

UNDER The Retirement Villages Act 2003

IN THE MATTER of a dispute

BETWEEN Ivan Mate Pivac

Applicant

AND Summerset Villages (Warkworth) Ltd

Respondent

DECISION OF DISPUTES PANEL MEMBER

DATED: 8 March 2018

Nigel Dunlop
Barrister
Nelson

1. I am called upon to decide is whether or not the respondent exploited the applicant.

Background

2. The applicant claims that he was exploited by the respondent in breach of clause 4.9 b of his occupation right agreement (ORA) with the respondent. The respondent agreed under that clause to "*ensure that you are not exploited.*"
3. The applicant similarly claims that the respondent breached clause 8 of the code of residents' rights. Clause 8 of the code confers "*the right not to be exploited by the operator.*" The code is contained in schedule 4 of the Retirement Villages Act 2003 (the Act). Section 32 of the Act confers the rights in the code on all persons who have entered into occupation right agreements with the operators of retirement villages.
4. The dispute arose as follows. The applicant purchased a unit at the respondent's Summerset Falls village in Warkworth. He still resides in it. When he purchased the unit, the windows were not double glazed. After he had purchased the unit, he subscribed to a double glazing scheme offered by the respondent to Summerset Falls residents. Under the scheme, the respondent offered to meet half the cost of retrofitting double glazed windows in single glazed village units. The remaining half of the cost would have to be met by the residents themselves.

Arguments

5. The applicant argues that this scheme was unfair having regard to the provisions of his ORA.
6. He purchased his unit by means of a licence payment. The ORA provides that upon termination of the ORA the licence payment will be repaid to the applicant. It is at that point called the repayment sum.
7. The nub of the dispute is this. The applicant says that when the unit is sold by the respondent on the termination of his ORA its value will have been enhanced as a result of the double glazing having been undertaken. He maintains that given that he has met half of the double glazing cost, then on termination of the ORA he should receive 50% of its enhanced value resulting from the double glazing. There is no provision or mechanism in the ORA for this to occur. Therefore he says that the ORA should be amended such that the repayment sum takes account of his investment in the double glazing.

8. Hence, the applicant argues that by introducing a scheme under which he has expended monies on his unit which he says will ultimately benefit the respondent but not himself, the respondent has exploited him.
9. Needless to say, the respondent views matters quite differently. In essence, it argues, that far from exploiting the applicant, it has conferred a benefit on him, namely, gifting him half the cost of the double glazing which will better enable him to manage the inside temperature of the unit, and thereby improve his use and enjoyment of the unit.
10. The respondent further argues that the applicant cannot justifiably claim that he was exploited for the following reasons:
 - Double glazing does not in fact increase the value of units, although renders them easier to sell.
 - The applicant was under no compulsion to subscribe to the scheme, but proceeded to do so in the full knowledge that the amount of the repayment sum on the termination of the ORA would not be adjusted to take account of the double glazing.
11. As the duly appointed disputes panel member, I am now required to rule on the dispute.

My views

12. In my view, it is inherently unlikely that the conferment of a benefit on a person, in this case a financial contribution by way of gift towards double glazing, can be deemed exploitative where the recipient is not required to repay the contribution, nor forego any existing rights. Especially is that so where the financial contribution was for a purpose which will enhance the quality of life of the recipient. There is some irony in the respondent setting about to assist the applicant improve his quality of life, only to have him accuse it of exploitation.
13. Exploitation involves one party unfairly using another party in order to achieve a benefit for the first party. The applicant argues that his resources, namely his half share of the double glazing costs, have been unfairly used by the respondent to gain a future advantage for the respondent, namely an improved selling price for the unit. Assuming that the double glazing would in fact increase the value of the unit, and thereby benefit the respondent, was the arrangement, however, unfair to the applicant?
14. In my view, the scheme was not unfair to the applicant, even if the respondent eventually benefits from it in way that the applicant does not. The applicant

entered into the scheme voluntarily, in full knowledge of its terms and conditions, and by that time already having been told by the respondent that his argument for an adjustment to the terms of the ORA was not accepted. It is very difficult for a person who makes a voluntary and fully informed decision to enter into an agreement, to subsequently successfully argue that the agreement was unfair.

15. The applicant is not arguing that he is suffering a loss at the hands of the respondent. On the contrary, he is achieving the benefits of double glazing for an indefinite period for half the usual cost. Rather, the applicant is arguing that he is being deprived of a benefit, namely an upwards adjustment to the repayment sum on the termination of the ORA. But it is not inherently unfair, in my view, for a party to an occupation right agreement to decline to provide the other party with a benefit not contained in the agreement.
16. Nor is it inherently unfair if as a result of changed circumstances one party to an agreement receives a benefit not shared by the other party. If the double glazing increases the value of the unit, and the respondent, but not the applicant, benefits as a result, then that does not automatically denote unfairness. It would be a case of good fortune on the part of the respondent. The applicant would not share in that good fortune, but nor would he suffer any detriment.
17. As it so happens, however, if the saleability of the unit is enhanced by the double glazing as claimed by the respondent (and not denied by the applicant) then both the applicant and the respondent may benefit as a result. The applicant is only entitled to receive the repayment sum once the respondent receives monies from a new resident of the unit. Hence if the unit is more saleable as a consequence of the double glazing, then both the applicant and the respondent may receive payment earlier than might otherwise be the case.
18. As already mentioned, however, the applicant's arguments are premised on the assumption that the value of the unit is enhanced by the double glazing having occurred. The respondent says this is a false assumption. It has received expert opinion to the effect that double glazing is *not* expected to increase the value of the unit, but only increase its saleability.
19. The applicant has not presented independent evidence to support his contention that the value of the unit has increased or will increase as a result of the double glazing. He says that the double glazing constitutes a capital expenditure, and hence the value of the unit must increase as a result of that expenditure. That is not the case. There is no necessary causative link between making improvements to a property and its value.
20. I do not know whether or not the double glazing will result in an increased value for the unit at the time it is eventually sold. Indeed, no-one knows. How

could they? The sale of the property will occur at an unknown future date. Not only is the date of sale unknown, but the likely market conditions at the time are unknown. Furthermore, when the unit is eventually sold, it might be difficult to determine what impact, if any, the double glazing had on the sale price.

21. This almost complete uncertainty about the impact of the double glazing on the eventual sale price of the unit is directly relevant to the issue of exploitation. As already noted, exploitation involves the notion of a party taking unfair advantage of another party in order that the first party derive a benefit. In this case, however, for reasons referred to in the previous paragraph, the respondent is not assured of achieving *any* benefit from the double glazing. Therefore it is difficult to argue that it is set about to exploit the applicant in order to achieve a benefit.
22. For the above reasons, I have concluded that the double glazing scheme did not involve the respondent exploiting the applicant. Therefore there has been no breach by the respondent of the ORA or the code of residents' rights.

Decision

23. It follows that the complaint by the applicant against the respondent must be dismissed. I accordingly dismiss the complaint.

Costs

24. Section 74 of the Act enables the disputes panel member to award costs and expenses to a party if the decision is fully or substantially in favour of that party.
25. The respondent does not seek an order for costs against the applicant. Therefore no order is made.


Nigel Dunlop
Disputes Panel Member

Note to parties:

You have the right to appeal against the decision of the disputes panel under section 75 of the Retirement Villages Act 2003. An appeal must be filed in the appropriate Court within twenty working days of the panel's decision.