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## Commercial and Consumer Tribunal

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**CITATION:** *REGAL WATERS RETIREMENT COMMUNITY PTY LTD  
v THE RESIDENTS OF REGAL WATERS AS LISTED IN  
'ANNEXURE A' IN APPLICATION LODGED ON 25  
NOVEMBER 2008* [2009] CCT MH034-08

**PARTIES:** REGAL WATERS RETIREMENT COMMUNITY PTY LTD  
  
V  
  
THE RESIDENTS OF REGAL WATERS AS LISTED IN  
'ANNEXURE A' IN APPLICATION LODGED ON 25  
NOVEMBER 2008

**APPLICATION NUMBER:** MH034-08

**DELIVERED ON:** 30 June 2009

**DELIVERED AT:** Brisbane

**HEARING DATE:** 9 June 2009

**DECISION OF:** Mr S W Sheaffe

**CATCHWORDS:** Manufactured Homes- claim for a market review when site  
agreement provides for a CPI increase only. Manufactured  
Homes (Residential Parks) Act 2003 Section 70&71

**REPRESENTATION:**

**APPLICANT:** Mr Melville

**RESPONDENT:** Mr Bell

**DECISION CATEGORY  
CLASSIFICATION:** C

**NUMBER OF  
PARAGRAPHS:** 66

## REASONS FOR DECISION

### Introduction

1 Regal Waters Retirement Community Pty Ltd (“the applicant”) seek orders confirming a proposed rental increase pursuant to section 71(7) and (9) of the *Manufactured Homes (Residential Parks) Act 2003* (“MHRP Act”). The respondents include the home owners who have not agreed to the proposed increase or are deemed to have not agreed to the proposed increase and are recorded on the list attached to the application, with changes made by order of Chairperson Ms Schafer on the 15 December 2008 (“the respondents”).

### Background

2 The applicant constructed the Regal Waters Retirement Park (“the park”) in three separate stages; the first and second in 1997 and the third stage in 2003. The park is located at 16 Holzheimer Road, Bethania and is restricted to home owners who are over 50 years of age.

3 The park contains 202 manufactured homes (“the homes”), and they are each occupied by either one, two or three persons. All these homes are occupied pursuant to site rent agreements (“the site agreements”) with one version of site agreement for all home owners, though the rent paid varies, depending on the number of occupants.

4 Each of the site agreements contain, in clause 3, an annual CPI rental clause provision and provides :

*“The Residence Fees shall be fixed at the amount set out in Item 4 of the Schedule until June 1999. On 1 July, 1999 and annually on 1 July in each year thereafter, the rental shall be reviewed and shall be increased by the percentage increase as the Consumer Price Index ( All Groups) for the March quarter (“the Index”) for the year of review from the Index in the preceding year. If the Index shall be discontinued, then RWRC may select some other index published by the Australian Statistician which is similar to the Index.”*

5 Site rents have only ever been increased in accordance with clause 3, and for some years no increase was made and for other years an increase of less than the CPI was applied. The actual rents paid for each year from 1997 to 2009 and the percentage increase in rents paid are set out in the tables A and B shown below, one for single and the other for two occupant homes. These tables show that the actual rents paid for the year ending June 2009 was \$101.90 for singles and \$114.40 for couples.

6 Tables A and B prescribe the notional rents payable if clause 3 was applied strictly over the years, and in these circumstances, the notional rents payable for the 2008-09 year would be \$115.26 and \$128.81 for single and couples respectively.

