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NEWSLETTER

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Commercial & Consumer
Tribunal.

This month we can bring
you a couple of very significant
Tribunal judgements,
read on:

Buderim Gardens Village

In March 2000, the then owner of Buderim Gardens, Hawtrey Holdings Pty. Ltd. sold the village to Coastal Buildings Pty. Ltd. Two years later, in June 2002, a group of residents (not the committee) made an application to the Tribunal in relation to several issues which they disputed with the new owners; the major issue being money spent on “initial repairs” which had been charged to residents’ Maintenance Reserve Fund. It seems clear from the evidence presented to the Tribunal that the former owners, Hawtrey Holdings, had, through neglect of necessary repairs and maintenance, allowed the village to become very run-down. That no doubt depressed the sale price.

Upon acquiring the village the new owners, Coastal Buildings Pty. Ltd. set about an intensive program of improving the village to get it to what they regarded as a respectable physical state. But, quite improperly, they charged the costs of that to the residents’ Maintenance Reserve

Fund. In fact, as ‘initial repairs’, or ‘capital improvement’, it was not chargeable to residents at all. That is what the Tribunal decided and, as a result, the scheme operator has to refund to the residents’ Maintenance Reserve Fund the sum of \$100,000. Yes, that’s right, one hundred thousand dollars.



Aged Care Queensland (still Buderim Gardens)

We have, on a number of occasions in our newsletters, advised residents not to allow their scheme operator to charge them with the cost of his membership of Aged Care Queensland. Putting such charges upon residents has now been made unlawful by a Tribunal decision in this Buderim Gardens case. Just so that you can challenge your scheme operator, if necessary, we quote the Tribunal’s ruling:

“We find that, as membership of Aged Care Queensland is open to proprietors of villages and not to residents, it is a capital expense of the respondent and not an exexpense which ought to be charged to residents”

The Tribunal ordered that an amount of \$5,266, being for membership of ACQ, be refunded by the proprietor to the residents’

General Services Fund. So, if your scheme operator is charging his membership of ACQ to you, tell him he must refund it.

The Tribunal was not asked to consider ACQ's charges for accreditation but from the above ruling it is reasonable to deduce that charges for their village 'accreditation' should also not be charged to residents. We have long said it shouldn't. If your scheme operator has charged you with such costs and refuses to refund them to you then we should seek a ruling from the Tribunal.

Buderim Gardens (still)

The Tribunal also ordered that a sum of \$2,340, the cost of a new 'Blue Care' service which residents' had not approved, also be refunded by the scheme operator to the residents' Funds.

In our November 2004 newsletter we reported on a case in which the Tribunal had ordered that, in respect of serviced apartments, a separate sub-account be established within the overall village Maintenance Reserve Fund to identify costs which were specific to the serviced apartments. In this Buderim Gardens case, the repairs and maintenance costs of the serviced apartments had been lumped together with those in respect of the Independent Living Units in a confusing way. The Tribunal ordered that sub-sets of accounts distinguishing between the Serviced Apartments and the Independent Living Units be established within the Village MRF.

Buderim Gardens Village residents, who successfully brought the Action against Coastal Building Pty. Ltd. were represented by Peter Boyce of Butler McDermott and Egan

Edenlea on Buderim

On the Sunshine Coast still, just up the road from Buderim Gardens, is Edenlea, owned, as Buderim Gardens used to be, by Hawtrey Holdings Pty. Ltd. During the year 2003/2004 this village was ostensibly managed by PrimeCRS.

In calculating increases in fees to be implemented from October 2003, just about everything that could be done in breach of the Act was done in breach of the Act, by PrimeCRS on behalf of Edenlea Pty. Ltd.. Improper budgetary statements, S.131 meeting called with only 4 days effective notice, increases in excess of the CPI movement. ARQRV President Phil Phillips, (a resident there) applied to the Commercial & Consumer Tribunal for remedy. The Tribunal instructed PrimeCRS to do the financial statements and estimated budgets again, in a proper and meaningful fashion and in accordance with the Act's requirements.

The applicant and both respondents, PrimeCRS & Edenlea Pty. Ltd. were directed by the Tribunal to make submissions on the meaning of Section 106 of the Act. The Tribunal accepted Phillips's submission and rejected what Minter Ellison submitted on behalf of the respondents. The immediate upshot was that Edenlea was ordered to repay residents the increase unlawfully imposed from 1 October 2003.



Of far wider significance for residents is that when contemplating increases in S.106 expenditure, each and every item is to be considered individually against the increase in the Consumer Price Index. No regard is to be had for the

aggregate of them or for S.107 items. If a scheme operator proposes to increase the expenditure on any S.106 item beyond the CPI then he has to have residents agreement by special resolution. That means a meeting called for the purpose, at twenty-one days notice, and the agreement of three-quarters of the residents voting.

