# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Australian Retirement Homes Ltd v Ash* [2013] QCA 355 |
| PARTIES: | **AUSTRALIAN RETIREMENT HOMES LTD**<br>ACN 061 603 718<br>(appellant)<br>**v**<br>**ERIC JOHN ASH**<br>(respondent) |
| FILE NO/S: | Appeal No 3592 of 2013<br>QCAT No 87 of 2012 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Leave *Queensland Civil and Administrative Tribunal Act* |
| ORIGINATING COURT: | Queensland Civil and Administrative Tribunal at Brisbane |
| DELIVERED ON: | 29 November 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 15 August 2013 |
| JUDGES: | Gotterson and Morrison JJA and North J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. Grant leave to appeal.**<br>**2. Allow appeal.**<br>**3. Set aside the decision of the Appeal Tribunal made on 25 March 2013.**<br>**4. Affirm the decision of the Tribunal made on 24 January 2012.**<br>**5. Respondent, Eric John Ash, is to pay the costs of the applicant, Australian Retirement Homes Ltd ACN 061 603 718, of the application for leave and the appeal fixed at $9,000.**<br>**6. Refuse respondent's application for an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973.** |
| CATCHWORDS: | PROCEDURE – INFERIOR COURTS – QUEENSLAND – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the applicant is a retirement village – where the respondent is a former resident in the retirement village – where the respondent filed an application in QCAT putting into question the validity of charges for general services by the applicant – where the application was dismissed at first instance and the respondent appealed to the |

Appeal Tribunal on a question of statutory construction – where that appeal was allowed and the member's decision was set aside – where the applicant appeals against that decision on a question of statutory construction – whether leave should be granted

*Appeal Costs Fund Act* 1973 (Qld), s 15
*Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 150(2)(b), s 150(3)
*Retirement Villages Act* 1999 (Qld), s 103, s 104, s 105, s 106, s 107, s 108, s 167

COUNSEL: R M Derrington QC, with S J Forrest, for the applicant
D Wise (*sol*) for the respondent

SOLICITORS: Minter Ellison for the applicant
David Wise Solicitor for the respondent

[1] **GOTTERSON JA**: Australian Retirement Homes Ltd is the retirement village scheme operator for the AVEO Peregian Springs Country Club retirement village scheme ("Peregian Springs") which is located at 21 Gracemere Boulevard, Peregian Springs. Mr Eric Ash is a former resident of Unit 125 in the village. During the course of proceedings in the Queensland Civil and Administrative Tribunal ("QCAT") and in this Court, Australian Retirement Homes Ltd or Mr Ash have been an applicant for relief, an appellant within QCAT, an applicant for leave to appeal to this Court or a respondent. In these reasons, it is convenient to refer to the parties as ARH and Mr Ash respectively.

[2] On 15 March 2011, Mr Ash filed an application in QCAT invoking the retirement village dispute original jurisdiction conferred on it by s 167 of the *Retirement Villages Act* 1999 ("R V Act"). In that proceeding, Mr Ash put in question the validity of charges for general services incurred by ARH for Peregian Springs for the financial years ended 30 June 2007, 30 June 2008, 30 June 2009, 30 June 2010 and 30 June 2011 respectively. How this question is to be answered turns upon statutory construction of the R V Act. The answer has potential implications for the validity of charges for general services for other retirement village schemes.

[3] In a decision delivered on 24 January 2012, a member of QCAT dismissed Mr Ash's application. He appealed to the Appeal Tribunal of QCAT on a question of statutory construction. His appeal was heard on the papers by a judicial member of QCAT. In a decision delivered on 25 March 2013, the appeal was allowed, the Member's decision was set aside, and the matter was returned to the Registrar to proceed according to law. On 19 April 2013 ARH filed an application for leave to appeal under s 150 of the *Queensland Civil and Administrative Tribunal Act* 2009 ("QCAT Act") to this Court against the decision of the Judicial Member.

