FINAL DECISION OF THE DISPUTES PANEL AS TO COSTS

In the matter of a dispute under the Retirement Villages Act 2003

Applicants: Ronald Currie and Claudia Currie ("the Applicants")

Respondent: Windsor Lifestyle Estate Limited ("the Respondent")

(also referred to collectively as "the Parties")

The Statutory Basis for Costs

1. Section 74(1) of the RVA sets out that the Operator is responsible for meeting all the costs incurred by the disputes panel in conducting a dispute resolution. However, section 74(2) allows the disputes panel, in its discretion, to award costs to the Applicant or to any other person in the various circumstances set out in sub-sections (a) to (d).

2. Section 74(2)(a) allows an award of costs and expenses in favour of the Applicant "if the disputes panel makes a disputes resolution decision fully or substantially in favour of the Applicant". I have not made a decision fully or substantially in favour of the Applicant. The Applicant has succeeded in respect of Issue 1, and the Operator has succeeded in respect of Issue 2.

3. Section 74(2)(b) allows an award of costs and expenses in favour of the Applicant "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."

4. Section 74(2)(c) allows an award of costs and expenses to "any other person ...if "the disputes panel makes a dispute resolution decision fully or substantially in favour of that person. In the Retirement Villages Disputes Panel decision of Perry, Emery and Maunder v Waitakere Group Limited 2007-4, the Panelist found in paragraph 36 that the words "any other person" included the Respondent (the village operator), and further found in paragraph 38 that the word "costs" included the costs of the disputes panel. I concur with such conclusions. It is therefore open to make an award of costs in favour of the Operator if the decision is fully or substantially in favour of the Operator.

Factors to be Considered in Awarding costs

5. In considering whether to award costs under section 74(2), I am obliged to consider the three matters set out in section 74(3) (a), (b) and (c):
   (a) 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.
   (b) The amount or value of the matters in dispute, the relative importance of the matters in dispute to the respective parties, and the conduct of the parties.
   (c) Any limitations prescribed in any regulations made under the RVR for the purpose.

6. While I am not bound by the District Courts Rules 2014, it is noted that Rule 14.2(1)(b) Indicates that "an award of costs should reflect the complexity **and significance** of the proceeding," This reflects similar sentiments to the words "**relative importance** of the matters in dispute" n section 74(3)(b).

The Decision

7. By way of summary:
   (a) I have determined Issue (a) in favour of the Applicants.

(b) In respect of Issue (b), I have determined 11.5 Items in favour of the Applicants, and 16.5 Items in favour of the Respondent.

(c) I have determined Issue (c) in favour of the Respondent.

(d) I have not determined Issue (d) in favour of either Party.

8. It is not, however, a matter of adding up the issues in which each Party has been successful, and arriving at a 12.5 versus 17.5 result. That would be simplistic. Of more importance are the nature and complexity of the issue, the significance of it in respect of the proceeding, the relative importance of it to the parties, and the conduct of the Parties.

Submissions Received

9. On 29 August 2024 the Applicants made a submission as to costs. They claim the sum of $150,000.00. There is no indication as to how this is arrived at, but the reasons put forward were "the possible loss of our home and occupation rights including the demand for money.", and for "the effect this has had on our mental health, well-being and lack of quiet enjoyment of life caused by the unconscionable conduct by the Respondent". They further indicated that they were willing to sell the Unit to the Respondent for "$619,000.00 in full plus legal fees." There was no information provided as to the costs and expenses actually incurred by the Applicants in respect of the Dispute.

10. On 03 September 2024 the Respondent made submissions as to costs. The Respondent indicated that the purpose of costs is to compensate a successful party for the costs expended in having their legal rights recognised and enforced at law, that the Applicants were not wholly but only partially successful, that the claim of $150,000 by the Applicants was really a claim for compensation under the guise of costs, that the Respondent had already incurred significant costs in dealing with matters raised by the Applicants which were outside the jurisdiction of the Panel or outside the scope of the Dispute, and the Respondent had incurred significant costs in respect of the dispute panel process (including the costs of the Panel). As a result, the Respondent considers that costs should "lie where they fall" . The Respondent further stated: "This recognises the

Applicants' right to bring a complaint and acknowledges that each party had a degree of success in the complaint (with the degree of success favouring the Respondent rather than the Applicants on the issues determined." The Respondent therefore makes no claim for costs against the Applicants, but also considers that costs sought by the Applicants are "wholly unreasonable" and "should be declined."

11. The Respondent also submitted (in paragraph 10 of their Submissions), quoting Rule 14.2(1)(f) of the District Court Rules 2014, that "an award of costs should not exceed the costs incurred by the party claiming costs". However, they did not quote (and I hope that this was not deliberate) the full wording of Rule14.2 (1)(f). It adds the words: "(not being a party acting in person)". Rule 14.2(2A)(a) defines a "party acting in person" as "a party who is without a solicitor on the record and who represents their own personal interests". The Applicants fall within that definition. The limitation in Rule 14.2(1)(f) therefore does not apply to them. Apart from that, I am not bound by the District Court Rules.

