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Retirement Villages Tribunal
Retirement Villages Act 1999

DATE: 10 JANUARY 2001

APPLICATION NO: V005-00

APPLICANT: CLEVELAND MANOR RESIDENTS' ASSOCIATION INC
SUB-COMMITTEE

RESPONDENT: HATWAY HOLDINGS LTD

REASONS FOR DECISION:

1. This is an application by Cleveland Manor Residents' Association Inc Sub-Committee, which I am informed consists of Mr Ted Decker, Mrs Bev Hogan and Mrs Silman. In this regard, Mr Boxall, who is named on the application, has now been replaced on the sub-committee by Mrs Silman. The applicant(s) were represented by Mr Decker and the Respondent by Mr Ross Campbell.
2. As I understand the application, it is made by the three member sub-committee and not by the incorporated Association. I was informed by Mr Decker that all residents are members of the incorporated Association.
3. The orders the applicant(s) seeks are:
 - 1.a. A ruling as to exactly what is "day to day maintenance" and spell out what should be paid out of the Maintenance Reserve Fund.
 - 1.b. A ruling on the legality of the scheme operators to instruct the "independent" quantity surveyors to vary their draft report.
 2. That the administration wages be reduced to be commensurate with the hours worked and any savings credited to the service fees.
4. As I understand it there are 49 units in the village. The total amount being disputed by the applicant(s) in relation to the Maintenance Reserve Fund is \$22,735, which would amount to approximately \$464 per unit. Likewise the identified amount being disputed in relation Services Charges Budget for the year 2000-01 for "Wages Administration" is the amount of \$35,000 which would amount to approximately \$714 per unit.
5. This raises the question of whether or not these orders are available in the Tribunal due to section 191 which states the following:

Tribunal orders generally

- 191.(1)** The tribunal may make the orders the tribunal considers to be just to resolve a retirement village issue.
- (2)** Without limiting subsection (1) or sections 192 to 194, the tribunal may make any 1 or more of the

following orders—

- (a) an order for a party to the issue to do, or not to do, anything (an “**enforcement order**”);
- (b) an order requiring a party to the issue to pay an amount (including an amount of compensation) to a specified person (a “**payment order**”);
- (c) an order that a party to the issue is not required to pay an amount to a specified person;
- (d) ...

(3) ...

(4) ...

6. The requested Orders 1a and 2, were drawn by a litigant-in-person but could be interpreted as requests for an enforcement Order against the Respondent or for and Order that a party to the issue is not required to pay an amount to the Respondent. Given that the action alleged to have been taken by the Respondent, which forms the basis of the request in Order 1b, has passed it is difficult to see how the Tribunal could make any order under section 191(2). This request appears to be for a declaration that the Respondent’s action was for some unexplained reason unlawful or contrary to the Act. A declaration is not specifically referred to as a power of the Tribunal and would only be available if it could be made under section 191(1). I need make no finding in this regard as I am satisfied that the Tribunal has power to grant the other orders sought.

7. The matter came before me at a directions hearing conducted under section 174 which states as follows:

Chairperson may hold directions hearing

174.(1) Before a tribunal hears a retirement village issue, the chairperson may decide to hold a directions hearing.

(2) ...

(3) The provisions of this division about the conduct of, and procedure at, a tribunal’s hearing of a retirement village dispute and the tribunal’s powers at the hearing apply, with the necessary changes, to the directions hearing.

(4) At the directions hearing—

- (a) the tribunal is constituted by the chairperson; and
- (b) the tribunal may make the decisions and give the directions it considers appropriate.

(5) Without limiting subsection (4), the tribunal may make decisions and give directions about—

- (a) questions of law; and
- (b) the tribunal’s jurisdiction; and
- (c) discovery and inspection of documents.

8. It appears from the limited facts available to me at the directions hearing that the three members of sub-committee and possibly other residents have prima facie claims against the Respondent, arising out of the same, similar or related circumstances, and giving rise to a substantial common issue of law or fact. However, the Respondent took issue with the application being filed in its current form and referred me to section 21 of the *Retirement Villages Act 1999* which states:

What is a “retirement village dispute”

21. A “**retirement village dispute**” is a dispute between a scheme operator and a resident of a retirement village about the parties’ rights and obligations under the resident’s residence contract or this Act.

9. For the Tribunal to have jurisdiction, there must be a retirement village dispute as defined in that section. Of course, this may need to be considered in the context of section 32C of the Acts Interpretation Act 1954 which provides:

Number

32C. In an Act—

- (a) words in the singular include the plural; and

(b) words in the plural include the singular.

