QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Golding v Lusping Pty Ltd* [2019] QCAT 352
PARTIES:	**PAUL HENRY GOLDING** (applicant) **v** **LUSPING PTY LTD** (respondent)
APPLICATION NO/S:	OCL075-18
MATTER TYPE:	Other civil dispute matters
DELIVERED ON:	21 November 2019
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Member Howe
ORDERS:	**Application dismissed.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – CONTROL OF PARTICULAR MATTERS – RESIDENTIAL – where the applicant entered into a residence contract in a retirement village – where subsequently general service charges increased by more than CPI – whether the increases greater than CPI were valid – whether contributions to the maintenance reserve fund were used for general service purposes – whether increased contributions to the maintenance reserve fund were authorised by special resolution – whether special resolution was necessary TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – MISLEADING OR DECEPTIVE CONDUCT GENERALLY – where the applicant claimed misleading or deceptive conduct on the part of the scheme operators – where the applicant claimed misrepresentation by silence or nondisclosure – whether the scheme operators failed to disclose material facts – where the scheme operators were unaware of the matters which the applicant claimed had not been disclosed

	Retirement Villages Act 1999 (Qld) s 5, s 7, s 8, s 12, s 19, s 21, s 86, s 100, s 106, s 107
	Clifford v Vegas Enterprises Pty Ltd (No 5) [2010] FCA 916 *Demagogue Pty Ltd v Ramensky* [1992] FCA 557 *Elevate NSW Pty Ltd v Canada Bay Private Hospital Pty Ltd* [2019] FCA 1248 *Miller & Associates Insurance Broking Pty Ltd v BMW* [2010] HCA 31 *Australia Finance Limited* [2010] HCA 31 *Thompson and Anor v Jedanhay Pty Ltd* [2012] QCATA 246 *Wheelahan & Anor v City of Casey & Ors* [2013] VSC 316
REPRESENTATION:	
Applicant:	Self-represented
Respondent:	Butler McDermott Lawyers
APPEARANCES:	This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld)

REASONS FOR DECISION

[1] On 22 November 2016 Mr Golding purchased a freehold title unit in Laurel Springs Retirement Village ('the Village') from a previous resident.

[2] The Village is made up of 16 bodies corporate comprising 76 freehold title units. On that day he signed a residence contract and service agreement with the scheme operator, Lusping Pty Ltd.

[3] As then required by the *Retirement Villages Act* 1999 (Qld) ('the Act'), Lusping supplied Mr Golding with a Public Information Document ('PID').

[4] In November 2018 Mr Golding filed an application for a tribunal hearing of a retirement village dispute. He seeks orders that his residence contract and service agreement be set aside and a mortgage and caveat given the scheme operators under the residence contract be cancelled. He intends to continue to live at the Village, however.

[5] Mr Golding says in his application that the reasons he seeks those orders are:

(a) Because the scheme operators through the PID knowingly provided misleading information about the financial viability of the Village and failed to mention that the general services charges in the Village would need to be increased at a rate greater than the Consumer Price Index ('CPI');

(b) In 2017 – 2018 money from the maintenance reserve fund was wrongly used to pay for general services;

(c) In 2018 – 2019 the scheme operators unlawfully increased the general services charges by three times CPI; and

(d) The scheme operators must have been aware of the 'true financial position of the Village' when Mr Golding was provided with the PID.

