

Under the Retirement Villages Act 2003

In the Matter of a Dispute Between

KAREN PHILLIPS

Of Unit 24,

Stonehaven Retirement Village,

27 Stonehaven Drive,

Maungakaramea,

WHANGAREI 0178.

APPLICANT

STONEHAVEN RETIREMENT VILLAGE

27 Stonehaven Drive,

Maungakaramea,

WHANGAREI 0178.

RESPONDENT

FINAL DECISION OF THE PANEL

Retirement Villages Act 2003.

INTRODUCTION

1. This is a dispute between the Applicant Karen Phillips (Ms Phillips) and Stonehaven Retirement Village (Stonehaven). The dispute is under The Retirement Villages Act 2003 (the RVA)
2. Ms Phillips is a resident of Stonehaven. Ms Phillips and Stonehaven signed an Occupation Rights Agreement(ORA) dated 26 February 2013.
3. Ms Phillips filed a Notice of Dispute dated 10.2.21. The Notice of Dispute complies with the required form.
4. In the Dispute Notice Ms Phillips raised the following issues;
 - a) Does the Applicant's ORA enable the Operator to increase her site payment?
 - b) Has the Operator increased, or is it intending to increase the Applicant's site payment?
 - c) Does the Applicant's ORA enable the Operator to decrease the Applicant's dwelling payment on exit, by increasing any future occupier's site payment?
 - d) Who is paying, and who should pay mediation and dispute panel costs?
5. These issues were accepted by Stonehaven as the issues for hearing.
6. Ms Phillips also raised further issues;
 - e) Can the Applicant claim that the Applicant's sister Ms McCloughan be reimbursed \$5000 in respect to her exit/site and exit/dwelling payments ?
 - f) Can the Applicant claim that previous and current residents be reimbursed in respect to their exit/site and exit/dwelling payments?
 - g) Can the Applicant claim that restrictions be placed on exit/site and exit/dwelling payments be applied to all future contracts?
7. The issues e), f) and g) above have the subject of an Interim Decision dated 22 April 2021. They are therefore not to be considered in this decision.

BACKGROUND

8. By way of background, when Ms Phillips applied to occupy a unit at Stonehaven both parties signed an ORA dated 26 February 2013. Ms Phillips had legal advice before signing the ORA.
9. Ms Phillips' ORA for Unit 24 required payment of a dwelling cost of \$105,000 and a site fee of \$20,000. The mechanics of this are set out in clause 3.4 of Ms Phillips' ORA.

10. If Ms Phillips chooses, or needs to terminate her occupation of Unit 24, or Stonehaven terminates it, then Stonehaven will generally find another occupier for the unit.
11. The new occupier will pay a site fee and dwelling fee according to the new occupier's ORA.

AGREEMENT ON HEARING

12. Ms Phillips and Stonehaven agreed the Panel hearing would be "*on the papers*". Both parties subsequently filed Will Say statements and written submissions.

THE ISSUES FOR THIS HEARING

ISSUE 1.

Does the Applicant's ORA enable the Operator to increase Ms Phillips' site payment?

The Facts

13. The one-off site fee of \$20,000 was paid by Ms Phillips when the ORA was signed by both parties before her entry to Stonehaven.
14. Clause 5.24 of Ms Phillips' ORA defines a site payment as a payment;
"... in exchange for the right to occupy the Residential Unit, to access the Community Facilities, and the right to receive the Exit Payment as set out in clause 3.4."
15. Ms Phillips' ORA also refers to the amount of the site fee in clause 3.4 which sets out the site fee as \$20,000.

Ms Phillip's position

16. Ms Phillips position is that she has lost trust in the Stonehaven trustees. She believes there have been or will be attempts to increase her site fee payment.

Stonehaven's position

17. Stonehaven's position is that Ms Phillips paid the site fee on entrance to the Stonehaven, and no further payment can be requested from her pursuant to the ORA.

The Law

18. The requirements in the RVA in respect to varying ORA's are set out in Schedule 2 of the Act.
19. At para 3(b) of the Schedule, it states that an ORA must include;
"whether the operator or resident can vary an occupation rights agreement and if so in what circumstances."

20. There is no clause in Ms Phillips' ORA to suggest the site fee may be varied or increased except by mutual agreement.

21. In clause 3.4 of Ms Phillips' ORA, it states the site payment is \$20,000.00

Decision on Issue 1.

22. The Panel's decision is that neither the law nor Ms Phillips' ORA enables Stonehaven to increase her site payment. Stonehaven accepts that position.