[4] The challenge to the validity of the charges is based upon a construction of a provision within Part 5 Division 7 of the R V Act, s 106 which, if correct, would place a cap upon the total amount payable from year to year by ARH in order to acquire general services for Peregian Springs, a cap which, the evidence suggests, would have been exceeded in all but one of those financial years. ARH urges a different construction of the provision which, if correct, would have the consequence that the cap in s 106 applies only to the total amount levied from year

to year on owner residents in order to fund the acquisition by ARH of general services for Peregian Springs. As will be explained, on this construction, that cap was not exceeded in any of the years in question.

[5] The statutory and factual circumstances from which this challenge has arisen may be outlined in the following way.

**Part 5 Division 7 of the R V Act**

[6] Part 5 Division 7 of the R V Act is headed "Charges for general services". As originally enacted, it consisted of six sections, ss 103 to 108 inclusive. Sections 103 and 104 related to working out and paying "charges for general services for residents" and "general services charges for former residents" respectively. Section 105 concerned "general services charges" for an unsold right to reside in an accommodation unit. Section 106 related to "increasing general services charges"; s 107 to each resident's responsibility for paying the increased "general services charge"; and s 108 to a requirement of approval by a majority of residents for provision of new services.[1]

[7] This division was substantially amended by the *Retirement Villages Amendment Act* 2006 ("the Amending Act"), the amendments having commenced on 1 January 2007. A number of the amendments are significant for present purposes.

[8] A new provision, s 102A was enacted as follows:

> "**102A General services charges budget**
>
> (1) The scheme operator must adopt a budget (the ***general services charges budget***) for each financial year for charges for general services.
>
> (2) For subsection (1), the general services charges budget must—
>
> (a) allow for raising a reasonable amount to provide the general services for the financial year; and
>
> (b) fix the amount to be raised by way of contribution to cover the amount.
>
> (3) The residents committee may, by written notice given to the scheme operator, ask the scheme operator to give the residents committee a copy of the draft general services charges budget for the financial year at least 14 days before the beginning of the financial year.
>
> (4) The notice must be given at least 28 days before the beginning of the financial year.
>
> (5) The scheme operator must comply with the notice.
>
> (6) If, at the end of a financial year for which a general services charges budget is adopted, there is a surplus

[1] Terms in quotations are taken from the headings of the respective sections as enacted in 1999.

or deficit for the charges, the surplus or deficit must be carried forward and taken into account in adopting the general services charges budget for the next financial year.

(7) Subsection (6) applies despite section 106(1)."[2]

[9] Section 106 was omitted and replaced by a provision in the following form:

"**106 Increasing charges for general services**

(1) A scheme operator must not increase the total of general services charges for a retirement village for a financial year by more than the CPI percentage increase for the financial year.

Maximum penalty—200 penalty units.

(2) In this section—

***CPI*** means the all groups consumer price index for Brisbane published by the Australian statistician.

***CPI percentage increase***, for a financial year, means the percentage increase between—

(a) the CPI published for the quarter ending immediately before the start of the financial year; and

(b) the CPI published for the quarter ending immediately before the end of the financial year.

***total of general services charges***, for a financial year, means the sum of all charges for general services for the financial year, other than the following charges—

(a) a charge for a general service that has been increased by more than the CPI percentage increase for the financial year and that the retirement village residents, by special resolution at a residents meeting, have approved;

(b) a charge for a general service that has been increased by more than the CPI percentage increase for the financial year and that is allowed under section 107."[3]

[10] Section 107 was amended, in consequence of which the section provides:

"**107 Resident's responsibility for paying increased general services charge**

A resident is not required to pay a charge for a general service under a residence contract to the extent that the

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2 Amending Act s 42.