The legislative scheme

[6] The Act provides:

> **5 What is a retirement village**
>
> (1) A retirement village is premises where older members of the community or retired persons reside, or are to reside, in independent living units or serviced units, under a retirement village scheme.
>
> …
>
> **7 What is a retirement village scheme**
>
> A retirement village scheme is a scheme under which a person—
>
> (a) enters into a residence contract; and
>
> (b) in consideration for paying an ingoing contribution under the residence contract, acquires personally or for someone else, a right to reside in a retirement village, however the right accrues; and
>
> (c) 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.
>
> …
>
> **8 Who is a retirement village scheme operator**
>
> A person is a retirement village scheme operator if the person, alone or with someone else, controls the scheme's operation or purports to control the scheme's operation.
>
> …
>
> **12 What is a service agreement**
>
> (1) A service agreement is an agreement made between a person and a scheme operator under which general services or personal services are to be supplied for or to the person or someone else when the person or other person becomes a resident of a retirement village.
>
> (2) A service agreement may be in a residence contract.
>
> …
>
> **19 What is a maintenance reserve fund**
>
> A maintenance reserve fund is a fund established under section 97 for maintaining and repairing the retirement village's capital items.

21 What is a retirement village dispute

(1) A retirement village dispute is a dispute between a scheme operator and a resident of a retirement village about the parties' rights and obligations under the resident's residence contract or this Act.

…

86 Misleading or deceptive conduct

(1) This section applies to a person who is—

(a) a scheme operator; or

(b) a representative of a scheme operator.

(2) The person must not, in relation to the operation of a retirement village scheme, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

…

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.

…

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 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 [s 107A] Retirement Villages Act 1999 Part 5 Operation of schemes for, and management of, retirement villages Page 92 Current as at 11 April 2019 Authorised by the Parliamentary Counsel

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

(i) the *Industrial Relations Act* 2016; 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.

…

170 Resident may apply for order if scheme operator contravenes particular provisions

(1) This section applies if—

(a) a scheme operator of a retirement village contravenes section 84 or 86; and

(b) a resident of the retirement village is materially prejudiced by the contravention.

(2) The resident may apply to the tribunal for an order to have the resident's residence contract set aside.

(3) Subsection (2) applies even if the resident was a prospective resident at the time of the contravention.

…

191 Tribunal orders generally

(1) The tribunal may make the orders the tribunal considers to be just to resolve a retirement village issue.

(2) For example, the tribunal may make any 1 or more of the following orders—

(a) an order for a party to the issue to do, or not to do, anything (an enforcement order);

(b) an order requiring a party to the issue to pay an amount (including an amount of compensation) to a specified person (a payment order);

(c) an order that a party to the issue is not required to pay an amount to a specified person;

…

193 Tribunal orders under section 170(1)

This section applies if a resident applies for a tribunal order under section 170.

(2) In setting a contract aside, the tribunal may make the orders it considers appropriate including, for example, the following—

(a) an order that the scheme operator refund to the resident the ingoing contribution or another amount paid under the contract;

(b) an order that the scheme operator compensate the resident for damages or loss caused by the contravention.

The issues

[7] There are no pleadings in tribunal matters. The issues for decision are usually determined by considering the statements of evidence filed by parties.[1] There are often proceedings in the tribunal in which the statements of evidence are inadequate or unclear. Sometimes statements of evidence are needlessly complex and confusing.

[8] Mr Golding filed six statements of evidence in this matter. He has obviously spent a great deal of time preparing his case. His material is hard to understand however. The issues to be decided and therefore addressed in the statements of evidence are not identified with precision and in consequence both parties have engaged in an unnecessary tit for tat approach on comments made by the other in their statements of evidence.

[9] Clarity is important in legal matters. Where there is a complex factual matrix, clarity is more important, not less. Prolixity adds to the problem.[2]

[10] Mr Golding was imprecise in identifying the misleading and deceptive conduct alleged. There appear to be a number of parts to the conduct challenged.

[11] I identify the following issues as the relevant issues to be determined in this matter drawn from his application and the subsequent statements of evidence he has filed:

(a) Was Mr Golding misled and deceived when entering into his residence contract by the PID because it failed to state general service charges would need to increase at a rate greater than CPI?

(b) Were the general services charges wrongly increased by increasing them by 3 times CPI in the financial year ending 30 June 2018?

