

RETIREMENT VILLAGES TRIBUNAL

DATE: 18 JUNE 2002

APPLICATION NO: V012-01

APPLICANT: CARR F D & J; DUDMAN G H & E A; FISHER E S;
HARVEY I M & R L; HILTON J C; KING C P & J M;
MATSEN I D & N M; PROUDMAN G H; ROBINSON R
V J & R F

RESPONDENT: CHANCELLOR PARK RETIREMENT VILLAGE PTY
LTD

DATE OF HEARING: 9 & 10 APRIL 2002 AND 13 MAY 2002

REFERENCE: RVT V012-01 18 JUNE 2002

REASON FOR DECISION:

1. This is an application against Chancellor Park Retirement Village Pty Ltd ("the Respondent") under section 170 of the Retirement Villages Act 1999 ("the Act") which relies upon alleged contraventions of section 86 of the Act. The Applicants are:

Mr F D & Mrs J Carr (the Carrs);

Mr G H & Mrs E A Dudman (the Dudmans);

Ms E S Fisher (Ms Fisher);

Mr I M & Mrs R L Harvey (the Harveys);

Ms J C Hilton (Ms Hilton);

Mr C P & Mrs J M King (the Kings);

Mr I D & Mrs N M Matsen (the Matsens);

Mr G H Proudman (Mr Proudman);

Mr R V J & Mrs R F Robinson (the Robinsons)

2. Section 170 provides as follows:

Resident may apply for order if given false or misleading documents

170.(1) This section applies if-

(a) a scheme operator of a retirement village contravenes section 86; and

(b) a resident of the retirement village is materially prejudiced by the contravention.

(2) The resident may apply to the chief executive for an order by a Tribunal to have the resident's residence contract set aside.

3. Section 86 provides as follows:

False or misleading documents

86.(1) A scheme operator must not give the chief executive or a resident a document containing information the scheme operator knows is false or misleading.

Maximum penalty-200 penalty units.

(2) A complaint against a scheme operator for an offence against subsection (1) is sufficient if it states the information was false or misleading to the scheme operator's knowledge.

4. The Applicants seek orders under section 193 on the basis that they allege they are materially prejudiced by the various contraventions to which they refer in their application.

5. Section 193 provides as follows:

Tribunal orders under section 170

193.(1) This section applies if a resident applies for a Tribunal order under section 170.

(2) In setting a contract aside, the Tribunal may make the orders it considers appropriate including, for example, the following-

(a) an order that the scheme operator refund to the resident the ingoing contribution or another amount paid under the contract;

(b) an order that the scheme operator compensate the resident for damages or loss caused by the contravention.

6. The Applicants seek orders by the Tribunal that each of their respective residence contracts be set aside, that the Respondent refund to them their ingoing contribution and that the Respondent compensate them for the damages or loss caused by the contraventions.

7. In relation to the contraventions under section 86, the documents upon which the Applicants rely are as follows:

1. the audited report of outgoings contributions account to 30 June 2000 (Applicant's document No E6-8 and Respondent's document No FMC7);

2. the audited report of outgoings contributions account to 30 June 2001 (Applicant's document No G1-6 and Respondent's document No FMC7);

3. the annual budget for the year ending 30 June 2001 (Applicant's document No E9 and Respondent's document No FMC7);

4. the annual budget for the year ending 30 June 2002 (Applicant's document No G11 and Respondent's document No FMC7).

Representation

8. The Applicants were represented at the hearing by Mr F Dawson of Counsel and the Respondent was represented by Mr EJ Read of Counsel.

Proceedings

9. A hearing was held at Maroochydore on 9 and 10 April and on 13 May 2002. The parties were given an opportunity to attempt to settle the matter at Maroochydore and were encouraged to do so before the matter resumed on 13 May 2002.

10. Mr Robinson, Ms Fisher, Mr Matsen, Mr Proudman, Mr King, Mrs Harvey, Mr Carr, Mr Dudman and Ms Hilton gave evidence for the Applicants and all were cross-examined.

11. Mr Rodney Nunn ("Mr Nunn"), the manager of the village at the relevant time, Mr Jonathon Ives, the Respondent's financial manager, Mr Robert Sandes, the current manager of the village, Mr Swan, an accountant from KPMG Accountants, and Ms Fiona Campbell ("Ms Campbell"), the former General Manager of the Respondent, were the only witnesses on behalf of the Respondent required by for cross examination.