ISSUE 2.

Has the Operator increased, or is the Operator intending to increase the Applicant's site payment?

The Facts

20.1 A letter dated 23 June 2016 to residents from Stonehaven, and signed by the Chairperson stated;

"Dear Resident,

The board would like to inform all Occupational Rights Resident's that the Site Payment,(Section 11 of your ORA agreement) has increased from \$20,000,00 to \$25,000.00....."

20.2 A letter once again signed by the Chairperson followed on 3 July 2016 and stated;

"Dear Resident,

Further to my letter of 23 June, I would like to clarify who this increase applies to. The increase from \$20,00.00 to \$25,000.00 will only apply to new residents entering into a new Occupational Right Agreement

Please accept my sincere apologies if my letter did not make this clear and please do not hesitate to ask any questions."

20.3 Then again by way of letter dated 5 September 2019 Stonehaven's Chairperson advised all residents that;

*" The board would like to inform **all** (emphasis added) Occupational Rights Resident's that the Site Payment,(Section 11 of your ORA agreement) will now include the Capital Price Index for the year plus 2%.*

The calculation for the year ending 31.3.2019 is CPI of 1.5% plus 2% which would be a total site fee of \$25,850.00."

20.4 Anchorage Trustee Services (Stonehaven's Statutory Supervisors called Anchorage) responded by letter dated 7 October 2019 concluding;

“6. As previously advised by the Operator the increase to the site fee only applies to new residents.....”

7. Existing residents are entitled to and should rely on the terms of their respective Occupation Agreements.....”

20.5 An email from Anchorage to Stonehaven dated 22 October 2019 seemed to indicate agreement that the increase was not to apply to the earlier ORA residents who had a \$7000.00 or such as Ms Phillips a \$20,000.00 site fee.

20.6 The email states;

“--Mike confirmed the site fee increase will only apply to new residents coming into the Stonehaven Village

--For existing residents the commercial terms are as per their respective occupation agreements

--It would be good if the Trust could clarify this with residents”

Ms Phillip’s position

20.7 Ms Phillips’ argument is Stonehaven have shown an intention to raise the site fee through it letters of 23 June 2016 and 5 September 2019 and would have followed through with the increase if not challenged by Anchorage, herself, and others.

20.8 The 2019 letter from Stonehaven to residents to increase the site fee came after an acknowledgment after the 2016 letter that an increase in Ms Phillips site fee was not possible under the terms of her ORA.

20.9 Ms Phillips has lost trust in the integrity of the Stonehaven trustees as to their future intentions, and hence she has filed the Dispute Notice to clarify the site fee and exit fee situation.

Stonehaven’s position

20.10 Stonehaven’s position is that it has not and does not intend to raise Ms Phillips’ site fee.

The Law

20.11 The law is the same as for Issue 1, to say whether Stonehaven can or has, or intends to increase Ms Phillips’ site fee.

20.12 The requirements in the Retirement Villages Act 2003(RVA) in respect to varying ORA’s are set out in Schedule 2 of the Act.

20.13 At para 3(b) of the Schedule, it states that an ORA must include;

“whether the operator or resident can vary an occupation rights agreement and if so in what circumstances.”

Decision on Issue 2

20.14 The Panel finds that it is reasonable for Ms Phillips to believe there was an intention shown by Stonehaven to raise the site fee by way of the letter to residents dated 23 June 2016.

20.15 Even after acknowledging the error of including the ORA's in Ms Phillips' 2013 era in the letter to residents in 2016, a similar letter was sent dated 5 September 2019.

20.16 The email from Anchorage Trust of 22 October 2019 confirms Stonehaven's stated intention to raise site fees for existing residents but confirms that Stonehaven has agreed site fees for existing residents (such as Ms Phillips) would not be increased.

20.17 There is no current evidence before the Panel that Stonehaven has raised or intends to raise the \$20,00.00 site fee payment already made by Ms Phillips.

20.18 The Panel finds accordingly that Stonehaven has not increased Ms Phillips site fee, and there is no current evidence to show it intends to do so.

ISSUE 3.

Does the Applicant's ORA enable the Operator to decrease the Applicant's dwelling payment on exit, by increasing any future occupiers site payment?

The Facts

30.1 The issue of greatest concern to both the Applicant Ms Phillips and the Operator Stonehaven is whether there is capacity under Ms Phillips' ORA for Stonehaven to decrease the amount Ms Phillips would receive on exit, by increasing any future occupier's site payment.

