



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Lynne Smith as executrix of the estate of the late Melville John Jack v Village Projects Pty Ltd t/a Sunrise Supported Living [2016] NSWCATCD 15
Hearing dates:	16 December 2015
Decision date:	24 February 2016
Jurisdiction:	Consumer and Commercial Division
Before:	J A Ringrose, General Member
Decision:	<ol style="list-style-type: none">1. The respondent is to pay the applicant the sum of \$3,470.00 immediately.2. Pursuant to s 66 (3) (b) the respondent is to refrain from charging the applicant any further recurrent charges in respect of unit 18.3. Any recurrent charges paid by the applicant for any period after 30 June 2015 are to be refunded immediately or, if they are adjusted on payment of exit fees, they are to bear interest in accordance with s 180(4) of the Act from the date of these orders until the date they are paid.4. When the sale of Unit 18 is completed and exit fees are calculated the Applicant shall be entitled to interest pursuant to s 180(4) of the Act in respect of all monies to which the estate is entitled for the period from 14 July 2015 to the date when the payment is made.
Catchwords:	Sale of village unit - operator to respect rights of residents - operator not to interfere with the right of any resident to autonomy over his or her financial and other matters and over his or her possessions.
Legislation Cited:	Retirement Villages Act 1999 ss. 66, 128, 169
Cases Cited:	Commonwealth v Amman Aviation Pty Ltd (1991) 174 CLR 64 Hungerfords v Walker (1989) 171 CLR 125 Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd (1981) 145 CLR 625
Category:	Principal judgment

Parties:	Lynne Smith as executrix of the estate of the late Melville John Jack (applicant) Village Project Pty Ltd t/a Sunrise Supported Living (respondent)
Representation:	The applicant appeared in person. Mr Paul Greenup, company director, appeared on behalf of the respondent.
File Number(s):	RV 15/52363
Publication restriction:	Nil

REASONS FOR DECISION

APPLICATION

- 1 By an application filed on 14 September 2015 Lynne Smith, as the executrix of the estate of her late father Melville John Jack brought a claim seeking the following orders:
 - (1) an order pursuant to s. 123(1) of the Retirement Villages Act declaring that cl 3.13 of the Supported Living Community Rules and Regulations was harsh, oppressive, unconscionable or unjust.
 - (2) an order pursuant to s. 128(1)(b) of the Retirement Villages Act varying or setting aside cl 13.3 of the Supported Living Community Rules and Regulations as unjust.
 - (3) an order pursuant to s. 66(3) of the Retirement Villages Act 1999 that the respondent had breached the Act by interfering with the residents autonomy including harassment and intimidation of the resident.
 - (4) an order pursuant to s. 9 of the Contracts Review Act 1980 that cl 13.3 of the Supported Living Community Rules and Regulations was unjust.
 - (5) an order pursuant to s. 180(4) of the Retirement Villages Act directing the operator to pay a refund to the former occupants who were registered interest holders with such payment to include interest at the rate determined by the regulations.
 - (6) an order pursuant to s. 128(f) of the Retirement Villages Act for payment of compensation.
 - (7) an order pursuant to s. 164 of the Retirement Villages Act that the former resident is not liable for refurbishment costs and an order that a sum of \$1,095.00 be repaid.
 - (8) an order pursuant to s. 128(2) of the Retirement Villages Act for a refund of recurrent fees in the sum of \$2,375.00.
- 2 Both parties provided submissions in accordance with the directions of the Tribunal and the matter was ultimately listed for a formal Hearing before me.

APPLICANT'S SUBMISSIONS

- 3 The applicant has brought the application as executrix of the estate of her late father,

