Decision of Disputes Panel

Name of applicant in dispute: **JANE HUGHES**

Name of each respondent in dispute: **BELMONT LIFESTYLE VILLAGE LIMITED**

Date of dispute notice: **11 August 2016**

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:

CONTENTS

Matters in dispute

1) Whether of the village operator is entitled to deduct from the capital sum, $380,000.00, due on termination of the Occupation Rights Agreement for Apartment 21 at the Belmont Lifestyle Village the whole or any part of two Amenity Fees of $45,600.00 each, totalling $91,200.00.

2) Costs.

Findings on material issues of fact

Background and hearing

1. The applicant presented to the respondent by letter from her lawyers dated 11 August 2016 a dispute notice. That notice contained certain contentions of incompetence and promises made and referred to what the applicant would accept "*in order to settle this matter*". The disputed amount was said to be $55,600.00. The dispute notice concluded:

> *"If [the respondent] does not accept the above proposal we request the matter be referred to a disputes panel…".*

2. The wording in that letter suggests a compromise offer for settlement of the dispute, but it is nevertheless framed as a dispute notice and has been treated as such.

3. The respondent provided a reply dated 10 October 2016. This gave certain background and factual matters and the respondent's position on legal questions. The reply had sought an order for payment of the sum of

$274,655.00 in accordance with a statement annexed thereto which included deduction of both Amenity Fees of $45,600.00 each.

4. I was appointed by the village operator as the Disputes Panel and I convened a telephone conference. I was then told that there was dispute about the deduction of both of the Amenity Fees, totalling $91,200.00.

5. I recorded my articulation of the disputes arising from a conference in a Minute No 2 dated 17 October 2016. Timetabling for disposal of the dispute was directed. The directions included that the applicant articulate how the sum of $55,600.00 referred to in the dispute notice was expressly made up. I then received an email from the lawyers for the applicant dated 17 October 2016 which included:

> *"The sum of $55,600.00 represents the full Amenity fee ($45,600.00) as at the Commencement Date, and $10,000 off the Amenity Fee One year after Commencement Date."*

although it was then stated that this would be the amount that was "*acceptable*" which again suggested some compromise proposal.

6. That direction was repeated in Minute No 3 dated 3 November 2016. A Memorandum on behalf of the applicant dated 14 November 2016 then referred to the issues arising.

7. These included a reference to challenge to the respondent's entitlement to deduct either Amenity Fee. The Memorandum referred to breaches of the Occupation Right Agreement, the Code of Residents' Rights and Code of Practice, section 9 of the Fair Trading Act 1983, section 23 of the Consumer Guarantees Act 1993 and section 6 of the Contractual Remedies Act 1979.

8. On the basis of those breaches, the Memorandum said, the applicant sought to amend the original sum claimed to the total of the two Amenity Fees,

$91,200.00 and to "*damages*" in the sum of $20,000.00. Any amendment to the dispute notice was resisted by the respondent at the hearing as noted below.

9. Otherwise the matter proceeded under timetabling and was heard by me on Wednesday, 7 December 2016. The parties were represented by counsel. Evidence was given from each of the two attorneys for the applicant, Mrs Dick and Ms Warner, the director of the respondent, Mr Wayne Wallace, and the manager of the Belmont Lifestyle Village, Ms Karen Martin.

The applicant's claim

10. At the hearing the claim for "*damages*" was abandoned for the applicant. It had been made under section 70 of the Retirement Villages Act 2003 (the RV Act). The power to order damages under that section can only be made in a dispute referred to in section 53(3) of the RV Act and that subsection refers to disputes

> *"... 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" (emphasis added).*

(Any such dispute must be resolved under section 60 of that Act by a disputes panel composed of at least 3 members).

The applicant apparently accepted that the dispute could not be under section 53(3) as it did not allege any breach of the agreement in disposing of the unit which had already been done.

Essentially the dispute is as to the entitlement of the applicant following the disposal.

11. As to the proposed amendments to the dispute notice, it was argued for the applicant that the amendments were within any time limits, that the RV Act does not prevent a disputes panel from considering points raised in a Memorandum such as this, that there was not sufficient reason not to hear the dispute as the majority of points raised are a "*clarification*" of the grounds in the dispute notice, that the only amendment was as to quantum claims, and that the quantum

relates directly to the same issues and grounds raised in the original dispute notice.

12. It is not necessary for me to decide definitively on whether a dispute notice can be amended in the course of its disposal by a Disputes Panel as the applicant has purported to do in this case. The form of a dispute notice is prescribed by section 56 of the RV Act. The time for giving a dispute notice must under section 57 be 6 months after the dispute "*was first referred to the complaints facility*" (which facility is required to be operated and made known to residents by section 51), unless the parties otherwise agreed.

13. There are further requirements concerning the Disputes Panel including disclosure of interests and independence. It could be the case that a proposed amendment to a dispute notice might need reconsideration of the appointment of the Panel or disclosure of interests. Certainly, it would be useful if any changes to the allegations in a dispute notice were dealt with by way of amendment; but that might depend on the nature, timing and extent of the amendment.

14. In this case, the dispute notice referred to entitlement to deduct one Amenity fee at least if not both which was said to have been occasioned by "*incompetence*" on the part of the respondent.

