

U N D E R

The Retirement Villages Act
2003

I n t h e m a t t e r of a dispute

B E T W E E N

**JOHN LEVER & JANET
LEVER**
5 Milford Avenue, Bethlehem
Country Club
Applicants

A N D

**BETHLEHEM COUNTRY
CLUB**
Carmichael Road, Bethlehem,
Tauranga
Operator

DECISION OF DISPUTES PANEL

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DECISION OF DISPUTES PANEL

Date of Dispute Notice	15 December 2015 and 9 May 2016
Date of Dispute Hearing	12 September 2016
Date of Decision	14 September 2016
Present at Hearing	MR and MRS LEVER , Applicants MS BALDWIN , Counsel for the Bethlehem Country Club Ltd and Operator of the Bethlehem Country Club MR DUNCAN , Manager of the Bethlehem Country Club MS MISHRIKI , In-house Solicitor for the Bethlehem Country Club

THE HEARING

1. This is a hearing under the **RETIREMENT VILLAGES ACT 2003 (the Act)** in respect to a Dispute Notice issued by **MR and MRS LEVER** in regard to **BETHLEHEM COUNTRY CLUB LIMITED (BCC LTD)**.
2. I am appointed as the Disputes Panel under s 60 of the Act.

UNDISPUTED BACKGROUND

3. **MR and MRS LEVER** signed an Occupation Licence (OL) to occupy a dwelling, and utilise the facilities and improvements at the **BETHLEHEM COUNTRY CLUB (BCC)** on 6 April 2006. The complex which is a Retirement Village was still under development.
4. The **OPERATOR** of the **BCC** is **BCC LTD**.
5. In approximately September 2006, **MR and MRS LEVER** moved into their dwelling at 5 Milford Avenue Bethlehem Tauranga.
6. Sometime in April 2013, a dwelling at 7 Milford Avenue next to **MR and MRS LEVER**'s, was completed and later occupied.
7. After occupation of No. 7, the **OPERATOR**, through its **BCC MANAGER** planted a hedge between the adjoining dwellings for privacy. **MR and MRS LEVER** objected to the hedge, which they say blocked their view.
8. From mid-April 2013 to mid-April 2014, consultation and discussion occurred between **MR and MRS LEVER**, and the neighbours at No.7, with the **BCC MANAGER**. The **BCC MANAGER** decided the hedge would be kept at a height of 1.5m.

9. In early 2015, once the hedge had grown to 1.5m, the **BCC MANAGER** became aware that it was not providing the desired privacy for the No. 7 residents, and the **BCC MANAGER** therefore decided to maintain the hedge at 1.7m. The **BCC MANAGER** was of the view that even if the hedge was 1.8m it would not impact materially on **MR** and **MRS LEVER**'s view. **MR** and **MRS LEVER** did not agree.
10. **MR** and **MRS LEVER** gave notification of a dispute between themselves and the **BCC MANAGER** by issuing a Complaint Form dated 18 May 2015. The **BCC MANAGER** acknowledged receipt of the Complaint Form on 20 May 2015.
11. **MR** and **MRS LEVER** were advised of the **BCC MANAGER**'s decision on the intended height of the hedge by way of a letter dated 19 May 2015.
12. In approximately August 2015, **MR** and **MRS LEVER** made a complaint to the Retirement Villages' Association of NZ (RVA). The **BCC MANAGER** was notified of the Complaint on 26 August 2015.
13. On 8 October 2015 the RVA communicated its decision, that there was no breach of the Code of Residents Rights, by the **OPERATOR**.
14. **MR** and **MRS LEVER** issued a Dispute Notice on 15 December 2015, received by the **BCC MANAGER** on 21 December 2015.
15. At some time, unknown to the Disputes Panel **MR** and **MRS LEVER** disputed the RVA decision.
16. On 11 January 2016, the RVA communicated that it maintained its earlier decision.
17. **MR** and **MRS LEVER** signed a further Complaint Form dated 25 February 2016, received by the **BCC MANAGER** on the same day.
18. A further Dispute Notice was issued by **MR** and **MRS LEVER** on 9 May 2016, and received by the **BCC MANAGER** on 11 May 2016.
19. **MR LEVER** advised at the hearing on 12 September 2016 that he and **MRS LEVER** withdrew the first Dispute Notice dated 15 December 2015, and that they relied on the Dispute Notice of 9 May 2016.

