

## Retirement Villages Tribunal

*Retirement Villages Act 1999*

### --- REASONS FOR DECISION ---

**APPLICATION NO: V003-00**

**BETWEEN (Applicant): Noyea Park Country Club Pty Ltd**

**AND (Respondent): John William Reynolds**

#### **REASONS FOR DECISION:**

This is an application by Noyea Park Country Club Pty Ltd, the scheme operator of Noyea Park Riverside Village. The respondent is a resident of the Village but we were informed at the start of the hearing that he has sold his unit and that settlement was to occur that day.

he orders the applicant seeks are:

1. That in the circumstances the residence contract does not contain any obligation upon the Applicant to purchase Unit 112, Noyea Park Riverside Village from the Respondent.
2. That in the event of the sale of Unit 112 by the Respondent the exit fee (deferred management charge) payable by the Respondent to the Applicant is to be based upon the consideration paid to the Respondent without any account to be made for improvements made to Unit 112 by the Respondent at his expense. †

This raises the question of whether or not these orders are available in the Tribunal due to section 191 of the Retirement Villages Act 1999 (the Act) 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)** ...

The request for Order 1 appears to be for a declaration as to the meaning and effect of part of the contract between the Applicant and the Respondent in circumstances where the Respondent has sold his unit and the issue does not constitute a dispute between the parties. 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). Under these circumstances where the issue does not constitute a dispute between the parties, the Tribunal need make no finding and does not propose to do so.

On the material submitted to the Tribunal prior to the hearing, the request for Order 2, also appeared to be for a declaration. However, at the hearing, we were informed that the deferred management charge had been calculated on the sale price obtained by the Respondent of \$167,000 and that the Applicant had agreed to hold the sum of \$2,887.50. This sum is the Respondent’s solicitors assessed figure of the amount which related to the Respondent’s improvements. Mr McGregor, who appeared for the Applicant, advised the Tribunal that there was no agreement on the basis of the calculation of this sum but simply an agreement to hold this amount pending the determination by the Tribunal.

The issue of how the deferred management charge should be calculated was in dispute and was clearly within the jurisdiction of the Tribunal.

### **The Evidence**

Mrs Herbst, who gave evidence for the Applicant, provided the Tribunal with copies of the Disclosure Statement, dated 12 March 1991, which formed part of the Applicant’s contract with the Respondent and his wife. (The Respondent’s wife has since died). Mrs Herbst also provide the Tribunal with a copy of the Manager and Unit Owner’s Agreement, dated 11 March 1994, signed by the Respondent and his wife.

The Disclosure Statement at clause 9.3 refers to the deferred management charge as follows:

#### 9.3 DEFERRED MANAGEMENT CHARGE

The Deferred Management Charge is payable to the Manager on the sale or transfer of the unit.

The Deferred Management Charge shall be calculated in accordance with the following formula:-

$$\text{D.M.C.} = \underline{2.5} \times \text{\$P} \times \text{N}$$

WHERE

D.M.C. = the Deferred Management Charge

\$P = the sale price or fair market value of the Unit

N = number of years of duration of the Manager and Unit Owner's Agreement up to a maximum of twelve (12) years.

The Deferred Management Charge is determined in accordance with the procedure set out in Clause 5.3 of the Manager and Unit Owner's Agreement which is set out in the Tenth Schedule of the Agreement for Sale.

The relevant parts of Clause 5.3 of the Manager and Unit Owner's Agreement provide as follows:

5.3 The Deferred Management Charge shall be determined as follows:

5.3.2.1 In the event of sale or disposition by the Unit Owner to a person other than Noyea Park Riverside Village Pty Ltd then 2.5 % of the consideration paid to the Unit Owner for each year or part thereof for the duration of this agreement for a maximum of (12) years.

5.3.2.2 In the event of sale or disposition by the Unit Owner to a person other than Noyea Park Riverside Village Pty Ltd the Unit Owner shall forthwith notify the Manger of the consideration to be paid to the Unit Owner and ...

