



Civil and Administrative Tribunal New South Wales

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| Medium Neutral Citation: | Estate of Madeline Cozma v Milstern Retirement Living Pty Ltd t/as Golden Lifestyles [2016] NSWCATCD 56 |
| Hearing dates: | 23 June 2016 |
| Decision date: | 10 August 2016 |
| Jurisdiction: | Consumer and Commercial Division |
| Before: | P French, General Member |
| Decision: | <ol style="list-style-type: none">1. Pursuant to section 161 of the Retirement Villages Act 1999 the Tribunal Orders that the departure fee payable by the Estate of Madeleine Cozma to Milstern Retirement Living Pty Ltd on the sale of the Lease in respect of Unit 48 of Strathfield Gardens Retirement Village is to be limited to 10% of the sale price plus GST.2. The application is otherwise dismissed on the basis that it is misconceived. |
| Catchwords: | RETIREMENT VILLAGES – right to residence –recurrent fees owed on permanent vacation – departure fees – failure to market and promote sale of retirement unit |
| Legislation Cited: | Retirement Villages Act 1999 Civil and Administrative Tribunal Act 2013 |
| Category: | Principal judgment |
| Parties: | Estate of Madeleine Cozma by its Executors Anita Cozma and John Cozma (Applicants) Milsten Retirement Living Pty Limited (Respondent) |
| Representation: | Jerry Safar, authorised representative of applicants; Ms Leisel Pierce, solicitor, CLS Legal for the respondent |
| File Number(s): | RV 15/63918 |
| Publication restriction: | Nil |

REASONS FOR DECISION

Introduction

- 1 This is an application to the Tribunal pursuant to the provisions of the *Retirement Villages Act 1999 (RV Act)* made on behalf of the executors of the Estate of the Madeline Cozma (**the Estate**), who are her adult children Anita and John Cozma (**the Applicants**). Up to the time of her death, the late Madeleine Cozma was a resident of residential premises (**Unit 48**) under the terms of a Lease and Residence Contract at Strathfield Gardens Retirement Village (**Strathfield Gardens**) which is operated by Milstern Retirement Living Pty Ltd trading as Golden Lifestyles (**the Respondent**). The Applicants seek an Order from the Tribunal pursuant to section 82 of the RV Act that would require the Respondent to recognise the right of a person now occupying Unit 48 to enter into a residence contract with the Respondent; an Order pursuant to section 128(a) RV Act that would require the Respondent to comply with section 152(3) of the RV Act in determining the recurrent fees owed by the Estate; and, an Order pursuant to section 161 of the RV Act that would reduce or waive the departure fees owed by the Estate to the Respondent on the sale of the Lease. This application was made to the Tribunal on 26 November 2015 (**the Application**).
- 2 For reasons that are set out following the Tribunal refuses to make an Order pursuant to section 81 of the RV Act that would recognise the person specified by the applicants, Mr Safer Safer, as having a residence right entitling him to enter into a residence contract with the Respondent on the basis that he is not a person entitled to be so recognised. Mr Safer Safer was not a person occupying the residential premises concerned at the time the late Madeleine Cozma died. The Tribunal has also refused to make an Order pursuant to section 128(a) of the RV Act requiring the Respondent to comply with section 152(3) of the RV Act because the Applicants have not established any failure by the Respondent to comply with the requirements of that section. However, the Tribunal has determined that the Applicants are entitled to an Order pursuant to section 161 of the RV Act that will reduce the departure fees owed by the Estate to the Respondent on the sale of the Lease to 10% of the sale price plus GST. The Applicants are entitled to this Order because the Respondent and a related entity failed to effectively market and promote the sale of the Lease and engaged in other conduct that has inhibited the sale of the Lease.

Procedural history

- 3 The Application was first listed before the Tribunal for directions on 9 December 2015. Mr Jerry Safer attended that listing on behalf of the Applicants. He is the son of Anita Cozma. The Respondent was represented at that listing by its solicitor, Ms Leisel Pierce of CLS Legal. The Tribunal Ordered the Applicants to file and serve points of claim setting out the legal causes of action and any particulars relied upon by 11 January 2016. It Ordered the Respondent to file and serve its points of defence and any particulars by 9 February 2016. The Tribunal also granted both parties leave to be legally represented in the proceedings.
- 4 The Applicants failed to file and serve points of claim as directed and as a consequence no defence was filed and served either.

- 5 The Application was next listed before the Tribunal for a further directions hearing on 22 February 2016. Mr Jerry Safer attended that listing on behalf of the Applicants. There was no appearance on behalf of the Respondent. Just prior to this listing, on 18 February 2016, the Applicants filed and served a Statement of Claim seeking relief in the form of damages in the amount of \$162,047.00. The Tribunal made an Order requiring the Respondent to file its defence to the Applicants' claim by 7 March 2016 (this was subsequently extended on application to 18 March 2016). It also made further Orders for the filing and service of evidence by the parties. The Application was adjourned for hearing to a date to be fixed by the Registrar.
- 6 The parties complied with the Tribunal's orders for the filing and exchange of the defence and their evidence and the matter came before the Tribunal for hearing on 23 June 2016. Mr Jerry Safer and Ms Anita Cozma attended the hearing on behalf of the applicants. Mr Safer handed up a document signed by Anita and John Cozma in their capacities as Executors of the Estate authorising him to represent them at the hearing. Ms Leisel Pierce, solicitor, again attended on behalf of the Respondent. No other representative of the Respondent was in attendance.
- 7 Although the matter had been listed for hearing, in accordance with its usual practice, prior to embarking on the hearing the Tribunal canvassed with the parties the potential for the dispute to be resolved cooperatively without the need for a hearing. Both parties expressed openness to settlement discussions. In light of this, the Tribunal stood the matter down for 20 minutes to allow time for settlement discussions to take place. When the parties returned to the hearing room they advised the Tribunal that settlement discussions had been unsuccessful. The application therefore proceeded to hearing.

Evidence and submissions before the Tribunal

- 8 Mr Jerry Safer and Ms Anita Cozma both gave evidence under oath. They relied upon the contents of the Application filed with the Tribunal on 26 November 2016, the Statement of Claim filed with the Tribunal on 18 February 2016 and a bundle of documents filed with the Tribunal on 7 March 2016. Those documents were a copy of a Lease Agreement made between Milstern Retirement Living Pty Ltd and Madeleine Cozma dated 28 January 2004; a copy of a Death Certificate for Madeleine Cozma dated 3 November 2005; a copy of a "Sales Inspection and Agency Agreement" made between John Cozma and Anita Cozma and Milstern Retirement Unit Sales Pty Ltd dated 3 July 2006; a copy of a "Sales Inspection and Exclusive Agency Agreement" made between Anita Cozma and John Cozma and Raine and Horne Strathfield dated 22 September 2011; a copy of an email confirming a reduction in the asking price for Unit 48 sent by Anita Cozma to Raine and Horne on 7 April 2012; and, a copy of an Agency Agreement between Milstern Retirement Unit Sales Pty Ltd and Anita Cozma for the sale of Unit 48 dated 1 September 2014, which was not executed by the Applicants.

