains there is no jurisdiction to hear the matters which are the subject of the applicants' Dispute Notice because the issues are not within the criteria set out in s. 53 of the RVA. Section 53 of the RVA specifies the types of disputes that can be brought by residents as follows:

53 Types of dispute for which resident may give dispute notice

(1) A resident may give a dispute notice for the resolution of a dispute concerning any of the operator's decisions—

(a) affecting the resident's occupation right or right to access services or facilities; or

(b) relating to changes to charges for outgoings or access to services or facilities imposed or payable under the resident's occupation right agreement; or

(c) relating to the charges or deductions imposed as a result of the resident's occupation right coming to an end for any reason or relating to money due to the resident under the resident's occupation right agreement following termination or avoidance under section 31 of the resident's occupation right agreement; or

(d) relating to an alleged breach of a right referred to in the code of residents' rights or of the code of practice.

(2) Nothing in subsection (1) enables a resident to give a dispute notice concerning any health services or disability services, or any facilities to which the Code of Health and Disability Services Consumers' Rights under the Health and Disability Commissioner Act 1994 applies.

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

(4) A resident may give a dispute notice for the resolution of a dispute affecting the resident's occupation right between the resident and any other person who is—

(a) another resident of the retirement village; or

(b) another resident's residential unit with that other resident's permission.

13. Whether there is jurisdiction to determine an issue is a matter which is distinct from the merits of a resident's dispute. If there is a basis under the Act's provisions that a dispute can arguably be determined under, the matter can be heard and determined.

Provision of financial Information

14. The respondent maintains that the outstanding issues about the provision of financial information are not within the s. 53 criteria for the filing of a Dispute Notice. Summer Homes Ltd argues that the complaints are about the form in which financial information is provided and that the form of information can have no effect on the occupation right, the right to access to services or facilities (ss 53 (1) (a)) and nor does it concern a change

to charges payable for, or a change in access services or facilities under the occupation right agreement (ss 53 (1) (b)).

15. The applicants rely on ss 53 (1) (d) and maintain that the right to information derived from the Residents' Code of Rights, brings their claim within jurisdiction.

16. The relevant provision in the Code of Residents Rights is:

    Information

    2. You have the right to information relating to any matters affecting, or likely to affect, the terms or conditions of your residency.

17. I accept the submission of the applicants that the form of the information, including the level of detail is an aspect of the right to have the information so long as it meets the requirement of the information having an effect on the resident's terms and conditions of residency.

18. My view is that the request for a breakdown of what comprises the weekly fees and the request for more detailed breakdown of budget items and actual expenses clearly fits within 53 (1)(d). I consider that a failure to deny residents with information of this nature could potentially amount to a breach of the right to information derived from the Code of Residents Rights as set out above. If the form or level of detail and itemisation could not be challenged, then the Right to Information could be rendered meaningless.

19. I also accept that the form in which information is provided can be the subject of a dispute based on the Right to Information.

20. The respondent has submitted that the only matter that affects the residents' fees is the Consumer Price Index (CPI) and therefore that is the only information that has to be

provided in respect of the weekly fees. It says that in this case, as this information has been provided and has not been raised as an issue, then there is no jurisdiction. [2]

21. I disagree. Although I can only assume that there is a basis, derived from something other than the Management Deed, that either limits increases to the weekly fees to upwards movements in the CPI, or matches movements in the CPI to the fees in the unlikelihood of a decrease.[3], a limitation on the right to increase the fees should not take away the right to know what is covered in terms of outgoings by weekly fees paid. The Management Deed specifies that the obligation of the residents is to pay the "administration charges" (referred to as weekly fees under the RTA) as defined in Clause 2 of the Deed. Unless I was satisfied that this provision is no longer applicable, I consider the Right to Information must include information about the costs and expenses that make up these charges.

22. In the alternative, I am of the view that clause 38 (1)(b) of the Code of Practice confers jurisdiction for further breakdowns of what is included in the weekly fees, to be provided on request by a resident. I consider that the word 'charge' in that clause, which is undefined, includes weekly fees. Clause 38(1)(b) provides:

> **38. Breakdown of items**
> On invoices to residents, the operator must list charges for items as follows:
> b. a breakdown of what the charge covers.

