

Decision of Disputes Panel

Name of applicants in dispute: **MICHAEL LEONARD McCARTHY and LYNNE DENNIS**

Name of each respondent in dispute: **TE AWA LIFECARE VILLAGE LIMITED**

Date of dispute notice: **29 August 2019**

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:

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Matters in dispute

- 1) Whether there has been any breach by the village operator of its obligations owed to the applicants in respect of their occupancy of Villa No 7, Te Awa Lifecare Village, 1866 Cambridge Rd, Cambridge, New Zealand and specifically with an adjoining Cottonwood tree and its seeds, catkins and resin.
- 2) Costs.

The Dispute Notice

1. The applicants gave to the village operator a dispute notice dated 29 August 2019 to which there was a reply with documents dated 25 September 2019. I was appointed by the village operator as disputes panel to resolve the dispute, the parties then signed Agreed Terms of Engagement of my appointment, and I conducted a pre-hearing conference by telephone and gave directions for timetabling for resolution of the dispute. The parties agreed that I would make a decision on the dispute on paperwork provided by them in accordance with the timetable that had been fixed.

Background

2. The retirement village is the Te Awa Lifecare Village at Cambridge Rd, Cambridge. The applicants are occupants of Villa 7. There is growing on the village site adjacent to the villa a Populus tree, identified as a Cottonwood (referred to herein as "**the Cottonwood tree**").
3. In December 2017 the applicants applied to enter into an Occupation Right Agreement ("**ORA**") for the villa. At that stage the village was in the early stages of development and construction of the villa had not been completed. The Cottonwood tree was growing on site at the time.
4. On 27 February 2018 the applicants signed an ORA and some of its clauses are mentioned below.
5. The application by the applicants for an ORA for the villa was expressly subject to their confirming an acceptable plan for the site which was satisfied on 13 August 2018.
6. By 6 September 2018 construction of Villa 7 had been completed and the applicants commenced occupation of it that day.

7. On 29 October 2018 the applicants sent an email to the village operator complaining about the tree and requesting its removal. There were then further exchanges between the parties which included:
 - 7.1. A complaint from the applicants by letter dated 13 June 2019 that the outdoor areas could not be used for their intended uses.
 - 7.2. A meeting of the parties with a representative of the statutory supervisor on 15 July 2019; followed by a written record of the meeting and a statement of the village operator's proposals concerning the issues between the parties.
 - 7.3. An email from the applicants dated 20 July 2019 declining those proposals.
 - 7.4. An email from the village operator dated 29 July 2019 referring to a plan of action for removal of limbs to reduce the span of the tree, to advance the eastern and western boundary planting of specimen trees to Spring 2019, and for review of the life of the Cottonwood tree in August 2020.
 - 7.5. About 7 August 2019 the village operator had certain pruning work done to the Cottonwood tree.
8. In accordance with required dispute resolution procedures the matter was referred to the statutory supervisor, Covenant Trustee Services Limited ("**Covenant**") and it made certain recommendations on 15 August 2019. Those recommendations were rejected by the applicants as was a suggestion for mediation.
9. The dispute notice and response thereto followed resulting in this current dispute panel procedure.

The applicants' position

10. The applicants' position is that the Cottonwood tree drops seeds covered in resins, catkins and filaments all full of resin. The resin clings to what it falls on and is "*almost impossible to remove easily*".
11. During the 2018/2019 summer this continued causing the applicants to clean furniture and tiles continuously; and even into the autumn. The leaves dropping from the trees still had seeds and resins. There were twigs and small branches

continuously falling throughout the winter months which “*clonk and bang onto the roof all times of day and night*” which was annoying and distracting.

