UNDER the Retirement Villages Act 2003

In the Matter of disputes

BETWEEN **DOUGLAS IAN DAVIES** and Others

Applicants

AND **BETHLEHEM COUNTRY CLUB VILLAGE LIMITED**

Village Operator /Respondent

REASONS OF DISPUTES PANEL FOR COSTS DECISION
19 AUGUST 2025

David M. Carden, LL M,
Auckland

Background

1. In the substantive decision on the dispute notice in question I reached a conclusion on the two issues involved and reserved the question of costs. The Village Operator has made a claim for costs and this decision deals with that claim.
2. The first issue concerned the closure of the subject footpath referred to in the decision as being in breach of the rights of the Applicants to services and other benefits. I upheld part of the Applicants' position by finding that all of the Applicants were entitled to use that pathway, it being common area.. I found that the Village Operator had the right to remove the amenity of access to that common area from time to time permanently or temporarily. That included closure of access to that common area. This latter point was effectively conceded by the Applicants without dispute.
3. The second issue was of lack of consultation with the Applicants concerning that decision as in breach of certain rights. I found that the Village Operator had obligations of consultation with residents about any proposals for closure of this amenity of access under clauses in the respective ORAs, of the Code of Residents' Rights of the Code of Practice.
4. I further found that, on balance, the Village Operator had discharged that obligation of consultation before having made a temporary closure to the subject footpath that it did.
5. One issue concerning consultation was whether the Village Operator had predetermined the question before making a decision or going through the process of consultation. On the evidence I found that there had been no such predetermination which might have affected the validity of the consultation process.

The Village Operator's application for costs

6. The Village Operator has applied for an order for costs under section 74 of the Retirement Villages Act 2003 ("**the RV Act**").
7. It submitted first that there was jurisdiction for an order in its favour.
8. It gave detail of the costs that it had incurred the namely:
   8.1. The dispute panel costs totalling $20,500.00.

8.2. External legal costs totalling $55,336.45.

9. It did not supply detail of the dispute panel costs but I can confirm that there were three accounts from me totalling $20,566.20.

10. There were various legal invoices attached for reference but these were substantially redacted. I had no way of assessing the value of the amounts claimed or any of the detail which had been redacted; but there were some disbursements included and GST content. The costs for the Village Operator were said not to include costs to the business of involving the village manager and/or sales manager or General Counsel for Arvida (including travel costs to and from the dispute) (Arvida having a beneficial interest in the Village Operator).

11. Of the combined total, $75,836.45 (although my calculations gave a slightly different total), the Village Operator sought a contribution of $20,000.00 representing $10,000.00 for legal invoices and $10,000.00 for dispute panel costs and expenses.

12. The submissions made a comparison with scale costs in court litigation where it was said recovery would be $11,460.00 which demonstrated that the $10,000.00 claimed for legal fees was reasonable representing a recovery rate of 20% against actual costs incurred. It was accepted that the Village Operator is responsible for the dispute panel costs but submitted that it was open to the panel to make an order in respect of dispute panel costs and that $10,000.00 is reasonable in all the circumstances.

13. As to relative importance to the parties was submitted that this was a neutral factor, it being of importance to both parties requiring resolution. There were then submissions made regarding the conduct of the parties.

14. In conclusion the Village Operator sought an order for costs of $20,000.00 as a contribution towards its costs and submitted that the award would be payable by "*all 23 Applicants signing in support of the dispute notice on a several basis*". The submissions had earlier said that if the costs sought were allocated in equal proportion the contribution would be $870.00 per applicant.

Applicable principles

15. 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.

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

Currie v Windsor Lifestyle[1]

16.1. There were four issues raised in this retirement village dispute, namely whether the applicants had an occupation right agreement by correct interpretation of other documents (decided in favour of the applicants); unfair treatment of the applicants including bullying, harassment and attempted exploitation (decided as to 11.5 items in favour of the applicants and 16.5 items in favour of the village operator); an unlawful request to sign a document (decided in favour of the village operator); and the status of a Management Deed between the parties (not decided in favour of either party). Having reviewed the respective merits of the parties, the disputes panel found that the applicants' claim for $150,000.00 was "*ridiculous and manifestly excessive*" but awarded $15,000.00 in favour of the applicants towards their actual costs of $17,450.30.