Further Information Obtained by the Panel

12. In the absence of any information from the Applicants as to their actual costs incurred in respect of the dispute, I requested from them details as to the legal costs paid by them to the two law firms that they consulted regarding the dispute, namely North End Law and Norris Ward McKinnon. The Applicants forwarded to me a bank statement for 11 June 2021 showing a payment to North End Law of $4,085.00. The Applicants forwarded to me Invoices from Norris Ward McKinnon dated 01 June 2021 ($5,865.00), 30 September 2021 ($1,322.50), 30 July 2021 ($402.50), 31 October 2021 ($448.50), 31 January 2022 ($496.80), 28 February 2022 ($1,242.00), and 31 May 2022 ($3,588.00), making a total paid to Norris Ward McKinnon of $13,365.30. The grand total of all payments was $17,450.30. Apart from these consultations, the Applicants represented themselves throughout the dispute. They did not engage a law firm to appear on their behalf at the hearing, nor to make submissions on their behalf.

13. The Respondent has not disclosed the amount of any legal costs incurred and has not made any claim for costs, on the basis of their submission that costs should lie where they fall.

Section 74(3) of the Retirement Villages Act

I turn now to the matters to be considered in terms of section 74(3) (a), (b) and (c) of the RVA.

14. Section 74(3)(a) "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."

(a) The Applicants did not indicate how the sum of $150,000.00 claimed by them was arrived at, but it is clear that it includes compensation or damages, and possibly solicitor-client cost, or both. I have no jurisdiction to award compensation or damages (see paragraph 231 of my Final Decision). As far as solicitor-client costs, while the Applicants consulted two law firms for advice and assistance in respect of issues arising from certain aspects ultimately considered in the Dispute, the , when it came to the Dispute itself they were entirely self-represented. Further, as mentioned in paragraph 231 of my Final Decision, solicitor-client costs are only awarded where the other party is clearly in the wrong and yet has belligerently continued with proceedings. That is not the case. The Applicants initiated the Dispute, and the Respondent defended some aspects of the Dispute and conceded other aspects of the Dispute. I do not consider that the Respondent acted unreasonably or belligerently in those aspects that it contested. In my view, the amount claimed by the Applicants for costs is therefore excessive and untenable.

(b) It is noted that the Respondent has not only paid the costs of the Panel, but also would have paid the costs of its solicitors in handling the Dispute for the Respondent. In view of the number of issues, the complexity of the issues, and the length of the Dispute, I accept that these costs have been significant (albeit tax deductible). It should be born in mind, however, that the Dispute had gone on for some years before the Dispute Notice was initiated, without being resolved. It was the Applicants' right to initiate the Dispute process to have the Issues resolved. Since that became necessary, it then activated the statutory requirement that the Respondent meet the Panel's costs. I made it clear to both parties throughout such process that the Dispute could be settled at any time up to the conclusion of the hearing. That would have avoided a lot of time, expense and stress, but it did not occur.

(c) Neither the Applicant nor the Respondent have received any monetary award in the Dispute.

15. Section 74(3)(b) "The amount or value of the matters in dispute, the relative importance of the matters in dispute to the respective parties, and the conduct of the parties."

(a) There was no monetary amount or value in issue in the Dispute.

(b) It is my view that Issues (a) and (d) were of most significance and relative importance to the parties. I indicated in my Final Decision that these two issues were

obviously related. The items of "unfair behaviour" raised in Issue (b) were able to be considered only if the Applicants were residents having an occupation right agreement, and Issue (c) was already raised as Items 18, 20 and 21 in Issue (b). I indicated in my Final Decision that Issues (b) and (c) were related (mistakenly typed as "(c) and (d)" on page 5).

(c) Issue (a) - Whether or not the Applicants had an occupation right agreement and were therefore "residents" . This was the crux of the Dispute. Unless the Applicants were "residents" having an "occupation right agreement", then the protections in the RVA, the Code of Practice for Retirement Villages and the Code of Residents Rights for Retirement Villages could not apply to them. I found in my Preliminary Decision dated 30 September 2023 that they did have an occupation right agreement comprised of a combination of documents arising from the course of dealing between the Parties, and they were therefore "residents". This was accepted by the Respondent. In the Final Decision, the Respondent conceded that the Applicants had an occupation right agreement comprised of the Encumbrance and Management Deed, which agreed with my own conclusion, and further found that the Encumbrance and the Management Deed were valid and effective documents. These findings were important and relevant to the Parties in clarifying the composition and effectiveness of existing ORA structures (whether implied from a course of dealing, or arising from historical registered documents), and the application of the RVA to them.