(c) Was Mr Golding misled and deceived when entering into his residence contract about the financial viability of the Village because the scheme operator knowingly failed to disclose that the general services charges would need to be increased at a rate greater than the CPI to ensure its budget was self-funding?

(d) Was Mr Golding misled and deceived when entering into his residence contract about the financial viability of the Village because the scheme operator knowingly failed to disclose that the general services charges were insufficient to cover the true cost of employing a professional village manager?

(e) In respect of 'the financial year ending 30 June 2018', was money from the maintenance reserve fund wrongly used to pay for general services?

(f) Was Mr Golding misled or deceived about the estimated increases of the monthly maintenance reserve fund stated in the quantity surveyor's report attached to the PID provided to him in 2016 given the monthly maintenance

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1 *Thompson and Anor v Jedanhay Pty Ltd* [2012] QCATA 246, [22].
2 *Wheelahan & Anor v City of Casey & Ors* [2013] VSC 316, [25].

reserve fund contributions for the financial year ending 30 June 2018 increased from $22 to $33?

(g) Was the increase in the maintenance reserve fund for the year ending 30 June 2018 invalid because there was no special resolution to pass the increase as required by section 106(2) of the Act?

Increasing the general service charges by more than CPI

[12] The first two issues can be addressed together and can be addressed shortly.

[13] Mr Golding says both in the residence contract and in the Act it states that the general services charges cannot be increased by more than CPI. Therefore the increases made by the scheme operators here were invalid.

[14] With retirement villages there may be need for increases greater than CPI for a number of reasons as time goes by. The Act recognises this by allowing increases above CPI in a number of situations. One is where there are increases in such things as rates, insurance premiums, wages and an increase in the maintenance reserve fund.[3] The other is where an increase is agreed upon and approved by a majority of the residents by way of special resolution.[4]

[15] There is no requirement that the residence contract or the PID set out a warning for residents that there are exceptions to the general requirement that increases of general services charges be limited to CPI. The exceptions are set out in the Act.

[16] The increase Mr Golding complains about is one of those exceptions to the requirement that general service charges not increase by greater than CPI. In the 2018 financial year the charge for the maintenance reserve fund was increased from $22 per month to $33. This was far greater than the increase under CPI. However it comes within one of the stated exceptions to the rule that the general services charges not be increased by more than CPI.

[17] The increase in 2018 was not invalid simply because it was greater than CPI.

[18] In so far as Mr Golding claims the increase in question was not truly a maintenance reserve fund increase, or it was wrongly used to pay for general services charges, those matters are addressed below.

Misleading and deceptive conduct

[19] Mr Golding's most significant complaint is that the scheme operators wrongly and knowingly misled and deceived him when he signed his residence contract about the financial viability of the Village. He identifies a number of instances of misleading and deceptive conduct driving that complaint.

[20] First, that he was not informed that the general service fees would be insufficient to cover the true cost of employing a professional village manager.

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3 The Act, ss 106(2)(b), 107.
4 The Act, s 106(2)(a).

[21] Second, that he was not informed that the Village budget was not sufficient to allow it to be self-funding unless general services charges were increased by more than the CPI increases provided for in the contract.

[22] He says this information was missing from the residence contract and the PID.

[23] Mr Golding refers to a statement recorded in the minutes of the 2017 annual general meeting where the scheme operator explained why there would be an increase of $10 plus GST per month for each unit. The meeting was held on 9 October 2017 and the scheme operators were identified in the minutes as Lance Taylor and Shirley McGuiness. The person identified in the minutes as the chairperson, Vicki Henkelman, is apparently the manager referred to throughout the minutes although that is not stated in the document. Vicki Henkelman was also one of the scheme operators which is also not mentioned in the minutes. The minutes show the following statement recorded:

> Manager explained that the scheme operators have contributed $21,483 to the budget in order for everything to happen. This is partly due to unpaid village fees of $12,833 which the scheme operator is in the process of recovering.
>
> The scheme operator explained that as per the budget item titled 'Scheme Operator Loan' what it mean (sic) in some point of time when there is surplus funds the amount will be reimbursed. The scheme operator also addressed that the manager and assistant manager are to receive a small increase in their wages. He made the comment that the manager hadn't received an increase in over ten years and if she was to leave today there is not enough money in the budget to replace her.[5]

[24] Then Mr Golding refers to the minutes of the annual general meeting of the Village held 12 months later on 10 October 2018 where the manager, clearly identified this time as Ms Henkelman, said her resignation would be discussed as a special item in general business at the meeting.

