

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

INTERIM DECISION OF THE PANEL

Sections 63, 64, 65 and 69 Retirement Villages Act 2003.

INTRODUCTION

1. This is a dispute between Ms Karen Phillips (Ms Phillips) and Stonehaven Retirement Village(Stonehaven).
2. Ms Phillips is a resident of Stonehaven. She 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 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 sale, by increasing any purchasers 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. It is agreed at the Pre-Hearing Conference that issues e) to g) above were to be heard by submissions only as part of an Interim Decision by the Panel.

BACKGROUND

8. By way of background when Ms Phillips applied to occupy a unit at Stonehaven she signed an ORA.

9. Ms Phillips ORA for Unit 24 required payment of a site/exit fee of \$20,000. The mechanics of this are set out in clause 3.4 of the ORA.
10. If Ms Phillips chooses, or needs to end her ORA, Stonehaven will then generally find another occupier for the Unit.
11. If Stonehaven negotiates a further ORA with a new occupier at a higher site/exit fee, Ms Phillips will receive the “sale” price less the new occupiers site/exit fee, which may be higher than the perhaps the \$20,000 deduction anticipated by Ms Phillips. This is set out in clause 3.4(a) of the ORA.
12. Ms Phillips considers she was misled in her negotiations with Stonehaven which led to the signing of the ORA by herself and her sister Ms McCloughan.
13. Ms Phillips also considers Stonehaven has failed to provide full, accurate and clearly understood information to current and past residents, and by implication future residents about how the site/exit fees will operate.
14. However, the issues arising in Issues (e) to (g) above are not about the issue of the validity or otherwise of the site/exit payments, but are about whether Ms Phillips can represent another named or other un-named residents or former or future residents in the dispute about the site/exit payments.

THE ISSUES FOR THIS HEARING

ISSUE 1.

A. Can the Applicant claim that the Applicant’s sister Ms McCloughan be reimbursed \$5000 in respect to her exit/site and exit/dwelling payments ?

15. This is issue (e) in para 6 above.
16. Ms Phillips claims a refund of \$5000 in respect to her sister Ms McCloughan’s site/exit payment from the termination of her ORA.
17. There is little detail on Ms McCloughan’s circumstances which have led to Ms Phillips claim.
18. Ms Phillips says her goal is *“To have my sister’s extra \$5000.00 reimbursed.”*
19. Stonehaven’s response is that there is no jurisdiction for the Panel to hear a dispute which Ms Phillips is not a party to.

- 20. Stonehaven also says that Ms Phillips cannot bring a dispute against Stonehaven on behalf of any other resident.
- 21. Stonehaven submits the law that applies is Section 53 of the Act which sets out the types of disputes the Panel can hear, and that it applies only to a particular resident, by the use of the term “**the** resident”.

The Law and the Facts

- 22. The law that applies to Issue 1 is Section 53 of the Retirement Villages Act 2003 (the Act). It says;

53 *Types of dispute for which resident may give dispute notice*

(1) *A resident may give a dispute notice for the resolution of a dispute 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.*

(2) *.....*

(3) *A resident may give a dispute notice for resolution of a dispute concerning the operator’s breach of the resident’s occupation right agreement or code of practice in disposing of a residential unit in a retirement village formerly occupied by the resident.*

(4) *.....*

- 23. Section 53 sets out the types of disputes the Panel may hear. It refers to “*a resident*” and “*the resident*” indicating the dispute must be about the individual resident’s ORA.

24. Section 53(d) however notes a dispute may be taken over the resident's rights in the code of resident's rights or the code of practice which may have implications beyond the individual resident taking the dispute.

25. Section 49 of the Act also applies to this issue. It says;

49 *Resident's rights may be exercised by personal representative*

Any right conferred by this Part on a resident may be exercised by his or her personal representative.

26. This indicates that for anyone to bring a claim for any other resident, or former resident that person would need to have formal authority to act as a personal representative. The application made for the resident would need to be made in the name of the resident, by the representative for them.

27. It is required by clause 33 of Ms Phillips' ORA that all signatories to an ORA in that format must have a valid Enduring Power of Attorney in respect to property and welfare. That appointee may be an authorised "*personal representative*" for a resident or former resident.

Decision on Issue 1.

