Civil and Administrative Tribunal
New South Wales

Amendment notes

Medium Neutral Citation:	**The Residents Committee of the Landings v Sakkara Investment Holdings Pty Ltd T/As Sakkara Landings Trust [2015] NSWCATCD 113**
Hearing dates:	25 June 2015
Decision date:	03 September 2015
Jurisdiction:	Consumer and Commercial Division
Before:	A P Coleman SC, Senior Member
Decision:	1 Order that within 21 days from the date of these orders, the respondent pay into the Village Operating Account the sum of $1,338.00 representing the cost of the purchase of new fly screens. 2 Order that within 21 days of the date of these orders the respondent pay to each of the 220 eligible residents the sum of $135.52 by way of refund of overcharged recurrent charges. 3 Order that within 21 days of the date of these orders, the respondent provide to the applicant a statement of financial position (balance sheet) for FY14 the accounts. 4 Order that within 21 days of the date of these orders the respondent have prepared an audited report of the FY14 accounts to take account of the net surplus of $65,717.00 as disclosed in the final audit reports of the accounts of FY12 and FY 13 dated 16 March 2015 and that the respondent bear the cost of such report and if that report shows a deficit order that within 7 days of receipt of that report, the respondent make good any such deficit. If the report discloses a surplus, the surplus is to be dealt with in accordance with s 120B of the RV Act. 5 Order that the respondent withdraw all invoices issued by it in May 2015 to any resident, past or present, seeking to recover additional recurrent charges as a result of the audit reports of the accounts for FY12 and FY13 dated 16 March 2015 and that the respondent not issue to any other resident any invoice for recurrent charges for those years. 6 Order that within 7 days of the date of these orders the respondent repay to any resident, past or present, any amount paid by such resident purportedly in compliance with any invoice referred to in order 5 above.

7 The application otherwise be dismissed.

8 No order as to costs.

Catchwords:	RETIREMENT VILLAGES: recurrent charges: overpayment and refund. Accounts: effect of final audit to possible challenge of accounts. Capital maintenance and capital expense.
Legislation Cited:	Civil and Administrative Tribunal Act (NSW) 2013 Retirement Villages Act, (NSW) 1999 Retirement Villages Regulation, (NSW) 2009
Cases Cited:	Alloura Waters Retirement Village Residents Committee v Living Choice Australia Pty Ltd [2014] NSWCATCD 68 Bull v A-G (NSW) (1913) 17 CLR 370 at 384. Smith v Sakkara Investment Holdings Pty Ltd 2011] NSWCTTT 162 Sakarra Investment Holdings v The Residents Committee, The Landings [2103] NSWCTTT 263 Sakkara Investment Holdings Pty Ltd as trustee for Sakkara Landings Trust v The Residents Committee, the Landings and the Consumer Trader and Tenancy Tribunal of New South Wales [2014] NSWSC 610
Category:	Principal judgment
Parties:	The Residents Committee of the Landings (applicants) Sakkara Investment Holdings Pty Ltd t/as Sakkara Landings Trust (respondent)
Representation:	Solicitors: Mr Hill, Hill & Co Lawyers (for applicants) Mr Koumoukelis, Gadens Lawyers (for respondent)
File Number(s):	RV 14/57001
Publication restriction:	Nil

REASONS FOR DECISION

Overview of the Proceedings

1 The Landings is a retirement village situated on the upper North Shore of Sydney at 440 Bobbin Head Road, Turramurra North, New South Wales. It consists of 220 leased dwellings occupied by approximately 330 residents. The residents enter into registered leases for their lifetimes. The village was originally established by the RAAF Association as a not for profit organisation. It was sold to the present owner, the respondent, in 2009.

2 The leases of residences in and operation of the retirement village are subject to the provisions of the *Retirement Villages Act, 1999 (NSW)* (the RV Act) and the *Retirement*

Villages Regulation, 2009 (NSW) (the RV Regulation). The statutory scheme governing the operation of retirement villages such as the Landings provides mechanisms for the resolution of disputes between residents and operators. It also recognises the financial commitment and potential financial exposures of the residents. It provides for the payment by residents of certain defined categories of expenditure that can only be spent by the operators for specified purposes. It will be necessary to set out some specific provisions of the RV Act below.

3 The Residents Committee has standing to bring an application to the Tribunal on behalf of the residents at the request of one or more of the residents of the village: *RV Regulation cl 39(1).* By cl 39(2) of those regulations, the Residents Committee may apply on behalf of all residents for an order that a resident may apply for if the residents consent to the application. I have before me [1] , evidence of a resolution passed at the Residents Meeting on 18 November 2014 authorising the Residents Committee to file and prosecute these proceedings as applicant.

4 The present dispute is not the first between the applicant and the respondent in respect to the operation of the retirement village. There have been several previous applications heard and determined by the Tribunal. It is not necessary for me to here set out the complete history of the disputes between the parties, or all of the previous orders made by the Tribunal. Some are relevant to the issues presently before me, and some are not. In so far as is necessary I will refer to the previous reasons or orders of the Tribunal below.

5 The present dispute, as it was crystallised at the hearing on 25 June 2015, involves 5 issues to be determined. At the hearing, the applicants were represented by Mr Hill, solicitor. He has also apparently assisted in the preparation of the written submissions which have been signed by Mr Burgess, the chairman of the Residents Committee. The respondent was represented by Mr Koumoukelis, solicitor. Each party read affidavits and tendered documentary material.

6 The applicant relied on Points of Claim dated 10 April 2015. The following affidavits were read:

(1) Affidavit of Andrew Richard Burgess sworn 10 April 2015;

(2) Affidavit of Graham Francis Laurance sworn 10 April 2015; and

(3) Affidavit of Neil Leybourne Smith sworn 10 April 2015.

7 In addition, the applicant tendered a folder of material comprising documentary evidence which was marked Exhibit A. Included in that Exhibit was a document which purported to be an expert report of a Mr McClelland of Bishop Collins Audit Pty Ltd. The report did not comply with the Tribunal's Practice Note regarding expert reports. It was not dated and did not have the usual acknowledgment by the expert of his obligations to the Tribunal as an expert witness. Mr McClelland, however, made that acknowledgement when he gave evidence. The Tribunal is not bound by the rules of evidence and its proceedings are to be conducted with as little formality as is practical. Over the objection of the respondent, I allowed the report into evidence but indicated

that what weight it was given would be a matter for the Tribunal following consideration of all of the material and submissions.

8 The respondent read the following affidavits:

(a) Affidavit Suzanne Carmel Lawrence sworn 31 March 2015; and

(b) Affidavit of Gordon Cupit sworn 1 April 2015.

9 The respondent also tendered a folder of material that was marked as Exhibit 1.

10 Several of the deponents were cross-examined. At the conclusion of the hearing, I made directions for the filing and service of submissions. Each party has availed themselves of that opportunity and I have received and considered the following:

(a) Applicants' Submissions dated 9 July 2015 signed by Mr Burgess, the Residents' Committee Chairman;

(b) Respondent's Submissions in Reply dated 23 July 2015; and

(c) Applicant's Response to Respondent's Submissions in Reply filed 28 July 2015.

11 The parties also provided additional copies of the affidavit material and exhibits to assist the Tribunal in writing these reasons. I am grateful for the co-operation of the parties in doing so.

The Issues to be determined

12 As I have observed, despite the apparent breadth of the Points of Claim document, at the hearing the issues to be determined were distilled into 5 issues. They are (following the order in the applicant's submissions):

(1) Re-imbursement of Recurrent Charges used for replacement of capital items;

(2) Re-imbursement of Salary of village manager spent on village defect and rectification works and other tasks;

(3) Re-imbursement of Recurrent Charges for extra utility expenses in the FY14 amended budget;

(4) Provision by the respondent to the applicant of a Statement of Financial Position (Balance Sheet) for the FY14; and

(5) Make good of accrued deficits in the FY14 accounts.

Some Preliminary points

13 Before I move to deal with the 5 issues, it is necessary to deal with some matters raised by the respondent in its written submissions.

14 The respondent makes a general submission [2] that the applicant must fail as the application is fundamentally flawed as it "does not rely on any specific provision of the Act in support of any of the orders seeking refunds of money" and "absent a statutory basis for seeking payment the application should be rejected" as…"it is not for the Respondent to guess or surmise the powers available…to seek the orders in the Application." I reject this submission. The applicant has adequately identified the provisions of the RV Act and RV Regulation that it says the respondent has breached,

or that are relevant to the conduct of the respondent that it seeks to impugn. This was done during the hearing and has been done in the written submissions of the applicant. I do not think it can be fairly said that the respondent is left guessing at the legislative provisions it is said to have contravened.

15 The respondent also submits that it is wrong to speak of, and I interpolate order, refunds to residents of expenditure incorrectly used or allocated by the operator. Whether the word used is repayment or refund, I do not think the difference in that terminology matters. Cleary power lies with the Tribunal to make such orders.