Information about Insurance Policy

23. The respondent has submitted that by providing a copy of the insurance policy, and confirming that no other property is owned by Summer Homes Ltd, there can be no

[2] This argument was raised about the right to issue a disputes notice about decisions 'to change the fees' under Clause 37; but equally I consider that it could have been argued under the Right to Information that effects the terms and conditions of the occupancy.
[3] The first time that I was aware that increases to fees for the residents were limited to CPI was when the respondent's submissions for the hearing were received. No one was able to enlighten me during the hearing where this is provided for. One of the applicants thought the practise began two years before Summer Homes Ltd took over; Mr Duindam thought it was considerably longer.

further complaint about there being a lack of information in respect of insurance. Again, putting aside the merits of the dispute before me, I consider that further information such as the premium amount for the insurance payable, the type of insurance residents are expected to pay as a component of their weekly fees, and the provision of the schedule, is also information that effects a resident's terms and conditions of occupancy. On that basis I consider there is jurisdiction provided under s 53(1) (d).

24. I note that although the details of the remaining insurance issues were not specified in the Disputes Notice as noted in the respondent's submission, there was a clear reference in the Disputes Notice to the applicants' lawyers' letter paragraphs 21-23 where these issues were raised. It cannot be said, therefore that those issues did not form part of the issues particularised in the Dispute Notice.

Subsidisation of the Madhvans

25. The respondent has questioned, not necessarily the jurisdiction of the panel to determine this issue, but the basis for this dispute. The respondent alleges the basis for this aspect of the dispute has not been provided.

26. I am quite satisfied there is jurisdiction to hear this issue on the basis of an alleged breach of the Management Deed in respect of what the applicants are obliged to pay (the Occupancy Right Agreement s. 53(1) (a)). This section specifies that decisions that affect the resident's occupation rights are included or as a breach of the Code of Residents Rights, Right 1 (The right to services and other benefits promised to you in the occupation rights agreement).

The Use of Communal Facilities

27. I am of the view that the concern about people other than the residents using the communal facilities can be heard and determined.

28. The Management Deed requires the operator to make the communal facilities available to residents; and the Code of Residents' Rights, Right 1, the right to services and benefits promised in the occupation agreement, provides the jurisdiction. Availability can be affected by who else may be entitled to use it.

The addition of television(s) and gym equipment in the communal facilities

29. The applicants' complaint concerns an alleged lack of consultation with them by the respondent before a large screen television set and gym equipment were placed in the communal area.

30. The respondent maintains that a resident has no right to be consulted when there are no cost ramifications for that resident. Again putting aside the merits of the applicants' claim in this case, it is clear to me that the right to consultation is a matter which can form the basis of a dispute under the Right 3 of the Code of Residents Rights. This is replicated by the Code of Practise in Clause 28. Right 3 provides:

> ***Consultation***
>
> You have the right to be consulted by the operator about any proposed changes in the services and benefits provided or [emphasis added] the charges that you pay that will or might have a material impact on your—
>
> i. occupancy; or
> ii. ability to pay for the services and benefits provided.

31. The addition of the gym and television set is a change in a benefit provided; the benefit being the use of the communal facilities. The word "or" establishes that it is not only things that affect charges that residents have the right to be consulted about.

Maintenance

32 The time taken to properly repair the hot water system is the issue behind the dispute about maintenance and/or repairs.

33 I am satisfied this can be considered under Clause 40 and 41 of the Code of Practice which clauses concern the operator's obligation to maintain the buildings, plant and

equipment and to have procedures in place for minor repairs maintenance and emergency repairs.

Summary of Findings

34. In summary I am satisfied that the Panel has jurisdiction to hear and determination all four issues which have been referred to me.