THE ISSUES

20. **MR** and **MRS LEVER**'s issues, as confirmed in the Pre Hearing Minutes dated 22 July 2016 are:
 - (a) Their treatment by the **BCC MANAGER** for the **OPERATOR**, in respect to the hedge dispute.
 - (b) The height of the hedge between their dwelling at No. 5 Milford Avenue, and the neighbouring dwelling at No. 7.
21. **THE OPERATOR**'s issues are:

- (a) **MR** and **MRS LEVER**'s dispute is not one for which a Dispute Notice can be issued under s.53 of the Act;
- (b) The Dispute Notices are outside the time limit set under s.57(1) of the Act;
- (c) The dispute is frivolous, or vexatious or an abuse of process, under s.66 of the Act.
- (d) A Costs Order is sought against **MR** and **MRS LEVER**.

ISSUES FOR THE PANEL

22. The decisions that need to be made by the Disputes Panel are as follows:

- (a) Does the Dispute Notice of 9 May 2016, come within s.53 (1) (a) or (d) of the Act?
- (b) If valid, is the Dispute Notice of 9 May 2016, within time, pursuant to s.57 (1) of the Act?
- (c) What rights do **MR** and **MRS LEVER** have in respect to the height and maintenance of the hedge?
- (d) What rights and obligations do **MR** and **MRS LEVER** and the **BCC MANAGER** have in respect to their interactions?
- (e) Is the 9 May 2016 Dispute Notice frivolous, or vexatious or an abuse of process under s.66 of the Act?
- (f) Should costs be ordered against either party?

A. DOES THE DISPUTE NOTICE COME WITHIN S.53(1)(a) OR (d) OF THE ACT?

23. The first issue for the Panel is whether the Dispute Notice of 9 May 2016 submitted by **MR** and **MRS LEVER** is a dispute which comes within the matters set out in s.53(1) of the Act. The dispute must come within one or more of the subsections (a) to (d) of s.53(1) to be a valid dispute.

24. Section 53 states:

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) ...
 - (c) ...

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

....

25. Section 53(1)(a) states that **MR** and **MRS LEVER** may issue a Dispute Notice for resolution of a dispute about a decision of the **OPERATOR** and the **BCC MANAGER**'s breach of their rights, only if the decision affects **MR** and **MRS LEVER**'s:
- (a) occupation rights; or
 - (b) right to access services; or
 - (c) right to access facilities; or is
 - (d) a breach of the code of residents' rights, or the code of practice.
26. This is not a dispute about access to services, or the right to access facilities. For the Dispute Notice to be valid it must therefore relate to **MR** and **MRS LEVER**'s occupation rights, or a breach of the Code of Residents Rights, or the Code of Practice.

OCCUPATION RIGHTS

THE PARTIES POSITIONS

27. **MR** and **MRS LEVER**'s position is that the Dispute Notice comes within ss53 (a) and (d) of the Act.
28. The **OPERATOR**'s position is that the Dispute Notice does not relate to any of the requirements in s53 (1) of the Act.

PANEL DISCUSSION

29. **MR** and **MRS LEVER**'s occupation rights are established through the Occupation Licence between themselves and **BCC LTD**, dated 6 April 2006.
30. Clause 1.2 of the Occupation Licence states:

“1.0 GRANT OF OCCUPATION LICENCE

1.2 The Resident shall be entitled to the non-transferable right to occupy the Dwelling when available and have access in common with all other Residents and their invited guests and all other persons from time to time authorised by the management to use the Bethlehem Country Club facilities and improvements on Bethlehem Country Club land.”