16 The RV Act specifically contemplates applications to the Tribunal where there are disputes between residents and operators of retirement villages subject to the Act. Section 122 of the RV Act gives a resident, or residents, the right to make a direct application to the Tribunal who claims that a dispute has arisen between the resident(s) and the operator. The jurisdiction of the Tribunal is set out in s 123 of the RV Act. That section provides:

> **123 Jurisdiction of Tribunal**
>
> (1) A resident of a retirement village may apply directly to the Tribunal for an order in relation to any village contract (being a contract to which the resident is a party) that the resident considers to be harsh, oppressive, unconscionable or unjust.
>
> (2) The Tribunal has, and may exercise:
>
> (a) jurisdiction to determine any application made to it under this section, and
>
> (b) (Repealed)
>
> (c) the same jurisdiction as the Supreme Court, and all the powers and authority of the Supreme Court, in proceedings in which relief under the Contracts Review Act 1980 is sought in relation to a contract between an operator of a retirement village and a resident of the village.
>
> **Note.** Under the Contracts Review Act 1980, the Supreme Court may (among other things) refuse to enforce any or all of the provisions of the contract concerned or make an order declaring the contract void (in whole or in part) or varying (in whole or in part) any provision of the contract. It may also make orders with respect to any consequential or related matter, such as orders for the payment of money (whether or not by way of compensation) to a party to the contract and orders for the supply of services.
>
> (3) This section does not authorise the Tribunal to exercise the powers conferred by section 10 of the Contracts Review Act 1980.
>
> Note. Section 10 of the Contracts Review Act 1980 allows the Supreme Court, in certain circumstances, to prescribe or otherwise restrict the terms on which certain persons may enter into contracts of a specified class.
>
> (4) This section does not affect any jurisdiction of the Supreme Court under the Contracts Review Act 1980 in relation to contracts between operators and residents of retirement villages.

17 The powers of the Tribunal to make orders in respect to disputes between residents and operators are set out in Division 3 of the RV Act as follows:

> **126 Ancillary orders**
>
> (1) (Repealed)
>
> (2) The power to make orders conferred on the Tribunal by or under this Act includes the power to make orders ancillary to those orders.
>
> **127 No monetary limit on jurisdiction of Tribunal**

> Despite any other law, the Tribunal is not, in exercising the jurisdiction conferred on it by this Act, limited in the amount of money that it may order to be paid.
>
> **128 Order of Tribunal**
>
> (1) The Tribunal may, on application by a resident (or residents) or an operator under this Act, make one or more of the following orders:
>
> (a) an order directing the resident (or residents) or operator to comply with a requirement of this Act or the regulations,
>
> (b) an order that varies or sets aside a provision of a village contract that conflicts with this Act or the regulations,
>
> (c) an order that:
>
> (i) restrains any action in breach of any village contract or village rule, or
>
> (ii) requires the performance of any village contract or village rule,
>
> (d) an order directing the resident (or residents) or operator to perform such work or take such other steps as the order specifies to remedy a breach of a village contract or village rule,
>
> (e) an order for the payment of an amount of money,
>
> (f) an order for compensation,
>
> (g) an order that requires payment to the Tribunal of all or part of any recurrent charges payable by a resident (or residents) to the operator until the whole or part of any village contract has been performed or any application for compensation has been determined,
>
> (h) an order that requires payment (out of recurrent charges paid to the Tribunal) towards the cost of remedying a breach of a contract or towards the cost of any compensation,
>
> (i), (j) (Repealed)
>
> (k) in the case of an application in relation to any other dispute made by a resident (or residents) or an operator of a retirement village that is subject to a community land scheme and with the concurrence of the other party to the dispute—any order that the Tribunal may make under the Community Land Management Act 1989 to determine the dispute,
>
> (k1) in the case of an application in relation to any other dispute made by a resident (or residents) or an operator of a retirement village that is subject to a strata scheme and with the concurrence of the other party to the dispute—any order that the Tribunal may make under the Strata Schemes Management Act 1996 to determine the dispute,
>
> (l) any other order prescribed by the regulations for the purposes of this section.
>
> (2) Nothing in this section limits the orders that the Tribunal may make under this Act.

18 As can be seen, the powers of the Tribunal under the RV Act are extremely broad. They include an order for the payment of money or for compensation. In so far as the respondent submits that there is no power for the Tribunal to order the operator to "refund" an amount of money improperly charged to the residents [3] , I reject that submission. The powers of the Tribunal are broad enough to order a payment, by way of refund, to a resident or residents if they have been improperly charged or overcharged an amount by an operator. Indeed, if the basis for relief is otherwise established, s 109 of the RV Act specifically provides for orders that an operator refund overpaid recurrent charges on any grounds and s 116(4) expressly provides for a refund of recurrent charges expended other than in accordance with the approved budget of the retirement village.

19 Whilst I accept, as a general statement, that it may be in some circumstances

"incorrect" for the Tribunal to "reject an item of expenditure that has been funded and to then require the operator to *again* pay for the item of expenditure" [4] (my emphasis), I do not think that ordering the repayment of an amount of expenditure incorrectly paid from recurrent charges would be improper or incorrect. For example, if an item of expenditure was incorrectly funded as a recurrent charge (and thus paid for by the residents) and the operator used the money raised to pay for an item which should have been borne by the operator from its own funds, I see no barrier to ordering the operator to repay that amount of expenditure into the recurrent charges account or operational account. Such a repayment would mean that there would be restitution to the residents' recurrent charges account and the operator would be funding that expenditure that it otherwise ought to have funded from its own money.

20 There is one final general matter to be dealt with before I move on to deal with the 5 issues for determination. That is the submissions by the respondent made at the hearing and repeated in its written submissions about the effect and finality of the audit of the operator's annual accounts. For example, in respect to the claim by the residents that the sum of $17,540 should be refunded as it amounts to replacement of capital items (issue 1), the respondent submits that because the matters dealing with the expenditure on maintenance issues have been considered by the auditor, the matter is final and concluded [5] . The respondent contended that the structure of the RV Act was such that once the annual budget is prepared and approved (or varied and approved), expenditure is incurred in accordance with that budget and the accounts of the operator are thereafter audited on an annual basis. It submitted that the audited accounts are conclusive of the matters contained in them and could not be challenged.

21 I reject that submission. I do not accept that once the accounts of an operator are audited, there can be no challenge to them. As an example, assume a situation where the residents are supplied accounts by the operator that show an amount charged as capital maintenance which, in fact, ought to have been charged as a capital expense. Assume the auditor accepts, wrongly as a matter of law or accounting practice or because of incorrect information provided by the operator, that the amount was properly charged as maintenance. In such a situation, it seems to me, it is plainly open to the residents to challenge that expenditure, despite it being reflected in the final audited accounts. If, in this example, the residents can otherwise discharge the burden of proof to show that the amount ought be charged as a capital amount, then they are entitled to appropriate relief. It may be that because the accounts have been audited that there would need to be cogent proof that the amount was incorrectly expended, but the mere fact that the accounts have been audited does not prevent them being challenged by the residents. There is nothing in the structure of the RV Act that would lead to such a conclusion.

22 Having dealt with those preliminary points, I will now deal with each issue, the evidence in support and the parties' respective submissions. I will use the order of issues as set out in the applicant's submissions. As there is a slight difference to the order of the

issues in the respondent's submissions (the last two issues being swapped in order), I will cross-reference the issues using the name adopted by the respondent in its submissions.

Issue 1: Re-imbursement of Recurrent Charges used for replacement of capital items

The nature of the claim

23 The respondent refers to this issue as the "Refund Maintenance Costs Claim". The claim by the applicant here is that the residents have paid, from their contributed funds, the sum of $17,540 of maintenance costs that are, in fact, the responsibility of the respondent to pay.

24 The applicant contends that residents' funds have been used to pay for replacements of major and "discrete" parts installed mainly into air conditioning units in residents' leased dwellings to restore them to working condition.

The applicant's submissions and evidence

25 In support of this claim, the applicant refers to the draft audit report for FY14 prepared by Mann Judd, the then auditors of the operator (see Tab 12 Exhibit A). In that report, Mann Judd had identified a list of items deemed to be of a capital expenditure. A list of these items had been provided to the village manager of the respondent and to the Residents Committee. By referencing these invoices (see Tabs 19 & 20 of Exhibit A) the applicant submits that the amount of $17,540 refers to these capital amounts.

26 The applicant contends that following the circulation of the draft accounts, the respondent provided residents with a final audit prepared by Mann Judd. This final audit had been prepared after communications between the respondent's solicitor and the auditors and the requirement that the auditors sign a confidentiality agreement. The final audit made no mention of the matters raised by Mann Judd in its draft report of the list of items that were thought to be capital expenditure.

27 The applicant referred to previous decisions of the Tribunal, which considered whether an item is a "discrete" item such that it would be capital expenditure and thus the responsibility of the respondent. Those decisions are *Smith v Sakkara Investment Holdings Pty Ltd* 2011] NSWCTTT 162 and *Sakarra Investment Holdings v The Residents Committee, The Landings* [2103] NSWCTTT 263.

28 In the former case, Member Meadows, as the Senior Member then was, said:

> "The items therein are complete in themselves and, I'm further, I purchased separate items and essentially "plug-in" to the system. By analogy, the process appears to me to be similar to, for example, replacing a power amplifier in a high-five system. The system won't work without the power amplifier and to that extent it is part of the system, yet in my opinion that is a matter of capital replacement. If the replacement was of a part of a discrete item, such as a transitional or a switch or something similar, that would, in my opinion, be capital maintenance. I find in this instance, that the replacement of the hubs or receivers to be capital replacement and therefore the liability not of the residents but of the operator".

29 In the latter case, Senior Member Bordon referred to the relevant provisions of the RV

Act and previous decisions of the Tribunal, including that just referred to, and noted that the test of whether an item is either a discrete system or part of a discrete system, whilst in some instances is a good guide, was not always easy to apply or determine. In that case Senior Member Bordon held that the replacement of two new electronic circuit boards into different hot water systems and a logic board and other parts were clearly capital replacement items. He held that each were separate and discrete items. He held that air conditioning pipework which required replacement of 36 m of wire was so substantial that it did not fall within capital maintenance. In those circumstances, he ordered the operator to refund the amounts charged to the residents for those items.

30 The applicant says that in this case, because the draft audit report listed the items as potentially being classed as capital and as there was no explanation in the final audit report as to why these items were not capital, the Tribunal should infer that they are and the amounts should be paid back into the village operating account.

