# Civil and Administrative Tribunal
## New South Wales

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| Case Name: | The Vasey Housing Association NSW v Baume<br>The Vasey Housing Association NSW v Best |
| Medium Neutral Citation: | [2017] NSW CATCD |
| Hearing Dates: | 9 June 2017 and 7 August 2017 |
| Date of Decision: | 10 November 2017 |
| Jurisdiction: | Consumer and Commercial Division |
| Before: | S.A. McDonald, Senior Member |
| Decision: | (1) The Tribunal orders that the residence contracts of the two respondents, Mr Stephen Baume and Mr Richard Best, at the applicant's Parkview Retirement Village, Waitara, be terminated.<br><br>(2) The Tribunal orders that the two respondents, Mr Stephen Baume and Mr Richard Best, vacate the applicant's Parkview Retirement Village either on a date agreed between the parties or, in the absence of agreement, as ordered by the Tribunal. |
| Catchwords: | Retirement villages – terminating a residence contract – improving the village – development consents – notice – alternative accommodation – compensation |
| Legislation Cited: | Civil and Administrative Tribunal Act 2013 (NSW)<br>Retirement Villages Act 1999<br>Retirement Villages Regulations 2009<br>Retirement Villages Regulations 2017 |
| Cases Cited: | Penshurst Street Holdings Pty Limited v. Barker [2014] NSWCATCD 209<br>Elliott Tuthill Nominees Pty Limited v. Boele (Retirement Villages) [2011] NSWCTTT 50<br>Linkins v Rinbac Pty Ltd [2010] NSWSC 1199 |
| Texts Cited: | Retirement Village Law in NSW, Richard McCullagh, Thomson Reuters/Law Book Co., 2013. |
| Category: | Principal judgment |

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| Parties: | The Vasey Housing Association NSW – Applicant<br>Stephen Baume – Respondent (RV 16/55981)<br>Richard Best – Respondent (RV 16/55983) |
| Representation: | Mr Arthur Koumoukelis, solicitor, Dentons for the Applicant<br>Mr Peter Hill, solicitor, Hill & Co, Lawyers, for the Respondents |
| File Number(s): | RV 16/55981 (Baume)<br>RV 16/55983 (Best) |
| Publication Restriction: | Unrestricted |

## REASONS FOR DECISION

1 These two applications are brought by The Vasey Housing Association NSW (**Vasey**) as applicant against two residents of the Parkview Independent Living Retirement Village, Waitara, NSW, 2077 (**Parkview**) seeking an order for the termination of the residence contract of each of the two respondents, Mr Stephen Baume and Mr Richard Best. Where appropriate, they will be differentially referred to as **the Baume Application** and **the Best Application**. Vasey owns and operates Parkview.

2 The reason that Vasey seeks termination of the resident contracts of the two respondents is purportedly to improve Parkview and obtain vacant possession in order to redevelop Parkview pursuant to s 136(1)(a) of the *Retirement Villages Act 1999 (NSW)* (**RV Act**). The Applicant also seeks an order against both Respondents to the effect that they vacate their residential premises within 21 days of the Tribunal's order pursuant to s 136(3)(a) of the RV Act.

3 Both applications were filed manually by Vasey in the Tribunal registry on 23 December 2016. They were heard together and evidence in one was evidence in the other. A single set of written submissions were served by the

solicitors for Vasey and by the solicitors for both Mr Baume and Mr Best respectively in the applications.

**Jurisdiction**

4 The Tribunal has jurisdiction to resolve disputes about retirement villages in New South Wales under the RV Act. The Tribunal has jurisdiction to hear disputes between a retirement village owner or operator and one or more residents, including disputes about termination and vacant possession.

5 No issue was raised by any party either at the hearing of these applications or in their written submissions about the jurisdiction of the Tribunal to determine these two applications.

**Background**

6 Vasey is a not-for-profit organisation and a registered charity first established in 1959. Vasey was originally established to provide independent living units for women over the age of 60 who were either a relative of ex-service personnel, or who were in the Defence Forces themselves. More recently, Vasey has opened its doors to all single persons over the age of 55. Its mission is to provide affordable, secure, independent residential accommodation to all members of the community in need, whilst at the same time maintaining its significant history of continued support to the Defence community.