Substantive Issues

Provision of Financial Information

35. The applicants allege that the financial information they have been given is insufficient. They rely on the Right to Information in the Code of Residents Right as the basis for their claim that further information should be provided. The applicants seek a “fully particularised itemisation of outgoings” in respect of the outgoings they are paying together with copies of invoices for each outgoing when requested.

36. The respondent refers to the requirements in the accounting section of the Code of Practice, Clauses 37 to 39, and submits that these clauses have not been breached. The accountant says disclosures meet the requirements of the relevant provisions including Regulation 9 (3) of Retirement Villages (General) Regulations 2006.

37. I accept the letters advising the applicants of their new weekly fee met the requirements of clause 37 (to be issued when the amount charged is amended). They also comply with the requirements of Clause 39 in that I consider them to be easy to read and understand. However I am not as satisfied that clause 38 in respect of the requirement for a breakdown of what the charge covers has been complied with. In any event it comes down to the same argument as raised under the Right to Information, about how detailed that information has to be.

34. I do not consider that compliance with Clauses 37, 38 and 39 means that the Right to Information is respect of financial matters has properly been given effect to. These Clauses are about the minimum requirements to be included in an Occupation Rights agreement. They are not a code of what financial information should be provided as of right and upon request.

35. The applicants, relying as they do on the Right to Information in the Code of Residents' Rights, must establish that the information they seek has an effect on their terms and conditions of occupancy, in this case, what they pay the respondent; what is provided by the respondent in exchange for the fees, and for insurance what they and the Village have cover for.

Costs and Type of Insurance Information

36. The applicants' through their solicitors requested a full copy of the insurance policy, the valuation of each unit for insurance purposes, information as to which events would trigger a payment to residents, what the insurance covers and the timing of the premium payment. The Dispute Notice lodged subsequently referred to these requests.

37. A copy of the building policy for the buildings insurance, NZI Multi Units Dwelling, was provided by the respondent after the Dispute Notice was filed. The applicants' submission for the hearing asked for further information about insurance premiums and noted the schedule had not yet been provided. In their submission the applicants relied on the Right to Information.

38. The respondent says that the information sought in the submission had not been requested prior or that it had not clearly been requested prior, so there can be no finding that there is a failure to respond to a request. I note that there was a failure prior to the issue of the Dispute Notice to supply even the generic policy wording for the buildings.

39. While I accept the applicants' initial complaint letter and the Dispute Notice does not explicitly refer to the premium information sought at the hearing, the request for the full policy encompasses the policy schedule. A breakdown of the total premium for the [up to] four types of insurance must exist in the schedule or an invoices as otherwise; the respondent would not know how much of the premium is for buildings in order to calculate the residents' individual amount of insurance for their respective units.

40. In short, I am satisfied that the request for premium information was encompassed by the request for the full policy. This is particularly so as the concerns expressed by applicant Prema Devadatta could not be answered without that information.

41. Further, I am satisfied that specific premium information is also encompassed in the request for itemisation and particularisation of the outgoings. There is reference in the earlier correspondence leading up to the formal complaints and the Disputes Notice about the insurance premium(s). It was also clear from the pre-hearing meeting that the applicants were still seeking premium information; information about insurance charges was listed as one of the four items going forward to the hearing. Having reviewed what applicant Devadatta has requested over time, I am satisfied that premium information is covered by the requests, formal complaints and the dispute notice. In simple terms, to understand what the residents are paying for, they need to be informed of the specific amounts and therefore I am satisfied they are entitled to seek proof of those amounts.

42. The calculation of the insurance payable by the applicants for their own units is not by reference to the CPI so the argument that are only entitled to information about the CPI cannot apply to insurance for the units.

43. My finding is that the applicants are entitled to have enough information about the insurance costs so they can be satisfied that the amount payable for their units (for example proof that the $10,464.84 (April 2013 to 31 March 2014) or the $4,325.62 (for 1 September to 31 March 2013) is in fact the amount invoiced or payable for that portion of the insurance. The entitlement to this information based on the right to information

that effects terms and conditions. I am satisfied that the request for insurance value for each unit does not exist, although it probably could be calculated from the total insured value and is not something the respondent is required to supply.

