



## Civil and Administrative Tribunal New South Wales

<b>Medium Neutral Citation:</b>	<b>Pittwater Palms Management Pty Ltd (Applicant); The Residents Committee Pittwater Palms Management (Respondent) [2016] NSWCATCD 18</b>
<b>Hearing dates:</b>	11 November 2015 and 19 February 2016
<b>Decision date:</b>	31 March 2016
<b>Jurisdiction:</b>	Consumer and Commercial Division
<b>Before:</b>	Ms S. Thode, Senior Member
<b>Decision:</b>	The application RV 15/54050 is dismissed.
<b>Catchwords:</b>	RETIREMENT VILLAGES - preliminary question of jurisdiction – meaning of proposed annual budget
<b>Legislation Cited:</b>	Civil and Administrative Tribunal Act 2013 (NSW); Retirement Villages Act 1999 (NSW)
<b>Category:</b>	Principal judgment
<b>Parties:</b>	Pittwater Palms Management Pty Ltd (Applicant) The Residents Committee Pittwater Palms Management (Respondent)
<b>Representation:</b>	Mr A. Koumoukelis Gadens solicitors for the appellant Mr T. Rollo, Carroll O'Dea solicitors for the respondent
<b>File Number(s):</b>	RV 15/54050
<b>Publication restriction:</b>	None

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### REASONS FOR DECISION

#### Introduction

- 1 In an application filed on 24 September 2015 Pittwater Palms Management Pty Ltd (the operator) seeks approval of the proposed expenditure under s 115 and orders under s 108 to vary recurrent charges paid by Lodge residents to reflect the changes to the cost of operating the Lodge in the 2015/16 financial year.
- 2 The Resident Committee of the Lodge (the residents) opposed some items in dispute. The operator seeks an order allowing all items of expenditure as itemised in a

document entitled "proposed annual budget" except for those items disputed by the Lodge residents pursuant to the mechanism set out in section 114.

- 3 The matter was first listed for directions on 16 October 2015. The substantive application effectively seeks a declaration that the Lodge budget (as opposed to the Village budget) be approved.
- 4 On 15 October 2015 the hearing was adjourned to hearing on 17 November 2015 to determine a preliminary jurisdictional issue raised by the respondent.

### **Background**

- 5 Pittwater Palms is a strata title retirement village which comprises 167 residential lots, 40 of which are assisted living units in a complex known as the Pittwater Palms Lodge (the Lodge). The remainder of the residential lots are independent living units (the ILU's) and are not subject of the substantive application for orders under s 115 of the Retirement Villages Act 1999 (the Act).
- 6 Pursuant to their village contract the Lodge residents receive additional services to the remainder of the independent living units and are required to pay significantly higher recurrent charges for this reason.
- 7 The operator prepares and presents two types of village budget each year pursuant to the Act. A village budget for standard services also referred to as general services under the resident agreement that are received for all residents and all residents (including the Lodge residents) pay the same recurrent charges under this budget.
- 8 The operator also prepares a separate budget for additional services referred to as the serviced apartment services (the Lodge budget). This budget is only received by Lodge residents who pay for these services by way of recurrent charges. Only the Lodge residents are asked to consent to this budget. This budget is not incorporated in and does not form part of the Village budget and a copy is not distributed to the residents of the independent living units.
- 9 The Lodge budget is the subject of this application and the residents concerned, as referred to in section 114 (4) of the Act, are the residents residing in the Lodge (the respondent). The Lodge committee informed the operator on 24 May 2015 that the proposed Lodge budget was rejected on the basis that the operator should bear the cost of seven line items. The operator filed the current application pursuant to section 115 of the Act, seeking an order that the budget be approved.
- 10 The residents seek an order that the application be dismissed for want of jurisdiction. For the reasons set out below I have concluded the Tribunal does not have jurisdiction to hear and determine the issues between the parties.

### **The residents' submission**

- 11 The residents submit that the Tribunal does not have jurisdiction to hear and determine the substantive application because the operator has not provided the Lodge budget to all village residents for their consideration. Furthermore the Lodge budget is not a

“proposed annual budget” for the purpose of the Act.

12 Firstly, as the budget has not been provided to all residents, it cannot be *the* proposed annual budget, and does not conform with the wording and requirements of section 115(a):

If the residents of a retirement village refuse consent to the expenditure itemised in the proposed annual budget, the operator or a resident may apply to the Tribunal for an order in respect of the expenditure proposed for the financial year concerned.

