

# NEWSLETTER

## No. 40 April 2003

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### *Law and Opinion*

Many of the articles that appear in our newsletters draw attention to issues in which scheme operators are at fault, sometimes breaching residence contracts and sometimes breaching the Retirement Villages Act, sometimes both. We draw attention to the Sections of the Act which are being breached and for which residents may have a remedy at the Disputes Tribunal. As a retirement village resident your obligations and entitlements are to be found in your contract and PID, (in nobody else's PID); if anything in your contract or PID contravenes the Act then the Act prevails. That is the Law.

We also express our opinions on what we think is wrong with the Act, what ought to be and what ought not to be. And we are not slow to criticise the practices of scheme operators and their managers when we believe them to be malpractices. But our criticisms and opinions are not statements of law. They represent what we believe and what we campaign for; what we believe should be in retirement village legislation. That is Opinion.

### *Fair Proportion*

The Retirement Villages Act 1999 refers to the "General Services Fund" (GSF) and so too, now, do Public Information Documents (PIDs). In essence the General Services Fund is the operational account to which all recurrent run of the mill expenditure should be charged. Somewhat absurdly, it includes the contributions payable into the Maintenance Reserve Fund (MRF) but we are not concerned with that here.

In all PIDs, old and new, one can find two or three pages, at least, describing what can be charged to the GSF. And the first words used are "including but not limited to" - an expression beloved of lawyers who draw up the contracts we are required to sign. So what the scheme operator is saying is: I can charge whatever I like to this operational expenditure fund.

When it comes to what each resident must pay, it is usually described in the PID as the "resident's fair proportion of total outgoings". So, what is the resident's fair proportion? How should it be calculated? In many villages, the newer ones particularly, there is an increasing trend toward a wide range of accommodation Units, ranging from small duplex Units with two bedrooms, one bathroom, one pedestal and no garage, to big, stand alone, four bedroom Units with two bathrooms and pedestals and a double garage. In most such villages there is a differentiated scale of recurrent fees reflecting the size, amenities and value of the Units. One cannot fairly complain of that; it is how it should be.

What we are concerned with are those villages where the range of Units, though not perhaps quite so extensive as described above, do range fairly widely but where residents' payments to the General Services Fund are not differentiated. In many such cases each resident pays an equal share but an equal share is not necessarily a fair share. A large Unit is going to cost more in terms of repair and maintenance, periodic repainting and the like than a small one. And local Council rates are of course determined by size, value and by number of pedestals. If you are

living in a small Unit but paying as much in recurrent fees as a resident in a large Unit then you are paying more than your fair share. In that case, if the scheme operator declines to make an adjustment you have a case for the Disputes Tribunal.

## ***Repairs and Insurance***

We hear more and more of residents being required to pay personally for the costs of repairing accidental damage which can be claimed under the village's insurance policy. Usually it is by requiring the resident to pay for the "excess", that part of a claim which the insurance company does not pay.

The insurance which the scheme operator is obliged to put in place is paid for from our general services fund, to which we alone contribute. That is, we pay the premiums from the funds collected from us. If there is an "excess" clause in the insurance it means that the policy holder has to pay part of the cost of repair or replacement but, against that, the premium is lower than it would have been had there been no excess. We all know how this works from experience in insuring our cars.

If the premium is paid from our general services fund, which it certainly is, then it is entirely logical that any excess which is withheld from a claim should be charged to that fund, not to an individual resident. Residents should refuse to pay personally for any part of an insurance claim. The Retirement Villages Act, Section 110(1) requires the scheme operator to insure to full replacement value. If he doesn't then he is at fault.

Let us observe, too, that Section 110 (2)(a) of the Act requires of scheme operators that the insurance policy: "must cover, to the greatest practicable extent----". As it is the scheme operator who is the policy holder, then if he does not cover "to the greatest practicable extent" all the costs of repair or replacement, then the scheme operator, the policy holder, not the resident or the residents' funds, should pay what the insurance company doesn't, that is the excess. And also suffer the penalty which the Act provides for defaulting operators. What is quite certain is that residents should never be required to pay personally.

## ***Cash Flow***

Many, probably a considerable majority of, Shire and City Councils allow some reduction in rates if they are paid promptly, by a certain date. As residents, who ultimately bear the cost, we have every right to expect that the scheme operator, that is management, will ensure that the rates are always paid promptly so that residents get the benefit of whatever discount is available. But this does not always happen; we quoted an example in our February newsletter.

Things like rates and insurance premiums are generally payable in advance and scheme operators are required to pay and recover from residents, through their recurrent fees, that "fair proportion of total outgoings", to which we have already referred. It means that scheme operators have to lay out money before they can recover it from the customers - that's us. So be it, that is what is expected of them. It is the same for any income producing enterprise - and that is what a retirement village is.

Some of you may find that your PID requires that you have to pay bank interest on borrowings made by the scheme operator in connection with the running of the village. Why should we residents pay interest on what the scheme operator borrows in order to run his income producing business? We should not be required to pay any bank fees or charges at all. They are business expenses, tax-deductible!

Often the scheme operator attempts to create a surplus in our general services fund so that when the demand for six months rates, for example, comes in there is money in our "kitty" to

pay them. That is the essence of cash flow. But cash flow is something that any business must organise as part of its operation. It is not the responsibility of residents nor should they have to provide it.