31. The definition of *occupy* in the Oxford English Dictionary is *the right to enter and take control*.
32. In summary, clause 1.2 of the Occupation Licence gives **MR** and **MRS LEVER** the right to occupy their dwelling. There is no definition of *dwelling* and the plan

supposedly attached to the schedule to **MR** and **MRS LEVER**'s Occupation Licence was not attached, or available to the Panel. The parties both agreed at hearing however, after viewing a number of plans of the **BCC**, that the dwelling did not include any surrounding land.

33. It cannot be said therefore, that this dispute effects **MR** and **MRS LEVER**'s occupation right for the dwelling. The hedge is not within the area encompassing the actual dwelling.
34. The second part of clause 1.2 refers to access to facilities and improvements, on **BCC** land, as being available for residents' use, including by **MR** and **MRS LEVER**.
35. The relevant part of clause 1.2 is;

“1.2 ... and have access in common with all other residents and their invited guests and all other persons from time to time authorised by the Manager to use the Bethlehem Country Club facilities and improvements on Bethlehem Country Club land.”
36. This right is repeated and expanded in clause 9.1 of the Occupation Licence, it states:

“9.1 The Resident shall have the exclusive right to the full use in common with that of all other Residents to Bethlehem Country Club common areas.

Bethlehem Country Club common areas are an extension of the Resident's Dwelling and are therefore available to Residents to use in the same way as they would use and look after their own Dwelling.”
37. Both clauses 1.2 and 9.1 of the Occupation Licence, clarify the status of the common land surrounding all the resident dwellings, and elsewhere in the **BCC**. In particular clause 9.1 records that the common areas *“are an extension of the Resident Dwelling and are therefore available to residents to use in the same way as they would use and look after their own dwelling”*.
38. It follows therefore the use of the common land by **MR** and **MRS LEVER** is equated to the use of their dwelling, as an extension to the dwelling, to be used and looked after as they would their own dwelling.
39. The next issue is whether the hedge comes within the term *improvements*. Improvements are not defined in the Occupation Licence or in the Act. The Oxford English Dictionary however defines improvements as *“the process of making something better”*, an example given is of home improvements.
40. The improvements at the **BCC** would by that definition include, communal buildings, driveways, lawns, gardens, hedges and the likes.
41. The issue is whether **MR** and **MRS LEVER**'s rights of access to common land, including the common land where the hedge is situated, and the hedge itself, are an occupation right, which therefore enables this dispute to fit within s.53(1)(a) of the Act.

PANEL DECISION

42. The Panel finds that the clauses in the Occupation Licence in respect to occupation of the dwelling, and access to common land should be interpreted broadly.
43. The interrelationship in the Occupation Licence between clauses 1.2 and 9.1 provides for the dwelling and common land to be treated in a similar manner. It refers to **MR** and **MRS LEVER** using and looking after the common land, as they would their own dwelling.
44. The Panel therefore finds, on a broad interpretation **MR** and **MRS LEVER** have occupation rights in respect to both their dwelling, and the facilities and improvements on the land, in a similar manner. The improvements including the hedge subject to this dispute.
45. The Panel finds that the issues in dispute set out in the Dispute Notice of 9 May 2016 filed by **MR** and **MRS LEVER**, about the hedge, are ones which affect their residents' occupation rights.
46. The Dispute Notice of 9 May 2016 is therefore a valid Dispute Notice, under s.53(1)(a), as to the hedge dispute, in that it effects **MR** and **MRS LEVER**'s occupation rights.

BREACH OF CODE OF RESIDENT'S RIGHTS OR CODE OF PRACTICE

CODE OF RESIDENTS RIGHTS

THE PARTIES POSITIONS

47. **MR** and **MRS LEVER**'s position is that their right to freedom from exploitation in the Code of Residents' Rights, has been breached by the way the **BCC MANAGER** has dealt with the hedge dispute.
48. The **OPERATOR**'s position is that none of the rights accorded to residents under the Code of Residents' Rights has been breached.