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The Respondent relied upon its Points of Defence dated 17 March 2016; a document headed "Chronology for the Respondent" which notes various events and interactions in the period 28 January 2004 to 17 September 2015; a copy of a "Strathfield Gardens" Residence Contract (**Residence Contract**) entered into between the Respondent and Madeliene Cozma on 28 January 2004; a copy of an "Estimate of Exit Entitlement" for Unit 48 as at 30 April 2010 on letterhead of Meridien Retirement Living; copies of emails between Michael Turkic of Meridien Retirement Living, Caterina Ripepi of Strathfield Gardens Retirement Village and Anita Cozma dated 7 to 9 June 2011; a copy of an email from Tammie Carter, Sales Manager RetireAustralia to Michael Turkic and others about a telephone call received from Raine and Horne Strathfield dated 18 October 2011; emails from Anna Frew of Strathfield Gardens to CLS Legal and a Mrs Phillips concerning the occupant of Unit 48 dated 9 August and 1 October 2013 respectively; email and other correspondence between Kosmin and Associates, solicitors for Milstern Retirement Living Pty Limited and Pappas Law solicitor for Anita Cozma concerning a proposed assignment of the lease of Unit 48 across the period 13 February 2014 to 14 August 2014; a copy of a letter from Michelle Malouf, Licensee in Charge, Milstern Retirement Unit Sales Pty Ltd to Anita Cozma enclosing an "updated Selling Agency Agreement" dated 1 September 2014; copies of email exchanges between Michael Burns, Michelle Malouf, Oxana Churilina of Kosmin and Associates and Anita Cozma, Jerry Safar and Geoffrey Bean, of MDG Legal, solicitor for Anita Cozma concerning the occupant of Unit 48 and the proposed assignment of the lease to Safer Safer across the period 26 September 2014 to 17 September 2015; a copy of an "Exit Statement for Unit 48" as at 1 April 2016; an estimate of amounts owing by the Estate to the Respondent as at 22 June 2016; an account ledger setting out monies owed by the Estate to the Respondent for the period 1 July 2012 to 1 December 2015; and a list of recent sales of leases at Strathfield Gardens.

Material facts

10 The material facts to emerge from the evidence are as follows:

- (a) On 28 January 2004 Madeleine Cozma entered into a lease with the Respondent over residential premises known as Unit 48 at Strathfield Gardens Retirement Village. The term of the lease was 94 years, 11 months and 20 days. The lease is a "registered long term lease" registered under the *Real Property Act* 1900. It was expressed to commence from 28 January 2004 and to terminate on 17 January 2099. The purchase price of the lease was \$210,000.00;
- (b) Strathfield Gardens Retirement Village is a "retirement village" within the meaning of section 5 of the RV Act. It is residential premises to which the RV Act applies;
- (c) The Lease agreement between the parties incorporates pursuant to clause 8 a registered Memorandum (No 0424524) (**Memorandum**) which is deemed to be part of the lease pursuant to Annexure A clause 2 of the Lease. That Memorandum includes provisions related to the right of residence, the assignment of the lease and sub-leases, retention amounts (departure fees) and disputes about the market value. In these

respects, it relevantly provides:

1.1.21 “**Qualified person**” means a person who:-

- (1) (a) has attained the age of fifty-five years; or
- (b) has attained such age as may be included from time to time in any State Environmental Planning Policy concerning aged persons’ accommodation;
- (c) has attained such age as “aged person” may be defined under the Aged and Disabled Care Act 1954 as amended; or
- (d) is a “disabled person” as defined under the Aged and Disabled Care Act 1954, as amended: or
- (e) is the spouse or de facto partner (within the meaning of the De Facto Relationships Act, 1984) of any deceased Qualified Person referred to in sub-clauses (a) to (d) above and who resided in the residence at the date of death

AND has provided the Manager with a medical certificate prepared by a qualified medical practitioner not more than forty-two (42) days prior to the entering into of this agreement to the effect that the Resident is/will be able, subject to the services referred to in Clause 3 to be provided or arranged by the Lessor and the Manager pursuant to the lease, to live independently in the residence: OR

- (2) Is a natural person who is a Qualified Person as defined in Clause 1.1.21 and has been granted a life sub-tenancy by a person or a corporate lessee.

Lease only to Qualified Persons

6.5 The Lessor shall lease residences with Strathfield Gardens only to Qualified Persons subject to the right of an Administrator/Manager or caretaker to live in one of the residences.

15. Assignment subleases and mortgages

Subleases/Mortgages

15.1 The Lessee shall not without the written consent of the Lessor (which consent may be withheld at the Lessor’s absolute discretion) sublet part with or share the possession of licence or mortgage charge or otherwise deal with or dispose of the Premises or any part thereof or any estate or interest therein or by any act of deed procure the Premises or any part thereof or any estate or interest therein to be sublet unto shared with or put into possession of any person or persons or to be mortgaged charged or otherwise dealt with or disposed of PROVIDED HOWEVER that the Lessor shall not withhold its consent to a sublease where:

15.1.1 Qualified Person

The Sub-Lessee is a Qualified Person

15.1.2 Term of the Sub-Lease

The Sub-Lease is for a period of six (6) months or less

15.1.3 Form of Sub-Lease

The form of Sub-lease contains an absolute prohibition upon the Sub-Lessee against any assigning, subletting, licensing, or parting with possession, and contains covenants on the part of the Lessee to observe all the Rules and Regulations; and

15.1.4 Lessee to Pay Costs

...

Assignment

15.2 The Lessee shall not assign this Lease without first making a written request to the Lessor therefor and obtaining the prior consent in writing of the Lessor provided such consent shall not be arbitrarily or unreasonably refused or

withheld if:-

15.2.1 Qualified Person

The proposed assignee is a Qualified Person as herein defined; and

15.2.2 Lessee to pay costs

...

15.2.3 No Unremedied breach

All contributions to outgoings and other moneys due or payable by the Lessee to the Lessor and/or the Manager as at the date of the assignment shall have been paid by the Lessee and there shall not then be any existing unremedied breach of the terms covenants conditions and restrictions herein contained which has not been waived by the Lessor or the Manager; and

15.2.4 Assignee to enter into Covenant

...

15.2.5 Lessee's Contribution to Operating Expenses

...

15.2.6 Retention Amount

The Lessee shall pay to the Lessor the Retention Amount referred to in Clause 17 hereof

17. Retention Amount

Definitions

17.1 ...