The respondent's submissions and evidence

31 The respondent submits that the Refund Maintenance Costs Claim should be rejected. It accepts that the items comprising the relevant expenditure are listed at p 105 of Exhibit A (Tab 19). It says those items comprise 5 items of air conditioning maintenance items and invoices, purchase of fly screens and maintenance done on optic receivers, amplifiers, and balancing and testing of those items. It refers to correspondence passing between the auditors, the applicants and the respondent in relation to the draft audit and, in particular, the list of items noted to be possible maintenance items. The respondent says that following the provision of certain information to the auditors, the revised draft report sent by email dated 31 October 2014 (see annexure M to the affidavit of Ms Lawrence) Mann Judd accepted that the items were expended as capital maintenance.

32 The respondent submits that as the applicant provided no evidence from any lay or expert witness as to the characterisation of the expenditure, did not call or bring any evidence from the auditor and has had the opportunity to challenge the veracity of the auditor's decision, the view taken by the auditor should be final.

33 The respondent referred to *Alloura Waters Retirement Village Residents Committee v Living Choice Australia Pty Ltd* [2014] NSWCATCD 68 in support of its submissions. It said that applying the principles in that case, the applicant has not discharged the onus to establish that the amounts charge were not properly payable from the recurrent charges account.

Decision on Issue 1

34 In the *Alloura Waters* decision, Member Charles undertook a thorough and, may I respectfully say, cogent analysis of the relevant provisions of the RV Act and RV Regulation, particularly in respect to items of capital maintenance and capital replacement. I gratefully adopt the Member's discussion of the legislative provisions at

[83]-[95] as follows:

Statement of Principles as regards differentiation of capital maintenance items and capital replacement items in retirement village financial reports

83 Before analysing the specific item C, D and E matters as listed on the applicant's Claims Schedule, it is necessary to outline the legal principles which should guide and inform the Tribunal in making determinations as to whether items of capital are capital maintenance items or capital replacement items.

84 Residents of a retirement village bear the financial burden (via the capital works fund and/or recurrent charges) for capital maintenance items; whereas an operator of a retirement village is responsible for capital replacement items. This is apt to create tension between residents seeking to displace their obligation to pay any part of maintenance and an operator seeking to respond to matters arising from the operation of a village from time to time and to maintain the village.

85 The definition of "capital maintenance" (s 4(1) RVA) refers to "works carried out for the purpose of repairing or maintaining ..." (emphasis added). Apart from the definition in s 4(1), reg 5(1)(b) of the RVR offers further elucidation of the meaning of "capital replacement" by indicating that: "(i) work done to substantially improve an item of capital beyond its original condition, (ii) work done to maintain or repair an item of capital in circumstances where it would have been more cost effective to replace the item of capital" (emphasis added) will not constitute capital maintenance.

86 In Smith v Sakkara Investment Holding Pty Ltd [2011] CTTT 162 (20 August 2011) Senior Member G Meadows, after noting that the legislation does not define 'replace', 'repair', 'maintain' or 'improve' in the context of capital maintenance and capital replacement, said he was required to consider what is the normal or everyday meaning of those terms. I respectfully agree.

87 According to Osborn's Concise Law Dictionary 8th edition, 'repair' is defined as:

"the making good of defects in property which has deteriorated from its original state. The work required may involve curing defects arising from defective design or construction of the building, but it must fall short of effectively reconstructing the premises or improving them."

Similarly, 'replacement' is defined in the Concise Oxford Dictionary, 6th Edition as: "replacing or being replaced; person or thing that takes the place of another". On the other hand, the ordinary meaning of 'improvement' according to that Dictionary is: "improving or being improved; the addition or alteration that adds to value".

88 A repair involves restoring the efficiency of function of the property without changing its character and may include restoration to its former appearance, form, state or condition. A repair replaces something or corrects something that is already there and has become worn out and dilapidated by ordinary wear and tear, by accidental or deliberate damage, or by the operation of natural causes. A minor incidental degree of improvement, addition or alteration may be done to property and still constitute a repair; however, if the work amounts to substantial improvement, addition or alteration it will be capital replacement: as Senior Member Meadows observed in Smith v Sakkara, supra, a new door is capital replacement but fixing the mesh and preserving the insect repellent function of the door is capital maintenance.

89 I am also satisfied that the facts matters and circumstances bearing upon, or relating to, 'repairs and maintenance', and not only 'repairs', are to be considered for the Tribunal's enquiry as to whether or not there is a capital maintenance item for the purposes of the legislation. To proceed otherwise is at odds with the intent of the legislation which expressly refers to 'repairs and maintenance'.

90 It necessarily follows, in my opinion, that in adverting to whether there is a capital maintenance item, the Tribunal must apply the word 'maintenance' separately from the word 'repair'; that is, both words are not to be applied interchangeably to the characterisation of a capital maintenance item as the applicant submits. The Oxford paperback dictionary definition of 'maintain' is: "1. To cause to continue, to keep in existence; 2. To keep in repair, 'the house is well maintained'". Similarly the definition of 'maintenance' is the noun defined as: "1. Maintaining, being maintained; 2. Keeping equipment etc. in repair".

> 91 Accordingly, to maintain an item of capital in a retirement village is not necessarily the same thing as to repair it. Maintenance is work done to keep an item of equipment functioning efficiently or to extend its economic life by enhancing or improving it. Ordinarily 'maintenance' involves repair work which is performed to prevent defects' damage or deterioration; but in some contexts including in the context of a retirement village, 'maintenance' may take on a wider meaning that includes repairing as well as other operations which are apt to enhance an item of capital. So long as the work done does not substantially improve the item of capital beyond its original condition it is to be treated as a capital maintenance item and not a capital replacement item: see, for example, Carey Bay Retirement Village Residents Committee v Anglican Care (Retirement Villages) [2011] NSWCTTT 497 (24 October 2011), where Senior Member R Connolly (at paragraph 21) found that the costs incurred in the labour and materials for obtaining and replacing a defective WC Cistern improved an item of capital beyond its original condition and that it must therefore be treated as a capital replacement item.
>
> 92 When considering each of the specific Items C, D and E, which are in dispute, I must advert to both concepts of 'repair' and 'maintenance'. Put another way, I must have regard to:
>
> Whether the activity is in the nature of an action that rectifies something or does something to an item of equipment that is not functioning to bring it to its functional state (in which case it is a 'repair');
>
> Whether the activity is in the nature of an action that anticipates or prevents the further deterioration of an item of equipment or capital without enhancing or substantially improving an item beyond its original condition (in which case it is 'maintenance').
>
> 93 Both forms of expenditure are within the definition of "capital maintenance" under the legislation.
>
> 94 The respondent referred me to taxation cases which are said to be in aid of analysing the proper characterisation of a capital maintenance item and a capital replacement item in circumstances where the repair is of subsidiary components and not of the entirety of equipment. The respondent contends that such cases are authority for the proposition that the replacement of a component of an overall item of capital is not, in itself, 'capital replacement' when the item of equipment is viewed as a whole. However, I do not find these cases (where the subject matters in dispute bear upon the application of revenue legislation) of any real assistance in the application of the RVA and the RVR, which is, as referred to above, consumer protection legislation for the residents of retirement villages. I prefer the common sense and purposive approach followed in Tribunal decisions such as Smith v Sakkara supra and Carey Bay Retirement Village v Anglican Care supra.
>
> 95 Of course, each case must be determined on its own facts, and the Tribunal must have regard to the substance, and not the form, of the transaction under review. Relevantly, in respect of some items in dispute in these proceedings, even if an invoice refers to 'replacement' of an item of capital, that circumstance, in itself, cannot be determinative of the enquiry as to proper characterisation whether capital maintenance or capital replacement. The Tribunal's enquiry is always objective and all of the factors as outlined above must be taken into account.

35 I also gratefully adopt the following passage from the Member’s reasons dealing with the approach the Tribunal should adopt in dealing with resident’s applications challenging expenditures at retirement villages:

> 134 Any resident or residents' committee of a retirement village has a legitimate right to challenge expenditure incurred by an operator to ensure that it is properly characterised and charged; however, the resident or committee must be mindful that an application rests or falls on the case as presented and the evidence provided. Mere assertions or bald statements of disagreement or non-acceptance of an Operator's budgets which are unsubstantiated by transparent and identified facts in evidence will be of little assistance to the Tribunal in determining the real issues in dispute.
>
> 135 In my view, the matters that guide and inform the Tribunal when considering applications where residents are challenging expenditure of operators, include:
>
> Whether an operator has applied the relevant provisions of the legislation in characterising items of expenditure as capital maintenance or capital replacement;

Whether an operator has allowed residents an opportunity to raise issues of concern as regards characterisation of items of expenditure during the relevant financial year via the quarterly management accounts and/or via its general communications with a resident or residents or (where applicable) a residents' committee;

If it is proved that an operator has not done so, then there is probably cause for the Tribunal to grant relief to an applicant or applicants;

Where proper process is observed by an operator and a final audit supports that process (in particular, there is credible evidence to establish compliance with s 114 and s 118 of the RVA), a residents' challenge to audited accounts must have a strong foundation of transparent and identified facts in evidence;

It is not enough for an applicant to rely upon a simple expression of disagreement as regards an accounting treatment of particular items of expenditure or even upon an invoice that refers to 'replacement' without other context to suggest it is not a capital maintenance item;

There has to be a cogent and structured argument and disagreement supported by a proper factual analysis and preferably, where accounts have been audited, an expert opinion to substantiate a challenge that the accounts do not at least in respect of the items of expenditure that are challenged, provide a true and fair view in accordance with an operator's obligations under the retirement villages' legislation.

