IN THE MATTER of a dispute under the Retirement Villages Act 2003

AND IN THE MATTER of Waitakere Gardens Retirement Village, Auckland

BETWEEN [names withheld] and 10 others

Applicants

AND Metlifecare Limited on behalf of Waitakere Group Limited

Respondent

Disputes panel member:	Mr N J Dunlop, Barrister, Nelson
Applicants' representative:	Mr D Brown
Respondent's representatives:	Ms ML Burke and Ms KW Kemp
Date of dispute notice:	10 April 2017
Date of appointment of disputes panel member:	21 June 2017

DECISION
5 December 2017

Introduction

1. This dispute concerns the building known as Rose Court at the Waitakere Gardens retirement village in west Auckland.

2. Remedial work is required to Rose Court. The work has yet to commence. The residents concerned will need to move out of Rose Court while the work is undertaken.

3. Eighteen residents and one former resident of Rose Court jointly lodged a dispute notice. The notice alleged that proposed arrangements while the remedial works were undertaken were adverse to them, and contrary to their rights as Village residents, and had not been subject of proper consultation. They also complained about the proposed works themselves, alleging that they would result in reduced amenities, and that again, proper consultation had not occurred. They alleged that their physical and mental wellbeing were being affected by the associated worry and concern.

4. All nineteen applicants were represented by Mr Dennis Brown, an Auckland businessman.

5. Subsequently, six applicants withdrew from the dispute resolution process. On 30 November 2017 Mr Brown advised that he was no longer representing one of the thirteen remaining applicants. As at 30 November therefore, Mr Brown was representing twelve applicants, namely: [names withheld].

6. I was appointed disputes panel member on 21 June 2017. Six days later I convened a telephone conference between Mr Brown representing the applicants and Ms Michelle Burke and Ms Karen Kemp representing the respondent. Ms Burke and Ms Kemp are lawyers with the law firm Anthony Harper. Ms Burke is one of the firm's retirement village specialists. Ms Kemp is a litigation specialist. Both are partners of the firm.

7. In the telephone conference, I learned that by letter dated 24 November 2016 the respondent had advised Rose Court residents that the works project was suspended indefinitely. The letter stated that Metlifecare "*will continue to engage and consult with you throughout 2017 so that a mutually beneficial process and solution can be reached.*"

8. The day following the telephone conference, I directed that the hearing of the dispute be adjourned indefinitely, but that a further telephone conference be held approximately three months later to review progress on the consultation process. In a minute I noted that "*… to embark at this stage on a hearing of the applicants' grievances, may achieve little or nothing for them.*" That view was held primarily because the proposed remediation works which are the subject of the dispute had been suspended indefinitely, and new proposals were being developed. I noted in the minute that "*presumably what is of most importance to the applicants is what will actually happen in relation to Rose Court. That has yet to be determined. It is right and proper that the applicants be fully consulted in relation to any new proposal.*" My provisional view was that for reasons discussed below, that even if I made findings in favour of the applicants that breaches of their rights had occurred, there was no remedy that I was empowered to order. It was a view shared by the respondent, but not Mr Brown.

9. In the event, I did not hold the scheduled telephone conference as referred to above. Instead, I decided that it was more desirable to attend Waitakere Gardens in person. That was because I considered, amongst other things, that it was respectful to the applicants that I meet them in person. It was also an opportunity for me to meet Mr Brown in person. Up until then I had only engaged with him by telephone and email.

10. I duly met with Mr Brown, the eight applicants who were available, one of their support people and the representatives of the respondent. Also present was the Chair of the Waitakere Gardens residents' association. This meeting which was held on 26 September 2017 was a procedural hearing rather than substantive hearing.

11. From my discussions with those present, it appeared to me that putting aside the historical concerns of the applicants, overall there were not widespread and entrenched differences of opinion between the applicants and the respondent. I asked all those present what the outstanding issues were and I set those out in a minute which was subsequently circulated to all applicants and the respondent

12. . The general counsel and company secretary for the respondent, Mr Andrew Peskett, attended the meeting. He undertook to take various steps in relation to the identified outstanding matters. I directed that he report back to me in six weeks' time. I directed that Mr Brown file a response to Mr Peskett's report within ten working days of receipt.