The Respondent has informed the Applicant in accordance with these Clauses that the consideration to be received by him is \$167,000. However, the Respondent has asserted to the Applicant and to the Tribunal, that from this amount there should be deducted a sum to reflect the Respondent's expenditure on improvements to the Unit. At the Tribunal hearing the Respondent quantified this sum, for the first time, as being \$16,500 after discounting his estimated expenditure at \$17,020.

Under cross-examination by Mr McGregor the Respondent admitted that the amount of \$5,540 claimed by him in relation to the front patio was based on an estimate given to him by the Village tradesman. This was because the Respondent had carried out this work himself and had not employed a contractor. The Respondent also admitted that some of his other claims were for work carried out by him, which explained in some cases their somewhat nominal cost.

The Respondent did not give evidence as to when, during his tenure, the various improvements were carried out but he admitted that some of the work, such as the security doors, was required and other work was for his comfort and enjoyment as an occupant. No receipts were produced to the Tribunal although the Respondent referred to having a need to retain them. The Respondent also did not explain how he arrived at the three (3) per cent figure he used for discounting. In summary, the Tribunal agrees with Mr McGregor's submission that this evidence was less than satisfactory.

The Respondent gave hearsay evidence that Mr Herbst, a Director of the Applicant, in about 1996 had told others that, if they could prove by receipts the value of their improvements, they could sell the improvements on a separate contract to the contract for the unit. There was no further evidence presented by the Respondent to substantiate this claim and its absence was not explained.

Even if the Tribunal accepted this evidence, which under the circumstances it cannot, the Respondent simply sold his unit with the improvements included in the contract. He then sought to require the Applicant to discount the sale price by the value of the improvements for the purpose of calculating the Deferred Management Charge.

Under the terms of the Disclosure Statement and the Manager and Unit Owner's Agreement which constitute the relevant parts of the agreement between the Applicant and the Respondent, the Applicant is entitled to calculate the Deferred Management Charge by the formula set-out above using the sale price of \$167,000 which is "the consideration to be paid to the Unit Owner" namely the Respondent.

While the Respondent considers it unjust for the Applicant to be able to charge a Deferred Management Charge on the improvements paid for solely by the Respondent, that is the contractual effect of the agreement into which the Respondent entered in 1994. The Respondent contends that the Deferred Management Charge should be calculated on the "selling price" charged by the Applicant when the Respondent initially purchased the unit. The Tribunal rejects this interpretation of the contract as it is contrary to the clear meaning of the documents.

The Respondent contends that the Disclosure Statement does not sufficiently make it clear that the Deferred Management Charge, now called an exit fee, would be charged on the improvements made by the Unit owners. The Tribunal accepts that the improvements are not referred to in the Disclosure Statement and that the purpose of such Statements is to make the relationship as transparent as possible to avoid disputes.

The Act does not attempt to retrospectively change the contracts which parties entered into before the Act came into effect. However, one of the objects of the Act is "to facilitate the disclosure of information to prospective residents of a retirement village to ensure the rights and obligations of the village residents and scheme operators may be easily understood" (See section 3(c))

In this regard the Tribunal notes that the Public Information Document (PID) issued by Regulation under the Act also does not refer to how improvements are to be dealt with when calculating the exit fee. The Tribunal recommends that the PID should be amended to do so.

## **Conclusion**

On the basis of all of the evidence and the Tribunal's findings, the Tribunal orders that the exit fee (deferred management charge) payable by the Respondent to the Applicant in relation to the sale of Unit 112 by the Respondent is to be based upon the selling price of \$167,000 to be paid to the Respondent without any account being required to be made for improvements made to Unit 112 by the Respondent at his expense.

RETIREMENT VILLAGE TRIBUNAL

BARRY COTTERELL

Chairperson

Dated:

March 2001

DULCIE NEWMAN

Member

FRANK LYNDON

Member

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