[25] When the motion was put to adopt the proposed new general services charges and maintenance reserve accounts for the period 1 July 2018 through to 30 June 2019, the following statement was made and recorded in the minutes:

> Ms Pauline Higgins expressed her concern over the rise in village fees. Lance Taylor explained that the budget was very tight. He reminded the meeting that once again the scheme operator will top up the budget this year for an amount of approximately $20,000 in order to meet our commitments. He also pointed out that with the manager leaving, a replacement would need to be paid the going rate. He also spoke about the management's efforts to save money whenever possible e.g. power and water. He expressed his thoughts that the scheme operator had committed to a fair and equitable budget. He pointed out that the fees would need to be a lot higher in order to be a self-funding budget.[6]

[26] Mr Golding submits that it is not credible for the scheme operators to claim that when he entered into his residence contract on 22 November 2016 the scheme operators were not aware that they could not afford to pay a replacement manager

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5 Ibid annexure A03, [4,] page 3.

6 Ibid annexure A05.

and that the budget would not be self-funding without increasing the general services fee by an amount greater than that allowed for by CPI increases.

[27] The scheme operators say that they had no knowledge of the need to increase the budget of the Village when Mr Golding purchased his unit.[7] I take that statement to refer to both the need to increase the budget to pay for a replacement manager and to make the budget self-funding.

[28] In the respondent's document secondly entitled 'Further Response and Submissions on Behalf of the Respondent',[8] the scheme operators say they (absent Mr Taylor) took control of the Village from receivers in November 2011. At the time the Village was in a deteriorated state and required significant improvements in management, maintenance and administration. Mr Taylor became a scheme operator in November 2016. Mr Taylor recognised and put in place appropriate budgeting requirements to ensure the Village did not fall back into receivership. The budget was changed, but only after Mr Golding had entered into his residence contract and been given the PID.[9]

[29] Ms Henkelman filed an affidavit in the proceedings.[10] She said this:

> [5] In November 2018 me (sic), along with the other two scheme operators Lance Taylor and Brian McGuiness, found another suitable person to fulfil the manager's position for the Village, Denise Meehl. We offered Denise $66,000 per annum plus super to accept the management position and this was accepted.
>
> [6] It was difficult finding someone to replace the manager's position for the village given my wage was well under the average rate awarded and we would be required to pay the new manager the going or award rate.
>
> [7] Because I was a scheme operator I accepted the reduced rate for a number of years, however, in 2018 it was decided that I could no longer continue in that position and I formerly (sic) noted my resignation in the Villages 2018 AGM.

[30] Mr Golding filed further statements of evidence and said many things, but did not address the respondent's claim that it was only after he had entered into his residence contract and received the PID and after Mr Taylor became a scheme operator that Mr Taylor recognised and put in place changes to the budget to ensure the scheme was able to sustain itself.

[31] Nor did he address the assertions by Ms Henkelman in her statutory declaration, which are somewhat imprecise but answers, I conclude, by denial in broad brush terms the similarly broad brush accusations levelled by Mr Goldberg in his material.

[32] Mr Golding claims that the silence or nondisclosure of the scheme managers about the financial standing of the scheme in being able to afford to pay a replacement manager for Ms Henkelman, and that the budget of the scheme would not be self-funding without a substantial increase in the budget beyond that of CPI, must have

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7 Further Response and Submissions on behalf of the respondent filed 15 April 2019, [22].
8 Filed 19 June 2019.
9 Ibid [11e].
10 Respondent's Further Response and Submissions filed 15 April 2019, annexure 1.

been known to them when he signed his residence contract. Therefore the non-disclosure of that information amounted to misleading or deceptive conduct on their part.