- Melville John Jack who in June 2010 entered into a 99 year lease with the respondent.
- 4 She claimed that her late father paid \$185,000.00 as ingoing contribution and on an enquiry made to the manager at the time of the purchase she was informed that when her father died the unit would be repurchased within six months.
- 5 On 22 July 2012 Mr Jack took ill and was transported to a local hospital until in August 2012 he was moved to a higher care level at Glaica House Aged Care where he remained until his death on 25 May 2014.
- 6 On 2 August 2012 Ms Smith provided the respondent with a verbal notice of his intention to vacate the property as a result of his needs to move to a higher care facility. The verbal notice was followed by a written notice on 13 August 2012 and a copy of that notice has been attached with the papers.
- 7 On 23 November 2012 the respondent was authorised to act as a selling agent for the unit being unit 18 and at the time Mr Paul Greenup, on behalf of the respondent assured her that she would be informed of all offers.
- 8 The unit remains unsold although the applicant and the Tribunal were advised on or about 17 November 2015 that the villa unit had been sold and that a contract would be signed on 17 November 2015.
- 9 After the matter was listed for hearing the applicant was advised that her late father's lot was sold, although the sale had not been completed and the contract exchanged was only a conditional contract dependent upon the sale of the current dwelling owned by the purchaser. The applicant, however agreed that it was now not necessary to seek any orders in relation to cl 3.13 of the Supported Living Community Rules and Regulations. That concession resulted in the withdrawal of an application for orders 1, 2 and 4. In relation to the proposed order 7 seeking a repayment of \$1,095.00 for refurbishment, it was agreed between the parties that the operator would pay that sum. It was further agreed that the applicant, on behalf of the estate of the deceased, was entitled to a refund of recurrent fees in a sum of \$2,375.00 being the sum claimed under order 8.
- 10 The balance of the applicant's claim relates to interference with the autonomy of a resident within the meaning of s 66(3) and interference of a sale within the meaning of s 169 of the Act.
- 11 The applicant provided evidence that between August 2012 and January 2014 following unit 18 becoming vacant she received only two updates from the respondent regarding sales and marketing of various units. She claimed further that a revised sale price for units of that type of \$215,000.00 was not communicated to her and she only received information of the increase through a local magazine.
- 12 The applicant claimed that Mr Greenup had misdirected prospective residents and failed to inform them of the availability of unit 18. She claimed further that he had tampered with and removed or destroyed her private 'for sale' sign and he submitted that prospective residents of the complex were shown a number of other units but no

- mention was ever made that unit 18 was for sale. The applicant included a copy of the 99 year lease which was to expire on 31 May 2109 along with a copy of the Village Rules and various emails between the parties.
- 13 On 23 November 2012 she requested that the unit be listed for sale by either the respondent or an agent working on its behalf for a reduced price of \$200,000.00 and that any offers made to either party were to be submitted to her for consideration. In a letter from Mr Greenup dated 21 December 2012 it was noted that the unit had been shown to potential residents at the requested purchase price of \$200,000.00 but confirmed that the respondent would not be in a position to buy back the unit as requested. The letter went on to point out that general service fees at 50% of the standard rate would continue to be payable and the contributions could not be deferred. It was finally noted that the respondent had formed an association with Australia's largest aged care placement and as a result a dramatic increase in the number of enquiries was expected.
- 14 The applicant's evidence included a statutory declaration of Kim Greentree declared on 18 February 2014 who made an enquiry concerning the purchase of the unit for a friend in November 2013. Ms Greentree declared that she was shown one unit at the back of the complex where there were a number of new vacant units. As she walked passed unit 18 she noted a small sign on the window and asked if she could inspect that unit. She was advised that in order to view the unit she would need to speak to the manager who was only present in the village between Mondays and Fridays. Although she sought some information from the manager she claimed that he never got back to her with any details.
- 15 A further statutory declaration dated 8 February 2014 was included from a Mr Raymond Bell who claimed that he attended the respondent's premises on 30 January 2014 seeking information about the availability of single person units. He stated that he had a lengthy conversation with Mr Greenup and was shown three units namely units 34 and 44 being one bedroom units and 48 being a two bedroom unit. He claimed to have seen a sign in unit 14 but he also indicated that he did not receive any information to the effect that unit 18 was for sale.
- 16 A further statutory declaration of Adam Smith declared on 6 April 2015 stated that he attended the respondent's complex on 5 April 2015 to enquire about a suitable single unit for his mother. He asked whether pets would be allowed and noted that his mother had a small dog. He was asked if a two bedroom was required but he specifically stated that a one bedroom unit was all that was necessary. He was taken to a display unit in front of the village and was told that a fence could be put up if it was needed to be suitable for keeping a dog. At the time, Unit 18 already had fencing to accommodate a dog but he was not offered any opportunity to inspect it. The unit was at that time in the hands of private selling agents.
- 17 Mr Smith claimed that as he returned from the office he passed unit 9 and was told that it was for sale but having enquired also about unit 18 he was told by the salesperson

Vicki, that she didn't think it was for sale anymore.