12. The statement sent to me as disputes panel also referred to health concerns for Ms Dennis. This was not a matter mentioned in the dispute notice (although there is reference to “*the problems of the tree*” of which further reasons would be given). The results of tests were inconclusive, it was said, with retesting requiring to be done at a relevant part of the season.
13. The submission from the applicants referred to the detail of a Cottonwood tree as a male Populus growing 20 - 40 meters in height and spanning 15 - 20 meters; with flower catkins and pollen catkins creating seed capsules which can release 40,000,000 seeds from one tree. It is said that the seeds or buds are flammable and “*make a huge mess*” with white piles of fluffy seeds along driveways, landscaping, roofs and gutters.
14. It is the applicants’ position at the time of design and production of conceptual plans for the villa they requested that the outside areas conform to their desired lifestyle as they enjoyed entertaining and eating outdoors. They referred to the furniture that they had purchased for outdoor living. They said the problems began with resin being deposited all over the cane woven furniture which needed removal on a daily basis as a painstaking task.
15. Secondly when they were sitting outside resin or a seed dropping onto a person could leave yellow stains and causing further staining if transported indoors. These stains were not easily removed and they were embarrassed checking visitors for stains on clothing or shoes.
16. The applicants referred to resin over parked cars with the need to remove this. They said that it is only for approximately 12 weeks in a whole year (23% of the time) that they are clear of varying degrees of nuisance.
17. Their claim is that the villa and surrounding areas do not fit the criteria for its intended use. Their position is that they require that the Cottonwood tree be removed to allow the villa to be used for its intended purpose.
18. There was reference to attempts that had been made to settle the dispute which I need not go into. It is open to any party to a dispute, including a retirement village dispute, to settle the dispute by negotiation or mediation in the normal way. The procedures in the current Code of Practice indeed require that this

be done. No party is obliged, however, to reach a settlement and I do not hold it against either party that they have not settled the matter (although it could be relevant to the question of costs). I must decide the matter on the basis of legal issues and within the Retirement Villages Act 2003 (“**the RV Act**”) framework.

19. The applicants referred to the Cottonwood tree having been reduced in size by the village operator by about one-third its height and also as to its span. The applicants say that this has had an effect of reducing the problems for the current (2019/2020) season but it has not eliminated them and they will still have to deal with resin to a lesser degree. They said it also raises the question whether there will be annual pruning to maintain the lesser amount of debris.
20. The applicants say that there has never been additional time spent cleaning areas impacted by resin as had been recommended (presumably by the statutory supervisor) and the applicants have no confidence that any further attempt will occur.
21. Any question of review of removal of the tree in August 2020 gives the applicants no confidence in any favourable solution as there was no definite timeframe and no certainty of outcome.
22. The submission then went on to refer to other female trees in the vicinity and resultant fluff from them and the assumption from the applicants that they will need to tolerate the debris situation until any clean-up has occurred. The applicants consider that the village operator is using *“the wrong sort of trees for a retirement village”*.
23. After a six week vacation taken by the applicants ending October 2019 their first job, they said, was to sweep and wash the driveway and clean furniture of resin but that even one month later deposits of resin on the patios still required cleaning.
24. They said that when they purchased they thought maintenance would occur adequately and require little input from them but this has not proven to be the case.
25. There was reference then to a Plane tree recently planted on the western boundary and its distance from the Cottonwood tree and a future problem with light when both trees reached full span and height and spread.

26. They referred to a breach of a duty of care to disclose further development of the western boundary by the village operator. That is not something mentioned in the dispute notice.
27. The Summary referred to a duty of care they claim was owed by the village operator to inform them of the ramifications of living next to the Cottonwood tree in close proximity to the villa which is more a farm tree than a residential tree; and failure to inform of the proposed planting of large trees on the western boundary.
28. The Summary referred to lack of maintenance and concluded that the tree should be removed because the applicants can only use affected areas for 23% of the year leaving 77% of that time when they are unfit for intended purpose.
29. The applicants produced 54 photographs taken between 4 November 2018 and 19 February 2020. These show the Cottonwood tree before and after the August 2019 pruning by the village operator; the seeds and the catkins and debris falling from that tree; deposits on cane furniture, the roof and the patio, and the Plane trees on the western boundary. I have looked carefully at all of those and noted what they show.
30. In their reply submission the applicants effectively alleged breaches by the village operator of clauses 5.4 and 5.6(a) of the ORA and the obligations under sections 40 and 40.1 of the Retirement Villages Code of Practice 2008 (incorporating variations to April 2017) (which the village operator is required to comply with under clause 5.19 of the ORA). It was said that, even since reduction in size of the tree, maintenance has not been satisfactory for the applicants to be able to use their eastern terrace.
31. The applicants accepted that the resins and seeds had reduced significantly "*this last season*" (which I take to mean after the August 2019 pruning) but expressed their concern as to what would happen in following seasons and that "*if the tree is not reduced significantly every year to maintain it, than the total extent of problems will return*".

The village operator's/respondent's position

32. The reply by the village operator to the dispute notice referred to:
 - 32.1. The essential sequence of events as outlined above.