136 In this application, I accept without reservation that the applicant was, genuinely, in doubt as to the principles to be applied in demarcation of items of capital as maintenance or replacement, and that this was a material consideration in it pursuing this application. In my view, the principles for application by the Tribunal as regards demarcation may be summarised as follows:

Determining the proper characterisation of an item of capital and whether it is capital maintenance or capital replacement, depends on its own facts matters and circumstances;

An objective test applies to characterisation of these matters, and it is to the substance, and not to the form, of the transaction underlying the expenditure item that the Tribunal must look in making its determinations;

A statement in an invoice regarding 'replacement' is not necessarily determinative of there being a capital replacement item;

In construing the relevant statutory framework, a purposive, common sense and business efficacy approach is to be preferred, with the Tribunal always keeping in mind the benefits intended by the legislation;

The RVA and the RVR contain significant consumer protection provisions balanced by recognition of an operator's need to be able to continue its operations profitably;

In the context of consumer protection legislation, profitability cannot be the dominant consideration so that fairness to consumers is at least as dominant as a balancing consideration to be weighed in the exercise of a balanced approach: Queens Lake Village Pty Ltd v Queens Village Residents Association [2011] NSWDC 21 at [70];

In determining whether or not there is a capital maintenance item for the purposes of the legislation, the Tribunal must consider the facts matters and circumstances bearing upon, or relating, to 'repairs and maintenance', and not only 'repairs';

The Tribunal has to look to the nature of the expenditure incurred in relation to an item of capital and ask whether the expenditure changes the character or function of the item so that if the work done has the effect of substantially improving an item of capital beyond its original condition it cannot be characterised as capital maintenance;

On the other hand, if the expenditure is necessary to ensure an item of capital, in fact, works (i.e. repairs), or is to allow the item of capital to continue to function or to preserve its ability to work (i.e. maintenance), and it cannot be said, objectively, that it would be more cost effective to replace the item rather than repair and maintain it, then it is apt to be characterised as capital maintenance.

36 In this case, the applicant bears the onus of proof, at the civil standard, to satisfy the Tribunal that the amounts of expenditure sought to be refunded were incorrectly

characterised. Of course, the respondent does not bear an onus to justify a characterisation of expenditure.

37 As I have observed above, the evidence relied upon by the applicant comprises the list of items sent by Mr. Fenner of Mann Judd in October 2014 as “possible” capital items. The applicant also relies upon the invoices at tab 20 of exhibit A which indicate that the items of expenditure comprise such things as new compressors, liquid line dryers and sensors for the air conditioners. The invoices also relate to new control systems to replace existing parts and new circuit breakers. There are charges as well for new fly screens.

38 Upon receipt of the draft report of Mann Judd which, as I've noted, indicates that these items could "potentially be classed as capital under the Retirement Villages Act 1999", there followed correspondence between the solicitors for the respondent in which the respondent disputed Mann Judd's approach to determining whether the items were capital items or capital maintenance. That correspondence referred to the Tribunal's decision in *Alloura Waters*. Subsequently, Mann Judd sent a revised draft audit. In that revised draft, at section 2.4 dealing with capital and capital maintenance, Mann Judd said: "Based on the documentation forwarded to us by the solicitors of the Operator, we agree that the expenditure can be interpreted as capital maintenance". I do not know what documentation was sent by the solicitors for the respondent to Mann Judd, which caused them to change their view. However, it is clear they have reviewed additional information and formed the view that the expenditure was capital maintenance.

39 It can be accepted that the final audit report for FY14 prepared by Mann Judd dated 31 October 2014 (see tab 9 of Exhibit A) does not list the relevant items as capital items. However, that report, refers to “a dispute” between the residents and the operator about capital maintenance and capital replacement, such dispute said to be "awaiting resolution, including the classification of certain items of capital maintenance or capital replacement". I was not informed of any other dispute for FY14 that relates to capital expenditure or capital maintenance. I'm prepared to assume that this notation refers to the dispute the subject of Issue 1 in these proceedings.

40 Having said that, however, the difficulty for the applicant is that assuming the auditors were suggesting that the Tribunal would determine whether the items were capital expense or capital maintenance, the Tribunal is in a position where the only evidence it has before it upon which it is asked to make a decision as to whether or not the items of expenditure are of a capital nature or are capital maintenance within the meaning of the RV Act, is the list sent by the auditors in the draft report and the invoices previously referred to. There has been no evidence, expert or otherwise, of the detail of those items, the nature of the work or the condition of the air conditioning systems (or other equipment) so as to enable the Tribunal to assess whether the expense was for repair or maintenance or was in fact a capital expense.

41 As I have observed, the applicant bears the onus of proof to establish that the items have been incorrectly characterised. From the principles I have set out above, and

having regard to the submissions of each of the parties and the evidence that I referred to, the Tribunal finds that the applicant has not discharged the onus of proof to satisfy it that the items claimed have been incorrectly characterised. Because of the absence of evidence it is impossible for the Tribunal to analyse whether or not such expenditure was for the maintenance or repair of the air conditioning system and other equipment or whether the tests referred to in the cited authorities have been satisfied so as to establish that the expenditures were of a capital nature.

42 For example, I do not know whether the replacement of the compressors is repair or maintenance (in the sense identified in the passage from *Alloura Waters* above) or whether it would have been more cost effective to replace the whole system rather than repair it by replacing the compressor, such that the expense was a capital expense. The same goes for the other expenditure items. The fact that in other cases, similar types of expenditure may have been found to have been capital expenditure is of little assistance. Each case depends on its own facts. I must determine the matter based upon the evidence before me, which allows me to make factual findings. I cannot do so with respect to the invoice items for the air conditioning. Prima facie, the revised audit opinion of Mann Judd indicates that it was satisfied that the items were for maintenance following the consideration of the additional information provided by the solicitors. Whilst the applicant may legitimately feel the expenditures go beyond maintenance, it has not placed before the Tribunal, evidence of a nature sufficient to prove otherwise.

43 The position is different with respect to the fly screens. It seems clear that these are new fly screens being added to the building. I do not think on any view this could be regarded as maintenance or repair. The amount allowed for the fly screens in tab 19 of Exhibit A was $1,338. I will order that this amount be paid by the operator into the village operating account within 21 days from the date of these orders.

44 In the circumstances, save for the amount claimed for the fly screens, the applicant has failed to put before me a strong foundation of transparent and identified facts in evidence to overcome the final audited accounts. I allow an amount of $1,338.00 but otherwise reject the applicant's claim under issue one.

Issue 2: Reimbursement of Village Manager Costs spent on village defect rectification works and other tasks.

The nature of the claim

45 The applicant claims that during FY13 and FY14 the respondent failed to contribute its fair portion of costs to defray the salary package of the village manager Mr Michael Deery paid out of recurrent charges for work and tasks he undertook to manage and rectify defects at the village. The applicant says that the village manager has been working on remedying defects and that the respondent should pay for the time taken for the village manager to undertake such work. The respondent refers to this as the "Refund Manager’s Costs Claim".

The applicant’s submissions and evidence

46 The applicants referred to previous occasions when it has filed applications with the tribunal seeking to recover compensation under similar circumstances. In particular it referred to a decision of Senior Member Bordon in *Sakkara investment Holdings v The Residence Committee, the Landings (Retirement Village)* [2013] NSWCTTT 263 where the tribunal ordered the respondent to pay compensation to the residents arising from its use of management, contractors, material and maintenance to rectify past defect across the village.

47 The applicant's only evidence in support of this claim is at tab 22 of Exhibit A. That tab comprises an email from Mr Deery dated 31 July 2013 and a table prepared by the applicant quantifying the claim. The email relevantly notes that, on the village manager's estimation, he spends 5% of his time meeting with "Mark" every morning to discuss the defect management. The document says: "this has been predominated by Echelon as all other defect works are covered by Mark and I am only involved in sign off where required or where an issue is raised".

48 The applicant asserts that this email shows that the "pattern of the past years" has not changed. The table seeks to break down the village manager's salary based upon the estimates of the time he spends on various tasks set out in the email at tab 2 of Exhibit A. It quantifies the amount as being $50,000 for each of FY13 and FY14.

The respondent's submissions and evidence

49 The respondent submits that this claim must be rejected. It submits that the approved expenses and the auditing of those expenses relating to FY13 has been the subject of the proceedings before the Tribunal, being proceedings 12/32770. It says that the applicant cannot agitate this claim in these proceedings as an issue estoppel arises.

50 With respect to the claim for FY14, the respondent submits that the item of expenditure for the village manager's salary and wages formed part of the approved budget for the year ended 30 June 2014. It submits that to the extent that any portion of the salaries and wages did not relate to the operation of the village properly recoverable from the residents by way of recurrent charges, that item of expenditure was excluded from the accounts in accordance with the respondent's management processes confirmed by the auditor. It submits that as with the Maintenance Refund Claim, the auditor consulted with both the applicant and the respondent in relation to the expenditure incurred in the operation of the village and both parties were provided an opportunity to make submissions as to the characterisation and treatment of any expenditure. It says that absent cogent evidence otherwise, the characterisation of the expenses in the final audit mean that the expenses were properly characterised.

51 In support of its submissions, it referred to the evidence of Ms Lawrence as to the role of a village manager of being the interface between residents and issues which need to be addressed in the management and operation of the village including matters that may be at the operator's own costs. It also referred to the fact that the only evidence relied upon by the applicant was the above-mentioned email, which related to the

period ending 30 June 2013. As such, it is submitted, there was no evidence before the Tribunal with respect to the year ended 30 June 2014.