PANEL DISCUSSION

49. The second issue in the Dispute Notice, alleges a breach of resident's rights by the **BCC MANAGER** in his treatment of **MR** and **MRS LEVER**, relating to the hedge incident. This point is forcefully argued by **MR LEVER**.
50. The question is whether there has been a breach of any right in the Code of Residents Rights, or the Code of Practice, by the **BCC MANAGER** in dealing with the hedge issue.
51. **MR** and **MRS LEVER** allege that there has been a breach of their rights, by the **BCC MANAGER** by for example:
 - Management taking the side of the neighbours in total, in the hedge dispute;

- Management not taking account of **MR** and **MRS LEVER**'s interests in the hedge dispute;
 - Management not adhering to an "agreed" height in respect to the hedge;
 - **MR** and **MRS LEVER** being caused unnecessary stress by the continuing dispute, because of the **BCC MANAGER**'s failure to accord **MR** and **MRS LEVER** their resident's rights.
52. The Code of Residents' Rights contains requirements of provision of rights for residents to:
- Information;
 - Consultation;
 - Make a complaint;
 - Dispute resolution;
 - Use of a support person;
 - Be treated with courtesy; and
 - Not to be exploited.
53. It follows the rights that **MR** and **MRS LEVER** are entitled to be provided with by the **BCC MANAGER** in respect to the hedge dispute are; information, consultation, have the facility to make a complaint, and utilise dispute resolution, being treated with courtesy, and to not be exploited.
54. At the hearing **MR LEVER** acknowledged he and **MRS LEVER** had been provided with information, were consulted, had made a complaint, and undertaken dispute processes, had had access to support persons, and had been treated with courtesy by the **BCC MANAGER**, in respect to the hedge dispute.
55. **MR LEVER** however considered both he and **MRS LEVER** had been exploited, by not having their wishes implemented, as opposed to the wishes of their neighbour being, in **MR LEVER**'s view, implemented in full. The exploitation was about a lack of fairness between residents.

PANEL DECISION

56. **MR** and **MRS LEVER** are aggrieved by the decisions made by the **BCC MANAGER** over the hedge, and the way they perceive they have been treated by the **BCC MANAGER**. **MR** and **MRS LEVER** strongly argue that the Code of Residents' Rights has been breached, and that they have been exploited, by the **BCC MANAGER**, by not having their wishes in respect to the hedge implemented.
57. The Panel finds that there is an argument put forward, of a potential breach of the Code of Rights, as to exploitation of **MR** and **MRS LEVER** by Management.

58. The Panel finds that in respect to the alleged treatment of **MR** and **MRS LEVER**, and a potential breach of their rights, the Dispute Notice falls within s.53(1)(d) of the Act.
59. This finding under s.53(1)(d), does not determine the likely outcome of the alleged breach. It only finds that there is a possible breach of a right, not to be exploited has been satisfied. The possible breach has to be heard, before it can be substantiated.

CODE OF PRACTICE

THE PARTIES POSITIONS

60. **MR** and **MRS LEVER** accept the Code of Practice does not apply to this dispute.
61. The **OPERATOR** agrees.

PANEL DISCUSSION

62. The only relevant part of the Code of Practice, to the Dispute Notice is that of the complaint procedure.
63. **MR LEVER** acknowledged at hearing that he and **MRS LEVER** have had access to a complaints procedure.

PANEL DECISION

64. The Panel accepts by consent accordingly, that **MR** and **MS LEVER**, were accorded an appropriate complaint procedure, and utilised the same. There is therefore no evidence that the Code of Practice has been breached, by Management's treatment of **MR** and **MRS LEVER**, in respect to the hedge dispute.

B. IF VALID, IS THE DISPUTE NOTICE WITHIN TIME, PURSUANT TO S.57(1) OF THE ACT?

THE PARTIES POSITIONS

65. **MR** and **MRS LEVER**'s position is that the first Dispute Notice is withdrawn, and the second Dispute Notice is within time pursuant to s.57 of the Act.
66. The **OPERATOR**'s position is that both Dispute Notices are out of time, as time started when the first Dispute Notice was filed.

PANEL DISCUSSION

67. The first issue for the Dispute Panel is whether the first Dispute Notice can be withdrawn.
68. S65 of the Act states;

65 Hearing must be held

(1) In the course of conducting a dispute resolution, the disputes panel must hold a hearing unless-

(a) The applicant withdraws the dispute resolution notice;

69. **MR LEVER** advised at hearing he withdrew the Dispute Notice dated 15 December 2015, as he is entitled to do.