- 32.2. The complaint by the applicants to the village operator in October 2018 requesting that the tree be removed.
- 32.3. The further complaints and processes that had been followed including attempts to resolve the matter by the statutory supervisor to resolve the matter, and to
- 32.4. The express provisions of clauses 4.1(a), 5.4 and 5.6(a) of the ORA.
33. The village operator acknowledged that it had a responsibility to maintain and keep in good and respectable tidy operational order and condition the common areas under clause 5.4, stating that the tree is within the common area and maintenance of it is the sole responsibility of the village operator with no rights to the applicants other than the right to shared use.
34. The reply acknowledge that the village operator had, and would continue to fulfil, its maintenance obligations during the resin season and said that steam cleaning would be effective in removing resin and maintaining the external areas of the villa.
35. The tree, like others in the village, is part of the special character of the village that the village operator is committed to retaining with reference to trees impacting at different times of the year due to their pollination cycle or deciduous nature.
36. Inconvenience to the applicants at times of the year was not, it was said, a breach of any of the terms of the ORA. The applicants do not have any rights to decision-making about removal of the Cottonwood tree and the village operator has the right to make unfettered decisions with respect to trees.
37. Reference was made to costs (referred to below) in its submission.
38. The village operator referred to drone footage supplied which has been viewed. It said that the tree was trimmed on 7 August 2019 and that the overhanging of the villa by the tree is now minimal. The tree can be seen to be part of the special character of the village. An invoice for cleaning the roof between 5 September and 3 October 2019 was produced (and the applicants comment on this was that the cleaning was about one month after the tree was reduced in size and there were still dried resin patches to be seen on the roofing iron).
39. The submission referred to the terrace to the villa having been cleaned on 6 October 2019 and again shortly before the applicants returned from overseas,

with a photograph being produced taken at that time (and the applicants' response to that was that the photograph showed the wet terrace incapable of detection of marks and there was no photograph of the eastern terrace).

40. The village operator resists any order for removal of trees (including the Cottonwood tree) and says that the disputes panel has no jurisdiction to order this and it is not warranted in the circumstances. It says that it is maintaining the Cottonwood tree, the common area, and, to the extent it is obliged to, the villa and there has been no breach by it of the provisions of the ORA.

Findings on material issues of fact

41. There are no essential differences in the factual position taken by both parties to this dispute. The sequence of events was as set out in the background. The Cottonwood tree had been on site before the applicants' villa was constructed (and possibly before the village was developed). The applicants saw the site with that Cottonwood tree present. There was a Barbary hedge nearby along the western boundary which was to be, and has since been, removed.
42. The applicants applied for occupation rights to Villa 7 and this was subsequently agreed on terms and conditions acceptable to them (and with independent legal advice, as is required). There may have been exchanges between the parties about proposals concerning the Barbary hedge or other planting along the western boundary, but that is not stated in the dispute notice as being in dispute or a ground for relief.
43. The applicants have complained about the Cottonwood tree and debris from it and the effects this has had on their enjoyment of their villa and the outside amenities. In the meantime the village operator has significantly cut back the Cottonwood tree. The applicants are now concerned about growth from the tree and resultant debris in the future.
44. The village operator does not appear to dispute that the applicants have had to deal with the consequences of the debris and resin from the Cottonwood tree. The village operator has carried out cleaning to the patio in that area and to the roof of Villa 7. The provisions of the ORA and the Code of Practice are as set out below.

The statutory dispute notice scheme

45. The types of dispute for which a resident may give a dispute notice under section 53 of the RV Act are:

“...concerning any of the operator’s decisions—

(a) affecting the resident’s occupation right or right to access services or facilities; or

(b) relating to changes to charges for outgoings or access to services or facilities imposed or payable under the resident’s occupation right agreement; or

(c) 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 money due to the resident under the resident’s occupation right agreement following termination or avoidance under [section 31](#) of the resident’s occupation right agreement; or

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

(There is also provision for a dispute notice under section 53(3) which does not apply in this case).

46. The village operator accepts that the applicants gave the dispute notice in the time prescribed by section 57. The provisions of section 65 concerning the holding of the hearing have been met by this decision on the paperwork.

47. The relevant powers that the disputes panel has under section 69 of the RV Act are to:

(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) ... or

(d) ... or

(e) not impose any other obligation other than in relation to the payment of costs on any party.

48. The provisions of the ORA on which the applicants rely, namely clauses 5.4 and 5.6(a) read as follows:

“5.4 To maintain and keep in good and respectable tidy operational order and condition the common areas..

...