13 Secondly it is submitted that *the* (being a single) budget has not been proposed and that no single budget covering all expenses (lodge and non lodge) has been provided to the residents of the village, and therefore the operator may not apply for an order in respect of the expenditure proposed.

14 The matter came before hearing before the Tribunal on 17 November 2017 for separate determination of a jurisdictional threshold question.

15 The applicant is seeking an order that the substantive application RV 15/54050 be dismissed for want of jurisdiction.

16 The issues are summarised in the submissions of the residents filed 15 October 2015.

17 The residents submit that pursuant to section 112 of the Act, the budget is a document dealing with expenditure funded from the recurrent charges from *all* (emphasis added) residents of a village and the document for consideration in this case deals with only expenditure funded from *some* (emphasis added) of the recurrent changes from *some* of the residents of the village.

18 The requirements of section 112 have therefore not been met and there is no jurisdiction to make any order in relation to the Lodge budget proposed by the operator.

“it follows that the document on which orders are sought is not a “proposed annual budget” as defined in the Act”.

19 Relevantly subsection 115(7) provides:

(7) If the Tribunal receives an application under this section at the same time as (or while there is before it) an application under section 108 in relation to recurrent charges payable at the same retirement village, it must make a determination under this section before making a determination under section 108.

20 Section 108 of the Act confers jurisdiction on the Tribunal to hear and determine a dispute about recurrent charges between operator and residents. One of the factors to which the Tribunal may have regard to in any application under s 108 is “the level and cost of services and facilities provided for in the proposed annual budget or proposed annual budget” (s 108(4)(a)).

21 The residents submit that the wording in s 108(4)(a) suggests that the section assumes the existence of a proposed annual budget. The residents further submit that any dispute about a proposed annual budget 115 must be determined before a section 108 application for a variation of a recurrent charge may be brought. Where there is no proposed annual budget for which an application under section 115 can be brought, an underlying requirement for an application concerning recurrent charges is also not met.

22 Section 108 provides:

- (1) An operator of a retirement village may apply to the Tribunal for (and the Tribunal may make) an order in respect of a proposed variation of recurrent charges if:
- (a) the consent of the residents of the retirement village is required before the proposed variation can take effect, and
- (b) the residents do not consent to the proposed variation under section 107.
- (2) The Tribunal may, on application by the operator:
- (a) order that the proposed variation is to take effect, with or without modification, or
- (b) order that the proposed variation is not to take effect.
- (3) An order under subsection (2) (a) may:
- (a) specify the date from which the variation is to take effect (which may be a date other than the date specified by the operator in the notice given under section 106), and
- (b) order that the recurrent charges are not to be further varied for a specified period, being a period that does not exceed 12 months.
- (4) In determining an application made under this section, the Tribunal may have regard to the following:
- (a) the general market level of recurrent charges paid at similar retirement villages in the locality of the retirement village concerned or a similar locality,
- (b) the level and cost of services and facilities provided for in the proposed annual budget or approved annual budget (as the case may be),
- (c) any proposed variations (including additions) to those services and facilities, being variations to which the residents have consented,
- (d) the cost of general services required to be provided by the operator,
- (e) the frequency and amount of past variations of the recurrent charges,
- (f) if the retirement village is subject to a community land scheme or strata scheme-the amounts of levies and other contributions payable by the residents under the Community Land Management Act 1989 or the Strata Schemes Management Act 1996,
- (g) any other relevant matter.

- 23 It is further submitted that it is procedurally unfair to make an order under section 108 unless a proposed annual budget has been provided. The resident's written submissions set this argument out as follows:

Even if not implicit as a matter of construction, as a matter of procedural fairness no such application [under section 108] should be entertained unless there is such a proposed annual budget otherwise the owners may be put at a significant disadvantage in dealing with the application. This concern arises more clearly in a case where, as here, there is a dispute as to some of the items on which the operator proposes to spend the funds from the recurrent charges.

- 24 It is further submitted that on the operator's admission the Lodge budget has not been provided to all residents. And a proposed annual budget covering all expenses in the village has not been provided to all residents.