13. Mr Peskett duly supplied a report on 7 November. That was done through Ms Burke. Mr Brown considered that the report should have come from Mr Peskett personally. As a result of Mr Brown's concerns, Mr Peskett personally filed a report on 10 November.

14. In the event, Mr Brown did not provide a discrete response, but did supply me with copious email correspondence which he said would suffice instead.

15. I then decided that a further telephone conference was called for. It duly took place on 30 November and was 1 ½ hours in duration. Those in attendance were Mr Brown, Ms Kemp and I. I signalled in advance that the purpose of the telephone conference was to ascertain:

    - In very summary form what matters are yet to be agreed upon with which applicants as to future arrangements;
    - The expected timetable for the completion of outstanding matters;
    - Whether there is legal opinion available or awaited as to whether my view that no remedy is available to the applicants (should there have been breaches) is correct;
    - Whether if no legal opinion is available to the applicants that a remedy could potentially be ordered, and whether any of the applicants wish to proceed to a hearing, and if so which of the applicants;
    - Whether the case should be transferred to the District Court for hearing pursuant to section 66(1)(b) and (3) of the Act;
    - If I do not transfer the case to the District Court what the next step in the case should be, and how and by what legislative authority the case should be concluded.

A further purpose was to discuss any other pertinent matters.

16. This decision results from the 30 November telephone conference and what has transpired since my appointment in June.

17. I will now discuss the two fundamental difficulties which have led me to make this decision.

Available remedies

18. At a very early stage in these proceedings I identified a fundamental issue with the applicants' case. That issue is that even if I was to find that the respondent had breached obligations to the applicants, there was no remedy I could order. This largely was the result of the remedial works which are the subject of the dispute having been suspended with the intention of being replaced by new proposals.

19. Apart from making an order for costs under section 74 of the Retirement Villages Act 2003 (RVA) my powers are limited to those contained in section 69. The additional powers referred to in section 70 do not apply in this case because they only relate to disputes about the disposing of residential units.

20. Section 69 is as follows:

> *"69* ***Powers of disputes panel***
> *(1) A disputes panel may-*
> *(a) Amend an occupation right agreement so that it complies with any applicable code of practice or section 27(1); or*
> *(b) Order any party to comply with its obligations under an occupation right agreement or the code of practice, or to give effect to a right referred to in the code of residents' rights; or*
> *(c) In the case of a dispute with the operator concerning the liability for, or payment of, any monetary amount, order the operator or, as the case may be, the resident to pay or refund all or part of the amount in dispute; or*
> *(d) In the case of a dispute where the operator is not a party to the dispute,-*
> *(i) Order a party to return to the other party specific property not exceeding $1,000 in value; or*
> *(ii) Order a party to pay the other party an amount by way of compensation not exceeding $1,000; or*
> *(e) Not impose any other obligation other than in relation to the payment of costs on any party.*
> *(2) For the avoidance of doubt, a disputes panel may amend an occupation right agreement to comply with a provision of the code of practice from which the operator of the retirement village is exempted from complying, but the disputes panel must make the amendment subject to that exemption while it is in force."*

21. In my view none of paragraphs (a) – (e) of section 69(1) apply for the following reasons. Referring to the paragraphs in the subsection:

(a) The applicants do not seek to amend an occupation right agreement.

(b) I cannot order a party to comply with its obligations under an occupation right agreement in relation to planned remediation works when that plan has been indefinitely suspended and is to be replaced by a new plan.

(c) The dispute is not about liability for, or payment of, any monetary amount; it is about alleged breaches of a range of obligations owed by the respondent to the applicants under their occupation right agreements and various statutory instruments.

(d) The operator (i.e. the respondent) is a party to the dispute.

(e) This paragraph makes it clear that I cannot impose any other obligations to those referred to above except in relation to the payment of costs.

22. The view of the respondent's solicitors is that my above analysis is correct. The respondent thus agrees with me that if I was to conduct a full substantive hearing, and make findings in favour of the applicants, I would not be able to order any remedy.

