



## Civil and Administrative Tribunal New South Wales

Case Name: Peter Boyton v Wivenhoe Village Management Pty Ltd

Medium Neutral Citation: [2019] NSWCATCD

Hearing Date(s): 09 December 2019

Date of Orders: 13 December 2019

Date of Decision: 13 December 2019

Jurisdiction: Consumer and Commercial Division

Before: Senior Member Geoffrey Meadows

Decision:

- 1 Pursuant to s. 128(1) (a) of the RV Act the Tribunal directs the operator to comply with s. 101(1) of the RV Act and to cease passing responsibility for the cost of any capital item by way of buying, leasing or renting such capital item the costs of which are obtained through recurrent charges.
- 2 Pursuant to s. 128(1)(f) of the RV Act the respondent is to refund to the residents the sum of \$48,347.08 less any amount which may be agreed between the parties to represent the costs of capital maintenance.
- 3 If the parties are unable to agree to an assessment of the costs of capital maintenance the applicant has leave to renew these proceedings no later than 13 April 2020 for the Tribunal to determine that matter.

Catchwords: RETIREMENT VILLAGES — rental of capital items — passing responsibility to residents — breach of Retirement Villages Act 1991 — compensation to residents

Legislation Cited: Retirement Villages Act 1991

Category: Principal judgment

Parties: Peter Boyton — Applicant  
Wivenhoe Village Management Pty Ltd —  
Respondent

Representation: The applicant was self-represented.  
Mr Adam Somerville and Mr John Leo represented the  
respondent

File Number(s): RV 19/38533

Publication Restriction: Nil

## **REASONS FOR DECISION**

### **Background**

- 4 Mr Boyton is a resident of Wivenhoe Village in Cobbitty, New South Wales, operated by the respondent company. On 26 August 2019 Mr Boyton lodged an application seeking an order under s. 128 of the Retirement Villages Act 1999 (RV Act) directing the operator to comply with the requirements of the RV Act or the regulations, an Order for Compensation in relation to recurrent charges “expended” in contravention of ss. 92(1) and 101(1) of the RV Act.
- 5 Mr Boyton alleges that the operator has avoided its responsibility to supply items of capital under s. 92 of the RV Act and has passed responsibility for those items of capital (directly or indirectly) to the residence contrary to s. 101 of the RV Act and in those regards has expended amounts raised through recurrent charges.
- 6 The operator denies that the arrangement by which it has entered into a, or rather several, rental agreements (rental agreement) with a company called Ecoserv Australia Pty Ltd can be characterised in the manner alleged by Mr Boyton.
- 7 There is little or no dispute between the parties as to the relevant facts and circumstances existing in Wivenhoe Village. The determination of this application depends on a careful interpretation of the relevant legislative provisions and the rental agreement.
- 8 For the reasons below I have determined that the orders sought by the applicant should be made.

### **The Evidence**

- 9 Mr Boyton has provided a bundle of evidence including a short statement, relevant extracts from the RV Act, a chart of “Mbark Company Relationships”, ASIC company extracts in relation to each of the companies in the chart, one

Equipment Rental Agreement, certain financial records of the village and copies of email correspondence.

- 10 In reply, the operator has provided a statement also including a sample rental agreement, correspondence to the applicant and a table of rental costs for the financial years 2017, 2018, and 2019.

## Relevant Legislative Provisions

- 11 The following sections of the RV Act apply to this application.

### 4 Definitions

(1) In this Act:

...

**capital maintenance** means works carried out for the purpose of repairing or maintaining an item of capital and includes works prescribed by the regulations as being capital maintenance, but does not include works that are prescribed by the regulations as not being capital maintenance.

**capital replacement** means works carried out for the purpose of replacing an item of capital, but does not include capital maintenance.

...

**item of capital** means:

- (a) any building or structure in a retirement village, and
- (b) any plant, machinery or equipment used in the operation of the village, and
- (c) any part of the infrastructure of the village, and
- (d) any other item prescribed by the regulations,

but does not include any item excluded from this definition by the regulations.

...