### **The operator's submissions**

- 25 The operator summarises the residents' arguments as follows in paragraphs 25 to 29: It is submitted that the operator issued two forms of proposed annual budget in accordance with section 112 of the Act and Regulation 17 of the Retirement Villages Regulations 2009 (the Regulations). One is referred to as the Lodge budget and covers recurrent charges payable by the Lodge residents. There is another budget published

which covers recurrent charges for all residents.

- 26 The Lodge residents' submissions are predicated on its position that the Lodge budget is not a proposed annual budget section under the Act because it does not fulfil the requirements of s 112(1):

At least 60 days before the commencement of each financial year of a retirement village, or such other time as may be prescribed by the regulations, the operator of the village must supply each resident of the village with a proposed annual budget itemising the way in which the operator proposes to expend the money to be received by way of recurrent charges from the residents of the village during the financial year.

- 27 A budget that is relevant to a whole village, can only be a budget referred to in section 112. The Lodge residents submit that Lodge budget is not a proposed annual budget under section 112 of the Act because it does not conform with subsection 112 (1) of the Act, as set out above. In order to be "a proposed annual budget" the Lodge budget ought to have been distributed to all residents of Pittwater Palms, not just the Lodge residents, and itemised all items that the applicant proposed to expend money on within Pittwater Palms as a whole.

- 28 The Lodge budget is said to be defective as it only outlines the way in which the operator proposes to expend the money to be received by way of recurrent charges from *some* of the residents of the village. It is therefore not a proposed annual budget. As there is no proposed annual budget within section 112, there is no "trigger" to seek orders under section 115:

(1) If the residents of a retirement village refuse consent to the expenditure itemised in the proposed annual budget, the operator or a resident may apply to the Tribunal for an order in respect of the expenditure proposed for the financial year concerned.

- 29 As there is no proposed annual budget the operator cannot apply to the Tribunal for an order in respect of the expenditure proposed this is said to be a jurisdictional threshold question.

- 30 The operator submits that the resident's argument as set out above must fail.

- 31 The assumption advanced by the Lodge residents is that because of section 112 using the words "each resident of the village" it must be the case that a proposed budget can only refer to a budget for the *whole* of the residents and the residents of the *whole* of the village.

- 32 It is submitted that this is an incorrect interpretation of section 112 and the nature of the proposed annual budget under section 112. It is submitted that the residents' position is not supported by the ordinary meaning of section 112 nor the regulations when read together as a whole.

- 33 The submission of the operator poses the following rhetorical questions:

Rather, the issue thrown up by the respondent [residents'] submissions is 'what is the position in relation to a proposed annual budget when a body of residents have different service regimes? What is to occur in respect of the serviced apartments known as the Palms Lodge where residents (the Lodge residents) are paying a higher level of recurrent charges for a different range of services?'

'Do all residents receive a copy of the proposed budget and is the budget for the Palms Lodge part of the wider budget for all residents to vote on?'

- 34 The operator submits that the correct interpretation of s 112 is that a proposed annual budget is a document provided by an operator to residents of a village itemising the manner in which the operator proposes to expend the money paid by *those* residents (being the Lodge residents) to the operator by way of recurrent charges. It is a document providing information to residents as to how the operator intends to spend the money *those* residents have given to the operator.

### Findings and consideration

- 35 The application seeks a dismissal of the application for determination of an annual budget pursuant to section 115.
- 36 The issues in dispute between the parties are factual in nature. The residents submit that the application by the operator must fail as it is not brought in relation to a proposed annual budget for the whole of the residents of Pittwater Palms. The application brought by the operator must fail because the application is brought in relation to money received by the residents by way of recurrent charges in relation to optional services provided in the Lodge, and albeit a large component of the expenditure, and does not reflect the whole of the expenditure for the whole village.
- 37 I have been provided with a bundle of documents tendered by the operator. It contains, at annexure J an annual budget for the Lodge only, being the “proposed annual budget” as argued by the operator. I have also been provided with the following submission by the operator.

“the operator issues two forms of proposed annual budget for each financial year.

A general proposed budget in relation to recurrent charges payable by and services provided to all residents of Pittwater Palms - which is provided to all residents.”

- 38 The operator has also attached a notice of meeting at annexure E (page 55) of its submissions. The notice dated 30 April 2015 is addressed to “the resident Pittwater Palms Village” and is entitled

Budget Notice under section 112(4) of the Retirement Villages Act 1999.