23. Mr Brown's view is that I would be able to compensate the applicants by way of ordering monetary payment under section 74.

24. The relevant part of section 74 is subsection (2) which states as follows:

"(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."

25. Section 74 is however not concerned with substantive remedies. It is concerned with the costs and expenses of the dispute resolution process itself. While this point is obvious to lawyers, it is not accepted by Mr Brown, who has continued to argue that substantive remedies can be provided under section 74.

26. The only possible relevance of section 74 is that it empowers me to award procedural costs and expenses. As Ms Kemp has correctly submitted

however, I do not have power to award the applicants costs and expenses should I refuse to continue to hear the dispute, because in the words of section 74(2)(a) I have not made "*a dispute resolution decision fully or substantially in favour of the applicant*." I consider however, that I could potentially make an award under section 74(2)(b). I decline to do so for reasons referred to later.

27. I invited Mr Brown to obtain a legal opinion that might contradict my views about sections 69 and 74 as set out above. He has not provided me with such a legal opinion, nor indicated that such an opinion is forthcoming. I therefore rely entirely on my own legal assessment, which no less than three lawyers on behalf of the respondent have indicated is correct. If those lawyers considered that I was incorrect, they would have been professionally bound to tell me so, because I directly asked them for their opinions.

28. Given therefore that even if I potentially made findings in favour of the applicants I was not empowered to order any remedy (apart from costs) it seemed to me that a full hearing would achieve little or nothing for the applicants. On the contrary, it would be stressful for them. Amongst other things, they would be required to produce briefs of evidence or affidavits and would likely be subject to cross-examination. The hearing process would have taken a number of days.

29. It was, however, my wish that the disputes process would bring benefit to the applicants by bringing focus and urgency to the ongoing consultation process. Following the procedural hearing at Waitakere Gardens on 26 September I had cause for optimism that the consultation process would be quickly concluded and arrangements agreed upon for the period during which the remedial works will be undertaken and any other relevant issues.

30. This takes me to the next issue, namely that of the representation of the applicants.

Representation of the applicants

31. The following comments are not lightly made, and are made with regret.

32. From very early on in these proceedings, I had concerns about the representation of the applicants by Mr Brown. In my minute dated 28 June 2017, I recorded that I was "*…concerned that there appears not to be a sound working relationship between Mr Brown and the operator. This may not be in the best interests of the applicants.*" As time went on I became increasingly concerned as to whether Mr Brown was acting in the best interests of the applicants.

33. My primary concern has been that rather than adopt a conciliatory approach, Mr Brown has adopted a highly aggressive approach. Rather than narrow issues in dispute, he appears determined to widen them. His

representation of the applicants may have imperilled their vital relationship with the respondent, in particular with the Waitakere Village management. He insists that the applicants have become highly distressed. If that is indeed the case, then that is of considerable concern, because it should have been avoidable.

34. Since my appointment, I have been privy to hundreds of pages of email correspondence passing between Mr Brown and various representatives of the respondent. What I have observed on the one hand, is unfailing politeness and restraint on the part of the various representatives of the respondent. On the other hand, Mr Brown has been insulting and abusive in his communications. He has accused a range of persons of dishonesty, lack of integrity, incompetence and lacking in good faith and good will. The tone of his communications is one of unrestrained criticism. He has displayed unremitting negativity. On a number of occasions I have called upon him to be more civil in his communications. My pleas have not been heeded. In the telephone conference I held on 30 November Mr Brown liberally used profanities and expletives, and addressed Ms Kemp in a disparaging and disrespectful manner.

35. I have found Mr Brown difficult to deal with. Even straightforward matters, such as agreeing on a time for telephone conferences, have proven to be complex, frustrating and difficult exercises. I have observed the respondent experience similar difficulties in its dealings with Mr Brown.

36. I have observed a tendency for Mr Brown to stand between the respondent and the applicants, thereby serving to block what might otherwise be straightforward and constructive conversation.

37. I have had some concerns about the issue of payment by the applicants to Mr Brown for his services. I am not aware what the arrangements are, but Mr Brown has frequently alluded to his wish to recover such costs from the respondent. With some dismay I have learned from Mr Brown that he is suing four of the applicants who he previously represented for alleged unpaid fees.