- 18 The applicant produced her own statutory declaration sworn on 7 September 2015 in which she set out a detailed chronology noting open days where the unit was locked and various instances where private 'for sale' signs were taken down. She attempted to put signs in the window of the unit between 2013 and 2015 and the material provided to Ms Smith by the respondent detailed the number of resale units and the number of new sale units sold between 2012 and 14 November 2015.

RESPONDENT'S SUBMISSIONS

- 19 Mr Paul Greenup, director of Village Projects Pty Ltd provided responses to the submissions made by and on behalf of the applicant. He pointed out that there was no obligation under the terms of the lease for the respondent to purchase the unit back within six months and there is clearly no provision in the lease requiring the respondent to do so.
- 20 Mr Greenup agreed that the respondent was asked to be the selling agent of the unit on 23 November 2012 but claims the appointment was not accepted until January 2013. He pointed out that Ray White Real Estate at Foster was appointed for a period of six months between 13 November 2014 and 25 May 2015.
- 21 In his submissions, Mr Greenup stated that the unit was recently sold for \$215,000.00 being a sum of \$15,000.00 higher than that which the applicant was prepared to accept. Although he initially stated that contract documents were to be executed on 17 November it is clear that as a result of some error the new contract was not submitted to the prospective purchaser until 7 December 2015. In the course of questioning at the hearing Mr Greenup conceded further that the contract was a conditional contract dependent upon the sale of the incoming purchaser's present property. He was unable to give any indication as to when the contract was likely to be completed and settled and therefore as to when the estate of the late Melville Jack could expect to receive its entitlement on sale.
- 22 He confirmed that in the interim the estate was obliged to continue paying recurrent charges in accordance with provisions of cl 10 of the lease.
- 23 Mr Greenup denied allegations of verbal or written abuse directed to the applicant and addressed in detail the allegations relating to the placement of display signs on the window of the unit. He accused Ms Smith of continually seeking to break village rules and a personal agreement which he alleged she had with him and suggested that he could only assume she was doing so to provoke him.
- 24 It was conceded that the recurrent charges should not have been charged whilst the unit was uninhabitable and it was agreed that the amount charged to the applicant should be credited to the account. He also conceded at the Hearing that refurbishment costs which had been paid by the applicant in the sum of \$1,095.00 should be reimbursed to the estate.
- 25 In relation to the allegations that there were disruptions in the marketing process of the

unit he claimed that the disruptions were the fault of the applicant. He conceded that monthly updates in relation to the progress of sale were not undertaken and suggested that it was as a result of health problems with the village manager and the changes in management between November 2013 and May 2015. He claimed that there was no obligation on the respondent to notify anyone including the applicant when the price of units in the village was changed and stated “we are marketing ALL the units in the village. We do not however point out to prospective residents that unit 18 is available at a lower price.”

- 26 Mr Greenup rejected the assertions made in the applicant’s evidence that prospective residents had been directed away from unit 18 and claimed that during the marketing process there were many vacant units at the village. He claimed that prospective residents did not want to purchase small sized units like unit 18 and that they also wanted to live on the northern end of the village whereas unit 18 was located at the southern end of the village.
- 27 Reference was made to a report to the applicant on 6 November 2014 recording the sales in the village from August 2013. Mr Greenup advised that since the date of that report there had been two further resales in the village, both at the northern end, and there had also been a total of 15 additional sales with three being for smaller units.
- 28 In his submissions, Mr Greenup alleged that the applicant had misconstrued the application of certain provisions of the Retirement Villages Act including a claim under s 169 of the Act where she accused the respondent of interfering with the sale process. He noted quite correctly that the section applies where an operator of a retirement village is not appointed as a selling agent. He argued that there was no inference in the evidence that the respondent interfered with the marketing campaign of Ray White Real Estate during the period that that organisation was appointed as a sole agent.