7 Vasey owns and operates five retirement villages in the Sydney metropolitan area being:

(1) “Parkview” at 18 Waitara Avenue, Waitara, NSW, 2077 which was built in 1962;

(2) “Epping Manor” at 43-45 Kent Street, Epping, NSW, 2121 which was built in 1964 and extended in 1991;

(3) “Wurley Court” at 8 Passy Avenue, Hunters Hill, NSW, 2110 which was built in 1967;

(4) “Northcott Gardens” at 92-94 Burns Bay Road, Lane Cove, NSW, 2066 which was built in 1967; and

(5) “Ivan Court” at 61-67 Moverly Road, Maroubra, NSW 2035 which was built in 1971.

8 Parkview features 52 self-contained one bedroom apartments plus three studio apartments and is conveniently located close to Waitara Railway Station. Apartments at Parkview range in size from 26 m² for the studios to 35 m² for the one bedroom apartments. Each is secure and appointed with window screens, carpet, light fittings, phone line, digital TV antenna and monitored fire alarm (including smoke and heat detectors) as standard inclusions. Studios comprise a combined living area/kitchen and bedroom with separate bathroom while one bedroom apartments also have the bedroom separate. Some may also include a balcony. Parkview provides shared laundry facilities and there is the availability of leased on-site parking.

9 The village building and its facilities at Parkview are 55 years old. Vasey claims that Parkview is outdated and at the end of its economic life when compared to more current forms of retirement village accommodation. Also, Vasey asserts that the land on which the village sits is not utilised to its full capacity to meet the requirements of existing residents and the growing demand of the ageing community and potential residents.

10 At a general meeting of residents of Parkview on 25 March 2015 Vasey, through its chief executive officer Mr David Elkins, informed the Parkview residents of the plan to redevelop Parkview, that a Development Application to that effect would be lodged with Hornsby Shire Council by mid-2016, vacant possession of the residential units in the village would not be required before the end of 2016 and that Vasey would contact each resident to identify

their needs in order to assist in their relocation, either to another Vasey retirement village or elsewhere.

11 Since then, most of the residents have relocated and found or been provided with, information relating to alternative accommodation, including alternative accommodation at one of the four other retirement villages which Vasey operates. By December 2016, only two residents remained in two of the 55 apartments which constitute Parkview. They are the two respondents to these applications. Part of the balance of the residential accommodation units appear to be occupied by short-term residential tenancies which are arranged pursuant to the *Residential Tenancies Act* 2010 (NSW).

12 While the individual circumstances of the two respondents differ, they allege that Vasey has failed to comply with certain prerequisites pursuant to s 136 of the RV Act necessary for it to succeed in these applications. Vasey, on the other hand, claims that it has fulfilled the necessary pre-conditions pursuant to s 136 of the RV Act which entitle it to cancel the residence contracts of both Respondents.

**Legislation**

13 Section 136 is in the following terms:

> *TERMINATION ON GROUNDS OF UPGRADE OR CHANGE OF USE*
>
> *(1) The Tribunal may, on application by the operator of a retirement village, make an order terminating a residence contract if it is satisfied that:*
>
> *(a) for the purpose of improving the village, the operator intends to carry out such substantial works in the village as require vacant possession of the residential premises concerned, or*
>
> *(b) it is appropriate that the land on which the village is situated should be used for a purpose other than a retirement village.*
>
> *(2) However, the Tribunal is not to make an order terminating a residence contract under this section unless it is also satisfied that:*
>
> *(a) the operator has given the resident at least 12 months' written notice of the operator's intention to make an application under this section, and*

*(b) development consent and any other necessary approvals to carry out the works or use the land for the other purpose have been obtained, and*

*(c) the operator has obtained (or made available) for the resident alternative accommodation:*

*(i) that is of approximately the same standard as, and requires no greater financial outlay on the part of the resident than, the residential premises the subject of the residence contract, and*

*(ii) that is acceptable to the resident or reasonably ought to be acceptable to the resident.*

*(3) If the Tribunal makes an order terminating a residence contract under this section, the Tribunal:*

*(a) must fix in the order a date by which the resident must vacate the residential premises concerned, and*

*(b) must specify in the order the penalty that the operator will incur if the works are not substantially commenced, or action to facilitate the use of the land for the other purpose not taken, within 6 months after the date fixed under paragraph (a), and*

*(c) may order the operator to allow the resident to return to the residential premises, under a contract identical to the contract being terminated, on completion of the works, and*

