



## New South Wales District Court

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**CITATION:** **Queens Lake Village Pty Ltd v Queens Lake Village Residents Association [2011] NSWDC 21**

**HEARING DATES:** 14 & 15 March, 8 April 2011

**JUDGMENT DATE:** 8 April 2011

**JURISDICTION:** Civil

**JUDGMENT OF:** Levy SC DCJ

- DECISION:**
1. The appeal by Queens Lake Village Pty Ltd is dismissed;
  2. The orders made on 9 December 2010 by the Consumer, Trader and Tenancy Tribunal in proceedings numbered RV 10/28914 and RV 10/31794 are confirmed;
  3. Queens Lake Village Pty Ltd is to pay the costs of the Queens Lake Village Residents Association on the ordinary basis unless otherwise ordered;
  4. The exhibits may be returned;
  5. Liberty to apply on 7 days notice if further orders are required.

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

**CATCHWORDS:** **ADMINISTRATIVE LAW** – appeal from decision of Consumer Trader and Tenancy Tribunal – whether questions have arisen pursuant to s 67(1) of the *Consumer Trader and Tenancy Tribunal Act 2001* with respect to matters of law – whether evidence mandated that CTTT exercise statutory discretion in favour of appellant; **INTERPRETATION OF STATUTES** – whether purposive construction of applicable provisions of the *Retirement Villages Act 2009* and the applicable regulations under the *Retirement Villages Regulation 2009* permits the operator of a retirement village to impose on the residents certain overhead items of contentious expenditure – whether refusal of CTTT to so order involves a question with respect to a matter of law

**CATEGORY:** Principal judgment

**LEGISLATION CITED:** Consumer Trader and Tenancy Tribunal Act 2001, s 67(1)

Retirement Villages Act 1999, ss 100, 107, 108, 112, 115, 199  
Retirement Villages Regulation 2009, reg 17, reg 26  
Uniform Civil Procedure Rules 2005, r 12.1(b)

**CASES CITED:** Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191  
House v The King [1936] HCA 40; (1936) 55 CLR 499  
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; 219 CLR  
165

**TEXTS CITED:** Hansard, *Retirement Villages Bill 1999*, Second Reading

**PARTIES:** Queens Lake Village Pty Ltd (Appellant)  
Queens Lake Village Residents Association (Respondent)

**FILE NUMBER:** 2010/4255534

**COUNSEL:** Mr I Griscti (Appellant)  
Mr PW Hill, solicitor (Respondent)

**SOLICITORS:** Gadens (Appellant)  
Hill & Co (Respondent)

**LOWER TRIBUNAL:** CTTT

**LOWER TRIBUNAL  
OFFICER:** Tribunal Senior Member J Smith

**LOWER TRIBUNAL  
DATE OF DECISION:** 9 December 2010

**LOWER TRIBUNAL  
DECISION NUMBERS:** RV 10/28914  
RV 10/31794

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## JUDGMENT

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### Summons

1. This summons involves an appeal pursuant to s 67(1) of the *Consumer Trader and Tenancy Tribunal Act 2001* [“*CTTT Act*”]. The appeal is from a decision of the Retirement Villages Division of the Consumer, Trader and Tenancy Tribunal

["CTTT"]. Those proceedings were heard by Senior Member J Smith at Port Macquarie on 8 November 2010. The decision of the CTTT was made on 9 December 2010.

### **Nature of dispute and parties**

2. The appellant, Queens Lake Village Pty Ltd ["the operator"] is the owner of a retirement village situated at 349 Ocean Drive Laurieton, NSW ["the retirement village"]. The respondent, Queens Lake Village Residents Association is the residents' association whose members have a relevant interest in the operation of that retirement village ["the residents"].
3. The operator and the residents have found themselves in dispute as to certain insurance expenses and certain business overhead costs. The operator has indicated that it proposed to require the residents to bear those disputed costs. The parties took their dispute to the CTTT for adjudication. In the CTTT the dispute was determined in favour of the residents. The operator is dissatisfied with the decision of the CTTT, and claims the decision involved errors concerning questions with respect to matters of law.
4. The determination of the matters in dispute in this appeal necessarily involves a consideration of the basis for decision of the CTTT, the contractual relationship of the parties, principles of statutory interpretation and a consideration of whether the CTTT truly failed to exercise discretions conferred upon it by statute, as is claimed by the operator, so as to amount to errors concerning questions with respect to matters of law.

### **Factual Background**

5. The operator is owned by a publicly listed company, Aevum Ltd ["Aevum"] which, operates 30 retirement villages and 367 other facilities comprising nursing homes, aged care facilities and low care hostel facilities. For the purposes of operating those businesses, Aevum employs 582 employees in its group of business entities. In addition to operating its businesses at various individual locations, such as at the retirement village in question at Laurieton, for understandable reasons of practicality and business efficiency, a number of business activities and functions of Aevum are

conducted from Aevum’s central head office location. There is no dispute that in respect of its trading and business operations, Aevum, as the operator of those businesses, incurs significant annual expenses in connection with the running of those businesses at all of its various locations.

6. The *Retirement Villages Act 1999* [“RV Act”] and the *Retirement Villages Regulation 2009* [“RV Regulations”] provide rights, mechanisms and procedures for an operator to prepare an annual budget of anticipated expenses for the residents of a retirement village to approve for a forthcoming financial year. The mechanism provides for a budget to be placed before a management committee of residents of a retirement village for approval in anticipation of the expenses being levied against the residents in the forthcoming year. The budget in question in the CTTT proceedings, which is the subject of this appeal, was presented to the residents in accordance with those prescribed procedures. The residents raised objections to several items in the budget. The residents are not the owners of any property in the retirement village, they are simply lessees. However, they have rights as consumers. Those rights arise as a matter of contractual relationship and by statute.