17.2 The Lease shall not be assigned to anyone other than a Qualified Person OR a natural person who, not being a Qualified Person, has granted a registered or registrable life sub-lease to a relative of the said natural person which relative is a Qualified Person.

In this provision "relative" shall mean a spouse, parent, grandparent, child, grandchild, brother, sister, child of a brother or sister or brother or sister of a parent or similar relatives of a spouse.

17.3 No interest in this Lease shall hereafter be permitted to become vested by transmission in any person other than the Lessee's executors or administrators in their capacity as such or a surviving Lessee or the spouse of the Lessee as devisee.

17.4 Neither the Lease nor any interest therein shall be surrendered or assigned unless:-

17.4.1 The Lessee pays to the Lessor a Retention Amount being the percentage of the sale price stipulated in the schedule hereunder in the event of the Lease being assigned or surrendered in the year, calculated from the date of purchase, specified in the following schedule:

(this schedule is in the same terms as clause 15 Departure Fees of the Residence Contract, as to which see following)

...

19 Lessee Assigns at Less than Fair Market Value

19.1 In the event that the Lessee disposes of his interest in this Lease and the new Lessee has not been introduced by the Manager, the Lessor shall have the right, if it is of the opinion that the consideration is less than the fair market value of the Lessee's interest in this lease, to request the President for the time being of the Australian Institute of Valuers and Land Economists to nominate a valuer to determine the current market value of the Lessee's interest in this Lease as at the date of the Lessee entering into a Deed of Assignment of the Lease or executing surrender of the Lease. If the said valuation is more than five per cent (5%) above the consideration being paid to the Lessee, then:

19.1.1 the "sale price" shall be deemed to be the market value of the Lessee's interest in this Lease as determined by the nominated valuer, and

19.1.2 the valuation fees shall be added to the Retention Amount and paid by the Lessee to the Lessor at or prior to the Lessor executing a Deed of Consent to Assignment of Lease or a Surrender of Lease (as the case may be)

PROVIDED ALWAYS that this provision shall not prevent the sale at undervalue or gift by the Lessee of his interest in this Lease to his spouse.

- (d) On 28 January 2004 Madeleine Cozma also entered into a Residence Contract with the Respondent in relation to Unit 48. This Residence Contract includes provisions related to the payment of recurrent charges, departure fees and termination of the contract. In these respects it relevantly provides:

4. Recurrent charges

The following provisions relate to recurrent charges

(a) The recurrent charges are payable monthly in advance on or about the 1st day of the month by cash or cheque to the village operator

(b) ... (d)

(e) The resident is liable to continue to pay recurrent charges for general charges after permanently vacating the residential premises until:

(i) the date on which the village operator enters into a village contract with an incoming resident in relation to the residential premises; or

(ii) the date on which a person takes up residence in the residential premises with the consent of the village operator; or

(iii) ...

(iv) ...

(v) the date that is 6 months after the date on which the resident otherwise delivered up vacant possession of the residential premises to the village operator,

whichever date occurs first, or such earlier date as the village operator and the resident may agree.

(f) The resident may at his or her option, either:

(i) discharge (either wholly or in part) his or her liability for recurrent charges that arise after the resident permanently vacated the residential premises; or

(ii) discharge that liability (either wholly or in part) from the proceeds of sale of the residential premises.

(g) The resident must notify the village operator in writing of the option chose as soon as practicable after permanently vacating the residential premises.

13. Termination of contract

(a) This contract terminates:

(i) on the date on which the resident delivers up vacant possession of the residential premises to the village operator, being a date that is (except as otherwise provided in this clause) at least one month after the date on which the resident gives the village operator written notice of intention to vacate the premises (or such earlier date as the residence contract may allow), or

(ii) ... (iv)

(v) on the death of the last surviving resident under the contract, or

(vi) to (viii)

(b) Termination of a residence contract does not affect any other right or obligation of the parties under a village contract.

(c) to (d)

15. Departure Fees

(a) a departure fee is payable by the residence on termination of the contract.

The departure fee is the percentage of the sale price plus GST stipulated in the following schedule if the residential premises are sold in the year, calculated from the date of purchase on a daily basis, specified in the following schedule:

| % of Sale Price | Year |
|-----------------|---------------------|
| 5.0% | in the first year |
| 7.5% | in the second year |
| 10.0% | in the third year |
| 12.5% | in the fourth year |
| 15.0% | in the fifth year |
| 17.5% | in the sixth year |
| 20.0% | in the seventh year |
| 22.5% | in the eighth year |
| 25.0% | after eight years |

16 Refund of payment to resident

The resident may assign or transfer his leasehold interest in the residential premises in accordance with the provisions of the Memorandum and subject to payment of the departure fees to the village operator, the resident is entitled to the proceeds of that assignment or transfer. As no ingoing contribution is payable by the resident, the resident is not entitled to any refund or other payment by the village operator or the owner/lessor on the termination of the contract.

17 Capital gain or loss

Any capital gain, or increase in ingoing contribution paid by the incoming resident, is not to be shared between the resident and the village operator, but shall be solely to the account of the resident.

- (e) On 23 October 2005 Madeleine Cozma died. Under the terms of the late Madeleine Cozma's will her adult children Anita and John Cozma were appointed the Executors of her Estate. On 3 March 2006 they received a grant of probate. Since that time they contend that they have been trying to sell Unit 48 so that the late Madeleine Cozma's assets can be distributed to her beneficiaries according to the terms of her will;
- (f) From the time of the late Madeleine Cozma's death up to the present the Respondent has continued to charge the Applicants recurrent operating

charges in relation to Unit 48. It has not levied any charge for optional services. The Applicants have refused or failed to pay those charges. As at 22 June 2016, the accumulated recurrent operating charges now claimed by the Respondent to be due from the Applicants is \$110,011.25;

