



## Civil and Administrative Tribunal New South Wales

<b>Medium Neutral Citation:</b>	<b>Farraway v Galt Investments Pty Ltd [2016] NSWCATCD 53</b>
<b>Hearing dates:</b>	3 June 2016
<b>Decision date:</b>	21 June 2016
<b>Jurisdiction:</b>	Consumer and Commercial Division
<b>Before:</b>	D Moss, General Member
<b>Decision:</b>	1. The application is dismissed.  Reasons: The grounds required to make the orders sought have not been established.
<b>Catchwords:</b>	Park Owner's refusal to give permission to assignment of residential site agreement.
<b>Legislation Cited:</b>	Residential (Land Lease) Communities Act 2013, Residential (Land Lease) Communities Regulation 2015, Residential Parks Act 1998, Residential Parks Regulation 1999, Residential Parks Regulation 2006.
<b>Category:</b>	Principal judgment
<b>Parties:</b>	Barry Farraway ("the home owner") (applicant) Galt Investments Pty Ltd ("the operator") (respondent)
<b>Representation:</b>	The home owner was represented by Ms Steel, an advocate from the Port Stephens Park Residents' Association. The operator was represented by its employee, Ms Daly.
<b>File Number(s):</b>	RC 16/15277
<b>Publication restriction:</b>	Nil

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### REASONS FOR DECISION

#### Application

1 On 30 March 2016, the home owner made an application under the *Residential (Land*

*Lease) Communities Act 2013, ("the Act").*

2 In submissions filed before the hearing, the home owner sought the following order:

An order pursuant to s45(1) of the Residential (Land Lease) Communities Act 2013 (the Act) that the park operator, Galt Investments P/L consent to the assignment of the Tenancy Agreement dated 15th January 1999, in the name of (Mr) Farraway, to Mr .... McLeer – such consent to be provided within 7 days of the date of the order.

### **Jurisdiction**

3 The NSW Civil and Administrative Tribunal, (*"the Tribunal"*), has jurisdiction to hear and determine applications under the *Residential (Land Lease) Communities Act 2013*, including making an order requiring the operator to consent to the assignment of a residential site agreement (Section 45(6)); an order preventing an operator from interfering with a home owner's right to sell their home, (Section 107(1)); and an order requiring an operator to take all necessary steps to facilitate the sale of a home to a specified prospective home owner, (Section 115(2)(e)).

### **The case for the home owner**

4 Ms Steele presented the case for the home owner.

5 5 The documents filed on behalf of the home owner on 29 April 2016 were admitted into evidence.

6 It was submitted on behalf of the home owner that the operator's refusal to give permission for the assignment of the site agreement was unreasonable. Section 45(1)(b) allows for assignment of a site agreement and Section 45(3) is quite clear that consent to the assignment of a tenancy agreement cannot be unreasonably refused. Further, Section 45(6)(a) provides an avenue for a dispute about a proposed assignment of a site agreement to be dealt with by the Tribunal.

7 The home owner relied upon the Tribunal's decision in the matter of *Davey v Leth*, handed down on 8 March 2016, where an order was made requiring the operator of a residential community to execute a deed of assignment of a residential site agreement because there was *"no reasonable reason for the operator to withhold or refuse consent to the assignment"*.

8 During the course of the hearing, it was further submitted that, by refusing to give permission to the assignment of the residential site agreement, the operator was interfering with the sale of the Applicant's home, in contravention of Section 107 of the Act. The Tribunal was requested to make an order under Section 115(2)(d) of the Act, preventing interference with the sale of the home and an order under Section 115(2)(e) of the Act, requiring the operator to take all necessary steps to facilitate the sale of the home to the specified prospective home owner.

9 Even if there is no requirement that the operator must not unreasonably withhold or refuse consent to an assignment of a residential site agreement, the home owner urged the Tribunal to use its discretion under Section 45(6)(a), to make the orders sought, including an order that the operator consent to the assignment of the residential site

agreement within 7 days of the date of the order.