Table A: Site rents paid over the years for singles

| Year                     | 1997-98 | 1998-99 | 1999-00 | 2000-01 | 2001-02 | 2002-03 | 2003-04 | 2004-05 | 2005-06 | 2006-07 | 2007-08         | 2008-09 |
|--------------------------|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|-----------------|---------|
| Site rent                | \$85    | \$85    | \$85    | \$85    | \$89.25 | \$89.25 | 92.30   | 93.20   | 95.60   | 98.37   | 101.23<br>97.23 | 101.90  |
| Actual % increase        | 0       | 0       | 0       | 0       | 5.0%    | 0       | 3.4%    | .97%    | 2.6%    | 2.9%    | 2.9%<br>-1.16   | 4.8%    |
| Actual CPI               | -       | -       | .7%     | 2.2%    | 5%      | 3.3%    | 3.4%    | 2.5%    | 2.6%    | 2.9%    | 2.9%            | 4.8%    |
| Increase if CPI increase | 85      | 85      | 86.60   | 87.48   | 92.47   | 95.52   | 98.77   | 101.24  | 103.87  | 106.88  | 109.98          | 115.26  |

Table B: Site rents paid over the years for couples

| Year                     | 1997-98 | 1998-99 | 1999-00 | 2000-01 | 2001-02 | 2002-03 | 2003-04 | 2004-05 | 2005-06 | 2006-07 | 2007-08          | 2008-09 |
|--------------------------|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|------------------|---------|
| Site rent                | \$95    | \$95    | \$95    | \$95    | \$99.75 | \$99.75 | 103.15  | 104.15  | 106.85  | 109.95  | 113.15<br>109.15 | 114.40  |
| Actual % increase        | 0       | 0       | 0       | 0       | 5.0%    | 0       | 3.4%    | .97%    | 2.6%    | 2.9%    | 2.9%<br>-1.16    | 4.8%    |
| Actual CPI               | -       | -       | .7%     | 2.2%    | 5.0%    | 3.3%    | 3.4%    | 2.5%    | 2.6%    | 2.9%    | 2.9%             | 4.8%    |
| Increase if CPI increase | 95      | 95      | 95.67   | 97.77   | 103.34  | 106.75  | 110.38  | 113.14  | 116.08  | 119.45  | 122.91           | 128.81  |

7 A table for the triple occupants has not been included as the two triple occupant home owners consented to the market rental increase.

8 The site agreements do not contain a market review clause and the applicant has never carried out a market review of the site rents payable at the park.

9 Of the 202 homes, only two are triple (1%) occupancy homes, 79 are occupied by couples (39%) and 121 are single occupancy homes (60%).

10 In 2007 the residents challenged the annual increase and in the decision of *Hugh Bell & Ors v Regal Waters Retirement Community Pty Ltd [2007] CCT MH031-07* the Tribunal ordered that the site rents be reduced by \$4.00 per week. The order was only with respect to the 49 applicants and not to the other 153 home owners who were not applicants. The applicant as a gesture of goodwill and no doubt for accounting convenience, adjusted the rental for the entire 202 park owners down by \$4.00 in order to maintain uniformity across the park.

11 On 22 October 2008 the applicant delivered to all 202 home owners a notice of increase in site rent (the notice) issued pursuant to section 71 of the MHRP Act and the notices varied depending on the number of occupants, as follows:

- a) single occupancy – increase from \$101.90 per week to \$112.00 per week being an increase of \$10.10 per week;
- b) double occupancy – increase from \$114.40 to \$122.00 per week being an increase of \$7.60 per week; and
- c) triple occupancy – increase from \$121.05 per week to \$132.00 per week being an increase of \$10.95 per week.

12 The notices prescribed the basis for the rent increase, that the increase was to take effect on 1 January 2009 and invited a response within 28 days.

13 A copy of the notice with respect to a one occupant home, so far as relevant, provides:

*“Take notice that Regal Waters Retirement Community the owner of Regal Waters...hereby notifies you that pursuant to section 71 of the Manufactured Homes (Residential Parks) Act 2003 (QLD) (“the Act”) the park owner wishes to increase the site rent payable under your site agreement from \$101.90 per week to \$112.00 per week (GST inclusive), representing an increase of \$10.10 per week. The new site rent is the proposed increase site rent for the purposes of this notice.*

*The proposed site rent has been calculated based on a review of the site rent payable under your site agreement to market.*

*The fundamental principles and factors considered in determining the basis for the proposed increase site rent including a consideration of the following factors in section 70(3)(a)-(j) of the Act”.*

14 It was stated that the rental for the double occupants would be at the market rate of \$122 per week and for the single occupants at \$110.00 per week or they would receive a \$10.00 per week discount.

