Land Lease Community E-newsletter
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Lennox Head, NSW - photo by Kim Wright

DISCLOSURE
TRIBUNAL CLARIFIES DUTY

The obligation on an operator to provide a disclosure statement in the approved form before entering into a site agreement is straightforward. The purpose of the obligation is also clear – to enable a prospective purchaser to make an informed choice about the community. Given the clarity of obligation and purpose, it is difficult to understand why disclosure is becoming a major source of dispute. Perhaps a recent Tribunal case involving Hometown Australia will provide some answers.

Ms Jones (not her real name) purchased a home in a land lease community and was provided with a disclosure statement by the operator prior to signing a site agreement. In February 2021 Ms Jones signed the proposed site agreement and moved into her home.

In June 2021 Ms Jones attended a residents committee meeting where there was a discussion regarding the operator's method of determining the fair market value of site fees in new site agreements. Ms Jones became concerned about the site fees in her agreement and arranged

Continued on page 2

Continued from page 1

to meet with Kim Wright, chairperson of the residents committee. In July 2021, Kim wrote to the operator on Ms Jones' behalf regarding the site fees in her site agreement. The operator denied any wrongdoing and refused to amend the site fees.

Through this interaction Ms Jones also became aware that there may be other inaccuracies in the disclosure statement issued to her including, whether the community is located on flood prone land and in a bush fire affected area. These issues were also raised with the operator who again denied any wrongdoing.

Assisted by Kim Wright, Ms Jones made an application to the NSW Civil and Administrative Tribunal (NCAT) regarding the site fees in her site agreement and the alleged misleading information in the disclosure statement.

FAIR MARKET VALUE

It was an undisputed fact that when Ms Jones purchased her home the site fees payable by the selling home owner were $164.40 per week. However, in the disclosure statement, the operator stated that "the current site fees payable for the site you are interested in are $176.90 – charged weekly." The proposed site fees for Ms Jones were $176.90.

The *Residential (Land Lease) Communities Act 2013* (RLLC Act) requires site fees in a new site agreement to be fair market value and Ms Jones' contended that was $164.40. The operator argued that the "current site fees' in the disclosure statement refer to fair market value for the site and not the site fees payable by the selling home owner. The Tribunal rejected this contention and said "This is plainly not a correct application of the law."

The Tribunal found that the disclosure statement required the operator to state the site fees currently payable by the home owner who is selling the home. Further, the Tribunal was satisfied the operator provided false and deceptive information to the home owner and "that it did so for the improper purpose of obscuring from [Ms Jones] the site fee increase from the rate payable by the vendor. That is, it deliberately conflated or merged its disclosure of the "current site fee" with its statement of the

Kim Wright, Resident Committee Chairperson

"fair market value" so as to create the impression there was no site fee increase."

The Tribunal then considered what fair market value was for the site at the time Ms Jones entered into the site agreement and determined it to be $164.90. The operator was ordered to repay any overpaid amounts to Ms Jones by 31 January 2022.

WE ARE NOT AWARE

Regarding whether the community is situated on flood prone land and in a declared bush fire prone area the operator had simply written "no we are not aware" in the disclosure statement. The Tribunal said the evidence before it was insufficient to determine whether the land was flood or bush fire prone. However, the operator's responses "no, we are not aware" were not considered satisfactory.

The Tribunal went on to say "Section 21 imposes a duty of disclosure which cannot be satisfied by an actual or professed ignorance of the matter to be disclosed. There is an onus on the operator to disclose the facts of these matters, which may oblige it to make necessary inquiries of local and other planning authorities, if it does not know the answer. Particularly in this day and age of rapid climate change, whether the community is on

flood prone land or in a declared bush fire area are important matters that a home owner has a right to know at the time they are considering purchasing a home in the community. Such matters go to their future personal safety and the security and the re-sale value of the primary asset they are interested in acquiring."

The Tribunal found the operator had breached its statutory duty regarding the disclosure of information to Ms Jones and awarded her general damages of $1,000 to compensate her for that breach.