3 Amending Act s 46.

charge is more than that payable under the contract and increased under section 106, unless the excess is attributable to an increase in—

(a) rates, taxes or charges levied under an Act in relation to the retirement village land or its use; or

(b) the salary or wages of a person engaged in the retirement village's operation and payable under an award, certified agreement, enterprise flexibility agreement, industrial agreement, Queensland workplace agreement or other industrial agreement made, approved, certified, or continued in force under—

(i) *the Industrial Relations Act 1999*; or

(ii) a Commonwealth Act; or

(c) insurance premiums, or insurance excesses paid, in relation to the retirement village or its use; or

(d) maintenance reserve fund contributions."[4]

[11] Upon enactment, Schedule 2 Dictionary to the R V Act contained a definition of the term "services charge" which has remained unamended. This term means:

"a charge payable by a resident for a general or personal service under a residence contract."

Originally, s 12(3) of the R V Act contained the following definitions of the terms "general services" and "personal services" which were relocated unamended in the Schedule Dictionary by the Amending Act:[5]

"***general services*** are services supplied, or made available, to all residents of a retirement village.

*Examples of general services—*

• management and administration

• gardening and general maintenance

• a shop or other facility for supplying goods to residents

• a service or facility for the recreation or entertainment of residents

***personal services*** are optional services supplied or made available for the benefit, care or enjoyment of a resident of a retirement village.

*Examples of personal services—*

• laundry

• meals

• cleaning the resident's accommodation unit"

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4 Amending Act s 47.

5 Ss 6, 64.

**Computation of charges for general services and its implications for the parties**

[12] The evidence before QCAT reveals that ARH adopted an annual budget for a "General Services Fund" ("the Fund") for each of the years in question. The budget would be prepared at a time less than six months prior to the commencement of the financial year to which it was to apply. At that point, actual expenditure on the acquisition of general services for the immediately preceding year, of course, would not be known. Based upon actual expenditure for the first six months of that year, a forecast could then be made of actual expenditure for the whole of the preceding year. The budget document would set out in tabular form, for each line item of Fund income and each line item of Fund expenditure, the budgeted and the forecast actual dollar amounts for the immediately preceding year and the budgeted dollar amount for the budget year.

[13] The budget document would also set out, for each line item of income and expenditure, the percentage increase or decrease by which the budget year dollar amount would vary from each of the dollar amount budgeted and the dollar amount forecast as actual for the immediately preceding year. The percentage variation for the totals of Fund income and Fund expenditure were also stated. The line item variations could be very large. For example, for the budget for the year ended 30 June 2007, income line items included one increase of 328.57 per cent and one decrease of 66.67 per cent; and expenditure line items included one increase of 220 per cent and one decrease of 33.33 per cent.[6]

[14] By comparison, variations for the totals were over a much narrower range. For that year, the percentage increase from the immediately preceding year in budgeted total income was 2.93 per cent and the percentage increase in budgeted total expenditure was 7.09 per cent. Significantly for this case, the percentage increase for total expenditure exceeded the percentage increase for the Consumer Price Index ("CPI") for the comparable period (2.8 per cent).[7] Likewise, for most of the following years in question: a 17.66 per cent increase for the year ended 30 June 2008 (CPI increase 3.4 per cent);[8] a 20.41 per cent increase for the year ended 30 June 2009 (CPI increase 4.8 per cent);[9] a 1.85 per cent increase for the year ended 30 June 2010 (CPI increase 3.10 per cent);[10] and a 3.33 per cent increase for the year ended 30 June 2011 (CPI increase 3.00 per cent).[11]

[15] On Mr Ash's construction of s 106(1), the percentage by which total expenditure on general services might lawfully increase from one year to the next was capped at the CPI percentage increase for that period, unless the residents otherwise agreed by special resolution passed pursuant to s 106(2)(a) of the R V Act.[12] No such special resolution was passed in respect of any of the years in question.

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6 AB 40. These percentages are calculated upon a comparison of budgeted line items for the years ended 30 June 2005 and 30 June 2006 respectively.

7 AB 40.

8 AB 42.

9 AB 43.

10 AB 45.

11 AB 47.

12 As the learned Judicial Member noted at Reasons [49] AB 228, Mr Ash initially contended that the cap applied on a line item by line item of expenditure basis, but that contention was refined during the course of the proceeding to one directed at total expenditure on general services only.

