

UNDER the Retirement Villages Act 2003

In the Matter of disputes

**BETWEEN ROWLAND MURRAY DUNBAR and
PATRICIA ANN DUNBAR**

First Applicants

AND ANNE McDONNELL

Second Applicant

AND JOHN and JEAN SPARROW

Third Applicants

**AND CONDELL RETIREMENT VILLAGE
(2011) LIMITED**

Village Operator /Respondent

REASONS FOR COSTS DECISION OF DISPUTES PANEL 9 APRIL 2025

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Introduction

1. In the three decisions on the three Dispute Notices (which were all by agreement heard together) dated 12 February 2025 and background Reasons, the Disputes Panel first found in favour of the Village Operator/respondent and dismissed the disputes and secondly reserved the question of costs for any for any further application.
2. There has only been one application, namely that from the Village Operator/respondent. The amount claimed for costs totals \$19,329.50. This is made up as to:
 - 2.1. Dispute panel costs totalling \$6,300.00 (and no further claim is made for costs in relation to this present costs decision).
 - 2.2. Its solicitors' costs totalling \$13,029.50 inclusive of GST. There were invoices provided which had certain items excised as relating to other matters but the amount claimed was, I was told, reduced accordingly.
3. This decision relates to that claim for costs.

The claims and essential decision

4. In their three separate Dispute Notices, the Applicants took objection to two letters which had been written on behalf of the Village Operator claiming that they had been abused by those two letters which they claimed blamed them for a decision made by the Village Operator for an alcohol ban in common ground areas. They alleged that the letters were bullying and "*elder abuse*" and treated them in a childish manner. There had been earlier a decision by the Village Operator management to impose an alcohol ban in the common areas because of concerns. The Applicants had sought in their respective Dispute Notices more fulsome apologies in written letters by Village Operator management clearing their names.
5. The Applicants, through their spokesperson, another resident, and the Village Operator agreed that the Disputes Panel decision would be based on documents which had been agreed between the parties. There was therefore no oral evidence from the Applicants or any other resident or on behalf of management of the village.

6. On that basis the Disputes Panel decision was that there was nothing in the documents which identified the Applicants or any of them as referred to in those documents and that if the Applicants self-identified as being referred to, then they had to take the consequence of that.
7. As to the content of the two letters in question the Disputes Panel found that they were neutral and made no specific reference to any individual, especially the Applicants. There was no evidence of any consequence for any of the Applicants or in any harm done to them from the letters in question. On that basis of the Disputes Panel found in favour of the Village Operator respondent and dismissed the three disputes.

The Village Operator's claim for costs

8. The submissions for the Village Operator was first that there was jurisdiction to order costs and that: "... *that [sic] is only the quantum of the costs which is to be addressed*". There are the three considerations, jurisdiction, entitlement, and quantum and entitlement to costs cannot be taken for granted.
9. The submissions did however, address the considerations raised by section 74(3) of the Retirement Villages Act 2003 ("**the RV Act**"), namely:
 - 9.1. The reasonableness of the costs and expenses where comparison was played with court litigation scales of costs allowing recovery of some 75% of reasonable fees and 100% of disbursements.
 - 9.2. The relative importance of the matter in dispute where it was said that the matter was very important from the Village Operator's point of view with the allegations of breaches of the Code of Practice and terms of Occupation Rights Agreements and reference to elder abuse. It was said that the Village Operator had taken great care not to identify individuals which affects the Village Operator's reputation in the village and in the marketplace and the cohesiveness of the village community. The Village Operator had been, it was said, obliged to defend the proceedings and incur the costs which were reasonable.
 - 9.3. The conduct of the parties.

- 9.3.1. Reference was first made to certain exchanges that had occurred between personnel, including the spokesperson for the Applicants; and relied on the fact that similar allegations had been made in the Reply to the Dispute Notices but not subsequently denied by the Applicants or their spokesperson.
- 9.3.2. There was then reference to various apologies that had been given as referred to in the Reply to Dispute Notices; again with reliance on the absence of any dispute to the allegations made there.
- 9.3.3. The Village Operator relied on the attempted inclusion on behalf of the Applicants in the bundle of documents of exchanges that had taken place with the statutory supervisor.
- 9.3.4. Finally, the Village Operator relied on the merits of the ultimate decision that has been made which should be taken into account in assessing conduct, it was said.

