

RV - Alert

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Calculation of Exit Fees

In our September 2008 Retirement Villages Alert, we reported on the ongoing debate between residents and operators about how exit fees should be calculated.

Where the exit fee is expressed in residents' agreements as being calculated on an annual basis:

- should they be calculated on the year in which the resident vacates the unit, regardless of what day of the year that is; or
- should they be based on a pro rata calculation made on the day the resident vacates.

The Tribunal

In the case of *Joan Saunders –v- Paragon Property Investments*, the Commercial and Consumer Tribunal decided that the words “on a daily pro rata basis” should not be read into s.15(2) of the Act and that where the resident and operator had agreed to calculate the exit fee on an annual basis, that is what should happen regardless of what day of any given year the resident vacates.

This appeared to be a legally sound outcome as well as a reasonable decision that balanced the interests of residents and operators. But, wait for it - there's more! Mrs Saunders was not happy about that decision and took the matter on appeal.

District Court Decision

The resident appealed against the Tribunal's findings to the District Court and on 19 December 2008, the Court reversed the decision of the Tribunal.

While the Court thought that s. 15(2) of the Act is open to interpretation, it decided that the section required apportionment (i.e. a pro rata calculation) of the exit fee which it found was supported by the objects of the Act.

Implications for you

The decision is very significant for all villages and depending on how your exit fees are calculated, could even impact on the financial viability and sustainability of your business.

Some specific implications are:

- Operators may not be able to enforce yearly calculation of exit fees;
- Resident agreements should be reviewed to determine how your exit fee calculation is affected by the decision;
- You may need to review the viability of your current exit fee calculation

Please feel free to contact me or Joanne O'Brien about this crucial decision.

Regards

BRIAN HERD