44. The balance of any insurance components, for example the insurance for the communal areas that is included in the weekly fees along with other insurance cover for which the Residents pay (possibly business interruption and public liability) is altered by the increase/changes to CPI. The central submission of the respondent about detail of other costs is that they there is only one thing that affects their costs and that is the annual CPI figure.

45. The applicants' Management Deeds require them to pay the "annual administration charge" (Clause 2) which is defined in Clause 1 as "the Resident's proportion (as determined by the Manager) of the total annual expenses and out goings of the Village" further defined by the list of seven types of costs that can be charged to Residents. The question then becomes that due to the practice (or arrangement or contractual term) of the CPI being used to adjust the fees annually, are the individual outgoings/expenses that go into calculating the weekly fees amounts each year for the residents not on the CPI regime, something that affects these Residents' who have the CPI adjustment?

46. The finding is that the applicants are entitled to the information (in whatever form that it is in) which shows the actual amount and the type of outgoing or costs paid or charged by the respondent. That is because the applicants' primary obligation is to pay the amounts that are within the definition of expenses and outgoings, rather than a fee, presumably based on the amount payable as an administration charge at some point in the past. The fact that increases (or changes) to the fees have been set by the CPI does not remove their primary obligation[4]. Although unlikely, it is feasible that the costs of the Village could go down. In that case, but dependent on the terms of the CPI index arrangement, it may be that in years other than 2012-2014, residents will be paying actual operating expenses and outgoings. Even if the residents are not paying "the full

[4] Again I note the lack of information about why and how the CPI regime exists. As I have not been provided with any documents showing that clause 2 of the Management Deed is no longer applicable, I have assumed it is still a term of the contract.

price" for the operating expenses they should be permitted to know what is being paid for which recoverable expenses. This would allow the residents to have some insight into what is being provided by the respondent that is covered by the weekly fees; and it may well also provide some information about matters such as the viability of the Village, a relatively recent concern. In short the information about Village expenses, while it may not affect the precise amount the applicants pay in weekly fees, could well be information that affects their other terms and conditions in the sense of what is provided by the respondent and what they have to pay separately. A format for the presentation of the information has been put forward by Guy Duindam. While it appears to be good format for ease of understanding and assessing, there is no basis on which to require that particular form be used. .

47. Comment was made by the respondent that because the fees for the applicants were set by the previous operator, they do not know what makes up the figure that the CPI is applied to. Regardless of the change of operator, it would seem to me that the applicants are entitled to know how that figure has been calculated and I consider it is the respondent's duty to make any necessary inquiries to ascertain the basis for the relevant fees.

Subsidisation of the Madhvan's Unit

48. This issue concerns the calculations of weekly fees for the Village being set by excluding the Madhvan's unit which is part of the Body Corporate and the Village. The weekly fees have been calculated by dividing the applicable costs by 19 units when there are in fact 20 units when the Madhvan's unit is included.

49. The respondent submits again that as the applicants' fees are not set by dividing the outgoings by the number of units, but varied only by movements in the CPI, the applicants cannot be subsidising the Madhvans.

50. I accept the respondent's submission on this issue. I am satisfied that it is unlikely that the applicants are subsidising the Madhvan's unit.

51. As the applicants are paying significantly less than residents whose fees are set by the cost of outgoings and services, any subsidisation of the Madhvan's share of say of $570.18 a month, when divided by 19 (the number of ORA residents) each resident would be paying $30.00 more a month. The per month figures of $570.18 per month would apply if simply dividing costs (excluding insurance)[5] by the number of units ; Prema Devadatta is paying $449.54 , Guy Duindam and Edith Molly $471.41.[6]

52.Because the applicants are paying in the region of $100 less than the 'non- CPI' residents I consider that it is unlikely they are paying a share of expenses attributable to the Madhvan's occupancy in the Village. I also note it that it is not at all clear that it would in fact be a breach of the other residents' Occupation Right agreements to pay a portion of expenses that includes expenses or outgoings attributable to the Madhvan's premises, or for insurance items like public libaility or business interruption insurance. However their obligation to pay depends on the precise terms of their respective Occupation Right agreements. Thus, my finding on this issue is limited to my consideration of the applicants' situation only.