This is a landmark decision by the Tribunal, which properly considers and makes findings regarding the disclosure obligations of operators, and the determination of fair market value. Hopefully these findings will ensure the operator complies fully with such disclosure obligations in the future.

"The operator provided false and deceptive information to the home owner for the improper purpose of obscuring the site fee increase from the rate payable by the vendor"

WILLS AND PROBATE

APPEAL PANEL SETTLES DISPUTES

In a recent decision of the Appeal Panel the question of whether a home can be sold without a grant of probate has been answered. Probate is the name of a court order granted by the Supreme Court of NSW. Being granted probate confirms that the will is valid and the named executor (legal personal representative) has permission to distribute the estate of the deceased according to the provisions in the will.

In *Barrack Point Holdings Pty Ltd v Jenkins (No 2); Jenkins v Barrack Point Holdings Pty Ltd* [2022] NSWCATAP 10 the Appeal Panel determined an appeal by the operator and a cross appeal by Lee Jenkins, beneficiary and executor of the estate of the late Alvin Jenkins.

The dispute arose between the parties following the death of Alvin Jenkins in March 2019. Alvin was a home owner at Surfrider Caravan Park on the New South Wales south coast at the time of his death. He had occupied his home on site 4 under a site agreement. Alvin's final will and testament named his son Lee Jenkins as sole beneficiary and executor of the estate.

Lee asked the operator of Surfrider if they could advertise and sell the home on his behalf. The operator's response was that they couldn't list the home for sale, or enter into a site agreement with a purchaser until a grant of probate had been obtained.

For various reasons Lee did not obtain a grant of probate until 4 August 2020 and by this time a considerable amount of site fees were owing on the site.

Mr Jenkins applied to the Tribunal for compensation for site fees paid on the basis the

Continued on page 4

operator had interfered with the sale of the home. The Tribunal found there had been interference and awarded Mr Jenkins compensation of $2,845.80 for site fees between March 2019 and 4 August 2019 (which the Tribunal erroneously recorded as the date probate was granted). Neither party was happy with this outcome and both lodged appeals against the decision.

THE APPEALS

The operator appealed on six grounds including that the Tribunal had failed to properly interpret the definition of "home owner" in the RLLC Act and had failed to properly consider the operator's decision to require a grant of probate.

Mr Jenkins appealed on the basis the Tribunal erred in determining the date of probate and in calculating the damages he was awarded.

THE DECISIONS

The Appeal Panel determined the Tribunal was correct to find that Mr Jenkins was a "home owner" within the meaning of the RLLC Act. It said "The RC Act confers rights under that Act on those defined as a home owner. In the present case they are a "personal representative or a beneficiary of the estate". In either case, Mr Jenkins fits within the definition and is therefore a home owner for the purpose of the RC Act."

Regarding whether the operator interfered with Mr Jenkins' right to sell the home, the Appeal Panel found that statements made (to Mr Jenkins) by the operator could constitute interference. Additionally, declining to advertise the property and/or act as agent was also conduct that could amount to interference within the meaning of s107 (RLLC Act).

On the issue of whether the operator's actions caused Mr Jenkins to suffer a loss the Appeal Panel differed from the Tribunal. It found the operator was entitled to insist upon a grant of probate prior to signing a transfer of the existing site agreement to a prospective purchaser or entering into a new site agreement with a prospective purchaser "because without such a grant the operator would be at risk of dealing with the estate property inappropriately. Similarly, acting as agent and promoting a sale on behalf of Mr Jenkins prior to the grant of probate may also have placed the operator at risk of liability to prospective purchasers concerning statements made."

The Appeal Panel said "it seems to us that the identified conduct, although constituting interference, did not relevantly cause the loss and damage in question to be suffered. Rather, it remained for Mr Jenkins, who had independent legal advice, to appoint his own selling agent and obtain probate and thereby facilitate a sale at an earlier point in time."

The Appeal Panel found the Tribunal had erred in awarding compensation to Mr Jenkins. It set aside the order for compensation and dismissed Mr Jenkins appeal.

A home at Surfrider Caravan Park

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