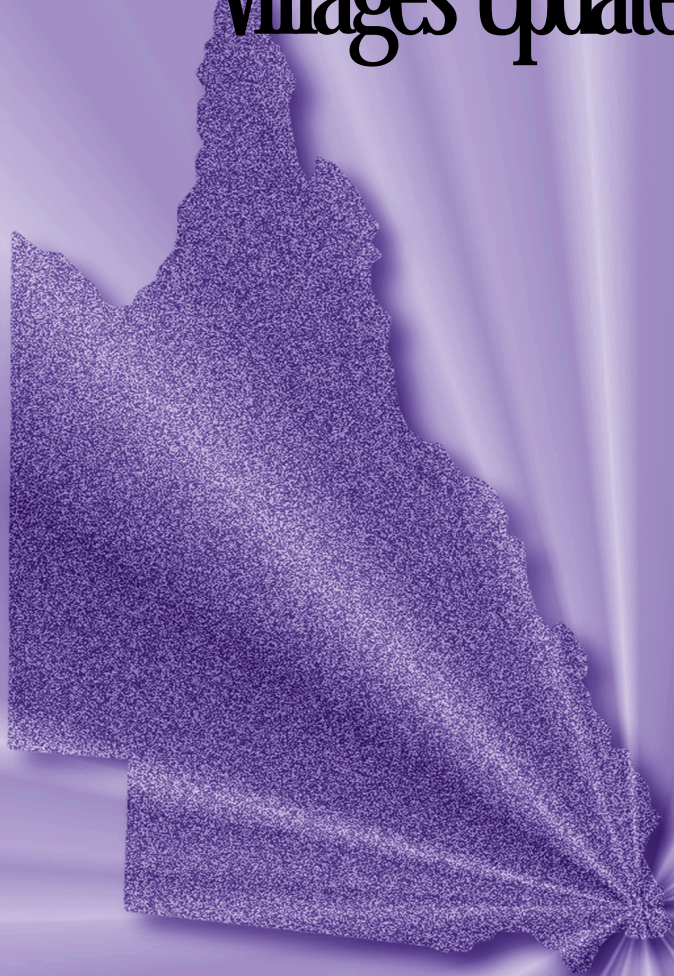


CLE TELECONFERENCE

Retirement Villages Update



CLE Teleconference
Wednesday 29 March 2000
5.30pm - 6.30pm



Retirement Villages – Teleconference

Annie O'Connor

Common problems

It has been said that retirement villages are delightful to go into but can be quite torturous to get out of. This is because of the unique character of a retirement village and the restrictions attaching to resale or surrendering of a lease by way of payment of exit fees etc. that have already been averted to by my colleagues.

My job this evening is to discuss the more practical aspects of retirement village law dealing with common problems that arise between scheme operators and residents and even between the scheme operators and resident's offspring. Forgive me if what I say sounds somewhat anecdotal at times.

Many of the problems I believe have arisen because prior to entering a village, residents have not completely familiarised themselves with the contents of the public information document which of course contains the contract between the scheme operator and the resident and have not researched the village sufficiently to ensure that it absolutely is what they want long term. Many residents have lived totally independently in their own home for many years and whilst they are very much imbued with the lifestyle of security and services provided by a retirement village they quite often do not understand that they have to surrender a degree of independence in managing their own day to day living.

I believe you as a practitioner can assist the resident by making absolutely sure that:

- they have completely researched the locality and the type of village they feel they can live in long term;
- they are totally aware of their financial obligations both on entering into a village, residing in a village and when departing from the village; and
- they know their obligations as a resident living in a community, both in respect of their contractual arrangement with the Scheme Operator but also in living in harmony with their fellow residents.

As I have said previously, quite often the resident is very much enamoured with a beautiful village, beautiful landscaping, services, perhaps a swimming pool, bowling green, tennis courts and think this is where they want to spend the rest of their lives. Residents must be made aware that an interest in a retirement village is a dissipating asset. They must consider their long term needs and the possibility, or in some cases, it might even be a probability, that they may need to move from the village to go into another form of aged care, either in a hostel or a nursing home. Having lived in a comfortable retirement village they would presumably like to select accommodation of comparable standard which will require an accommodation bond. My colleagues have already detailed the fact that there is no such concept (only in very limited circumstances), of compulsory buy-back. A fact of the matter is that the resident may be in a hiatus simply having to settle for second best as far as a hostel is concerned or soldier on in what might be uncomfortable health related circumstances in the retirement village.

This paper is designed to enable you as a practitioner to discuss the matter prior to the resident becoming committed, if that is possible (and it would have to be within the 7 or 14 day cooling off period), so that the resident may be spared financial and emotional disappointment down the track. I should add at this time that I act for both scheme operators and individual residents (not on the one transaction naturally).

