

UNDER The Retirement Villages Act 2003

In the matter of a dispute

BETWEEN **Mr. Brian and Mrs. Eleanor
Teviotdale**

Applicants

AND **Settlers Albany Limited**

Respondents

Decision of Disputes Panel

Date of Disputes Notice: 1 February 2021

Date of Disputes Hearing: 24 June 2021

Date of Substantive Decision: 5 July 2021

Date of Costs Decision: 26 August 2021

The Disputes Panel was appointed under the Retirement Villages Act 2003 to resolve the dispute between the Applicants and Respondents and has further decided upon the dispute as follows:

Decision of Disputes Panel

1. In the earlier decision in this matter, of 5 July 2021, I made findings on the substantive issues between the parties. I reserved the question of costs. There has been an application for costs by the Respondent Village Operator Settlers Lifestyle Village in Albany (Settlers) against the Applicants Mr Brian Teviotdale and Mrs Eleanor Teviotdale (the Teviotdales). This further decision deals with that application. In all other respects the earlier decision is affirmed.
2. Settlers claim costs and have filed submissions on this point. Settlers note that the decision to pursue costs has not been made lightly, and they acknowledge the rights of a resident to pursue a dispute and have access to the dispute panel process, without generally being responsible for costs. However the Retirement Villages Act 2003 does make provision for costs to be awarded in favour of an operator in certain circumstances and Settlers say that this a situation where a costs order would be fair and reasonable.

3. Settlers' submissions refer to the reasons for their costs claim and the different categories of costs incurred. The submissions seek the sum of **\$9,596** which represents the costs of the disputes panel and the two mediations conducted. No claim has been made with respect to the costs of the lawyer representing Settlers, the management costs in processing the dispute, or the costs in dealing with this costs claim. The costs sought, therefore, represent only a small portion of the actual costs incurred by Settlers.
4. Settlers' submission highlights that the substantive decision was fully in their favour and makes reference to the conduct of the Parties throughout this dispute, noting that they attempted to resolve this dispute over many months and to find ways to address the Teviotdales' concerns. In Settlers' view, this dispute did not need to advance to a Disputes Panel Hearing and in the circumstances it was unnecessary and avoidable.
5. By email dated 2 August 2021 the Teviotdales indicated they had no view to express regarding the issue of costs and they have not filed submissions in response.

Discussion

6. The statutory provision for costs in a dispute of this kind are set out in section 74 of the Retirement Villages Act 2003 which 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.*
- (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. Awards 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.*

(3) *The disputes panel must make a decision whether to award costs and expenses under this section and the amount of any award –*

- a. *After having regard to the reasonableness of the costs and expenses and the amount of any award incurred by the applicant or other person in the circumstances of the particular case; and*
- b. *After taking into account the amount or value of the matters in dispute, the relative importance to the respective parties, and the conduct of the parties; and*
- c. *In accordance with, and subject to any limitations prescribed in, any regulations made under this Act for the purpose.*

(4) *Any person against whom costs and expenses are awarded under this section must pay them within 28 days of the decision to award them.*

7. The starting point under section 74 of the Retirement Villages Act 2003 is that the primary responsibility for the costs of the Disputes Panel lies with the village operator whether or not it is a party to the dispute.
8. The provision allowing for an order for costs is discretionary under subsection (2) and, in respect of the village operator where it is a party to the dispute, the provision is in the broader expression of subparagraph (c) “...any other person...if the disputes panel makes a dispute resolution decision fully or substantially in favour of that person”.
9. The criteria which the Disputes Panel is obliged under section (3) to take into account in making the decision is **first** whether to award the costs and expenses and **secondly** if that decision is made, to consider:
 - a. The reasonableness of costs and expenses incurred.
 - b. The amount of any award “*incurred*” in the circumstances of the case.
 - c. The amount or value of the matters in dispute.
 - d. The relative importance of the matters in dispute to the respective parties.
 - e. The conduct of the parties.
10. I have considered the applicable legislation in relation to the present case. Settlers qualifies for an order of costs because the decision was fully in its favour. It is discretionary whether I order costs against the Teviotdales in favour of Settlers. In my view, Settlers are entitled to such an order. Settlers has presented its position clearly from the outset and has made valiant efforts to resolve the dispute to the satisfaction of the Teviotdales, notwithstanding the fact that the Applicants pursued a claim which had little chance of success.

11. With respect to the individual criteria referred to in section 74(3) of the Retirement Villages Act 2003, I would like to specifically note the following two points:

The reasonableness of costs and expenses incurred

12. There has been no dispute that the amount of the costs and expenses that Settlers is claiming in Disputes Panel and Mediation costs was unreasonable and I take the amount that is being claimed, being **\$9,596**, as the appropriate amount. As noted above, no claim has been made with respect to the costs of the lawyer representing Settlers, the management costs in processing the dispute, or the costs in dealing with this costs claim. The costs and expenses sought, therefore, represent only a small portion of the actual costs incurred and in my view are reasonable expenses and costs to claim.

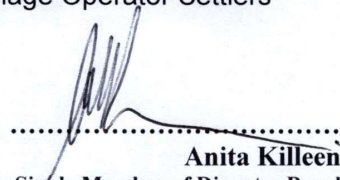
The conduct of the parties

13. The submissions for Settlers refers to the conduct of the Parties throughout this dispute, noting that they attempted to resolve this dispute over many months and to find ways to address the Teviotdales' concerns.
14. Two separate mediation hearings were conducted to try and find a workable solution to the dispute. Offers were made by Settlers to accommodate the Teviotdales' request for additional storage. The Teviotdales rejected the offers that were put to them.
15. In Settlers' submission, this dispute did not need to advance to a Disputes Panel Hearing and in the circumstances it was avoidable. I accept that submission.

Decision

16. The Disputes Panel process in the Retirement Villages Act 2003 is available for residents at a retirement village to have disputes resolved in the way prescribed by the Act. The primary purpose of the processes is to ensure speedy and cost effective resolution of disputes which qualify for resolution by a Disputes Panel in this way.
17. In this instance Settlers qualifies for an order of costs because the substantive decision was fully in its favour and the Teviotdales have pursued a claim which had little chance of success.
18. The expense and costs sought in this instance, **\$9,596**, represent only a small portion of the actual expenses and costs incurred, and therefore represent reasonable expenses and costs to claim in the circumstances. In my view Settlers are entitled to be reimbursed for the full amount of their claimed expenses and costs.

19. I therefore award and direct pursuant to section 74 of the Retirement Villages Act 2003 as costs and expenses that the Applicants Mr Brian Teviotdale and Mrs Eleanor Teviotdale, pay to the Respondent Village Operator Settlers Lifestyle Village in Albany, the sum of **\$9,596**.


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Anita Killeen
Single Member of Disputes Panel

26 August 2021
Date of Costs 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.