15 As at the date of Mr Arnold’s statement, 100 sites had accepted the proposed increase, 12 sites had not accepted the proposed increase and 90 sites had not provided a written response and are therefore deemed to have not agreed to the increase pursuant to section 71(6) of the MHRP Act.

16 The applicant applied to the Tribunal on 25 November 2008 for an order affirming the proposed increase pursuant to section 71(7)-(9) of the MHRP Act.

17 On the 29 May 2009 the applicants forwarded a further notice (CPI notice) to all the 202 home owners claiming a CPI rental increase of 3.1% pursuant to clause 3 of the site agreements and commencing on the 1 July 2009. The amount claimed is specified in the CPI notice; \$235.88 for a triple occupancy, and \$115.47 and \$125.78 respectively for single and double occupancy, and is calculated as follows.

Table C

|        | Increase per week | Tribunal confirmed section 71 increase | Adjusted increase per week the subject of this notice | Additional increase per week to be paid back to 1 July 2009 |
|--------|-------------------|--|---|---|
| Single | \$105.05          | \$112.00                               | \$115.47 (\$112 x 1.031%)                             | \$3.47  |
| Couple | \$117.95          | \$122.00                               | \$125.78 (\$122 x 1.031%)                             | \$3.78  |

## Relevant Legislation

18 The MHRP Act provides:

**“23 Contracting out prohibited**

- a) *An agreement is void to the extent to which it purports to exclude, change or restrict the application or operation of a provision of this Act about the terms of a site agreement.*
- b) *A person must not enter into an agreement with the intention, directly or indirectly, of defeating the operation of this Act.  
Maximum penalty—200 penalty units.*
- c) *In this section—  
**agreement** includes arrangement.  
**defeating** includes evading and preventing.*

**70 Home owner may apply to tribunal for order about site rent increase**

- (1) *This section applies if—*

- (a) the park owner for a residential park gives a home owner notice, under section 69, of an increase in the site rent payable under the site agreement between the parties; and
  - (b) the home owner considers the increase is excessive.
- (2) On application by the home owner made within 28 days after receiving the notice, the tribunal may make any of the following orders—
- (a) an order reducing the amount of the increase by a stated amount;
  - (b) an order setting aside the increase;
  - (c) an order confirming the increase on the conditions, if any, the tribunal considers appropriate;
  - (d) another order the tribunal considers appropriate.
- (3) In deciding the application, the tribunal may have regard to the following—
- (a) the range of site rents usually charged for comparable sites in comparable residential parks in the locality of the park, or if there are no comparable residential parks or sites, the range of market rents usually charged for residential accommodation in the locality;
  - (b) the increased site rent compared to the previous site rent;
  - (c) the frequency, and amount, of past increases in the site rent payable under the agreement;
  - (d) any increase in the CPI number during the previous site rent period;
  - (e) the amenity or standard of the common areas and communal facilities;
  - (f) any withdrawal of a communal facility or service previously provided at the park;
  - (g) any addition of a communal facility or service not previously provided at the park;
  - (h) any increase in the park owner's operating costs for the park during the previous site rent period;
  - (i) whether the increase is fair and equitable in all the circumstances of the case;
  - (j) anything else the tribunal considers relevant.
- (4) If, in deciding the application, the tribunal makes an order mentioned in subsection (2)(a) or (b), the park owner must refund to the home owner any overpayment of the site rent since when the increased site rent has been paid.
- Maximum penalty—10 penalty units.
- (5) An amount payable to the home owner under subsection (4) is recoverable as a debt.
- (6) In this section—
- CPI** means the all groups consumer price index for Brisbane published by the Australian statistician
- previous site rent** means the site rent payable under the agreement before the increase.
- previous site rent period** means the period commencing on the first day the previous site rent was payable and ending on the day the tribunal decides the application.