[33] The difficulty with this proposition is that at the time of the alleged misleading and deceptive conduct, on 16 November 2016, the evidence rather suggests that the scheme operators were unaware, first that Ms Henkelman would be resigning as manager in 2018, second that there would need to be a substantial increase in general service fees to cover the costs of employing another manager not a scheme operator, and third that it was necessary or desirable that the scheme be 'self-funding'.

[34] There has been a significant body of law developed in respect of the meaning of the words 'engage in conduct that is misleading or deceptive or is likely to mislead or deceive', initially associated with s 52 of the former *Trade Practices Act* 1974 (Cth) (repealed) and currently with its successor provision s 18 of the Australian Consumer Law.[11]

[35] There are a number of things clearly established by the law relating to the interpretation of the expression 'engage in conduct that is misleading or deceptive'. One is that it is not necessary in order to succeed in a claim that a respondent has engaged in misleading or deceptive conduct that the applicant prove the respondent intended to mislead or deceive.[12]

[36] Silence can in some circumstances amount to misleading or deceptive conduct. Conduct is not limited to words or positive representations. But whether silence does constitute misleading or deceptive conduct always depends on the circumstances of the case. In *Demagogue Pty Ltd v Ramensky*,[13] the Full Court of the Federal Court considered circumstances where silence might constitute a contravention of s 52 of the *Trade Practices Act* 1974 (Cth). The Court said there that silence is to be assessed as a circumstance like any other. Black CJ explained:

> Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. To speak of "mere silence" or of a duty of disclosure can divert attention from that primary question. Although "mere silence" is a convenient way of describing some fact situations, there is in truth no such thing as "mere silence" because the significance of silence always falls to be considered in the context in which it occurs.[14]

[37] The test to be drawn from the authorities is one of reasonable expectation:

> In *Vitek*, at [40], Barrett J considered that the test is one of "reasonable expectation". That is to say, an entitlement to expect or infer that the other party will disclose, if it exists, will be found in the whole of the circumstances

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11 *Competition And Consumer Act* 2010 (Cth) – Schedule 2.

12 *Hornsby Building Information Centre Pty Ltd. v Sydney Building Information Centre Ltd* [1978] HCA 11; (1978) 140 CLR 216; *Parkdale Custom Built Furniture Pty. Ltd. v Puxu Pty Ltd*. [1982] HCA 44; (1982) 149 CLR 191.

13 [1992] FCA 557.

14 Ibid [3].

> in which the parties dealt with one another. I respectfully agree this test may be drawn from the authorities.[15]

[38] In the context of commercial transactions[16] such as the one at hand, the High Court explained in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited*:[17]

> In commercial dealings between individuals or individual entities, characterisation of conduct will be undertaken by reference to its circumstances and context. Silence may be a circumstance to be considered. The knowledge of the person to whom the conduct is directed may be relevant.[18]

[39] In *Elevate NSW Pty Ltd v Canada Bay Private Hospital Pty Ltd*,[19] it was suggested that a plaintiff can establish misleading or deceptive conduct by silence, even if the person making the representation by silence is unaware and has no knowledge of the information being withheld. Gyles J rejected that proposition:

> [88] Those submissions are rejected. They raise significant problems at a level of principle and are flatly inconsistent with binding authority, including *Henjo* at 557 per Lockhart J (with whom Burchett and Foster JJ agreed) and *BMW Australia* at [21] per French CJ and Kiefel J. Whether or not an alleged contravener has knowledge of a particular fact which the aggrieved party says ought to have been disclosed but was not is a necessary aspect of the circumstances and context in which the characterisation of the impugned conduct in commercial dealings is to be undertaken (see, for example, *BMW Australia* at [20] per French CJ and Kiefel J and *Henjo* at 555 per Lockhart J).
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> …
>
> [90] Thus, while it is true that an intention to mislead or deceive is not an essential element for the cause of action under s 18 of the *ACL*, a representation based on silence necessarily focusses attention on whether the impugned conduct of its nature constitutes misleading or deceptive conduct and knowledge or absence of knowledge of the undisclosed matter by the alleged contravener will be relevant.