38. Mr Brown has been sharing details of this dispute with a wide range of persons including members of Parliament. My fundamental concern in this regard has been that this threatens the privacy of the applicants. This wide dissemination of communications pertinent to the dispute runs counter to my repeated directions that the process should be, at least at this stage, a private and confidential one. Mr Brown says that the applicants have authorised him to share private information, but my concerns remain. Mr Brown himself has repeatedly alluded to the age and frailty of the applicants.

39. Having said all of the above, I should record that in the greater part Mr Brown's dealings with me have been respectful, and he has cooperated with me. Furthermore, I am prepared to accept that Mr Brown is sincerely

motivated to assist the applicants. It is how is has been going about that, which is of concern.

Considerations leading to my decision

40. At the telephone conference held on 30 November I sought to ascertain the number and nature of outstanding issues between the applicants and the respondent.

41. Ms Burke told me that ten of the twelve applicants represented by Mr Brown had either already moved into temporary accommodation pending the works commencing, or were about to do so. She said these applicants were agreeable with the arrangements that had been put into place. She said one of the two remaining applicants represented by Mr Brown had just been sent a proposal by the respondent. She said there was an outstanding issue in relation to the twelfth applicant, namely concerning the intended construction of an enclosed space, but in this regard Mr Brown's proposal was acceptable to the respondent. She said that there is one applicant who is no longer represented by Mr Brown who has now left the Village, and about whom she did not have details as to what might have been agreed with her. In general terms, therefore, Ms Burke said that there was a general contentment on the part of ten of the twelve applicants represented by Mr Brown with the agreed arrangements, and that she expected arrangements soon to be agreed with the remaining two applicants.

42. Mr Brown painted an entirely different picture to that painted by Ms Kemp. He said that there is widespread dissatisfaction on the part of the twelve applicants, all of whom have ongoing issues with the respondent. He said that the relocation letters signed by applicants recording arrangements were inaccurate or misleading, and alleged that the vulnerable applicants had been taken advantage of by the respondent. He said that his company lawyer will be advising the applicants about the relocation letters. He would not tell me the name of this lawyer, although after being pressed by me said that his first name is Seth. He steadfastly refused to provide the lawyer's full name. He was unable to be clear with me as to whether the lawyer would be acting for the applicants or for him.

43. Mr Brown said that all the applicants want to pursue their dispute notices in relation to events going back to April 2016. He continued to insist that I have the power under section 74 to provide the applicants with a remedy in relation to the previous works proposal. He appeared to indicate that I could award monetary damages. He would not give me a straightforward answer as to whether he had received legal opinions from lawyers about my powers, although appeared to suggest that he may have, but would not pass their opinions on to me as "it is not their job to help you."

44. I asked Mr Brown and Ms Kemp for their views as to whether I should refer the dispute to the District Court as I am empowered to do under section 66 of the RVA. For some time Mr Brown had been copying in Members of Parliament and a range of other persons and organisations into correspondence passing between him on behalf of the applicants, and the respondent. Although this practice was unusual, if not unwise and irregular, I had no power to control it provided that it did not involve me or the dispute resolution process itself. I first contemplated the step of a referral to the District Court when on 10 November Mr Brown disregarded a message from me exhorting him not to copy Members of Parliament and other third parties into correspondence involving me, in contradiction of my direction that the proceedings remain private and confidential. I had emailed Mr Brown on very clear terms about this at 10.56 a.m. on 10 November. At 12.08 p.m. Mr Brown proceeded to do exactly what I had asked him not to do. I was concerned that this amounted to a direct challenge to my authority as disputes panel member, an authority conferred by the RVA. I was further concerned that the applicants might not be in a position to fully understand the extent to which their private affairs were being disseminated by Mr Brown to the world at large. I wondered whether the authority of the District Court and the procedural sanctions it can impose were called for in these circumstances.

45. Mr Brown submitted that to me "that you should do what you are employed to do" and proceed to conduct a substantive hearing. He said that neither he nor the applicants had any fears about the matter being heard in the District Court.

