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THE POTENTIAL FOR CONTRACTUAL DISPUTES IN RETIREMENT VILLAGE LIVING

An examination of recent litigation arising from resident contract disputes in NSW retirement villages.

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ABSTRACT

A review of recent court hearings in Australia suggests that the primary source of litigation, and hence conflict, in the retirement village industry is the contents of the contracts signed by residents on entering the villages. Currently, about 80% of cases heard relate to this issue. The Retirement Villages Act, 1999 goes a considerable way towards minimising future disputes of this nature, but there are still some key issues which require careful consideration in this area.

Comparisons between matters that end up in court and those at the coalface indicate that some of the major points of conflict include the relative lack of case law currently available in this area, the wide variety in contract and tenure structures, resident interface issues and unconscionable conduct on the part of the owners and developers of villages.

Introduction

Retirement housing has been a recognised property sector within Australia since at least the 1950's. Church and other non-profit organisations were the initial groups to see the need to provide accommodation of this nature, and since then government, community and company organisations have also had an increasing role in the provision of services.

During this period the industry has undergone enormous change and it continues to evolve at an even faster rate than previously.

Its position as a growth sector within the property sector (as other sectors) is without question and with the baby boomers reaching the early-retirement age of 55 years and assessing their retirement options the sector will be subject to unprecedented growth. Add to this 'bottom-end' growth the fact that Australians are on average living far longer than previous generations and there is 'top-end' growth which also must be factored in to the equation.

Contracting for a peaceful retirement

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 comfort with retirement village living.

Review of recent court hearings in New South Wales suggests that the primary source of litigation, and hence conflict, in the retirement village industry has its genesis in the contracts signed by residents on entering self-care villages. With the dramatic ageing of the population over the next twenty years, further disputes are inevitable. Currently only 7% of Australians over the age of 65 live in retirement villages. Whilst the Retirement Villages Act, 1999 (New South Wales) goes a considerable way towards minimising future disputes of this nature, there are still some key issues which require careful consideration to minimise the likelihood of further disputes within self-care villages.

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? 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. There may be a failure on both sides to appreciate that the commercial 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.

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 of 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."

Legislative Context

With the Government seeking to encourage private sector investment in this area in recent years, there has also been a significant increase in policy requirements from Government. Some of the more recent key developments have included:

1982 Implementation of NSW *State Environmental Planning Policy No. 5*

1987 Removal of the National Companies & Securities Commission Legislation (NCSC) as authority responsible for retirement villages

1987 Implementation of the NSW *Fair Trading Act 1987*

1989 Implementation of the NSW *Retirement Villages Act 1989*(and Code of Practice)

1995 Commencement of the *Retirement Villages Industry Code of Regulation 1995*

1997 Implementation of the Commonwealth *Aged Care Act 1997*

1998 Implementation of s.51AC in *Trade Practices Act 1974*

1999 Implementation of the NSW *Retirement Villages Act 1999*

2000 Major review of the NSW *State Environmental Planning Policy No. 5*

It would appear that the rate of policy change in aged care is steadily increasing. Given that the number of people over the age of 60 will double within the next 20 years, electoral interest will ensure that this continues. Labour has recently released its new blueprint for the industry which flags more changes again.

Accommodation Types

There are three levels of retirement housing:

- **Independent living (or self-care):** Equivalent to a townhouse or villa in size, these have all the same conveniences of a standard home.
- **Assisted living – hostel (or low-care):** Residents have their own bedroom and bathroom but share facilities such as living and dining. Meals are prepared by staff. Limited 24-hour care is provided.
- **Assisted living – nursing home (or high-care):** Residents may share a room with other residents. Intensive 24-hour care is provided and much higher staffing levels are also required.

Within the industry 'retirement village' generally refers to either a self-care village or a village catering for self-care and assisted living. 'Aged care centres' commonly refers to

assisted living complexes. The industry is looking to move forward to only two-levels of care to increase the flexibility for the support infrastructure required. This will involve increasing the length-of-stay for self-care residents by providing additional services in-situ and merging the low and high care functions into a level of care which straddles these two current assisted care levels.