- 39 It states that the Budget Notice is accompanied by the proposed annual budget for the Village for the financial year 1 July 2015 to 30 June 2016 (the Budget). A document appears at page 58 of the annexures and that document contains the “offsite running costs associated with providing administration and functional support to the site.” The reference as to site refers to the Pittwater Palms ILU or independent living units.
- 40 Page 59 of the document tendered by the applicant is a document purporting to be the Proposed Annual Budget but its figures pertain to the expenditure associated with independent living units. The parties agree that this budget related to all residents of the village, including Lodge residents. Importantly it does not include recurrent charges of Lodge residents.
- 41 The document contained at page 61 and following entitled Annexure F states as follows:

Budget Notice under section 112(4) of the Retirement Villages Act 1999.

- 42 It is referred to in identical terms as the notice referred to in the budget Notice at pages 55 and set out above.
- 43 It also refers to “the proposed budget for the Village for the financial year.” However, what is attached at page 60 and also in annexure J, is clearly the budget for Lodge residents only. This document’s expenditure is not incorporated in annexure E and not distributed to residents other than Lodge residents. Its expenditure is separate and distinct from the village budget.
- 44 I am satisfied on the evidence before me that a budget tendered for the purpose of this application is “the proposed annual budget for the ILU’s” (the village budget) and “the proposed annual budget for the Lodge”. On the evidence before me I am not satisfied that an annual budget for the whole village was prepared in accordance with the requirements of section 112.
- 45 Section 114(4) of the Act relevantly states that
- (4) The residents concerned must, within 30 days after receiving a request for consent to a proposed annual budget (or an amended budget):
    - (a) meet, consider and vote on the budget, and
    - (b) advise the operator that they consent, or do not consent (as the case may be) to the budget, and
    - (c) if they do not consent to the budget-specify the item or items in the budget to which they object.
- 46 It must follow that the applicants have prepared an annual budget for the purpose of assessing the relative expenses for the ILU residents and one for the Lodge residents. The “residents concerned” (being all residents) are therefore not provided with a proposed annual budget incorporating expenses for the village as a whole. It must follow that when the Lodge residents met to consider and vote on the Lodge budget, they did not consider and vote on the Proposed Annual Budget, but on some other budget. There cannot have been a “request to consent” as required by s114(4) nor has there been a meeting, consideration or vote within the meaning of (s 114(4)(a)) and finally, there has been no valid advice to the operator whether all residents consent to the proposed annual budget or any of its line items.
- 47 I am therefore of the view that the letter of 24 May 2015 by the Lodge residents to the operator, purporting to reject certain line items, cannot constitute a “refusal of consent” as set out and required under the Act and a compliance that must be met before any application may be brought to the Tribunal.
- 48 Further, there has been non-compliance with the requirement under Regulation 17(h)
- For the purposes of section 112 (3) (a) of the Act, the matters that must be dealt with in a proposed annual budget are the following:...
  - (h) if any residents of the village are paying significantly higher recurrent charges than some other residents of the village (for example, because they are receiving optional services)-the method or calculation by which expenditure is apportioned between the categories of residents concerned,
  - (i) the total proposed expenditure of the village for the year,
- 49 What has been prepared is a budget that provides only an apportionment of charges,

as relevant to the ILU's and the Lodge residents' respectively. That does not allow assessment as to what proportion is spent by one class of resident when compared to another when seen in the context of the total proposed expenditure of the village for the year. It is impossible to assess the apportionment as a share without reference to the budget of the village as a whole.

- 50 A similar issue was briefly considered by Member HE Moore in the decision of *Australian Retirement Homes No 2 Pty Ltd Ors v the Residents of Aveo Minkara Resort* [2011 ] NSW CTTT 262. This case is supportive of the proposition that the residents in receipt of vastly differing services must be provided with a single budget as well as a means of showing apportionment between two classes of residents.

The difficulty arising from there now being two applications for approval of two budgets is that it is obscure that the fact that the Aveo Minkara Resort is one retirement village with one budget to be approved for the 2010/2011 year. Where some residents in the village are paying significantly higher recurrent charges than others in that village, regulation 17(h) requires an operator to show the method of calculation by which expenditure is apportioned between the categories of residents. At the same time regulation 17(i) requires the budget to show "the total proposed expenditure of the village for the year".