Fundamentally, the Tribunal confirmed what it had ruled in the Carlyle Gardens case but without its confidentiality. As we said in our July 2004 newsletter:



That is the Law

On that occasion our detractors, including Primelife Corporation and Aged Care Queensland and a few other misinformed observers, chastised us for being so bold, even instructing us to withdraw our statements and claims. Perhaps on this occasion their criticisms of us will be somewhat muted. They may even perhaps acknowledge our righteousness and apologise to us.

Both of the above two cases are on the Commercial & Consumer Tribunal's web-site at <www.tribunals.qld.gov.au>

Insurance Excess

Many operators are taking out village insurance policies with a policy excess. This means that if there is a valid claim against the policy the Insurers pay the claim but deduct the amount of the excess. If the amount of the excess is greater than the claim then the Insurers pay nothing. But some of us are being told by our managements that we residents have to pay personally for the excess which insurers deduct from the claim. Why, on what authority do they assert that? On

have a policy with any excess at all? The Retirement Villages Act says ***“A scheme operator must insure and keep insured, to full replacement value, the retirement village, including the accommodation Units.....”***

A little further on the Act also says:

“An insurance policy taken out under this section must cover to the greatest practicable extent....”

Any decision to have an excess clause and the amount of the excess is an arbitrary one by the scheme operator; residents are not consulted. Excesses can and sometimes do amount to thousands of dollars, as residents in some Australian Retirement Homes villages have discovered.

It is important to realise that the Act, S.110(1), requires the insurance to be, as indicated above, ***“to full replacement value”***. It is rarely sensible for residents to agree to an excess clause because, in the event of a claim, any saving on premium is offset by the ‘excess’ reduction in payment by the insurers, which should logically be charged, as is the premium, to the General Services Fund. As we pay the premium, we should decide on what is the ‘greatest practicable extent’. (S.110 (2). Anything less is unlawful. And we should never ever be required to pay personally for any excess.



There is a fundamental point which scheme operators seem generally to ignore. It is that any repair or replacement has got to be attended to immediately, regardless of any question of insurance.

And the cost of the repair has to be charged to the General Services Fund. If the damage or loss is covered by the Village insurance and recoverable, so

well and good. If it isn't, the cost remains charged to the General Services Fund.



A resident in Carlyle Gardens, Mackay, whose window was broken (not by him) was told by management that it would not be repaired unless he first paid over to management the cost of the repair (It was less than the excess) That is extortionate and quite insufferable. Do not allow the scheme operator or manager to do that to you. Let us know if he tries because it should be straight to the Commercial & Consumer Tribunal.

Serviced Apartments & GST

In our September newsletter we referred to the intention of the Federal Government to free residents of serviced apartments from the Goods and Services Tax which they had been paying on personal services. That has come to pass. Let us remind ourselves of what is involved. In leasehold and loan/licence villages, indeed in all non freehold villages, whether we are in Independent Living Units or in Serviced Apartments, everything that is to do with our accommodation, including what are described as general services, are, with but a couple of exceptions, described by the ATO as 'Input Taxed',

That means that whatever it is, the cost to the scheme operator includes the appropriate GST to that stage and he does not have to add any more. For GST purposes the scheme operator is the end consumer. In serviced apartments, however, personal services are supplied which have been regarded as taxable supplies: meals, laundry, housework for example. That has meant that the scheme operator had to add GST to the cost of those services. Now, when the serviced

apartment resident is assessed as requiring daily living or nursing services, and certain other requirements are met, they are not taxable supplies but GST free. This has been backdated to 1st July 2000. Similarly, accommodation in a serviced apartment can be GST free. In effect, residents in retirement village serviced apartments can be treated similarly to residents in Commonwealth Aged Care Establishments.

Backdating to 1st July 2000 means that your scheme operator can reclaim from the ATO the GST which he has paid. Any Bills which were given to you for such services should have shown the amount of GST included. This is what can now be refunded by your scheme operator, back to July 2000. If your scheme operator has not already drawn your attention to the subject, take the initiative and draw it to his attention. Inexplicably, the law does not require that eligible residents be refunded but leaves it to the scheme operator's discretion. It may be to your advantage to pursue it with your scheme operator.

Purely Domestic Matters

As you can see, we have changed the style of our newsletter a bit and increased the size of the print. We hope you think it an improvement.

Subscriptions for 2005 are coming in steadily and we thank you for that. We need members' financial support for what we do.

Best wishes for the New Year, well, nearly new!

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