Contract Types

There are no standard forms of contract in the industry for self-care accommodation which can create confusion for some potential residents and other stakeholders such as their lawyers and family members. However broadly speaking self-care contracts fall into four broad categories:

- **Loan/license agreement**: This is the most common arrangement (77% of all villages) and involves the provision by the resident to the owner of an interest-free loan. The loan is refunded immediately at the end of the occupancy minus any retention holdings (typically 2.5-3% per annum capped over about a 10-12 year period). In addition to this payment residents are also required to pay a weekly levy directly linked to the cost of running the village. The not-for-profit sector operates almost exclusively on a loan/license arrangement which is interesting given Australian's preferences for bricks and mortar ownership.
- **Leasehold**: is generally offered only by the private sector. This operates almost identically to the loan/license with a retention fund as well. The main differences are the lease is generally registered and the repayment of any deposit is contingent upon the on-selling of the unit to a new tenant.
- **Strata schemes**: Operation of a strata village is the same as any other strata scheme. The only differences are that a minimum age rule of 55 applies and a management company is required to provide services and manage any community facilities.
- **Rental:** was previously far more popular than today in the not-for-profit sector. One of the reasons for its decline would seem to be the significant equity advantages for the operator under virtually any of the other options. This is evidenced by the fact that the Department of Housing is the main provider of aged care rental today.

Other systems also used but less common include Community title and Company title schemes.

There are no plans to develop standard form contracts. From the operators perspective this would be self-defeating as it would clarify means of comparison significantly. Often the best methodology for comparison is to undertake a discounted cashflow analysis of the financial options offered in addition to a risk assessment on the contract provisions. This can be done by comparing the contract being considered with that of a reputable competitor.

Legal Precedent

Interestingly, given the size of the retirement village industry, there have not yet been a commensurate number of cases heard before Australian courts. Perhaps this is related to the comparable meekness of the residents themselves as noted in a 1996 case in the Residential Tribunal of NSW *King v Tasman Securities Pty Ltd 96024970* where the resident concerned alleged:

> *One of the unspoken principles by which people conduct their lives in the commercial world must surely be: leave yourself open to exploitation by others and that exploitation will inevitably take place. Elderly people have become greater targets for exploitation over the years it is generally acknowledged……. The oppressive nature of the system on the individual cannot be overstated.*

However a review of the cases concerning this industry shows that there are two main areas of litigation:

- the nature of agreements amongst those parties establishing retirement villages such as owners, operators, financiers and builders. These account for about 10-20% of matters.
- the nature of contracts between residents and operators/owners of retirement villages. These account for about 80-90% of matters.

Some cases of note coming under this latter category are shown in the table accompanying. It is interesting to note that the majority of matters are heard in the Residential Tribunal. Whilst this list of cases is by no means exhaustive, it includes most of the recent court cases but only about 50% of the recent tribunal cases.

Areas of Concern

Clearly when the matters for debate are assessed, even in overview, it is clear that the overwhelming problem area in the self-care sector of the retirement industry is that of contractual liability and clarity. This is due to several factors. These factors and potential areas for review are listed below:

- **Case law development:** The court cases listed in the accompanying tables represent the majority of retirement village court cases reported in NSW. Hence there is little legal precedent to fall back on in some situations. Given the propensity of individual contracts (some operators themselves have been known to have as many as 16 in force at one time!) the matters presented to the courts or the arbitrators are rarely the subject of previous legal proceedings. This situation is in stark contrast to that of say commercial leasing where individual contracts are stock-standard but there is a high level of market awareness and acumen in the use of such contracts. This can be attributed in part to the comparative maturity of the commercial leasing market, whereas the notion of contracts in retirement villages is still a relatively recent development.
- **'Cottage industry' background:** The retirement sector was initially formed almost accidentally by a number of church and charity groups who wished to provide affordable housing to older people in need. This pedigree and the organisations that exist today as a result of this initial movement have dictated to a large extent the formation of the industry. Whilst the term 'cottage industry' may be considered to be unfair, on the whole this was how most of the major retirement village operators commenced operations. It has been interesting to see the shifting of the ground as firstly the independent property developers turned their attention to the sector and then in turn the property investment groups also moved in. However this interest creates other tensions with some players within the industry being 'not-for-profit' and other players being strictly 'for-profit'. To view the operators of villages as a like-minded group is hence quite inappropriate.
- **Lack of standard-form contracts:** The lack of such contracts can render many individuals requiring accommodation very vulnerable. Legal advisers are not always consulted in the reviewing of contracts and unfortunately, family solicitors are not always equipped to understand and negotiate on the nuances of such contracts. However, whether the introduction of standard-form contracts will be of assistance is

