

EVERYTHING'S ROSY, ISN'T IT?

A commentary on legal tensions
below the surface in retirement village living

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KEY WORDS

ABSTRACT

A perpetually peaceful lifestyle

Since 1996 a number of significant retirement village disputes have come before NSW Courts and Tribunals for determination. Collectively the cases have stripped away the rose-tinted notion that retirement living in a retirement village will guarantee a perpetually peaceful lifestyle and re-enforced the timeless adage of eternal vigilance as the price one must ultimately pay to achieve a satisfactory level of mental comfort.

Individual cases involving the “Heritage”¹, “Elim”², “Fernbank”³, “Rowland”⁴, and “Windsor Country”⁵ villages (to name a few) have been instrumental in turning the spotlight on:

- the financial arrangements upon entry to the village (the ‘Rowland case’);
- the validity of the statutory “Code of Practice” regulation (the ‘Heritage’ case);
- the appointment and delegation of powers to the managing agent (the ‘Fernbank’ case);
- the appointment of levy contributions and consultation with residents over the setting of budgets ‘Elim’ and ‘Windsor Country’ cases);
- the use of deferred management fees (the ‘Windsor Country’ case), and
- even the jurisdiction of the Supreme Court to grant relief to residents (see ‘Elim’ case).

How are disputes generated?

Why do these disputes between operators and residents arise in the first place and what are the primary generators of such disputes? The answers have much to do with a failure to appreciate that the aspirations of operators must co-exist with the needs of the residents committees which are by nature wholly focused on achieving a productive, peaceful lifestyle in retirement. Sometimes resident groups demonstrate an inability to effectively articulate their concerns to the operator or to achieve consensus in decision making within time frames expected by the operator. At the very root of the problem there is often an inability or reluctance of operators and residents alike to communicate their respective expectations to each

other, particularly at times when contracts establishing relationships are being formed or re-negotiated.

Davies AJ in the recent NSW Supreme Court case of *Overton Investments v Carnegie & Anor.* [2000] NSWSC 581 (28 June 2000), commented on the 'give and take' required by both sides:

"Overton Investments Pty Limited ("Overton") which is the plaintiff in these proceedings and the administering authority of The Heritage Retirement Village, and the residents of that village, who are represented by the Secretary of the Residents' Committee, Neville John Carnegie ("the first defendant"), appear to have learnt nothing from their many forays into litigation. It was made clear by Windeyer J in *Murphy v Overton Investments Pty Limited* (unreported, 23 December 1997) and, on appeal, by Fitzgerald JA, with whom Priestley and Powell JJA agreed in *Murphy v Overton Investments Pty Limited* (unreported, 3 September 1998), that the provisions of the Industry Code of Practice Regulation, 1995 ("the Code") are directed to good behaviour and good management rather than to legal rights. They are general provisions affecting all residents which should be enforced by the methods envisaged by the Code itself, rather than by litigation in the courts. At p 14 of the appeal, Fitzgerald JA cited the following from the reasons of Windeyer J:

"... I have set out Clause 3 of each regulation, which makes the relationship between the Regulation and the Code under s95 of the Fair Trading Act clear. However, a code of practice is not necessarily a statutory enactment creating duties, obligations and rights which can be enforced by action by those involved in the industry in respect of which a code is introduced. The fact that the code provides that it is mandatory, in my view, means no more that it relates to all retirement villages" so that its operation cannot be excluded by contract ... Further, many provisions of the code are cast in language which is directed to good behaviour or good management rather

than contractual rights ... Such general statements are not usually to be read as giving rise to private rights enforceable in courts.”

At pp 23-24, Fitzgerald JA said:

“The provision of the 1995 Code of Practice which is of primary importance for present purposes is subcl 3(2), which envisages that the ‘obligations’ for which the Code provides ‘will be monitored ... and can be enforced’ under the Fair Trading Act. Consequently with established principles of statutory construction this should be regarded as the intended method of enforcement. Reference has already been made to the material provisions of the Fair Trading Act. It is a central feature of the scheme contained in that Act that a code obligation can only be enforced by, or with the consent of, the Director-General of the Department of Fair Trading. This ensures that individual residents or groups of residents, or an owner or manager, cannot take manipulative advantage of a code of practice or frustrate the exercise of rights or the performance of obligations under residence contracts contrary to ‘good practice for fair dealing’ and ‘the basic need for the management of the village’ to be conducted in a sensible and financially prudent manner.’ Under the regime established by the Fair Trading Act and the Codes of Practice, the views of interested persons other than the immediate disputants can be ascertained and taken into account”

Thus, the statute and the regulations have established a regime for the sensible and prudent administration of retirement villages” involving good management by the administering authority with appropriate input from the residents. Section 14A of the *Retirement Villages Act 1989*, uses the words “reasonable consultation between the residents and the administering authority”. The expression accords with the words and object of the Code.