*(d) may make such other orders (including an order that the operator pay to the resident compensation for the resident's loss of rights under the residence contract) as it thinks fit.*

14 For clarity, the two applications made by Vasey against Mr Best and against Mr Baume fall under s 136(1)(a) of the RV Act. Vasey therefore needs to have satisfied the pre-conditions under s 136(2)(a) *[12 months' written notice]*; s 136(2)(b) *[obtain development consent]*; s 136(2)(c) *[has obtained or made available alternative accommodation]* to succeed. These are the discrete issues upon which the evidence, testimony and cross-examination of the parties was primarily directed.

**Applicant's evidence**

15 Vasey's evidence in both applications was comprised of:

(1) Statement of David Elkins dated 21 February 2017 (**Elkins' statement**);

(2) Statement of Kerry Lehman dated 21 February 2017;

(3) Reply statement of David Elkins dated 10 April 2017;

(4) Letter from the Hornsby Shire Council to Vasey dated 11 May 2017, which was tendered on 9 June 2017 without objection and was marked Exhibit A1 as well as later correspondence between Vasey and Hornsby Shire Council with which Vasey agreed to update the Tribunal;

(5) The oral evidence and cross-examination of those witnesses at the hearing on 9 June 2017 in the Tribunal.

**Respondents' Evidence**

16 The Respondents' evidence in both applications is comprised of:

(1) Statement of Stephen Baume dated 21 March 2017;

(2) Statement of Richard Best dated 21 March 2017;

(3) The oral evidence and cross-examination of those witnesses at the hearing on 9 July 2017.

17 The Tribunal has read and considered the totality of the evidence prepared by the parties and submitted in respect of the hearing on 9 June 2017, including the cross-examination of witnesses. Rather than outline exhaustively the evidence of each party much of which is by way of background, the more efficient way forward is to consider the evidence only in the context of the determination of the issues outlined above that the Tribunal is required to make. Apart from a brief summary of each respondent's evidence, the Tribunal shall proceed in this manner.

**Mr Stephen Baume's evidence**

18 Mr Baume occupies Unit 53 at Parkview under a Village Contract dated 9 October 2006. Mr Baume paid an ingoing contribution of $100,500 in order to reside at Parkview. Mr Baume is 78 years old and has lived at Parkview for over 10 years.

19 Mr Baume has significant health problems and has established good relationships with his local cardiologist, oncologist and urologist. He also enjoys the close proximity to Hornsby Hospital.

20 In particular, Mr Baume cares for his grandson who is in attendance at Year 1 at nearby Barker College in Waitara. He said in his statement:

> *"… My grandson is in Year No. 1 in Barker College, a school very close to Parkview, and most days is dropped at my home after school. On those afternoons we have afternoon tea, play games and do any homework he has been given. His parents pick him up from me after they have finished work for the day. This is a very treasured role and responsibility for me and it is the main reason why I need to stay in Waitara. The relationship with my grandson plays a large part in my emotional and mental wellbeing."*

21 Relevantly, the Deed of Occupancy for "Parkview" Waitara executed by Mr Baume on or about 9 October 2006 state:

> *"(a) In consideration of the Resident entering into this Deed, agreeing to comply with its provisions, agreeing to abide by the Rules and Regulations of the Village, agreeing to abide by the Charter and paying and continue to pay all the amounts to the Vasey referred to in this Deed, Vasey agrees to provide to the Resident a Unit for the Resident to occupy and use as a permanent home for and by the Resident on the terms set out in this Deed.*
>
> *(b) The Resident's right to occupy the Unit shall be non-exclusive and shall cease upon the death of the Resident."*

**Mr Richard Best's evidence**

22 Mr Best occupies Unit 15 at Parkview under a contract dated 31 August 2010. Mr Best paid an ingoing contribution of $105,500 to reside at Parkview.

23 Mr Best is 71 years old and still active. He has lived in and around Waitara for approximately 60 of those years.

24 Mr Best was cross-examined about his social life, both around Waitara and beyond. His evidence confirmed a broad range of social activities that would ultimately narrow with ageing and decreasing mobility.