15. I have considered the dispute notice and the issues raised by the proposed amendment.

Background

16. The respondent is the owner and operator of the Belmont Retirement Village at 12 Coronation Street, Belmont, Auckland.

17. The attorneys for the applicant and daughters are Mrs Dick and Ms Warner under enduring Power of Attorney dated 25 January 2008.

18. On 18 November 2014 the applicant's attorneys signed an Occupation Right Agreement with the respondent in respect of Apartment 21 at the Belmont Retirement Village.

19. The agreement provided for payment of a capital sum of $380,000.00 including any GST and a service fee of $463.05 per week including GST.

20. A certificate by a lawyer advising the applicant and her attorneys was completed dated 18 November 2014 confirming explanation to the attorneys of the general effect and implications of the Occupation Right Agreement in a language that was appropriate.

21. The applicant moved into the Apartment 21 at the Belmont Retirement Village on 18 November 2014.

22. She remained there until 8 December 2015 when the agreement was terminated on her behalf and she moved to another facility.

23. A new resident for Apartment 21 was found by the respondent which then accounted to the applicant for her entitlement under the Occupation Right Agreement, namely the capital sum repaid but with deductions of the two Amenity Fees mentioned, totalling $91,200.00 and an administration fee of $14,145.00 (the latter of which is not in dispute).

24. The deduction of the Amenity Fees was challenged by the applicant's attorneys as mentioned above resulting in the dispute notice considered by me at the hearing.

Pre-Agreement

25. Evidence was given by each of the applicant's attorneys and daughters, Mrs Dick and Ms Warner. Mrs Dick said that they chose for their mother, the applicant, to live at the Belmont Retirement Village "*based primarily on what*

[the] owner Mr Wayne Wallace said to [them] in regards to the level of care [the applicant] would receive if she chose to live there".

26. The applicant had been residing at another retirement village but on 6 November 2014 she was admitted to North Shore Hospital and during her stay there Mrs Dick and Ms Warner were advised that the applicant could no longer live in an independent living apartment and needed certain care.

27. Mrs Dick said that the applicant was suffering from dementia and her condition was likely to deteriorate over time; and that she needed to be somewhere where staff could also monitor her when she experienced absence seizures.

28. Mrs Dick said that, after having looked at other options, she met with Mr Wallace and Ms Martin at the Belmont Retirement Village. She said that she and Ms Warner explained the applicant's situation with her fading memory and need for residential care with supervision. She said that both Mr Wallace and Ms Martin were reassuring that the Belmont Retirement Village could meet the applicant's needs and she gave detail about what she said was said.

29. There was reference to the provision of meals and medications, regular trips and shopping excursions, organising a van for outings, encouragement of residents to organise clubs, and the provision of a hairdresser. She said that both Mr Wallace and Ms Martin were emphatic that the staff at the village could monitor the applicant if and when her "*turns*" appeared; but she said that she had explained that these did not require hospitalisation but that the applicant just needed to be monitored until she came around. Then she referred to the applicant becoming anxious and requiring comfort.

30. Ms Warner referred[1] to a written record she had made of the recommended care that the applicant required, namely supervised meals, supervised medications, encouragement to join in group activities, and consistent care so as to notice if she was unwell. She did not, however, in her evidence refer to having mentioned those matters to either Mr Wallace or Ms Martin, but rather

[1] Paragraph 7

spoke about the applicant's needs for hospital care, when she was referred to the next door facility for which the Belmont Retirement Village residents had first offer of beds.

31. Specifically, Mrs Dick said that Mr Wallace specifically said that "*this will be [the applicant's] last move*" which Mrs Dick said made a huge impression on her because she understood that the Village would be able to care for all of the applicant's needs for the remainder of her life.

32. The decision to take the Belmont Retirement Village apartment for the applicant was made which Mrs Dick said was

> "*.. mainly due to the strength of [Mr Wallace's] promise that Belmont was able to care for the elderly with dementia and [the applicant] specifically, and given we had clearly discussed [the applicant's] condition and needs*".

33. Mrs Dick gave evidence about the advice she had concerning the Belmont Retirement Village particularly as to the level of Amenity Fee payments.

34. Mr Wallace said that the Belmont Retirement Village had been operating since 2007 and had 28 units, providing independent and assisted living with the residents choosing the level of care they wanted. He also referred to a care facility with 33 beds on the premises operated by an unrelated party with residents at the Belmont Retirement Village entitled to priority access to this facility depending on the availability of beds.

35. Mr Wallace said that at the meeting with Mrs Dick and Ms Warner he and Ms Martin were told that the applicant had been living independently but was currently in hospital; and the hospital had advised them that the applicant required some assistance which the previous facility did not offer. He said that according to Mrs Dick and Ms Warner the applicant was showing signs of mild dementia and also had "*occasional panic attacks*" (now referred to by the family as "*turns*").

36. Mr Wallace referred to what he had been told about the applicant's condition and that he outlined the various levels of service set out in the First Schedule to the Occupation Right Agreement, with the level of service provided increasing with increased need and commensurate increase in cost.

