

# **RETIREMENT VILLAGES TRIBUNAL**

**DATE: 22 OCTOBER 2001**

**APPLICATION NO: V004-01**

**APPLICANT: MR REX JOHNS, MRS BETTY KERR AND MRS PAULINE DAVEY**

**RESPONDENT: PARK HAVEN PTY LTD**

**DATE OF HEARING: 19 AND 20 SEPTEMBER 2001**

**REFERENCE: RVT V004-01 22 OCTOBER 2001**

## **REASONS FOR DECISION: (Delivered 20 September 2001)**

1. This is an application by Mr Rex Johns ("Mr Johns"), Mrs Betty Kerr ("Mrs Kerr") and Mrs Pauline Davey ("Mrs Davey") against Park Haven Pty Ltd ("Park Haven") seeking the following orders:

1. That the Respondent refund to the residents of the village the sum of \$46.00 per resident being the amount claimed and paid to the Respondent by residents described as "GST Arrears 01/09/00 to 31/10/00 \$46.00" and sought as a levy contribution for the sinking fund and received by the respondent on or about early December 2000.
2. That the Respondent within thirty (30) days transfer any monies presently held for the Village on account of capital replacement (currently termed "Sinking Fund with a balance of \$8,345.80 as at 28 February 2001") to the account for the Village styled "Park Haven Garden Village Capital Replacement Account".
3. That the Respondent within thirty (30) days transfer any monies presently held for the Village on account of maintenance and repairs (currently termed "Administrative Fund Account with a balance of \$1,599.40 as at 28 February 2001") to the account for the Retirement Village styled "Park Haven Garden Village General Services Account".
4. That the Respondent ensure a quarterly financial statement (unaudited) of the income and expenditure of the Park Haven Retirement Village Capital Replacement Account, Park Haven Village Maintenance and Repairs Reserve Account, (and Park Haven Retirement Village General Services Account be) provided to residents by "posting up" in the Village meeting room until the next quarterly financial statement is made.
5. That the Respondent provide for inspection with seven (7) days of written request by any resident all receipts for all expenditure by the Respondent by through or in relation to in any way the management of the Village whether for Capital Replacement account, Maintenance and Repairs account or General Services account.
6. That the Respondents Manager be in personal attendance on site at the Village for attending to

management duties, excluding emergency responses, for the hours of 9.00am until 5.00pm inclusive during ordinary business days in Mackay.

7. That details of and a copy of each policy of insurance effected by the Respondent for or relating to the Village be available for inspection within 7 days of a written request by a resident.
8. That the Respondents legal costs, if any of or incidental to this Tribunal matter not be included as expenditure or in any other way recovered from the residents through levies or otherwise but be borne by the Respondent solely.

2. In response to the application, Park Haven sought that all of the above orders be refused and sought an order that an increase in the general services charge be approved in such amount as is necessary for the wages of the Respondent's staff to be \$60,000 per annum.

## Background

3. Park Haven Garden village was established in 1991 after having been constructed by Coralspruit Pty Ltd. It was set up under the *Building Units and Group Titles Act 1980* but the body corporate immediately gave its powers to Park Haven which it appointed as body corporate manager for a term of 80 years. In addition, as the units were sold each purchaser was required to give their power of attorney to Park Haven under a service agreement entered into with Park Haven.

4. The tribunal requested Mr Brian Wallwork ("Mr Wallwork"), the director of Park Haven, to provide it with a copy of the agreement appointing Park Haven as the body corporate manager and despite him providing the tribunal with his solicitor's files, a copy of this agreement was not produced.

5. When the village was first established, the Retirement Village Act 1988 ("the Repealed Act") applied and a public information document ("PID") was issued under that Act. The repealed act has since been replaced by the *Retirement Villages Act 1999* ("the RV Act"). Under section 89 of the *RV Act*, the scheme operator must not exercise or purport to exercise a power of attorney given by a resident.

6. The *Body Corporate and Community Management Act 1997* ("the BCCM Act") has since replaced the *Building Units and Group Titles Act 1980* and significantly the *Body Corporate and Community Management (Accommodation Module) Regulation 1997* by section 78 provides as follows:

### **Term of engagement of body corporate manager [SM, s 80]**

**78.(1)** The term of the engagement of a person as a body corporate manager (after allowing for any rights or options of extension or renewal) must not be longer than 3 years.

**(2)** If the term purports to be longer than 3 years, it is taken to be 3 years.

7. On the basis of this provision, it became obvious at the hearing, that the appointment of Park Haven as body corporate manager of the village had expired, and while Park Haven had continued to carry out this function, the body corporate needed to make a decision in relation to

the appointment of a manager.

8. An annual general meeting of the body corporate had been held on 28 May 2001 and a body corporate committee had been elected. Mr Johns was the chairperson elected to that committee and Mrs Kerr was elected as the secretary. However, Mr Wallwork had not handed over the running of the body corporate to the body corporate committee by the time of the hearing. It appears that his legal advice was that Park Haven was legally able to continue to run the body corporate as it had done from the establishment of the village in 1991.