### Division 2 Capital maintenance and replacement

#### 92 Interpretation

(1) In this Division, an item of capital for which an operator of a retirement village is responsible means any item of capital within the retirement village other than an item of capital:

- (a) that is owned by a resident of the retirement village, or
- (b) that is association property under a community land scheme or common property under a strata scheme, or
- (c) that is of a class prescribed by the regulations for the purposes of this section.

(2) For the purposes of this Division, maintenance or replacement of an item of capital is urgent if it is for the purpose of rectifying any of the following:

- (a) a burst water service,
- (b) a blocked or broken lavatory service,
- (c) a serious roof leak,
- (d) a gas leak,
- (e) a dangerous electrical fault,
- (f) flooding or serious flood damage,
- (g) serious storm or fire damage,
- (h) a failure or breakdown of the gas, electricity or water supply to residential premises within the retirement village,
- (i) a failure or breakdown of any essential service on the residential premises for hot water, cooking, heating or laundering,
- (j) any fault or damage that causes the retirement village to be unsafe or insecure,
- (k) any other matter prescribed by the regulations.

### **93 Obligations of operator with respect to certain capital maintenance or replacement**

(1) The operator of a retirement village is to maintain each item of capital for which the operator is responsible in a reasonable condition having regard to the following:

- (a) the age of the item,
- (b) the prospective life of the item,
- (c) the money paid to the operator by the residents under a village contract (including ongoing contributions).

(2) If it is not practical to maintain an item of capital in accordance with this section, the operator may replace the item.

(3) The operator of a retirement village must carry out the maintenance of, or replace, an item of capital for which the operator is responsible within a reasonable time after becoming aware of the need for the maintenance or replacement of the item.

#### **94 Obligations of residents with respect to capital maintenance or replacement**

(1) A resident of a retirement village is to notify the operator of the retirement village of the need for maintenance to be carried out on, or the replacement of, an item of capital for which the operator is responsible and that is located within the resident's residential premises as soon as the resident becomes aware of the need for the maintenance or replacement of the item.

(2) A resident of a retirement village must reimburse the operator of the village in respect of any damage (other than fair wear and tear) caused by the resident to an item of capital for which the operator is responsible.

(3) A resident of a retirement village must not hinder or obstruct the operator of the retirement village or a person authorised by the operator, from carrying out capital maintenance or capital replacement in respect of an item of capital for which the operator is responsible.

Note. Section 67 sets out the circumstances in which an operator of a retirement village or a person authorised by the operator may enter residential premises in respect of which a person has a residence right.

...

#### **96 Tribunal may make orders for capital maintenance and replacement**

(1) If a resident of a retirement village is of the opinion that the operator of the retirement village is not maintaining or replacing items of capital for which the operator is responsible when necessary, the resident may apply to the Tribunal for (and the Tribunal may make) an order directing the operator:

(a) to carry out specified maintenance of an item of capital within the time specified in the order, or

(b) to replace a specified item of capital within the time specified in the order.

(2) If the operator of a retirement village is of the opinion that a resident of the retirement village has caused damage to an item of capital for which the operator is responsible, the operator may apply to the Tribunal for (and the Tribunal may make) an order directing the resident to reimburse the operator for the cost of the maintenance or replacement of the item of capital as a result of the damage.

(3) Subsection (2) does not apply to damage caused by fair wear and tear.

## **97 Funding of certain capital maintenance and capital replacement**

(1) The operator of a retirement village may fund the cost of capital maintenance in respect of which the operator is responsible from the following sources:

- (a) the capital works fund for the retirement village (if any),
- (b) recurrent charges.

(2) The operator of a retirement village must bear the cost of capital replacement in respect of an item of capital for which the operator is responsible.

(3) This section does not authorise the funding of any of the following from the capital works fund or recurrent charges for the retirement village:

- (a) the construction of a new building or a new stage of the retirement village,
- (b) any work arising from the breach of a statutory warranty (within the meaning of the Home Building Act 1989) in respect of which proceedings may be commenced under Part 2C of that Act,
- (c) the depreciation of items of capital,
- (d) the refurbishment of vacant residential premises within the retirement village,
- (e) such other things as may be prescribed by the regulations.

...

## **101 Operator not to sell items of capital to residents**

(1) The operator of a retirement village must not sell any item of capital for which the operator is responsible, or pass responsibility for any such item of capital (whether directly or indirectly), to a resident or prospective resident of the retirement village under a village contract or otherwise except as provided by the regulations.