### **The case for the operator**

- 10 Ms Davy presented the case for the operator.
- 11 The documents filed on behalf of the operator on 20 May 2016 were admitted into evidence.
- 12 It was submitted that although an operator cannot unreasonably withhold consent to an assignment of a residential tenancy agreement under Section 45(3) of the Act, the section does not apply to residential site agreements. The agreement between the home owner and the operator in this case is a residential site agreement. There is no provision in Section 45 that requires an operator not to unreasonably withhold consent to the assignment of a residential site agreement.
- 13 The operator submitted that it was not interfering with the sale of the home to the prospective home owner, Mr McLeer. The operator is willing to enter into a new site agreement with Mr McLeer. However, the operator does not consent to the assignment of the home owner's current site agreement to Mr McLeer and is entitled not to consent.
- 14 The operator submitted that the Tribunal should not make an order in favour of the home owner, as the operator may withhold or refuse consent to the assignment of a residential site agreement, without any ground, in accordance with the provisions of the Act and the terms of the residential site agreement.

### **Findings of Fact**

- 15 On 15 January 1999, the home owner entered into a written agreement with P & R Hendrikx, (the former residential park owner), giving the home owner the right to occupy a specified site in Bay Village Retreat, (now known as Anna Bay Village), a residential community at Anna Bay NSW.
- 16 The agreement is entitled "Residential Tenancy Agreement for Landlords and Tenants of Movable Dwellings or Movable Dwelling Sites". The agreement gave the home owner the right to occupy a movable dwelling site in the village.
- 17 The home owner owns a manufactured home on the site. The home owner does not lease the home from the operator. It is a two bedroom home with its own amenities. It is of a consistent size and standard as the other homes in the village.
- 18 Prior to February 2014, Mr McLeer regularly spent weekends with the home owner, in Anna Bay Village.
- 19 On 28 February 2014, Mr McLeer retired from his occupation and, a short time later, he moved in with the home owner. The home owner relies on Mr McLeer for assistance with daily tasks.
- 20 Since moving into Anna Bay Village, Mr McLeer has involved himself in activities in the local area. He socialises with other residents of the village and attends meetings held

by the Village Residents' Committee.

21 In early December 2015, the home owner decided to sell his home in Anna Bay Village to Mr McLeer, in return for ongoing care and a further agreed consideration. The proposed sale would allow both men to remain in the local area, where they both have support and access to medical services.

22 A condition of sale was that the home owner could continue living in the home, with Mr McLeer, for as long as he needed.

23 On 14 December 2015, the home owner wrote the following letter to the operator:

"I wish to notify you that I .... will be selling my house, situated on Site .... in Bay Village Retreat 4320 Nelson Bay Rd Anna Bay 2316 to Mr ... McLeer, and request a meeting for you to sign the transfer of my lease to Mr McLeer."

24 The operator subsequently met with the home owner and Mr McLeer. The operator requested that Mr McLeer fill in a site agreement application and provide two character references and two financial references.

25 During the meeting, the operator advised the home owner and Mr McLeer that the operator would not assign the home owner's existing agreement to occupy the site. The operator consented to the sale of the home to Mr McLeer and agreed to enter into a new residential site agreement with him. The site fees under the proposed new residential site agreement would be \$300.00 per fortnight. The current site fees are \$254.75 per fortnight.

26 Following the meeting, the home owner contacted Port Stephens Park Residents' Association, (PSPRA), for information and advice.

27 On 24 February 2016, Ms Steel, an advocate from PSPRA, sent an e-mail to the operator in the following terms:

"I have been asked to act as the Advocate for (the home owner) and his carer Mr McLeer.

I understand (the home owner) has had discussions with you regarding the sale of his home to Mr McLeer and his wish to assign his site agreement to him.

Under the terms of the subject site agreement, page 5, clause 18; and under s45 of the Residential (Land Lease) Communities Act 2013, (the home owner) has the right to assign the agreement.

As Mr McLeer has been caring for (the home owner) for the last 2 years without giving you any reason to consider him an unacceptable person to continue to reside in the village, I assume he will be viewed as an acceptable homeowner.

Will you please confirm your assent to the assignment by email. I will forward a completed Deed of Assignment for your signature, on receipt of the email.

I would appreciate your reply by the Thursday 3rd March 2016."

