

DISPUTES PANEL DECISIONS

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There have now been four decisions handed down by the Disputes Panel under the disputes provisions contained in the Retirement Villages Act 2003 and its Regulations.

There are clearly some lessons to be drawn from the decisions, both in terms of the approach of the Disputes Panel and the matters the members of the Panel will take into consideration, and in terms of how operators can conduct themselves to get the best result.

In summary:

- Panel members will look hard at whether or not they have jurisdiction to consider applications.
- Panel members appear to be taking a reasonably strict legalistic approach to contract interpretation when considering the disputes.
- The correct processes set out in the Act and the Regulations must be followed.
- The conduct of the operator and the resident can be important when the panel member determines whether or not to award costs.
- The general rights of residents as set out in the Code of Residents Rights will be just as important an area on which a resident may base a claim in addition to more specific complaints relating to a breach of the Code of Practice or the occupation right agreement.

Overview of the Decisions

The decisions of the disputes panel were handed down in March, April, June and October of 2007. Each of the matters was heard before a single panel member each of whom is legally qualified. From

information about the panel members on the Retirement Commissioners website, it appears that three of the members practice generally as barristers and the fourth practises mainly as a disputes referee. The operators concerned were Metlifecare Kapiti Limited, Dutch Village Trust, Summerset Management Group and Waitakere Group Limited.

Of the four decisions, one found in favour of the resident, one found partly for and partly against the resident, and the remaining two decisions in favour of the Operator. Two orders of costs have been made, one in favour of a resident and one in favour of an operator.

Summarising briefly the decisions:

❑ The first application was lodged by a resident in relation to a dispute with Metlifecare Kapiti Limited. The dispute related to the procedures applicable when determining the refurbishment requirements. The form of licence was in use before Metlifecare purchased the Village. There was apparently some ambiguity in the licence regarding how the refurbishment charges were to be determined. Metlifecare arrived at a process as to how the refurbishment was to be carried out and published the process in a newsletter.

Although the resident's licence had not terminated, the panel member determined that she could hear the dispute. She found, as was acknowledged by Metlifecare throughout, that the terms of the licence must override any general statement of process. She found that the resident was entitled to undertake his own

refurbishment. The panel member declined to determine other matters raised by the resident as they were not raised in the initial dispute notice and that even if the matters had been raised in the dispute notice the panel member had no jurisdiction to make any ruling in relation to those matters.

□ The second dispute involved the Dutch Village Trust. The resident raised a raft of issues which, in summary, can be identified as complaining about a lack of consultation (in respect of some maintenance work and entry to the unit) and complaining about the approach of the Village manager towards the resident.

The panel member found that one entry into the resident's unit by the manager was in breach of that resident's licence in that inadequate notice was given and the remedy required was a letter of apology. All other complaints regarding this issue were dismissed.

The Panel member found that it had no power to consider the matter regarding the attitude of the Village manager towards a resident as the Code of Practice was at that point, not adopted by the Village. The Panel member considered that the Code of Resident's Rights did not apply at that time. The relevant "Right" is contained in paragraph 7 of the Code of Residents Rights and states that a resident is to be treated with courtesy. The Panel member made the comment that beaching this right would be an issue for the future.

The resident was awarded costs of \$250.00.

□ The third decision was a complaint by a resident's son on behalf of his mother in respect of Summerset's Trentham Village.

The dispute related to the internal transfer of the resident from an independent villa to more supported accommodation. Once again a raft of

matters were raised. These were mainly to do with refurbishment on transfer and a claim that resale costs should not have been charged and were in any event, excessive.

The complainant also claimed that the licence should be overturned as its terms were excessive and unconscionably unfavourable to the resident, having regard among other things to Summerset's profitability.

On the specific points relating to the refurbishment costs the Panel member preferred the evidence of the manager of the village and ruled against the resident.

In respect of the resale costs, the Panel member held the contract allowed for these to be charged.

In regard to the overturning of the licence, the panel member held that the claim was too broad based and that some of the evidence supporting the claim was "specious". He held that any dispute needed to relate to a specific resident and licence rather than an economic argument affecting the retirement village industry as a whole.

Accordingly none of the complaints were upheld. Summerset did not seek costs and no orders as to costs were made.

□ The final complaint was lodged by a group of residents on behalf of the Waitakere Gardens Residents Committee in relation to a dispute with Waitakere Group Limited.

The complaint related to a general matter of how the village operated as opposed to an issue affecting a specific resident and the residents' occupation rights.

The dispute related to the keeping of village outgoings in a separate bank account "in the name of the village".

A separate bank account in the name of the operator company was established. The residents argued that this was not adequate. They also complained that other moneys pertaining to the Village were lodged to this account as well as the village outgoings.

The panel member wasted no time in ruling that the claim was probably outside of his jurisdiction. In any event, the panel member ruled that it was entirely appropriate for the account to be in the name of a company as only a legal entity can hold a bank account and the Village was not a legal entity.

Further, whilst under the Deed of Supervision and the earlier Deed of Participation, there may well have been an argument regarding the intermingling of other village moneys with residents' moneys in this account, this was a matter for the statutory supervisor, not the residents. The panel member noted that the statutory supervisor has confirmed that it is satisfied with the process.

Costs against the residents were ordered in the amount of \$1,000.

Jurisdiction and Process

It is clear from a review of all four decisions that the panel members will consider carefully first of all whether they have jurisdiction to hear complaints. Even though the panel member may be prepared to give all parties a hearing, they may still at the end of the day determine that they have no jurisdiction to make a decision. Operators can also be reassured that panel members will adhere to the provisions of the contract and the statutory and regulatory provisions. Any complaint will need to be seen in the light of the relevant rights and obligations and it will not be open to residents to make general or specious complaints.

Code Of Residents' Rights

Of particular interest however are the comments relating to the Code of Residents' Rights. The two provisions which operators will wish to pay attention to are contained in paragraph 7 and paragraph 8. Paragraph 7 refers to the right of a resident to be treated with courtesy and to have the resident's rights respected by the operator and the people who work at the village or who provide services at the village.

This right is reasonably self-evident and will be a matter of fact to be determined in each case. Operators will have in place policies about how residents are to be treated by staff and other providers of services.

The right contained in paragraph 8 of the Code of Residents' Rights, is the right of a resident

"not to be exploited by the operator, the people who work at the village and the people who provide services at the village."

This right will be less easily determined. Whilst the claim that the financial terms of an occupation licence were exploitative and unconscionable was not upheld in the Summerset case, the panel member made reference to the potential for the common law regarding "unconscionability" to be at least considered. He did however comment that it was difficult to see how a resident could raise this claim in relation to the financial structure of a licence when the resident had received legal advice before entering the licence.

All of these decisions reflect the need for an operator to have strong policies in place, to pay good attention to their obligations towards residents under the Act, Regulations, Codes and occupation licences, and to conduct themselves with

consideration at all times but especially during any dispute process.

Copies of the four decisions discussed above can be viewed and downloaded from the Retirement Commissioners website at:

www.retirement.org.nz/rv-decisions.html

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