

Final 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 further decided on the dispute as follows:

1. In the earlier decision in this matter I made findings on the substantive issues between the parties. I reserved the question of costs. There has been an application for costs by the respondent village operator against the applicant. This further decision deals with that application. In all other respects the earlier decision is affirmed.
2. The respondent village operator claims costs. There have been submissions made by both parties. The respondent's submissions refer to the different categories of costs incurred, the costs of the dispute panel, the costs for the lawyer and counsel representing the respondent in respect of the dispute notice and at the hearing, disbursements incurred for the hearing, venue hire, etc., management costs for the respondent in processing the dispute and its response to it, and the costs in dealing with this costs claim.
3. The submissions seek the sum of \$39,000.00 representing approximately the first two items, the costs of the disputes panel and the costs of the lawyer and counsel representing the village. No claim is made in respect of the hearing disbursements (and that is appropriate, given that the applicant had agreed to the changed venue only on the basis that she would not incur cost in this), the managerial costs claim or the further costs of this decision.

4. Reference is made to the statutory criteria in section 74 Retirement Villages Act 2003 (**the RV Act**).
5. It is said:
 - 5.1. That the costs for the respondent as claimed for the disputes panel and lawyer and counsel are reasonable. Analogy is drawn with the High Court and District Court costs regime rules and applicable amounts. It is argued that the court costs regime was intended to reimburse the party entitled to costs approximately 66% of the reasonable costs that would have been incurred. Applying the formula in reverse, it was said that the District Court costs as calculated by counsel totalling \$18,000.00 represented about 66% of the sum of \$24,000.00 (although these figures were later amended to \$12,000.00 and \$18,000.00 respectively). The disputes panel costs, it is said, should be ordered to be reimbursed in full as a disbursement.
 - 5.2. That there was significant importance in the matter to the respondent. There were serious allegations of misrepresentation and allegations concerning the level of care provided that needed answer. There were questions of the respondent's entitlement to enforce compliance with contractual payment provisions.
6. There is also significant reference to the conduct of the applicant's attorneys both in bringing the claim and in seeking to resolve the costs issue.
7. The submissions for the applicant referred to the statutory criteria and asserted too that the matter was of "*utmost*" importance to the applicant. Reference was made to the initial sums claimed totalling \$111,200.00, described in the submissions as both "*significant*" and "*substantial*".
8. There was also a reference to the courts costs regime and criteria with the submission that had the claim been brought in the District Court, there would only be a costs entitlement of some \$8,000.00.

9. It was said that it was reasonable for the applicant and her attorneys to have brought the claim and that they should not be “*punished*” for having done so.
10. By reference to and by analogy with an earlier retirement village dispute panel decision¹, it was submitted that, having regard to all relevant criteria, an order of \$8,000.00 would be appropriate.

Discussion

11. The statutory provision for costs in a dispute of this kind is in section 74 of the RV Act which reads:

74 Costs on dispute resolution

- (1) *The operator that appoints a disputes panel is responsible for meeting all the costs incurred by the disputes panel in conducting a dispute resolution, whether or not the operator is a party to the dispute.*
- (2) *Whether or not there is a hearing, the disputes panel may—*
 - (a) *award the applicant costs and expenses if the disputes panel makes a dispute resolution decision fully or substantially in favour of the applicant:*
 - (b) *award the applicant costs and expenses if the disputes panel does not make a dispute resolution decision in favour of the applicant but considers that the applicant acted reasonably in applying for the dispute resolution:*
 - (c) *award any other person costs and expenses if the disputes panel makes a dispute resolution decision fully or substantially in favour of that person:*
 - (d) *in a dispute where the operator is not a party to the dispute, award to the operator, by way of refund, all or part of the costs incurred by the disputes panel in conducting a dispute resolution.*
- (3) *The disputes panel must make a decision whether to award costs and expenses under this section and the amount of any award—*

¹ *Perry Foundation v Waters Estate and Murray*; 20/12/13; D M Carden (Panel Member)

- (a) *after having regard to the reasonableness of the costs and expenses and the amount of any award incurred by the applicant or other person in the circumstances of the particular case; and*
- (b) *after taking into account the amount or value of the matters in dispute, the relative importance of the matters in dispute to the respective parties, and the conduct of the parties; and*
- (c) *in accordance with, and subject to any limitations prescribed in, any regulations made under this Act for the purpose....'*

12. It will be seen first that the primary responsibility for the costs of the disputes panel lies with the village operator whether or not it is a party to the dispute.

13. The provision allowing for an order for costs is discretionary under subsection (2) and, in respect of the village operator where it is a party to the dispute, the provision is in the broader expression of subparagraph (c) “ ... *any other person ... if the disputes panel makes a dispute resolution decision fully or substantially in favour of that person*”.

14. The criteria which the disputes panel is obliged under subsection (3) to take into account in making the decision **first** whether to award the costs and expenses and **secondly** the amount of these are:

14.1. The reasonableness of costs and expenses incurred.

14.2. The amount of any award “*incurred*” in the circumstances of the case.

14.3. The amount or value of the matters in dispute.

14.4. The relative importance of the matters in dispute to the respective parties.

14.5. The conduct of the parties.

Reference is also made to regulations but to date there has been none on this topic.