37. He said that after discussion Mrs Dick and Ms Warner said that the applicant required Level Two Care, which he said was $441.00 per week but appears in fact to be $463.05 including GST. Mr Wallace described that level of care as indicative of a lower level need. He said he was assured by Mrs Dick that the applicant did not wander and did not require constant supervision because the Belmont Retirement Village cannot cater for that. He said that dementia care in a rest home would cost $967.68 which he said was about double the cost of Level Two Care. He said that Mrs Dick and Ms Warner were well aware of the difference between facilities which provided dementia care and those that offered assisted living.

38. Mr Wallace said that, based on what he was told and the assessment by Mrs Dick and Ms Warner of the relatively low level of support required, he told them that it sounded as if the applicant could fit in well with what Belmont offered, which, he said, was consistent with an opinion that the applicant's doctor confirmed in a note dated 23 November 2015 which was produced. That note from Dr Waddell said that significant dementia was apparent from the first time she met the applicant on 9 December 2014, but then she was quite co-operative and settled and appeared to be suitable for the retirement village. Dr Waddell said that notes suggest that dementia began to escalate during the applicant's stay at the Village and referred to a Needs Assessment.

39. Mr Wallace said that the applicants' attorneys paid a $1,000.00 deposit on 14 November 2014, that the agreement was signed on 18 November 2014 and the applicant moved in, that the applicant and her attorneys had 15 working days to cancel the agreement, and that the balance, $379,000.00 was paid on 3 March 2015.

40. I have taken into account all the detail that Mrs Dick and Ms Warner have given concerning the discussions with Mr Wallace and Ms Martin before the Occupation Right Agreement was concluded; but I also take into account the level of care which was agreed in the Occupation Right Agreement. This was Level Two Care which provided, for a weekly fee of $463.05 including GST for:

    40.1. Lunch and dinner in the restaurant;
    40.2. Breakfast supplied in the apartment;
    40.3. Daily bed making;
    40.4. Laundry – Bed linen changed weekly. Towels changed three times weekly;
    40.5. Personal laundry daily;
    40.6. Full cleaning of the apartment weekly and tidied daily;
    40.7. Daily supervision - includes brief check on the applicant's health and wellbeing;
    40.8. Electronic bracelet or pendant for emergency call;
    40.9. Provision and implementation of a nurse care plan;
    40.10. Administration of medication and care support management to a maximum of 3 hours per week.

41. This was Level Two of four Levels of care, Levels Three and Four of which were for greater sums, $683.00 per week and $752.46 per week both inclusive of GST providing for greater support needs than Level Two.

Essential Occupation Right Agreement provisions

42. The Occupation Right Agreement between the applicant and the respondent is lengthy but provides for the supply by the respondent to the applicant of accommodation in return for a capital sum of $380,000.00 including GST. There is a Service Fee payable, in this case $463.05 per week (incl GST) comprising first a charge in respect of expenses for provision of accommodation ("*the Village Outgoings Charge*") and provision of accommodation and care services as appropriate ("*the Service Charge*").

43. There is an Amenity Fee payable under clause 3.3 on termination of the Occupation Right Agreement which is provided in the Schedule as being $45,600.00 on the Commencement Date of Occupation (18 November 2014) and $45,600.00 from one year from Commencement Date of Occupation. The Commencement Date of Occupation is stated as 18 November 2014. The provisions for termination are in clause 16 and include termination by the applicant which can occur on one calendar month's written notice.

44. Under clause 17.2 it is expressly provided that in the event of termination the Capital Sum shall be repaid to the applicant but subject to the deduction of the Amenity Fee and other charges specified in the Schedule of Details and this includes both of the Amenity Fees in question in this dispute.

Applicant's other claims

45. Extensive evidence was given about what had occurred after completion of the Occupation Right Agreement between the parties and occupation of the apartment by the applicant. These must be considered separately from rights and obligations arising under the Occupation Right Agreement.

46. The evidence given comprised comment on the facilities that were enjoyed at the village and specifically by the applicant, the suggestions and approaches that the attorneys made to improve or change aspects of lifestyle there. Assurances that were given by either Mr Wallace or Ms Martin concerning continued care for the applicant at the village.

47. These matters are contentious to some extent and I discern that there may have been a balancing required by the manager of the village, Ms Martin, between considering suggestions made to her by Mrs Dick or Ms Warner and needing to run the facility to the best interests of all residents and within any budgetary constraints.

48. This is a retirement village dispute and not a dispute concerning a rest home and the RV Act contains definitions of the two facilities which are different.

Entitlement to Amenity Fees

49. The respondent claims that it is entitled to deduct both of the Amenity Fees because these became payable in terms of the Occupation Right Agreement and especially the Schedule of Details to it.

50. It is not for me to address whether this is fair to the applicant or not. That is not my role and I have no jurisdiction to consider fairness.

51. Apparently, the express provisions concerning payment of Amenity Fees was expressly advised to Mrs Dick when she was inquiring about the Occupation Right Agreement. The Occupation Right Agreement and its provisions are clear that as soon as the commencement date of occupation occurs the resident, in this case the applicant, forfeits the sum of $45,600.00. which is, as noted in the Schedule, 12% of the capital sum. The Occupation Right Agreement and its provisions are further clear that the further Amenity Fee of $45,600.00, another 12%, is due one year from the commencement date, which would be 18 November 2015.