70. The second issue for the Disputes Panel is whether the Dispute Notice of 9 May 2016, is within the time limits set out within the Act.

71. Section 57 states:

57 Time for giving dispute notice

(1) A dispute notice must be given within 6 months after the dispute was first referred to the complaints facility or

(2) However, a dispute notice may be given after 6 months if the parties to the dispute agree.

...

72. The relevant part of section 57(1) requires that a Dispute Notice must be given within 6 months “*after the dispute was first referred to the complaints facility....*”

73. Sections 50 and 51 of the Act go on to provide clarification of the dispute process, which is important in deciding if the Dispute Notice is within the time limits.

74. Section 50 states:

50 Types of dispute procedures

In any retirement village there are 2 forms of dispute procedure: a complaints facility and dispute resolution.

75. Section 51 states that the **OPERATOR** must operate, and inform residents of a complaints facility.

51 Complaints Facility

The operator must operate and make known to the residents of a retirement village a facility for dealing with complaints by the residents.

76. In summary the **OPERATOR** must provide a complaints facility which must be used, before dispute resolution through the Disputes Panel can occur.

77. So what is the *complaints facility* provided at **BCC**, as required under s.51?

78. The Occupation Licence, at clause 22.1 states:

“DISPUTES

22.1 Any dispute which may arise between the Resident and any other resident or between the Resident and the Manager shall be referred to

the Manager for resolution in the first instance. If the dispute is not resolved within 60 days then either the Resident or the Manager may refer the matter to a disputes committee (“Disputes Committee”) established by the manager to hear and mediate disputes.”

79. In summary the dispute process required under the Occupation Licence is as follows:
- (a) **MR** and **MRS LEVER** must refer the dispute to the Manager for resolution;
 - (b) If the dispute is not resolved within 60 days, then it may be referred to the Disputes Committee.
80. The requirements under s.51 of the Act, are set out in clause 22 of the Occupation Licence. Therefore the first part of the complaints facility is implemented as soon as a dispute is referred to the Manager for resolution in the first instance.
81. In this matter therefore the issues raised by **MR** and **MRS LEVER**’s dispute came into existence, when the complaint was first referred to the **BCC MANAGER** by **MR** and **MRS LEVER**.
82. The question is when is a complaint considered referred to the **BCC MANAGER**?
83. The complaint process should only reasonably be triggered at an easily identified time. There would be never-ending dispute if the complaint process was seen as triggering the 6 month time limit in s.57, when the resident first informally raised the issue with the Manager.
84. The action of filing the Complaint Form is the only sensible trigger to initiating the procedure.
85. The second Complaint Form was filed by **MR** and **MRS LEVER** on 25 February 2016, and was served on the **BCC MANAGER** on the same day.
86. It is acknowledged by **MR LEVER** that the second Dispute Notice was filed because the first Dispute Notice was out of time. There is however, no apparent impediment to the filing of a second Dispute Notice, under the Act, or the Occupation Licence.

PANEL DECISION

87. The Panel finds the s.57, 6 month time limit occurs once, in this case, the Complaint Form is filed.
88. The Complaint Form, albeit the second one, was filed on 25 February 2016, and the Dispute Notice on 9 May 2016.
89. The Dispute Notice dated 9 May 2016 is therefore a notice which fits within the time limits under s.57.

C. WHAT RIGHTS DO MR AND MRS LEVER HAVE IN RESPECT TO THE HEIGHT & MAINTENANCE OF THE HEDGE?

THE PARTIES POSITIONS

90. **MR** and **MRS LEVER** argue that the **BCC MANAGER** has a moral obligation to treat them fairly.
91. The **OPERATOR**'s position is that there are contractual obligations for the **BCC MANAGER** to maintain trees and shrubs, including hedges. The residents have no rights in respect to such decisions.