7. The contractual basis of the operator’s entitlement to seek the payment of overheads is found in the definition of “*outgoings*” in the contracts between the operator and the residents. Outgoings are relevantly identified as follows:

“ ‘*Outgoings*’ means (to the extent to which the same are not specifically payable from time to time by any Lessee of any part of Queens Lake Village) the total cost of all outgoings costs and expenses of the Lessor now or hereafter properly and reasonably assessed charged or chargeable paid or payable or otherwise incurred upon or in respect of the whole of Queens Lake Village and the Village Centre or upon the Lessor in relation thereto or in the conduct management and maintenance of Queens Lake Village and the use and occupation of the same as a high-class retirement village and the Village Centre as a high-class administrative and communal centre. Fees payable by the Lessor to its auditors or to the Trustee shall not be included in general outgoings.”

[Emphasis added]

8. The matter at issue in the CTTT was the permissibility of the operator including in its annual budget for payment by the residents, two items of likely expenditure for the village in the forthcoming year. Those items comprised certain insurance costs, and some amounts for administrative and business overhead expenses, described as corporate recharge expenses, likely to be incurred by the operator in the forthcoming year.

9. The residents did not dispute the statutory entitlement of the operator to make levies of the kind sought. However, the residents disputed the proper identification of the amounts sought to be paid and the transparency of the particular amounts as sought by the operator. The residents disputed the characterisation of those amounts as being legitimately and properly passed on to them as being amounts reasonably assessed or chargeable in respect of the Queens Lake Village. The basis of the dispute arose from the definition of outgoings in the contract between the parties, according to the elements of the definition to which I have added emphasis. The amounts in question were \$23,100 in respect of insurance, and \$28,954 in respect of a broad category of items described as corporate recharge expenses.
10. In the CTTT, that dispute was resolved in favour of the residents. The operator was dissatisfied with that decision and has therefore appealed as of right to this court, pursuant to s 67(1) of the *CTTT Act*, claiming the decision of the CTTT was afflicted with errors concerning questions with respect to matters of law.

### **Findings made by the CTTT**

11. The formal finding and order made by the CTTT was as follows:
  - “2. Pursuant to the provisions of the *Retirement Villages Act* 1999, s 115(2)(e) an order is made that the line item of “*insurance*” in the sum of \$23,100.00 and the line item of “*corporate recharge*” in the sum of \$28,594.00 are both excluded from the budget for Queens Lake Retirement Village for the financial year 2010-2011.”
12. The CTTT gave detailed, transparently clear, cogent and logically structured reasons for its decision, in a series of 77 numbered paragraphs. Those reasons make it plain that before arriving at the findings on the matters in dispute, the CTTT Senior Member canvassed relevant matters. Those included the detail and the basis of the operator’s application, the procedural course taken during the hearing, the issue of jurisdiction, and an appropriate review of the respective submissions of the parties. In making his findings, the CTTT Senior Member set out the relevant provisions of ss 100, 106-108 and 115 of the *RV Act*, as well as the provisions of regulation 26 of the *RV Regulations*.

13. In reaching that reasoned determination, which is now challenged by the operator as being vitiated by contended errors concerning questions with respect to matters of law, the CTTT Senior Member identified certain categories of expenditure that by law, must not be financed by way of recurrent charges to be passed on to the residents.
14. On appeal, the operator submitted that in arriving at his determination, the CTTT Senior Member had failed to exercise relevant statutory discretions that were provided for under the cited legislation.

### **Procedural matters**

15. The transcript of the proceedings before the CTTT was not available at the commencement of the hearing of this appeal. Notwithstanding that position, the parties took what I considered to be an unusual course by proceeding with the appeal without the transcript of the CTTT hearing. In conformity with that decision, the appeal proceeded to the stage of concluding the evidence and the delivery of final submissions. This was because the parties had agreed that since the subject matter of the appeal principally concerned construction of the relevant legislative provisions, they had agreed that the appeal could conveniently proceed on the basis of an examination of the orders made by the CTTT, together with the underlying documentary evidence that was before the CTTT. In that regard, they considered that they could do without the transcript of the proceedings in the CTTT. The initial hearing of the appeal took place in this court on that basis on 14 and 15 March 2011.
16. During the course of final submissions, on 15 March 2011, the parties changed course and decided that after all, it would be prudent to defer finalising their arguments and submissions in order to obtain the transcript of the CTTT proceedings. That course was taken because it became apparent that the outcome of the appeal may turn on the issue of whether the CTTT had before it by way of submissions on behalf of the operator, a request that it exercise the statutory discretions that were now contended on appeal, and whether the evidence justified that course. The proceedings were then adjourned to 8 April 2011 for that purpose in order to conclude the arguments after a consideration of that transcript.