Decision on Issue 2

52 For the reasons given above, I reject the respondent's submission that because the auditors in the final accounts have not made an allowance for this issue, the claim must be rejected. However, I do not think it is necessary for me to decide whether or not the claim insofar as it relates to FY13, is the subject of any issue estoppel. That is because I have formed the view that, on the evidence before me, the applicant has not discharged its onus to prove that the work undertaken by the village manager was not properly incurred in the ordinary course of running the village.

53 The evidence in this case seems very different from and much less comprehensive than that presented by the applicant in the previous Tribunal decision relied upon by the applicant. In that case there appeared to have been significant affidavit evidence detailing the nature of the works undertaken by the village manager so that the Tribunal could properly consider and conclude that such work was not properly chargeable to the residents. I do not have the benefit of such affidavit evidence.

54 The evidence in this case, in my opinion, lacks the requisite detail such that I could conclude that the work undertaken by the village manager was improperly charged to the residents. I would not be prepared to make such a finding based solely upon the email of Mr Deery that I have referred to. That email is only proof, if it is proof of anything, that the village manager spent minimal time (at most 20 minutes per day) in some unspecified period up to 31 July 2013 liaising with some other unknown person to discuss defect management. In my opinion, this is insufficient evidence upon which to base a finding that an amount, let alone 50% of the village manager's annual salary, was improperly spent.

55 I reject the applicant's claim under issue 2.

Issue 3: Reimbursement of over collected recurrent charges specifically authorised for extra utility expenses in the FY14 amended budget

Nature of the Claim

56 The respondent refers to this issue as the "Refund Recurrent Charges Claim". Under this issue, the applicant submits that some eight months into the FY14 year, the residents were requested by village management to consent to an amendment to the FY 14 budget. The amendment was to contribute additional recurrent charges to specifically pay extra costs for village utilities.

57 The applicant says that, as things turned out, the amount estimated by the respondent for the increased utilities charges was found to have been "overestimated" and the actual expenditure for those amounts was $29,815 less than the amounts the residents had consented to and had paid in the form of recurrent charges specifically to meet those estimated amounts. The applicant seeks an order that the respondent repay in

equal shares to 220 residents, the amount of $29,815 arising from these overpaid recurrent charges.

The applicant's submissions and evidence

58 The applicant submits that there are budget negotiations with the respondent which normally occur prior to 30 April each year. The applicant says in those negotiations it has consistently informed the respondent that whenever the costs of council rates, gas, electricity, water and other statutory charges increase but such increases are not known until after the approval of the annual budget, the applicant would recommend to residents that consent to an amended budget to deal with those increased charges should be given.

59 The applicant referred to sections 104 and 107 of the RV Act and also to the power of the Tribunal to order a refund of recurrent charges under section 109 of that act. The applicants further refer to section 116 which provides that the operator of a village must not expend money received by way of recurrent charges otherwise than in accordance (apart from minor variations) with the approved annual budget or any authorised amendment of that budget. Amendment of the approved budget is governed by section 117 of the RV Act.

60 The applicant referred to a letter from the respondent to the residents dated September 2014 that sought an amendment to the approved FY14 budget. That letter noted that there had been an increase of $61,354 "primarily caused by increases in utility and statutory charges". On 27 February 2014 the residents approved an amended budget on this basis.

61 The applicant submits that as the additional amounts were not spent on the utilities, in effect there is a surplus created by the over collection of recurrent charges for those utilities. Instead of recognising this surplus, the applicant submits that the respondent has allowed those funds to become part of the general recurrent charges expenditure. It submits this is not permitted under the relevant legislative provisions.

62 At tab 11 of Exhibit A, the applicant has prepared a comparison of the budgeted costs for the relevant utility items as set out in the amended budget for FY14 and the actual costs for those utility items as disclosed in the order the accounts for FY14 for them. This shows, according to the applicant, that there had been an over budgeting for those utilities of $29,815. The applicant says each of the 220 residents is entitled to their pro rata share of that amount.

The respondent's submissions and evidence

63 The respondent submits that the Refund Recurrent Charges Claim should be rejected. The respondent notes that the applicant confirms that the residents had agreed to an amendment to the approved budget in accordance with section 117 of the RV Act. The respondent noted that no submissions were made by the applicant that s 117(1)(a) applies and, accordingly, the Tribunal must conclude that the residents of the village

approved a variation to the recurrent charges in accordance with the variation of the expenditure. The respondent submits that having agreed to the variation of the approved budget and commensurate variation to the recurrent charges, the expenditure and recurrent charges formed part of the approved budget. It submitted that by reason of section 116(3) and (3A) of the RV Act the respondent was entitled to expend money in accordance with the approved budget as a whole and is allowed variations in expenditure between line items.

64 The respondent submits that as the varied amount of expenditure relating to the utilities forms part of an item of expenditure within an approved budget consented to by the residents, there is no basis on which can be claimed there was an entitlement to any refund under the RV Act.

Decision on issue 3

65 It is relevant to consider the statutory provisions dealing with recurrent charges.

66 Part 7 of the RV Act deals with financial management of retirement villages. Division 4 of Part 7 of the RV Act deals with recurrent charges. Division 5 of that Part deals with proposed and approved annual budgets.

67 A “recurrent charge” is defined in s 4 as being “any amount (including rent) payable under a village contract, on a recurrent basis, by a resident of a village”. The RV Act provides for how recurrent charges can be varied.

68 The operators of a retirement village must, at least 60 days before the commencement of each financial year, supply to each resident of a village, a proposed annual budget itemising the way in which the operator proposes to extend the money to be received by way of recurrent charges from residents of the village during the financial year (s 112). Further, the operator of a retirement village must seek the consent of the residents of the village to the expenditure itemised in the proposed annual budget (s 114). The operator must provide such information in relation to the proposed expenditure as the Residents Committee or any resident reasonably requests for the purposes of deciding whether consent should be given to the budget (s 114(2)). Once the residents have received a request to consent to a proposed annual budget (or an amended budget) they must meet, consider and vote on the budget and advise the operator whether they consent or not and, if they do not consent, specify the item or items of the budget to which they object (s 114(4)).

69 A proposed annual budget becomes an approved annual budget once, relevantly, the residents consent to expenditure in accordance with the proposed annual budget. The operator of a retirement village must not expend money received by way of recurrent charges otherwise than (apart from minor variations) in accordance with the approved annual budget or any authorised amendment of that budget (s 116(3)). Failure to comply with s 116(3) constitutes an offence punishable with a maximum penalty of 100 penalty units. However, an operator does not contravene s116(3) if the expenditure that was otherwise than in accordance with the budget was a variation in expenditure

between items in the approved annual budget and does not reduce the level of services provided by the retirement village and does not cause the total expenditure provided for by the approved annual budget to be exceeded (s 116(3A)).

70 If an operator contravenes S116 (3) a resident may apply to the Tribunal for (and the Tribunal may make) an order directing the operator to refund the recurrent charges paid by the resident during so much of the financial year as has passed at the time the order is made (s116(4)).

71 Turning to the facts of this matter, the respondent does not challenge the submissions of the applicant that the money raised by the additional recurrent charges was not spent on the utilities referred to in the applicant's evidence. As such, it must be taken to accept that the amounts raised by variations to the recurrent charges to pay for the additional budgeted utilities were not, in fact, spent on those utilities.

72 The respondent seeks to rely on s 116 and s116(3A) of the RV Act in support of a submission that there is a statutory mechanism where operators and residents can agree a total level of expenditure under an approved budget, identify line items of expenditure in the approved budget, allow variations in actual expenditure between line items and provide a safety mechanism to ensure that there is no reduction in the level of services provided by the operator to the residents. Implicit in the respondent's submission is the fact that the amount of $29,815 budgeted for the increased cost of utilities was spent on other line items properly charged as recurrent charges.

73 The respondent has led no evidence to justify or explain on what line items in the varied approved budget those additional charges were spent. In my opinion, if it seeks to rely on section 116(3A) of the RV Act, it has the evidential burden of establishing that expenditure of the additional amounts approved for the utilities was spent as a variation in expenditure between items in the approved budget. It would need to prove what the money was spent on. It has not done so.

74 In my opinion, having regard to the requirement under section 114 for the operator of a retirement village to seek consent of the residents of the village to the expenditure itemised in the proposed annual budget, coupled with the provisions of section 116(3) which provide that the operator must not expend money received by way of recurrent charges otherwise than in accordance with the approved annual budget or any amendment thereof, prima facie if an amount itemised in a proposed annual budget to which the residents have consented is not spent in accordance with that budget, and the provisions of s 116 (3A) do not apply, then the residents are entitled to have that amount refunded to them. In this case, in my opinion, as the respondent has not rebutted the evidence of the applicant that the expenditure of the varied recurrent charges was not spent on the items for which they were approved by the residents, it has not discharged the evidential onus on it to satisfy the Tribunal that each of the requirements of s116(3A) have been satisfied. Accordingly, the residents are entitled to the relief sought.

75 I therefore find that either on the basis that the recurrent charges have been overpaid

(thus entitling a refund pursuant to section 109) or on the basis that the respondent has failed to spend the money received by way of recurrent charges in accordance with the approved varied FY14 budget (thereby entitling a refund under s 116(4)) I will order that, within 21 days of these orders, the respondent pay to each of the 220 eligible residents the sum of $135.52.

Issue 4: Operator to provide a statement of financial position (balance sheet) for FY14

The nature of the claim

76 The respondent refers to this as the Audited Accounts Claim. The applicant seeks the provision of a statement of financial position or balance sheet over and above or as part of the final audited accounts provided to them. The issue is whether the respondent is obliged by the provisions of the RV Act to provide a balance sheet to the residents as part of the final audited accounts.