- (g) On 3 July 2006 the Applicants entered into a "Sales Inspection Report and Agency Agreement" with a related entity of the Respondent, Milstern Retirement Unit Sales Pty Ltd, appointing that entity agent for the sale of Unit 48. This was a non-exclusive continuing agency agreement which, on the evidence before me, I conclude was never terminated by either party. That Agency Agreement is annotated to state that the Agent's estimate of the selling price or price range for the property is \$210,000.00 to \$220,000.00;
- (h) The Lease was not sold by Milstern Retirement Unit Sales Pty Ltd. The Applicants are very critical of the performance of that agency and the Respondent in this respect. They contend that no real effort was made to secure a sale of the Lease. They contend that the agent was at all times in a position of conflict of interest because the longer the Lease went without being sold the higher would be the departure fees that were payable to Milstern Retirement Living Pty Ltd. They contend that there were and are always multiple leases for sale at Strathfield Gardens. They contend that they 'tested' the agency's diligence in attempting the secure sale of the Lease by sending friends to make inquiries about available leases for sale. They say that their friends were always shown other properties and not Unit 48;
- (i) At some time in 2010 (the precise date not being in evidence) Milstern Retirement Living Pty Limited sold Strathfield Gardens to an entity trading as Meridien Retirement Living. At some time in 2013 (again the precise date not being in evidence) Milstern Retirement Living Pty Limited bought Strathfield Gardens back from Meridien Retirement Living. It does not appear in the evidence before me that this had any legal effect of terminating the agency agreement between the Applicants and Milstern Retirement Unit Sales Pty Ltd in relation to the sale of the lease of Unit 48;
- (j) There is virtually no evidence of any prospective sale of the Lease by Milstern Retirement Unit Sales Pty Ltd. In April 2010, Meridien Retirement Living prepared an "Estimate of Exit Entitlement" in respect of Unit 48 as at 30 April 2010 apparently in preparation for the sale of the Lease of that property which was appointed for 30 September 2010. It does not appear from the evidence for whom that Estimate was prepared. The sale price specified was \$90,000.00. The estimated exit entitlement of the Applicants after the departure fee, recurrent fees due, and other charges were applied, was \$23,360.09. For reasons not apparent in the evidence, the sale was not proceeded with;
- (k) On 22 September 2011 the Applicants entered into a "Sales Inspection and Exclusive Agency Agreement with Oscaville Pty Ltd trading as Raine and Horne Strathfield appointing that entity agent for the sale of the lease over Unit 48. That Agency Agreement is annotated to state that the Agent's estimate of the selling price or price range for the property was \$185,000.00;
- (l) It appears that in September and October 2011 an Agent from Raine and Horne Strathfield made various attempts to obtain information from the Respondent to prepare a marketing campaign for the sale of the Lease of

Unit 48. Those efforts appear to have met with a number of objections from persons acting on behalf of the Respondent which included the alleged failure of the Applicants to issue the Respondent with vacant possession of the unit; their alleged failure to pay recurrent fees due; and the alleged failure of the Applicants to notify the Respondent of the appointment of Raine and Horne as agent. The Applicants contend that the Respondent's officers sought to obstruct Raine and Horne's efforts to sell the lease. It appears that these objections were later resolved or acquiesced in and that Raine and Horne did attempt to sell the lease on behalf of the Applicants. However, Mr Jerry Safer's evidence is that Raine and Horne was unable to obtain any serious interest from a prospective buyer even at a quoted selling price of \$85,000.00;

- (m) On 12 September 2013, Mr Safer Safer moved into Unit 48. He has been living there ever since. He is the former husband of Ms Anita Cozma and the father of Mr Jerry Safer. The Respondent does not consent to Mr Safer Safer living in Unit 48 and has repeatedly objected to his presence there;
- (n) During the period February 2014 to August 2015 there were various email exchanges and other correspondence between the parties in relation to the prospective sale of the Lease of Unit 48 to a purchaser who had been found by the Applicants who was unidentified to the Respondent. By email dated 6 August 2015, in response to repeated inquiries and demands made on the Applicants by various officers of the Respondent, Mr Jerry Safer notified the Respondent that the purchaser was Mr Safer Safer and that the sale price for the lease over Unit 48 that had been agreed with him was \$1,000.00;
- (o) By telephone call and email to the Applicants' solicitor dated 17 August 2015, the Respondent notified the Applicants that the Respondent did not accept the \$1,000 purchase price;
- (p) There have been subsequent negotiations and offers of compromise made between the parties up to the date of hearing. However, the dispute about the sale of the lease, and Mr Safer Safer's occupancy of Unit 48 remains unresolved;
- (q) The Respondent has offered to enter into an agency agreement with the Applicants for the sale of the lease of Unit 48. The Respondent continues to estimate the market value of the lease to be \$210,000.00; and
- (r) The Respondent contends that as at 1 April 2016, based upon a prospective sale price of \$210,000.00 it will be owed a departure fee of \$52,500.00 (being 25% of the estimated sale price plus GST) when the lease is reassigned as well as unpaid recurrent charges due in the amount of \$110,011.25 (a total of \$162,511.25).

Applicable law

- 11 The Applicants contend that the Respondent has failed to comply with section 81 of the RV Act by refusing to recognise Mr Safer Safer's right to become a resident of Unit 48. They seek an Order of the Tribunal pursuant to section 82 of the RV Act directing the Respondent to enter into a residence contract within a specified period.
- 12 Section 82 of the RV Act is in the following terms:

82 Application to Tribunal concerning non-resident

- (1) If the operator of a retirement village refuses to enter into a residence contract

referred to in section 81, the relative of the resident may apply to the Tribunal for an order directing the operator of the village to enter into the contract within the time specified in the order.

(2) If the relative of the resident:

(a) refuses to enter into a residence contract with the operator of the village in respect of the residential premises concerned, and

(b) refuses to deliver vacant possession of the residential premises to the operator, the operator may apply to the Tribunal for an order directing the relative of the resident to deliver vacant possession of the premises to the operator within the time specified in the order.

(3) On application made to it under this section, the Tribunal may make the order sought or any other order of a kind referred to in this section, as the Tribunal considers appropriate.

(4) If the Tribunal is satisfied that the relative of the resident refused to enter into a residence contract only because the terms of the proposed contract were unreasonable, the Tribunal may set the terms of the contract (having regard to the terms of other residence contracts in force in the village) and direct the operator and the relative of the resident to enter into the contract within the time specified in the order.

(5) The operator of the village must not enter into a residence contract in respect of the residential premises with any person other than the relative of the resident unless:

(a) the relative delivers vacant possession of the premises to the operator, or

(b) the Tribunal orders the relative to do so.

(6) A contract entered into on contravention of subsection (5) is void.

(7) If:

(a) a person who was occupying residential premises in the retirement village with a resident who has vacated premises is not a person referred to in section 81(1), and

(b) the person refuses to deliver vacant possession of the premises to the operator, the operator may apply to the Tribunal for (and the Tribunal may make) an order requiring the person to deliver vacant possession of the premises to the operator within the time specified in the order.

- 13 The circumstances in which a relative of a former resident has a right to enter into a residence contract with the operator of a retirement village are set out in section 81(1) of the RV Act, which is in the following terms:

81 Right to become resident

(1) A relative of a resident of residential premises in a retirement village:

(a) who is a retired person, and

(b) who is occupying the residential premises concerned at the time the resident dies or vacates the premises, and

(c) who had been occupying those premises for at least 6 months (whether before or after the commencement of this Act) immediately before that time,

has the right to enter into a residence contract with the operator of the village in respect of the premises.