17. On 5 April 2011, my Associate was provided with a copy of the transcript of the CTTT proceedings in anticipation of the resumed hearing today. On 6 April 2011 the solicitors for the operator provided my Associate with a copy of a Notice of Motion filed on 4 April 2011, in which the operator sought to discontinue the appeal. That motion was supported by the affidavit of the solicitor for the operator, Mr Athanasios George Koumoukelis, sworn 4 April 2011. By that motion, the operator sought leave to discontinue its appeal, pursuant to r 12.1(b) of the Uniform Civil Procedures Rules 2005. In its motion, the operator indicated its consent to an order that it pay the costs of the residents on an indemnity basis on such a discontinuance.
18. At the commencement of the hearing of the appeal on 14 March 2011, I was informed that this appeal was considered by the parties to be a test case, by which the operator sought to clarify certain matters of law with respect to its proposed charges.
19. Paragraph 21 of Mr Koumoukelis' affidavit is in the following terms:

“On 16 February 2010, we were informed by the CTTT that no transcript or sound recording existed in relation to the Tribunal Proceedings.”
20. It appears that the reference to the 16 February 2010 date of the advice from the CTTT to the effect that there was no transcript or sound recording of the proceedings should clearly have been a reference to 16 February 2011. It was clearly apparent that when these proceedings were commenced, no transcript of the CTTT proceedings was available. However, it is now apparent that when that transcript was obtained on 28 March 2011, on instructions from the operator, the solicitors for the operator sought to discontinue the appeal.
21. Today, when the motion filed on 4 April 2011 was called on for hearing, it was withdrawn and the parties agreed that the applicant/plaintiff should pay the respondent/ defendant's costs on the ordinary basis. I made orders in those terms, and the remainder of the appeal then proceeded to conclusion.
22. It was also plain from the affidavits filed by the residents in connection with the dismissed motion, that they wanted an adjudication on the matters raised by the operator in this appeal in order to settle as soon as practicable, the claimed questions with respect to matters of law.

23. In the course of final arguments, I was referred to an interim transcript of reasons determining other proceedings in the CTTT between the operator in this case, and the residents of another of its retirement villages, in which similar issues were litigated. The transcript of reasons in the other matter was not full or final, and I took the view that whilst it could be argued to be persuasive, it was not determinative of the present appeal with which I am concerned. Accordingly, I then heard the remaining arguments to conclusion, in order to give this final judgment on the appeal.

### **Transcript of the proceedings before the CTTT**

24. Today, on the resumed hearing of the appeal, the transcript of the CTTT proceedings, which comprised 33 pages, was formally tendered: Exhibit “B”. I had already had the opportunity of reading it when the parties had forwarded it for that purpose on 5 April 2011. Today I heard submissions based on that transcript, which shows that in the CTTT hearing, one of the residents, Mr Cooper, appeared as a representative spokesman of the residents. The operator was represented by its employee, Mr Burkett. Neither were legal practitioners.
25. An examination of the transcript of the interchanges that took place between the CTTT Senior Member and the representatives of the parties reveals that the parties had been provided with an adequate opportunity to present relevant evidence and arguments in order to advance their respective positions. It clearly emerges from the transcript that the CTTT Senior Member had pointed out to the operator that the residents were concerned at the arbitrary, “*fictitious*” or non-factual basis upon which the operator had assigned and raised the claimed expenses for insurance and corporate recharge expenses.
26. This was in the context of evidence that the operator was involved in the running of a number of different but similar facilities, which incurred common or shared expenses, and where the operator sought to rely upon a percentage method of dividing or assigning those costs to this particular retirement village.
27. The nub of the objections raised by the residents concerned the operator’s request that they pay for such artificially calculated sums. It was claimed it was not

transparently apparent from the evidence, that the amounts sought by the operator were factually and temporally related to the particular retirement village in question. It was also argued that such expenses were not restricted only to categories of expense that the legislation permitted to be passed on to the residents. The concern of the residents, as consumers, was to ensure that only properly raised charges should be the subject of such a request for payment by them.

28. In the CTTT, the residents made reference to their concern that they should only be required to pay expenses that were permitted by the legislation. In that regard they pointed to claimed insurance costs not being restricted to the specific matters permitted or authorised by statute, namely reinstatement costs. It was apparent that the insurance costs also extended to the cost of insuring for business losses, which were outside the provisions of s 100 of the *RV Act*.
29. The transcript of the CTTT proceedings shows that the residents also argued that they should not be responsible for amounts representing unaccountable head office overhead expenses where the operator ran a number of like businesses in respect of which those overhead expenses whether for insurance expenses, or corporate recharge expenses, were incurred in respect of the aggregate of those other businesses, and where the residents were not provided with the means by which to differentiate or to identify those items of expenditure or corporate recharge items that specifically related to their particular retirement village.
30. The CTTT transcript shows that the residents had argued, that as a result of those matters, they could not properly consider or approve expenses claimed in that way, as the expenses could not be transparently assessed as being capable of conforming with the agreed definition of properly chargeable outgoings.
31. The CTTT transcript also shows that the residents articulated a complaint that they should not be required to pay for such items on an arbitrary basis, which was the effect of the position adopted by the operator. The operator's position relied upon an averaging percentage or statistical approach to formulating the budget. That was advanced through the evidence of Mr Ram, Mr Burkett and Ms Stephenson. That approach was described as "*fictitious*" or non-factual.

32. Significantly, in my view, the transcript does not reveal any request or formulation advanced on behalf of the operator, for the CTTT Senior Member to carry out a reasoned apportionment of such contentious expenses in order to meet the concerns of the residents. In this appeal, the burden is on the operator to demonstrate that the result of the CTTT proceedings was afflicted by an error concerning questions with respect to matters of law. The absence from the transcript of a request made by the operator for the CTTT Senior Member to undertake a discretionary apportionment is a material consideration to the evaluation of the operator's attack on the reasons of the CTTT Senior Member concerning an alleged failure to exercise an available statutory discretion in favour of the operator.