Kenward and Knebel v Metlife Care Kapiti Ltd[2]

16.2. 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

[1] 2/10/24; R Donnell (Panel Member)
[2] 16/1/09; N J Dunlop (Panel Member)

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, 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. ".*

16.3. 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 Ltd[3]

16.4. 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

[3] 30/10/07 : D M Carden – Penal Member

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*".

16.5. 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"*
>
> …
>
> *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[4]

16.6. 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 (Waiapu) Ltd[5]

16.7. 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.

[4] 18/4/07; C Elliott (Panel member)
[5] 18/12/13: D Carden (Panel member)

16.8. 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.

16.9. 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 referring 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 there 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.

Applicant A v A Village[6] – 2022

16.10. 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.

[6] 25/9/2022; R Donnell (Panel member)

TW v WV[7].

16.11. 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 reserved 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 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.

Discussion

17. The power for a disputes panel to order costs is discretionary as noted above ("*may*"). What **is** compulsory under section 74(3) are the requirements that the disputes panel **must** follow in reaching a decision first as to whether or not to award costs and expenses at all and secondly the amount of any award.. That does not mean those are the only factors.
18. The primary consideration addressed by section 74(1) is that it is the responsibility of the village operator which appoints a dispute panel to meet all the costs incurred by the panel.
19. The provisions of section 74(2) are then relevant. Although not squarely with the current case, it has relevant principles. It reads:

20. (2) Whether or not there is a hearing, the disputes panel may—

…

(b) award the applicant costs and expenses if the disputes panel does not make a dispute resolution decision

[7] 27/11/2024; S Robson (Panel member)

in favour of the applicant but considers that the applicant acted reasonably in applying for the dispute resolution:

21. The decisions of disputes panels in previous cases mentioned above, with which I concur, mean that primarily the Village Operator must meet the disputes panel costs, but that can be an "*expense*" which can be awarded under subsection (2) in an appropriate case.
22. The principle behind subsection (2)(b) is that an applicant may be awarded costs and expenses despite the decision having gone against that applicant if the applicant is found to have acted reasonably in applying for the dispute resolution.
23. It is a necessary corollary to that that even if an applicant does not apply for costs or expenses in the face of an unfavourable decision, that applicant may not be considered liable to contribute to the costs and expenses of the village operator if the applicant has acted reasonably in applying for the dispute resolution.
24. It would be a strange outcome to say that that principle did not apply simply because the applicant did not seek to be awarded costs and expenses. It is also one of the factors that the disputes panel **must** take into account under subsection (3)(b) in the context of "*the conduct of the parties*".
25. This was certainly the outcome that applied in the above cases of *Currie v Windsor Lifestyle; A F & C Barnes Family Trust v Anglican Care (Waiapu) Ltd;* and possibly *Applicant A v A Village.*

Jurisdiction and entitlement

26. I accept the submissions for the Village Operator that I have jurisdiction to make the order sought by it on the grounds mentioned in the application and on the bases referred to above.

Quantum of costs

27. I have mentioned the differences in the dispute panel costs referred to by the application, $20,500.00, and my records totalling $20,566.20 but I disregard the differences there.

28. As to the external legal costs, again I disagree with the calculations but am prepared to accept for present purposes the total referred to in the application. I am not, however, prepared to accept that these were costs legitimately incurred by the Village Operator in the absence of any detail and total redaction of that detail from the invoices provided.
29. The first identifiable time period covered by those redacted accounts (and some do not have periods covered) commences December 2024. The last identifiable date is 30 June 2025. There is no identification of personnel involved and there was significant input from General Counsel which the application says are not included in the total. It is unclear whether any of the invoices included that person's time. There were entries reading "*Office Expenses*" totalling $2,204.27 and no detail as to what these were.
30. All that is perhaps academic given that by comparison the claim for costs is based on the appropriate applicable court scale and a percentage taken from that. I am invited to find that the claim for $10,000.00 for legal fees "*is reasonable in all the circumstances*" and, although I am in no position to do that on the basis as argued, I am prepared to take that figure for the purpose of this decision.