(2) This section does not apply if:

(a) the resident is, or was, a registered interest holder (other than a person referred to in section 7(1)(c)) in respect of the residential premises, or

(b) the resident is taken to be a resident by operation of section 4(2)

- 14 A “retired person” is defined in section 4 of the RV Act to mean “a person who has reached the age of 55 years or has retired from full-time employment.”

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Section 4(1) of the RV Act defines the residence right of a person to mean:

The person's right to occupy residential premises in a retirement village, being a right arising from a contract

- (a) under which the person purchased the residential premises, or
- (b) under which the person purchased shares entitling the person to occupy the residential premises; or
- (c) in the form of a lease, licence, arrangement or agreement of any kind, other than a residential tenancy agreement in the form prescribed under the *Residential Tenancies Act 2010*:
 - (i) that is entered into under Division 5 of Part 10, or
 - (ii) that contains a term to the effect that this Act does not apply to the residential premises the subject of the agreement, or
- (d) in the form of any other contract of a kind prescribed by the regulations, or any other right of a kind prescribed by the regulations.

16 Section 4(2) of the RV Act provides:

(2) For the purposes of the definition of "residence right" in subsection (1), it does not matter that the person who obtains the right:

- (a) is a corporation, if the premises concerned are intended for use as a residence by a natural person, or
- (b) obtains it for the purpose of allowing another person to live in the residential premises (instead of the person who obtained the right), and in those cases a retired person who lives in the premises with the consent of the corporation or of the person (as the case may be) is taken to have a residence right

Subsection (2) would apply in the case, for example, of a person who buys a strata-titled unit in a retirement village for the person's parent to live in.

17 Section 174 of the RV Act deals with the letting or subletting of residential premises. It provides:

174 Letting or subletting of premises

(1) A resident of residential premises in a retirement village may let (or in the case of a resident referred to in section 7(1)(c), Sublet, the premises under a residential tenancy agreement in accordance with this Division. As a consequence of section 8(d), a resident or former occupant may retain possession of residential premises (ie they are not required to hand over the keys to the operator) in order to enable the premises to be let or sublet.

(2) Any residential tenancy agreement under this Division:

(3) The tenant or subtenant under the residential tenancy agreement must be a retired person.

(4) A resident of residential premises in a retirement village must not let or sublet the premises unless he or she has given the operator of the village written particulars of:

(5) The operator may refuse to consent to a second or subsequent residential tenancy agreement if the proposed term of the agreement, when added to the term of any preceding agreement relating to the premises and to which the same resident was a party, would exceed 3 years.

(6) If the operator decides not to consent to the residential tenancy agreement (otherwise than as allowed) by subsection (5) the operator must, no later than 7 days after receiving the written particulars required by subsection (4):

- (a) advise the resident of that decision (and the reasons for it), and
- (b) apply to the Tribunal for an order declaring that the operator is not obliged to consent to the agreement.

(7) If the operator does not apply for such an order within the time allowed by this

section, the operator is taken to have consented to the residential tenancy agreement.

- 18 Section 175 of the RV Act confers power on the Tribunal to determine whether an operator's decision not to consent to a proposed tenant or subtenant is reasonable. It provides:

175 Determination by Tribunal concerning proposed tenant or subtenant

(1) On application under section 174, the Tribunal is to determine whether the operator's decision not to consent to the residential tenancy agreement concerned is reasonable in the circumstances, having regard to:

(a) whether the residential premises concerned are suitable for occupation by the proposed tenant or subtenant, having regard to his or her physical and mental capacity, and

(b) any other factor that the Tribunal considers relevant.

(2) For the purposes of subsection (1)(b), the age of the proposed tenant or subtenant is not relevant if the proposed tenant or subtenant is a retired person.

(3) On making its determination under subsection (1), the Tribunal may make an order:

(a) directing the operator to consent to the residential tenancy agreement concerned and pay such compensation (if any) as is specified in the order, or

(b) declaring that the operator is not obliged to consent to the agreement.

(4) The operator is taken to have consented to have consented to the residential tenancy concerned on the making of an order under subsection (3)(a).

- 19 Section 179 of the RV Act provides:

179 Legal ability to sublet

(1) For the purposes of this Division and despite the termination of the resident's residence contract, a resident referred to in section 7(1)(c) is taken to possess a legal estate in his or her residential premises in the village such as to enable the resident to lease the premises to another person under a residential tenancy agreement.

(2) The resident ceases to possess that estate on completion of the sale of the premises.

- 20 In this respect section 7(1)(c) of the RV Act provides:

7 Meaning of "registered interest holder"

(1) For the purposes of this Act, a person is the "registered interest holder" within respect to residential premises in a retirement village if:

...

(c) the person's residence contract is in the form of a registered long-term lease that includes a provision that entitles the person to at least 50% of any capital gain.

- 21 The Applicants seek an Order pursuant to section 128(a) of the RV Act that would require the Respondent to comply with Part 10 of that Act in determining the recurrent charges that are owed by the applicants. Part 10 of the Act relevantly provides:

Part 10 – Matters relating to vacation of premises

Division 1 – Preliminary

149 Application of Part

(1) This Part extends to apply in respect of a former occupant of a retirement village whose residence contract was in force immediately before the commencement of this Part, except as otherwise provided by this Part.

(2) For the purposes of this Part, a former occupant referred to in Division 4 of Part 6 is taken to have permanently vacated his or her residential premises in the retirement village on the date on which he or she died or moved out of the village, and nothing in

that Division affects any rights or obligations of the resident under this Part.

(3) This Part has effect despite the provisions of any village contract.

150 References to sale of “residential premises”

(1) ...

(2) In this Part, a reference to the sale of “residential premises” occupied under a residence contract referred to in section 7(1)(c) is taken to include a reference to the sale of the residence right in respect of the premises.

(3) ..

Division 2 – Recurrent charges

...

152 Recurrent charges in respect of general services: registered interest holders

(1) This section applies to a former occupant of residential premises in a retirement village who is a registered interest holder in respect of the premises.

(2) Subject to sub-section (3), the former occupant's liability to pay recurrent charges (being recurrent charges in respect of general services) that arise after the former occupant permanently vacated the residential premises ceases on:

(a) the date on which the operator of the retirement village enters into:

(i) a village contract with an incoming resident, or

(ii) a residential tenancy agreement with an incoming tenant

in relation to the premises, or

(b) the date on which a person takes up residence in the premises with the consent of the operator, or

(c) if the operator buys the premises from the former occupant – the date on which contracts for the purchase are exchanged, or

(d) if the former occupant is a person referred to in section 7(1)(c):

(i) if the Tribunal terminated the residence contract – the date on which the former occupant permanently vacated the premises, or

(ii) if the former occupant permanently vacated the premises after receiving notice of the operator's intention to apply to the Tribunal for an order terminating the residence contract – the date on which the former occupant permanently vacated the premises,

whichever date occurs first, unless the contract between the former occupant and the operator provides for an earlier cessation of that liability.