30.2 If Stonehaven increases the site fee for the next occupier, then Ms Phillips will not receive the full capital gain, if there is any from her unit.

30.3 If the site fee is increased for a new occupier, a greater percentage of the dwelling and site fee cost of occupation to the next occupier of Ms Phillips' unit, will be the site fee.

30.4 The site fee is retained by Stonehaven, so less of the occupation price from the new occupier will be available as an exit payment for Ms Phillips.

30.5 The issue for the Panel is one of interpretation of Ms Phillips' ORA.

Ms Phillip's position

30.6 Ms Phillips advises she chose to sign an ORA for Stonehaven rather than other retirement villages because of two factors which she states influenced her decision.

30.7 The first factor was that a reported slogan used to market Stonehaven was that the purchaser could keep any capital gain on sale of the unit.

30.8 The second factor was that on sale there was a guaranteed exit fee. Ms Phillips alleges she was promised by the then chairperson, the real estate agents who marketed the Unit, and the previous manager that Stonehaven would only retain \$20,000 from the actual occupation price as an exit payment.

30.9 On the Stonehaven website advertising occupation opportunities Ms Phillips gave an endorsement for Stonehaven which said;

".... but the exit price sealed the deal....

*The cost of leaving is reasonable and **finite**(emphasis added) with the possibility of benefiting from capital gain....."*

The endorsement has since been revoked by Ms Phillips and removed by Stonehaven from its website.

30.10 Ms Phillips submits there is a conflict between the wording in the ORA and the Disclosure Statement about what exit payments can rightfully be charged.

30.11 Ms Phillips has provided evidence from the Statutory Supervisor which confirms Ms Phillips' own view that by increasing the site fee for any future occupier that automatically reduces the amount the present occupier receives on exit.

30.12 Ms Phillips submits the ORA does not clearly state that Stonehaven can increase the site fee to a new occupier, which will automatically reduce the sum paid to the current resident on exit.

Stonehaven's position

30.13 Stonehaven's position is that when Ms Phillips signed the ORA and made payment she paid a site fee of \$20,000.00 to occupy the unit, use the land and amenities, and receive an exit payment.

30.14 Site fees are used to improve the assets and facilities. Ms Phillips should not expect to benefit from any increase in any asset except the dwelling. Stonehaven owns the land and facilities.

30.15 Stonehaven submits there is nothing in Ms Phillips's ORA which specifies what her exit payment will be, therefore Stonehaven can charge future occupiers whatever site fee it considers appropriate.

30.16 To enable Ms Phillips' ORA to restrict what site fee Stonehaven can charge future occupiers would reduce the financial viability of Stonehaven and would be contrary to the law of contract.

30.17 Ms Phillips' ORA is clear as to the exit payment, and Ms Phillips received compulsory legal advice before she signed the ORA.

30.18 If there is a conflict in wording between the ORA and the Disclosure Statement the ORA prevails as that is the contractual document between Ms Phillips and Stonehaven.

30.19 It is not the Statutory Supervisor's role to interpret Ms Phillips' ORA.

30.20 The representations allegedly made to Ms Phillips about fixed site fee for the next occupier are contrary to the practice of Stonehaven.

30.21 Stonehaven seeks confirmation that the ORA is clear as to the fact Stonehaven has the sole right to set the site payment for new occupiers.

The Law

30.22 Section 27 of the RVA sets out what must be in all ORAs and states;

27 Occupation right agreements

- (1) No person may make any other person an offer of occupation in a retirement village, or accept an offer by a person to become a resident in a retirement village, except in accordance with an occupation right agreement that contains, in a clear and unambiguous form,—
- (a) provisions and information of the kind specified in Schedule 3; and
 - (b) any other provisions required to be specified in an occupation right agreement by this Act or regulations made under this Act; and

30.23 Schedule 3 is referred to in s 27 above and states;

SCHEDULE THREE

CODE OF RESIDENTS' RIGHTS

STONEHAVEN RETIREMENT VILLAGE

CODE OF RESIDENTS' RIGHTS

Information

- 2 You have the right to information relating to any matters affecting, or likely to affect, the terms or conditions of your residency.

Right not to be exploited

8 You have the right not to be exploited by the operator, the people who work at the village, and the people who provide services at the village.

30.24 The relevant clauses in the ORA are those which define the site and exit payments, and the process for calculating how the exit payment will be calculated.

30.25 Clause 5.24 of Ms Phillips' ORA defines a site payment as a payment;

"... in exchange for the right to occupy the Residential Unit, to access the Community Facilities, and the right to receive the Exit Payment as set out in clause 3.4."

