

MORE DISPUTES PANEL DECISIONS

Retirement Views, Summer 2009/2010

In the 2007 Summer Edition of Retirement Views, we reviewed the four decisions that had then been handed down by disputes panels under the disputes provisions contained in the Retirement Villages Act 2003 ("the Act") and its Regulations. We noted in that article some key points to be drawn from those decisions.

In summary in 2007, we noted that:

- Panel members will look hard at whether or not they have jurisdiction to consider disputes;
- Panel members appear to be taking a reasonably strict legalistic approach to contract interpretation when considering the disputes;
- The correct processes that are set out in 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.

Since then, four more disputes panel decisions have been handed down. The new decisions reinforce all of the key points and in particular that relating to jurisdiction. One decision also emphasises that residents should make reasonable efforts to resolve their differences before issuing a disputes notice.

Brief descriptions of the decisions are set out below.

The Selwyn Foundation – June 2008

The resident in this case sought two orders, firstly that the Foundation should build a new hospital and secondly that a rest home, that the Foundation had recently converted into a hospital, should be converted back into a rest home.

The resident argued that the orders should be granted because the Selwyn Foundation was not entitled to change the number and location of the rest homes and hospitals available at the Village or to change a rest home into a hospital. (At the time of the dispute there were two hospitals and two rest homes at the Village.)

The resident also argued that he had relied upon informal plans shown to residents about the restructuring of the village, including the building of a new hospital. Construction of a new hospital has not taken place. The resident argued that sharing the plans with residents at the Village meant that the Foundation had an obligation to carry through with those plans.

In response, the Foundation argued that the dispute did not fall within the type of dispute that a resident could give a dispute notice for pursuant to section 53.

The Foundation also pointed out that the resident's occupation right agreement and offer documents current at the time the resident moved into the village did not guarantee access to a specific rest home or hospital or guarantee that the Village would always maintain the same number of rest homes and hospitals at the Village

as were present at the time the resident entered the Village.

The panel found that the dispute was not in respect of an occupancy right or a right to access services, facilities or amenities, but was a dispute relating to a statutory right under the Act to be notified about any development. However, the panel ruled that the applicant had been so notified. The panel also found that it did not have the power to make the orders sought by the resident. The operator was ordered to pay costs of \$250 to the resident.

Metlifecare Kapiti Limited – January 2009

The dispute related to the use of a cold smoker by a resident couple (Z and L) outside their dwelling to smoke food three or four times a year. Neighbouring residents complained about smells from the smoker to the village management.

The operator corresponded with the complainants and Z and L, then undertook investigations and enquiries of various authorities. Z and L went overseas for a number of months and the operator indicated that it would address the complaints when they returned.

Two of the complainants were not willing to wait so lodged a dispute notice. The remedy sought by the applicants was an order that the operator serve notice on Z and L requiring them to comply with the terms of their occupation right agreement, by eliminating the nuisance or removing the smoker entirely.

The panel's decision makes it clear that the panel member attempted to encourage the residents to resolve this matter informally rather than proceeding to a hearing as he had reservations as to whether the applicant's case was capable of succeeding.

The panel member's main concern was that Z and L were not parties to the dispute.

The panel member found that the order sought was in breach of natural justice and posed enforceability problems, as an order could only be made against a party to the dispute, not Z and L. The panel member also stated that the use of the smoker at infrequent intervals was not necessarily a nuisance and that the operator had acted reasonably. He reminded residents that they should seek to resolve differences amongst themselves before elevating the problem.

In terms of costs, the operator incurred external fees of \$1,395, internal management costs of \$11,500 and panel member's fees of approximately \$14,000. The panel member awarded costs of \$750 against each applicant.

The Perry Foundation – June 2009

This is the first dispute brought in respect of the disposal of a residential unit and therefore required a panel composed of three members.

The applicants wanted to move out of the village into residential care. The dispute notice referred to their desire to sell the unit in March 2007. No written notice of termination of the occupation right agreement was ever given but the applicants moved out in October 2007.

The applicants were advised that there was a delay in the operator being able to market the unit due to changes brought about by the Act effective from 1 May 2007. The applicants claimed that this was in breach of the operator's obligations under the occupation right agreement to dispose of the unit and the delay in marketing was not necessary and not reasonable. The unit remained unsold at the date of the hearing and the applicants sought an order that the operator should buy back the unit. The operator had prepared documents to comply with the Act and registered the village in November 2007. The unit was then marketed. The applicants acknowledged that there was no criticism

of the marketing efforts since that date.

The panel found that the delay in marketing was necessitated by the introduction of the Act. In the circumstances, it agreed that the length of time it took to prepare the compliance documents was not unreasonable, and that there had been no breach of the operator's obligation under the existing occupation right agreement to take reasonable steps to market the unit.

Oceania Village Company Limited – November 2009

This decision is a preliminary ruling as to whether the panel had the jurisdiction to determine the dispute and to transfer the dispute to the District Court.

In this case, the residents own the units in which they live under the Unit Titles Act 1972. The dispute relates to a requirement of the residents to pay a deferred management fee to the operator of up to 20% of the sale price or the market value of the unit upon sale. The residents claim that not all of the services and facilities they were promised at the time they purchased the units have been provided and for this reason, they should not be required to pay the management fee.

The principal argument of the operator was that as the residents were not claiming rights to the services and benefits they were promised but were claiming cancellation of a fee, then their claim did not fall within the statutory provisions setting out the basis for a disputes claim.

In this case however, the panel determined that they did have jurisdiction to hear the dispute. The issue as to whether the panel had jurisdiction to hear a complaint related to the claim made, and not to the remedy sought. If certain services and facilities were not provided as promised, then this is a live issue and forms the basis of the complaint. Once the claim is

determined then the panel can decide whether it has the power to give the remedy sought.

The panel refused the request to transfer the claim to the District Court on the basis that the panel could hear the dispute and it was appropriate for the panel to hear it. Further consideration could be given to a transfer if the panel found for the residents but did not have the power to provide the remedy sought.

The hearing of the actual dispute has yet to occur.

Conclusion

The disputes panels are making it clear that they will examine carefully the rights of residents to have their claims heard, and have so far found mainly in favour of the operators. Nonetheless, it is an expensive business for operators to have a complaint against them heard by a panel. We reiterate the importance of good communication, good documentation and good processes.

The full decisions can be found on the Retirement Commission's web site:

<http://www.retirement.org.nz/retirement-villages/disputes/decisions>

Jenny Baldwin and Helen Melrose

Contact Us

Please feel free to contact us for more specific advice or about any other matter relating to your retirement village. Our contact details are:

Burke Melrose, Lawyers

PO Box 5142, Auckland 1141

Ph: +64 9 356 2630

Fax: +64 9 356 2631

Email enquiries@burkemelrose.co.nz

Web www.burkemelrose.co.nz

The information contained in this article is of a general nature and is not intended as a substitute for professional advice. It should be used as a guide only. Care has been taken in the preparation of this article but no liability is accepted for any errors.