Relative importance to the parties

31. The submission from the Village Operator is that that dispute was important to both parties and required resolution and was therefore a neutral factor.
32. I have no hesitation in finding that this was a significantly important issue for the Applicants. They had enjoyed the common area comprising the subject footpath for a long period time. They had invested significant effort and energy into formation and improving it over time. Although there may have only been about six times per day that it was used, it was in fact access to the clubhouse that was enjoyed by all the local residents who did use it. What I did not have clear evidence about at the hearing as is reflected in the decision on the merits, was the extent to which the individual residents had used and enjoyed it as against the common position that it was common area to be enjoyed by all.

33. The importance of the issue to the Applicants was reflected to me in the support they gave at the conferences I conducted and then at the hearing to the spokespersons on their behalf. Those persons had prepared careful, succinct and comprehensive detailed submissions which I found significantly helpful on the one hand, but also an indicator of the importance of the issue to the Applicants on the other.
34. I certainly find also that this was of importance to the Village Operator, but for other reasons. The primary concern on its behalf was to bring the use of this common area pathway to an end. The motivations for this seemed to me to have included the commercial requirements to provide privacy for adjoining villas, particularly Villas 107 and 108; so as to improve the marketability of Occupation Rights Agreements for those respective villas for the future. Those commercial considerations were in the background of consideration of residents' convenience considerations; and perhaps this is reflected by the fact that, despite closure of the footpath the residents were enjoying using to the extent they did, they are now faced with a claim for sums of money to meet the costs that the Village Operator says it has incurred to the extent that it is said to have done.

Conduct of the parties

35. The first submission for the Village Operator is that it has been consistent with its position throughout of its entitlement to remove the pathway and provide its reasons for doing so.
36. It refers to its engagement in the complaints process and with the Statutory Supervisor.
37. As to the complaints process, it was part of its submission in defence to the claim that the complaints process did not apply and there was objection raised to the production on behalf of the Applicants of documents concerning Arvida's complaints process.
38. So far as the Statutory Supervisor concerned, the submissions refer to a letter dated 21 May 2024 from the Statutory Supervisor to the residents and the then village manager. The role of the Statutory Supervisor was to recommend a way forward. The letter outlined the detail of the understanding

of the complaint dispute and the Village Operator's response to it. By and large that letter summarises the dispute as it was presented to me as disputes panel. A concluding paragraph reads:

> "*Having considered the details and background to the complaint [the Statutory Supervisor's] recommendation is that as the grass pathway is a recognised pedestrian route within the village, with the [village operator's] having endorsed its use by adding pavers for the [residents'] enjoyment of the walkway, and then later concreting it, it considers the walkway as a Common Area. As such, the walkway should remain. There have been proposed solutions to mitigate the incoming residents' privacy at the two villas, and these compromises could be considered as solutions to achieve balance and contribute to a harmonious community*".

39. I have disregarded the recommendation from the Statutory Supervisor which had formed part of the bundle because that person was fulfilling a different function from mine and I did not wish to be influenced by the recommendation that had been made in that "*way forward*" context.
40. In the context, however, of the conduct of the parties, it is surprising to me that the Village Operator would rely on that letter. Clearly that encouraged the Applicants to proceed with their dispute. They may not have quite appreciated the different role that the Statutory Supervisor was fulfilling, although there has been no comment on that, but they would have seen that there was support from the system which seeks to resolve disputes with the position that they were taking.
41. Far from this being a factor in favour of any order for costs as sought by the Village Operator, I see it as being completely the opposite; namely that the Village Operator then continued to resist the claim made by the Applicants despite the recommendation from the Statutory Supervisor.
42. The Village Operator specifically raised three other matters to which it said it had been "*put to unnecessary costs*":
    42.1. A large volume of evidence addressing historical matters. My view on that is that the Village Operator disputed that the subject pathway was common area. It was necessary then for the Applicants to give detail of the history of the subject pathway so as to establish that it was "*common area*" in terms of the respective ORAs. I was not aware of any historical matter

being addressed which was unnecessarily raised. That matter I ultimately decided in favour of the Applicants in any event despite the opposition from the Village Operator.