10. Resident is defined in section 9 as follows:

Who is a “resident”

9. A “resident” of a retirement village is a person who has a right to reside in the retirement village and a right to receive 1 or more services in relation to the retirement village under a residence contract.

11. There appears no dispute that each of the three members of the sub-committee resides in the village and, for that matter, I assume all of the members of the incorporated Association both reside in the village and that this is not contested.
12. In substance, what is contended is that the sub-committee and, this possibly may also extend to the incorporated association, cannot bring a representative action in the Tribunal. In this regard, there is limited evidence in the application that it is sought to be brought as a representative action other than naming the applicant as the sub-committee of the incorporated association and using the term “we” in relation to the facts alleged. Of course, “we” could simply refer to the three members of the sub-committee.
13. There were no submissions that the individuals did not each have a residential village dispute with the respondent, and on the basis of the limited material, I would find that a residential village dispute exists to satisfy that aspect of the Tribunal’s jurisdiction.
14. I, therefore, turn to the representative nature of the application.

Is a representative application available in the Tribunal?

15. Justices Toohey and Gaudron in *Carnie and Another v Esanda Finance Corporation Limited* (1995) 182 CLR 398; (1995) 127 ALR 76; (1995) 69 ALJR 206 quoted Bull JA in *Shaw v. Real Estate Board of Greater Vancouver*, 42 (1973) 36 DLR (3d) 250 at 254 and his observation was apposite that a representative “action is appropriate where if the plaintiff wins the other persons he purports to represent win too, and if he, because of that success, becomes entitled to relief whether or not in a fund or property, the others also become likewise entitled to that relief, having regard, always, for different quantitative participations.”
16. In *Prudential Assurance v. Newman Industries* (33 (1981) Ch 229) Vinelott J. traced the history of the rule governing representative actions and its application in the United Kingdom said at page 254:
- “...it is clear on authority and principle that a representative action can be brought by a plaintiff, suing on behalf of himself and all other members of a class, each member of which, including the plaintiff, is alleged to have a separate cause of action in tort, provided three conditions are satisfied”.
17. The first condition was that no order could be made if the effect might be to confer a right of action on a member of the class represented who would not otherwise have been able to assert such a right in separate proceedings, or to bar a defence which might otherwise have been available to the defendant in a separate action. The second was that the common interest requirement, where there are separate causes of action in tort, is a requirement for a common ingredient in the cause of action of each member of the class. The third condition was that it must be for the benefit of the class that the plaintiff be permitted to sue in a representative capacity.

In *Carnie Mason C.J. Deane and Dawson JJ* said:

“...it has now been recognised that persons having separate causes of action in contract or tort may have “the same interest” in proceedings to enforce those causes of action.

18. In relation to the reference in condition two to torts, the authorities are clear that the fact that claims arise under separate contracts does not mean that the requirement for the same interest is defeated (See *R.J. Flowers Ltd. v. Burns* (1987) 1 NZLR 260; *Irish Shipping Ltd. v. Commercial Union* (1991) 2 QB 206; *Bank of America v. Taylor* (1992) 1 Lloyd's Rep 484). This would appear particularly relevant in regard to retirement village disputes.
19. In *Carnie McHugh J* said:

But, as the judgment of Toohey and Gaudron JJ. shows, the recent cases have been more liberal in allowing representative actions to proceed. In the Age of Consumerism, it is proper that this should be so. The cost of litigation often makes it economically irrational for an individual to attempt to enforce legal rights arising out of a consumer contract. Consumers should not be denied the opportunity to have their legal rights determined when it can be done efficiently and effectively on their behalf by one person with the same community of interest as other consumers. Nor should the courts' lists be cluttered by numerous actions when one action can effectively determine the rights of many.
20. Justice McHugh's comments seem particularly apposite to applications of this sort involving matters which effect the residents of retirement villages. From these recent authorities it appears to me that this application is an appropriate one for a representative action if the Tribunal has the power to deal with such an application.
21. What is “day to day maintenance” and what should be paid out of the Maintenance Reserve Fund are issues that potentially effect all residents of a retirement village but in relative terms the amounts of the individual disputed payments involved may be very small. The resolution of these issues for one resident presumably will resolve the issue for all residents. In fact, the resolution of these issues might have ramifications for many retirement villages. One hopes that a village operator would not require the Tribunal to hear individual applications from all residents in order for the operator to be bound by a decision of the Tribunal.
22. Dealing firstly with the issue of whether or not the incorporated association can bring a representative action in the Tribunal, I find that it cannot do so as it is a separate legal body and is not, and cannot be, a resident of the village. There is also no residence contract between the incorporated association and the respondent upon which it can claim any rights. Therefore, I am of the view that there cannot be a “retirement village dispute” to which the incorporated association is a party.
23. I now turn to the issue of whether or not the sub-committee can bring a representative action in the Tribunal. The sub-committee is not a legal person. As a sub-committee it may act on behalf of the incorporated association or on behalf of the individual members of the sub-committee. When acting on behalf of the incorporated association it cannot bring a representative action in the Tribunal for the same reasons that the incorporated association cannot bring such an action.
24. However, this still leaves the question of whether or not the sub-committee, as individuals, can act on behalf of other residents.
25. The above cited cases dealt with representative actions brought under various Rules of