Jurisdiction

12. The Applicants all entered into written leases with the Respondent when the Retirement Villages Act 1988 ("the repealed Act") was in force, as follows:

Applicant	Unit No.	Commencement Date of Lease	Incoming Contribution
Mr F D & Mrs J Carr	112	27.03.1998	\$118,338
Mr G H & Mrs E A Dudman	100	10.05.1999	\$121,485
Ms E S Fisher	166	04.11.1997	\$106,409
Mr I M & Mrs R L Harvey	5	24.10.1997	\$93,891
Mr J C Hilton	71	01.09.1997	\$104,118
Mr C P & Mrs J M King	239	15.07.1999	\$122,495
Mr I D & Mrs N M Matsen	123	23.03.1998	\$115,200
Mr G H Proudman	69	01.09.1997	\$103,260
Mr R V J & Mrs R F Robinson	158	02.05.1997	\$98,489

13. The above information was extracted from Attachment FMC1 of Ms Campbell's Statement of 8 February 2002.

14. The Act commenced on 1 July 2000. By section 23 of the Act, the Act applies to an existing

residence contract such as that entered into by the parties here. By virtue of Sections 21 and 22 of the Act, the dispute between the parties constitutes both a retirement village dispute and a retirement village issue.

15. All actions by the parties prior to 1 July 2000 were required to comply with the repealed Act and the Tribunal is not given any specific powers to deal with matters which arose before 1 July 2000.

The Law

16. In applying section 86, the first question is whether the document contains information which is false or misleading. Then the second question is did the scheme operator know that the information was false or misleading at the time it was given.

17. The third question arises from section 170 and involves determining whether or not the resident was materially prejudiced by the contravention.

18. The character of the document said to be false or misleading is to be tested at the date of giving it, not with the benefit of hindsight (applying *Bill Acceptance Corporation Ltd. v. GWA Ltd* (1983) 78 FLR 171).

19. Conduct is misleading or deceptive if it induces or is capable of inducing error - *Keehn v Medical Benefits Fund of Australia Ltd* (1977) 14 ALR 77; *Weitmann v Katies Ltd* (1977) 29 FLR 336; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty L* 8 (Gibbs J); *Rhone-Poulenc Agrochimie SA v UMI Chemical Services Pty Ltd* (1986) 12 FCR 477. By analogy a document is misleading if it induces or is capable of inducing error.

20. False is defined in the *Macquarie Pocket Dictaurus* as not true or correct, apocryphal, erroneous, fallacious, unhistorical, untrue, wrong or used to deceive or mislead, bodgie, bogus, counterfeit, dummy, fake, phoney, sham, not genuine, artificial, imitation.

21. Mislead is defined in the same *Dictaurus* as to lead or guide wrongly, bamboozle, bluff, bull, catch, cheat on, come the raw prawn, deceive, delude, dupe, equivocate, fast-talk, fool, fox, gull, handle, have, have someone on, hoodwink, humbug, lead astray, lead up the garden path, take for a ride, take in or trick.

22. There is an evaluative judgment involved in determining this issue. As the Full Court said in *SAP Australia Pty Ltd v Sapient Australia Pty Ltd* (1999) 169 ALR 1 at 14:

"The characterisation of conduct as "misleading or deceptive or likely to mislead or deceive" involves a judgment of a notional cause and effect relationship between the conduct and the putative consumer's state of mind. Implicit in that judgment is a selection process which can reject some causal connections, which, although theoretically open, are too tenuous or impose responsibility otherwise than in accordance with the policy of the legislation."

23. Where it is necessary, as here, to prove that a document is knowingly false or misleading, regard should be had to the meaning intended by the giver if the explanation is not so unreasonable or unrealistic as to not be fairly open. The critical question is whether, having regard to the finding that the document was objectively false or misleading, it was given deliberately knowing it to be false or misleading.

24. These two concepts involve a mental element. The scheme operator giving the document must either know the document is false if given but still give it or, realising it may be wrong, gives it without caring whether it is true or false. If the scheme operator asserts it has neither of these states of mind but the true facts are widely divergent from what has been said, a tribunal of fact may be persuaded that the inference should be drawn that one or other of the states of mind exists.