[16] Consistently with its construction of s 106(1), ARH restricted the percentage increase from year to year in the general service levy that each owner resident was required to pay to no more than the CPI percentage increase. It did not seek to recover the full increase in total expenditure from owners. Typically, the Fund income fell short of Fund expenditure on general services. The shortfall was met by ARH. Each budget document contained a line item "Deficit Paid by ARH" (or "Deficit Paid by AVEO") and stated the amount of the shortfall for the year in order to balance the budget. For the five years in question, the Fund deficits subsidised by ARH totalled approximately $475,000.

[17] Thus neither Mr Ash, nor any of his co-owner residents during the years in question, paid a levy for general services that had been increased annually by a percentage greater than the CPI percentage increase. That being so, it might well be thought that the prospect of recovery by owner residents of "overpayments" of general services levies for those years, of itself, would have been insufficient to motivate this challenge[13].

[18] However, a particular concern of Mr Ash, and a number of other owner residents, arises from the deficit funding. It is common ground that it is industry practice for a scheme operator to subsidise expenditure on general services during the development stage of a retirement village. Obviously this is to the benefit of owner residents during that stage. It is also to the benefit of the scheme operator who can market the village as having lower general service levies than would prevail without a subsidy. The concern arises from the possibility that once the development stage has been completed, the subsidisation by way of deficit funding of the expenditure on general services will be terminated by the operator. Thereafter a substantial deficit in the one year could be carried forward into the next under s 102A(6) with the benefit for the scheme operator of immunity from any s 106(1) cap.[14] Hence, the financial interest on the part of the owner residents in a construction that places the cap in s 106(1) upon total expenditure in acquiring general services for the retirement village.

**The statutory construction issue**

[19] Section 106(1) operates to place a cap on the total of general services charges. It does so by providing that the scheme operator must not increase the total of general services charges for a retirement village for a financial year by more than the CPI percentage increase for the financial year. The issue between the parties to this application for leave to appeal concerns the precise meaning that the term "total of general services charges" has.

[20] That term is defined in s 106(2). It is a composite term that incorporates the expression "general services charges". Whilst, as noted, there are definitions of "services charge" and "general services" in the Dictionary Schedule, there are no

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13 It would not follow that because one or more line items of expenditure for a given year had exceeded the cap without approval by special resolution, then the levies that had been charged to residents for that year would be retrospectively reduced, proportionately or otherwise. Where the total amount of exceedences for the year was less than the scheme operator's deficit funding subsidy for that year, it would be difficult to justify any reduction.

14 See s 102A(7). It might be expected that the impact would be a substantial increase in general services levies for the first financial year after termination of the deficit subsidy. However, the extent of the impact would depend upon whether or not the scheme operator had progressively reduced the level of subsidisation as the development stage approached completion.

definitions for that expression, or the variant form "general services charge" in the R V Act. Nor is there a definition for the word "charge". The absence of definitions for both that expression and that word together with some inconsistent usage of terminology in s 106 and the provisions which precede and follow it, has left scope for putting in question the meaning that the defined term has. That question has been answered differently in the course of this proceeding.

[21] The Member concluded that the word "charge" in the composite term connotes the charges levied on residents,[15] former residents[16] and unsold rights[17] in respect of general service as defined. He stated:

> "[27] The definition in s 106(2) of the '*total of general services charges*' is limited to charges for general services. I agree with the respondent's submission that it eschews any notion that the amounts involved in the calculation include contributions made by a scheme operator to reduce the impost on the residents of the Village. As I observed earlier, it seems to be accepted by the parties that the word '*charge*' is the amount payable for general services and not the cost or expense of providing the services."[18]

He supplemented this statement with the footnote:

> "For clarity, it is my opinion that the word "charge" when used in the Act has its natural and ordinary meaning, being an impost or debt which the person charged is required to pay."[19]

[22] By contrast, the Judicial Member concluded that the composite expression is concerned with budgeted expenditure on the acquisition of general services by the scheme operator for the retirement village. He stated:

> "[54] I accept the appellant's overall submission that '*the sum of all charges for general services for the financial year*' in the definition of '*total of general services charges*' in s 106(2) of the RV Act is a reference to the total forecast expenditure on general services in the budget prepared under s 102A, regardless of whether the charges are paid by the residents or the operator, and that the only items that may properly be excluded from that sum are the items described in sub-paras (a) and (b) of that definition."[20]

[23] On the hearing of the application, senior counsel for ARH advanced three categories of argument in support of a submission that the construction preferred by the Judicial Member is erroneous. They were that it did not adopt the ordinary meaning of the word "charge"; that it was inconsistent with other provisions in the R V Act; and that it hampered, rather than promoted, the objects of the R V Act.[21] The arguments advanced on behalf of Mr Ash focused upon a connection between s 102A and s 106, and a perceived legislative objective of increasing transparency with respect to general services charges.[22]

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15 Under s 103.
16 Under s 104.
17 Under s 105.
18 AB 187.
19 *Ibid* footnote 2.
20 AB 202.
21 Tr1-6 LL6-13.
22 Tr1-37 LL16-19.

[24] It is convenient to consider each of these arguments separately.

**Ordinary meaning of the word "charge"**

[25] According to ordinary usage, in the context of markets for the supply of goods and services, the word "charge" connotes a price demanded by an entity for the provision of a good or service by it.[23] To apply that connotation to the expression "general services charges" in s 106 would give it the meaning of amounts demanded by a scheme operator for the provision of general services by it. In turn, applying that meaning to the term "total of general services charges" would give the term the meaning of the sum of all amounts demanded by a scheme operator for the provision of general services with the exception of amounts which have been increased by more than the CPI increase, they being amounts which paragraphs (a) and (b) in the definition of that term accommodate.

[26] By contrast, in the same market context, the word "charge" does not, in ordinary usage, connote an expenditure incurred in order to acquire a good or service. Consequently, the expression "general services charges" would not, in ordinary usage, connote expenditures incurred by a scheme operator in order to acquire goods or services.

[27] There are several features of this legislation which, in my view, suggest with some force that in the composite term the expression "general services charges" is intended to have the meaning of amounts demanded by a scheme operator for the provision of general services. Firstly, there is the definition of the term "services charge" in the Dictionary Schedule. As noted, it means a charge payable by a resident for a general or personal service under a residence contract. This definition reflects the ordinary meaning to which I have referred. It precludes any meaning referable to expenditure incurred by the scheme operator. There is good reason to expect that the legislature intended that services charges to which the expression "general services charges" refers, be the same charges as are defined as such in the Schedule.

[28] Secondly, s 106(1) is concerned with a category of charges which lie within the power of the scheme operator to increase. Clearly, the amount that it demands be paid to it for the provision of a general service is within that category. On the other hand, the expenditure that the scheme operator incurs in order to acquire a general service is not. Whether there is an increase in expenditure to acquire a particular service depends more upon whether or not the supplier of the service demands an increased price for provision of it and whether there are competitor suppliers who might offer a comparable service at a lower price, matters which are clearly beyond the power of the scheme operator to control.

[29] Thirdly, s 107 speaks of a charge for a general service as a charge that a resident is required to pay under a residence contract. Significantly, it identifies such a charge as the type of charge that s 106(1) comprehends as liable to increase by the scheme operator. It is also significant that it describes the charges that may be increased under it beyond the s 106(1) cap as those for which an excess above the cap is **attributable** to an increase in an expenditure item listed in paragraphs (a) to (d) thereof. In this way, the section makes a clear distinction between, on the one hand, the charge for a general service which is increased by the scheme operator, and on

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23 *Concise Oxford Dictionary*.

the other, an increase in expenditure that the scheme operator incurs to acquire the general service which results in an increase in the charge to the resident for the general service.