25 Both Mr Baume and Mr Best expressed a strong desire for various personal reasons to remain in the Waitara area. In written offers sent to Vasey by Mr Best and by Mr Baume separately dated 10 February 2017 and marked "without prejudice", both Mr Baume and Mr Best said they would move from Parkview if:

(1) Vasey temporarily rehoused them in Waitara in a one-bedroom apartment and, post-redevelopment of Parkview, returned them to the upgraded Parkview under the terms of their original contract;

(2) Vasey paid them the sum of approximately $550,000.00 to enable them to locate to the Grange Village, Waitara; or

(3) Vasey pay them the sum of approximately $660,000.00 to enable them to relocate to an apartment in Waitara.

26 Vasey declined to accept these commercial offers. Vasey had not apparently made or accepted offers of this kind to or from other Parkview residents that had relocated.

**Section 136(2)(a) – 12 months' written notice**

27 Pursuant to s 136(2)(a) of the RV Act, the Tribunal is not to make an order terminating a residence contract under this section unless it was satisfied that the operator (Vasey) has given the resident at least 12 months' written notice of its intention to make an application under this section.

28 The Elkins' statement outlines a chronology of communications both with the Parkview residents and Hornsby Shire Council about the proposed redevelopment of Parkview at paragraphs 50-64.

29 The form of notice is as prescribed in Part 4, Schedule 1 of the *Retirement Villages Regulation 2009* (**the 2009 Regulation**). Relevantly these regulations have now been repealed and have been replaced by the *Retirement Villages Regulation 2017* (**the 2017 Regulation**) which came into effect on or about 1 September 2017.

30 Vasey gave evidence that it had issued a first notice in the form prescribed at Part 4 of Schedule 1 of the 2009 Regulation to both Respondents on or about 1 October 2015. Copies of these were annexed at Annexure R2 or pp 53-55 of the Best Application and Annexure S2 or pp 56-58 of the Baume application.

31 Vasey then issued a second notice, again in the form prescribed at Part 4 of Schedule 1 of the 2009 Regulation, to both Respondents on or about 22 December 2016 and then filed both applications in the Tribunal on 23 December 2016.

32 Some of the confusion, which gave rise to the Respondent's submission that effective notice had not been given by Vasey, arose from the single and same form of the notice itself in the two circumstances. At the bottom of the notice there is a note which states (**footnote**):

> ***Note.*** *This notice lapses if the operator does not apply to the Tribunal for an order terminating your residence contract within 14 days after service of the notice.*

33 The matter is further complicated by the terms of Regulation 55 of the 2009 Regulation, which states:

> *'Termination notice*
>
> *(1) For the purpose of section 131(2) of the Act, a termination notice is to be in the relevant form set out in Part 4 of Schedule 1.*
>
> ***Note.*** *A termination notice does not have to be given if the application to terminate a residence contract is made on the grounds of the resident's causing serious damage to the village or serious injury to the operator, an employee of the operator or another resident. See section 135 of the Act*

*(2) Except in the case of an application referred to in section 136 of the Act, the notice is to be given no later than at the time at which the applicant makes the application to the Tribunal, but no earlier than 14 days before that time.*

*(3) If the person who gave the notice does not apply to the Tribunal for the relevant order within 14 days after giving the notice, a fresh termination notice must be given (in accordance with subclause (2)) before the application may* be made.'

34 Vasey submitted that two notices were required to be issued to each respondent in its applications to the Tribunal to terminate residence contracts pursuant to s 136(1)(a) or the RV Act. These are:

(1) A first notice given at least 12 months before the applicant makes an application to the Tribunal under s 136(1)(a) of the RV Act – this is to satisfy the time requirement specified under s 136(2)(a) of the RV Act namely, at least 12 months' written notice of the operator's intention to make an application under this section (**October 2015 Notice**); and

(2) A second notice given within 14 days before the Applicant makes the application to the Tribunal and after the 12 months' notice has passed – this is to satisfy the time requirement specified under clause 55(3) of the *2009 Regulation* **(December 2016 Notice)**.

35 Regulation 55 suggests that in an application under s.136 of the RV Act (such as here) a second notice is not required. However the form of Notice providing 12 months' notice to the respondent may then be misleading, especially in the form of the footnote.