The applicant's submissions and evidence

77 The applicant submits that the respondent has only partially complied with the requirements of s113 and s119(1) of the RV Act, in that it has failed to deliver to the residents within four months of the end of the financial year a complete set of financial accounts. The applicant notes that in the previous 11 years, the residents have been provided with a full set of financial accounts which included a balance sheet. The applicant further refers to the fact that past annual audited accounts had consisted of income and expenditure, a statement of financial position of the village in regards to assets and liabilities and supporting notes of the auditor. The applicant submits that the residents have a particular interest in being able to satisfy themselves that any surplus or deficit is properly identified so that they may take any action available under the legislative scheme to ensure deficits are made good or surpluses are retained or distributed.

78 The residents submit that only a transparent, independent and complete audit reporting of annual accounts can convey to the residents and their families the financial health of the village operational funds which are generated each month by residents' payment of their recurrent charges.

79 The residents referred to s119 of the RV Act and submit that in order for the respondent to comply with that section, it must be fully transparent and include a balance sheet covering assets, liabilities and whether a surplus or deficit has been incurred. It submits that the residents have a legitimate interest in the financial position of the operator and are entitled to this information.

80 The applicant points out that the draft accounts issued to all residents by the village manager on 16 October 2014 (see tab 13 of Exhibit A) contained a balance sheet as at 30 June 2014 (see page 71 of tab 13).

81 The applicants sought to rely on evidence from a Mr McClelland, an auditor with over 13 years experience auditing retirement village accounts. Mr McClelland provided an

undated letter which is tab 15 of Exhibit A. Mr McClellan was also cross-examined. The gist of his evidence was that the audited accounts for FY14 (at tab 9 of Exhibit A) do not contain balance sheet. In his report, he opined that in accordance with AASB 101 Presentation of Financial Statements, a balance sheet ought to be provided with the final audited accounts of an entity such as a retirement village operator.

82 In cross-examination Mr McClelland was steadfast in his opinion that in audited accounts of retirement villages he would expect to see a balance sheet, cash flows and notes to the accounts. He said that in his all of his time in auditing retirement village accounts, the FY14 audited accounts for the Landings was the only set of accounts he had seen which did not include a balance sheet.

83 There was also evidence from two residents of the village, Mr Laurance and Mr Smith regarding conversations they had with Mr Cupit, the respondent's external accountant. Mr Cupit's evidence is considered below. Each of those gentlemen give evidence that Mr Cupit acknowledged and agreed that it was normal accounting practice for balance sheet to be included in final financial accounts.

The respondent's submissions and evidence

84 The respondent submits that the Audited Accounts Claim should be dismissed. It refers to ss118 and s119 of the RV Act. It submits that the structure and effect of those statutory provisions is that there is no requirement for anything other than audited accounts, corresponding as closely as possible with the layout of the proposed annual budget, being provided to the residents.

85 The respondent referred to the evidence of Mr Cupit, the principle of Bedford chartered accountants. That firm was engaged as the respondent's external accountants on 5 September 2014. In respect of this issue, Mr Cupit said that whilst they balance sheet was a useful document (as a matter of general principle) and should be relatively straightforward to produce, it is not necessarily the case that one is required in every instance. He denied he had said to Mr Laurance and Mr Smith that a balance sheet should be provided with final accounts.

86 The respondent submits that the audited accounts for FY14, which do not contain balance sheet, conform with the requirements of the RV Act. On that basis, it submits that there is no requirement to provide further material to the applicant.

Decision on issue 4

87 I do not think it is necessary to determine the evidential dispute between the witnesses as to whether Mr Cupit made the acknowledgements that the witnesses for the applicant contend that a balance sheet is ordinarily a part of final accounts. Even if he did, that does not necessarily mean that a balance sheet is required to be provided to residents of a retirement village so that the operator complies with its obligations under the RV Act. The proper construction of the RV Act as that is a matter of law to be determined by me.

88 In reaching my decision on this issue, I have had regard to the objects of the RV Act as set out in s 3. These include the facilitation of the disclosure of information to prospective residents of retirement villages, resident input into the management of retirement villages and to set out particular rights and obligations of residents and operators of retirement villages. The RV Act can be seen, at least in so far as it deals with the rights of residents and the provision of information to them as to the financial management of retirement villages, as beneficial legislation. As such, it is to be construed liberally: *Bull v A-G (NSW) (1913) 17 CLR 370 at 384.* The legislation seeks to provide an element of consumer protection to residents of retirement villages.

89 I've also had regard, as I set out below, to the provisions of ss118-119 of the RV Act.

90 In my opinion, whilst there is no express reference to balance sheets as being part of the accounts of a retirement village that the operator of a retirement village must provide to the residents of that village, when one has proper regard to the objects of the RV Act and the statutory provisions, the final audited accounts of an operator of a retirement village should include a balance sheet for the relevant financial year.

91 By s118(3), the operator of a retirement village must, within 28 days after the end of the quarter to which the quarterly accounts relate, provide the Residents Committee with a copy of the quarterly accounts of the income and expenditure of the village.

92 Section 119 of the RV Act provides:

> **119 Copies of annual accounts to be provided to residents**
>
> (1) Within 4 months, or such other period as may be prescribed by the regulations, after the end of a financial year of a retirement village, the operator of the village must provide the residents of the village with copies of the audited accounts for that financial year in accordance with this section.
>
> Maximum penalty: 50 penalty units.
>
> (2) The audited accounts must include (***but are not limited to***):
>
> (a) the following particulars:
>
> (i) details of the income and expenditure of the village during the financial year, including income and expenditure of the capital works fund (if any),
>
> (ii) details of the balance of the capital works fund (if any),
>
> (iii) details of amounts received for insurance claims made in respect of any matter referred to in section 100 (2) (a) (i) or (ii) relating to the village during the financial year,
>
> (iv) ***details of any interests, mortgages and other charges affecting the property of, or forming part of, the village*** (other than property or premises owned by residents of the village) as at the end of the financial year, and
>
> (b) a statement that:
>
> (i) specifies whether or not money payable by the village operator to former residents during the financial year concerned was paid in full and on time, and,
>
> (ii) specifies, if any money so payable has not been paid, the amount concerned, details of the delay and the reasons for the delay, and
>
> (iii) ***contains the matters required to be included by subsection (3***), and
>
> (iv) gives details of any matters that may prevent the village operator from meeting those ***liabilities***, and
>
> (c) such other matters as may be prescribed by the regulations.

> (3) ***If the auditor is not satisfied that the operator has the capacity, during the financial year immediately following, to meet the liabilities relating to the village as and when they fall due, or if the auditor believes that there is considerable uncertainty regarding the ability of the operator to meet the liabilities of the village as and when they fall due during the financial year immediately following, a statement to that effect must appear in the audited accounts.***
>
> (4) The format of the accounts must correspond as closely as possible with the layout of the proposed annual budget.
>
> (5) A person who is the operator of more than one retirement village may provide audited consolidated accounts in relation to any 2 or more of the villages concerned, but, when providing the accounts to the residents of a particular village, must include a separate statement of income and expenditure for that village.
>
> (6) It is sufficient compliance with this section if the copies of the accounts are provided to the Residents Committee for the retirement village to which they relate and to any individual resident who asks the operator for one.
>
> (7) If there is no Residents Committee for the village concerned, a copy of the accounts is to be:
>
> (a) displayed on the common property of the village in accordance with the regulations, and
>
> (b) provided to any individual resident of the village who requests a copy.

(my emphasis in bold and italics)

93 Several things should be observed about the requirements of section 119. Firstly, it can be seen that what s 119(2) prescribes as being necessary to be included in the audited accounts of an operator of a retirement village specifically *does not limit* what should be included in those accounts. I infer, therefore, that those accounts should, in addition to including the matters prescribed, otherwise be prepared in accordance with ordinary accounting standards and include information that would ordinarily be included, such as balance sheets.

94 Secondly, details of any interest, mortgages and other charges affecting the property of, or forming part of, the village must be included. The inclusion of information about such interests or other encumbrances would be relevant to residents and prospective residents of the village who have an interest in the financial well-being of the operator, including its ability to pay its debts as and when they fall due. This is not only so that residents can be confident that the operator of the village can continue to operate it in the short term, but also to provide them with some comfort that it will be able to continue to do so in the future. After all, the investment of the residents, being people in their later years, is not insignificant.

95 Thirdly, s119(3) indicates that the auditor of the accounts is required to be satisfied that the operator has the capacity, during the financial year immediately following, to meet the liabilities relating to the village as and when they fall due and, if not so satisfied, must include a statement to that effect in the accounts. Once again, this highlights, in my opinion, the interest that residents and prospective residents of a village have or would have in the financial well-being of the operator. In order to reach a conclusion as to the capacity of the operator to meet its liabilities, it would be necessary for the auditor to understand the financial position of the operator, including understanding the nature of its assets and liabilities as well as the income and expenditure for the village.

As the residents have a genuine interest in the question of whether the operator can meet its liabilities and its financial position, it seems to me that they are entitled to be made aware of the basis on which the auditor reaches a conclusion on that question. That is so particularly for the operational account which the respondent uses for the purposes of the running of the village and expenditure of recurrent charges.

96 I have also had regard to the evidence of Mr McClelland and Mr Cupid that ordinarily in the final accounts of an entity, a balance sheet would be included. Whilst Mr McClelland's "report" does not satisfy the requirements of an independent expert report and takes more the form of advocacy of the applicant's case, in so far as it deals with accounting issues (rather than legal conclusions) it is relevant and of some use. Mr McClelland states, and I accept, that AASB 101 requires a balance sheet to be included. I do not see why this information, if otherwise ordinarily forming part of final accounts of an entity, should not be included in the final audited accounts of an operator of a retirement village and be provided to the residents.

97 I would be surprised if, in the course of the preparation of the final accounts of the respondent for FY14, a balance sheet of the respondent had not been prepared. In any event, Mr Cupid accepted that it would not be a difficult document to prepare.