Capacity and preparedness of resident

Having elected to enter a village, which upon visiting, appears to be paradise on earth for a resident, disappointment can come quite early in the piece. The public information document does contain a compulsory questionnaire. You should hammer these questions home to the resident and ensure that:

1. They have the capacity. Quite often, offspring don't particularly want their parents to go into a hostel (which sometimes might be the better avenue) and it has been known for 'confused' residents to find themselves in independent living units in a retirement village. This can disturb other residents and if the resident has to move shortly after arriving at the village, can be quite unsettling as you can imagine.
2. I will mention conveyancing type searches shortly, but it would be helpful to determine if the particular scheme operator has a proven record. Is the Village approved pursuant to the Retirement Villages Act? Look at the location of the village? Is it near to where the resident used to live or easily accessible for visitors? Is the village popular for resale purposes? Is the village of a size that appeals to your client - there may well be disclosure in the document, that instead of the initial 30 units, it is likely to expand to 230 units?

How long the village has been in place and how much is in the sinking fund? If, for instance, many of the units are vacant with the village being in existence for some time, this may well mean that a unit is difficult to resell and it might also mean that the capital and sinking fund levies have not been paid, it being the intention of the operator to deduct them from the money payable to the resident when the villa is resold. This obviously has impact on the operator to be able to maintain the village to a suitable standard.

3. As a side issue you should ensure that the resident has an Enduring Power of Attorney for financial and health matters which will help a resale process and assist the resident to move to an aged care facility although there are provisions in the new Act which allows the scheme operator to execute a Surrender of Lease where the scheme operator or an approved carer believes the resident would be best served by moving to an aged care facility.
4. Carry out a search of referee's complaints.
5. Investigate what services are available, is there a bus, is there an onsite manager; or is there only an emergency button.

As I have already said it is important to ensure that the retirement village is approved and to look at the terms of that approval. There are various other types of aged accommodation available which are not governed by the *Retirement Villages Act* or *The Aged Care Act* and which does not have the protection of age restrictions etc.

If you are acting for a resident purchasing a strata title unit then you would be familiar with all of the searches attaching to that but particular care should be taken to investigate whether the common property is owned by the scheme operator or is, as part of the body corporate common property. This will have impact on responsibility for capital replacements etc.

Additionally, the retirement village industry has a program for accreditation where very strict guidelines are imposed. Again, this would be worthwhile enquiring about.

Sometimes your client may like to do their own gardening. They should enquire whether this is a possibility for them. Certainly, some villages allow this but it may be important to them in deciding whether to go into the village.

Financial obligations of the resident

Having ensured that the resident is fully aware of his or her new habitat then the most important thing from there, to the resident, is the cost. Not only of entering into the village but residing and when leaving. You have already learned that there is to be a standard form of public information document which will be helpful to enable both residents and their advisers to compare ‘apples with apples’ at a glance which will give the vital terms up front. This is currently under consideration and is not yet available. Usually the resident will know fairly quickly what the payment up front is but it is of course important to ensure that they understand that anything up to 30% (and it may be more in view of the fact that for new contracts the operator has to bear the cost of capital replacements) of the amount paid **by a new resident** is to be deducted from the ultimate repayment to the resident.

During the term of their residency they will of course be required to pay service fees and the definition of service fees is usually spelt out very clearly in the document.

There can be a misunderstanding that the resident sometimes believes that as he or she is leasing a property there is an expectation that perhaps the scheme operator will replace items as and when it becomes necessary as those items were in the villa when they took up occupancy. Conversely, the scheme operator, and this is always made clear, is of the view that the village is self funded (although the issue has become less clear by the new legislation) and that all costs are to be borne by the resident.

There is an obligation upon the scheme operator to provide budgets each year and we have already learnt of the restrictions of increasing those costs. The service fee does however create practical tensions and you should warn the residents that if they want service they may well have to pay for it.

You should emphasise the non-compulsory buy-back.

It is not always made quite clear to the resident that whilst they are entitled to a share of the capital gain or resale, any capital loss is usually borne totally by the resident.

Repairs and reinstatement

The most common problems as I see it are related to repairs. Obviously, the obligation on the tenant will be dependent upon the terms of the Residential Contract but it is usual for the resident to be required to maintain the villa in good repair, subject to fair wear and tear, however, in the reinstatement provisions of the contract, provision is usually made for the unit to be reinstated to a condition as it was on entry so that you can have the somewhat strange situation where arguably a scheme operator will have to pay the cost of repairs if the resident is in occupation but at surrender or termination of the Lease then the reinstatement costs are at the cost of the resident. Unfortunately, the new Act attempts to give guidance as to what is a repair or replacement by reference to the Income Tax Assessment Act. Certainly, many scheme operators have attempted to interpret the repair conditions in the same light but of course the Income Tax Assessment Act relates to the question of deductibility and not the essence of the repair.