[40] Hence, for Mr Golding to succeed under s 86 of the Act, the question is not whether or not the information he was given, absent the claimed necessary disclosure, was misleading or deceptive to him from his perspective, but whether the conduct of the scheme operators in failing to reveal it was, in all the circumstances, misleading and deceptive conduct on their part. A very relevant circumstance is whether the scheme operators knew that Ms Henkelman would be resigning as manager in 2018 (or at all) and that when and if that occurred there would need to be a substantial increase in general service fees to cover the costs of employing another manager.

[41] Mr Golding bears the onus of establishing how what was not said or disclosed constituted misleading and deceptive conduct:

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15 *Clifford v Vegas Enterprises Pty Ltd (No 5)* [2010] FCA 916, [323].
16 As opposed to representations made at large such as through advertising to the public.
17 [2010] HCA 31.
18 Ibid [20] (French CJ and Kiefel J).
19 [2019] FCA 1248.

> Mr Clifford, as applicant, also bears the onus of establishing the materiality of the alleged non-disclosure. This too is well understood. In *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452, a case which confirms that the question whether or not there is a contravention of s 52 depends upon all the circumstances of the case (see, for example, the discussion at the Full Federal Court at 463-465), the Full Federal Court, at 467, emphasised that where the contravention of s 52 alleged involves a failure to make a full and fair disclosure of information, the applicant carries the onus of establishing how or in what manner that which was said involved error or how that which was left unsaid had the potential to mislead or deceive.[20]

[42] Mr Golding bears the onus of establishing the materiality of the claimed non-disclosure. The evidence he offers to persuade me that the scheme operators knew when he entered into his residence contract that Ms Henkelman had an intention of stepping down from her role as manager of the Village is missing. I am unable to conclude that at that relevant time she or the other scheme operators knew that would occur.

[43] Linked to that, he fails to persuade me that when he signed his residence contract the scheme operators knew that there was a marked difference between what was being paid to Ms Henkelman and what would be a reasonable wage necessary to attract someone else to the role. The first indication that the scheme operators realised there was a discrepancy between the two wages was Mr Taylor's statement recorded in the October 2017 AGM that Ms Henkelman's salary had not been increased for more than 10 years and if she 'was to leave today there is not enough money in the budget to replace her.' This was well after Mr Golding entered into his residence contract.

[44] He also fails to persuade me that when he entered into his residence contract the scheme operators knew that the Village budget was not sufficient to be self-funding unless general services charges were increased by more than the CPI increases provided for in the contract, or recognised that that was desirable. There is no evidence that the necessity for the budget to be self-funding, whether in the foreseeable future or at all, was a consideration of the scheme operators at the time Mr Golding bought into the Village. On the evidence, such as it is, it was Mr Taylor who introduced the proposal after he became a scheme operator, and Mr Taylor only became a scheme operator at or about the time Mr Golding became a resident.

[45] Mr Golding's claims about misleading or deceptive conduct through non-disclosure or silence on the part of the scheme operators fail.

Maintenance reserve fund

[46] Mr Golding also complains that in 2017 – 2018 money from the maintenance reserve fund was wrongly used to pay for general services.

[47] Mr Golding appears to reason as follows here.

[48] The scheme operators received $26,806 maintenance reserve fund contributions in the year ending 30 June 2018. That was paid into the general services fees account

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20 *Clifford v Vegas Enterprises Pty Ltd (No 5)* [2010] FCA 916, [324].

because residents pay a single monthly fee which includes both general services fees and maintenance reserve fund contributions.