28 On 21 March 2016, the operator sent Ms Steele an e-mail that included the following:

"In regards to the situation with (the home owner) and Mr McLeer we are not prepared to assign the lease. The commissioner of the office of fair trading has advised us that The Fair Trading position on this issue (assignment of site agreements) is quite clear. Currently under section 45 of the Residential (Land Lease) Communities Act 2013 the assignment of a site agreement can only occur with the written consent of the operator.

A reasonableness test does not apply to such a request. The operator is free to consent or say no for any reason. The obligation not to unreasonably withhold or refuse consent only applies to the assignment of a tenancy agreement. A tenancy agreement is a

defined term in the Act and only applies to those tenants who rent a home owned by the operator or another person.”

29 Later that day, Ms Steele sent a reply to the operator by e-mail in the following terms:

“I am surprised the Commissioner would have made such a statement given that many of the early site agreements are, in fact, Tenancy Agreements.

All such agreements remain in effect under the new legislation and therefore, by your own argument, there cannot be an unreasonable refusal.

(The home owner) has a Residential Tenancy Agreement and by the terms of his agreement (clause 18) and by s 45 of the Residential (Land Lease) Communities Act 2013 he has the right to assign with the consent of the park operator and that consent cannot be unreasonably withheld.

I ask that you please reconsider your position on this issue.”

### The decision

30 30 When the agreement between the home owner and the operator was signed, the relevant legislation was the *Residential Parks Act 1988*.

31 On 1 November 2015, the Residential Parks Act 1988, (“the old Act”) was repealed and replaced by the Residential (Land Lease) Communities Act 2013, (“the new Act”).

32 Section 6 of the Residential (Land Lease) Communities Act 2013 provides:

- (1) The Act applies to all site agreements, whether existing immediately before or coming into existence after the commencement of this section, unless a provision of or under this Act provides otherwise.
- (2) Where this Act applies to a site agreement, it so applies despite the terms of the agreement or any other contract, agreement or arrangement, whether made before or after the commencement of this section.
- (3) This Act applies to a site agreement until it is terminated in accordance with this Act.

33 Clauses 18 and 19 of the home owner’s site agreement dated 15 January 1999 provide:

#### **RIGHT TO ASSIGN RIGHTS OR SUB-LET**

18 **The tenant may** with the landlord’s prior permission assign the whole or part of the tenant’s interest under this agreement or sub-let the residential premises.

19 **The landlord agrees** not to charge for giving permission other than for the landlord’s reasonable expenses in giving permission.

34 The terminology has changed under the new Act. “The tenant” is now known as “the home owner” and “the landlord” is now known as “the operator”.

35 There is no condition in the site agreement requiring the operator to act reasonably when requested to give permission to the assignment of the home owner’s interest under the agreement.

36 Before it was repealed, the old Act provided as follows:

#### **41 Right to assign rights and obligations or to sub-let**

It is a term of every residential tenancy agreement that:

- (a) the resident may, with the prior consent of the park owner assign the whole or part of the resident’s rights and obligations under the agreement or sub-let the residential premises and

(b) the park owner must not make any charge for giving such a consent, other than for the park owner's reasonable expenses in giving consent.

Despite section 133B of the *Conveyancing Act 1919*, or any other law, it is not a term of a residential tenancy agreement that the park owner must not unreasonably withhold or refuse consent to an assignment or sub-letting referred to in subsection (1).

It is, however, a term of every **residential site agreement**, (*emphasis added*), that the park owner may not unreasonably withhold or refuse consent to an assignment or sub-letting referred to in subsection (1).

Without limiting the operation of subsection (3), it is not unreasonable for a park owner to withhold or refuse consent to the assignment of a residential site agreement or the sub-letting of a residential site under such an agreement:

(a) on grounds that would allow the park owner to give a notice of termination of the agreement to the resident under section 101, or

(b) on the ground that the residential site is within a Crown reserve and is to be used for a public purpose other than a residential site.

An instrument of assignment may be in the form prescribed by the regulations.