30.26 The exit payment is defined at clause 5.13 in the ORA, as set out in clause 3.14 to be paid following termination of the ORA .

30.27 Clause 5.13 states:

5.13 **"Exit Payment"** means the payment set out in clause 3.4 which we must pay you following termination of this Agreement."

30.28 Clause 5.13 refers to Clause 3.14. Clause 3.14 of the ORA states;

On the Exit Payment Date (set out in clause 57), we will pay you the Exit Payment. The Exit Payment will be:

(a) *The amount that we receive as the dwelling payment from the person who takes a new occupation right agreement for the Residential Unit ("the new resident") but will not include any part of the site payment that we may receive from the new resident);*

30.29 Clause 56 of the ORA refers to how the exit payment is calculated. Clause 56 of the ORA states;

FINDING A NEW RESIDENT

56.1 *Subject to clause 56.8 below, after the Termination Date we will take all reasonable steps to enter into a new occupation right agreement for the Residential Unit in a timely manner and for the best price reasonably obtainable. This will be with a new resident who is prepared to enter into an occupation right agreement on our then standard terms and conditions and who satisfies our normal criteria for entry into the Village ("the new resident"). We have absolute discretion in determining if those criteria have been met.*

56.2....

56.3 *The Entry Payment to be payable by the new resident will comprise:*

a) *a site payment of an amount that we determine is a fair charge to be made for a right to occupy a site within the Village, and*

(b) a dwelling payment of an amount agreed between us, you and the new resident as the market value of a right to occupy the Dwelling.

56.4.....

56.8.....

30.30 Section 26 of the RVA is also relevant and states;

Other restrictions on advertising

26 Operator must ensure that advertisements are not misleading or deceptive

- (1) Before any advertisement for occupation rights in a retirement village is published, the operator and promoter of the village must take all practicable steps to ensure that the advertisement is not misleading or deceptive.
- (2) Subsection (1) does not affect the obligations of the operator or promoter under the Fair Trading Act 1986.

30.31 Finally section 69 of the RVA gives certain powers to the Panel. It states;

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 rights 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

Analysis

30.32 The Panel needs to decide if Ms Phillips' ORA enables Stonehaven to effectively decrease her exit payment, by increasing the site fee for any new occupier of Ms Phillips' unit.

30.33 To make its decision the Panel needs to refer to specific sections of the RVA and the ORA

30.34 Firstly the purpose of the RVA is set out in section 3 of the Act. It states;

Purpose

The purpose of this Act is—

- (a) to protect the interests of residents and intending residents of retirement villages:
- (b) to enable the development of retirement villages under a legal framework readily understandable by residents, intending residents, and operators:
- (c) for the purposes in paragraphs (a) and (b),—
 - (i) to promote understanding of the financial and occupancy interests of residents and intending residents of retirement villages:
 - (ii)
 - (iii)

(iv)

(v) to provide an environment of security and protection of rights for residents of retirement villages:

(vi)

30.35 In summary one of the purposes of the RVA is to protect the interests of residents and inform and assist understanding by residents of their interests in respect to financial aspects of residency.

30.36 That would put emphasis on whether Ms Phillips' ORA was clear as to the ability of Stonehaven as Operator to raise the site fee for any subsequent occupier of her unit, and hence reduce the amount Ms Phillips would receive as an exit payment from the dwelling.

30.37 The relevant clause of the ORA as to the exit payment is clause 3.4 which states;

On the Exit Payment Date (set out in clause 57), we will pay you the Exit Payment. The Exit Payment will be:

(a) *The amount that we receive as the dwelling payment from the person who takes a new occupation right agreement for the Residential Unit ("the new resident") but will not include any part of the site payment that we may receive from the new resident);*

30.38 Clause 3.4 is clear as far as it goes. The question is does clause 3.4 go as far as it should to meet the purposes of s 3 of the RVA?

30.39 The debate in Hansard in 2003 at the time of the passing of the RVA records a clear understanding that the occupier of a unit would not have any ownership interest in the land. That was the balance agreed between operators and residents.