52. As things turned out for the applicant she was not there long after that date, the agreement terminating on 8 December 2015. That means that, for a period of just over one year, Amenity Fees totalling 24% of the capital sum that had been paid were due to be deducted.

53. The applicant and her attorneys were legally advised on the matter and they chose to complete the agreement knowing what its terms were. The respondent takes the position that it is entitled contractually to each of those Amenity Fees and claims that these should be deducted from the repaid capital sum of $380,000.00.

54. The provision for an Amenity Fee under the Occupation Right Agreement is contained in clause 3.3 which provides for the liability to pay the Fee at the agreed rate

> *"in consideration of the grant of the right to occupy the unit and the supply of other domestic goods and services..."*

The respondent had already agreed under clause 2.1 to supply accommodation to the applicant and it is hard to see what further meaning the expression "*the grant of the right to occupy*" adds. The Service Fee for which provision is made comprises, as noted above, two parts, the first a Village Outgoings Charge and the second the Service Charge for provision of accommodation and care services.

55. The Amenity Fee anticipated the supply of some other domestic goods and services.

56. The respondent claims it is contractually entitled to those Amenity Fees and I am obliged to consider whether it is so entitled.

57. The contract is clear. The fees are payable under its terms. No real argument to challenge any of that was advanced for the applicant.

Defences

58. For the applicant not to be liable to have those Amenity fees deducted from the capital sum she would have to show that the matters that are raised on her behalf:

58.1. Disentitle the respondent to those Amenity fees or part of them.

58.2. Constitute some available counterclaim or defence set-off against the amounts otherwise due.

59. Submissions for the applicant put it this way:

> *"Whether [the respondent] is entitled to deduct the amenity fees if there has* [sic] *been breaches of:*
> *(a) Misrepresentation;*
> *(b) The Contractual Remedies Act;*
> *(c) The Fair Trading Act;*

(d) The [Occupation Right Agreement];
(e) The Code; and/or
(f) *The Consumer Guarantees Act*".

60. In considering claims of misrepresentation it is necessary to consider:

60.1. What is the extent of the jurisdiction of a Disputes Panel to determine such issues.

60.2. What was said or represented at the time.

60.3. To what extent that was wrong.

60.4. What is the remedy to which the person to whom the representation was made is entitled.

Disputes Panel Powers and Jurisdiction

61. The powers of a dispute panel are contained in section 69 (and in section 70, where applicable, which is not the case here) of the RV Act.

62. These include as subsection 1(c)

> "*in the case of a dispute with the operator concerning the liability for, or payment of, any monetary amount, [an order that] the operator … pay or refund all or part of the amount in dispute*".

It is this subsection on which the applicant's submissions rely.

63. Emphasis is placed by the applicant on the provisions of section 53(1)(c) which reads:

> "*A resident may give a dispute notice for the resolution of a dispute concerning the operator's decisions … 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 any money due to the resident under the resident's occupation right agreement following the termination … of the resident's occupation right agreement*".

64. It is argued for the applicant that those provisions combined empower a Disputes Panel to order a payment or refund where the dispute notice relates to

deductions imposed following termination of the applicant's Occupation Right Agreement.

65. The respondent argues that there can be no order under section 69(1)(c) for payment unless there is some entitlement to this. It argues that the fact that under section 53(1) a dispute notice may be given relating to deductions imposed upon termination does not of itself give any entitlement to monies.

66. My interpretation of the two sections is that there needs to be a two-step process:

66.1. First the giving of a notice under section 53(1)(c) articulating the dispute as relating to deductions made following termination.

66.2. Secondly, if there is entitlement on the part of the resident for a payment from a village operator, consideration of whether the Disputes Panel should order this under section 69(1)(c).

67. In my opinion, the jurisdiction for a Disputes Panel goes no further than a consideration of the legitimacy of the charges or deductions imposed when the occupation right comes to an end. It does not empower a Disputes Panel to embark upon any exercise that a court may in determining whether relief under the Contractual Remedies Act 1979 or the Fair Trading Act 1986 or the like should be ordered. The proper forum for any such claim is in a court.

68. In any event for the sake of completeness, I now turn to consider whether any of the claimed grounds for reduction or extinguishment of one or both Amenity Fees is available to the applicant.

Contractual Remedies Act 1979

69. The arguments advanced for the applicant appear to confuse the respective provisions of section 6 of the Contractual Remedies Act and sections 7 and 9 of

that Act. On the one hand section 6 is referred to[2], but on the other the entitlement to claim damages is made by reference to section 9(2)[3].

70. Those are quite different provisions with quite different grounds, criteria and consequences. Section 6 entitles an applicant to damages where it is clear that that party has been induced to enter into a contract by a misrepresentation, such damages being to the same extent as if the representation were a term of the contract that had been broken.

71. Section 7 entitles a party to cancel a contract if the other party repudiates it (which appears not to be argued in this case) or if that party has been induced to enter into the contract by a misrepresentation but only if the parties have expressly or impliedly agreed that the truth of the representation is essential or the effect of the misrepresentation will be "*substantially*" to reduce the benefit of the contract. That is only a brief summary of provisions which appear to be possibly relevant in this case.

72. The power of relief under section 9 is granted to a court where a contract has been cancelled and that includes, "*subject to section 6*", to direct one party to pay to the other party such sum as is thought fit.