28. Section 53 allows for a variety of disputes to be raised by either the resident or the operator.

29. However, in each case where the resident is referred to it refers to "*the resident*" indicating the intention of the section is for a particular resident to take a dispute on matters which impact on that resident directly.

30. The intention to restrict a resident to taking claims only on their own behalf is strengthened by section 49 of the Act, which requires that anyone bringing a claim for a resident must be properly appointed to do so.

31. The claim must also be in the affected resident's name.

32. The Panel therefore finds that Ms Phillips cannot bring a claim on behalf of her sister in the manner she currently has.

33. Accordingly Issue 1 is dismissed.

ISSUE 2.

A. Can the Applicant claim that previous and current residents be reimbursed in respect to their exit/site and exit/dwelling payments?

34. This is issue (f) in para 6 above.

35. Ms Phillips position is that she has a moral obligation to protect the financial positions of current and previous residents in respect to exit/site and exit/dwelling payments.

36. Stonehaven's position is that the same principles apply as to Issue 1. A particular resident can only take a dispute claim about themselves because of section 53 of the Act which is set out above.

The Law and the Facts

37. The same law applies as to Issue 1.

38. In summary both sections 53 and 49 of the Act apply.

39. Any current or previous residents would need to bring a claim in their own names, or through a personal representative.

40. There is no facility under the Act for a resident to take what is often known as a "class action" where one applicant brings a claim on behalf of a similarly effected group. There has to be consent, even in general law from the rest of the group to be represented in the action taken by the applicant.

41. There is no such consent apparent in this case.

Decision on Issue 2

42. The Panel decision is that Ms Phillips, even with the best of intentions cannot bring a dispute on behalf of un-named other current or past residents.

43. The proper procedure needs to be followed in every case, with either a personal dispute being filed, or through a personal representative in the individual residents name who is a party to an ORA with Stonehaven.
44. This is not disputing that in some cases individual disputes can result in more wide spread implications such as in an interpretation issue. That however is beyond the determination on these interim issues.
45. Accordingly Issue 2 is dismissed.

ISSUE 3.

B. Can the Applicant claim that restrictions be placed on exit/site and exit/dwelling payments be applied to all future contracts?

46. This is issue (g) in para 6 above.
47. Ms Phillips ask the Panel to make a decision which restricts the amount of exit/site and exit/dwelling payments on all future ORA's at Stonehaven.
48. Stonehaven submits that as Ms Phillips is not a party to those as yet un-made ORA's there is no legal ability for the Panel to make findings on such future ORA's.
49. Stonehaven refers to Section 69 of the Act as to the limits of issues the Panel can make decisions on.
50. Section 69 says;

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) *.....*
 - (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.*

51. Stonehaven submits that Section 69 says that the Panel can only do what it is authorised to do under that section because of section 69(e) which says the Panel cannot impose any other obligations except for costs.

52. Ms Phillips says she and others have been misled, and that there should be redress for future residents if a breach is established.

The Law and the Facts

53. The law that applies to Issue 3 is Sections 49, 53, and 69 of the Act.

54. Once again sections 53 and 69 both restrict what decisions the Panel can make. All of the sections refer to the ORA of the applicant. For instance, in Section 69 it refers to "*an occupation rights agreement*" rather than all ORA's.

55. As noted in the earlier issues section 49 also restricts how disputes can be raised, they must be raised by the individual effected or by a personal representative.

56. The Panel therefore dismisses Issue 3 accordingly.

CONCLUSION

57. The Panel's interim decision is specific to the 3 Issues raised, which are about whether Ms Phillips can represent one named person Ms McLaughlin in the way she seeks to, and whether she can represent other un-named residents, past, current, and future.
58. The Issues in this decision do not directly impact on, or restrict any decision on the remaining issues for the substantive hearing, and what if any broader impact there be.

COSTS

59. The Panel has dismissed all 3 Issues raised by Ms Phillips.
60. Ms Phillips has not had the benefit of legal advice and has accepted some of Stonehaven's submissions.
61. Ms Phillips did not have the benefit of a Notice of Response having been filed before the Pre-trial hearing, or this decision.
62. The manner in which these issues have been agreed to be dealt with by both parties has been the most efficient and cost effective.
63. Any application for costs is reserved until after the final hearing.



PANEL MEMBER

Date: 22 April 2021.