PANEL DISCUSSION

92. **The BCC MANAGER** stated in evidence that the reason for planting, and maintaining the height of the hedge was for the privacy of **MR** and **MRS LEVER**'s neighbours.
93. **MR** and **MRS LEVER**'s obligations in respect to privacy of other residents are set out in the Occupation Licence at clause 7.1(h).
94. In the Occupation Licence, in clause 7.1 it states:

“7.0 RESIDENTS OBLIGATIONS

7.1 The Resident agrees covenants and undertakes with the Manager as follows:

(h) To acknowledge and observe the right of privacy of other Residents and avoid behaviour that would jeopardise the quiet enjoyment of other Residents of both their Dwelling or use of Bethlehem Country Club common areas”.

95. In summary **MR** and **MRS LEVER** have an obligation to observe their neighbours' right to privacy, of their dwelling and common areas.
96. Further **MR** and **MRS LEVER** have agreed by signing the Occupation Licence that management have the sole control over maintenance of trees and shrubs, which must include shrubs or trees which form hedges.
97. Clause 7.1(k) states:

“7.0 RESIDENT'S OBLIGATIONS

7.1 The Resident agrees covenants and undertakes with the Manager as follows:

(k) Trees, shrubs and all of the gardens will be cared for by the Manager who will have absolute discretion in their maintenance.”

98. **MR** and **MRS LEVER** have been advised of that position in the letter dated 19 May 2015 from the **BCC MANAGER**.
99. Apart from the obligation of residents to protect other residents' privacy, there are specific obligations in respect to maintenance of trees and shrubs, which must include hedges.
100. In clause 8.1.4 of the Occupation Licence the Management has obligations in respect to garden and ground maintenance including trees and shrubs as follows:

“8.0 MANAGER'S OBLIGATIONS

8.1.4 To maintain and keep in good and respectable tidy operational order and condition the common areas.....including the gardens trees and shrubs”

101. **MR LEVER** argues that beyond the obligations under the Occupation Licence, and the Act, that the **BCC MANAGER** has a moral obligation to be fair to both parties. **MR** and **MRS LEVER** say that, that moral obligation has not been fulfilled, as the neighbours' wishes had been implemented in full, as opposed to **MR** and **MRS LEVERS** wishes, which have not been implemented at all.
102. The **BCC MANAGER** gave evidence that he had made a difficult compromise decision, which met the moral aspect he felt, even if he was not legally required to. He considered he provided a resolution of the dispute, which treated residents equally and fairly as well as complying with the Act and the Occupation Licence.

PANEL DECISION

103. The Panel finds that although **MR** and **MRS LEVER** have rights under the Code of Residents' Rights, and the Code of Practice rights, they have no rights to decision making, about planting or maintenance of gardens, shrubs or trees.
104. The obligations under the Code of Residents' Rights and Code of Practice and the Act do not have a moral requirement, they are statutory and contractual rights. Those rights do not override the specific right and obligation of the **BCC MANAGER** to make unfettered decisions in respect to trees and shrubs.
105. The Panel finds that the **BCC MANAGER** had the legal authority pursuant to the Act and Occupation Licence to make the decisions he did, in respect to planting and maintaining the hedge.
106. The Panel finds further that **MR** and **MRS LEVER** have no legal rights to do more than give their views to the **BCC MANAGER**, for him to consider along with all other competing views in respect to the hedge.

D. WHAT RIGHTS AND OBLIGATIONS DO MR AND MRS LEVER AND MANAGEMENT HAVE IN RESPECT TO THEIR INTERACTIONS?

THE PARTIES POSITIONS

107. **MR** and **MRS LEVER**'s position was that they had the right to be treated equally and fairly as between residents by the **BCC MANAGER**.
108. The **OPERATOR**'s position was that there are no residents rights and obligations impacted by the hedge dispute.