## **71 Notice of proposed increase in site rent**

- (1) This section applies if—
- (a) the park owner for a residential park wishes to increase the site rent payable under a site agreement; and
  - (b) section 69 does not apply to the proposed increase.

- (2) *The park owner must give the home owner for the site a notice stating the following—*
  - (a) *the amount of the proposed increased site rent;*
  - (b) *the basis for the proposed increase;*
  - (c) *the day the proposed increased site rent is first payable (the **increase day**);*
  - (d) *the home owner must, within 28 days after receiving the notice, give the park owner a written response indicating whether or not the home owner agrees to the proposed increase.*
- (3) *The increase day must not be earlier than 2 months after the notice is given.*
- (4) *The home owner must within 28 days after receiving the notice give the park owner a written response indicating whether or not the home owner agrees to the proposed increase.*
- (5) *If the response indicates the home owner agrees to the proposed increase, the proposed increased site rent is first payable on the increase day.*
- (6) *If the home owner does not give a written response under subsection (4) within the 28 days, the home owner is taken to have not agreed to the proposed increase.*
- (7) *If the park owner and home owner do not agree on the proposed increase within the 28 days, the park owner may apply to the tribunal for an order about the proposed increase.*
- (8) *In deciding the application, the tribunal may have regard to the matters mentioned in section 70(3).*
- (9) *Also, in deciding the application, the tribunal may make any of the following orders—*
  - (a) *an order reducing the amount of the proposed increase by a stated amount;*
  - (b) *an order setting aside the proposed increase;*
  - (c) *an order confirming the proposed increase on the conditions, if any, the tribunal considers appropriate;*
  - (d) *another order the tribunal considers appropriate.*
- (10) *If the tribunal makes an order mentioned in subsection (9)(a) or (c), the order must also state the day from which the increased rent is first payable.”*

### **Applicant’s submissions**

19 The applicant submitted that it was entitled to make a claim for a market rent adjustment pursuant to section 71 of the MHRP Act, notwithstanding that the site agreements do not contain a market review rental clause, and relied on the reasoning of His Honour Dearden DCJ in *Palmpoint Pty Ltd v The Residents of Bribie Pines Island Village & Ors* [2007] QDC 130 and applied in *Bails & Ors v Tamberra Pty Ltd* [2009] CCT MH014-08.

20 The applicant submitted that a market rent review has never been made, and the only rent increases were pursuant to the annual CPI clause, though for some years an increase was never claimed, and for others, the amount claimed was less than the formula allowed. This failure has the consequence that the rents now paid are substantially lower than what would have been paid if the annual rent clause was strictly followed. For

example, the site rent for singles is \$101.90 per week but would have been \$115.26, and for two occupants the site rent is \$114.40 but would have been \$128.81.

21 The failure to increase the rents annually has led to a situation where the site rents are well below the market levels. It was asserted that the Tribunal acknowledged that this had occurred in *Bell and Ors v Regal Waters Retirement Community Pty Ltd [2008] CCT MH031-07* at paragraph 26.

22 The applicant submitted that after consideration of the factors set out in section 70(3) of the MHRP Act, the site rent increase should be approved. The applicant submitted that the market rent for these homes was \$122.00 per week, as stated by Mr Brown; eight new home owners have entered the park since the rental increase was notified and are paying the increased site rent; 50.5% of the home owners have agreed to and have been paying the increase since 1 January 2009; and none of these home owners are in rears or have expressed an opinion to management that they are unable to pay the increased site rent.

23 The other factors that justify the rental increase include; the rent differentiation for single, double and triple occupants, introduced for the benefit of single home owners, has been maintained even though it is contrary to the practice of other park owners in Queensland; residential rents in other parks in the locality have increased significantly over recent period; the applicant has made significant improvements to the facilities and services offered; the value of the park land has dramatically increased over the period; the value of the manufactured homes in the park has increased substantially over the period; and the rates payable by the applicant has substantially increased by up to 48.76%.