The Applicants' submissions

- 10. First, the Applicants produced a timeline. This effectively first set out the Applicants' position so far as the events were concerned and need not be addressed further. It also contained reference to the involvement of the statutory supervisor and the proposals for mediation that had been made by the Applicants.
- 11. It was submitted for the Applicants that costs should be allowed to lie where they fell with five reasons given:
 - 11.1. This was consistent with the statutory framework; with four points said to demonstrate to the intention that residents generally be protected from the costs of the dispute resolution scheme. These included that the provisions of section 74(2)(b), in providing that the Disputes Panel may award costs and expenses to the Applicant even though the decision is not in their favour, if they have acted reasonably, indicating that residents should be entitled

to use the process without fear of the risk of a costs order against them unless they have acted in a way that is clearly unreasonable.

- 11.2. The Village Operator's conduct, including in declining to participate in mediation, contributed to the cost of the dispute resolution. An apology as sought, if it had been made, would have involved no cost to the Village Operator; and the Village Operator has not acknowledged the "*genuine hurt and shame the Applicants felt and experienced*"; (although these beg the questions raised by the Dispute Notices as to whether there was identification of the Applicants in the documents on which they relied).
- 11.3. It had been reasonable for the Applicants to seek mediation and then file a claim after the recommendation of the statutory supervisor had been rejected with reference to the process followed with the statutory supervisor and the process for a proposed mediation.
- 11.4. The Applicants had not acted unreasonably; with submissions concerning alleged behaviour by a third party, the Applicants' representative; and steps taken by both parties concerning introduction of documents.
- 11.5. The quantum of costs sought was unreasonable having regard to the circumstances; with reference to comparative costs that might have been ordered in a District Court proceeding. There were submissions concerning the adequacy of the proof of the amount of costs claimed.
12. Finally the submissions referred to an extract from the substantive decision of the Disputes Panel on the merits giving an indication of possible costs claims results. It was said that "*[b]urdening the Applicants with legal and other costs would ... undoubtedly result in a failing of natural justice. The Applicants had no other remedies at their disposal*".

Applicable principles

13. The statutory provision for costs in a dispute resolution process under the RV Act is section 74 which reads as follows:

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) award 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 of the matters in dispute 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.

14. There have been many Disputes Panel decisions where claims for costs have been considered. Although the Applicants were critical of the Village Operator for not identifying any, the same could be said of the Applicants. The decisions are all available online.

15. Costs applications have been considered by the Disputes Panel in a number of previous disputes to which reference is now made:

*Kenward and Knebel v Metlife Care Kapiti Ltd*¹

16. That case involved a dispute concerning an alleged failure by the village operator to control a fish smoker which another resident was using which, it was claimed, was causing a nuisance. The panel found the process fundamentally flawed because the other resident was not a party to the dispute and the Applicants were seeking to make the village operator enforce rights against that party. The remedy sought by the Applicants was refused first because of that fundamental natural justice issue but also because the panel was not satisfied that the smoker was a nuisance and further was satisfied that the Village operator had taken all reasonable steps to try to resolve the dispute. In dealing with a cost application from the Village operator the panel first referred to, but dismissed, the apparent argument that section 74 may not apply to an application for costs by the Village operator because there is no express reference to this. The panel said:

“50 ... The operator is indeed required to meet all the costs incurred by the disputes panel. That does not mean however that Applicants cannot be required to reimburse or compensate the operator for some of those costs. Should an order for costs be made against an Applicant in favour of an operator, the operator continues to be responsible under section 74(1) for payment of the costs incurred by the disputes panel. The Applicants would not directly be paying any of those costs although that might be the indirect result. An order for costs relates not only to the costs incurred by the operator in relation to the disputes panel. Such an order may also relate to other costs incurred by the operator in respect of being a party to the dispute ... A further indication that an award of costs can be made in favour of an operator under section 74(2)(c) is that paragraph (d) permits an operator to be reimbursed for part of the costs incurred by the disputes panel in a situation where the operator is not a party. It could be argued that an operator should only receive a refund where it is not a party,

¹ 16/1/09; N J Dunlop (Panel Member)

otherwise applicants might be unduly discouraged from bringing disputes against operators. But the Panel Member prefers the opposite argument which is that it is unlikely that the legislature would have intended that an operator could be refunded all or part of costs incurred where it is not a party, but could not receive an award of costs in its favour where it is a party and has presumably incurred greater expense than if it were not a party. ”.

17. The village operator claimed internal management costs and external fees totalling \$12,945.00. The Disputes Panel member's costs approximated \$14,000.00 including airfares. Having taken various aggravating and mitigating factors into account the Disputes Panel member ordered each of the two Applicants to pay the village operator \$750.00 towards those costs.