25. The third question involves determining whether or not the resident was materially prejudiced by the contravention and will depend upon the resident being able to establish the prejudice and the causal connection. "Material" is defined in the *CCH Macquarie Concise Dictionary of Modern Law* as meaning

“substantial; significant”.

26. While the phrase “materially prejudiced” is used in several Queensland statutes it is not defined and does not appear to have been judicially considered. However, whether parties have been “materially prejudiced” has been considered in several cases involving applications to proceed after considerable delay and in those cases it is clear that being “materially prejudiced” can result from a range of matters and is not limited to financial considerations (See *Brisbane South Regional Health Authority v. Taylor* (1986) 186 CLR 541) A similar approach was taken by the High Court in *The Commonwealth v Verwayen*, (1990) 170 CLR 394, where “materially disadvantaged” and “detriment” were being considered and the judges’ statements make it clear that it must be “material” or “real” although pecuniary loss may not be necessary. Dawson J. at 461-2 observed that justice cannot always be measured in terms of money. Deane J. was of a similar view (see 448-9). Applying that logic here would suggest that pecuniary loss may not be necessary.

27. The reference to “document” in section 86 must be read widely as it is not defined as in section 85 to mean a “relevant document”. That definition is said to apply only to section 85. Therefore, subject to the surrounding circumstances, any document may qualify and certainly the documents to which the section refers are not limited to the residence contract or the public information document.

The audited report of the outgoings contributions account to 30 June 2000

28. This document was prepared after 1 July 2000 and given to the residents after that date. The Applicants allege that the information in relation to street lighting is false and misleading and that the Respondent knew that it was false and misleading.

29. The Respondent has admitted that the nursery expenses were incorrectly described in the audited report as street lighting but says that they were fully refunded by the Respondent into the residents outgoing contribution account by 29 August 2000.

30. The fact that the nursery expenses were included under the heading of “street lighting” meant that the nursery expenses, which were inappropriately charged to the residents outgoing contribution account as they were an owner’s expense, did not appear in the accounts.

31. In the matter of *Schintler v Chancellor Park Retirement Village Pty Ltd*, RVT V001-01 4 September 2001, Mr Nunn gave evidence that he first became aware of this error in relation to the annual financial statements the day before the annual meeting and that he discussed this with Ms Roberts and because the Respondent would look bad and because it was too late to cancel the meeting, the Respondent had to proceed with the meeting.

32. What Mr Nunn had to say in the *Schintler* matter is set-out in full below:

What happened then was that there was the AGM, I researched this matter that afternoon, I went and immediately across to Head Office and saw, ah, I produced some written notes obviously. Just to substantiate what I had found, and I went straight across and I saw Mrs Roberts and I saw Mrs Poulsen at the same time. Mrs Poulsen being the Accountant, and the Staff Accountant. I left the matter in her hands immediately to check out because there was an obvious challenge there with one Accountant talking to another and professional ah matters and so forth. **And I expressed at that stage fact that the whole company would look like a damn fool, with something like this being put in front of the residents.**

What actually occurred with that meeting was that I spoke to Mrs Roberts on the afternoon when I got those accounts, which was approximately 4pm. **That was the day before the meeting**, and we had two options. One was to continue with the meeting, and the other one was to call it off. Calling it off was not really an option, because at that time of afternoon there was no way of notifying a large retirement village, with people all in their homes at that time of day, **so we decided to proceed with it.** (The Tribunal’s highlighting)

What then happened was I met, while I was away getting those accounts, I had a message go out to the Residents Committee calling as many of them as were available in. The Residents Committee then came in, I met with them, I showed them the Budget. I showed them the papers, I said ‘There hot off the press, I haven’t had time to go through them’, I gave them each a copy. In fact I was talking to them while the copies were being printed, I pinned a copy on the Notice Board outside. We printed copies so that the residents coming to the meeting next day could get them. The residents were already upset in

relation to matters of GST etc., so they were justifiably angry before this occurred.

It could only be described as a pretty hostile meeting, and after that Mrs Roberts instructed me to make myself available for residents to come and talk to. I put a notice up for the residents, saying they could come and talk to me, and I would sit down and explain what had happened to them. I would give them, try to answer all of their queries. If I could not answer their queries I would take their questions and get answers provided for them.