15. There have been other decisions in which costs have been sought and ordered. I refer to the following extract from *Maddocks v LCM 1941 Limited and Argosy Trustee Limited*²:

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

*Kenward and Knebel v Metlife Care Kapiti Ltd*³

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

“50 ... The operator is indeed required to meet all the costs incurred by the disputes panel. That does not mean however that applicants cannot be required to reimburse or compensate the operator for some of those costs. Should an order for costs be made against an applicant in favour of an operator, the operator continues to be responsible under section 74(1) for payment of the costs incurred by the disputes panel. The applicants would not directly be paying any of those costs although that might be the indirect result. An order for costs relates not only to the costs incurred by the operator in relation to the disputes panel. Such an order may also relate to other costs incurred by the operator in respect of being a party to the dispute ... A further indication that an award of costs can be

² Dated 21/8/14- D M Carden (Panel Member)

³ 16/1/09; N J Dunlop (Panel Member)

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

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

Perry & Others v Waitakerei Group Ltd⁴

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

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

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

...

38. There is one other matter that needs mention. The power to award costs under s.74(2)(c) refers to "costs and expenses". This

⁴ 30/10/07 : D M Carden (Penal Member)

contrasts with the power to award costs under s.74(2)(d) in a dispute [where] the operator is not a party which speaks of a “refund ... of the costs incurred by the disputes panel in conducting a dispute resolution”. My view is that the power under s.74(2)(c) (applicable in this case) does include the costs of the disputes panel”.

*Perry Foundation v Waters Estate and Murray*⁵

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

*42. It was said*⁶:

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

*A F and C Barnes v Anglican Care (Waiapu) Limited*⁷

43. An order for costs was declined in an application made by the successful village operator in this case. It was accepted that there was jurisdiction to order costs under section 74(2)(c) of the RV Act but it was considered that there had been sufficient merit in the arguments advanced by the claimants/applicants in support of the dispute notice that there should be no order for costs against them even although those arguments were rejected.

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

44.1. Whether to award costs and expenses and

44.2. The amount of any award.

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

⁵ 20/12/13; D M Carden (Panel Member)

⁶ Paragraph 22

⁷ 13/12/13; D M Carden – (Panel Member)

16. The first issue is whether any distinction should be drawn between the costs incurred by the respondent and any expenses incurred by it. Those expenses are said to include the dispute panel fees and expenses. As noted above, there is a difference in wording between a costs award under section 74(2)(c) and one under section 74(2)(d). In the latter case, where the village operator is not a party to the dispute the award to it may be “*by way of refund*” of all or part of the costs incurred by the disputes panel in conducting the dispute resolution. That anticipates a case where the village operator should be found in the circumstances of the case not to have to carry some or all of the costs of the disputes panel.
17. Under subsection (2)(c), however, the award is to “*any other person*” and this has been held in other cases, and I now hold, to include the village operator as a party. The reference, however, is to “*costs and expenses*” and the question is whether those expenses include the disputes panel costs incurred by the village operator. In my view, they do and that is consistent with other decisions. Although different wording is used and there is no express reference in subparagraph (c) to disputes panel costs incurred by the village operator, in my view the Act anticipates that an unsuccessful party face the discretionary prospect that an order for costs may be made against him or her to include the village operator’s expenses in disputes panel costs.
18. The respondent certainly qualifies for an order for costs because the decision was fully in its favour. It is discretionary whether I order costs against the applicant in favour of the respondent. I think the respondent is entitled to such an order. It has presented its position clearly from the outset. The applicant has pursued claims at least some of which did not have any merit. That entitlement is accepted by the applicant in submissions on her behalf.
19. I now address the individual criteria referred to in section 74 (3) of the RV Act.

The reasonableness of costs and expenses incurred

20. There has been no suggestion that the amount of the expense that the respondent has incurred in disputes panel costs was unreasonable and I take the amount that has been paid, \$15,081.60, as the appropriate amount.
21. I then consider the respondent's legal costs incurred. There was no suggestion that the invoices presented by the respondent as coming from its lawyers or counsel were unreasonable in their respective amounts. Any order for costs should relate to costs incurred in relation to the dispute notice process; and not to any other preliminary matters or issues or incidental matters. Although the invoice from the lawyer for the respondent (other than counsel) did include some matters which might be said to be outside of the disputes process as such, I am prepared to accept, particularly given that they have been concessions made on some claims which might have been pursued, that the global figure of \$39,000.00 (including disputes panel fees) is the appropriate sum to consider in this costs award.
22. The applicant sought to restrict entitlement to costs for the respondent by reference to court litigation principles and scales. Reference was made to the District Court scales and applicable items. There was disagreement in the submissions as to the exact amount applicable. The respondent's submissions referred to an allowance for discovery and I am not aware of that process having occurred at all on any formal basis. Those submissions also referred to an earlier error in application of High Court rather than District Court scales.
23. My view is that, to the extent that these principles and scales are relevant, it is the District Court scales that should be considered because the amount in dispute in this claim in this matter was well within the current civil jurisdiction of the District Court.
24. The respondent argued that this is not court litigation and any cost consideration should not be limited to applicable principles in a court. In any event, it was argued, if the general principle is that cost recovered should be approximately 66% of actual reasonable costs incurred by a party, then, if the applicable District Court scale figure was \$12,000.00, the reasonable fee to consider for the

respondent's costs would be \$18,000.00. That was, it was said, the amount for which the respondent was pressing.