One of the points taken by the Village Operator related to the absence of evidence from some of the Applicants as to be issues involved in the disputes, including the use of the common area, their entitlement to consultation, and the consultation process. All that would have added to the factual material required to be covered.

42.2. Evidence concerning health and safety allegations and how these obligations were engaged. It was part of the whole question whether there had been adequate consultation about the proposed closure. That involved discussing the merits of it and there was evidence concerning a number of issues including health and safety. In the end, my decision was that it was not for me to decide on the merits of those issues but that was for the Village Operator as part of its consultation process. It was a perfectly legitimate process for the Applicants to follow to address the issues which the Village Operator should have taken into account in the consultation process in its decision to close the subject pathway, even if this was only in the context that there were these issues requiring to be addressed.

42.3. Unnecessary discovery sought. One of the critical factors was the communications that had been had between village personnel and the prospective occupants of villas 107 and 108. This was in the context of whether there had been some pre-determination of the issue before the consultation process was concluded. There seemed to be significant resistance to the disclosure of that information by the Village Operator and that necessitated some pointed directions from me as to its necessity to address this issue and provide the documents sought by the Applicants. It also required the Applicants to issue a request to the resident of Villa 108 to attend as a witness and for that person's evidence to be given without written brief, a course properly followed by the Applicants to address the issue in question. This could perhaps have been avoided by the co-operative supply of information by the Village Operator. In the end there was in fact an agreed summary of facts, although there was other evidence

about this issue which was provided to the hearing. It was perfectly legitimate for the Applicants to seek disclosure of documents which impacted that issue and I do not regard that is being an "*unnecessary cost*" incurred by the Village Operator.

43. There were some inconsistencies in the Village Operator's submissions that may have made the case for the Applicants more difficult to present:

43.1. The change in position that I noted at paragraph 46 of the Reasons for Decision that in its written opening submissions counsel for the Village Operator said that "*the operator did not invoke clause 48 to remove that disputed pathway*",[8] but a different position was taken in its Closing submissions where it is said

> "*The operator says that clause 48 entitles it to remove the disputed pathway and the powers properly exercised in the circumstances*"[9].

43.2. The different approach that the village operator took in respect of the Arvida complaints process. On the one hand it argued that that process had no application to a consideration of its obligations for consultation about the closure of the subject pathway, but on the other hand seeking to take advantage of it in the context of the present costs application.

44. I have weighed carefully the conduct of the Applicants other than mentioned above and I have formed the very clear view that their case was presented comprehensively and succinctly on their behalf by representatives. They had issues which needed to be addressed, they met with resistance from the Village Operator on some points in respect of which I found in their favour, the submissions made on their behalf were comprehensive and covered all points needing to be addressed.

45. My finding is that on balance conduct in this dispute favours the Applicants rather than the Village Operator.

46. I even comment that, had there been a claim for costs by the Applicants under section 74(2)(b), I may have been inclined to consider it.

[8] Opening submissions for the operator - clause 9.2
[9] Closing submissions for the operator - paragraph 4.2(a)

Conclusion

47. There is a measure of irony about the fact that this claim by the Village Operator against the Applicants for monetary contribution is in the context that the common area which the Applicants had enjoyed and contributed to the value of upgrading over many years has now been removed from them. They have a brought this dispute notice procedure after having had a "*way forward*" recommendation from the statutory supervisor which favoured their position. There may have been some opportunity in the mediation for a conciliatory or compromise course but I was not given detail of that. They are now having to face and answer a claim for monetary costs by the Village Operator which is critical of them for the stance that they have taken.
48. I exercise my discretion to decline the application for costs and decline to award any order for costs in favour of the Village Operator against the Applicants or any of them.
49. The decision I reached in the earlier reasons for decision document dated 6 August 2025 is now a final decision which I repeat:
50. The proper response to the two disputes in the dispute notice is:
    50.1. There was closure of the common area/common facility walkway but no breach of the Applicants' rights because there had been an entitlement for the Village Operator to do this and on balance there had been adequate consultation prior to closure.
    50.2. On balance there was no lack of consultation with qualifying residents concerned with the decision for closure of access to the walkway.
51. I decline the application for costs by the Village Operator.

Dated at Auckland this 19th day of August 2025

David M Carden
Disputes Panellist