33. Mr Nunn gave different evidence in his statement to this Tribunal in that he said he first became aware of this error the afternoon after the audited statements were presented to the residents at the Annual Meeting. He said that he was asked a question at the Annual Meeting which he could not answer but investigation after the meeting revealed the error.

34. Mr Nunn said that he then went straight across and saw Mrs Roberts and Mrs Poulsen at the same time and that it was at this meeting that he said that the whole company would look like a damn fool, with something like this being put in front of the residents.

35. Mr Nunn said that his reference to “something like this being put in front of the residents” related to the meetings he was to have with residents after the Annual Meeting or at another Annual Meeting, which the residents had requested at the Annual Meeting, and was not a reference to the Annual Meeting which had occurred on 17 August 2001.

36. Mr Nunn was questioned in relation to this evidence by Mr Dawson on behalf of the Applicants at the hearing of this matter. Mr Nunn said in relation to the above evidence:

Mr Nunn There are no incorrect parts in that evidence that I gave Sir. It just appears that I gave it in such a manner that I confused the Tribunal, that it appears jumbled.

Mr Dawson So the factual information contained in that passage, is an accurate record of your evidence.

Mr Nunn That is correct Sir

37. The Tribunal drew to Mr Read’s attention the fact that Mr Nunn had given two different and contradictory versions in relation to the same incident and that for the Tribunal to decide which version to accept it might be of assistance if Mrs Roberts or Mrs Poulsen, who Mr Nunn referred to as being party to his conversations, gave evidence. The Tribunal specifically advised Mr Read that if they were not called it would request submissions on the question of the drawing of adverse inferences.

38. Ms Campbell gave evidence that Mrs Roberts worked for Mal Pratt and Associates. Mr Pratt is the director of the Respondent. However, Mr Read advised the Tribunal that he did not seek leave to call further witnesses in this regard.

39. It is also clear from Mr Nunn’s evidence that the Respondent did not make what the Tribunal would regard as full and proper disclosure of the errors, but Mr Nunn said that he did acknowledge that the accounts were not accurate if the residents asked. When questioned by Mr Dawson he said:

Mr Nunn I made myself available to the residents, freely available to answer any questions, and I invited them to approach me. And I was quite happy to discuss it with anybody.

Mr Dawson You didn’t see it as your obligation to actually make it known to the residents that there was a mistake.

Mr Nunn I acted under instructions from Mrs Roberts, and that is what I did, Sir.

40. On the basis of the Respondent’s admission and the other evidence, the Tribunal finds that audited report of the outgoing contributions account to 30 June 2000, was false and misleading.

41. The Tribunal considers that the Respondent would have been aware that Mr Nunn’s evidence in this matter would be subject to challenge as not credible and despite that, and the Tribunal specifically drawing Mr Read’s attention to the possibility of an adverse inference being drawn, the Respondent chose

not to call Mrs Roberts or Mrs Poulsen to support Mr Nunn's version of events as contained in his evidence to this Tribunal. The Tribunal, therefore, considers that the only reasonable inference to be drawn is that neither Mrs Roberts nor Mrs Poulsen could confirm Mr Nunn's evidence. For these reasons, the Tribunal prefers Mr Nunn's evidence given in the *Schintler* matter and set-out above to his evidence given in this matter.

42. On the basis of the Tribunal's findings in relation to Mr Nunn's evidence, the Tribunal finds that the fact that this information was false and misleading was known to the Respondent before the audited statements were given to the residents, including the Applicants, at the annual meeting.

43. The Tribunal is of the opinion that this was a very serious breach of the Respondents obligations to all of the residents of the village.

44. The giving of this document to the Applicants was required to comply with the Act and the document comes within section 86 for the reasons given above.

45. As the Tribunal stated in the *Schintler* matter, the Respondent is to blame for the false and misleading audited statements. In the High Court in *Esanda Finance Corporation Limited v Peat Marwick Hungerfords (Reg)*, 18 March 1997, McHugh J. discussed the role of the auditor and the client and said:

... the accounts are ordinarily prepared by the client and, in any event, are that person's responsibility (*Bily* 834 P 2d 745 at 762 (1992)). Each case must be judged on its own facts. But it would have to be an exceptional case for the client and all its servants and agents to be innocent of fraud or negligence in relation to the publication of accounts that are false or misleading.