73. In my view, the powers to grant relief under those provisions of the Contractual Remedies Act are vested in the courts. I do not think that a dispute panel has jurisdiction to consider such relief when considering a dispute notice under section 53(1)(c) of the RV Act.

74. Even if I am wrong in that, I do not think in this case that the applicant is entitled to any relief under any of those provisions of the Contractual Remedies Act. First, under section 6 the applicant would need to prove that she had been induced to enter into the Occupation Right Agreement by misrepresentations on behalf of the respondent.

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[2] Paragraph 2(2) of the Synopsis of Submissions on Behalf of the Applicant
[3] Paragraph 23

75. The claim is that the respondent was never going to offer the consistent and regular services which it was told by the attorneys that the applicant required.

76. I have attempted to summarise the relevant evidence given by the witnesses above, and it is only what was said before the Occupation Right Agreement was entered into by the parties that can count. Anything said afterwards cannot be said to have been an inducement to the applicant or her attorneys to enter into the Occupation Right Agreement. Mrs Dick outlined what she said were her expressions of concern at a meeting she and Ms Warner had with Mr Wallace and Ms Martin on 15 October 2015. Those concerns in brief referred to the suggestion of photographs of staff for identification purposes, trips out on the same day of each week, afternoon tea for families in the weekend, movies suited for women, accounting for direct payment for dinner guests, an Activities Co-ordinator, encouragement of residents to join in and introduce new activities, telephone diversion to a fax machine which prevented contact, and a reminder for contact by email. While those may have been helpful suggestions (and it was for the Belmont Retirement Village management to decide on that), any assurances that may have been given at that time cannot form pre-contractual representations on which there can be any reliance.

77. It is these matters which the submissions for the applicant rely on as being breaches of the representations that were made to them.

78. Of particular relevance is:

78.1. The fact that the Belmont Retirement Village did not have dementia care facilities and I find that was represented by neither Mr Wallace nor Ms Martin.

78.2. That it was made clear to the attorneys that there were dementia care facilities available to a resident off-site.

78.3. That there was discussion about the level of care required and Level Two Care, with its resultant reduced cost from high Levels of Care, was selected by the attorneys.

78.4. Even if Mr Wallace had said something of the kind that this would have been the applicant's last move, that cannot be said to have been any representation that dementia care, which as things later turned out was required for the applicant, would be provided by the Belmont Retirement Village.

79. It is not, of course, what Mrs Dick or Ms Warner may have thought or discussed between themselves as to their expectations from the Village, but rather what was said to them by Mr Wallace or Ms Martin that matters.

80. I according would have found, had I had jurisdiction, that there was no basis for damages to the applicant under section 6 of the Contractual Remedies Act.

81. As the cancellation, had I had jurisdiction, I would have found that section 9, giving a power to grant relief, is only available when there has been cancellation under section 7 of the Contractual Remedies Act.

82. Section 7(3) again requires that the applicant was induced to enter into the Occupation Right Agreement by a misrepresentation on behalf of the respondent. Again, this must be a pre-contractual misrepresentation, and I have found above that there is not sufficient evidence of any qualifying representation by either Mr Wallace or Ms Martin on behalf of the respondent.

83. Secondly, under section 7(4) the parties must have expressly or impliedly agreed that performance was essential to the applicant or the alleged misrepresentation must have been substantially to reduce the benefit of the contract of the applicant.

84. Again, on the facts I would not have found that those grounds had been made out. The applicants' attorneys may have thought that performance of the dementia resources and facilities representation at the Belmont Retirement

Village was essential to the applicant but there is no evidence that this was agreed to by the respondent.

85. There is no evidence of substantial reduction in the benefit from the contract to the applicant, given that she had some 13 months in the Belmont Retirement Village and given that the level of care which was agreed to be provided was in fact provided.

86. To support an argument that the Occupation Right Agreement had been cancelled, reliance was placed on certain evidence from Mrs Dick. That evidence[4], referred to consideration by the attorneys of taking the applicant somewhere else and that they felt that they "*had no reasonable option but to move [the applicant] elsewhere*". Mrs Dick said that on 24 November 2015 the attorneys met with Mr Wallace and agreed that the applicant had deteriorated but expressed their views that the village's "*sub-standard*" service had exacerbated the applicant's decline, and that they did not feel the village could care for the applicant appropriately and that they had lost trust in both Mr Wallace and Ms Martin. She said that "*[the applicant] would not be returning to [the village]*".

87. Mrs Dick also wrote an email to the respondent on 13 November 2016 in which she said: "*This is to confirm our verbal notification that [the applicant] will not be returning to her apartment*". The email refers to disappointment at failure to provide the care and activities that were promised, to clearing the apartment and vacation of it once that had been completed.

88. I do not consider that that any of that amounts to proper cancellation of the Occupation Right Agreement to qualify for relief under sections 7 or 9 of the Contractual Remedies Act.

89. Accordingly, I would have found, had I had jurisdiction, that there was no basis for, or evidence of, cancellation and that therefore there would have been no

[4] Paragraphs 107 - 110

jurisdiction for me to have granted relief under section 9 of the Contractual Remedies Act.