33. The CTTT transcript shows that at the conclusion of submissions made by Mr Cooper on behalf of the residents, the following interchange took place between the operator's representative, Mr Burkett, and Senior Member Smith:

“SMITH: Thanks, Mr Cooper, okay anything else from you Mr Burkett?

BURKETT: No I think, I don't want to contest a lot of those points which are accurate and inaccurate so I don't think its worthwhile going down - there's a number of inaccuracies and I won't attest to the applicants, I don't think this is the place.”

34. Accordingly, if a means had existed by which the discretionary apportionments contended for in this appeal could have been identified in the CTTT, the evidentiary basis for the exercise of such a discretion was not provided to the CTTT Senior Member. The CTTT Senior Member invited further submissions, and in the course of his submissions, the representative of the operator did not make a request for the exercise of the statutory discretion now claimed as an alleged failure. In my view, the absence of such a request of the CTTT to exercise the discretion now claimed, must be seen as being fatal to an appeal that seeks to rely on an alleged failure of the CTTT to exercise that discretion. The CTTT Senior Member had clearly taken the view that the two items in dispute were threshold matters to be considered on an all or nothing approach because he was not provided with a non-arbitrary evidentiary basis for making a discretionary apportionment as to what expenses were allowable.

## Grounds of Appeal

35. The operator's summons which commenced the appeal, invoked 6 separate grounds of appeal. In my view, these can be conveniently condensed into the following formulations.
- (a) Contended error in reaching a determination that excluded insurance and corporate recharge items from the budget, having regard to the contractual obligations that subsisted between the parties: *Grounds 1 and 2* ["the contractual grounds"];
  - (b) Contended error in failing to apply an apportionment of the insurance premium identified in the budget to reflect charges that were permissible pursuant to s 115(2) (d), (e), (g) or (h) of the *RT Act*, and a related contended failure to determine an approximate cost for that insurance: *Grounds 3 and 5* ["the insurance apportionment ground"];
  - (c) Contended error in failing to apply an apportionment of the corporate recharge item identified in the budget to reflect charges that were permissible pursuant to s 115(2)(d), (e), (g) or (h) of the *RT Act*, and a related contended failure to consider the provisions of regulations 17(1)(g) and 17(2) of the *RV Regulations* to determine and apportion the approximate costs of those items : *Grounds 4 and 5 and 6* ["the corporate recharge apportionment ground"];
36. A notice of contention was filed by the residents in the appeal. The notice of contention invoked s 199 of the *RV Act*, which provided that the operator was prohibited from contracting out of the provisions of the *RV Act*. The residents consequently argued for the unenforceability of the contractual obligations relied upon by the operator to justify the budgetary items in contention. The argument was to the effect that the insurance and head office expense items included in the budget, were not permitted by ss 100 and 112(3) of the *RV Act*.

## **Contentions of the parties**

37. The primary submission made on behalf of the residents was that the CTTT decision was correct on its face, and involved no errors of the kind now claimed, on questions with respect to matters of law.
38. The submissions made on behalf of the operator were to the effect that the budget forecast items placed into contention by the residents were legitimate items of expenditure that it was entitled to pass on to the residents. The operator further claimed that in its determination, the CTTT had failed to make relevant apportionments of such identified expenditure, including by analysing the evidence for that purpose.
39. The residents contended that the evidence placed before the CTTT by the operator could not have reasonably supported such an apportionment exercise. In contrast, the operator claimed that in these events, errors were made by the CTTT with respect to matters of law because of a contended failure by the CTTT to effect apportionments pursuant to statutory discretions that were available to the CTTT.

## **Argued errors concerning questions with respect to matters of law**

40. In the appeal, the operator argued that jurisdiction for the appeal was established because, it was claimed, that the CTTT had made errors concerning questions with respect to matters of law in determining that the residents were not liable to pay the disputed amounts claimed by the operator.
41. In this regard, on behalf of the operator, it was argued that the CTTT had erred in that it had failed to exercise an available statutory discretion to interpret the evidence before it, in order to make an apportionment of the disputed budget items, and as a consequence, had incorrectly found in favour of the residents.
42. The outcome of the appeal is largely dependent upon the interpretation of the contractual documents entered into by the parties, as well as the relevant statutory and regulatory provisions, subject to the procedural matters that I have already identified as having arisen from the transcript.

## **Relief sought by appellant**

43. The summons filed by the operator seeks orders to the following effect:
- (a) The appeal should be allowed and the whole of the decision of the Tribunal should be set aside;
  - (b) The amounts of \$23,100 for insurance, and \$28,954 for corporate recharge expenditure, are to remain in the budget forecast for the retirement village;
  - (c) An order for costs.
44. There is an obvious tension evident between the grounds of appeal that alleged failure on the part of the CTTT to make an apportionment for the claimed budgetary items, and the relief claimed in the summons, which sought orders for the inclusion of the full amounts that had been claimed by the operator for insurance and corporate re-charge expenses.

## **Issues central to the outcome of the appeal**

45. The central issue that was raised for determination in the appeal was whether, in reaching its decision, the CTTT failed to exercise statutory discretions that were available to it, in favour of the operator of the retirement village. The operator's contention is that the CTTT should have in some way apportioned the components of the identified categories of expenses as being payable to the operator by the residents.
46. The point that was at issue in the appeal seemed to be the contention of the operator to the effect that the exercise of such discretion was not only mandated in the circumstances, but that it ought to have been exercised in favour of the operator, notwithstanding the state of the evidence that the parties had placed before the CTTT.