debatable as industry acceptance would be minimal and in any case further amendments to the contracts would render them close to obsolete.

- **Developers & Operators:** As indicated with respect to the 'profit' vs 'not-for-profit' sectors there is also a blurring of the lines between those market players who are merely property developers and those market players who are village operators undertaking property development. The short-term profit interests of the property developers are not always in the interests of the occupants. By way of example if a developer skimps on construction quality resulting in a high level of maintenance being required, under a strata scheme this will be picked up by the residents and under a loan/license scheme this will also be met in full by the residents. There have also been instances where developers with large tracts of coastal land have built Stage 1 of their development and sold them under strata title, and then went on to build following stages. However when residents in the early stages of the development tried to sell their units, they found that their were few buyers as new units still being built by the developer were taking buyers off the market for second-hand stock.
- **Family involvement:** A difficulty in dealing with residents is who makes the decisions – themselves or their family. When residents first move into self-care they are fully capable of making such decision on their own behalf. Often when they leave, they are not. This contractual 'shifting of the goalposts' needs further consideration to ensure that the residents needs continue to be met, the family members are dealt with appropriately and it is clear who amongst the myriad of sons and daughters has the final say if required.
- **Legislative change:** Ongoing changes to legislation which can make it arguable as to which Act or regulation applies in each case. This can be seen in a review of the legal documentation where discussions as to which regulations applied at which times for long–term residents. There is also a need for balance in the legislation to not seek to overly regulate the industry whilst still ensuring that there is a base level of regulatory influence which is enforced.
- **Resident action:** It is clear from some of the court cases that have been heard that not only management is at fault in each instance. There are a number of cases where individual residents have created a great deal of trouble and angst within an entire village sometimes over matters of quite a trivial nature. This can impact negatively on the character and hence prices within a village. Often there is little village

management can do in this instance, and the Residential Tenancies Tribunal has clearly been aware that this is a continuing problem.

- **Unconscionable conduct:** The negotiations between operators and residents can be one-sided. The operators know their contracts very well, and most residents would not have experience in the review of such documents. Particularly if the contract has been provided by a reputable organisation there is a risk that the resident merely trusts the advice provided by the operator. The operator's professional conduct needs to be moderated to ensure that the resident is not taken advantage of in such a situation where they can be most vulnerable. Contractual terms which on reflection may be judged to be unfair, unjust, harsh or oppressive could be unconscionable in the eyes of the law.

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 then 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. 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.

Conclusions and the future

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, 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.

All of these issues point to the fact that further litigation in this area is inevitable as case law is built up to ensure that the rights and responsibilities of all parties are made clearer. However there is much that can be done to avoid litigation in these areas with respect to the professional and responsible conduct of the operator, better legal advice for those people contemplating a move to a village and above all a greater understanding of the issues to be addressed in any retirement village contract situation.