46. Ms Burke submitted that there was no point in my transferring the dispute to the District Court because it only has the same substantive powers in such disputes as disputes panellists. She referred to section 66(4)(a) RVA which states the District Court *"has all the powers and duties of a disputes panel under this Act."* Ms Burke submitted that instead of referring the dispute to the Court I should refuse to hear it under section 66 RVA.

47. Ms Burke also submitted that the applicants themselves have not been correctly advised by Mr Brown of the implications of District Court proceedings, such as them each being a separate party and having to attend court. Mr Brown suggested that the Court could hear evidence at Waitakere Gardens.

48. In broad summary, Ms Burke submitted that the nature of Mr Brown's representation of the applicants amounted to an abuse of their rights and interests, while Mr Brown submitted that the respondent was continuing to abuse the applicants' rights and interests.

The view of the disputes panel

49. Subsection (1) of section 66 RVA states:

A disputes panel may refuse to hear, or continue to hear, a dispute if the panel considers, after consulting with the parties, –
(a) that the dispute is frivolous or vexatious or an abuse of process; or
(b) that the dispute should be heard by a court of law; or
(c) that the panel should not hear it for any other sufficient reason.

50. In my view, the continuation of the disputes process is not in the interests of the applicants, firstly because it can achieve nothing for them, and secondly, because it only serves to create and compound rifts between the applicants and the respondent.

51. Mr Brown has failed to mount any credible argument to counter my view and that of the respondent that I have no powers in the circumstances to provide substantive relief to the applicants, even if I was to find that their rights had been breached in relation to the former remedial works proposal. Mr Brown recognised that he was out of his depth when it came to consideration of the law, but continued to represent the applicants without apparent recourse to legal advice which could be presented to me. My view that no substantive remedies are available to the applicants remains.

52. The contentment and welfare of retirement village residents is dependent on a trusting and harmonious relationship between residents and operators and their staff. It has been of concern to me that the manner in which Mr Brown has and continues to represent the applicants has unnecessarily given rise to a deeply fractious relationship between them and the respondent. This has come about particularly because of the way in which Mr Brown characterises the respondent as lacking integrity or decency, and stands between the applicants and the respondent. For example, Mr Brown persists in claiming that the respondent has committed "crimes", and labels direct communications between Village management and the applicants "bullying". I am concerned that instead of issues in dispute being narrowed and lessened over time, they are being widened and magnified. Mr Brown has repeatedly said that he will bring proceedings against the respondent in relation to the current proposed remedial works, although to my knowledge that has not occurred.

53. All of the above leads me to the view that I should refuse to hear the dispute on the grounds that it is now an abuse of process.

54. The parties have been consulted and advised about this as required by section 66(1) and (2) RVA. As has been mentioned above, there has been discursive discussion between me, Mr Brown and respondent's representatives from soon after my appointment as to whether the proceedings should continue.

55. It is important to record that I have not made any findings that the rights of the applicants were, or were not, infringed in relation to the former proposed remedial works. It is possible that rights of the applicants *were* breached. Equally, it is possible that they were *not*. I simply do not know. I

could only make such findings following the hearing of comprehensive evidence which had been subject to the scrutiny of me and the parties. I have, however, been made privy by Mr Brown to many hundreds of pages of documentation, including a copious number of emails. Indeed, the volume and spread of that documentation was frustrating and largely unhelpful because much was irrelevant and not accompanied by explanation or clear and succinct summaries.

56. I have considered whether I should make an order for costs in favour of the applicants. I decline to do so. In the terms of section 74(2)(b) I do not consider that the applicants acted reasonably in applying for the dispute resolution. That is because, as set out above, the remediation works proposal to which the application relates had already been indefinitely suspended by the time the application was made, and there were therefore no remedial orders available. Also, the criticisms set out above of Mr Brown's representation of the applicants count against an order for costs.

Decision

57. The disputes panel refuses pursuant to section 66(1)(a) to continue to hear the dispute on the grounds that to do so would be an abuse of process, and makes no order for costs in favour of either party.

.....

Nigel Dunlop
Disputes Panellist