We have seen that the new Act will require capital replacement for new residents to be at the cost of the scheme operator and the scheme operator has to obtain estimates of forward costings.

As it presently stands, capital replacement could extend to replacement of roads, electrical installations and even roofing and it really does come down to the question of whether it is in fact a replacement or a repair.

As I have already said, this can have impact on costs to be payable from the general services fund ie. under the present legislation if there is a component relating to such repairs or, in the future from the capital reserve fund. The question of repairs is therefore two-tiered. One relating to repairs in an individual unit and one relating to whether they should be paid from the sinking fund or by the scheme operator itself.

I repeat this is the main area of concern and most problems revolve around this concept.

Reinstatement

Again, I urge you to advise the resident to consider the terms of their agreements because as far as reinstatement is concerned where responsibility falls is clearly stated in the document.

Attaching to the matter of repairs is the ‘additions required’ or what is sometimes called ‘variations required’ when a resident enters the village. Sometimes they believe that these are provided by the scheme operator and as such are the operator’s responsibility, whereas irrespective of the other fixtures and fittings in a unit, the scheme operator would most definitely require that they be maintained and replaced if necessary by the resident or possibly removed at the end of the Lease. What is not uncommon is for those particular additions or variations to be sold separately by an outgoing resident to an incoming resident.

Usually it is not unusual for homeowners to mortgage equity in a home with interest payments to be deducted on sale of their home. Many retirees and elderly people take advantage of such a scheme. It should be made quite clear to the resident that such a scheme would probably not be acceptable to a scheme operator because of the usual powers of possession for a mortgagee to take up possession etc.

General accountability and management

You should warn your clients that, especially in a strata title situation, whilst most villages have arrangements in place for residents to hold meetings, and certainly the new Act is much more prescriptive in this regard, their ability to influence management may be minimal.

It seems that in most instances residents are happy to leave the management to people who really have the best interests of the residents at heart but there are sometimes what I should call ‘activists’ than can affect the harmony of the village. Again, this is a matter of simply preparing your client for such an eventuality.

The new Act provides for a Residents Committee with a method for dispute resolution. A tribunal is to be established in which lawyers can appear. I believe the tribunal will be inundated with concerns from residents relating to repairs and reinstatement and hopefully some case law will develop to be of assistance to all concerned.

From the tribunal there is appeal to the District Court.

New Act

With the new Act there will be virtually two levels of residents existing upon different scales of contribution and documentation etc. This cannot be helped but hopefully it will not create any more concern. Certainly, the existing new residents will have different responsibilities so far as contribution to capital replacement is concerned and different standards and obligations in relation to reinstatement of the villa when it is vacated.

Freehold

The above generally relates to both leasehold and freehold schemes. However, I should mention briefly different applications that apply to freehold schemes. Presently, there are two Acts that apply, the *Body Corporate and Community Management Act 1997* and the *Retirement Villages Act*. Brian Herd has drawn your attention to the difficulties relating to powers of attorney under that Act and as the legislation stands

different requirements apply for the meetings. Certainly, most freehold residents would prefer that they be given the ability to control management of the village, but to delegate that responsibility which is clearly not possible. Somehow, freehold owners have a higher degree of feeling of ownership of their unit and they find it difficult to understand why they do not have a greater say in the management of the village itself.

Presently, the Department of Natural Resources is considering a retirement village module for the BCCM Act relating to freehold schemes but in the meantime the standard module applies which is not at all satisfactory and does not fit well with the *Retirement Villages Act*. The new Act provides for the RVA to prevail in the case of inconsistency.

I have only had an opportunity to touch on the main areas of concern and I believe that once the new Act comes into force (probably 1 July 2000) the tribunal will see a manifestation of even more 'common problems'. I repeat that being prepared and being able to fully advise your client of the considerations that should be given prior to them taking the step of entering a village is paramount.

CLE Retirement Villages Teleconference

1 Introduction

Before one can begin to consider the new legislation for Retirement Villages it is useful to understand the context in which the legislation was drafted and the concept of a Retirement Village.

I act for the Association of Residents of Queensland Retirement Villages (ARQRV) which is an incorporated association which has been set up to represent the interests of residents in retirement villages. As a result, much of my experience in this area of the law has been as a "consumer advocate" for residents and means that I am concerned with the protection of resident's rights. Other practitioners act for Operators and Managers of Retirement Villages and their concerns relate to statutory compliance, licensing and the preparation of the documentation for the "sale" of units in the villages.