**Consistency with other provisions of the R V Act**

[30] Section 107 also informs the meaning of the expression "charges for general services" directly via the provision in paragraph (b) of the defined term. Paragraph (b) excepts from the scope of charges for general services "a charge for a general service that has been increased by more than the CPI percentage increase for the financial year and that is allowed under section 107". As noted, the charge for a general service to which s 107 is referenced is the charge that the resident must pay to the scheme operator. Thus, that is the meaning that the expression "a charge for a general service" in paragraph (b) must have. It follows that for a paragraph (b) charge to be an exception, the charges with which the defined term is concerned must also have the same meaning.

[31] More broadly, the R V Act differentiates elsewhere between charges levied on a resident and expenditure (costs) incurred by a scheme operator in a range of contexts. Section 73(a) distinguishes the "services charge" for a service and the cost of supplying the service in the context of a limit upon liability on the part of a scheme operator for failing to supply a general service to a resident. Section 76 which defines resident's contributions, speaks, in paragraph (c), of how the general services charge is worked out in relation to "the retirement village's total operating costs". Section 108, which concerns new services, prevents the operator from charging residents for a new service before it is supplied to them: subsection (8). Section 112 relates to quarterly financial statements and, in subsection (4), provides for the provision to the residents committee of a document that explains expenditure involved in providing each general service.

[32] Other examples were mentioned in the course of oral submissions.[24] It is sufficient only to mention one of them. Section 7 defines what constitutes a retirement village scheme. Paragraph (c) thereof specifies one of the necessary characteristics of such a scheme as being where "a person, on payment of the relevant charge, acquires personally or for someone else, a right to receive 1 or more services in relation to the retirement village".

[33] These aspects of consistency also give considerable support to the construction proposed by ARH.

**Consistency with the objects of the R V Act**

[34] There are two main objects of the R V Act.[25] One of them is the promotion of consumer protection and fair trading practices in operating retirement villages by declaring particular rights and obligations of residents and scheme operators and facilitating the disclosure of information to prospective residents with respect to the same.

[35] ARH argues that the construction it favours is consistent with the consumer protection object in that it operates upon the levies that residents are to pay

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[24] In sections 7(c), 14, 20, 45, 63, 68, 79 and 90 of the R V Act.

[25] See s 10.

a scheme operator, keeping any percentage increase in them to within the applicable CPI percentage increase. It also argues that "anomalous" results would flow if the competing construction is correct. By way of example, it points to a circumstance where, in order to improve general services at a retirement village, a scheme operator might wish to spend more on acquiring certain of such services than the cap would allow and would be willing to meet the excess itself. It suggests that in that circumstance, the scheme operator would run the risk of infringing s 106(1) unless special resolutions approving the increases were passed by the residents who were not being called upon to contribute to the excess.

[36] On the other hand, the particular concern of owner residents identified at paragraph 18 of these reasons is a genuine one. A sound argument that the realisation of that concern would represent a failure in consumer protection could well be made.

[37] In reality, this objective is so broadly formulated that debating points can be made for and against each of the competing constructions in terms of consistency with it. To my mind, this category of argument does not materially assist in answering the construction question.

**Sections 102A and 106**

[38] The conclusion expressed by the Judicial Member at paragraph 54 of his reasons was reached by the following reasoning:

> "[38] The adoption of the s 102A budget is not in itself the imposition of a charge or levy. A further specific step is contemplated by s 103 of 'working out and paying charges for general services for residents'. Section 103 contemplates the working out of the residents' individual charges, and is concerned with matters such as maintaining the proportions payable by the individual residents consistently with the "public information document"[26] that each resident receives. It does not impact on the total charges to be levied, which have already been determined by the budget.
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> [39] It is the adoption of the section 102A budget that fixes the total of the charges for the year. Consistently with the requirements of the Act, this seemingly should be adopted early in the financial year to which it relates. The obligation to advise residents of the operator's intentions before the end of the preceding financial year, imposed by s 102A(3), is only for the provision of a draft budget. Accordingly, submissions that the Act requires the budget to be prepared before the final CPI figures for the year can be known are incorrect and unhelpful. It would seem that only one budget is contemplated for each financial year. The prospect of an amended or supplementary budget would seem to be ruled out by the requirement that a draft of the budget be supplied to residents at least 14 days before the commencement of the financial year.
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> [40] The act of "increase" by the operator would therefore seem to be the passing of the s 102A budget.