In the case of The Heritage Retirement Village, it is clear that neither the administering authority nor the residents have abided by the precepts for

appropriate conduct which the Code has laid down. Neither side has acted in a reasonable, responsible and effective manner. When, inevitably, disputes have arisen, the parties have engaged in litigation with a view to having what they describe as legal issues resolved.

The first application came before Windeyer J. His Honour's ruling was taken on appeal and became the subject of the judgment of the Court of Appeal. There was a reference to Peter Taylor SC to resolve some of the factual issues in dispute. Mr Taylor's report became the subject of four separate judgments by Windeyer J who was called upon to rule on the acceptance of his report. There was an application made to the Commercial Tribunal when the Director-General of the Department of Fair Trading took steps to improve the relationship between the parties. That proceeding having been commenced before the Commercial Tribunal, application was made to this Court for a ruling on whether the Code was valid. Windeyer J held that it was. In addition to litigation in this Court, there has been litigation in the Local Court and complex litigation in the Federal Court of Australia.

The quantum of the litigation which has occurred between the parties is inexcusably inappropriate. It is time that both sides studied the Code and adjusted their conduct to accord with it. Reasonable behaviour on both sides is required. This will necessitate give and take by both."

Full, open and frank consultation is essential

Full, open and frank consultation between operators and residents is an essential requirement if consensus between parties is to be achieved. The former Commercial Tribunal (now the Fair Trading Tribunal) observed in the 'Heritage Case': "The flexible language which characterizes the provisions of the 1995 Code, clearly leaves it open for retirement village managements and residents to adopt structures for consultation, which may vary markedly in their detail from village to village but it is clear that the structure must be of a kind that can be achieved in practice." Structures established by operators for resident input must allow residents to have "input into and agree to" the various significant matters

dealing with life in a retirement village. As Acting Justice Cowdroy QC (as he then was) in the Supreme Court observed in the 'Elim Case': "there must be a process of consultation between residents and operators of retirement villages touching upon matters which may affect the daily lives of residents (and) very explicit obligations are imposed upon operators to inform residents of the matters described, especially financial and budgetary matters."

Life under the new Legislation

The Retirement Villages Act 1999 (the "Act") was assented to on 3 December 1999 and has been described by the Minister for Fair Trading, John Watkins MP, as "one of the most important social justice reforms ever made in the Fair Trading area". Symbolically, the Act was passed in 1999, the International Year of Older Persons. By the middle of 2000, most of the new provisions introduced by the Act were fully implemented. The new Act repealed the Retirement Villages Act 1989, the Retirement Villages Regulation 1995 and the Retirement Village Industry Code of Practice Regulation 1995. In the truest sense, the Act represents a complete overhaul of all legislation and codes of practice governing the conduct of retirement villages in New South Wales.

In the main the new Act implemented the bulk of the seventy recommendations put to the Minister in the final report of the steering committee of August 1998 ("Review of Regulation of the NSW Retirement Village Industry"). There are more than 900 retirement villages in NSW providing some 50,000 retirees with accommodation. In excess of 1,100 people (mostly retirement village residents) attended the public meetings conducted throughout the state to review the legislation and codes of practice. As a result of the review process, the steering committee received some 275 written submissions. The report notes: "Many expressed dissatisfaction over certain industry practices and the level of consumer protection afforded by the current legislation."

At the heart of residents' dissatisfaction there are critical questions about "consent". Was the consent of an individual resident to a village contract obtained by an operator in circumstances which failed to fully disclose all relevant

information concerning the matter or obtained without the resident having adequate time to seek independent advice or reflect on the decision to proceed with the contract? To what degree and in what manner did the operator of a retirement village seek the consent of residents to a proposed measure or action relating to the village?

The new Act addresses these critical issues of informed consent by firstly requiring operators to be fully accountable (with the risk of paying compensation) to prospective residents for any misrepresentations made concerning the availability of a particular service or facility (see Section 17) and secondly, by ensuring that a comprehensive disclosure statement is provided to a prospective resident at least 14 days before a prospective resident enters into a village contract (Section 17). A resident or prospective resident may, by written notice, rescind the contract within the period of 7 business days after entering into the contract (see Section 32). However, the right to rescind the contract within 7 days will be waived if the prospective resident commences living in the residential premises.

Thirdly, the “consent” of residents to any proposed measure or action relating to the village is given special prominence in Section 9 of the Act with the legislative intention of ensuring compliance with the protocols set out in “Schedule 1 Consent of Residents” (see page 128 of the Act) in respect to voting procedures, including the methods for calculating votes cast, consents requiring special resolutions and the opportunity to vote by a show of hands or a written ballot. Of considerable importance to residents is the provision in Schedule 1, Part 2, 4 (“Result of Vote”) which compels the operator to accept the residents’ decision in relation to a measure or action that requires their consent if the decision is reported to the operator by an officer of the Residents’ Committee, or if there is no Residents’ Committee, a resident elected in accordance with the Act to be their representative.