2 Choice of Village Lifestyle by Residents

When residents decide to enter into a village they are making a lifestyle decision. Therefore they place great emphasis on the concept of a retirement village. As far as they are concerned, the village is to them, their home, and for many their last home. They are not necessarily aware of the legal relationships created by the documentation signed by them and tend to treat their unit as if it was a freehold interest which gives them the same rights as they would have in their own home. Obviously this is not the true legal situation.

They choose to live in a retirement village because it offers them a safe environment in which to live, in a place where the responsibilities for maintenance and gardening are managed by other people and where they will be provided with facilities specifically designed for their age group. They also hope that it will provide them with social activities which will allow them to enjoy their later years of life.

Most residents will have sold their own homes to move into a retirement village and use funds from this sale to acquire their interest in the village. There is a range of villages from which to choose but often the resident's choice will depend on the cost of entry to the village and its closeness to family. It has been my experience that few residents see a solicitor before entering into the documentation for their new home. Cost of legal advice is often the reason for this. We hope that this will change as practitioners become more familiar with the processes involved and with the terms of the new Act as the documentation is reasonably complex but can be readily dealt with once you are aware of the different schemes that are in place for these villages.

3 Types of Villages

Broadly speaking, there are two types of ownership schemes commonly adopted for resident's units in a villages. One offers residents a leasehold interest in the unit occupied by the resident, the other offers residents a freehold title in a strata title development.

In both cases the village is developed by an Operator which may be a charitable or religious organisation but increasingly is a property developer who specialises in the development and operation of retirement villages. The villages are run by a Manager who is responsible not only for the maintenance and administration of the village and its facilities but also the fulfilment of certain legal responsibilities towards the residents of the village.

4 Role of the Operator, the Manager and the Resident

The Operator's primary obligation is to establish a properly licensed village which is able to provide the facilities advertised in the selling programme and to be responsible for the continuing operation of the village in perpetuity or until the existing residents at the time agree terminate the village scheme. The Operator recovers his investment in the village by selling the new units to the initial residents and collecting a fee on the resale of the units to subsequent residents once the original resident leaves the village. The Operator provides services and facilities to residents at cost. The Operator may appoint a Manager to operate and administer the village but may also undertake that role itself.

A resident who wishes to live in a village purchases an interest in a unit which he or she intend to occupy and enters into an agreement to pay a monthly fee for the ongoing services provided to residents by the Manager of the village. When a resident leaves the village, he or she is entitled to receive an agreed share of the proceeds from the sale of their unit. This amount is not usually payable until the resale has been completed. Unfortunately in some circumstances the delay in the resale can be several years. This creates problems as the residents and their beneficiaries can become frustrated by these delays and tend to blame the Manager/Operator for these problems.

5 Documentation

Residents usually enter into a contract with the Operator. The contract will contain the required statutory documentation and information about the village and its facilities and will usually set out in some detail the obligations of the Manager. If the interest being acquired is leasehold, the contract will include the terms of the lease to the resident. If it is an interest in a strata title unit, it will provide for the transfer of title to the resident and the assignment of the body-corporate entitlements of the resident to the Operator. The intent in each case is to allow the Manager/Operator to retain control of the Village and its operation. The contract will contain provisions concerning the resale of the unit and specify the resident's entitlement to the proceeds from the sale.

All villages provide facilities for the residents which range from swimming pools to bus transport and dining facilities to gymnasiums. They are usually designed for independent living and residents are often unhappy if the Manager accepts residents who are unable to look after themselves or who may be unable to live in harmony with the other residents. This of course is becoming a greater problem as the existing residents of the villages age and succumb to the problems of aging such as dementia and Alzheimer's disease.

6 Legislation

The Operation of Retirement Villages is regulated by the Retirement Villages Act which has been recently amended. Brian Herd will discuss this Act with you. Suffice it to say for the moment, that the Act does not prescribe whether or not a village will be a leasehold scheme or a freehold scheme. This decision is made by the Operator who develops the Village and will be driven by the tax implications for the investors in the development.

7 Conclusion

One of the misconception of prospective residents is that the village will look after all their needs. It is unrealistic to expect that all needs will be met especially when villages must operate within budget constraints and are intended to provide a return to the Developer/Operator. Although a resident will be assured of the right to continue to occupy their unit for their lifetime (subject to their health and behaviour), the rights that a resident of either a freehold or leasehold unit are similar as, in each case, the Operator/Manager will retain control of the village and resident's rights are limited to a right to consultation with the Manager/Operator so far as the day to day operation of the village is concerned.

Nevertheless Villages offer an attractive alternative to retirees looking for a secure lifestyle. Our role as lawyers is to ensure that we are able to provide timely and affordable advice to prospective residents and to ensure that they understand the limitations as well as the benefits of village life.

G R Chapman