Mismatch of the insurance cover year and the Village's financial year.

53. The remaining issue under the insurance heading arises from the fact that the policy year period differs from or, put another way, is not aligned to, the Village's financial year. The applicants' submission describes the problem as making it difficult to set the weekly fees, and (as raised in earlier documents) the confusion caused when there was large increase not anticipated when the fees were set.

54. While I accept there has been confusion over the insurance payments that can attributed in part to the insurance year and Village's financial year being different, I do not consider there is a basis for ordering the respondent to align the policy year with the

[5] On based Prema Devadatta's copy of the Village Outgoings Expense Budget ending March 2014 and stated to be effective 10 October 2013.

[6] Guy Duindam and Edith Malloys' per month figure is derived from their fortnightly fees effective 8 October 2013.

financial year. I note that the respondent has stated he wishes to change the situation to bring the two 'years' into alignment.

The Use of Communal Facilities

55. The applicants have complained that for various reasons they feel uncomfortable in the communal lounge area. The complaint is that the Madhvans' use the communal lounge as an extension of their living quarters. There was a specific allegation, by way of example that a woman thought to the Madhvan's nanny was watching television in the room and pulling the room divider to the exclusion of others.

56. Mr Madhvan seems to accept that there may have been such an occasion and that in addition to the family members, others who are not residents such as the nanny, whether an employee or friend, use the room. However the respondent has maintained that as he and his family are also residents in the Village they too must be entitled to use the communal lounge. Evidence was given in support of the respondent by another resident (Mrs Nora Ball) who stated that she can see the communal lounge from her unit and that it is rarely used. I have not placed significant weight on this evidence but have considered it in any event.

57. Clause 5(a) of the Management Deed requires the communal facilities to be made available on a non-exclusive basis in common with the other Residents. Under the Management Deed the definition of a Resident is "residents who own units in the Village". This may or may not technically include the Madhvans as it appears that their unit is owned by a company Seven Stars Ltd rather than themselves personally. However I am unwilling to find that the Madhvans' are not residents simply because the vehicle for their ownership of a unit is a limited liability company.

58. Although 'Resident' is defined in the RTA and its other provisions as being someone who has signed an ORA, which I assume the Madhvans have not (at least not in a personal capacity), I am not satisfied there is a basis for saying that the right to use the

facilities “in common with other Residents” excludes the Madhvans. Although the Code of Practice can override less favourable provisions in the Occupation Right Agreement (including the Management Deed) , there is no provision in the Code of Practise that refers to who is entitled to, or may use, the communal facilities. For that reason I am not satisfied there is a basis for saying the Madhvans cannot use the communal facilities in the same way as do residents who have signed occupation right agreements. Had I found differently there would be a difficulty as I am aware that under at least one of the other Occupation Right Agreements in place for the Village it is stated that the right to use those facilities is in common with the respondent operator.

58. The right to use the area still leaves the question open as to whether the Madhvans or their personal employees/friends, employees of Summer Homes Ltd or their associates, have conducted themselves in a manner that prevents physically or constructively, the residents from being able to use the area. While I have accepted that there was probably at least one instance where the “nanny” did watch television and divided an area off for her to watch television, I do not consider this is enough in itself to hold that there has been a breach of the Management Deed warranting a formal order in this case restricting people other than residents and their invitees from using the area.

59. Use by employees, who are not residents, for their own recreation is clearly not allowed for under any of the provisions. A suggestion is that the Madhvans be mindful that the area is primarily for recreational use by the people who reside in the Village, and that while that does not exclude them or their invitees from the communal areas due to their status as residents, it does not include use for the Operator’s non Village work purposes or by the employees of the operator for their recreational purposes in the same way that it would not be acceptable for other residents’ friends or families to use the room for their own purposes. The two hats worn by the Madhvans, as the manager and as residents, is a reason for them to take particular care about the effect their use of the room may have on the other residents’ comfort in the communal area. However there is no basis for a complaint about staff, and Mr Madhvan, if their work in and for the Village requires them to be present in the communal room. Being present for work purposes could also include being present, ostensibly socialising with residents

when they are present as part of their manager role as opposed to being there for personal reasons.