46. Likewise, the Tribunal rejects the suggestion that the certification of the auditor absolves the Respondent from liability for giving the residents false and misleading financial statements. It is clear from Mr Nunn's evidence to the Tribunal that he was aware of how the auditor's certification of false financial statements would leave the Respondent exposed to criticism.

47. The Respondent has admitted that audited report was not given to the Residents Committee until after 4pm on 16 August 2000 and to the Applicants and other residents until approximately 9am on 17 August 2000 at the meeting.

48. More significantly the Respondent has admitted that the residents who attended the meeting were denied the opportunity to properly consider and seek professional advice on the reports due to their late provision.

49. The Respondent has admitted that the Applicants did suffer prejudice but denies that it was material prejudice.

50. The Tribunal finds that the Applicants have been materially prejudiced by the Respondent's contravention of the Act because they were denied the benefit required by the Act of having audited statements, which could be relied upon. Further, because of the Respondents failure to make full and proper disclosure of the errors, they were denied the opportunity to properly question the scheme operator about the accounts. This also has relevance to the payments required by the Budget for the year ending 30 June 2001.

51. The fact that the meeting is required to be held by the Act and is only required to be held once each year is significant for the Applicants' rights. The annual meeting is the only formal opportunity where the Applicants and the other residents have the financial statements given to them by the Respondent, when the Respondent is then available to publicly respond to questions in relation to the statements.

52. The residents ability to realistically assess the Budget also depends upon the expenditure actually incurred and the income actually received in the previous year. Once the budget is presented, and

approved, where that is required under section 106, that is the one and only time the Applicants had an opportunity to formally question the Respondent in relation to the Budget at a public meeting. It is the denial of the Applicants' rights in all of these regards that the Tribunal considers amounts to material prejudice.

53. If further proof was necessary of the material prejudice suffered by the Applicants in relation to the presentation of these false and misleading financial statements, it comes from the Respondents refusal to hold another annual meeting when requested by the residents to do so.

54. The Applicants, therefore, were denied their one and only opportunity to exercise their rights in a meaningful way by the Respondent's contravention of the Act. The prejudice was substantial and significant and resulted directly from being given the false and misleading document by the Respondent when it knew it was false and misleading.

The audited report of the outgoings contributions account to 30 June 2001

55. According to the submissions on behalf of the Applicants, this claim depends on the Respondents admission "that the document did not separate the wages for administrative assistant, gardeners and managers". There is no allegation that the Respondent knew that the document was false or misleading.

56. There was no evidence as to how the way this information was presented was misleading or that the information itself was false.

57. The material prejudice is said to arise because "the Applicants were given financial documentation for the second year in a row that was not informative ..."

58. The Tribunal rejects the claims that the audited report of the outgoings contributions account to 30 June 2001 was false or misleading on the basis that the evidence does not substantiate this claim. For this reason, the Tribunal does not intend to further deal with these allegations.

The annual budget for the year ending 30 June 2001

59. The Respondent has admitted that the budget contained an over-estimate of rates to the extent that residents, including the Applicants, were charged \$1,047.03 per unit per year. According to the Respondent, residents should have only been charged \$987.65 per unit per year which resulted in an over-charge of \$59.38 per unit per year.

60. In the *Schintler* matter, the Tribunal considered the amount estimated by the Respondent for rates and concluded as follows:

On the basis of this evidence, the Tribunal finds that the figure \$423,000 was false and misleading and on the balance of probability, the Respondent knew it was false and misleading.

61. The over-charge here arose from the same reason as in the *Schintler* matter.

62. The Tribunal in the *Schintler* matter went on to say:

The next question is whether or not Mr Schintler has been materially prejudiced by the Respondent's contravention of the Act. Provided that the Respondent does for what is referred to in its solicitors letter of 29 September 2000, and credits any overpayments of rates to Mr Schintler and the other residents, Mr Schintler will not be materially prejudiced.

63. Significantly, shortly before the hearing of this matter, the Respondent refunded the Applicants an amount of \$128.40 of which \$60.00 was said to relate to the over-charge for 2000-01 and \$68.40 to the over-charge for 2001-02. These amounts were calculated on the basis of a report by Mr Swan, an accountant from KPMG Accountants. While the KPMG report was questioned by Mr Dawson in cross-examination the figures were not significantly challenged and no alternative figures were in evidence before the Tribunal.