- 37 Under the old Act, a "residential tenancy agreement" was defined as any agreement under which a person grants to another person, for value, a right of occupation of residential premises, for the purpose of use as a residence. "Residential premises" included a residential site on which a moveable dwelling was situated, or intended to be situated, if the moveable dwelling was used, or intended to be used, as a place of residence. "Moveable dwelling" included a manufactured home. A "residential site agreement" included a residential tenancy agreement under which the park owner granted the resident a right to install on a residential site a relocatable home and the resident occupied the premises as the resident's principal place of residence.
- 38 Prior to the repeal of the old Act on 1 November 2015, in accordance with Section 41 of that Act, the home owner was entitled to assign the whole of his rights under the residential site agreement dated 15 January 1999 and the operator could not unreasonably withhold or refuse consent to the assignment.
- 39 In my opinion, the new Act significantly altered the law in relation to a home owner's right to assign a site agreement.
- 40 Section 45 of the Residential (Land Lease) Communities Act 2013 provides:

**45 Sub-letting residential site or assignment of site agreement**

- (1) A home owner may, with the written consent of the operator of the community:
- (a) enter into a tenancy agreement for, or otherwise sub-let, the residential site or the home located on it, or
- (b) assign the site agreement.
- (2) The operator must not unreasonably withhold or refuse consent for a tenancy agreement or other sub-lease that is proposed to be entered into or granted once during any 3-year period in which the site agreement has effect and is for a term of 12 months or less.
- (3) The operator must not unreasonably withhold or refuse consent to the assignment of a **tenancy agreement**, (*emphasis added*).
- (4) Section 133B of the *Conveyancing Act 1919* does not prevent the operator from withholding or refusing consent, for any or no reason, for a tenancy agreement or other sub-lease if it is for a term exceeding 12 months.
- (5) This section has effect despite the terms of the site agreement and does not

prevent the home owner from the selling the home on site or from having additional occupants as contemplated by section 44.

The Tribunal may, on application by the home owner or operator, make orders to settle a dispute arising under this section, including but not limited to:

- (a) a dispute arising where consent was withheld or refused, and
- (b) a dispute arising where the term of a tenancy agreement or other sub-lease exceeds 12 months.

- 41 The home owner submitted that, in accordance with Section 45(3) of the new Act, the operator must not unreasonably withhold or refuse consent to the assignment of the agreement dated 15 January 1999, as it is a tenancy agreement.
- 42 The operator submitted that the agreement dated 15 January 1999 is not a tenancy agreement, it is a site agreement. There is no provision in Section 45 that requires the operator not to unreasonably withhold consent to the assignment of a site agreement.
- 43 In contrast to the old Act, the new Act differentiates between site agreements and tenancy agreements.
- 44 A "site agreement" means a site in a community for a home that is used, or is intended to be used, as a residence by an individual.
- 45 A "tenancy agreement" means a residential tenancy agreement within the meaning of the *Residential Tenancies Act 2010*, - i.e. an agreement under which a person grants to another person, for value, a right of occupation of residential premises, for the purpose of use as a residence. "Residential premises" means any premises, or part of premises, (including any land occupied with the premises), used or intended to be used as a residence.
- 46 Although the agreement made on 15 January 1999 is entitled "Residential Tenancy Agreement", I am satisfied that it is, in fact, a residential site agreement. The agreement gives the home owner the right to occupy the site, not the right to occupy the residential premises, for value.
- 47 The home owner owns the home and leases the land on which the home sits from the operator, (a site agreement). The home owner is not renting the home from the operator or any other person, (a tenancy agreement).
- 48 Section 45(2) of the new Act provides that an operator must not unreasonably withhold or refuse consent for a tenancy agreement, (between the home owner and a tenant), or other sub-lease (between the home owner a sub-lessor), for a term of 12 months or less.
- 49 Section 45(3) provides that an operator must not unreasonably withhold or refuse consent to the assignment of a **tenancy agreement**, (*emphasis added*).
- 50 Section 45(1) allows a home owner to assign a site agreement to another person, but only with the written consent of the operator.
- 51 There is no provision in Section 45 that that the operator must not unreasonably withhold or refuse consent to the assignment of a site agreement.
- 52 The home owner submitted that, in accordance with Section 45, an operator must not

unreasonably withhold or refuse consent to the assignment of a tenancy agreement, including a site agreement. The home owner relied upon the case of *Davey v Leth* (a decision of the NSW Civil and Administrative Tribunal) made on 8 March 2016. The Tribunal in that case made the following order:

“1. Pursuant to Section 155(2)(e) of the Residential (Land Lease) Communities Act 2013 (the Act), the operator is ordered to execute the Deed of Assignment of Residential Site Agreement in respect of a transfer from (the Applicant) to (the Prospective Purchaser), which deed is presently in the possession of the operator within 7 days of the date of these orders.”