Consultation about changes in the Communal Areas

60. The applicants have also complained about the changes made to the communal area, namely the installation of a large screen television with Sky television and possibly the smaller “gym TV” added to the one already present when the respondent took over; as well as the installation of a mini gym in the communal area (“the additions”). The applicants rely on Clause 28 of the the Code of Practice, being the Right to be Consulted as well the more specific provisions in the Code of Residents Rights, Right 3 namely:

> You have the right to be consulted by the operator about any proposed changes in the services and benefits provided or the charges that you pay that will or might have a material impact on your—
>
> i. Occupancy; or
> ii. Ability to pay for the services and benefits provided.

61. The respondent regards the additions as improvements provided at no cost to the applicants and the changes as minor and not having a material effect on the applicants’ occupancy.

62. The applicants are negative about the changes saying the gym is placed in an area where it was previously available as a quiet spot to sit in the sun; that it is not suitable for older people to use without supervision; and further, they say there is no good reason to have three television sets in the communal area.

63. The set-up of the communal area and the facilities such as television and a gym is in my view something that is capable, on an objective basis, of having a material effect on a resident’s occupancy. Opinion will vary as to whether the change is major or minor, good or bad.

64. My understanding is that there was no consultation about the gym, about installing Sky television or the additional large screen television set.

65. Accordingly I order pursuant to section 53 (1) (b) and to section 69 (1) (b) of the RTA, that the respondent must properly consult with the applicants about the gym, television(s) and Sky TV, including the placement of these items in the communal area within [specify timeframe to ensure order is enforceable].

66. This dispute is a good example of why in addition to the right to be consulted it is a positive process in the sense of providing information to the respondent. Mr Madhvan, based on what he saw, thought the area he put the gym had only ever been used for storage including a bookcase that he moved in to the hallway. At the hearing I heard the applicants explain that was only the case as the previous operator packed to leave and applicant Devadatta in particular has enjoyed sitting in that area and could no longer do so.

Maintenance procedures

67. This issue has been raised by the applicants primarily because of the long period of time taken to repair the hot water system to the point it ran reasonably reliably. As I understand it, the applicants maintain that as it took 3.5 to 5 months to have the hot water system repaired there is either an absence of good policies as is required under the Code of Practice or there has been a failure to maintain. While the Code of Practice requires policies for minor and emergency repairs, and I assume there are no written policies about repairs, this is not the essence of the complaint.

68. The plumber Mr Dave Jordan provided information about his attendances in relation to repairs on the hot water system. He stated he carried out 12 visits to the Village to deal with the hot water system between 7 May and 22 August 2013. It seems the explanation for the delay is that there was a series of problems that caused the delay in

addition to the system not being an ideal set up for residential use (being the same as was used when the Village was a motel) together with a historical lack of maintenance.

69. I have found that there is no basis upon which I could make any orders in respect of this complaint. That is because I am not satisfied there was at, the time of the difficulties, a lack of long term maintenance or a lack of a process to deal with repairs. The respondent through Mr Madhvan called the plumber, as far as I have been able to ascertain, whenever he was aware of a problem with the system. There are no specific instances when I can see that complaints about the system were not dealt with by Mr Madhvan in a timely manner. However such a delay should it be repeated may well be unacceptable. I consider that had the applicants been fully informed by the respondent of the progress and efforts made on its part to rectify the situation then this complaint is unlikely to have arisen.

Costs

70. Both parties have applied for costs. I propose to deal with this separately. I will provide a preliminary view about the request and allow for both parties to provide comment on it before a final decision is made as to costs.

Robyn Wilson

Panel Member under the Retirement Villages Act 2003

Dated this 20th day of August 2014