90. Finally, even if there were entitlement, there has not been sufficient evidence about what amount should be ordered. This is not a case where it is suggested that there has been overpayment of the service fee, but rather that the respondent should not be entitled to deduct the Amenity Fees that it has. The applicant is simply claiming that all of those Amenity Fees should be negated as compensation for damages or premature cancellation of the Occupation Right Agreement by the attorneys on her behalf. There is no basis on which that could be ordered.

Fair Trading Act 1986

91. The claim is that what Mr Wallace or Ms Martin told the applicant's attorneys was misleading or deceptive in trade, and a dispute panel can order refund of money or other payment of under section 43(3) of the Fair Trading Act.

92. The objection from the respondent is that there is no jurisdiction under the RV Act to do that.

93. I uphold that objection. The Act is clear that the jurisdiction under it is given to courts or a disputes tribunal and section 43 itself expressly refers to an order of a court or a dispute tribunal. It also expressly refers to proceedings already commenced in court or on any application to a court.

94. Indeed, the submissions for the applicant themselves expressly refers to the wide powers that "*the court*" has.

95. Even if I had jurisdiction to grant relief under the Fair Trading Act, I would not have found on the evidence given that there was qualifying misleading or deceptive conduct on the part of the Belmont Retirement Village.

96. The primary focus is on what was the conduct before the Occupation Right Agreement was concluded and I have summarised the exchanges between Mrs Dick, Ms Warner, Mr Wallace and Ms Martin above. I find that there was not anything deceptive said to Mrs Dick or Ms Warner by either Mr Wallace or Ms Martin that could be said to give grounds for relief under the Fair Trading Act.

97. This is particularly so in the context that the proposed Occupation Right Agreement gave four alternative options for care and Mrs Dick and Ms Warner, on behalf of the applicant, shows Level Two. Certainly, there was nothing misleading or deceptive about what was said concerning the Amenity Fees component of the Occupation Right Agreement. The Occupation Right Agreement clearly defined those fees and when they became payable and the applicant and her attorneys had independent legal advice from a lawyer concerning this. That advice, as noted above, expressly referred to the basis on which the Amenity Fees became payable.

98. If consideration is given to the exchanges and conduct after the Occupation Right Agreement was signed by the parties, the focus of this was on suggestions which Mrs Dick and/or Ms Warner made to Mr Wallace or Ms Martin as to how the village activities may be changed in a way which they thought might be beneficial to the residents and in particular the applicant. The responses on behalf of the Belmont Retirement Village to those suggestions can hardly be called misleading or deceptive.

99. The applicant and her attorneys have presented no evidence of specific monetary loss said to result from the Belmont Retirement Village's misleading or deceptive conduct. Section 43(2)(d) of the Fair Trading Act specifically refers to an order for payment to the person who suffered loss or damage of "*the amount of the loss or damage*".

100. Had I had jurisdiction under the Fair Trading Act, I would not have found any grounds for making an order under section 43.

Relief under the Occupation Right Agreement

101. To support this part of the claim, the applicants' attorneys rely on clauses 3.3, 5.5 and 5.7 of the Occupation Right Agreement.

102. Clause 3.3 provides for payment by the resident, in this case the applicant, to the operator, the Belmont Retirement Village, of Amenity Fees on termination of the Occupation Right Agreement. This is said to be expressed to be "*[i]n consideration of the grant of the right to occupy the unit and the supply of other domestic goods and services...*"

103. The claim is that there were services agreed to be provided to the applicant in the exchanges between the applicant's attorneys and the Village representatives and these were the services to which clause 3.3 refers. It is further claimed that these services have not been provided, that there is therefore a breach by the Village of the terms of the Occupation Right Agreement, and therefore the applicant is entitled to be compensated.

104. The focus can only be on what was said before the Occupation Right Agreement was concluded because it is only those negotiations which can be said to have been encompassed by the expression "*services*" in clause 3.3. The applicant and her attorneys, having made a commitment to the Occupation Right Agreement by signing it, cannot later impose further obligations on the Belmont Retirement Village as the consequence of any ongoing discussions.

105. Again, the applicant and her attorneys rely on what I have summarised above as to the exchanges between Mrs Dick, Ms Warner, Mr Wallace and Ms Martin. What must not be lost sight of is that the stated consideration for the Amenity Fees, apart from the grant of the right to occupy the unit, is the "*supply of other domestic goods and services*". I do not think that the word "*services*" can be considered in isolation; and that the focus must be on "*other domestic goods and services*" to which it might be said the Belmont Retirement Village has made a commitment.

106. Attention must first be given to clause 5 which has "*Operator's Covenants*" that is the obligations of the Belmont Retirement Village. They include under clause 5.2 the provision of chattels, 5.3 the supply of utilities, 5.4 maintenance of the common areas, 5.6 maintenance and repair of buildings and cleaning the exterior of windows, and 5.7 the use of reasonable care and skill in conducting the affairs of the village, and the like. These clauses are referred to in part in the submissions for the applicant.

107. The applicant's attorneys, however, rely further on oral commitments which they say were made to the attorneys by the Village representatives.