DECISION

- 29 The applicant has abandoned the request for orders that cl 3.13 of the Supported Living Community Rules should be set aside or varied as being unjust, harsh, oppressive or unconscionable within the meaning the Retirement Villages Act or the Contracts Review Act 1980. Although it is not necessary to determine any matters in respect of this issue, it is appropriate to note that in general, a rule which prohibits residents from displaying notices except on noticeboards dedicated for that purpose and without prior consent of the operator, is a rule which is frequently found in areas which involve community living.
- 30 The respondent has now conceded that it is prepared to refund refurbishment costs of \$1,095.00 sought under order 7 having regard to the provisions of s 164 of the Act and the evidence produced by the applicant.
- 31 The applicant has further conceded that recurrent charges should not have been charged while the unit was uninhabitable and that the amount charged would be credited to the applicant’s account. It is appropriate that the Tribunal order the

respondent to pay these monies totalling \$3,470.00 immediately in accordance with the provisions of s 128(1)(e) of the Act.

- 32 The remaining claim seeks orders under s. 66(3) of the Act which, so far as is relevant is in the following terms;-

66 Operator to respect rights of residents

- (1) the operator of a retirement village must respect the rights of residents of the village.
- (2) in particular the operator;
 - (a) ...
 - (b) ...
 - (c) must not interfere with the right of any resident to autonomy over his or her personal, financial and other matters and over his or her possessions, and
 - (d) must not inhibit any resident from exercising self-reliance in matters relating to his or her personal, domestic and financial affairs,
 - (e) ...
- (3) a resident of a retirement village who is of the opinion that the operator of the village has contravened any provision of this section in relation to the resident may apply to the Tribunal for an order for either or both of the following;
 - (a) an order directing the operator to pay compensation to the resident,
 - (b) an order directing the operator to comply with this section.
- (4) on an application made under this section the Tribunal may make the orders sought or any other order of a kind set out in subs (3).

- 33 The applicant claims that the respondent has failed to diligently market the unit formerly occupied by the late Melville Jack with a result that the sale of the unit has not yet been completed and there is presently no indication as to when completion will occur. The respondent, through Mr Greenup, has denied that there has been any failure to market the unit with due diligence but the evidence produced by the applicant from her witnesses clearly suggests, in my view, that on a number of occasions no real attempt was made to market the property to persons who had an interest in purchasing a single bedroom unit. The unit has been on the market for over three years, although for a period of six months between November 2014 and May 2015 the sale of the unit was placed in the hands of another agent. No sale has yet been completed and based upon the evidence of Mr Greenup unit 18 was the last unit in the village to sell apart from a demonstration unit which is still retained by the operator.

- 34 The letter sent by Mr Greenup to Ms Smith on 6 November 2014 lists all of the sales since August 2013 and up to the date of that letter. It is noted that there was a sale of a standard single unit at \$215,000.00 in that period although the unit was a new sale. Mr Greenup noted:

"I feel that our results at selling "resale units" has been extraordinarily successful. We have sold every single unit that has come up for resale except for two units. Yours (unit 18) and unit 14.

As you can see from the sales listed above, people want large units and they want to be in the northern part of the village with one exception. So, from the above, I fail to see how you can say that we are not trying to sell resale units."

- 35 From the period from November 2014 to November 2015 a further 15 units were sold and three of these were apparently single units. The only unit remaining unsold was unit 18.
- 36 There were a number of new sales as the operator was clearly in the process of constructing further units. The evidence before me persuades me that there was an apparent emphasis on selling of new units at the expense of those for resale.
- 37 Taking into account the statutory declarations of Kim Greentree sworn 8 February 2014, Raymond Bell sworn 8 February 2014 and Adam Smith sworn 6 April 2015, it is clear that those persons were offered new units but not referred to unit 18 which was at all times a single unit available for sale. At the time when Mr Adam Smith attended the village in April 2015 unit 18 was at that stage in the hands of an exclusive agency. The sales representative on behalf of the respondent offered to sell a single unit and put up a fence to accommodate a dog. Mr Smith states that as they passed unit 18 the agent said "I don't think that one is for sale anymore and the signs probably need to come down." That assertion has not been denied.
- 38 Section 169 of the Act provides as follows:

169 Operator not to interfere in sale

- (1) the operator of a retirement village who is not appointed as selling agent for residential premises in the village must not interfere with the sale of the premises.
- (2) without limiting subs (1) an operator interfered for the sale of the premises if the operator interferes with any "for sale" sign relating to the premises.
- (3) subs (2) does not apply if the sign has been erected contrary to the village rules (or by-laws), if the village is subject to a community land scheme or strata scheme or in such way as to interfere with the peace, comfort and quiet enjoyment of another resident in the village.