64. By the time of the Tribunal hearing the over-charge had been refunded. Although the refund did not occur as quickly as the Applicants might have hoped and its timing may have been connected to the progress of this application through the Tribunal, the Tribunal was of the view that the Applicants were not now materially prejudiced.

The annual budget for the year ending 30 June 2002

65. The Respondent has admitted that the budget contained an over-estimate of rates to the extent that residents, including the Applicants, were over-charged \$68.40 per unit per year.

66. By the time of the Tribunal hearing the over-charge had been refunded and the Tribunal was of the view that the Applicants were not now materially prejudiced.

The Other Evidence and Submissions

67. The Tribunal has considered the other evidence and the submissions of both parties but in view of the Applicants' claims, which by the end of the hearing had reduced to the four claims of false or misleading documents being knowingly given to them, the Tribunal considers that it has dealt with all issues of relevance to the claims.

Problems arising from the Format of the Accounts

68. The Tribunal commented in the *Schintler* matter on the fact that, in relation to the audited statements for 1999-2000 and the Budget for the year ending 2001, there was no consistency between the headings for Budget purposes and the Audited Statement headings or between budget headings from year to year. The Budget document for the year ended 30 June 2001 did not show the actual income received and expenditure incurred in the previous year or the budget for the previous year. In fact, it did not show any anticipated income. It also failed to show any total percentage increase let alone comply with the requirements of sections 106 and 107 as referred to above. Even the Notes to the Audited Statements for the year ended 30 June 2000 did not use the same headings as were used in the Audited Statement making cross referencing difficult.

69. The Tribunal notes that these inadequacies had been corrected by the Respondent in relation to the audited statements for 2000-2001 and the Budget for the year ending 2002.

Problems arising from sections 106 and 107 of the Act

70. Sections 103 to 108 all relate to charges for general services and sections 106 to 108 inclusive, all relate to increasing the general services charge.

71. Sections 106 and 107 of the Act provide as follows:

Increasing general services charges

106.(1) A scheme operator may increase charges for general services for a retirement village only under this section or as allowed under section 107.

(2) The scheme operator must not increase the general services charge above the percentage increase in the CPI for a particular year, unless the increase is approved by the retirement village residents by special resolution at a residents meeting.

Maximum penalty-200 penalty units.

(3) If the retirement village residents, by special resolution at a residents meeting, approve an increase in the general services charge for the retirement village above the percentage increase in the CPI for a particular year, the general services charge may be increased only by the amount of the approved increase.

(4) For applying this section, the percentage increase in the CPI for a particular year is the percentage increase between the CPI last published before the start of the particular year and the CPI published for the quarter ending immediately before the

residents meeting is held.

(5) In this section-

“CPI” means the all groups consumer price index for Brisbane published by the Australian statistician.

Resident’s responsibility for paying increased general services charge

107. A resident is not required to pay a charge for a general service under a residence contract to the extent that the charge is more than that payable under the contract and increased under section 106, unless the excess is attributable to an increase in-

(a) rates, taxes or charges levied under an Act in relation to the retirement village land or its use; or

(b) the salary or wages of a person engaged in the retirement village’s operation and payable under an award, certified agreement, enterprise flexibility agreement, industrial agreement, Queensland workplace agreement or other industrial agreement made,

approved, certified, or continued in force under-

(i) the *Industrial Relations Act 1999*; or

(ii) a Commonwealth Act; or

© insurance premiums in relation to the retirement village or its use;

or

(d) maintenance reserve fund contributions.

72. While these sections appear to cover similar matters there is a difference in terminology used. Section 107 refers to a “charge for a general service” which is the same terminology used in sub-section 106(1) which allows a scheme operator to increase “charges for general services” only under section 106 or as allowed under section 107. However, sub-section 106(2) refers to the “general services charge” and caps any increase in the “general services charge” to the CPI, unless the increase is approved by the residents.

73. Section 107 imposes a liability on the scheme operator to ensure that a charge for general services is payable under the residence contract and that any increase in the charge is valid under section 106. If the scheme operator fails to do these two things the resident is not required to pay the charge unless the excess is attributable to an increase in things such as rates, salary or wages or insurance premiums as listed in section 107 (a) to (d) inclusive.

74. Presumably, the items section 107 (a) to (d) inclusive are not capped to the CPI level because they are determined by bodies or processes independent of scheme operators, and for this reason, may exceed the CPI increase.