There were separate meetings of residents of Endeavour Lodge and Minkara Resort to consider the 2011 budget, adjusted to reflect the expenditure apportioned to their category. Both groups did not consent to the proposed budget although their objections to items of expenditure differed.

The applicant submitted that each objection should be considered in the context of the proposed expenditure portion to residents of that group. The effect being to treat the budget for Endeavour Lodge and Minkara resort as requiring separate consideration.

I cannot do so, notwithstanding that such an approach is consistent with the requirement that there be two applications for approval of the budget for the village. To take such an approach would be inconsistent with the Act that the budget be for the retirement village as a whole. It would be inconceivable that upholding objection by Minkara Resort residents to a line item in the budget would not apply to the proposed expenditure for Endeavour Lodge residents if those residents had not objected to that line item. In these proceedings I take each objection to apply to the total proposed expenditure of the village for the 2010/2011 year.

- 51 The authority appears to traverse the same issues in a remarkably similar case. With one significant distinction. Although there were two separate meetings of resort residents and Lodge residents, a 2011 budget had been prepared and distributed to all, "adjusted to reflect the expenditure apportioned to their category" (p 4). It appears from my reading of the decision the operator prepared a budget for the village as a whole, and that the single budget allowed comparison and apportionment to be considered for residents in different categories (compliant with regulation 17). I respectfully agree with the learned Member that the intent of the Act is that the budget be for the village as a whole, and not separate budgets for separate classes of residents.
- 52 The question posed to the Tribunal of whether "a" budget is "the" proposed annual budget" is a jurisdictional threshold question.
- 53 A jurisdictional fact normally arises where a statutory power is conditional upon something. The statement of the concept of 'jurisdictional fact' in Australia is set out in the majority judgment of the High Court in *Corporation of the City of Enfield v Development Assessment Commission* 27 (*Enfield*), as follows:

The term 'jurisdictional fact' (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion.

54 Consideration must be given to the total context of the legislative scheme in which the power and question is conferred including the scope and nature of the jurisdiction and the fact said to be jurisdictional. The fact is likely to be jurisdictional if satisfaction of it is preliminary or ancillary to the exercise of the statutory power. The word preliminary in this context refers to a matter that is legally antecedent to the decision-making process rather than to a matter that must be determined at the outset (*Pallas Newco Pty Ltd v Votraint No 1066 Pty Ltd* [2004] NSWLR 707).

55 Handley JA in that case distinguished between a finding that a development consent can be granted and a finding whether it should be. His Honour said

...this threshold of preliminary enquiry "can I?" is legally and logically antecedent to and distinct from the merits enquiry "should I?".

56 The Chief Justice, writing for the majority, went on to deal with "indicators **against** jurisdictional fact", saying (at [53], and [56] – [58]):

53 The first factor which may support a conclusion that the appropriate classification of a proposed development is not jurisdictional concerns the element of fact and degree involved when determining whether or not a particular proposal answers the statutory description.

...

56 Where issues of fact and degree arise it will often be the case that these are matters which a decision-maker is intended by Parliament to determine and, accordingly, any error is an error within jurisdiction rather than an error going to jurisdiction.

57 Where the factual reference contains words involving the mental state of the primary decision maker such as opinion, belief or satisfaction, the construction is often against a conclusion of jurisdictional fact.

58 In the instant case the residents seek to argue that the Lodge budget was not a proposed annual budget. The characterisation of whether it was, or not, did not require analysis of the budgets as tendered. This issue, using the words of the Chief Justice, was not in my view a question of fact or degree and did not require assessment of opinion, belief or satisfaction. Indeed, it was agreed that there was no one budget covering all expenses provided to all residents. The issue, in my view, is rather black and white, the budget either is a proposed annual budget for the whole village, allowing all residents to compare different line items, or it is not. In this instance no single annual budget was proposed. I am therefore persuaded that the question posed by the residents does give rise to a jurisdictional threshold question and for the reasons set out above, I am not satisfied that the Tribunal has jurisdiction to hear and determine the substantive proceedings pursuant to ss 115 and 108.

59 Accordingly I make the orders in paragraph one above and dismiss the application.

**S Thode**

**Senior Member**

**Civil and Administrative Tribunal of NSW**

**31 March 2016**

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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: 28 April 2016