[49] Only $19,523 however was paid over from the general services fees account to the maintenance reserve fund account. The balance, says Mr Golding, of $7,283, was therefore wrongly used for general services purposes.

[50] The scheme operators say there was not enough money in the general services account as at 30 June 2018 to pay all the maintenance reserve fund contributions into the maintenance reserve fund account. The scheme operators therefore loaned the Village the shortfall but that loan was not paid into the maintenance reserve fund account until 1 July 2018, one day outside the end of the 2017 – 2018 financial year.

[51] This, say the scheme operators, was simply a bookkeeping error. It was investigated by the Department of Housing as a result of a complaint by Mr Golding made directly to the department. The department took no further action other than to require monthly payments of maintenance reserve fund contributions received into the general services fees account rather than annually at the end of the financial year.

[52] Mr Golding concedes the matter was investigated by the Department of Housing.[21] He concedes both general services fees and maintenance reserve fund contributions are paid in one combined amount by residents into the general services fees account. He claims however that by s 100 of the Act the scheme operators must separate the maintenance reserve fund contributions from the general services fees account at the time of receiving the combined payment from the resident and deposit the former immediately into the maintenance reserve fund account.

[53] Section 100 provides:

> **Payments into maintenance reserve fund**
>
> (1) The scheme operator must ensure that the following amounts are paid into the maintenance reserve fund—
>
> (a) the residents' maintenance reserve fund contributions;
>
> (b) interest received on investments belonging to the fund. Maximum penalty—540 penalty units.
>
> (2) Subsection (1) does not limit the amounts a scheme operator may pay into the maintenance reserve fund.
>
> (3) However, the scheme operator must not pay into the maintenance reserve fund amounts properly payable into another fund.
>
> Maximum penalty for subsection (3) —540 penalty units.

[54] Section 100 does not have the additional requirement suggested by Mr Golding, namely that the scheme operators must separate the maintenance reserve fund contributions from the general services fees at the time of receiving the combined payment from a resident.

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21 SOE 15 April 2019 entitled 'In reply to second submission by respondent 12 April 2018', page 25.

[55] I accept this was a bookkeeping error associated with end of financial year requirements rather than a failure to comply with s 100 of the Act.

[56] There is no matter here to be remedied.

PID quantity surveyor's report

[57] Mr Golding adds a further complaint in the body of his statement of evidence filed 12 December 2018 which is not mentioned in his initial application. It is a complaint that an increase in the monthly maintenance reserve fund contributions in the financial year ending 30 June 2018 from $22 to $33 per month is not consistent with the amount that the scheme operators could reasonably levy based on the quantity surveyor's report he received as an attachment to the PID provided to him in 2016.

[58] The scheme operators obtained a new quantity surveyors report in April 2017 which recommended an annual reserve fund contribution of $30,096 which, on the basis of 76 contributing independent living units, necessitated a monthly charge of $33 for each unit.

[59] Mr Golding claims he was misled and deceived by the scheme operators when he entered into his residence contract because he relied on the 10 year forecast effective from 2010 attached to the PID.

[60] There is no substance to this complaint.

[61] Mr Golding offers no evidence to suggest that the scheme operators knew or had reason to believe that the projections contained in the quantity surveyor's report dated 2010 contained in the PID as at November 2016 would change so that his reserve fund contribution would increase from $22 per month to $33 per month in 2017 - 2018.

[62] It is more likely than not that it was only with Mr Taylor's introduction as one of the scheme operators that fresh projections were thought necessary. That was simply good business sense. Those new projections were apparently made by qualified quantity surveyors. I see no reason not to accept their estimates as true and correct and given to the best of their knowledge information and belief at the time of writing their report, which was after Mr Golding entered into his residence contract.