Maximum penalty: 20 penalty units.

(2) Any contract, agreement or scheme is unenforceable to the extent that it purports to sell or pass responsibility for the maintenance or replacement of items of capital in contravention of subsection (1).

(3) This section does not apply to the sale of residential premises within a retirement village, including fixtures in any such premises.

## 128 Order of Tribunal

(1) The Tribunal may, on application by a resident (or residents) or an operator under this Act, make one or more of the following orders:

(a) an order directing the resident (or residents) or operator to comply with a requirement of this Act or the regulations,

(b) an order that varies or sets aside a provision of a village contract that conflicts with this Act or the regulations,

(c) an order that:

(i) restrains any action in breach of any village contract or village rule, or

(ii) requires the performance of any village contract or village rule,

(d) an order directing the resident (or residents) or operator to perform such work or take such other steps as the order specifies to remedy a breach of a village contract or village rule,

(e) an order for the payment of an amount of money,

(f) an order for compensation,

(g) an order that requires payment to the Tribunal of all or part of any recurrent charges payable by a resident (or residents) to the operator until the whole or part of any village contract has been performed or any application for compensation has been determined,

(h) an order that requires payment (out of recurrent charges paid to the Tribunal) towards the cost of remedying a breach of a contract or towards the cost of any compensation,

(i), (j) (Repealed)

(k) in the case of an application in relation to any other dispute made by a resident (or residents) or an operator of a retirement village that is subject to a community land scheme and with the concurrence of the other party to the dispute—any order that the Tribunal may make under the Community Land Management Act 1989 to determine the dispute,

(k1) in the case of an application in relation to any other dispute made by a resident (or residents) or an operator of a retirement village that is subject to a strata scheme and with the concurrence of the other party to the dispute—any order that the Tribunal may make under the Strata Schemes Management Act 2015 to determine the dispute,



(l) any other order prescribed by the regulations for the purposes of this section.

(2) Nothing in this section limits the orders that the Tribunal may make under this Act.

### **Corporate Structure of the Respondent**

12 The following summary is taken from the “Company Relationships Chart” and the ASIC extract for each of the companies mentioned.

(1) **Mbark Pty Ltd**, Directors James Richard Robinson, John Bede Leo and Adam Kevin Somerville; 30,000 ordinary shares held in equal proportions by Crewso Pty Ltd (same address as Mr Robinson), Maxca Pty Ltd (same address as Mr Leo) and Rockydog Pty Ltd (same address as Mr Somerville).

(a) **Wivenhoe Village Pty Ltd**, Directors James Richard Robinson, John Bede Leo and Adam Kevin Somerville, 300 ordinary shares held by Mbark Pty Ltd.

(b) **Wivenhoe Village Management Pty Ltd**, Directors James Richard Robinson, John Bede Leo and James Richard Robinson, 300 ordinary shares held by Wivenhoe Village Pty Ltd.

(c) **Ecoserv Australia Pty Ltd**, Sole Director James Richard Robinson, 100 ordinary shares held by Mbark Pty Ltd.

### **The Rental Agreement**

13 The operator has provided an example “Ecoserv Rental Terms of Contract January 2016” and states that identical terms were used in relation to each separate item being rented by the operator.

14 The Schedule attached to the example agreement states that the “Owner” is Ecoserv Australia Proprietary Limited and the “Hirer” is Wivenhoe Village

Management Pty Ltd. Under the Heading “Equipment Schedule” is listed the identification and a description of the particular item and the Schedule also provides detail of the Term, Agreement Date, Payments and Servicing Obligations. The Schedule is signed under the headings “Hirer’s Acknowledgement” and “Owner’s Acknowledgement”.

- 15 Under the heading “Legal Effect of This Document” the rental terms provide, inter alia, that the owner does not relinquish or wave title or responsibility for the goods (as defined in the Schedule) but rents the goods to the hirer for the term. The hirer agrees that at all times the goods rented remain the property of the owner and that the goods are being rented from the owner “holly and mainly for a business carried on by the Hirer”.
- 16 The rental agreement contains a number of other provisions and obligations as would be reasonably expected in such a document, including a provision that the hirer must pay the owner in the event of loss, damage (beyond reasonable wear and tear) or destruction of the goods even if that loss damage or destruction is not caused by the fall of the hirer. In addition, the agreement provides that the hirer indemnifies the owner for any costs incurred by the owner in connection with the funding of the owner’s commitment to the hirer under “this contract”.