(3) The former occupant's liability to pay recurrent charges (being recurrent charges in respect of general services) that arise after the former occupant has permanently vacated the residential premises is to be met:

(a) in respect of a liability arising during the 42 days immediately after the former occupant permanently vacated the premises – by the former occupant, and

(b) in respect of a liability arising after the period referred to in paragraph (a) – by the former occupant and the operator if the retirement village in the same proportions as the former occupant and the operator of the retirement village would share any capital gain under the village contract.

...

154 Time of payment of recurrent charges

(1) A former occupant may, at his or her option, either

(a) discharge (either wholly or in part) as the liability arises his or her liability for the recurrent charges that arise after the former occupant permanently vacated the residential premises, or

(b) discharge that liability (either wholly or in part):

(i) in the case of a former occupant who is a registered interest holder (other than a person referred to in section 7(1)(c) in respect of the residential premises concerned – from the proceeds of the sale of the premises, or

(ii) in any other case – from the money payable to the former occupant by the operator of the retirement village under any village contract.

(2) The former occupant must notify the operator of the retirement village in writing of the option chosen as soon as practicable after permanently vacating the premises.

- 22 The Applicants seek an Order from the Tribunal pursuant to section 161(1) of the RV Act that would reduce or waive the departure fees claimed by the Respondent to be due on the sale of the Lease of Unit 48. Section 161 of the RV Act is in the following terms:

161 Reduction or waiver of departure fee

(1) The Tribunal may, on the application of a former occupant whose village contract providing for the payment of a departure fee was in force before the commencement of this section, make an order reducing or waiving the former occupant's liability for such part of the departure fee as is calculated in respect of a period after the former occupant has permanently vacated the residential premises concerned.

(2) However, the Tribunal may make such an order only if the Tribunal is of the opinion that the delay in the operator's entering into a village contract with another person in respect of the premises is attributable to any action (including a failure to market or promote the premises) of the operator.

- 23 Part 10 Division 3 of the RV Act deals with departure fees due to an operator on the sale of a lease:

Division 3 – Departure fees

156 What is a “departure fee”?

(1) A “departure fee” is:

(a) any amount of money payable under a village contract by a former occupant of a retirement village that is calculated in relation to:

(i) the period, or part of the period during which the former occupant has or had a residence right in the village, and

(ii) such period after the termination of the former occupant's residence right as is specified in section 160(2), or

(b) any other money payable by a former occupant of a retirement village that is declared by the regulations to be a departure fee. Departure fees include the fees known as “deferred fees” under the 1995 *Retirement Villages Industry Code of Practice* and “deferred management fees” under the 1989 *Retirement Village Industry Code of Practice*.

(2) However, a departure fee does not include recurrent charges.

(3) A departure fee must be calculated on a daily basis.

(4) If a resident or former occupant of a retirement village moves to other residential premises in the village (or in another retirement village that is managed or controlled by the same operator or a close associate of that operator), the resident or former occupant is taken to have a continuous residence right for the purpose of the calculation of the departure fee.

157 Payment of Departure Fee

(1) Any departure fee is payable to the operator of the retirement village.

(2) Any departure fee is payable out of the former occupant's ingoing contribution.

(3) However, if the former occupant is, or was, a registered interest holder in respect of his or her residential premises in the retirement village, the departure fee is payable out of the proceeds of sale of the residential premises concerned.

(4) A departure fee is to be deducted from the amount of the refund of the ingoing contribution, or the proceeds of the sale, payable to the former occupant as specified in the relevant village contract.

158 Period for which departure fee may be charged after permanent vacation of premises: new contracts

(1) This section applies only in the case of a former occupant whose village contract providing for payment of a departure fee was entered into on or after the commencement of this section.

(2) ...

159 Period for which departure fee may be charged after permanent vacation of premises: old contracts – registered interest holders.

(1) This section applies only in the case of a former occupant:

(a) who is a registered interest holder in respect of his or her residential premises in the retirement village, and

(b) whose village contract providing for payment of a departure fee was in force before the commencement of this section.

(2) A departure fee is not payable to the extent that it is calculated in respect of a period after:

(a) the date on which the operator of the retirement village enters into:

(i) a village contract with an incoming resident, or

(ii) a residential tenancy agreement with an incoming tenant,

In relation to the premises, or

(b) the date on which a person takes up residence in the premises with the consent of the operator, or

(c) if the operator buys the premises from the former occupant – the date on which contracts for the purchase are exchanged, or

(d) if the former occupant is a person referred to in section 7(1)(c):

(i) if the Tribunal terminated the residence contract – the date on which the former occupant permanently vacated the premises, or

(ii) if the former occupant permanently vacated the premises after receiving notice of the operator's intention to apply to the Tribunal for an order terminating the residence contract – the date on which the former occupant permanently vacated the premises, whichever date occurs first, or such earlier date as the operator and former occupant may agree.

(3) Despite the other provisions of this Act, subsection (2) does not affect any provision of a village contract that provides that the departure fee is not calculable in respect of a period before a date referred to in that subsection.

24 Section 8 of the RV sets out the circumstances in which a person is taken to have “permanently vacated” residential premises for the purposes of the Act:

8. “Permanent vacation” of residential premises

For the purposes of this Act, a person is taken to have “permanently vacated” residential premises in a retirement village when:

(a) the person (or another person on behalf of the person) delivers up vacant possession of the person's residential premises to the operator of the village following the person's vacation of the premises, or

(b) the executor or administrator of the person's estate delivers up vacant possession of the person's residential premises to the operator of the village following the person's death, or

(c) the Tribunal makes an order under section 143 declaring that the person's

residential premises were abandoned by the person (and the person is taken to have permanently vacated the premises on the day specified in the order), or

(d) if the person is a registered interest holder in relation to residential premises or is taken to be a resident of the premises by the operation of section 4(2) – the person dies or moves out of the premises.

- 25 he RV Act has been amended since the parties entered into the Lease and the Residence Contract. However, pursuant to section 11, the RV Act as it now stands has retrospective effect on the issues for determination in this case.

Consideration

Does Safer Safer have a right to become a resident?