36 The Respondents submits this caused confusion because they understood that the October 2015 Notice had lapsed as no application was made to the Tribunal within 14 days (as the footnote stated) and were then surprised when the December 2016 Notice was served and an application was made to the Tribunal almost immediately - although 12 months' notice had not been provided. The Tribunal rejects this submission. Paragraphs 50 – 64 of the statement of David Elkins outlined a detailed chronology of communications with each of the Parkview residents (including the respondents) about the

impending redevelopment. Those communications, which commenced at an annual management meeting of residents on 22 July 2014, are all consistent with Vasey's plan to redevelop Parkview, to lodge a development application with Hornsby Shire Council and to seek vacant possession of the Parkview village by approximately 2016.

37 Vasey provided evidence that there were 14 residents in occupation at Parkview at the time the October 2015 notice was provided to all residents. Within 12 months, only the two respondents remained. Vasey also provided evidence of all its communications with the two respondents between the October 2015 Notice and the December 2016 Notice. These included personalised correspondence to both respondents dated 14 October 2015, 17 November 2015, 18 January 2016, 2 February 2016, 29 March 2016, 4 May 2016, 6 July 2016 and 15 August 2016. This was in addition to individual conversations, email or mail communications with each of the respondents – Baume (10 February 2016, 2 March 2016, 26 July 2016, 16-7 August 2016, 23 September 2016 and 1 November 2016) and Best (10 & 14 September 2016, 23 September 2016, 1 November 2016 and 18 November 2016). In the context of these detailed and regular communications, it would be difficult to misconstrue Vasey's consistent intention.

38 There are some imperfections with the prescribed form of notice under Regulation 55 as it existed in late 2016. It refers to the operator's intention to apply to the Consumer, Trade and Tenancy Tribunal for an order terminating the residence contract. As of 1 January 2014 the Tribunal assumed these functions although the form of Notice contained in the Regulations was not changed.

39 For completeness, Regulation 49 of the 2017 Regulation is in almost identical terms to Regulation 55 of the 2009 Regulation. However in 49(2) and 49(3) it prescribes a 28 day period not a 14 day one. The Notice itself is found in Part 5 of Schedule 1 of the 2017 Regulation and is also identical except for prescribing this Tribunal (and not the CTTT) and for prescribing a 28 day

period and not a 14 day one. The footnote remains intact, except with the same change to 28 days.

40 The Respondents also claim that the form of October 2015 Notice was not valid because it ticked the bottom two boxes in the Notice namely first, "*it is our intention to carry out such substantial works in the village that we require vacant possession of your residential premises*"; and secondly, "*it is our intention to use the land on which the village is situated for a purpose other than a retirement village*". The Respondents submitted that because the October 2015 Notice was in respect of a different purpose than the November 2016 Notice (which only ticked the first box), that it was invalid. It is clear however from paragraphs 38 – 49 of the Elkins' statement that Vasey intended to redevelop the retirement village accommodation as a retirement village with some other ancillary uses such as childcare, medical centre etc. The Tribunal does not find that this invalidates the October 2015 Notice.

41 For these reasons, the Tribunal finds that Vasey has given notice of its intention to carry out such substantial works on Parkview such that it requires vacant possession of Parkview in accordance with s 136(1)(a) of the RV Act and pursuant to the October 2015 Notice and the December 2016 Notice.

**Section 136(2)(b) – development consent**

42 The Elkins' statement dealt with this issue for Vasey at paragraphs 81 – 90. On 15 November 2016 the principal certifying authority issued a Complying Development Certificate dated 14 November 2016 to Vasey in relation to the proposed demolition of the existing Parkview buildings (**CDC**). These were annexed at pp 56 – 57 of the Best application and pp 59 – 60 of the Baume application.

43 Vasey submitted that s 136(2)(b) of the RV Act should be read disjunctively and that the phrase "carry out the works" referred to the development consent which Vasey had obtained for demolition under the CDC and the words "or use the land for the other purpose" related to the redevelopment, the details of which have not yet been finalised.

44 Vasey also submitted that the "development consent and any other necessary approvals" required under s 136(2)(b) of the RV Act related only to approvals for carrying out the "substantial works" referred to in s 136(1)(a) of the RV Act. The substantial works were the demolition of Parkview. These are the "substantial" works that require vacant possession of the premises for the purposes of s 136(1)(a) of the RV Act.