25. The respondent further argued that the disputes panel costs are a disbursement or expense incurred by the respondent and should be considered in full. It argued therefore that the global figure of \$39,000.00 was the appropriate amount to be awarded.
26. By analogy with the District Court applicable scale figures, the applicant argued that the appropriate amount was \$8,000.00 and that this is the amount that should be ordered against her.
27. Any court scale principles or numbers are a guide only to a disputes panel in considering any costs award and the RV Act. They should be weighed in the balance along with the other factors prescribed by section 74.

The amount of any award “*incurred*” in the circumstances of the case

28. This item needs little consideration because the applicant concedes that the amount in dispute was significant. The dispute concerned the entitlement of the respondent to deduct amenity fees totalling \$91,200.00. (There was also a damages claim of \$20,000.00, but this was withdrawn at the hearing). Although the applicant's concession was framed in the context of what could be described as the “*fairness*” of the relevant Occupation Right Agreement, it is nevertheless the case that there was a substantial sum in dispute between the parties. The outcome was that none of this disputed amount was found not to be appropriately deductible.

The amount or value of the matters in dispute

29. I am taking it that the RV Act is referring to any difference there may be between the amount in dispute and the amount recovered by the successful party. In this case, there is no difference, the amounts claimed by the applicant, totalling \$91,200.00, being the same amounts as were in fact awarded against her.

The relative importance of the matters in dispute to the respective parties

30. Again, there was agreement between the parties that the matters in dispute were of significant importance to them. They each had their reasons. For the applicant and her attorneys it was because of the alleged representations that had been made before the Occupation Right Agreement was entered into and the importance of the standard of care that they anticipated the applicant would receive. For the respondent, it was the seriousness of the allegations that were made and criticisms of the level of care provided.

31. I accept that that is the case. Certainly, the arguments and evidence given at the hearing were strongly put in the context of importance to the parties and there was the significant amount that was in dispute which had its own importance.

The conduct of the parties

32. The submissions for the respondent referred at some length to the attempts that had been made by the parties to reach a negotiated and compromised settlement. While that is to be commended as occurring in a dispute of this kind, I do not think that the reasonableness of any compromise proposal that may be made or the unreasonableness in not accepting such a proposal should weigh too heavily in a costs consideration under the heading of "*conduct*". What, to my mind, is more important, is how the parties have conducted the dispute itself.

33. The lawyer for the respondent emphasised in an early telephone conference that the contractual provision for deduction of amenity fees in the Occupation Right Agreement was clear and express. At that stage the dispute notice related specifically to the amenity fees deductions. By the time of the hearing that claim had been extended to both deductions of amenity fees and there had been the addition of a claim for damages but this was withdrawn at the hearing.

34. The substantive part of the hearing process and my decision was in respect of those claims by the applicant which I categorised as set-off or counterclaim items,

namely claims under the Contractual Remedies Act 1979, claims under the Fair Trading Act 1986, alleged breaches of the Consumer Guarantees Act 1993, and breaches of the Occupation Right Agreement.

35. All of those claims I have rejected not only on the factual dispute but also in relation to jurisdiction in some respects.

Conclusion and decision

36. The disputes panel process in the RV Act is available for residents at a retirement village to have disputes resolved in the way prescribed by the Act. Some of the processes that the disputes panel must follow are specific but the primary thrust is to ensure speedy and cost effective resolution of disputes which qualify for resolution by a disputes panel in this way. The process is not available to a retirement village resident who wishes to bring claims which are outside the parameters prescribed and which are more properly brought in a court.

37. The applicant's resistance to the deduction of amenity fees from the outset and as forming the basis of the dispute notice and amendments to it were without merit and against basic contract law.

38. The issues raised which I have categorised as counterclaim or set-off I have found, to the extent I may have had jurisdiction, did not have merit either but further that the proper forum for some of these would have been a court.

39. The applicant chose to proceed with those claims in face of the clear indication from the lawyer for the respondent that it would be relying on the contractual terms.

40. In my view the costs of the dispute panel should be shared equally between the parties. Although the primary obligation for meeting these costs lay with the respondent, in the circumstances, in my view, the applicants should share equally in this. One-half of those costs is \$7,540.80.

41. I am further of the view that the respondent is entitled to be reimbursed 60% of the reasonable fees and expenses of lawyer and counsel for it. Those fees totalled \$24,422.50, of which 60% is \$14,653.50.

42. Thus, the total awarded is \$22,194.30.

43. I therefore award and direct pursuant to section 74 of the Retirement Villages Act 2003 as costs and expenses that the claimant, Jane Hughes, pay to the respondent, Belmont Lifestyle Village Limited, the sum of \$22,194.30.



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Single member

24 March 2017

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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.