- 26 Section 4(1) of the RV Act makes it clear that a person's right to occupy residential premises in a retirement village is a right arising under a contract, relevantly to this case, being a Lease. Section 4(2)(b) of the RV Act provides that for the purposes of defining a "residence right" it does not matter, relevantly to this case, that the person who obtains the right obtains it for the purpose of allowing another person to live in the residential premises. Provided that the person who occupies the residential premises in these circumstances is a retired person and that the operator consents to that person's occupancy the person is taken to have a residence right.
- 27 Upon the death of the late Madeliene Cozma the proprietary interest in the Lease over unit 48 vested in her Estate administered by her executors. It became the "registered interest holder" within the meaning of section 7(1)(c) of the RV Act. Pursuant to section 179 of the RV Act the Estate was therefore entitled to allow another person to live in the residential premises under a sub-lease provided that the person was a "retired person" and that the operator consented to their occupancy. The Estate was also entitled to sell the Lease subject to the terms of the RV Act and the Lease and Residence Contract.
- 28 In this case the Executors have arranged for Mr Safer Safer to occupy Unit 48 without obtaining the consent of the Respondent. It does not appear that this occupancy is on the basis of a sub-lease. In his evidence, Mr Jerry Safer described the arrangement as a "try before you buy" arrangement. There is no foundation for such an arrangement in any provision of the RV Act, Lease or Residence Contract.
- 29 In any event, the Respondent has not consented to any sub-lease arrangement with Mr Safer Safer. In this respect, the Respondent contends that the Applicants have not established that Mr Safer Safer is a "qualified person" to hold a residence right within the meaning of clauses 1.1.21 and 6.5 of the Memorandum. That barrier might be readily overcome by the Applicants' provision of the required information to the Respondent to establish Mr Safer Safer's age, retired status, and medical fitness for this form of accommodation.
- 30 However, it is clear from the application and from the oral evidence given by Mr Jerry Safer and Ms Anita Cozma that there has never been any real intention for Mr Safer Safer to enter into a sub-lease in relation to Unit 48. The intention has always been the sale of the lease to him.

- 31 The Respondent objects to the sale on a number of grounds: first, because the Applicants have not established that Mr Safer Safer is a “qualified person” as defined in the Lease and Residence Contract (or “retired person” within the meaning of section 4 of the RV Act); second, because the Applicants have not complied with clause 15.2 of the Lease Memorandum by obtaining the consent of the Respondent to the assignment and paying all money due for recurrent fees; and third, because the proposed sale price of the Lease is less than its fair market value contrary to clause 19 of the Memorandum.
- 32 The Applicants seek an Order pursuant to section 82 of the RV Act that would direct the Respondent to enter into a residence contract with Mr Safer Safer within a specified period of time. The Tribunal’s power to make such an order is confined by section 81 of the RV Act. It can only so Order, in the circumstances of this case, if Mr Safer Safer is a retired person (as defined), and if he was occupying Unit 48 at the time the late Ms Madeleine Cozma died, and had been residing there for a period of at least 6 months.
- 33 Mr Jerry Safer gave oral evidence that Mr Safer Safer was over the age of 55, was retired, and was in good health, but provided no documentary evidence to prove that this was the case. However, accepting that evidence and leaving this issue to aside, it is not in any dispute that Mr Safer Safer did not at any time live at Unit 48 during Ms Madeleine Cozma’s lifetime. The Tribunal therefore has no power to make the Order sought by the Applicants. Mr Safer Safer has no right to become a resident pursuant to the provisions of section 81 of the RV Act.
- 34 Given this conclusion, the question of whether the Tribunal, in its exercise of discretion, ought to direct the Respondent to enter into a residence contract with Mr Safer Safer, in all the circumstances outlined above, does not arise.

What recurrent operating fees are due to the Respondent?

- 35 The Applicants contend that the Respondent’s entitlement to charge recurrent operating fees is limited by the terms of section 152(3)(a) of the RV Act to 42 days following the date that the late Madeleine Cozma “permanently vacated” the residential premises. The Applicants’ contention is based upon section 8(d) of the RV Act which provides, *inter alia*, that a person is taken to have “permanently vacated” residential premises in a residential village if the registered interest holder of residential premises dies.
- 36 This contention is advanced the circumstances outlined above, where the Respondent has continued to charge recurrent operating fees to the Estate from the date of the late Madeleine Cozma’s death up to the present, and no payment has been made by the Estate against these charges, with the result that as at 22 June 2016 the Respondent contends that the recurrent fees owed to it by the Estate are \$110,011.25. If the Applicants are correct in their contentions the liability of the Estate is limited to 42 days at the daily rate of \$26.00 in the total amount of \$1,092.00.
- 37 The Applicants’ contention that the Estate’s liability for recurrent fees is limited to 42

days is misconceived because it is based upon the failure to read the conjunctive *and* between subsections 152(3)(a) and (b) and to apply the terms of subsection 152(3)(b). Subsection 152(3)(b) provides, in the circumstances of this case, that the Estate's liability for the payment of recurrent operating fees continues after the 42 day period in the same proportion as the Estate and the Respondent would share any capital gain on the sale of the Lease.

- 38 Clause 17 of the Residence Contract provides that any capital gain is not to be shared between the Estate and the Respondent but is to be solely to the account of the Estate. That is to say, the Estate is entitled to 100% of any capital gain on the sale of the Lease.
- 39 It follows from this that the Estate remains liable upon expiry of the 42 day period following the death of the late Madeliene Cozma for the payment of recurrent at the whole applicable rate rather than at any apportioned rate between the Estate and the Respondent.
- 40 Consequently, the Applicants have not demonstrated any failure of the Respondent to comply with section 152 of the RV Act. No order requiring such compliance is warranted.

Should the Tribunal waive or reduce the departure fees claimed by the Respondent?

- 41 The Applicants seek an order from the Tribunal pursuant to section 161 of the RV Act reducing or waiving the departure fees claimed by the Respondent on the basis that the Respondent, itself and through its related entity, Milstern Retirement Unit Sales Pty Ltd failed to effectively market and promote the sale of Unit 48 after its appointment as agent in July 2006, and on the basis that representatives of the Respondent failed to cooperate with and obstructed the efforts of Raine and Horne to market and promote the property when the Applicants appointed it agent for the sale of the Lease in September 2011.
- 42 The Applicants contend, in effect, that Milstern Retirement Unit Sales Pty Ltd had a conflict of interest between its fiduciary duty to them as agent for the sale and the financial interests of the principal of its group, the Respondent, because the longer the Lease on Unit 48 remained unsold the higher would be the percentage of departure fees payable to the Respondent.
- 43 The Applicants also contend, in effect, that the Respondent's insistence that the market value of the Lease is \$210,000.00 in circumstances where the Lease has not sold at or near that price for a period of 10 years, and in circumstances where no serious interest has been expressed at that price over this period, has prevented the sale of the Lease at its actual market value. They say, in effect, that Milstern Retirement Village Sales Pty Ltd, contrary to its fiduciary duty to them as agent, and the Respondent, have maintained and promoted an over-valuation of the Lease because this served the broader commercial interests of the Respondent.
- 44 I find the Applicants' contentions in this aspect of their claim quite compelling. On the

evidence before me, it is manifest that little if any effort was made by Milstern Retirement Unit Sales Pty Ltd to market and promote the sale of the Lease following its appointment in July 2006. It does not appear from the evidence that this agency agreement has ever been terminated by either party. The Respondent was clearly on notice that the Applicants impugned the conduct of that agency, and the principal of its group (the Respondent) in marketing and promoting the sale of the Lease. However, no evidence whatsoever has been adduced by the Respondent to counter the Applicants claims. There is in evidence the Estimate of Exit Entitlement prepared by Meridien Retirement Living dated 30 April 2010 apparently in relation to a prospective sale of the Lease at that time for \$90,000.00. However, the evidence does not establish that even this prospective sale was secured by Milstern Retirement Unit Sales Pty Ltd. Even if it had been, it appears to have been the only serious prospect of sale of the Lease in the (then) almost four years since that agency's appointment.