24 The applicant submitted that the park decision to differentiate between single, double and triple occupancy is a significant cost and at \$10 per week for the discount on single occupancy homes the total cost is \$62,920 for the 2008/9 financial year.

25 The applicant invited the Tribunal to accept the evidence of Mr Brown who gave his evidence honestly and after expert analysis of the comparable parks, and gave an opinion that the market rent for a site, as at 1 January 2009, was \$122.00 per week.

26 The applicant also submitted that the respondents' evidence was vague and unsatisfactory, and had limited probative value. Further, the respondents had failed to provide any expert valuation evidence that the market rental was other than \$122.00 per week and failed to provide any cogent or reliable evidence of their income tax returns or bank statements to show that they could not afford the increase.

### **Respondent's submissions**

27 The respondents submitted that the applicant should not be entitled to have a market review increase in rent as each of the site agreements allow for a CPI annual increase only. Also there were written and verbal statements by the applicant affirming one rental CPI per year, governed by the Brisbane March Quarter CPI. If the applicant was allowed a market review increase it would constitute a unilateral change to the site agreements and a breach of them.

28 The respondents seek to distinguish the *Palmpoint* decision.

29 The respondents also seek to rely on the previous decision in MH031-07, a decision handed down only 63 days prior to the notice being delivered. It is submitted that this application has the hallmarks of an appeal from that decision.

30 The respondents submit that the report of valuer Mr Brown should be rejected on the grounds that it excluded *River Glen Haven* as a comparable park, and did not take into account the superior facilities and services provided at *Palm Lake Waterford*. They assert *River Glen Haven* was excluded as it did not suit the valuer's opinion and *Palm Lake Waterford* is a superior park with an equal or only a marginally higher rent. They submit his report is not fair and open, and should not be accepted.

31 They also submit that when compared to the other parks in the locality the rent charged at *Regal Waters* as at the 31 December 2008 is fair, reasonable and in line with the local markets.

32 They also assert that it is grossly unfair to make more than one increase in one year especially when the site agreement allows for one annual increase and the park owner has acknowledged one CPI increase only per year. If an increase was allowed, it would open the door for ambit rent claims as parks play rent leapfrog. They assert that if this increase was allowed it would mean three increases have occurred over two years; the annual CPI reviews in 2008 and 2009 and the market review increase.

33 The respondents assert that the proposed increase was placing financial stress on the home owners as many of them are pensioners, self funded retirees or workers on relatively low wages.

34 Since the applicant is applying for a full 3.1% CPI rent increase for 2009, it means that single pensioners have experienced a 13.32% increase in rent but inflation has been only 3.1 percent. They assert that the applicant should not be entitled to the two increases this year; the CPI increase as of 1 July 2009 and the market review as at 1 January 2009.

35 They assert that the proposed rental increase is excessive, unaffordable, unfair and was based on a misunderstanding of the manufactured home park marketplace.

### **Observations and findings**

36 The first issue to consider is the applicant's entitlement to claim a market review increase in site rent in circumstances where the site agreements state that the rental shall be reviewed annually on 1 July each year and shall be increased by the CPI Index for the March quarter.

37 The legal position was expressed by His Honour Deardon DCJ in *Palmpoint Pty Ltd v The Residents of Bribie Island Pines & Ors [2007] QDC 130*. In this case, the park owner forwarded section 71 Notices of Increase in Rent based on a market review to all the 207 home owners, with 71 site agreements having market review clauses and the remaining 136 site agreements providing for an annual CPI rent increase only. Over half of the home owners refused to accept the rental increase, so the park owner applied to the Tribunal for an order affirming the proposed increase. The application was dismissed and on appeal, His Honour held that section 71 enabled park owners to claim an increase in site rent outside the terms of any site rent increase provision. His Honour said in paragraph 17:

*“MHRPA section 69 provides for park owners who seek to increase site rent pursuant to a site agreement that contains provisions for increasing the site rent, whereas MHRPA section 71 is a provision which enables park owners to seek to increase site rent either outside the terms of any such site rent increase provision, but also covers the unlikely event of a park owner seeking to increase a site rent either where no written site agreement exists, or where there is a written agreement, but it does not contain a site rent increase provision”*

38 In the matter before me, the applicant park owner has delivered a section 71 Notice of Increase in Rent based on a market review, despite the absence in the site agreements of a market review rental increase provision. These circumstances were identical to the facts before His Honour for many of the home owners in the *Palmpoint* case, and it was held that the park owner was entitled to seek the rental increase.