## **Evidence before the CTTT and in the appeal**

47. The parties had helpfully co-operated and had prepared an efficient common exhibit bundle which contained 61 separately tabbed categories of documents comprising some 333 pages: Exhibit “A”. Those materials were identified as Exhibit “JS1”, which was exhibited to an affidavit sworn on 8 March 2011 by Ms Jessica Carly Smythe. Ms Smythe was one of the solicitors acting for the operators of the retirement village.
48. Rather than here describe the large number of individual documents within those categories of papers, some of which proved to be of only background relevance, I will instead only refer to the relevant parts of the documentation, where it becomes necessary to do so.

## **Residents submissions**

49. The specific complaints of the residents were twofold. The first complaint was the legitimacy of the claimed obligation that they should meet the budget item of \$23,100 in respect of insurance. Of this amount, the residents claimed not all of that sum represented a cost that could be fairly passed on to them: s 100 of the *RV Act*. The second complaint related to a claimed obligation that they should meet the forecast expenses in the sum of \$28,495 which were described as corporate recharge items, representing categories of expenditure for administration costs, finance costs, human resources costs, property management costs, information technology costs and operations costs.
50. Dealing first with the insurance issue, the evidence disclosed that the claimed amount of \$23,100 was a global quotation obtained and presented by an insurance broker and which related in part to the material cost of reinstatement of buildings and the like, to the value of \$36,450,000 if certain defined events occurred to cause physical loss and damage. The evidence also disclosed that the policy quotation was to also cover potential consequential business losses and business interruption expenses for a period of 36 months if those defined events occurred.
51. The residents argued that the business loss component of insurable risk was not part of their contractual responsibility. The quotation identified these two areas of risk,

but made no attempt at differentiating them in terms of apportionable premium costs. The residents submitted that the evidence which the operator had submitted to them, and later to the CTTT, was not capable of permitting a reasoned differentiation of those two components in terms of premium apportionment or allocation. The residents adopted the formulation that arose in argument, that these two metaphorical eggs could not be unscrambled as the quotation for insurance was a global one, which covered matters beyond damage to property and reinstatement thereof, and therefore, it should not be visited upon the residents in that undifferentiated form.

52. The residents also claimed that the relevant legitimate insurance costs that were contemplated as arising within the legislative scheme of the *RV Act*, were necessarily confined to insurance in respect of matters referred to in s 100(2) of the *RV Act*, whereas the expenses sought to be passed on to them by the operator went beyond those entitlement limits, and were not permitted by the statute in the context of consumer protection legislation..
53. The residents also claimed there was a lack of transparency in the proposed insurance charges, arguing that it could not be properly or reasonably assessed or ascertained as to whether or not the proposed insurance costs covered legitimate items of risk, because the identified premium remained undifferentiated, and was therefore opaque to analysis.
54. With regard to the corporate recharge items in dispute, the complaint of the residents was that on the evidence, the items in question were not presented as being factually or temporally applicable to their particular retirement village, but rather, they were percentages of undifferentiated items that related to the overall business of the operator. The expenses were calculated as averages and percentages. The operator sought to impose them as a liability of the residents according to a formula, based on percentages, rather than being factually based expenses that related to the anticipated expenditure associated with the particular retirement village to which these proceedings relate.

## **Operator's submissions**

55. The position taken by the operator in the CTTT was that it was entitled to levy the insurance costs and the recurrent charges under the statutory and regulatory scheme within which it operated.
56. The operator argued that as a matter of recognised business efficacy and efficiency, the governing legislation contemplated that an operator may operate more than one retirement village. The operator also pointed to the mechanism within the legislative scheme for the preparation and approval of budgets for each retirement village separately. The operator submitted that regulation 17(1)(g) of the *RV Regulations* contemplated the apportionment of expenditure to a particular village as a proportion of a greater total and it was submitted that it had appropriately followed all proper steps contemplated by the legislation.
57. The operator also pointed to the fact that each of the residents had entered into an Agreement to Lease. Reliance was placed on the condition of the lease that provided for the residents to pay defined outgoings in the first schedule to the Memorandum of Lease. I have already cited the substantive terms of the definition of outgoings at paragraph [7] of these reasons.
58. The operator submitted that the expenses it had proposed to the residents in respect of insurance and corporate recharge items, which comprised administration, finance, human resources and information technology, were also properly identified as outgoings to be passed on to the residents pursuant to the agreement that existed between them.

## **Legislation and policy considerations**

59. Variations in recurrent charges for retirement villages are defined, and require notice by the operator: s 107 of the *RV Act*. Notified proposals for variations do not take effect unless the residents consent to them, or if the CTTT orders that they may have effect: s 107 of the *RV Act*. These provisions were obviously directed at consumer protection.