45 Finally, Vasey submitted that s 4 of the RV Act defines '*development*' and '*development consent*' as having the same meanings as they have in the *Environmental Planning and Assessment Act 1979 (***EPA Act***).* Section 4 of the EPA Act defines '*development consent*' as '*consent under Part 4 (of the EPA Act) to carry out development and includes, unless expressly excluded, a complying development certificate*'. And s 4 of the EPA Act defines '*development*' as including '*the demolition of a building or work*'. The Tribunal found this submission of Vasey to be compelling.

46 The respondents submitted that such an interpretation by the Tribunal would permit Vasey to rely on one aspect of its development plan, in this case the demolition of Parkview, and evade the necessary input attached to the words "any other necessary approvals". The respondents expected the approvals to refer to whatever was the proposed end-product to be constructed on the site and only when that was obtained could Vasey give notice of its intention to terminate residence contracts.

47 The respondents also submitted this was the proper reading because it would better inform the respondents as to the alternative accommodation options that may be available, assist the Tribunal in determining the availability of relief and allow fuller knowledge and information around assessing the viability of residents returning to a redeveloped village.

48 Against this was the time and cost that a development of this size and style takes to pass a large metropolitan Council in New South Wales, the need for such development therefore to be done in stages and the ongoing negotiation about detail relating to development approval (whether by amendments or

otherwise) which often extends this process for several years – including the potential for resubmission to the local metropolitan council or its committees and the prospect of appeals in part or whole to the Land and Environment Court. It is clear from information in paragraphs 81 – 90, 38 – 39 and the various annexures and feasibility reports of the Elkins' statement that Vasey propose a form of updated retirement village the cost of which would include a construction cost of approximately $62 million and a land cost of $10 million.

49 To make this viable, Vasey provided proposed budgetary information to the effect that the average price of a one bedroom apartment in the new village will exceed $720,000 and there will be a range of larger sizes (2-3 bedrooms) to meet current and expected demand. While in an ideal world the precise nature of the finished development may assist the Tribunal and provide peace of mind to those residents whose residence contracts are to be terminated that a retirement village will be replaced with a retirement village, local government processes suggest that this will be a work in progress for some considerable time into the future. And Vasey made it clear in its evidence that for economic reasons, it did not expect residents who had entered the old Parkview to be able to afford the greater amenity and cost of the new Parkview.

50 The Tribunal finds that by Vasey obtaining a CDC in relation to the proposed demolition of Parkview on 15 November 2016, it has obtained "development "consent and any other necessary approvals" referred to in s 136(2)(b) of the RV Act.

**Section 136(2)(c) – alternative accommodation**

51 Section 136(2)(c) requires Vasey to have obtained (or made available) for the two respondents alternative accommodation that is approximately the same standard as, and requires no greater financial outlay on the part of the resident than, the residential premises the subject of the residence contract, and that is acceptable to the resident or reasonably ought to be acceptable to the resident.

52 Unlike the operator in *Penshurst Street Holdings Pty Ltd v Barker* [2014] NSWCATCD 2009 which fell down in satisfying this limb of s 136, Vasey has significant resources and options at its disposal. The chronology of its communications with the Respondents regarding the availability of alternate accommodation is contained in paragraphs 65 – 80 of the Elkins' statement. That statement informs the Tribunal that prior to October 2015, there were 19 aged residents in occupation at Parkview. Five residents voluntarily relocated to other Vasey villages prior to October 2015. By February 2017 12 of the remaining residents had relocated to either other Vasey villages or external villages. Vasey provided support and assistance to these residents throughout the relocation process including packing and removal costs, taking interested residents to available alternate accommodation to inspect them, offering support during the relocation by Vasey's community services coordinator and assisting with packing, IT and personal administrative tasks to increase the efficiency of the relocation process.

53 A considerable time of the Tribunal hearing was spent on evidentiary matters around this issue. Both Respondents in the witness box and under cross-examination gave interesting and graceful accounts of their lives, how they lived them, their family connections and their social details. In essence, they liked the location of Parkview in Waitara for personal, family and social reasons (and in the case of Mr Baume, medical reasons) and did not seek relocation in particular to the Vasey villages at either Epping or Lane Cove which would bring a degree of social dislocation to their routine.

54 The issue however to be determined by the Tribunal is whether the alternative accommodation objectively is:

(1) of approximately the same standard;

(2) requires no greater financial outlay on the part of the resident; and

(3) is acceptable to the resident; or

(4) reasonably ought to be acceptable to the resident.