Perry & Others v Waitakerei Group Ltd²

18. The dispute in that case concerned compliance by the village operator with the requirements of regulation 49 (d) and (e) of the Retirement Villages (General) Regulations 2006 which includes provision for the contents of a Deed of Supervision. There was further concern that the village operator had not been complying with the Deed of Supervision in the keeping of its accounts. The Disputes Panel ruled that there had been no failure to comply with the appropriate regulations. The village operator sought costs claiming that the Dispute Notice had been “*frivolous*”.
19. In ordering a contribution of \$1,000.00 towards the costs of the respondent including the disputes panel costs, the disputes panel in that case said:

“36. *It will be seen that the jurisdiction to order costs is discretionary (“may”). Any award that I may make would be under s.74(2)(c) because the respondent is in this regard an “other person”. Certainly my decision is fully in favour of the respondent”*

...

² 30/10/07 : D M Carden – Penal Member

38. *There is one other matter that needs mention. The power to award costs under s.74(2)(c) refers to “costs and expenses”. This contrasts with the power to award costs under s.74(2)(d) in a dispute with the operator is not a party which speaks of a “refund ... of the costs incurred by the disputes panel in conducting a dispute resolution”. My view is that the power under s.74(2)(c) (applicable in this case) does include the costs of the disputes panel”.*

*Van der Hulst v Dutch Village Trust*³

20. Having found in favour of the Applicant against the Village Operator on certain issues in dispute concerning repairs to the Applicant’s unit and unlawful access, the Disputes Panel awarded \$250.00 as contribution to costs of \$923.75 that the Applicant had incurred.

*A F & C Barnes Family Trust v Anglican Care (Waiaapu) Ltd*⁴

21. In that case the village operator sought a contribution of 66.6% of the total of the village operator’s costs, the applicants’ stated costs, and the disputes panel’s fees and expenses totalling \$46,000.00.
22. The disputes panel said first that the primary responsibility for carrying the cost of the dispute resolution process, no matter who the parties are and no matter what the outcome, lies with the village operator.
23. Having then weighed the relevant considerations, which included an ambiguity about provisions in the occupation rights agreement in question, forwarding of the wrong form of valuation to the applicant, a memorandum referred to a future valuation, and that the village operator had in fact resorted to a disputes panel challenge to jurisdiction at the outset, the disputes panel then concluded that there was sufficient merit in the applicants’ having brought the dispute notice such that they should be no order for costs against them, there should be no order made against the village operator for costs, and that costs should lie where they fell.

³ 18/4/07; C Elliott (Panel member)

⁴ 18/12/13: D Carden (Panel member)

*Applicant A v A Village*⁵ – 2022

24. The disputes panel decision in that case extended to 286 pages which indicates the length and complexity of the hearing and issues before the panel. Essentially it involved how the village operator in that case dealt with three out of 246 residents of the village who had not complied with or adequately disclosed their vaccination position during the Covid - 19 regime. Many issues were raised some of which were found in favour of residents and some in favour of the village operator, the disputes panel describing the village operator as being in “*an unprecedented and difficult position [and had] a duty of care to keep residents healthy and safe*”, [with the disputes panel listing ... 12 factors it had had] to consider in the light of what was known about the Covid-19 Delta virus at the time”. On a preliminary basis, the Disputes Panel made no order for costs in favour of either party, the decision having canvassed the criteria in section 74(3)(a), (b) and (c) above.

*TW v WV*⁶.

25. The village operator in that case sought an order for costs against the applicant residents of \$9,927.79, which covered the costs of the statutory supervisor investigation and report, the dispute panel fee, and the cost of representation. The applicants had unsuccessfully sought orders for repayment of the difference between the estimated rates and the actual rates for the financial year prior to the involvement of the statutory supervisor but they were unable to surmount the challenge of the relevant provisions of their Occupation Rights Agreements that reserve the power to set the weekly fee (that encompasses a range of costs) to the village operator. The applicants appear to have acknowledged a liability to pay from some costs; but the decision of the Disputes Panel was to order the sum of \$9,237.79 stated to be half the Supervisor’s Report and the dispute panel costs.