PANEL DISCUSSION

109. The parties' obligations to each other are found in Schedule 4 of the Act, Code of Residents Rights.
110. **MR** and **MRS LEVER** have the following rights relevant to this dispute:
- (a) The right to information;
 - (b) The right to be consulted;
 - (c) The right to make a complaint, and have the dispute heard;
 - (d) The right to be treated with courtesy and have rights respected; and
 - (e) The right not to be exploited;
111. Effectively, the rights available to the residents including **MR** and **MRS LEVER** are that they will be consulted, treated with courtesy, and not to be exploited. They do not have the right to have their preferred options on disputed matters accepted, or implemented.
112. At hearing **MR LEVER** acknowledged the only right he considered breached was that of exploitation.
113. The Oxford English Dictionary defines *exploitation* as *treating someone unfairly for profit from them*.
114. The **BCC MANAGER** did not benefit from the planting, or height of the hedge, and therefore has not exploited **MR** and **MRS LEVER**.
115. **MR** and **MRS LEVER**'s complaint is not about the manner in which they have been dealt with, but the fact that their preferred option has not been accepted.

PANEL DECISION

116. The Panel finds that no rights available to **MR** and **MRS LEVER** have been breached, by the **OPERATOR**, through the **BCC MANAGER**, in respect to the issues in the Dispute Notice.

117. In particular the Panel finds that **MR** and **MRS LEVER** have not been exploited by the **BCC MANAGER** not accepting their preferred option in respect to the planting or height of the hedge. The **BCC MANAGER** did not treat **MR** and **MRS LEVER** unfairly so he could profit from his decision.

E. IS THE DISPUTE FRIVOLOUS, VEXATIOUS OR AN ABUSE OF PROCESS UNDER S.66 OF THE ACT?

THE PARTIES POSITION

118. **MR** and **MRS LEVER** dispute that their Dispute Notice is either frivolous or vexatious or an abuse of process.

119. The **OPERATOR** contends that since **MR** and **MRS LEVER** have filed 2 separate and similar Dispute Notices that, that is an abuse of process.

120. The **OPERATOR** does not state the dispute raised is frivolous or vexatious. Its contention is that the filing of the second Dispute Notice on substantially similar grounds is an abuse of process.

PANEL DISCUSSION

121. **MR LEVER** acknowledged at hearing that the reason for the filing of the second Dispute Notice was to correct a problem, with the first Dispute Notice being out of time. He alleged there were problems with both parties compliance. The Act provides for the parties to agree to extend the time for filing under s57(2).

122. **MR LEVER** advised at hearing he had thought the first Dispute Notice was no longer to be considered, after the filing of the second Dispute Notice. **MR LEVER** had not advised the **OPERATOR** that the first Dispute Notice was withdrawn until the hearing.

123. The Act does not prohibit the filing of a Dispute Notice provided it is correct as to form, and filed within the required time limits, which the Panel has found the second Dispute Notice complies with.

PANEL DECISION

124. This is a dispute which has not gone through a full hearing, until the present hearing. **MR** and **MRS LEVER** are entitled to have their dispute heard.

125. The Panel finds by consent that the Dispute Notice does not raise issues which are frivolous or vexatious.

126. The Panel finds that if the first Dispute Notice was not withdrawn, that may have been an abuse of process on the part of **MR** and **MRS LEVER**, but **MR LEVER** was clear the first Dispute Notice was no longer being pursued by him and **MRS LEVER**.

127. The Panel further finds that filing a second Dispute Notice when no prior Dispute Notice has been heard, even to correct a timing issue, is not of itself an abuse of process.

128. If a decision is made, and then a further Dispute Notice is filed on the same issue, consideration as to whether s.66 applies would then need to be given. That is not currently the case. If a future Dispute Notice on similar issues to this one were to be filed the issue of res judicata would be a consideration.

F. SHOULD COSTS BE ORDERED?

THE PARTIES POSITION

129. The **OPERATOR** seeks costs against **MR** and **MRS LEVER**.

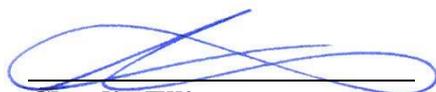
130. **MR** and **MRS LEVER** oppose costs.

PANEL DECISION

131. As a result of this decision, if costs are still sought, then written Submissions should be exchanged within 21 days by both parties, with the right of reply within 14 days.

132. Any decision on costs will made “on the papers”

Dated at Auckland this 11th day of October 2016



Claudia Elliott
PANEL MEMBER