9. On the second day of the hearing, Mr Wallwork, on behalf of Park Haven, agreed that the residents were now in control of the body corporate and that, if the body corporate wished to engage a manager, a new contract was required.

10. During the hearing, Mr Wallwork described the situation faced by the village and both the residents and the scheme operator as being a "legal minefield". This had resulted from the changes in the legislation referred to above and from the legal documentation used in establishing and running the village under that legislation.

11. The establishment of the village under the body corporate legislation and its need to also comply with the retirement village legislation has resulted in a layering of legislation, and in respect of financial administration, a duplication of the accounts required. The *BCCM Act* provides for a body corporate committee and the *RV Act* provides for a residents committee. An annual general meeting is required under both Acts and by virtue of the *RV Act* an annual general meeting shall not be held at the same time as a body corporate meeting. Both the *BCCM Act* and the *RV Act* provide for separate dispute resolution bodies. This tribunal has no jurisdiction to deal with issues which arise under the *BCCM Act*.

12. This layering of legislation has resulted in complexity and uncertainty for both the scheme operator and the residents and now for this tribunal.

13. During the hearing, the tribunal walked the parties through the legal minefield with a view to showing them how the village could be operated by the body corporate committee and the scheme operator if they were prepared to cooperate with each other. The tribunal is confident that the parties now realise the dangers to their respective investments if they fail to cooperate with each other. However, the tribunal is also aware, that, because of what has transpired, the establishment of an improved relationship will not be easy.

One of the significant issues which the tribunal sought to clarify during the hearing was the ownership of the various village assets. While it was clear that each of the residents owned their individual units and that the scheme operator (Park Haven) owned lots 1 and 2, the documentation created uncertainty as to the ownership of the communal facilities. The building units planned No 71100 was not definitive but the roads and paths between the units were marked "common property". While the tribunal considered that it would be normal for these village assets to be held as common property and, therefore, to be owned by the body corporate, this was directly contradicted by the most recent PID issued under the *RV Act* on 27 November 2000.

14. The PID at page 7 refers to the capital items and states as follows:

10. Capital items include:

a. buildings and structures owned by the scheme operator such as:

i. communal facilities;

ii. amenities;

iii. accommodation units;

- b. plant, machinery and equipment owned by the scheme operator such as communal hot water, community facility furnishings, gardening equipment, village bus; and
- c. village infrastructure owned by the scheme operator such as roads, paths, drainage, sewerage mains, landscaping, electrical distribution systems, water services and connections and distribution systems.

15. There was no dispute that lot 2, which includes the office, community room, library, viewing area, consulting room, toilets and kitchenette, was owned by Park Haven or that the unit on that lot was available as a communal facility. However, the swimming pool, spa and barbecue area, which were physically separated from lot 2, were the subject of an exclusive use agreement granted by each of the residents to Park Haven in their various service agreements.

16. The PID issued on 29 March 1994, at page 7 states: "Pursuant to an exclusive use provision the pool, spa, gazebo and barbecue area are containing in lot 2 and....". In view of the physical separation of these assets from lot 2, this statement in the PID results in confusion. Mr Wallwork asserted that these assets belonging to the body corporate and not to Park Haven.

17. Mr Wallwork also directly contradicted subparagraph (c) of clause 1.1.10 in the current PID and asserted that the village infrastructure referred to in the PID was in fact owned by the body corporate.

18. Under the current PID, it is clear that Park Haven are responsible for the village infrastructure replacements from the Capital Replacement Fund. However, if the village infrastructure is owned by the body corporate then it would be responsible from the body corporate sinking fund for any capital replacement. The tribunal was unable to make any specific finding in regard to the ownership of the village infrastructure on the basis of the evidence placed before it by the parties. This would appear to be a matter which comes under the jurisdiction of *BCCM Act* and is not under the *RV Act* as it is a dispute between the body corporate and the scheme operator. Clearly the ownership needs to be ascertained and, if necessary, the PID corrected as a matter of urgency.

19. However, the PID is a document required under the *RV Act* and its accuracy is of importance to both the scheme operator for the purposes of registration of the village and its relationship with residents, both existing and potential. Section 36 of the *RV Act* places strict requirements on the scheme operator as follows:

**Scheme operator to give notice about inaccuracy in public information**

**document**

**36.(1)** This section applies if the particulars in a public information

document for a resident become inaccurate in a way that may materially

affect the interests of a resident of the village.

**(2)** Within 28 days after the scheme operator becomes aware of the

inaccuracy or the circumstances causing the inaccuracy, the scheme operator

must make a full written disclosure of the inaccuracy to the chief executive

and to each resident who is, or is likely to be, materially affected by the

inaccuracy.

Maximum penalty for subsection (2)—540 penalty units.

20. Now that the scheme operator is aware of the possibility of errors in the PID it is also important that they be corrected as a matter of urgency to avoid the scheme operator breaching section 86 of the *RV Act* which provides as follows:

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**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.

21. The consequences for the scheme operator where residents, knowingly are given a document containing information the scheme operator knows is false or

Misleading, could be that the resident applies under section 170 seeking an order under section 193. See *Schintler v Chancellor Park Retirement Village Pty Ltd*, V001-01 of 4 September 2001

22. The need for the PID to be accurate also arises from the fact that it forms part of the resident's contract by virtue of section 37 which provides as follows:

**Public information document forms part of residence contract**

**37.(1)** A public information document for each resident is taken to form part of the resident's residence contract to which the public information document relates.