What these improper practices represent is the determination of commercial operators to offload every conceivable cost on to residents by

charging everything to our general services fund, to which we alone contribute. But it is instructive to see how "general services" are defined in Section 12(3) of the Retirement Villages Act 1999:

*"General Services are the services supplied, or made available, to all residents of the retirement village".*

Bank loans and overdrafts, borrowings from and interest payable to any source, including the scheme operator, cannot possibly be described as a service to residents. Refuse to pay these imposts and if the scheme operator does not relent then you have a case to be determined by the Disputes Tribunal.

## ***Fact and Fiction***

In our February newsletter we drew attention to the management of Robina retirement village, Primelife Corporation, imposing a special levy on residents there, despite the fact that the 1999 Act does not continue the 1988 Act's provision for such levies. Primelife chose to respond; they wanted to 'clarify', they said. They continued: *"The Village PID provides....."*. There is no such thing as *"the village PID"*. Villages, including Robina, have several editions of PIDs; they are changed from time to time whereupon they apply to new residents and new residents only. The **fact** is that a PID is part of the contract which an individual resident signs when becoming a resident.

The levy, they then went on to explain, was imposed pursuant to the provisions of Sections 106 and 107 of the Retirement Villages Act 1999.

That of course is pure **fiction**; there is no reference to special levies anywhere in the 1999 Act. We have to wonder how Primelife Corporation, which manages quite a number of retirement villages, can employ as on-site managers people who are apparently quite uninformed of the provisions and restraints of the Retirement Villages legislation and can so thoroughly misrepresent its provisions to their residents. However, that particular shortcoming, like others, is not peculiar to Primelife Corporation's village management.

## ***Intimidation***

One of the links from our web-site has always been to the web pages of the Australian Pensioners' and Superannuants' League. That League and our Association have much in common. We both take issue with things and practices which militate against the elderly; APSA in a broader perspective than we do. It is interesting to note an editorial in the March 2003 edition of the League's newsletter, the **"COMET"** . "Retirement Village Dictators" is the heading which draws attention to the plight of many elderly persons in retirement villages.

As we have remarked in the past, all too often retirement village managers see themselves not as managing the village for the residents, which is what we pay them for, but managing the residents for the scheme operator, or owner. Intimidation is not uncommon in some retirement villages. It takes various forms, ranging from a patronising pat on the head and "don't you worry yourself", through "it's none of your business" to "if you're not careful you'll be out of the village".

Sometimes it is even more heavy handed. At Edenlea Village in Buderim, an eighty three year old lady returned to the village after having spent several weeks in hostel accommodation, following a period in hospital. She found that she did not have a key so asked the managers to use their key to let her in. She had every right of entry to her Unit but the managers refused to let her in, on the specious grounds that family had directed them not to. The police had to be called, not once but twice, to compel the manager to allow the lady into her home. This unlawful action by the village managers, when brought to the attention of the Department of Fair Trading, prompted an investigation by that Department.

We do not have to put up with any degree of bullying or intimidation. You cannot be evicted at a manager's whim. Unless the resident has caused some injury to a person or caused serious damage in the village, or is thought likely to do so, the resident must be given two months notice and even then eviction needs a Court Order.

In the only case of an attempted eviction that we know of, the attempt to evict Bill Runciman a couple of years ago, the District Court found the village's eviction application to be unlawful and awarded the resident some thousands of dollars in costs. The Disputes Tribunal, at which the application was eventually heard, found in favour of the resident, as a result of which the scheme operator was obliged to come to a financial arrangement satisfactory to the resident.

Fear not the bullies, whatever their gender, for they will come unstuck. But we must see that they do!

## ***Reinstatement***

Having given this subject a good go in our February newsletter we don't want to devote much more time to it so soon. But there is one additional facet of the subject to which we should draw attention. Section 68 of the Act makes it clear that the scheme operator may not (except under a pre-1 July 2000 contract) charge any sort of fee or commission, however described, for selling the "right to reside" and that includes finding a new lessee.

But smart scheme operators and/or their managers are nevertheless trying it on. We have seen a recent attempt to impose a fee by including, together with costs of reinstatement, the cost of the village manager's time spent on the process of resale. If you see something like that, don't pay - and let us know.

Even with those contracts which pre-date 1 July 2000, you cannot be required to pay a fee or commission unless your contract or PID clearly require you to do so. It cannot be sprung on you.

## ***Review of Act***

The review of the Retirement Villages Act 1999 has been going on since July 2001. We have good reason to expect that a document for public discussion will issue in a few weeks time. And public discussion will no doubt be greatly needed. Your Association's Committee will get up a good head of steam but it needs all of us to enter into the discussion. So, get out your pencils and give them a good sharpen.

## ***Sponsorship***

Many of the disputes which have been heard by the Disputes Tribunal have been in respect of villages in the Sunshine Coast area. On a number of occasions cases have been presented, at mediation and at full hearings, by members of the Association's Committee. This is alright, perhaps, where not very much is involved and the issues are comparatively narrow.

However, where issues are complicated or where they have wide implications for residents generally, it is wiser to have competent legal representation. You will remember we said that was why we felt it necessary to increase our membership fees. A law firm on the Sunshine Coast has represented retirement village residents in a number of cases, with nothing but success. And they have some more of our cases "on their books".

The firm is Butler McDermott and Egan, see below, and they have agreed to lend their sponsorship to our activities.

## ***Constitution***

As foreshadowed at our last AGM and discussed at a subsequent general meeting, the Committee proposes to alter our Constitution. Something which is ten pages long can hardly be included in a newsletter or sent to each individual member but we have posted both the existing Constitution and our proposed new one on our web-site. If you want a hard copy of either or both please ask and we will send one. If you'd care to send us a couple of dollars in postage stamps it would help defray the cost of printing and postage.

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