39 A decision of the District Court binds this Tribunal. In those circumstances, the applicant is entitled to seek a site rent increase and deliver a notice pursuant to section 71 of the MHRP Act, notwithstanding the absence of a clause in the site agreements providing for a market rent review. I reject the submission of the respondents that the *Palmpoint* case is distinguishable. The factors to be considered as to the amount of any rental increase, if any, are those that are listed in section 70(3) of the MHRP Act.

40 The first issue is a consideration of the range of site rents usually charged for comparable sites in comparable residential parks in the locality.

41 Mr Brown compared and listed the facilities and services offered at the applicant's park with the nine other parks listed in table C. He also makes the valid observation that the comparison must be made as at the date of the valuation and in this case, 1 January 2009. It was submitted that these are comparable parks in the locality.

42 The respondents submitted that Mr Brown wrongfully excluded *River Glen* as a comparable park and says it was excluded as it did not fit his opinion. Mr Brown rejected this suggestion and I accept his evidence on this issue. I accept his conclusion that *River Glen* is not a comparable park.

43 The respondents also submitted that *Palm Lakes Waterford* is a better quality park and Mr Brown accepted this proposition, and I accept his evidence that this fact does not have a significant bearing on his opinion as to the market rent of the park.

44 The applicant invited the Tribunal to accept Mr Brown's report and the respondents submit to the contrary. It must be pointed out that the respondents did not tender any expert opinion contradicting the market rental at \$122.00 per week and a different valuation figure was not suggested to Mr Brown. In these circumstances, I accept the opinion of Mr Brown that the market rent for the sites at the park is \$122.00 per week. Mr Brown lists the rent payable in the nine parks in the locality and the \$122.00 assessment is certainly within the range of these listed rents. I accept that these parks are comparable and are in the locality.

45 The applicant further submitted that pursuant to section 70 (3)(a) of the MHRP Act, if there are no comparable parks, a comparison is to be made with the residential property market within the locality, and in this market the residential rentals have increased by 36.4% in the three years from September 2005 to September 2008, and the medium

house prices have increased by 129% over five years. However, as there are comparable parks in the locality it is not necessary to consider this issue.

Table C

| Park Name         | Suburb         | Rental Per week                    | Last increase | Proposed increase date | CPI Index Sept 2008 | Calculated increase |
|-------------------|----------------|------------------------------------|---------------|------------------------|---------------------|---------------------|
| Palm Lakes Resort | Bethania       | \$112.08                           | 1 Jan 09      | 1 Jan 09               | 5.6                 | \$118.36            |
| Palm Lakes Resort | Waterford      | \$118.10                           | 1 Jan 09      | 1 Jan 09               | 5.6                 | \$124.71            |
| Palm Lakes Resort | Mt Warren Park | \$117.38                           | 1 Jan 09      | 1 Jan 09               | 5.6                 | \$123.95            |
| Upstream          | Bethania       | \$120 (couples)<br>\$110 (singles) | 1 Sept 08     | 1 Jan 09               | -                   | \$120.00            |
| Claremount Resort | Park Ridge     | \$118.43                           | 1 Sept 08     | 1 Jan 09               | -                   | \$118.43            |
| Lakeview          | Eagleby        | \$125.50                           | 1 July 08     | 1 Jan 09               | 1.4                 | \$127.26            |
| Ruby Gardens      | Eagleby        | \$125.00                           | 1 July 08     | 1 Jan 09               | 1.4                 | \$126.75            |
| Saphire Gardens   | Eagleby        | \$118.00                           | 1 July 08     | 1 Jan 09               | 1.4                 | \$126.75            |
| River Glen Haven  | Waterford West | \$113.00                           | n/a           | n/a                    |                     | n/a                 |

46 The second issue is the increase in site rents compared to the previous site rents. The proposed market rent increase is \$10.10 for single occupants bringing it up to \$112.00 and \$7.60 for double occupants bringing it up to \$122.00 per week.