court. The Rule in the *Carnie Case* was fairly simple Rule which the New South Wales Court of Appeal thought was inadequate to provide a mechanism for a representative action. Gleeson CJ, (1992) 29 NSWLR at 388) in the course of explaining his concern about the absence of a detailed legislative prescription, mentioned the need to deal with such important matters as:

- (1) whether or not consent is required from group members;
- (2) the right of such members to opt out of the proceedings;
- (3) the position of persons under a disability;
- (4) alterations to the description of the group;
- (5) settlement and discontinuance of the proceedings; and
- (6) the giving of various notices to group members.

26. In *Carnie* The applicants based their claim for a representative order on Supreme Court Rules 1970 (N.S.W.) Pt 8 r.13(1) which was in the following terms:

" Where numerous persons have the same interest in any proceedings the proceedings may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them."

27. Despite the lack of a detailed legislative prescription in the Rule, the High Court held that the Rule made provision for an action to proceed as a representative action in a context in which there was no such legislative prescription.

28. Mason C.J. Deane and Dawson JJ went on to say:

Once the existence of numerous parties and the requisite commonality of interest are ascertained, the rule is brought into operation subject only to the exercise of the court's power to order otherwise.

29. In *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Limited* (Attorney-General for the State of Victoria intervening) [2000] VSCA 103 (8 June 2000) Order 18A made under the Victorian Supreme Court Rules was considered by the Court of Appeal. Order 18A is based on Part IVA of the *Federal Court Act of Australia Act 1976*. Ormiston J.A. who gave the lead judgement for the majority said;

More importantly, in the present context, for many centuries[41] the courts have permitted, in one way or another, parties to sue (and be sued) by representatives who have either claimed the right to sue on behalf of others or, more frequently (but not invariably) and in recognition of such claims, have been authorised or permitted by the courts in more recent centuries to sue or be sued on their behalf.[42] The Chancery practice, later adopted in Judicature Act rules, has been authoritatively expounded in relation to both the "traditional" representative suit[43] and Part IVA of the Federal Court Act in, respectively, *Carnie v. Esanda Finance Corp Ltd.*[44] and *Wong v. Silkfield*[45]

30. Representative proceedings may be commenced in the Federal Court where seven or more claimants have claims against the same person, arising out of the same, similar or related circumstances, and giving rise to a substantial common issue of law or fact. A representative proceeding may be commenced even if the individual claims for damages would require individual assessment. The Federal Court representative proceedings scheme is an opt-out scheme.

31. Arising out of the split decision in *Schutt Flying Academy Case* a the respondent's intention to appeal to the High Court on constitutional grounds, the Victorian Parliament passed new Rules for representative actions in that State and adopted an opt-in scheme.

32. Section 180 of the Act relates to procedure of the Tribunal and states as follows:

Procedure

- 180.(1)** When hearing a retirement village issue, the tribunal must—
- (a) observe natural justice; and
 - (b) act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the issues before it.
- (2)** In conducting the hearing, the tribunal—
- (a) is not bound by the rules of evidence; and
 - (b) may inform itself of any matter in the way it considers appropriate; and
 - (c) may decide the procedures to be followed for the hearing.
- (3)** However, the tribunal must comply with this part and any procedural rules prescribed by regulation.

33. Clearly this section prescribes a policy of speed and minimum formality and technicality and allows the Tribunal discretion as to the procedures to be followed. Sub-section (3) also makes specific provision for procedural rules to be prescribed by regulation. To date none have been prescribed despite the power in section 228 for the Governor in Council may make regulations under this Act.
34. In my view the Act is not sufficiently specific to enable a representative proceeding. Chief Justice's Gleeson's list of issues which arise in representative proceedings illustrate the reasons why a procedural rule is required. Such proceedings, if they are to be dealt with in the Tribunal, clearly require a procedural rule and until such rules are enacted, I am of the opinion, that the Tribunal has no power to deal with them.

.....
CHAIRPERSON - BARRY COTTERELL
RETIREMENT VILLAGE TRIBUNAL

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