## **Submissions**

### *Applicant’s Submissions*

- 17 Mr Boyton submits that the several items the subject of this application (being, in general terms, machinery or equipment used for landscaping maintenance) are “plant, machinery or equipment used in the operation of the village” (see s. 92 of the RV Act) and are therefore the responsibility of the operator. However, Mr Boyton submits, by entering into the rental agreement the operator has directly or indirectly passed responsibility to the residents for the provision of these capital items because the rental charges are raised and paid through recurrent charges.

- 18 The applicant is seeking compensation to recover those recurrent charges, apparently on behalf of all residents, in the sum of \$48,347.08. I understand that this claim is on behalf of all residents because in his statement Mr Boyton writes: “Recovery of these charges would be to the benefit of all Wivenhoe Village Residents”. [Emphasis in the original].
- 19 In the hearing of this matter, Mr Boyton raised an additional issue, referring to a decision of the operator to return to the previous system which operated until 30 June 2016, using contractors. The operator agreed to this had occurred but stated this was on the basis of waiting until this application was determined. Depending on the outcome, the operator would decide then as to the appropriate method of providing and funding the services.

#### *Operator’s Submissions*

- 20 The operator submits that the decision to introduce a scheme whereby particular equipment was rented, was kept on Village property and was operated by full-time staff of the Village was initiated because of steadily rising costs under the previous arrangement.
- 21 The operator states that rental terms and agreements were sought from the manufacturers of the desired equipment and also that a quotation was obtained from a leading service provider in the industry. In general terms and costs were thought to be too onerous.
- 22 The new system was introduced in a completely transparent manner and was included within Village budgets three times up to the present. No complaints or objections were ever received until the present proceedings were lodged.
- 23 Importantly, the operator submits that the method of paying the operating costs by way of recurrent charges is provided for at clause 60.1 of the Village Contract. “Operating Costs” is defined there to include:

“the cost of purchasing, leasing, hiring, providing, running and maintaining any motor vehicles or other machinery or equipment that is considered

necessary for the operation or maintenance of the Village or the provision of general services to residents”.

- 24 The operator then notes that under s. 4 of the RV Act “General Services” Are Services Provided by Our Own Behalf of the Operator to all residents of a retirement village and further there is a note in that section that examples of general services are management and administration services and gardening and general maintenance.
- 25 The operator then goes on to state that the rental equipment is being utilised for the purpose of Village maintenance and providing general services and its cost being included in recurrent charges “is directly attributable to the provision of services at the village”. Further, in accordance with the terms of the Village Contract referred to in paragraph 23 above, the rental amount is classified as an operating cost.
- 26 Next the operator submits that the hiring of equipment or any items of capital to provide general services is not excluded by regulation 26 and there is no prohibition on the cost of the rental equipment to be charged to the residents by way of recurrent charges.
- 27 The operator agrees that the rented equipment would fall within the definition of “items of capital” under the RV Act as they are items of machinery but the operator denies that any item of capital has been sold to the residents nor has responsibility of capital replacement or capital maintenance been passed on to the residents. There is no requirement under the act for the operator to own items of capital equipment nor any prohibition on an operator being able to rent equipment from a third party.
- 28 Finally the operator submits that the rental agreement is cost efficient, delivers significant savings and provides a higher standard of service to residents.

### **Consideration and Determination**

- 29 As I noted above there is little disagreement in regard to the facts and circumstances in these proceedings. There were some minor disputes in

relation to the description or identification of some of the items the subject of rental agreements but in my opinion those disputes do not affect my determination. There was also a dispute in relation to the failure of the respondent to provide copies of all rental agreements to the applicant. I accept the advice of the respondent's representative is that each of the agreements was in identical terms.