*5.6(a) to maintain and keep maintained in good clean tidy repair order and condition all **buildings in the village** and to arrange for the exterior of all windows to be regularly cleaned” (emphasis added).*

49. The provisions of sections 40 and 40.1 of the Retirement Villages Code of Practice 2008 on which reliance is placed read:

“40. General obligations

1 The operator must maintain all buildings, plant, and equipment in clean and safe working order, suitable for their intended use.”

Panel’s decision

50. To qualify as a dispute notice under section 53(1)(a) the dispute notice must relate to an *“operator’s decision ... affecting the residents’ occupation right or right to access services or facilities”* or to *“an alleged breach of a right referred to in the code of residents’ rights or of the code of practice.* Other sub paragraphs of section 53(1) do not apply.
51. For the disputes panel to make a legitimate order under section 69(1)(b) there would need to be some demonstrable breach by the village operator of obligations under the ORA or the Code of Practice (or other rights referred to in the Code of Residents’ Rights - although the applicants have not expressly stated any reliance on that Code).
52. The applicants have referred to a breach of clauses 5.4 and 5.6(a) of the ORA and the provisions of the Code of Practice mentioned *“because of the lack of maintenance and [the applicants’] inability to use the areas for their intended use”*.
53. That really raises two questions:
- 53.1. Whether there has been a lack of maintenance and
- 53.2. Whether this has caused the applicants to be unable to use the areas mentioned for their intended use.
54. I now consider obligations insofar as the Cottonwood tree itself is concerned, the common area surrounding the tree (but not the area occupied by Villa 7 of which the applicants have occupation rights), the patios surrounding Villa 7, the building comprising Villa 7 itself, and the applicants’ furniture and furnishings and cars.

55. The common areas are- those parts of the total site which are not exclusive to one resident or another, that is where all residents may have access and enjoy the amenities.

The Cottonwood Tree

56. I have taken it that the Cottonwood tree is in fact on a common area as that appears undisputed. That tree is part of the trees amenity for the whole village as was apparent from the drone footage sighted.
57. The tree has been pruned by the village operator during the 2019 season. It has stated that it proposes to do so regularly and appropriately as required.
58. I accept its claim that the 2019 pruning that occurred is compliance with the village operator's obligation under clause 5.4 to keep the common area including the tree and where it is planted in good and respectable tidy operational order and condition. There has been no lack of maintenance of the tree.
59. I do not accept that compliance with maintenance obligations requires that the tree be removed and I decline the applicants' request that this be ordered.

Seeds Catkins and Resin

60. It is not the tree that is causing problems for the applicants (although they have referred in the material to shading from light) but rather the seeds, catkins and resin coming from this Cottonwood tree.
61. It is the village operator's obligation:
- 61.1. Under clause 5.4 to keep the common area surrounding the tree in good and respectable tidy operational order and condition. That does require removal of debris from the Cottonwood tree and that removal must be done comprehensively and effectively.
- 61.2. Under clause 5.6(a) to maintain and keep maintained in good clean tidy repair order and condition Villa 7 including its exterior, windows and roof (and all other buildings in the village).
62. If that involves greater application because of the stickiness or the nature of the seeds, catkins and resins, then the maintenance has to be sufficiently comprehensive for that.

63. The applicants are effectively wanting that this maintenance work be done sufficiently regularly during the 77% of the time when there are seeds, catkins and resin and that will need to be something which the village operator takes into account as it performs its obligations under the ORA and the express provisions of clauses 5.4 and 5.6(a).
64. The applicants have done certain maintenance to a degree themselves with their cleaning work and the village operator has done so too with the roof maintenance cleaning. The tax invoice dated September 2019 was for roof maintenance work for all 12 villas in the village and refers to "*Rinse down*" and "*Wash off all areas using higher volume pressure washers to physically dislodge the dirt.*"
65. I have concluded that this has not been done to a sufficient degree by the village operator during the period in question between occupancy of Villa 7 by the applicants in September 2018 and December 2019.
66. Many of the photographs were taken during this period especially 6 November 2018 and 21 April 2019 and I accept the applicants' account of the cleaning work they have had to do because of resins from the seeds and catkins including to both the general area surrounding the tree and to the exterior of the dwelling of Villa 7.

Code of Practice

67. I do not think there has been a breach of clause 40.1 of the Code of Practice as stated above. That refers to maintenance of all buildings in clean and safe working order, suitable for their intended use. That seems to me to encompass issues differently from those covered by clauses 5.4 and 5.6 of the ORA mentioned. Clause 40.1 refers more to the cleanliness and safe working order of the building as a whole and there is no suggestion that Villa 7 is not clean and safe or as such unsuitable for its intended use.
68. The applicants' concern is about maintenance of the exterior and that is covered by clauses 5.4 and 5.6 of the ORA mentioned.