(d) Issue (d) – The Status of the Management Deed to Protect the Rights of the Applicants as Owners and Residents. This was of central importance to both parties because it affects the contractual relationship and resultant rights and obligations of the Parties going forward. This is obviously important in relation to any future sale of the Unit and exit of the Applicants from the Village.

(e) In respect of the Items of "unfair behaviour" raised in Issue (b), it is my view that the most significant were Items 3 [the threat of monetary penalties, possession, and mortgagee sale) and Items 18, 20 and 21 (which were essentially Issue (c))]. The reason is that these directly affected the occupation right of the Applicants.

(f) The conduct of the parties is relevant. The following behaviour is salient:

(i) I have referred in paragraph 5 on page 2 of the Final Decision to the non-disclosure by both parties of the letter dated 23 March 2023 from the Respondent's lawyers to the Applicants.

(ii) I have referred in paragraph 16 on page 5 of the Final Decision to the Respondent, to its credit, conceding that the Applicants had an occupation right agreement comprised of the Encumbrance and the Management Deed. This followed the Respondent's earlier acceptance, again to its credit, of my Preliminary Decision dated 20 September 2023 in which I found that the Applicants had an occupation right comprised of a combination of documents arising from the course of dealing of the Parties.

(iii) I have referred in paragraph 104 on page 44 of the Final Decision to the need for investigation by the Respondent of the nature and effect of the entries on the Applicants' title.

(iv) I have referred in paragraphs 104 on page 44 and paragraph 120 on page 53 of the Final Decision to the need for earlier confirmation and disclosure by the Applicants of consent being obtained, rather than silence.

(v) I have referred in paragraph 115 on page 48 of the Final Decision to the Applicants being treated as non-residents by the Respondent and being publicly called out in a meeting.

(vi) I have referred in paragraph 119(d) on page 52 and paragraph 120 on page 53 of the Final Decision to the indications by the Applicants of consent being obtained needing to be taken seriously and investigated by the Respondent.

(vii) I have referred in paragraphs 121 to 129 on pages 54 to 62 of the Final Decision to the compelling reasons for the Respondent not to exercise its perceived remedies against the Applicants.

(viii) I have referred in paragraph 160 on page 69 of the Final Decision to the lack of a prompt response from the Respondent to the letter of North End Law dated 28 January 2021 and the letter of Norris Ward McKinnon dated 28 May 2021.

(ix) I have referred in paragraph 167 on page 71 of the Final Decision to the peremptory termination by the Respondent of the Zoom meeting held on 3 May 2022.

(x) I have referred in paragraph 178 on page 74 of the Final Decision to the Applicants' complaint not being taken seriously and dismissed by the Respondent.

(xi) I have referred in paragraph 214 on page 84 of the Final Decision to the poor handling of the Dispute by the Respondent, and the resultant breach of clause 16 of the COP, and resultant stress and anxiety to the Applicants.

(xii) I have referred in paragraphs 228 and 230 on page 92 of the Final Decision to the unreasonable settlement figure of $884,000.00 put forward by the Applicants.

16. Section 74(3)(c) – "Any limitations prescribed in any regulations made under the RVR for the purpose."

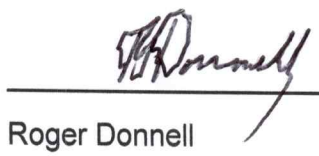
There are no such regulations made under the RVR which impose any limitations.

Conclusion

17. It is my view that in considering the overall conduct of the parties in this Dispute, the Respondent is more culpable than the Applicants. While neither party is faultless, the Respondent had the onus of ensuring that, in whatever it did in relation to the Applicants, the requirements of the COP and the CRR were adhered to. That did not always occur. The Applicants became "persona non grata" in the Village. They were treated with discourtesy and disrespect. They were threatened and humiliated. This inevitably affected their health and well-being. On the other hand, I have taken into account the early acceptance by the Respondent, in the course of the proceedings, of the occupation right held by the Applicants

18. In all the circumstances, I consider that a modest award of costs in favour of the Applicants is appropriate. Their claim for $150,000.00 is ridiculous and manifestly excessive. They have, however, incurred actual costs of $17,450.30.

19. I award costs in the sum of $15,000.00 in favour of the Applicants. In terms of section 74(4) of the RVA, such costs shall be paid by the Respondent to the Applicants within 28 days of the date of the release of this decision. For such purposes the Applicants shall either advise me or advise the Respondent directly (and copy me into such advice) within 14 days of the date of the release of this Decision of the bank account to which they wish the costs to be credited. I ORDER ACCORDINGLY.



Roger Donnell

Single Member of Disputes Panel

02 OCTOBER 2024

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.