60. On any application to the CTTT for a determination in cases such as this, the CTTT is invested with the power to order that the proposed variation either take effect, or not take effect as the case requires: s 108(2) of the *RV Act*. In reaching any determination concerning whether variations should, or should not take effect on a consideration of s 108(2) of the *RV Act*, the CTTT is permitted, but not mandatorily required, to have regard to the factors outlined in s 108(4)(a)-(g) of the *RV Act*. Those provisions refer to market factors or conditions in the industry, levels of costs and services for providing the facilities, whether the residents consent to certain costs, the cost of general services, the frequency and amount of past variations, and “*any other relevant matter*”.
61. In a case where the residents have refused to consent to proposed items of budgetary expenditure, on the application of an operator or a resident, the CTTT is invested with wide powers: s 115(2)(a)-(i) of the *RV Act*. Again, those powers are discretionary in their application, and not mandatory. In particular, in the determination of a relevant dispute, the CTTT is given a discretion to make an order that the operator should remain liable for so much of the proposed expenditure as was considered by the CTTT as being not reasonable or not necessary to pass on to the residents: s 115(4) of the *RV Act*. In making any determination under this section, the CTTT was given a wide discretion to have regard to “*any other relevant matter*”: s 115(6) of the *RV Act*.
62. I construe the references to “*any other relevant matter*” in ss 115 and 108 of the *RV Act*, to be read subject to the rules of procedural fairness, which, in this context, requires that appropriate notice be given to the affected party, and for that process to be applied, transparent evidence should be available in respect of any such matters to be considered in that regard. These conferred discretions are wide in their nature and effect. Accordingly, the exercise of such discretions must proceed according to recognised principles of fairness to the persons affected: *House v The King* [1936] HCA 40; (1936) 55 CLR 499.
63. The *RV Act* and the *RV Regulations*, being the legislative scheme under which this dispute arises, not only facilitate the provision of important social benefits and standards concerning the living arrangements for retired persons, but in recognition of the potential financial and other possible vulnerabilities of retired persons, it also

contains significant elements of consumer protection: Hansard, *Retirement Villages Bill 1999*, Second Reading.

64. The social policy behind the scheme does not seek to impose an unfair burden on operators, as it recognises that the business of providing facilities for retired persons should be permitted to be profitable for the operators: Hansard, *Retirement Villages Bill 1999*, Second Reading.
65. Similarly, the policy behind the scheme for the operation of retirement villages does not seek to create an unfair advantage for the clients of operators. This is evident from the requirements that centre around the obligation of residents to pay for certain defined categories of expenditure that are incurred by operators, subject to compliance with identified administrative pathways.
66. In the context of the legislative scheme, the CTTT has been assigned the role of resolving disputes in a transparent and fair manner, or not in a manner that is arbitrary or unfair to a party.

### **Principles of interpretation**

67. Insofar as it is necessary to construe any relevant provisions of the contract between the residents and the operator, the applicable principles of contractual interpretation are well known, and can be briefly stated.
68. In giving business efficacy to the terms of the agreement, the required approach is to consider what a reasonable person in the position of the other party would have understood the contract to mean in the context in which it was intended to apply: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165, at p 179, [40]. In this case, this must mean balancing the relative interests and needs of the residents and the operator.
69. This requires that a literal, technical, artificial or overly syntactic or semantic based analysis that yields absurd results is to be avoided in favour of more purposive conclusions that reveals business commonsense: *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, per Diplock LJ at 201.

70. In construing relevant statutory provisions, the purposive interpretation is also the preferred or required approach in order to achieve the benefit intended by the legislation, recognising that in the context of this case, the *RV Act* and the *RV Regulations* contain significant consumer protection provisions. At the same time, the purposive approach to interpretation also requires recognition of the need for operators of retirement villages to be able to continue their operations profitably. However, in the context of a consumer protection statute, profitability is not the dominant consideration and fairness to consumers is at least a dominant balancing consideration to be weighed in the exercise.

### **Consideration**

71. In the paragraphs that follow, I set out my consideration of the general, contractual, insurance and corporate recharge grounds in the appeal.

#### ***General consideration***

72. In the context of this case, a purposive and business efficacy approach requires a balanced approach where acknowledgment must be given to the predominant features that contain compliance codes and limiting circumstances for the financial exposure of residents, purposively aimed at consumer protection. In my view, the fairest manner in which these objectives are met is for determinations and interpretations to proceed transparently on identified facts in evidence.

#### ***The contractual ground***

73. In my view the contractual grounds of appeal can be disposed of simply. The definition of “*outgoings*” in the agreement between the parties requires that the changes sought to be made are “*properly and reasonably assessed charged or chargeable ... in respect of the retirement village or in the conduct management and maintenance of*” the retirement village. Where the contractual definition of outgoings makes reference to “*all*” expenses, that has to be read subject to the statutory provisions and the notion of reasonableness based on analysis.
74. By definition, these outgoings must be assessed by reference to the particular village in question, and not by reference to an artificial formula that has no particular

application to the retirement village. The term “*reasonably*” must be given the contextual meaning that the charges should be capable of being reasoned to refer to the particular retirement village in a fair and sensible way, and factually particularised rather than being based on some other shared notion or estimate derived from considerations that apply to other entities, including the running costs of other retirement villages. The specific reference to Queens Lake Village in the definition of “*outgoings*” requires that Queens Lake Village be read as the definite article in such a consideration, and not some non-factual formulation when outgoings, costs and expenses are being sought from the residents.

75. In my view, that is the necessary commonsense and business efficacy interpretation that must be applied in this dispute. The contrary interpretation, which seeks to impose charges not referable to, or based on, the operations of Queens Lake Village, is non-purposive, strained, not based on commonsense and leads to the absurd and incorrect construction that would incorrectly equate generalities with the definite article : *Antaios v Compannia Naviera SA; Toll (FGT) Pty Ltd.*

#### ***The insurance apportionment ground***

76. To succeed on the issue of apportionment of insurance costs, the operator’s appeal must demonstrate a failure by the CTTT to exercise a relevant statutory discretion so as to amount to an error with respect to a matter of law: s 67(1) of the *CTTT Act*.
77. Any consideration of the relevant discretion conferred by the statute cannot be undertaken without reference to the facts that were in evidence before the CTTT.
78. The only relevant evidence that was placed before the CTTT on the insurance issue was the broker’s quotation dated 21 September 2010. That document was addressed to Aevum Limited. The total cost of that quotation was in the sum of \$48,851.98. The stated insurable interest was for material damage consisting of physical loss and damage to the property insured, together with consequential loss for business interruption. The policy provided for a limit of \$50,000,000 in combined cover for these two nominated areas of potential loss. The quotation identified the respective cover for the values of the property insurance at \$36,450,000, and gross profit insurance at \$1,450,000.