**(2)** A notice given to the chief executive and a resident under section 36 is taken to form part of the resident's residence contract.

**(3)** If a provision ("**PID provision**") of a public information document forming part of a resident's residence contract is inconsistent with another provision ("**contract provision**") of the contract not contained in the public information document, and the contract provision disadvantages the

resident, the PID provision prevails to the extent of the inconsistency

(4) If a PID provision is inconsistent with this Act, this Act prevails to the extent of the inconsistency.

23. Because of the significance of the PID and the need for it to be accurate the Tribunal intends to order that that the scheme operator urgently clarify the ownership of the capital items in the village and notify the Chief Executive of the Department of Tourism, Racing and Fair Trading, as required under the *RV Act*, and the body corporate of the village of which entity owns what assets.

24. As the Tribunal informed the parties at the hearing of this matter, many of the orders requested by the applicants are matters which arise under the *BCCM Act* and the Tribunal has no jurisdiction to make the orders requested. However, as part of the Tribunal's hearing process it helped the parties clarify the current situation in the village which was different to both parties understanding at the outset.

25. The body corporate is now running the village and it needs to decide what it intends to do about the appointment of a body corporate manager, as there is no current appointment. However, the body corporate needs to consider this appointment in the context of Park Haven's on-going role in the village as the scheme operator and its ownership of assets important to the effective running of the village.

26. As the president and secretary of the body corporate committee, Mr Johns and Mrs Kerr respectively will now be in a position of having access to many of the things requested in the applicants' orders and several of the orders, therefore, would appear unnecessary.

## **The Orders requested by the Applicants**

27. The Tribunal has examined the Act and under the service agreements and finds that they give the scheme operator the necessary power to retrospectively recover outlays paid on behalf of the village relating to taxes such as the goods and services tax. The Tribunal, therefore, orders:

1 that the Applicants are required to pay the levy of \$46.00 under the Act and under their service agreements.

28. The Tribunal finds that, because of the existence of the body corporate structure and the requirement for funds to be established under the *BCCM Act*, the orders 2 and 3 requested by

the applicants are not appropriate.

29. The Tribunal finds that quarterly financial statements of the income and expenditure of the capital replacement fund and the maintenance reserve fund are to be given by the scheme operator on request to a resident under section 112 of the Act. The Tribunal has no power to order the scheme operator to provide quarterly financial statements of the income and expenditure of the general services account. However, there is no reason why the scheme operator could not provide quarterly financial statements. The Tribunal has a practice of advising scheme operators that when residents ask for information, the smart response is to ask what else they would like and to provide it because that builds trust. Here, there would be a major change in the relationship between the scheme operator and the residents if that attitude were to be adopted and the Tribunal urged Mr Wallwork to seriously consider adopting that approach despite its lack of power to make the order requested.

30. The Tribunal finds that it does not have powers to make the order 6 requested by the applicants as this is a matter arising under *BCCM Act* and is within the power of the body corporate committee to resolve when appointing a body corporate manager if they are prepared to pay the cost of the service they require.

31. The Tribunal finds that it does not have powers to make the order 7 requested by the applicants. However, as members of the body corporate committee the applicants will get details of and a copy of each policy of insurance anyway.

32. Order 8 requested by the applicants is covered by section 200 of the *RV Act* which provides as follows:

**Parties to pay own costs**

**200.** Each party to a retirement village issue must bear the party's own costs of the tribunal's hearing of the issue.

33. The Tribunal finds this section to mean that the scheme operator cannot pass the costs of any litigation on to the residents and must bear the costs itself. To interpret this section otherwise would mean that the scheme operator would not bear any costs if it was able to pass the costs of any litigation on to the residents. Of course, the scheme operator already has the advantage of being able to claim these costs as a cost of running the business for the purpose of taxation. Tax deductibility of these costs would not appear to be available to the residents.

**The Order requested by the Respondent**

34. For the reasons mentioned in relation to the applicants requested order 6, the Tribunal finds that it does not have powers to make this order as this is a matter arising under *BCCM Act* and is within the power of the parties to resolve when negotiating the appointment a body corporate manager.

## Orders

35. For the above reasons, the Tribunal declines to make the orders requested and makes the following orders:

1. that the Respondent shall urgently clarify the ownership of the capital items in the village and notify:
  - a. the Chief Executive of the Department of Tourism, Racing and Fair Trading, as required under the *RV Act*, and
  - b. the body corporate of the village of which entity owns what assets.
2. that the Applicants are required to pay the levy of \$46.00 under the Act and under their service agreements.
3. that the Respondent shall not pass the costs of this litigation on to the residents and must bear the costs itself.
4. that this decision and its reasons be published.

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*MR B COTTERELL - CHAIRPERSON*

**for the RETIREMENT VILLAGES TRIBUNAL**

Mr B. Cotterell

Mrs M. Wilson

Mr P. Toohey

Chairperson

Member

Member

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