- 39 The statutory declaration of Lynne Smith details the restriction on signs imposed on the agent which included only an A4 size with no price. She refers further to an open day on 6 January 2015 when it is claimed the representative of the agent was told that he was not to approach anyone. Neither the agent, Ray White, nor the applicant received any report on the outcome of the sales on open day in March notwithstanding that a monthly report was requested by the applicant.
- 40 The matters referred to above are in my view sufficient to constitute an interference in a sale within the meaning of s. 169 when the statutory declarations in relation to 2014 are taken into account, I am satisfied they will also constitute an interference with the right of a residents autonomy over his personal, financial and other matters within the meanings of ss. 66(1)(c) and could further constitute inhibiting a resident from exercising self-reliance in matters related to personal, domestic and financial affairs.
- 41 Having regard to the provisions of s. 66(3) the applicant is entitled to seek an order directing the operator to pay compensation to the resident or an order directing the operator to comply with the section. The power of the Tribunal to order compensation is contained within s 128(1)(f) and the power to direct an operator to comply with the requirement of the Act on the regulations is contained within s 128(1)(a).
- 42 Although Ms Smith has concentrated on allegations relating to the taking down of

signs, the evidence overall persuades me that the respondent failed to attempt to sell the applicant's unit with due diligence and evidence indicates that although single units in the area where unit 18 was situated, were not in high demand, it was nevertheless the last available unit to be sold as at the time when the matter came before the Tribunal. I am satisfied that refusal to show the unit specifically on the occasions detailed in the applicant's evidence, along with the actions apparently taken when the sale of the unit was in the hands of a private operator have delayed the sale to the financial detriment of the estate of the late Melville John Jack.

- 43 Had the unit been sold at an earlier time the responsibility for recurrent charges would have passed to the incoming purchaser.
- 44 A court or a tribunal has an obligation to attempt to assess compensation or damages and that responsibility does not diminish where some element of speculation is required (*Commonwealth v Amman Aviation Pty Ltd [1991] 174 CLR 64*). In compensating for loss the High Court has been prepared to adjust dogma so as to achieve results in accord with commercial reality (*Hungerfords v Walker [1989] 171 CLR 125*). The amount awarded is in many cases no more than approximation lacking in mathematical or economic accuracy or sufficiency (*Pennant Hills Restaurants v Barrell Insurances Pty Ltd [1981] 145 CLR 625*) Taking into account the evidence which has been produced by the parties in this matter I am satisfied on the probabilities that in the absence of interference by the village operator whilst the sale was in the hands of an alternate selling agent and in the absence of actions which appeared to prefer the sale of new units owned by the operator over the unit presently marketed by the respondent, the sale of the unit should have been completed by 30 June 2015 and exit fees should have been adjusted and paid 14 days thereafter. The applicant is accordingly entitled to a refund of any or all recurrent charges paid in respect of a period after 30 June 2015 together with any interest charged thereof. That sum is to be taken into account in an adjustment of exit fees and balances due to the applicant are calculated. Interest should also be payable in accordance with s. 180(4) from 14 July 2015.
- 45 As the Tribunal has determined that the respondent is no longer entitled to seek payment of recurrent charges after 30 June 2015 the respondent is ordered to refrain from submitting further accounts for recurrent charges for any period from the date of the present orders until the date when a purchaser of unit 18 becomes liable to pay those charges.
- 46 The respondent is to pay the applicant the sum of \$3,470.00 forthwith and all matters relating to recurrent charges and interest are to be adjusted when exit fees are calculated.

J A Ringrose

General Member

Civil and Administrative Tribunal of New South Wales

24 February 2016

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

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Decision last updated: 08 April 2016