79. Given the operator's complaint that the CTTT failed to apportion the insurance costs, it is relevant to look at the scope within the evidence for any such apportionment. In this regard, the two identified elements of insurance total \$37,990,000. My purpose in identifying that total is to demonstrate that there appears to be no rational relationship between the insurance liability limit of \$50,000,000 and the combined cover values stated to be in the amount of \$37,990,000.
80. Given that the amount for insurance that the operator sought the residents to pay was in the sum of \$23,100, it is relevant to look at the quotation in order to determine whether the amount of \$23,100 can be identified or explained by a reasoned reference to any of the abovementioned figures, either as to a finite part, or as a percentage of a greater amount: Exhibit "JS1", pp 179-183.
81. In this regard it is relevant to note that the insurance for which the quotation was obtained, was identified in the quotation as being for "Industrial Special Risks". The identity of the insured was stated as "Aevum Limited / Queens Lake Village": Exhibit "JS1", p 181. The business description was "Principally Owners, Operators of Aged Care & Associated Facilities, Property Owners and other occupations incidental thereto": Exhibit "JS1", p 181.
82. Also of relevance is the nature of the insurance cover for consequential loss and business interruption. It was for gross profit, payroll, "*gross rental or gross revenue if appropriate*" and professional fees: Exhibit "JS1", p 181.
83. Also of relevance to the claim for discretionary apportionment of the insurance costs is the Australia-wide nature of part of the cover: Exhibit "JS1", p 183. The payroll component of the cover was identified to be 8 weeks at 100 per cent, and 148 weeks at 30 per cent, with head office corporate salaries insured at 100 per cent for 156 weeks: Exhibit "JS1", p 183.
84. My purpose in reviewing the information set out in the preceding 8 paragraphs is to identify the dilemma that would have necessarily confronted the CTTT Senior Member in approaching any attempted form of rational analysis of this information for the purposes of trying to achieve a discretionary apportionment, as is now

contended by the operator in this appeal. This analysis reveals that the following propositions would have been evident to the CTTT Senior Member:

- Within the documentation in evidence in the CTTT, without explanatory evidence, the sum of \$23,100 had no readily identifiable or rational relationship to the legitimate property insurance costs for the retirement village, as distinct from other, and unrelated expenses;
- Any division of the sum of \$23,100, or indeed the sum of \$48,851.98, as insurance costs for proportionate relevance to the reinstatement costs for the retirement village, is completely opaque to an analysis that would enable a rational or reasoned discretionary apportionment. In my view, it is simply not possible to explain, with reasons, the manner in which a claimed discretion could be exercised according to the requirements of well-settled authority that precludes arbitrary results: *House v The King*.

85. In light of this analysis, without the required evidence, it was impossible for the CTTT to justify with reasons, any differentiation or discretionary apportionment within the identified insurance costs so as to confine that portion of the insurance costs that could reasonably be passed on to the residents as being proper or chargeable to residents in connection with the conduct, management and maintenance of the retirement village in question : *see contractual definition of outgoings*.
86. There is no doubt that the CTTT had jurisdiction to exercise a discretion on the question of insurance costs. However, in order for the operator to sustain its criticism of the CTTT concerning the contended failure to exercise that discretion in favour of the operator, a rational basis must be demonstrated to exist for the claim that the exercise of discretion ought to have been undertaken in favour of one party at the expense of another, on a non-arbitrary basis.
87. My review of the evidence before the CTTT on the insurance issue compels me to the conclusion that the state of the evidence simply did not permit any rational analysis of the insurance costs so as to enable a justifiable or reasoned apportionment of the insurance costs, including to confine such costs to only those costs permitted by statute as being legitimately relevant to insurance of the

retirement village in question. Only the insurance costs permitted by statute could be passed on to the residents: s 100 of the *RV Act*. That is not a provision which can be avoided by contract between the parties: s 199 of the *RV Act*.

88. In such circumstances, the CTTT was bound by the rules of procedural fairness and was precluded from arbitrarily exercising discretion in favour of the operator on any basis other than that which involved a rational analysis according to law. In my view the CTTT did not depart from that requirement. The question of whether the evidence permitted a rational analysis is a threshold question. It was either available, or it was not. If it was not available, the answer to the threshold question requires that there be no arbitrary exercise of discretion. The decision of the CTTT member must be seen in that light.
89. I therefore conclude that the CTTT Senior Member decided the matter of insurance correctly. In my view he correctly declined to undertake an arbitrary discretionary apportionment of the insurance charges: *CTTT decision*, [56]. In that regard, he correctly found the residents had no contractual obligation to pay the additional insurance charges for the risks in contention because there was simply no evidence that the risks insured were “*referrable to Queens Lake Village*”: *CTTT decision*, [56]-[60]. This was a simple exercise of assessing whether the evidence of the disputed charges was in conformity with the agreement. In my view, the CTTT correctly decided the charges were not in conformity with the agreement with regard to the contractually defined meaning of “*outgoings*”.
90. Accordingly, on that analysis, the CTTT Senior Member concluded that the undifferentiated claim by the operator for the disputed insurance costs should be excluded: *CTTT decision*, [2]; [77]. That conclusion is consistent with an analysis of the evidence in terms of onus of proof and the fundamental requirement of avoiding an arbitrary discretionary apportionment. I reject the submission that there had been a failure to consider a discretionary apportionment as an alternative to an all or nothing approach. My reason for so finding is that on the evidence, the CTTT Senior Member was left with the choice of an all or nothing threshold consideration, or making an arbitrary decision of apportionment. In my view, the state of the evidence mandated the former approach. The latter alternative was an unacceptable one and the CTTT Senior Member correctly recognised this to be the position.