75. However, it is important to note that while “rates, taxes or charges” may be increased beyond the CPI increase without resident approval, section 107 only applies to those rates, taxes or charges “levied under an Act”.

76. In determining a general services charge for a particular year, a scheme operator must start with those charges for general services payable under the residence contract and may increase those charges under section 106 or 107 of the Act.

77. Sub-section 106(2) imposes a CPI limit on the “general services charge” unless a greater increase is approved by the residents. However, increases in individual charges for general services are not so limited but the general service must payable under the residence contract and the increases in the items in section 107 (a) to (d) inclusive are limited to those “levied under an Act or otherwise determined

independent of scheme operators and justified as such.

78. For these reasons, the Tribunal considers that it would be appropriate for scheme operators to categorise the charges for general services into those under sections 106 and 107 and to show the relevant percentage increases for each category and the resultant general services charge percentage increase.

79. This approach should result in transparency of the process and lead to greater trust on the part of residents.

Conclusion

80. The Tribunal is aware that it is necessary for scheme operators and village residents to have an on-going relationship and, for that reason, wherever possible it attempts to improve rather than exacerbate that relationship by its orders. However, here the relationship has broken down entirely.

81. The Tribunal accepts that the Applicants have satisfied the requirements of sections 170 and 86 and intends to exercise its discretion to make the appropriate orders available to it under section 193.

82. On the basis of the evidence the Tribunal has seen and heard of the Respondent's behaviour as referred to above and for the reasons set-out above the Tribunal accepts that the setting aside of the residence contracts is the appropriate remedy.

83. Section 193(2) provides that "in setting a contract aside" the tribunal may make the orders it considers appropriate and gives two examples.

84. The Applicants have been materially prejudiced by the Respondent's behaviour on 17 August 2000. The on-going relationship from that date has been and will be adversely affected by what occurred and the lack of trust which has flowed from that occurrence.

85. However, prior to that date, while there was some dissatisfaction in evidence, the Tribunal is satisfied that the Applicants had the benefits provided by the Respondent from their residency in the village. For this reason, the Tribunal, in setting aside each of the contracts, orders that the Respondent refund to each of the Applicants the amount of their ingoing contribution less an amount of two and a half percent (2.5%) per year or part thereof from the commencement of each lease to 17 August 2000.

86. The Tribunal also orders that the Respondent pay each Applicant, in accordance with the residence contract for any improvements made by them, a reasonable amount (a) to be agreed between the parties or (b) if agreement is not possible, to be assessed by the Tribunal after the serving of written submissions by the Applicant on the Respondent as to each amount in dispute and the reason for the payment of each amount, including an allowance for depreciation in each case, and the filing of the Applicant's submissions and the Respondent's

response in the Registry of the Tribunal within seven days of the Respondent's receipt of the Applicant's submissions.

Orders

87. For the above reasons the Tribunal makes the following orders:

1) That the residence contract between each of the Applicants and Chancellor Park Retirement Village Pty Ltd be set aside with effect from 4pm 30 July 2002; and

2) That Chancellor Park Retirement Village Pty Ltd refund to each of the Applicants the amount of their ingoing contribution less an amount of two and a half percent (2.5%) per year or part thereof from the commencement of their lease to 17 August 2000. Such sum to be paid to each of the Applicants by 4pm 30 July 2002;

3) That Chancellor Park Retirement Village Pty Ltd pay each Applicant, in accordance with the residence contract for any improvements made by them, a reasonable amount

(a) to be agreed between the parties; or

(b) if agreement is not possible, to be assessed by the Tribunal after the serving of written submissions by the Applicant on the Respondent as to each amount in dispute and the reason for the payment of each amount, including an allowance for depreciation in each case, and the filing of the Applicant's submissions and the Respondent's response in the Registry of the Tribunal within seven days of the Respondent's receipt of the Applicant's submissions.

Such sum to be paid to each of the Applicants by 4pm 30 July 2002 unless the Applicant has served written submissions on the Respondent as to the costs of improvements which remain in dispute and in that case all monies not the subject of dispute are to be paid by 4pm 30 July 2002;

4) That this decision and its reasons be published.

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MR B A COTTERELL - CHAIRPERSON

for the RETIREMENT VILLAGES TRIBUNAL

Barry Cotterell

Ms Zardani

Mr Blackwood

Chairperson

Member

Member

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