Patios

69. It is unclear to me whether any part of the patios surrounding Villa 7 are located in any part of the common area or whether they are in that part of the site forming part of Villa 7 for which the applicants have occupation rights.
70. Either way, however, the answer is the same, that is that, if there is any aspect of common area maintenance required, the village operator has the obligations for that under clause 5.4¹; and if, as I suspect is the case, the patios are in the exclusive area occupied by the applicants, then they would form part of the buildings to which clause 5.6(a) refers². Although they are patios, I interpret clause 5.6(a) as including any structure such as a patio.
71. My conclusions so far as patios around the Villa 7 are concerned are first that it is the village operator's responsibility to keep these clean and well maintained; secondly, that there has been inadequate discharge of these responsibilities in the period referred to earlier, that is from occupancy by the applicants until December 2019; and thirdly that, if the discharge of that maintenance obligation requires additional cleaning work by the village operator because of the nature of the detritus from the Cottonwood tree, that extra work will need to be done regularly and by the village operator at its cost.

Outdoor Furniture and Furnishings and cars

72. I do not think the village operator has any responsibilities so far as cleaning the applicants' outdoor furniture or cars is concerned. There was some reference to the interior of the villa being too small to accommodate all of the applicants' furnishings and that is it a matter for them. Insofar as there may have been furniture left outside the villa, whether on patios or otherwise, or any cars keeping these clean is the responsibility of the applicants or owners of the cars and not the village operator.

Summary

73. The parties must live with the fact that there is a mature Cottonwood tree growing in close proximity to this villa. On the one hand the village operator has chosen to have this tree on its village site and it must cope with maintenance of

¹ Refer paragraph 61.1 above

² Refer paragraph 61.2 above

the tree and maintenance of the detritus that falls from this. This is part of its maintenance obligation it has to the applicants under clause 5.4 of the common area; and the maintenance obligations it has of the building of Villa 7 under clause 5.6(a). This includes patios.

74. Conversely, the applicants must take responsibility that they have chosen to enter into an Occupation Right Agreement for a villa where there was an existing Cottonwood tree with associated issues concerning resin and detritus from it. They are entitled to expect the village operator to maintain that tree. This may not necessarily involve annual pruning such as occurred in 2019.
75. The tree must be maintained appropriately for its appearance, the nature of the village, and safety for the residents, including the applicants. It is not required to be removed.
76. The applicants are, however, entitled to have cleaned to a reasonable extent the seeds, catkins and resins falling from the tree and any marking that that may occasion to the exterior of the Villa 7, including patios. They are entitled to have that done on a reasonably regular basis as needed to maintain the appearance and cleanliness of the villa exterior and the village operator is obliged to do that under its maintenance obligations under clauses 5.4 and 5.6(a) of the ORA.
77. All other cleaning, sweeping, etc must be done by the applicants as part of their own living standards, including cleaning of their own furniture and other items left outside the villa.
78. I find that there has been a breach by the village operator of its obligations to the applicants in respect of Villa 7 as set out above in respect of the period since the commencement of their occupation until December 2019 but not to the extent as claimed by the applicants.
79. The current situation appears to be appropriately managed and controlled by the tree having been pruned in the 2019 season and for a review in August 2020; and with the cleaning that has respectively been done by both the applicants and the village operator.
80. Accordingly there is no relief that needs be ordered under section 69(1)(b) other than to order the village operator to continue to comply with its obligations under the ORA and the Code of Practice affecting the applicants by maintenance of

the Cottonwood tree, the common area surrounding it and to comply with its obligations for cleaning and maintenance of the exterior of the building of Villa 7 and patios to the reasonable extent referred to above.

81. The disputes panel finds partly in favour of that applicants and makes the following orders:

81.1. The respondent/village operator is to comply with its obligations under the Occupation Right Agreement with the applicants and the applicable Code of Practice in the way mentioned in this decision.

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

82. The disputes panel finds partly in favour of that respondent/village operator and makes the following orders:

82.1. The respondent/village operator is under no obligation to remove the Cottonwood tree.

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

83. I make this an interim decision so that the parties may have the opportunity for submission as to costs.

84. 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.

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

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



.....
Single member

16 March 2020
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.