⁵ 25/9/2022; R Donnell (Panel member)

⁶ 27/11/2024; S Robson (Panel member)

Costs claim: discussion

26. Any power the Disputes Panel has to award the Village Operator costs as claimed comes from section 74 of the RV Act. The relevant applicable subsection is s. 74(2)(c).
- (2) *Whether or not there is a hearing, the Disputes Panel may—*
 ...
 (c) *award any other person costs and expenses if the Disputes Panel makes a dispute resolution decision fully or substantially in favour of that person:*
27. As noted above it has been found before, and I now confirm, that this allows the Village Operator to claim its own costs and the expenses it has incurred in funding the Disputes Panel process.
28. The factors to be taken into account are prescribed (“*must*”) by s. 74(3):
- (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 of the matters in dispute 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. [There are no such regulations].*

Reasonableness of claim

29. In support of its claim, the Village Operator tendered first the expense account of the Disputes Panel and neither party appeared to make any criticism of the amount of that (although submissions for the Applicants in general terms referred to the “*unreasonably high [costs] for a determination on the papers on what is a relatively confined issue*” (which could be said to include those dispute panel costs)), \$6,300.00.
30. The claim for costs incurred by the Village Operator were for its legal expenses, \$13,029.50. In support there were tendered certain invoices from the solicitors for the Village Operator which had been redacted in part and the explanation was given that the accounts included work outside of

the dispute panel process and the amount had been reduced accordingly (by \$4,600.00 plus GST). No detail was given and the Applicants submissions were critical of that.

31. They submitted that the Dispute Notice was a “*simple matter which, in all reasonableness, did not require the involvement of solicitors*”. I cannot accept that. The Applicants had raised serious issues concerning the operation of the village by the Village Operator and had had assistance in completing their paperwork and submissions from a person apparently with familiarity and understanding of retirement village issues and residents’ rights. The Village Operator was entitled to, and in the circumstances justified in, taking proper legal advice. Perhaps the Applicants would have been helped by having done the same.
32. The Applicants’ submissions included that solicitor indemnity costs were not appropriate and that no detail was given of the hourly rate charged.
33. Both parties made reference to court costs’ claims structures. They are useful to a degree, if only to emphasise that, at least in the court regime, neither party, if successful, can expect to recover full costs (although this does occur) but can expect a reasonable contribution from the other party. I accept submissions for the Applicants that on the District Courts scales, the amounts claimed by the Village Operator would have been “*high for a claim determined on the papers without discovery*”.
34. It is always hard to assess the reasonableness of a solicitors’ charge to their client, but particularly in reliance on invoices only which are then redacted. I have taken into account the Applicants’ criticisms of, and the areas of uncertainty in, the invoices from the solicitor on which reliance is placed by the Village Operator, but they are otherwise a starting point for assessment of reasonableness.

Amount or value of the matters in dispute

35. The matters in dispute had no monetary value or amount. They did have significant value to the Applicants. They perceived that there was significant harm done to their reputation by the letters which had been written by the Village Operator on which reliance was placed. I perceive

also that they felt aggrieved by the responsibility that had been placed on them for the decision to ban alcohol in common areas. As noted in the substantive decision, however, there was no direct evidence before me on which any such conclusion could be drawn. First, because there was no evidence identifying the Applicants as the persons having any responsibility for the decision to ban alcohol; and secondly because there was no evidence that the reputation of the Applicants suffered with other village residents or otherwise in that decision.

36. I accept conversely that the matter was of importance to the Village Operator in that the Dispute Notices made allegations against the Village Operator which included references to elder abuse which could not be left unanswered (although the “*elder abuse*” issue was abandoned at the first conference).
37. Looking at what was presented to the Disputes Panel, namely primarily the letters written by the Village Operator to which exception was taken, these did not affect the Applicants directly as such and they were written in perfectly neutral terms by representatives of the Village Operator.

Conduct of the parties

38. I find that so far as the Dispute Notice resolution process is concerned the conduct of the parties and their respective representatives cannot be faulted.
39. The Applicants have each brought separately Dispute Notices which are differently worded but on the same issue; they have attended the conferences that I have called and spoken through their spokesperson, Mr Barry Dent, and the articulation of their claims and submissions has been succinct and respectful to the Village Operator and to the dispute panel process.
40. The Village Operator’s compliance with the process has been appropriate too.
41. I reject the reliance by the Village Operator on statements it had made in the reply to the Dispute Notices and reiterated in the submissions concerning alleged statements made by the third party, Mr Barry Dent,

despite there having been no denial of those allegations by him. This is not the subject of any evidence before me and he is not, of course, a party to the Dispute Notices (3) in question.

42. I am not placing any weight on the conduct of the parties in relation to the intervention of the statutory supervisor. The Applicants sought to introduce into the bundle documents which they later withdrew in the face of objection from the Village Operator. The statutory supervisor may have expressed some view as to how to reach a resolution of this dispute without proceeding to decision by the Disputes Panel, and this may have included an apology, but that was not binding on me and was a way which the statutory supervisor thought a result could be achieved. The Village Operator did not follow that course for the reasons that are articulated in its response.
43. I have noted the timeline produced by the Applicants. That does not, in my view, indicate any unreasonableness on the part of either party.