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[26] R V Act ss 13, 74.

> [41] Against that background it seems obvious that both ss 102A and 106 are concerned with the total of general services charges for the village for the financial year, and are not concerned with subdivisions of those charges or subdivisions of the amount that will be raised by way of contribution. Those are additional steps, voluntarily decided upon by the operator."

[39] This reasoning proceeds upon the premise that ascertainment of the source or sources from which the amount required to fund expenditure on general services will be raised and the amount to be raised from each source, if more than one, is not part of the budget process. That, is said, occurs afterwards when charges are worked out under s 103 and perhaps also ss 104 and 105 "as additional steps, voluntarily decided upon by the operator."

[40] This reasoning focuses upon the expenditure items in the budget. It appears to treat the total of those items, or the equal dollar amount required to be raised to meet that expenditure, as being "the total of general services charges for the village for the financial year". Perhaps more accurately, it appears to treat them as "the sum of all charges for general services" for the purpose of the defined term "total of general services charges" in s 106(2).

[41] I am unable to accept this underlying premise. Section 102A(1) requires the scheme operator to adopt a budget. In ordinary usage, the word "budget" means an estimate of revenue and expenditure of an organisation.[27] That a budget is comprised of both revenue and expenditure is reflected in the everyday expression "balance budget" in which the one is matched with the other.

[42] Whilst s 102A does not specify in detail how the general services charges budget is to be prepared, the provisions of subsection (2) indicate that it is to follow the conventional form dealing with both revenue and expenditure. It must allow for raising a reasonable amount to provide the general services for the year: paragraph (a); hence, it must set out the estimated expenditure to be incurred to acquire the general services for the year. It must also fix the amount to be raised by way of contribution to cover that amount: paragraph (b). The contribution amount under paragraph (b) is not expressed to be the same amount as the reasonable amount for which allowance is to be made under paragraph (a). As the structure of s 102A(2) suggests, they are two distinct amounts.[28]

[43] In my view, the contribution amount envisages the estimated total amount to be raised by way of contribution from residents and former residents to cover the paragraph (a) amount. In individual cases, the contribution is payable by way of service charges under the resident's contract subject to regulation in accordance with ss 103 and 104. This contribution amount is a revenue item that must be included in the budget. However, it need not be the only revenue item that is included in the budget. Depending upon the circumstances of the retirement village, there might also be included service charges which the scheme operator must pay under s 105, and, as well, there might be a scheme operator's subsidy. In my view, it is quite clear that s 102A(a) contemplates that service charges payable by

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27 *Concise Oxford Dictionary*.

28 In some instances the two amounts might be the same dollar amount; for example, where there are no unsold rights and no scheme operator subsidy.

residents and former residents to which ss 103 and 104 refer and by the scheme operator in accordance with s 105, will be worked out during the budget process and that the revenue budgeted to be received from residents for them will be set out in the budget document.

[44] I consider that this conception of what a general services charges budget is to comprise also better achieves the transparency for which ss (3), (4) and (5) in s 102A are designed.[29] A budget which merely states a single line revenue item equal in amount to the total of the budgeted expenditure would fail to inform residents how much the scheme operator is budgeting for them to contribute. It would also fail to inform them what was budgeted to be paid by the scheme operator under s 105 and by way of subsidy. As a medium for fully informing residents, it would be significantly deficient.

[45] I am therefore unable to discern in s 102A any indication that the expression "the sum of all charges for general services" in the defined term is intended to refer to expenditure to be incurred in acquiring general services. More specifically, I am unable to discern such an indication sufficiently compelling that the ordinary meaning that the expression has is to be displaced. Furthermore, s 102A was enacted in 2006. Section 106 was originally enacted in 1999. As such, it regulated increases in "charges for general services" by capping them at CPI percentage increases. That is to say, its subject matter then was, as it is now. It is quite unlikely in these circumstances that s 102A was intended to alter or modify implicitly the meaning and scope of s 106.