91. In my view, the CTTT did not make any error concerning a question with respect to a matter of law on this issue. The insurance grounds should therefore be rejected.

*The corporate recharge ground*

92. The operator submitted that the contentious budget forecast items were legitimate items of expenditure that it was entitled to pass on to residents. The alternative position adopted, was the claim that the CTTT Senior Member failed to exercise an available statutory discretion in favour of the operator, in order to apportion the corporate recharge expenses claim to identify an amount the operator could legitimately call upon the residents to pay, as properly chargeable items relating to the retirement village.
93. In my review of the transcript before the CTTT I have already identified the reasons why the apportionment claim is unavailable to the operator in this appeal to argue as a claimed question with respect to a matter of law: paragraphs [24] – [34] of these reasons.
94. In my view the failure of the operator to seek such an apportionment before the CTTT, and the failure to introduce evidence before the CTTT that would enable a reasoned analysis of what expenses were properly assessed or chargeable as referring to the conduct, management and maintenance of the actual retirement village in question, necessarily disposes of the corporate recharge ground of appeal.
95. The CTTT Senior Member dealt with the corporate recharge issue between paragraphs [61] to [71] of his reasons. He correctly identified the issue for determination as follows:

“61. The fundamental issue for determination is whether or not the amounts charged under the heading of corporate recharge are ‘costs or fees associated with providing services to residents of the retirement village’. Unless the amounts included in the corporate recharge come within that exception provided for under Reg. 26(e) the operator is precluded from including the sum in the annual budget pursuant to s.112 and Regulation 26.”

[Emphasis added]

96. The CTTT Senior Member reviewed the operator’s methodology for calculating an apportionment of Aevum Group expenditure on administration, finance, human

resources, information technology and payroll. He also reviewed the evidence of Mr Burkett, Mr Ram and Mr Stephenson on those matters.

97. The CTTT Senior Member correctly analysed Mr Ram's evidence by observing that as the operator's corporate financial controller, Mr Ram would be expected to have the knowledge or capacity to ascertain exactly what charges would be associated with the provision of the identified services to the retirement village to which this case related. He concluded, correctly, that information was not forthcoming: *CTTT decision, [65]*.
98. The CTTT Senior Member concluded on the evidence before him, that whilst it was self-evident that many of the functions for which the operator sought to charge the residents in fact related to direct or indirect services to residents, he also concluded that he had insufficient information to determine that all the identified and claimed expenses incurred by Aevum concerning its overall operations, were appropriately apportioned to reflect a proper association to the residents of Queens Lake Retirement Village: *CTTT decision, [66]-[71]*.
99. In view of the state of the evidence, for which the operator, as the applicant in the CTTT, bore the onus of proof, I consider that no proper basis has been made out for the assertion that the CTTT Senior Member relevantly failed to make a discretionary apportionment of the corporate recharge expenses, as is now contended on appeal. For the same reasons I have already identified at paragraph [90] of these reasons, I take the view that the all or nothing approach to this issue was the preferred approach rather than taking an arbitrary and inappropriate course.
100. Accordingly, in my view, no error has been demonstrated with regard to the claimed failure of the CTTT Senior Member to exercise his discretion to make an apportionment so as to raise an error concerning a question with respect to a matter of law.
101. The finding made by the CTTT Senior Member with regard to the corporate recharge issue was in the following terms:

“71. With the information available I am unable to say that the respondent was entitled to claim funding of the corporate recharge items from recurrent charges as claimed.”

102. In my view, that finding, which required an all or nothing result, was compelling, and was the only proper finding that was available on the evidence. This was in circumstances where an arbitrary decision of apportionment would have been a legally unacceptable result. Accordingly, the corporate recharge ground of appeal should be rejected.

### **Disposition**

103. I have determined that the operator's appeal should be dismissed on all of the grounds that were raised. In my view it should follow that the operator should pay the costs of the appeal incurred by the residents. In such circumstances, those costs should be paid on the ordinary basis unless, the residents can show an entitlement to an order in different terms.

### **Orders**

104. I make the following orders:

- (a) The appeal by Queens Lake Village Pty Ltd is dismissed;
- (b) The orders made on 9 December 2010 by the Consumer, Trader and Tenancy Tribunal in proceedings before it numbered RV 10/28914 and RV 10/31794 are confirmed;
- (c) Queens Lake Village Pty Ltd is to pay the costs of the Queens Lake Village Residents Association on the ordinary basis unless otherwise ordered;
- (d) The exhibits may be returned;
- (e) Liberty to apply on 7 days notice if further orders are required.

I CERTIFY THAT THIS AND THE PRECEDING 26 PAGES CONSTITUTE A TRUE COPY OF THE REASONS FOR DECISION OF HIS HONOUR JUDGE LEONARD LEVY SC DELIVERED IN THESE PROCEEDINGS.

Associate  
8 April 2011