Conclusion

44. It is essential in the successful running of a retirement village that there be good communication and understanding between the Village Operator and each and all of the residents and between the residents themselves. There must be room for give and take on all sides. Issues that arise should be addressed carefully with understanding. Those principles are articulated carefully and thoroughly in the various statutory and other materials produced for retirement villages. It is regrettable that in this case that has not occurred.
45. Having taken all those factors into account, I have concluded that the substantial part of its costs in this matter, including the dispute panel costs, should be borne by the Village Operator.
46. This is the structure of the statutory process. Under section 77(1) the primary responsibility for meeting those costs lies with the Village Operator. The discretionary power under subsection (2) to award costs taking into account the factors that are mentioned gives broad discretion to the Disputes Panel.

47. The Applicants had a grievance which they articulated in their respective disputes notices. They sought relief by way of apology that is mentioned above which was declined. Their case was presented in an articulate and succinct form and they had help with this. They agreed that evidence should be based on the documents rather than choosing to give evidence. They saw the Village Operator's response and chose to go ahead in any event. During the process there was mediation mooted but not preceded with; and there was the recommendation for an apology from the statutory supervisor which was not taken up by the Village Operator.
48. Against this, however, is that the Dispute Notices were bound to fail from the outset. They sought to have the apologies order for which there is no jurisdiction. They did not put up any direct evidence on matters at issue and chose not to give evidence themselves and be faced with questioning.
49. When I convened the first telephone conference I referred to section 69 of the RV Act and the limits on what are the Disputes Panel could order in respect of any successful Dispute Notice. I expressly recorded this at paragraph 4.2.2 of Minute No 2 dated 11 December 2024 as follows:

*After I referred [the Applicants' representative] to section 69 of the Retirement Villages Act 2002 ("**the Act**"), [he said] that he would need time to respond to questions of my jurisdiction to order the apology sought.*

50. The Applicants were on notice from that time of the difficulties they would have in obtaining the order that they sought and at no stage was there any response to those questions raised by me.
51. In *Applicant A v A Village*⁷ referred to above at paragraph 24 at page 33 the Disputes Panel held:
- "1. The Applicant has sought an apology from the Operator for the lack of consultation. It is not within the powers in section 69 of the RVA for me to order the Operator to give such an apology, but I strongly recommend to the Operator, as an exercise in goodwill, that this be done*
52. I accept that principle and it is pertinent here. Even had I strongly recommended an apology as sought by the Applicants, that is unlikely to it

⁷ 25/9/2022; R Donnell (Panel member)

happened given that that recommendation had been made by the statutory supervisor but not taken up by the Village Operator.

53. It is regrettable that the parties did not go to mediation under these disputes. I canvassed that possibility of the first telephone conference but recorded in Minute No 2:

“I canvassed whether the parties wished to proceed with any mediation but was told categorically by the Applicants that they did not”.

The documents given to me suggest that the process for mediation had been set up but did not occur for reasons which the Applicants attribute to the Village Operator.

54. My experience of mediation is that this could well have brought a solution for these parties. On the one hand careful questioning might have elicited that the Applicants were going to be unsuccessfully in their attempts to force an apology through the Dispute Notice process. On the other hand, there could have been a carefully crafted statement to be made by the Village Operator which satisfied the Applicants exonerating them for any suggestion that they had been the authors of the ban on alcohol but on the other hand did not amount to the apology which the Village Operator did not wish to make. I am only speculating because mediation did not occur, but that could have been a possible outcome avoiding the cost of Dispute Notice process.
55. At all events, the claims in the Dispute Notices were bound to fail from the outset for many reasons including lack of jurisdiction to order the apologies sought, lack of evidence identifying the Applicants in the letters in question, lack of any evidence from the Applicants or anyone else as to the events surrounding the alcohol ban in common areas and lack of any evidence implicating the Applicants in that process.
56. The Applicants may have been encouraged to bring their respective Dispute Notices by other parties. There was no evidence as to the identity of the individuals involved in the “group” in question but if that included

persons other than the respective Applicants, then it may be said that they should bear some responsibility for the present outcome.

57. Having weighed all those factors up, I have concluded that in my discretion I should order a contribution from the respective Applicants to the costs incurred by the Village Operator in respect of the dispute panel costs and some of the legal expenses would incurred by it.
58. I fix that contribution at a total of \$2,100.00 and I include in the final order in this matter an order against each of the respective Applicants (and that includes the first and third Applicants each jointly) of \$700.00 each.

Dated at Auckland this 9th day of April 2025



David M Carden
Disputes Panellist