53 The Tribunal stated:

“3. The applicant wishes to assign her tenancy agreement to a new assignee, and has submitted this request to the operator.

4. The applicant has caused the new transferee to make contact with the operator and to provide the operator with financial information as to his ability to pay the rent, as well as character references as to his suitability. I can find no reasonable reason for the operator to withhold or refuse consent to the assignment of this tenancy agreement. The operator has not attended Tribunal to make such a submission.”

54 In my view, and with respect, the Tribunal in the matter of *Davey v Leth* failed to recognise the important difference under the new Act between a site agreement and a tenancy agreement. This crucial issue was not raised, (I note that the Respondent did not attend the hearing), and was not considered by the Tribunal.

55 In the decision, the terms “residential site agreement” and “tenancy agreement”, are used interchangeably. They are, in fact, different types of agreements, with different legislative provisions. The decision of the Tribunal in the matter of *Davey v Leth* does not assist me in my determination of whether an operator must not unreasonably withhold or refuse consent to the assignment of a site agreement.

56 Having considered this matter very carefully, I accept the operator’s submission that, unlike a request for assignment of a tenancy agreement, under the new Act, there is no “reasonability test” attached to a home owner’s request for assignment of a site agreement.

57 It appears to me that the new Act has transposed the “reasonability test” in relation to the assignment of rights and obligations. Formerly, an operator could not unreasonably withhold or refuse consent to the assignment of a site agreement. There was no such provision in relation to the assignment of a tenancy agreement. Since the commencement of the new Act, an operator cannot unreasonably withhold or refuse consent to the assignment of a tenancy agreement. There is no such provision in relation to the assignment of a site agreement.

58 In my view, Section 45(3) provides that the operator must not unreasonably withhold or refuse consent to the assignment of a tenancy agreement, (i.e. an assignment from an existing tenant to a subsequent tenant). Section 45(3) does not govern the assignment of a site agreement from an existing home owner to a subsequent home owner.

59 The Second Reading Speech concerning the new Act supports this finding. Relevantly:

“Part 10 of the bill includes a simple and more effective procedure for those wishing to sell their homes on site.

The current system of assigning existing leases upon the sale of a home was seen as complex and confusing.

The bill replaces this process with an obligation on the operator to enter into a new site agreement with the purchaser, unless it would be reasonable to refuse.

The site fees under the new agreement must be no greater than the current fees payable for the site or the fees payable for comparable sites within the community.”

- 60 A standard form of residential site agreement was prescribed by the *Residential (Land Lease) Communities Regulation 2015*. The standard form applies to site agreements entered into on or after the standard form was prescribed, (1 November 2015). All site agreements entered into on or after that date, must be in the standard form, (additional clauses are allowed), and are taken to include the terms of the standard form, if the standard terms are omitted from the site agreement.
- 61 Although the standard form is not relevant to the home owner’s site agreement in this case, it provides guidance on the rights and responsibilities of home owners and operators under the new Act.
- 62 The standard form site agreement provides that a home owner may enter into a tenancy agreement, or otherwise sub-let their home, with the operator’s written consent. The standard form provides that the operator will not unreasonably withhold or refuse consent for any request to enter into a tenancy agreement, or otherwise sub-let the home, as long as it is only once during any 3-year period and is for a term of 12 months or less.
- 63 The standard form also provides for the sale of the home. It provides that the operator agrees to allow the home owner to sell their home while it is located on the residential site. The operator also agrees not to cause or permit interference with the home owner’s right to sell their home.
- 64 Under the standard form of site agreement, the operator agrees to enter into a **new site agreement with the purchaser of the home**, (*emphasis added*), unless the operator has a reasonable excuse not to, (for example if the operator and the purchaser do not agree on the terms of the proposed agreement). The operator also agrees not to unreasonably delay, or refuse to enter into, a new site agreement with the purchaser.
- 65 There is no term in the standard form of site agreement for the assignment of a site agreement.
- 66 The terms contained in the new standard form residential site agreement give support to my finding that, although there is a requirement to act reasonably in relation to the letting or sub-letting of a home in a residential land-lease community, there is no such condition relating to the assignment of a site agreement.
- 67 During the hearing, the home owner also asked the Tribunal to make an order under Section 115 of the new Act. Section 115(1)(d) allows a home owner to apply to the Tribunal for the resolution of any dispute about interference by the operator, or another person, with the sale of a home in a residential land-lease community.
- 68 The home owner submitted that, by refusing to consent to the assignment of the site

agreement dated 15 January 1999, the operator was interfering with the sale of his home.