Whether conduct could be unconscionable

Clearly, any process which boosts the flow of relevant information between operators and residents should be given serious consideration by resident

committees. Predictable areas of dispute are not, however, confined to weakness in the flow of information or the inability of the parties to address through meaningful dialogue, the tensions which arise. New provisions in consumer protection legislation make recourse to the Trade Practices or Fair Trading legislation almost inevitable. Section 51AC of the Trade Practices Act (“unconscionable conduct”) was specifically introduced in July 1998 to recognize a wider range of factors to which a court may refer in deciding whether or not the weaker party in a business-consumer relationship was treated unconscionably. For example, whether the terms of a contract between operator and a resident could be said to be unreasonable or unjust or unfair, oppressive or harsh, given the particular circumstances of the resident.

Just such a situation was alleged to have arisen in respect to the circumstances under which a married couple, Mr and Mrs Murphy, entered into a residency lease contract in the Heritage Village. Their grievances concerning maintenance fees found their way into the Federal Court where part of their submissions were directed at unconscionable conduct by the village operator. Emmet J in *Murphy v Overton Investments Pty Ltd*⁶ discussed their claim in these terms:

“Mr and Mrs Murphy contend that they were in a position of special disability vis-à-vis Overton because they were misinformed as to the nature and effect of their liability under the lease. That conclusion is said to follow from the fact that Overton kept from them the level of expenditure that was being incurred in operating the Heritage Village and was not being taken into account in calculating maintenance fees. They say that Overton knew that they lacked knowledge and understanding of the entitlement of Overton to increase fees and lacked assistance and advice in entering into the Lease where assistance and advice were plainly necessary.

Mr and Mrs Murphy were under a disadvantage, in the sense that they were unaware of the fact that the estimate of maintenance fees was not based on a calculation that took account of all expenditure that was being incurred by

Overton in operating the Heritage Village. However, there was no special vulnerability or weakness of the part of Mr and Mrs Murphy. I do not consider that the evidence justifies any conclusion that Overton made any unconscientious use of any superior position or bargaining power to the detriment of Mr and Mrs Murphy. Accordingly, I do not consider that any basis has been made out that would establish a cause of action based on unconscionable conduct, either under the general law or under the *Trade Practices Act*.”

It is arguable that some contractual clauses in retirement villages contracts are ready for a Section 51AC test case. The operators' right to seek and retain deferred management fees from a resident on departure, sale or termination of a residence contract would appear to be an anachronism in an era which opposes restrictive trade practices, supports open competition and deregulation of agent's fees. Judges generally have been critical of behaviour which keeps the consumer captive to the principal service provider.

In recognizing that some contracts currently in use in retirement villages have by their very nature the potential to promote legal tensions, the time may have arrived when it is appropriate to question whether conscientiously some contractual rights presently enjoyed by management should be curtailed under legislation, in the public interest.

Back to the Roses ...

Indeed, the future looks rosier for retirement village residents following the total reform of the retirement village legislation. As the NSW Government said in April 2000: “Many people have chosen to live in a retirement village, and for good reasons. They offer an alternative lifestyle that maintains dignity and independence, while providing a safe communal atmosphere. New South Wales has the highest population of retirement village residents in Australia, and it is for this reason that the NSW Government is at the forefront of legislative reform. These reforms provide improvements for residents as well as operators that will take them into the new millennium.”⁷ However, there are usually a few thorns

among the roses. Given the increased wealth of an aging population, an abundance of time on their hands, a propensity for lawyers to readily assist in the development of class actions, and the ease of access to *possible* remedies under the *Trade Practices Act*, it is unlikely that the level of litigation will ebb in the near future, despite the Government's best intentions.

Endnotes

- 1 *Murphy v Overton Investments Pty Limited* (unreported, 23 December 1997 NSW Supreme Court, Windeyer J; *Murphy v Overton Investments Pty Limited* (unreported, 3 September 1998, NSW Court of Appeal, Fitzgerald, Priestley & Powell JJA); *Overton Investments v Carnegie & Anor.* [2000] NSWSC 581 (28 June 2000), Davies AJ; *Murphy v Overton Investments Pty Ltd* [2000] FCA 801 (15 June 2000), Federal Court, Emmett J.
- 2 *Howes v Christian Enterprises Limited* (Cowdroy AJ, unreported NSW Supreme Court, 26 November 1996); *Dobson Developments v Howes 7 Ors.* [2000] NSWSC 132 (9 March 2000, Master Malpass).
- 3 *Gillett v Halwood Corporation Ltd & Ors.* [1998] NSWSC 431 (26 March 1998), NSW Court of Appeal, Priestley JA, Handley JA, Powell JA.
- 4 *R.S.L. v Walker and Ors.* [1999] NSWSC 81 (17 February 1999), Dowd J.
- 5 *King v Tasman Securities Pty Limited* Residential Tribunal of NSW, 1997, No. 96/24970, Tribunal Member Keogh.
- 6 *Murphy v Overton Investments Pty Ltd* [2000] FCA 801 (15 June 2000) Federal Court, Emmett J.
- 7 NSW Department of Fair Trading *Retirement Village Green*, Issue I, April 2000.