108. It is a principle of law that an oral agreement cannot add to, vary or contradict the express written provisions of an agreement; and that principle has been the subject of variation in judicial decision. Essentially, however, it applies to what is now advanced and I do not find that, on the facts that have been given to me, there is any justification to find that the Belmont Retirement Village has made further commitments to the applicants' attorneys before the Occupation Right Agreement was completed and signed by them beyond what is in that Agreement.

109. There is express reference in the submissions to clause 5.5 of the Occupation Right Agreement and to breaches of covenant by the Village "*to provide or ensure the provision of, those services the subject of the Service Fee*". The provisions for the Service Fee are contained in clause 3.2 of the Occupation Right Agreement. As noted above this has two components, the Village Outgoings Charge and the Service Charge.

110. In the case of this agreement the service fee was $463.05 for Level Two Care and no part of the applicant's case involves any suggestions that those fees were excessive or that the services to which they refer have not been provided (except for the provision of a nursing plan).

111. Despite that, the allegation in the submissions for the applicant are that the Belmont Retirement Village has failed to provide the services it promised (and

that is a reference to the pre-contractual exchanges that occurred) as being in breach of clause 5.5.

112. I find that argument is illogical. It confuses the claim that has been made in the Dispute Notice for some reduction in the Amenity Fees with the attorneys' claim that the services to which the Service Fees refer have not been provided. Those service fees are acknowledged by the applicant and her attorneys as having been properly payable and that the services to which they refer have been provided (except for the nursing plan). It confuses the two categories of fees to claim on the one hand that there can be a refund ordered in respect of the Amenity Fees for services which are said on the other hand not to have been provided under the Service Fees obligations.

113. In any event, I do not find on the facts that the Belmont Retirement Village has failed to provide the services to which the Service Fees in clause 5 refer. While the existence of the nursing plan was acknowledged, there was no suggestion that this caused any material detriment to the applicant.

114. The submissions also allege a breach of clause 5.7 of the Occupation Right Agreement which is an obligation on the Belmont Retirement Village to use reasonable care and skill in conducting the affairs of the village properly and efficiently and in the exercise of the performance of the Belmont Retirement Village's powers, functions and duties.

115. Again, reliance is placed on the assurances which the applicants' attorneys claim were made to them before the Occupation Right Agreement was concluded. My interpretation of clause 5.7 refers to the overall conduct of the affairs of the Belmont Retirement Village in the performance of powers, functions and duties. There is no evidence before me that the respondent has failed in that obligation.

116. Accordingly, I cannot find that the applicant is entitled to any of the claimed relief under the alleged breaches of the Occupation Right Agreement. The fact that section 69(1)(c) of the RV Act allows for me to make an order does not of

itself create grounds for such an order; and I find that no grounds are made out in this context.

Consumer Guarantees Act 1993

117. There is again an allegation by the applicant that she is entitled to damages under this Act. It is said that the applicant is a consumer under the Consumer Guarantees Act, that section 28 of that Act provides that services supplied include a guarantee that this will be with reasonable skill and care, and that, under section 32, where the service provided does not comply with the guarantee the applicant is entitled to damages reasonably foreseeable as a result of the Village's failure.

118. To qualify for any relief under the Consumer Guarantees Act there must first be services to be supplied by the Village to the applicant. The services to which the Occupation Right Agreement refers, including those in clause 5 mentioned above, are encompassed by the Service Fee which, as noted above, I find as being supplied by the respondent to the applicant.

119. The applicants' attorneys rely on the services which they say were agreed to be supplied by the Belmont Retirement Village **additionally** to those written services. That would mean that those services were to be provided free of charge, because the Service Fees were payable by the applicant for the services to which they refer and which she has received.

120. I have found on the facts above that in the pre-contractual negotiations before the matter was concluded there were no assurances given by either Mr Wallace or Ms Martin that have not been provided.

121. Certainly, there were none which could be said to be services for which no fee was payable. Even if there were additional services agreed by Mr Wallace or Ms Martin to be provided to the applicant beyond those in the Occupation Right Agreement, there is no evidence that these were not provided without reasonable skill and care. Even in the post-contractual period when

suggestions for improvements were made by Mrs Dick or Ms Warner on behalf of the applicant, these suggestions were addressed by the Belmont Retirement Village and there is no suggestion that what was provided by the Belmont Retirement Village was not provided with reasonable skill and care.

122. The essential complaint by the applicant's attorneys is that with hindsight they were expecting dementia care from the Belmont Retirement Village and that has not been provided which has necessitated moving the applicant to another facility. Dementia care was never agreed to be provided. It was expressly said that this was available off-site.

123. What was agreed to be provided was the Level Two Care for which there was any appropriate Service Fee and that that was provided with reasonable skill and care.

124. Accordingly, I do not find any breach of the Consumer Guarantees Act entitling the applicants to any reduction of the Amenity Fees, which, of course, dealt with separate obligations.

Code of Residents' Rights

125. The applicant's attorneys allege that there have been breaches of the Code of Residents' Rights (the Code) entitling them to some compensation.

126. As the Dispute Notice, and even the purported amendments, make clear, the claim is that this compensation should be by way of reduction of the Amenity Fees component otherwise deductible from monies to which the applicant is entitled.

127. It is a provided in section 32 of the RV Act that the Code set out in Schedule 4 is a summary of the minimum rights conferred on a resident of a retirement village by the RV Act.