55 Vasey submitted a statement of Kerry Lehman dated 21 February 2017 relating to these issues. It was a review of accommodation options between the three Vasey villages at Parkview, Epping and Lane Cove. It provided in a schedule a summary of available amenities in the three sites in respect of offers made to the two respondents of alternative accommodation by Vasey. It also provided photographic evidence of the inside of the units as well as parking, common room, laundry and bathroom facilities provided in each of the three Vasey villages.

56 The expertise of Ms Lehman appeared to be in marketing. In cross-examination by the Respondents' solicitor it became clear that Ms Lehman had some commercial interest in marketing the redevelopment of Parkview for Vasey and therefore any opinion – it was unclear whether it was a lay or expert opinion that she proffered – must be discounted. Nevertheless, the photographs and information in the schedule to Ms Lehman's statement were not contradicted significantly by either the Respondents' evidence or cross-examination and spoke for themselves. And it was of assistance to the Tribunal in understanding the day-to-day impacts of the proposed offers of alternative accommodation by Vasey on the two respondents.

57 The respondents also complained that the offers contained in Vasey's evidence were in fact made for the first time either immediately before or after the Tribunal applications had been filed. Irrespective of this, it appears to the Tribunal on a comparable analysis of alternative accommodation within Vasey – in particular at Epping or Lane Cove – these fulfil the parameters of the legislation outlined in paragraphs 13 and 44 above. They are similar, of the same standard, require no greater financial outlay and "reasonably ought to be acceptable to the resident". This is perhaps best shown by the fact that many of the other Parkview residents have accepted similar offers to those made to the Respondents.

58 Of course the respondents are not compelled to accept Vasey's offer. They may pursue other accommodation offerings from third parties if they so choose. However the Tribunal finds that in making the offers that it has to the two respondents in respect of alternative accommodation at either its Lane Cove or Epping retirement villages – see paras 27-38, Annexure B, Baume Application and Best Application - it has fulfilled the requirements of s 136(2)(c) of the RV Act. Ideally those offers or similar offers should remain on foot or be renewed for a further period of 28 days following the publication of these Reasons for Decision

**Conclusion**

59 For all of the reasons outlined above, the Tribunal is satisfied that Vasey is entitled to orders terminating the residence contract of the two respondents, Mr Richard Best and Mr Stephen Baume, for the purpose of improving and redeveloping the Parkview Retirement Village at Waitara; and that Mr Richard Best and Mr Stephen Baume need to provide vacant possession of their residential units due to the substantial works which are intended to be carried out by Vasey which will include the demolition of the existing Parkview Village.

60 The second order sought by Vasey is that the two respondents, Mr Stephen Baume and Mr Richard Best, vacate the residential premises within 21 days. Pursuant to s 136(3)(a) of the RV Act, the Tribunal must:

(1) fix in the order a date by which the respondents must physically vacate Parkview; and

(2) specify in the order the penalty that the operator will incur if the works are not substantially commenced within 6 months after the date so fixed.

61 Having regard to the impact that the form of second order will have on both parties, the Tribunal is minded to distribute these Reasons for Decision and allow the parties 14 days to agree the appropriate date to be inserted in the

form of second order, or to bring in short minutes of order that fulfil this requirement of the legislation.

62 The Tribunal is also concerned, before finalising a date in the form of the second order sought under s 136(3)(a) of the RV Act by the applicant, to better understand or update its knowledge about the precise current state of Vasey's development consent, the number of temporary residents remaining in Parkview, the impact of the respondents having to relocate at this time of year and the prospect of either Mr Best or Mr Baume being able to arrange alternative accommodation (either in another Vasey facility or otherwise) and in what timeframe.

63 I propose to publish the Reasons for Decision in this form with a single order made terminating the respondents' two residence contracts at Parkview and allow the parties up to 14 days to agree the precise form of second order for the Tribunal to make in respect of the date they must vacate Parkview. The applications may then be listed before the Tribunal for short minutes to be handed up or for any disagreement as to the operative date for vacation of the retirement village by the respondents to be considered by the Tribunal. Alternatively if agreed short minutes could be submitted by email to the Tribunal Registry. In this manner, the applications can be finalised in a form more practical and hopefully less disruptive to both the parties.

**(signed)**

**S A McDonald**
**Senior Member**
**Civil and Administrative Tribunal of NSW**

**10 November 2017**