30.40 However another purpose of the RVA was to protect retirement village residents as recorded in Hansard by the Minister when she said:

"What is so good about this legislation is that all the information is explained in plain language upfront, so that right at the very outset people know they are not buying property that they can sell. They will know what monies will be deducted from their (her) investment should they (she) leave the retirement village.....". [Hon L Dalziel Associate Minister of Justice]

30.41 The question for the Panel is therefore whether the language and information in Ms Phillips' ORA does provide sufficient information for Ms Phillips to "*know what monies will be deducted from their(her) investment should they(she) leave the retirement village*"

30.42 It is noted that compulsory legal advice was given to Ms Phillips about the terms of the ORA. The details of that advice are unknown except for the solicitor's certificate that states;

"(a) | explained to **KAREN MARGARET PHILLIPS** the general effect of the attached agreement and its implications before he or she signed the agreement; and

(b) | gave the explanation in a manner and in language that was appropriate to the age and understanding of **KAREN MARGARET PHILLIPS**."

30.43 Clause 56 of Ms Phillips' ORA details the process that Stonehaven may take in finding a new occupier. At clause 56(3) it outlines how the entry payment for the new occupier is calculated and states;

56.3 *The Entry Payment to be payable by the new resident will comprise:*

(a) a site payment of an amount that we determine is a fair charge to be made for a right to occupy a site within the Village, and

(b) a dwelling payment of an amount agreed between us, you and the new resident as the market value of a right to occupy the Dwelling.

30.44 The above clause does not clarify that once a value is established for the unit that value which is a finite amount, is divided between site fee and dwelling fee.

30.45 Accordingly if the amount charged for the new site fee, is increased then correspondingly the dwelling fee decreases.

30.46 There are certainly protections on exit in that the prior resident receives legal advice on the exit sum, but frankly by then it is likely to be too late to renegotiate, because of age or deteriorating health, death, or other factors.

30.47 Ms Phillips received legal advice on her ORA before signing the same, but clearly had not understood the exit payment at clause 56 of the ORA, as her subsequent endorsement on the Stonehaven website marketing the Village stated;

"... but the exit price sealed the deal...."

*The cost of leaving is reasonable and **finite** (emphasis added) with the possibility of benefiting from capital gain....."*

30.48 If Stonehaven did not consider the endorsement to be correct then it had an obligation to correct or remove Ms Phillips' endorsement under s 26 RVA which states;

26 Operator must ensure that advertisements are not misleading or deceptive

- (1) Before any advertisement for occupation rights in a retirement village is published, the operator and promoter of the village must take all practicable steps to ensure that the advertisement is not misleading or deceptive.

The Decision

30.49 The Panel finds that the detail and placing of the information in respect to the exit payment in Ms Phillips' ORA is insufficient.

30.50 The Panel's finding is that for transparency and to comply with the RVA, particularly Schedule 3, clause 3.4 of the ORA should have included an explanation after the current clause.

30.51 The Panel finds that the use of the endorsement by Ms Phillips on the Stonehaven website encouraging application for occupation of units, is in breach of s 26 RVA, which places obligations on Stonehaven to advertise accurately on all aspects including the amount of exit fees.

30.52 The Panel finds that pursuant to the Code of Residents' Rights number 2 as to provision of information on matters affecting terms or conditions of residency, Ms Phillips was not provided with sufficient information on the exit payment.

30.53 Further in respect to the Code of Residents' Right number 8 the Panel finds that Ms Phillips has been "*exploited*" by Stonehaven by not explaining in clear concise language in the ORA that the exit payment to Ms Phillips may be reduced by the amount that the site fee for the next occupier is increased.

30.54 Accordingly pursuant to s 69 (b) of the RVA the Panel directs that Stonehaven complies with its obligations under the RVA,ORA and Code of Residents Rights and does not make a deduction from any exit payment to Ms Phillips, for any increase in the site payment for any new occupier for her unit.

Issue 4

Who is paying, and who should pay mediation and dispute panel costs?

The Facts

40.1 Section 74 of the RVA sets out that the operator is liable for the costs of the Panel.

Ms Phillip's position

40.2 Ms Phillips accepts that Stonehaven is responsible for the costs of the Panel but states that in fact the residents are paying because they are the only source of funds for Stonehaven.

Stonehaven's position

40.3 Stonehaven accepts it is liable for the Panel's costs.

The Law

40.4 S 74 of the RVA states;

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.

Decision on Issue 4

40.5 The Panel costs are required to be met by Stonehaven. The Panel has no authority to require which resources are used by Stonehaven to make the payment.

Party Costs

50.1 It is noted both parties agreed to a hearing "*on the papers*" to reduce costs.

50.2 Ms Phillips has not been legally represented in this matter. It is noted that Stonehaven staff have assisted in providing material directly to and from Ms Phillips.

Decision on Costs

50.3 Accordingly there is no grant in respect to party costs.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Panel Member

Date: 21 June 2021.