128. Although the heading to that section reads "***Retirement Villages to have code of residents' rights***", there is no actual stated obligation in the section itself.

129. There was no evidence to me that the Belmont Retirement Village had an independent Code nor, if there was one, the content of it. The applicants relied on the minimum stipulation of rights in Schedule 4 to the RV Act.

130. At least one of the consequences of any breach by the village operator of a right conferred by a Code are that these can be the subject of a dispute notice under section 53(1)(d). This would have the consequence that a Disputes Panel could, amongst other things, order under section 69(1)(b) of the RV Act that the village operator comply with its obligations under the Code. That would only have relevance when the resident remained at the time in the village, and this is not the case here.

131. This has not been done here. The dispute notice relates to deductions made by Belmont Retirement Village from monies due to be paid to the applicant and the dispute notice is expressly given under section 53(1)(c) of the RV Act with the relief sought being a reduction in the Amenity Fees deduction amounts.

132. Accordingly, I do not need to deal with the individual clauses separately except to say that, even if I were to uphold that they had been a breach of the Code it is open to question whether I could have ordered compensation given that the provisions of section 69(1)(b) to order compliance and, in any event, there is no identified monetary loss to the applicant on which I could have made any order for compensation on the bases sought in the submissions. (Indeed, the submissions at paragraph 38 expressly refer to "*a Fair Trading Act breach*". It makes no reference to any monetary compensation entitlement for a breach of the code. This may be a misprint but does not alter the principal point).

Panel's decision

Summary and conclusion

133. The claim by the applicant's attorneys expressly referred in the original dispute notice to deductions from or cancellation of Amenity Fees. This was the

primary emphasis of the amendments to the dispute notice sought to be made at the hearing.

134. The provisions in the Occupation Right Agreement concerning Amenity Fees and the Belmont Retirement Village's entitlement to deduct these is expressed and clear and factually there is no dispute between the parties that the time passed such that both sums of Amenity Fees became deductible under the express terms of the Occupation Right Agreement.

135. There were some exchanges between the parties before the Occupation Right Agreement was concluded but essentially both understood each other at that time.

136. The applicant's health had been in slow decline and she had some issues described as "*turns*" or "*absence seizures*". There was also reference to fading memory and the need for residential care with supervision. This was made clear to the Village personnel. It was made clear in return to the applicant's attorneys that the Belmont Retirement Village was not a dementia facility but that there were resources nearby available to any resident needing this.

137. There was discussion between the applicants' attorneys and village personnel concerning the level of care that the applicant needed and would be provided by Belmont Retirement Village. Level Two Care was chosen and agreed to and the specific obligations on the village under that level of care was spelled out in the Occupation Right Agreement.

138. The Occupation Right Agreement was completed and signed by the parties; and the applicant's attorneys had independent legal advice which included express reference to the provisions concerning deductibility of Amenity Fees.

139. Both of the applicants' daughters had concerns for her and her wellbeing in the last years of her life. They saw things about the village that they thought could be improved to benefit their mother and other residents. They made

suggestions concerning those to the village personnel who dealt with them to the extent they thought appropriate.

140. When the applicant's mental health deteriorated more quickly than had been expected, she received appropriate care away from the village and then ultimately the decision was made by her daughters and attorneys to move her away from the Belmont Retirement Village to another facility. The Occupation Right Agreement was terminated accordingly by the applicant's attorneys.

141. The Amenity Fees to which the Occupation Right Agreement refers are properly deductible from monies which the applicant is otherwise entitled to following termination of the Occupation Right Agreement.

142. The submissions of counsel for the applicant and her attorneys have raised a scattergun approach with grounds on which it is said there is some right to compensation and therefore reduction of the amounts that are otherwise deductible as Amenity Fees.

143. In respect of some of these, claims under the Contractual Remedies Act and the Fair Trading Act, I find I have no jurisdiction to grant relief as sought and further that there is no basis on which I would have granted relief had I been able to. There are no bases for me to grant any relief under the Consumer Guarantees Act or the Code by way of compensation to the applicant. There have been no breaches of the Occupation Right Agreement such as would qualify the applicant to have any compensation ordered.

144. I therefore disallow the dispute notice and any amendment to it.

145. The parties asked that I make this an interim decision and that they then have the opportunity for submission as to costs.

146. Any application for costs by one party against the other is to be made in writing to me and copied to the other party by **no later than 20 working days from the date of this decision**.

147. Any opposition is to be in writing to me and copied to the other party **within 10 working days thereafter**.

148. Any reply is to be in writing to me and copied to the other party **within 5 working days thereafter**.

149. I record in the context of costs that at an early telephone conference the entitlement by the respondent to deduct Amenity Fees independently of any health issues that the applicant had or consequences of those was raised by the lawyer for the respondent.

150. The Disputes Panel finds fully in favour of the respondent, **BELMONT LIFESTYLE VILLAGE LIMITED** and makes the following orders:

1. That the respondent is entitled to deduct the Amenity Fees of $45,600.00 each on the commencement date of occupation, 18 November 2014 and one year from that date, 18 November 2015

2. That costs between the parties are reserved under the timetable above. If there is no application for costs, this will become a final order.

.....
Single member

2 February 2017
.....
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.