98 Finally, I note that the re-audited accounts for FY12 and FY13 prepared by William Buck dated 16 March 2015 (at annexures C and D to Ms Lawrence's affidavit) contain statements of financial position (balance sheets) for those years.

99 I therefore conclude that the applicant is entitled to the relief it seeks under this issue and I will order that within 21 days from the date of the orders, the respondent provide to the applicant a statement of financial position (balance sheet) for the FY14 accounts.

Issue 5: Make good of accrued deficit for FY14.

The nature of the claim

100 The final issue concerns the applicant's assertion that the respondent is required to make good into the village operating account accumulated deficits for F12 and FY 13 the sum of $73,332.00. The respondent refers to this as the "Prior Years Deficit Claim".

The applicant's submissions and evidence

101 The applicant submits that the attempts by the respondent to issue invoices to residents for additional amounts for recurrent charges for historical budget years FY12 and FY13 is impermissible. The applicant says that, in so far as those charges were levied by the respondent's reliance on orders made by the Tribunal on 14 November 2014, this represented a misunderstanding of the Tribunal's orders. It submits that to invoice the residents for the additional charges would have the effect of the charging the residents an amount to make good a deficit in contravention of s 120C of the RV Act. It submits that the construction of the orders contended for by the respondent involves the Tribunal implicitly sanctioning a breach of s 120C of the RV Act and that this could not have been the intention of the Tribunal when it made the orders. It

submits that the respondent in seeking to apply the approved budgeted recurrent charges ignores the fact that in the final re-audited accounts, the actual expenditure was less resulting in a net surplus for the two years.

102 The applicant submits that there remains a deficit for the relevant years which has been carried forward by the respondent in contravention of the RV Act. Alternatively, the applicant submits that in so far as the levying of the additional charges creates a surplus for the relevant financial years in accordance with the audited final budgets, that surplus should be returned to the residents in accordance with a resolution passed by them on 27 May 2015.

103 The applicant relied on the terms of the orders made by the Tribunal and the final audited accounts. Those accounts were only finally presented in March 2015. The applicant refers to the previous Tribunal orders and to the decision of Sackar J in *Sakkara Investment Holdings Pty Ltd as trustee for Sakkara Landings Trust v The Residents Committee, the Landings and the Consumer Trader and Tenancy Tribunal of New South Wales* [2014] NSWSC 610.

The respondent's submissions and evidence

104 The respondent also refers to the orders made by the Tribunal on 14 November 2014 in respect to the FY12 and FY13 approved budgets and the final audits of those budgets. It submits that the effect of those orders was, for the purposes of ss 108 and 115 of the RV Act entitled to issue the invoices it did to charge the recurrent charges in the approved budget (approved by the Tribunal) and the final audited accounts.

105 The respondent relied on the affidavit of Ms Lawrence who, after referring to the orders made by the Tribunal in November 2014 and the final audit of the accounts for FY12 and FY13, deposed that the result of that audit was that the respondent had, without the benefit of the approved budgets, collected from the residents a lower amount of levies than it was entitled to collect for those years. She noted that as a result of the audit of the budgets as approved by the Tribunal, there was "net surplus" for FY12 and FY13 of $65,717.00.

Decision on issue 5

106 It is necessary to consider in more detail the previous applications to and orders of the Tribunal relating to the FY12 and FY13 years. It is also necessary to make further reference to the Supreme Court proceedings and the judgment of Sackar J. The chronology below is taken from his Honour's summary of the history of the matter at [6]-[9] of that judgment.

107 The respondent filed an application in the Tribunal (then the CTTT) on 3 June 2011 (RV 11/29123) seeking orders under s 108 of the RV Act regarding consent to a variation of the recurrent charges stated in the proposed annual budget for FY12, and an order under s 115 of the RV Act to pay expenditure as stated in that proposed budget.

108 The respondent filed a further application in the Tribunal on 1 March 2012 (RV

12/32770) in relation to the budget for FY13, regarding expenditure, variation of recurrent charges and distribution or otherwise of a Capital Works Fund.

109 There were some matters resolved by consent. Others, including the budget matters, were heard by the Tribunal, constituted by Senior Member Bordon, in November 2012 who handed down reasons for his decision on 19 April 2013. Those reasons are at tab 21 of Exhibit A.

110 Orders were made on 14 June 2013 reflecting those reasons. Those orders are annexure A to Ms Lawrence's affidavit. Relevant to this application are orders 20- 22 (relating to FY13) and 25-26 (relating to FY 12).

111 Orders 20-22 (dealing with proceedings RV 12/32770 and the FY 13 budget) provided that:

> 20. The [respondent] is to provide the Residents Committee with an amended budget for the 12/13 year within seven days from the date of these orders and hold discussions in relation to its content.
>
> 21. The [respondent] is to provide the Residents Committee with a reconciled audited statement of account which represents the income, liability and expenditure for the 12/13 year to date within 21 days of the date of these orders.
>
> 22.The Tribunal will not finally dispose of these 12/13 budget issues until such time as the parties can either agree on its form or either party re-lists the matter for further submissions in relation to adjusted recurrent charges.

112 Orders 25-26 (dealing with proceedings RV 11/29123 and the FY 12 budget) provided that:

> 25. The [respondent] is to provide the Residents Committee with a reconciled audited statement of account which represents the income, liability and expenditure for the revised and adjusted 10/11 and 11/12 financial year within 21 days of the date of these orders.
>
> 26. The Tribunal will not finally dispose of these 10/11 and 11/12 budget issues until such time as the parties can hold discussions in relation to these audited accounts so as to agree on the correct accounting baseline for future budgets or either party re-lists the matter for further submission in relation to any outstanding issues which arise.

113 The respondent then commenced proceedings in the District Court seeking to appeal certain orders consequent of the Tribunal's decision. Those proceedings were discontinued and the respondent commenced the Supreme Court proceedings seeking judicial review of the Tribunal's orders. The summons was filed out of time and Sackar J refused to exercise his discretion to grant an extension of time. Accordingly, the proceedings were dismissed.

114 Subsequently, the matter came back before the Tribunal in August 2014 for two days hearing. Submissions were also filed and on 14 November 2014 the Tribunal published its reasons for decision and made orders. These reasons can be found at Annexure B to Ms Lawrence's affidavit (without annexures) and at tab 23 of Exhibit A (with annexures). The relevant parts of the Tribunal's reasons for the purposes of this application are at [53]-[60]. I set them out as relevant:

> **Relisting Operator's applications RV 11/29123 and RV 12/32770 in relation to budget and recurrent charges**
>
> 53. These relate respectively to the proposed budgets for the financial year end of 2012 and for the financial year end of 2013. I have considered all submissions filed

> including the supplementary submissions by the residents…
>
> 54. One 14 June 2013 orders 24,25,26 and 27 and orders 20,21,and 22 were made. On the relisting of these matters and taking into account the findings made in those proceedings I now propose to make final orders for those years. It may be that there is little practical utility in now making budget orders, nevertheless for the sake of finality I shall do so.
>
> 55. The painting items which had been identified in the rulings have to be removed as submitted by the residents. I agree with the submission that it does not make sense to include charges for painting of woodwork to be included in the budgets.
>
> 56. I have accepted that an appropriate budget for the 2011/2012 financial year should have the line item “pergola painting” removed. Similarly in the case of 2012/12 the item “painting” should be removed and the calculations appropriately corrected.
>
> 57. Noting section 120C of the Retirement Villages Act, deficits are not to be carried forward and are to be made good.
>
> 58.The residents also argue that the audit of both budgets in the revised accounts should be paid for by the operator. For the reasons put forward by the residents I am persuaded to make this ancillary order.
>
> 59. In proceedings RV 11/2923 (sic 29123) in relation to the proposed budget for the financial year 2012 the following orders will be made:
>
> (a) Pursuant to section 108 an order that the recurrent charges be the monthly levy of $574.40.
>
> (b) Pursuant to section 115 the Tribunal’s approved budget be in the form of expenditure for a total amount of $1,325,721 in the form as annexed as Annexure A.
>
> (c) The operator is to undertake an audit of the approved budget and accounts for the 2011/2012 financial year in accordance with these orders and earlier CTTT findings and is to fund the cost of this.
>
> (d) In the event that the audit identifies any shortfall or deficit in the village accounts the operator is not to carry forward this deficit in future years and is to make good any deficit amount in the village accounts within 7 days following the receipt of the audit report.
>
> (e) Notation: The Tribunal notes that the Tribunal ordered budget in Annexure A has had removed from a line item of painting for pergolas an amount of $41,747.00 and a dwelling divisor is 192.
>
> 60. In proceedings RV 12/32770 in relation to the proposed budgets for the financial year end of 2013 the Tribunal orders:
>
> (a) Pursuant to section 108 recurrent charges for the financial year be a monthly levy of $504.23
>
> (b) Pursuant to section 115, the approved budget be in the form of expenditure for the financial year for a total of $1,246,456 in the form annexed B in the column headed “Budget after CTTT Deductions”.
>
> (c) That the operator is to undertake an audit by its current auditor of the approved budget and revised accounts for the 2012/2013 financial year within 28 days in accordance with these orders and earlier CTTT findings and the operator is to fund this cost.
>
> (d) In the event that the audit identifies any shortfall or deficit in the village budget the operator is not to carry forward this deficit to future years and is to make good any deficit amount in the village accounts within 7 days following the receipt of the audited report.
>
> (e) The Tribunal notes that the budget in Annexure B headed contained in the column headed “Budget after CTTT Deductions” has had removed from it a line item of painting for an amount of $104,488.00 as shown in the adjustment for this amount and that the dwelling divisor is 206.