[63] In Mr Golding's submission filed 15 April 2019 entitled 'In Reply to Second Submission by Respondent 12 April 2018' he makes the claim that the quantity surveyors report of April 2017 is a forgery. He has no basis to make that allegation. He makes a further rather outrageous allegation in the alternative that if it is not a forgery then there has been collusion between the scheme operators and the quantity surveyors. I reject that accusation. It is simply conjecture without an evidential base.

[64] The onus of proof in this matter lies on Mr Golding. He has not come up to proof in respect of his claim. His claim about the quantity surveyor's report therefore fails.

Forgery

[65] Mr Golding makes another claim about forgery which perhaps should be addressed, though its relevance is not explained. In his submission filed 15 April 2019 entitled 'In Reply to Second Submission by Respondent 12 April 2018' he makes a claim that the document entitled Financial Statements and Auditors Report for the year

ended 30 June 2018 supplied to him and other residents by the scheme operators was not an authentic copy of the report.

[66] Again he offers little more than conjecture to support this proposition. He says the copy that he received, and he asserts all other residents received, had Ms Henkelman's name and signature removed from the document, whereas the copy provided to the tribunal bore all three scheme operators' signatures.

[67] The significant point about the contents of the documents however, is that, regardless of signature, they are apparently identical in substance. That is what the scheme operators say and that is not contested by Mr Goldman. The only issue he focuses on is the missing signature to his copy of the document.

[68] The scheme operators say it was only necessary that the document be signed by two scheme operators, not three. Therefore it was signed by Mr Taylor and Mr McGuinness. I take that to mean the copy given to Mr Golding bore the signature of those two directors only.

[69] Mr Golding says the document was fraudulently altered (by Ms Henkelman's signature being removed from the document) for the purpose of deception, to hide Ms Henkelman's position as one of the scheme operators from residents.

[70] Again this is supposition and a contention without evidence. Besides that, however, I fail to see how the matter constitutes a retirement village dispute[22] concerning Mr Golding's rights and obligations under Mr Golding's residence contract or the Act.

[71] There is no issue identified here requiring resolution.

No special resolution

[72] Mr Golding's final complaint identified in one of his statements of evidence[23] is that the increase in the maintenance reserve fund for the year ending 30 June 2018 was invalid because there was no resolution as required by section 106(2) of the Act.

[73] The scheme operators respond that the Village residents were given 21 days' notice prior to the holding of the 2018 AGM of the proposed increase in Village fees above CPI. They say, however, they are unable to provide any further material 'at this stage' as to whether the vote was passed by the residents to increase the fees above CPI by way of special resolution. That is a strange submission to make to the tribunal at the time of determination of the retirement village dispute. I take it to mean the scheme operators have no evidence that the increase was notified to residents as a special resolution to be voted upon at the AGM, which special resolutions must be.

[74] By s 99 of the Act a scheme operator must adopt a maintenance reserve fund budget for each financial year for the maintenance reserve fund. The stricture placed by s 106(1) that the total of general services charges not be increased by more than CPI for the financial year does not apply to the maintenance reserve fund budget including the amount fixed by the budget to be raised by way of contributions.

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22 The Act, s 21(1).

23 SOE 11 December 2018, page 9.

[75] Section 107 excludes the expenditures listed there, one of which is increases of maintenance reserve fund contributions, from the necessity of passing them by way of special resolution. Indeed by s 99(7) it is provided that if at the end of a financial year there is a surplus or deficit in respect of the maintenance reserve fund, the surplus or deficit must be carried forward and taken into account in adopting the budget for the general services charges for the next financial year 'despite s 106(1)'.

[76] It was not necessary that the scheme operators have the maintenance reserve fund budget changes passed by special resolution at the AGM. The requirement in s 106 of a special resolution for increases above CPI does not apply to those items of cost and expenditure set out in s 107.

Conclusion

[77] None of the matters raised by Mr Golding as retirement village disputes succeed. Because of that his application must be dismissed.