**Budget disclosure of individual general services charges**

[46] The defined term "total of general services charges" in s 106 comprehends that there is a charge for each general service from which a summation of charges can be derived. The repeated references in the section to "a charge for a general service" makes that clear. On the construction of the defined term which I prefer, and having regard also to s 107 to which the definition expressly refers, the charge for each general service comprehended by the definition is the charge for that service which the scheme operator requires the resident to pay. Thus the definition also comprehends that the scheme operator will charge the resident an identified amount for each general service under the residence contract.

[47] Notwithstanding, it remains open to the scheme operator to levy a composite general services charge on residents.[30] However, what is significant is that the operation of s 106 requires that the charge levied on residents individually for each general service be specifically identified.

[48] This definition was enacted in 2006 when s 102A was enacted. In my view, it influences the content of the general services charges budget. Importantly for present purposes, the budget must state the dollar amount of the charge for each general service to be paid by residents individually.[31] In accordance with conventional practice for budget presentation, both the dollar amount for the

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29 It may be noted that the proposed budgets for the years in question were prepared on the basis of this interpretation: see, for example, AB 41-42, 46, 47.

30 It might be expected that a composite single amount would usually be more convenient to administer.

31 It might do this by way of a schedule to the budget.

financial year in question and the corresponding dollar amount for the immediately preceding financial year would be stated, thereby facilitating ready identification of those increases to individual general services charges which require special resolution under s 106(2) (if any) or are covered by s 107.

**Disposition**

[49] For these reasons, I consider that the applicant has demonstrated a persuasive case of error on the part of the Judicial Member. The issues in dispute relate to statutory interpretation applicable to retirement villages generally. For these two reasons, this is a clear case for the grant of leave to appeal to this Court. I would allow the appeal, set aside the decision of the Appeal Tribunal made on 25 March 2013 and affirm the decision of the Tribunal made on 24 January 2012.

[50] A consequence of this decision is that if the concern of owner residents referred to at paragraph 18 of these reasons is to be addressed, it would need to be addressed legislatively.

**Costs**

[51] There was no agreement between the parties that this proceeding be a test case. At the hearing, a submission was made on behalf of Mr Ash that in the event that the appeal succeeds, the matter should be viewed as a test case because of its industry-wide relevance. Yet, many cases involving statutory construction between private parties have implications beyond the litigation in which they arose. Reference was also made to the fact that this appeal is from a "no costs" jurisdiction. Neither of these reasons is sufficient in my view to displace the general rule that costs are to follow the event. However, they, together with the minimal dollar amount at stake as between these two parties, combine to justify an order that the costs Mr Ash is to pay ARH be fixed at $9,000.

[52] Lastly, an application was made on behalf of Mr Ash for an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973 in respect of costs of the appeal in the event that the application for leave to appeal succeeds. ARH has succeeded. Its success is on questions of law. However, the issues of statutory construction on which ARH has succeeded were decided by the Judicial Member in accordance with submissions made on behalf of Mr Ash and not in error independently made by the Judicial Member. This application must be refused.

**Orders**

[53] I would propose the following orders:

1. Grant leave to appeal.
2. Allow appeal.
3. Set aside the decision of the Appeal Tribunal made on 25 March 2013.
4. Affirm the decision of the Tribunal made on 24 January 2012.
5. Respondent, Eric John Ash, is to pay the costs of the applicant, Australian Retirement Homes Ltd ACN 061 603 718, of the application for leave and the appeal fixed at $9,000.
6. Refuse respondent's application for an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973.

[54] **MORRISON JA:** I have had the advantage of reading the reasons prepared by Gotterson JA. I agree with those reasons and the orders proposed by his Honour.

[55] **NORTH J:** I have read the reasons of Gotterson JA. For the reasons given by his Honour I agree with the orders he proposes.