- 45 It also appears on the evidence before me that representatives of the Respondent did not reasonably cooperate with Raine and Horne when that agency was appointed by the Applicants to sell the Lease in 2011. The Applicants had a non-exclusive agency agreement with Milstern Retirement Unit Sales Pty Ltd.
- 46 It is clear in the evidence that the Respondents representatives initially demanded that the Applicants give the Respondent "vacant possession" as a precondition to the Respondent's cooperation with Raine and Horne. There was no basis for such a demand. The Applicants were and are the registered interest holder in the Lease. They continue to have a right to possession of Unit 48 up to the date the Lease is assigned to a purchaser.
- 47 The Respondents officers also initially demanded that the Applicants pay all recurrent fees then owed as a precondition to the Respondent recognising the appointment of, and cooperating with, Raine and Horne as agent for the sale of Unit 48. For the reasons set out above, it is clear that the Estate was in substantial debt to the Respondent in relation to recurrent operating fees due at the time Raine and Horne was appointed. However, I cannot see how that fact has any bearing on the appointment of Raine and Horne for the sale of the Lease. It did not give rise to any right in the Respondent to inhibit or prevent Raine and Horne from marketing and promoting the sale of the Lease.
- 48 It also appears to me to have been unreasonable for the Respondent to refuse to accept, without receiving direct advice to this effect from the Applicants, that Raine and Horne had been appointed agent for the sale of the Lease in circumstances where Raine and Horne had a Managing Agency Agreement signed by the Applicants which evidenced that fact.
- 49 I am satisfied that the conduct of the Respondent's representatives in these respects had the colour of an hostility to the external agent being appointed for the sale of the Lease. I find that this did inhibit efforts to secure a sale of the Lease. Notwithstanding these observations I also take account of the fact that after a period of disputation, the

length of which is not apparent in the evidence, the Respondent's officers did ultimately cooperate with Raine and Horne, although the extent to which they did this remains in hot dispute between the parties.

- 50 There is no satisfactory evidence before me of the actual market value of the Lease. The Respondent contends that the market value was in 2006 and has been at all times since up to the present \$210,000.00. That is a puzzling proposition. At the least, it appears to me unusual that there would be no movement in the value of the Lease over a 10 year period. By contrast, the Applicants contend that the Lease only has a nominal value. While it does appear to me there is significant artifice associated with their attempt to sell the Lease to Mr Safer Safer for the price of \$1,000.00, the Applicants also evince what I accept to be genuine despair and distress at their inability to secure the sale of the Lease even at a price less than half of what the Respondent contends to be its value (the prospective sale for \$90,000.00 in 2010).
- 51 The Respondent has tendered into evidence a sales report listing recent sales at Strathfield Gardens. It is submitted that this sales report provides evidence to support the Respondent's proposition that the Lease has a value of \$210,000.00. What it does not explain, if that assertion is correct, is why the Lease had not been sold at or near that price for a period of more than 10 years.
- 52 I am unable on the evidence before me to make any finding in relation to the realistic market value of the Lease. However, I do find that the Respondent has not established with satisfactory evidence, such as an independent valuation as contemplated by clause 19 of the Memorandum, that its value since 2006 up to the present was and is \$210,000.00. I also find that the Applicants have not been able to sell the Lease at that price or any other price for a period of ten years despite having appointed the Respondent's related entity Milstern Retirement Unit Sales Pty Ltd agent for the sale in 2006 and Raine and Horne agent for the sale in 2011.
- 53 The Respondent's entitlement to departure fees is set out in clause 17 of the Memorandum and clause 15 of the Residence Contract. Those provisions rest on Part 10 Division 3 of the RV Act. According to the clause 17 of the Memorandum and Clause 15 of the Residence Contract the Respondent is now entitled to 25% of the sale price of the Lease plus GST, the Lease now having been on foot for a period of more than eight years.
- 54 The Tribunal's power pursuant to section 161 of the RV Act to order a reduction or waiver in the liability for departure fees of a former occupant who has "permanently vacated" residential premises does not appear, in its terms, to vest only on the sale of the Lease. It appears to me the Tribunal has the power to make such an order prior to the sale of a Lease.
- 55 In the circumstances outlined above I find pursuant to subsection 161(2) that the delay in the Respondent entering into a Residence Contract with another person in respect of Unit 48 is substantially attributable to its failure both as principal and through its related entity Milstern Retirement Unit Sales Pty Ltd to effectively market and promote the sale

of the Lease from the time of Milstern Retirement Unit Sales Pty Ltd appointment as agent for the sale in July 2006 up to the present, the Respondent's failure to reasonably cooperate with Raine and Horne when it was appointed agent for the sale of the Lease in September 2011, and the failure of the Respondent to establish on an objective basis a realistic market value for the Lease.

- 56 Having made this finding I order that upon the sale of the Lease the departure fees owed to the Respondent by the Estate be limited to 10% of the sale price plus GST, being the percentage of the sale price the Respondent would have been entitled to in the circumstances of this case had the Lease been sold within one year of the late Madeleine Cozma "permanently vacating" Unit 48 by reason of her death. I conclude that this one year period was a sufficient time in which the Respondent and its related entity Milstern Retirement Unit Sales Pty Ltd ought to have secured a sale of the Lease had they been acting with due care and diligence and on the basis of a realistic market value for the Lease (whatever that may have been at the time).

Conclusions

- 57 It follows from these findings and reasons that the Applicants are entitled to an Order pursuant to section 161 of the RV Act reducing the departure fees the Estate will be liable to pay on the sale of the lease from 25% of the sale price plus GST to 10% of the sale price plus GST. The Application must otherwise be dismissed on the basis that it is misconceived.

P French

General Member

Civil and Administrative Tribunal of New South Wales

10 August 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: 22 September 2016