115 The approved budget for FY12 at annexure A to the Tribunal’s reasons approves a budget of Net Operating Expenses of $1,325,721. The anticipated surplus (deficit) was

$0. Applying the divisor of the number of residents of 192, this amounts to an approved annual recurrent charge of $6,904.80 per resident or $575.40 monthly.

116 The approved budget for FY13 at annexure B to the Tribunal's reasons approves a budget of Total Expenditure of $1,246,456. Applying the divisor of the number of residents of 206 this gives an approved annual recurrent charge of $6,050.76 per resident or $504.23 per month.

117 The final audited accounts of the expenditure approved by the Tribunal by its orders of 14 November 2014 for each of the FY12 and FY13 years were prepared by William Buck Auditors. They are each dated 16 March 2015.

118 The FY12 final audited accounts are at annexure C to Ms Lawrence's affidavit. They reflect the approved total budgeted expenditure of $1,325,721 but an actual total expenditure of $1,237,141. From the total income received of $1,316,905 this resulted in a net operating surplus for the year of $79,764.

119 The FY13 final audited accounts are at annexure D to Ms Lawrence's affidavit. They reflect the total approved budgeted expenditure of $1,246,456 but an actual total expenditure of $1,218,668. From the total income received of $1,204,621 this resulted in a deficit for the year of $14,047.00. As set out above, the Tribunal ordered that any deficit is not to be carried forward but to be made good in the village accounts within 7 days of receipt of the reports. This was not done but, as can be seen below, the surplus for the FY12 year was carried forward.

120 Ms Lawrence, at [15]-[31] her affidavit, deposes to certain matters about this issue and the history of the village budget disputes. In respect to the re-audited budgets dated 16 March 2015, she says (at [27]) that her review of those audited budgets leads her to "consider that the Respondent – operating without the benefit of approved budgets – collected a lower sum of levies than it was entitled to collect under the orders in respect of the [proceedings 11/29123] and [proceedings 12/32770]." She does not explain not give any detail of what was charged to the residents, what she concludes the final re-audited budgets "allow" the respondent to have charged the residents by way of recurrent charges, nor whether there has been an actual shortfall in the recurrent charges levied to the actual expenditure incurred.

121 Ms Lawrence asserts, in [28] of her affidavit, based on the March 2015 audit reports "…the residents of the village have to pay additional amounts by way of recurrent charges for both years". Once again, she does not explain why this is so, or the amounts that each or any resident must pay.

122 I do not accept that the re-auditing of the historical accounts leads to the conclusions Ms Lawrence asserts. As the applicant submits, she does not appear to have taken into account the fact that the *actual expenditure* (as reflected in the re-audited accounts) is significantly less than the approved budgeted expenditure.

123 Senior Member Bordon made clear in his orders there was concern about the utility of making the budget orders on what were then, and are now, historical budget matters.

He noted no deficits were to be carried forward and were to be made good by the operator.

124 The comments by Senior Member Bordon as to the practical utility of the relief sought in respect to historical budgets were echoed by Sackar J in his judgment. At [38] his Honour said:

> …It is important in my view however to consider the practical utility, particularly in a case where the issues largely relate to budgets from previous years which on one view are now of historical interest only. As [the Residents Committee] points out, by the time the proceedings were heard in November 2012 and the orders were made in June 2013, the budget years of 2010/2011 and 2011/2012 were well over. I am inclined to accept the submission of the residents…that the Tribunal had made orders in a practical and expedient way to resolve the issues between the parties in relation to historical budgets.

125 Further, in discussing whether the Court ought exercise its discretion to grant an extension of time to file the summons in the Supreme Court proceedings, at [47] his Honour said:

> Secondly, at an impressionistic level, to have debates years later regarding the appropriateness of budgets *as opposed to actual expenditure* would appear to lack practical utility… (my emphasis)

126 I do no think, in making the orders he did, Senior Member Bordon envisaged that further levies would be imposed on the residents for recurrent charges for the budget years already passed. I would have expected if that was his intention, this would have been made clear both in his reasons and in his orders.

127 In any event, to the extent that the intention of the Senior Member is irrelevant but one is simply to construe the orders made, I do not accept the orders have the effect contended for by the respondent. As I have observed, there is no adequate evidence of the levies for recurrent charges incurred (based upon the proposed budgets) as against the actual expenditure incurred (based upon the audit of the Tribunal approved budgets) so that a finding could be made as to whether there could be an additional levy for recurrent charges or a variation of the recurrent charges already levied. Ms Lawrence's evidence is wholly unsatisfactory in this regard and I reject her conclusions that the re-audited accounts of 16 March 2015 had the effect she contends.

128 There is a further reason why I do not think that the respondent was entitled to invoice the residents for additional recurrent charges for FY12 and FY13. Ms Lawrence also notes (at [28]), as is apparent from the face of the audit reports themselves, that for FY 12 there was a surplus of $79,764.00 and for FY13 there was a deficit of $14,047.00. She asserts that the auditor "…has applied the surplus from the 2012/2013 year to the deficit on the basis that given the financial years had passed and there was not resolution, this was an appropriate treatment". That is supported by note 7A to the accounts.

129 Therefore, on the basis of the actual expenditure, as there is a surplus for FY12 I do not see any basis by which the respondent is entitled to seek additional recurrent charges for that year from the residents. Further, as there is a deficit for FY13, such a deficit cannot be recovered from the residents: s120C(2)(b) of the RV Act. None of the

exceptions in s 120C(3) apply.

130 There is a net surplus for those two years of $65,717 based upon the actual income and expenditure of those two years. The rendering of invoices for additional recurrent charges to match the approved budgeted income reflected in the orders of Senior Member Bordon of 14 November 2014 would only increase that surplus because the actual income would increase by the amount so levied, but the actual expenditure would remain the same.

131 I will make orders sought by the applicant to the effect that the respondent was not entitled to invoice the residents for any additional recurrent charges for FY12 or FY13 and that the residents are not obliged to pay such charges and that any resident who has already paid, is entitled to a refund.

132 This brings me to the applicant's claim that there remains a deficit to be made good by the respondent. The applicant submits that there were deficits incurred in FY12, FY13 and FY14 which had accumulated to a total deficit of $185,246.00 up to 30 June 2014. This is, they say, reflected in the draft Mann Judd audit report for FY14 (tab13 of Exhibit A). The final Mann Judd audit report for FY14 (tab 9 of Exhibit A) shows a deficit of $111,914.00. This deficit was made good by the respondent by payment into the village Operational Account on 30 January 2015 ([51] Lawrence affidavit). The applicant submits that there remains a deficit of $73,332.00 which ought to be made good by the respondent.

133 It does not seem to me, however, that there has been brought to account the net surplus of $65,717.00 for FY12 and FY13 as disclosed in the final re-audited accounts for those years dated 16 March 2015. These reports were not available to Mann Judd at the time of the creation of the final audit report for FY14. The respondent does not make any submissions as to what should happen with this surplus. Prima facie, the surplus is to be carried forward to the accounts of the next financial year unless the residents consent to a proposal that the whole or any part of a surplus be spent or distributed to the residents. As I have noted, the residents have resolved that any surplus be refunded to them. However, I do not think I can make such an order absent the effect of the surplus being brought to bear on the FY14 accounts.

134 In the circumstances, the only order I propose to make in this regard is that, within 21 days of the date of these orders, the respondent have the accounts for FY14 re-audited to take account of effect, if any, of the final re-audited accounts of FY12 and FY13 and that the respondent is to bear the cost of this audit. If that re-audit shows a deficit, such a deficit is to be made good by the respondent within 7 days of receipt of the report.

Costs

135 No party has made an application for costs. No submissions were made by either party in their written submissions as to costs. On that basis, I will make no order as to costs with the intent that each party pay its own costs of the proceedings.

Orders

136 Accordingly, for the reasons above the Tribunal makes the following orders:

(1) Order that within 21 days from the date of these orders, the respondent pay into the Village Operating Account the sum of $1,338.00 representing the cost of the purchase of new fly screens.

(2) Order that within 21 days of the date of these orders the respondent pay to each of the 220 eligible residents the sum of $135.52.00 by way of refund of overcharged recurrent charges.

(3) Order that within 21 days of the date of these orders, the respondent provide to the applicant a statement of financial position (balance sheet) for FY14 the accounts.

(4) Order that within 21 days of the date of these orders the respondent have prepared an audited report of the FY14 accounts to take account of the net surplus of $65,717 as disclosed in the final audit reports of the accounts of FY12 and FY 13 dated 16 March 2015 and that the respondent bear the cost of such report and if that report shows a deficit order that within 7 days of receipt of that report, the respondent make good any such deficit. If the report discloses a surplus, the surplus is to be dealt with in accordance with s 120B of the RV Act.

(5) Order that the respondent withdraw all invoices issued by it in May 2015 to any resident, past or present, seeking to recover additional recurrent charges as a result of the audit reports of the accounts for FY12 and FY13 dated 16 March 2015 and that the respondent not issue to any other resident any invoice for recurrent charges for those years.

(6) Order that within 7 days of the date of these orders the respondent repay to any resident, past or present, any amount paid by such resident purportedly in compliance with any invoice referred to in order 5 above.

(7) The application otherwise be dismissed.

(8) No order as to costs.

A Coleman SC

Senior Member

NSW Civil and Administrative Tribunal

3 September 2015

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Endnotes

1. Tab 5 of Exhibit A
2. Respondent's submission in reply at [30].
3. Respondent's submissions in reply at [12]
4. Respondent's submission in reply at 16]-[20].
5. Respondent's submissions in reply at [34]. This was also a theme of the respondent's oral submissions.

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

Amendments

26 November 2015 - typographical errors corrected

Decision last updated: 26 November 2015