69 The Tribunal may make an order under Section 115(2)(d), preventing interference with the sale of the home, and/or an order under Section 115(2)(e), requiring the operator to take all necessary steps to facilitate the sale of the home, to a specified prospective home owner.

70 The operator submitted that it was not interfering with the sale of the home and is willing to enter into a new site agreement with the prospective purchaser, Mr McLeer.

71 Pursuant to Section 105(1), a home owner is entitled to sell their home while the home is located on the site.

72 Pursuant to Section 107(1), the operator must not cause or permit any interference with, or attempt to interfere with a home owner's right to sell a home.

73 In accordance with Section 107(2), "interference" includes:

- (1) hindering the exercise of the right to sell;
- (2) unreasonably restricting prospective home owners from inspecting the home or any common area of the community;
- (3) making false or misleading statements about the community that affect or may affect the home owner's right to sell;
- (4) taking any action to require the home owner to comply with any requirement under the *Local Government Act 1993*, after becoming aware that the home owner is seeking to sell his or her home, (unless the matter has been the subject of previous action.)

74 In accordance with Section 107(3), an operator does not interfere with the right to sell the home if the operator declines to enter into a site agreement with a prospective home owner and does so on reasonable grounds.

75 There is no evidence that the operator has hindered the sale of the home to Mr McLeer. There is no evidence that the operator has unreasonably restricted Mr McLeer's access to the home or to the common areas of the community. There is no evidence that the operator has made false or misleading statements about the community. There is no evidence that the operator has taken any action requiring the home owner to comply with any requirement under the *Local Government Act 1993*.

76 In my view, the operator's refusal to consent to the assignment of the site agreement dated 15 January 1999, from the home owner to Mr McLeer, does not amount to interference with the home owner's right to sell the home.

77 The home owner is entitled to sell the home to Mr McLeer if he wishes. If the sale proceeds, the operator has agreed to enter into a new site agreement with Mr McLeer. There is no evidence that the operator has interfered with, or caused, or permitted interference with, the proposed sale.

### **Conclusion**

78 The home owner wishes to sell his home in a residential land-lease community at Anna

Bay NSW to Mr McLeer and assign the whole of his interest under his residential site agreement dated 15 January 1999 to Mr McLeer.

- 79 The residential site agreement provides that the home owner may assign the whole of his interest under the agreement, with the operator's prior permission.
- 80 The operator has refused to consent to the proposed assignment.
- 81 There is no provision in the residential site agreement, or the *Residential (Land Lease) Communities Act 2013*, that the operator must not unreasonably withhold or refuse consent to the assignment of a residential site agreement.
- 82 The operator is lawfully entitled to refuse to consent to the proposed assignment, even if this refusal is unreasonable.
- 83 The home owner is legally entitled to sell his home to Mr McLeer.
- 84 The operator is prepared to enter into a new residential site agreement with Mr McLeer.
- 85 The operator is not causing or permitting or attempting any interference with the home owner's right to sell his home to Mr McLeer by refusing to assign the site agreement dated 15 January 1999, or otherwise.
- 86 The grounds required to make an order that the operator consent to the assignment of the residential site agreement dated 15 January 1999 from the home owner to Mr McLeer have not been established.
- 87 The grounds required to make an order preventing interference by the operator with the sale of the home to Mr McLeer have not been established.
- 88 The grounds required to make an order requiring the operator to take all necessary steps to facilitate the sale of the home to Mr McLeer have not been established.

**D Moss**

**General Member**

**Civil and Administrative Tribunal of New South Wales**

**21 June 2016**

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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Decision last updated: 11 August 2016