Table of Case Law

Case name	Full description	Court / Tribunal	Major points	Contract type	Decision in favour
Heritage	Overton Investments v Newtown & Organisation, 1996, No. 96020548, Tribunal member Nolan	Residential Tribunal of NSW	Request from owner to backcharge fees totalling $391,560 for the previous four years. Debate over the application of the old (1989) and new (1995) codes. Following the precedent of the Elim case, the tribunal endorsed the view that new code operates retrospectively and that it did not have the power to order such payments.		Resident
Heritage	Murphy v Overton Investments Pty Ltd [2000] FCA 801 (15 June 2000), Emmett J.	Federal Court of Australia	Murphy claimed that Overton had made misleading statements prior to signing of the lease to the effect that maintenance fees of $55/week would be charged. After 2 years, Overton sought to increase these fees to about $95/week causing financial hardship to Murphy. Court ruled that Overton had breached their duty in failing to advise clearly initially but that contractually it had acted appropriately.		Owner
Heritage	Overton v Carnegie & Anor [2000] NSWSC 581 (28 June 2000)	NSW Supreme Court	Main argument again centres on the approval process for the management budget for the village and the degree to which resident consultation did or did not occur. The resident committee refused to approve the budget and Overton bypassed the Residential Tenancies Tribunal and went directly to the Supreme Court. Action was dismissed.		Resident
	Shipman v Overton Investments Pty Ltd [2001] FCA 410 (28 March 2001) Emmett J	Federal Court of Australia	Request from deceased's executor to release lease price paid. View of Court that formal surrender of lease had not yet occurred and hence repayment was inappropriate.		Owner

Case name	Full description	Court / Tribunal	Major points	Contract type	Decision in favour
Fernbank	Gillett v Halwood Corporation Ltd & Ors. [1998] NSWSC 431 (26 March 1998), Priestly JA, Handley JA, Powell JA	NSW Court of Appeal	Resident claimed that parts of her contract were illegal when read with the Strata Titles Act. The Body Corporate was not a party to the Management Agreement. If this view was upheld it would have major flow-on effects for the whole village.		Held over
Rowland	RSL v Walker & Ors. [1999] NSWSC 81 (17 February 1999) Dowd J	NSW Supreme Court	Dispute arose over the alleged misuse of resident funds with regard to the retention fund being used for 'long term maintenance' and what this was defined as. The RSL adjusted its contracts to ensure that residents moving in after July 1992 did not have such an expectation. It was alleged that this resulted in the village becoming run-down and hence lowering the future demand for residences within the village. However the owners did not follow the 'Amended Orders Sought' process resulting in a ruling in favour of the RSL.		Owner
Elim	Dobson Development v Howes & Ors. [2000] NSWSC 132 (9 March 2000) Malpass M	NSW Supreme Court	Case required clarification of the definition of retirement village. Owner claimed that it was not a village and hence they were not the operator of a village and bound to such requirements. Agreed by Court.		Owner
Windsor	King v Tasman Securities Pty Ltd, 1997, No. 96024970, Tribunal member Keogh	Residential Tribunal of NSW	Resident alleged owner was breaking terms of agreement by seeking to increase levy contributions in excess of allowable limit. Major issues included: whether retrospective management fees could be claimed; and when the deferred management fees can actually be utilised. Ruling resulted in the capping of future increases in levies to CPI and the removal of any back-charging of levies.		Resident

Case name	Full description	Court / Tribunal	Major points	Contract type	Decision in favour
	Estate of Martin (resident), Barnes (executor), Louis (executor) & Pearce (executor) v Peninsular Villages Ltd, 1996, No. 96026704, Tribunal member Moore	Residential Tribunal of NSW	Resident (now deceased) had signed a contract which allowed for a refund of a portion of entry contribution only on resale of unit. Executors requested payment immediately for the unit prior to resale (a number of units in the village had remained empty for some time). Tribunal advised them they would have to wait for it to be sold.		Owner
	Seth v Leisure Retirements Pty Ltd, 1991, No. 91006609, Tribunal member Keenan	Residential Tribunal of NSW	Dispute by resident who did not wish to pay an additional $3.00 per week as a pro-rata of a new Water Levy. Position upheld by tribunal who ruled that initial deed in place did not specifically nominate the Water cost as an inclusion in the running costs and hence could not pass on any increase.		Resident
	Dowman v Governors Retirement Resort Pty Ltd, 2000, NSWRT 190, Tribunal member McCaskie	Residential Tribunal of NSW	Request from resident that the owner reverse decision to charge $18,000 for fire safety works to the sinking funds as these works could be defined as capital improvements (Note: New Retirement Villages Act allows levies to be charged on a cost recovery basis of operations). Ruling was based on fact that initial lease clearly defined what could be drawn from the sinking fund.		Owner

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, 1977, 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 Depart. of Fair Trading *Retirement Village Green*, Issue I, April 2000.