- 30 I find that pursuant to the definition in s. 4 of the RV Act every item subject to the rental agreement from Ecoserv is an item of capital, being plant machinery or equipment used in the operation of the Village and is not excluded from that definition by the regulations.
- 31 It is often the case in retirement village matters relating to capital items that there is a dispute as to whether proposed costs or charges should properly be regarded as capital replacement or capital maintenance. That issue has not been raised before me and although, depending on my determination, it may become necessary to distinguish those components of the rental charges or fees, it is not necessary to identify those components in these reasons.
- 32 The operator has submitted that it does not own any of the subject capital items, that it has not sold any of the subject capital items to the residents and that it "has not passed on the responsibility of capital replacement or capital maintenance, in relation to a capital item, to the residents". As noted previously, the operator states that the RV Act does not require a capital item to be owned by the operator and does not prevent an operator from renting equipment from third parties.
- 33 I agree that the operator has not sold any of the subject capital items to the residents and I agree that the RV Act does not require any capital item to be owned by the operator nor does it prevent any capital item being hired or rented by the operator from a third party.
- 34 Mr Boyton was concerned to demonstrate that each of the subject capital items was in fact owned by the operator on the basis that the operator,

Wivenhoe Village Management Pty Ltd, was wholly owned by Wivenhoe Village Pty Ltd which was wholly owned by Mbark Pty Ltd which in turn wholly owned Ecoserv Pty Ltd.

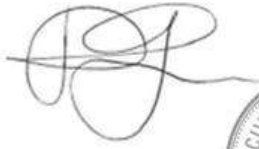
- 35 During the hearing I suggested that each of those corporate entities was a separate legal person and that I would require some submissions in relation to whether Mr Boyton's characterisation of ownership was legally sound. In fact, in my opinion I do not need to resolve that issue because I find that under the provisions of the RV Act, ownership is not necessarily a relevant matter, provided, at least in the circumstances of these proceedings, the items are not owned by the residents nor are the residents responsible for any costs other than capital maintenance as defined by the RV Act.
- 36 As I read the legislative provisions extracted above, there is nothing preventing an operator from purchasing a capital item outright or by utilising any other legal means to obtain ownership or rights associated with that. That is, Wivenhoe Village Management Pty Ltd could have purchased the lawnmower or other item or could have leased or, as here, rented the item.
- 37 In my view that is an issue entirely separate from the maintenance of that capital item. The operator may seek to recover maintenance charges by way of recurrent charges in the usual way. But I find that the operator may not recover the costs of ownership or leasing or renting items of capital equipment by way of recurrent charges.
- 38 I come to that conclusion because in my opinion requiring the residents, through recurrent charges, to pay for rental or leasing or similar charges amounts to passing responsibility to the residents by indirect means. I note that in submitting that the operator "has not passed on the responsibility of capital replacement ..., in relation to a capital item, to the residents" the operator has not referred to the passing of such responsibility "whether directly or indirectly" as provided in s. 101 (1) of the RV Act.

- 39 I note further that s. 101(2) of the RV Act provides that “[a]ny contract, agreement or scheme is unenforceable to the extent that it purports to sell or pass responsibility for the maintenance or replacement of items of capital in contravention of this subsection (1)”. In my opinion the rental agreement is unenforceable for that reason.
- 40 I have not been asked to, and I specifically refrain from, making any findings as to the motives or reasons or purpose of the operator in entering into the rental agreements. I have no reason not to accept the submission of the operator that it was motivated to do so not only as a means of saving costs *to the residents* but also of improving services *to the residents*. Nevertheless, for the reasons above I find that the rental agreement does not comply with the terms of the RV Act.
- 41 Pursuant to s. 128(1) (a) of the RV Act the Tribunal directs the operator to comply with s. 101(1) of the RV Act and to cease passing responsibility for the cost of any capital item by way of buying, leasing or renting such capital item the costs of which are obtained through recurrent charges.
- 42 Pursuant to s. 128(1)(f) of the RV Act the respondent is to refund to the residents the sum of \$48,347.08 less any amount which may be agreed between the parties to represent the costs of capital maintenance.
- 43 If the parties are unable to agree to an assessment of the costs of capital maintenance the applicant has leave to renew these proceedings no later than 13 April 2020 for the Tribunal to determine that matter.

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

Registrar

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.