47 The next issue is the frequency and amount of past increases in the site rent payable under the agreement. The applicant refers to table A and B noted above and submitted that a market review increase has never occurred and the annual CPI clause has not been applied every year or applied in full.

48 If it had been applied annually the rental now paid would now be much higher. To the contrary, the respondents say there was a CPI increase in July 2008, a market review in January 2009 and another CPI increase in July 2009; the third increase in a short period. The respondents submitted that the two increases in 2009 resulted in an increase of 13.2% whereas the inflation was only 3.1%. The applicant was entitled to a CPI annual increase but this entitlement was not always exercised fully and they never made a market review claim. However, it is also clear that the applicant is making an additional market review claim in addition to the annual CPI claims; three increases in two years.

49 The next issue is a consideration of the improvements to the services and amenities at the park. The applicant listed the many improvements made to the park, and the respondents agreed that improvements were made, but says, that they were not made in recent years. The applicant conceded that the improvements were made over many years but no commensurate rental increase had occurred at or since the time these improvements were made. The improvements included the purchase of a new gym, the development of a croquet lawn, installation of a patio, air-conditioning in the club house,

tanks and safety features. I find that there have been improvements to the facilities and amenities at the park since it was established in 1997 and these improvements have occurred gradually but not significantly in recent years.

50 The respondents raised the issue of access and said there were limitations such as the bin could only be located some distance from the door and there were difficulties manoeuvring a stretcher into some homes. The position was different for each home owner with some owners having more difficulties with access than others. The parties argued over the access at the other parks, especially *River Glen* where the homes are smaller and often with three or more front steps. I do not consider access a significant factor, and if it did it would be reflected in the market rent. In the modern world, people reside in smaller premises, especially in high rise accommodation with stairways, lifts and a need to leave the bin at ground level. Space and access can be an issue.

51 The applicant also raised the issue of the increasing costs of maintaining the park. I accept that the rates and other costs have increased significantly in recent times and the financial viability of park owners is an important and significant issue. If park owners are not economically viable the demand for park closures and for a change of land use would be stimulated.

52 There is evidence that an increase in site rents would impose a financial burden on some of the respondents, especially the single pensioner home owners. It is accepted that those living on a single pension are affected by the increase and this is a factor that must be taken into account. On the other hand pensions do increase and most of these residents receive rental assistance.

53 There are many features of this case that have a bearing on the just and equitable principle. The applicant engaged a solicitor many years ago to give advice and to draft a site agreement and the produced draft agreement did not contain a market review clause.

54 When the park owner sold the homes, the prospective purchasers were advised that they should get legal advice as to their rights and obligations. The site agreements stated that the site rent was to be increased by the CPI in July each year, the sales agents engaged by the applicants restated this proposition to the prospective purchasers and the legal advice was to the same effect.

55 There is evidence that the park owner advocated and informed the home owners that the rental increase was a CPI annual increase only. A document circulated outlining the distinctive features of the park and in comparison to other parks said that "*residence fees fixed to 30 June 1999, and increases thereafter only in accordance with CPI used for increases of pensions*". Also at a residents meeting held on 6 May 1998, Mr PJ Melville, a park owner representative reaffirmed, and it is recorded in the minutes, that the site agreements would only permit an increase by the Consumer Price Index. Further, the recently prepared and undated Regal Waters General Information Document, listed and answered frequently asked questions including, "*Do the fees go up?*" The recorded response was that "*the fees will go up on an annual basis in July in accordance with the increase in CPI*"

56 The annual CPI basis for a rental increase was affirmed by the applicant's agents when presentations were made to prospective purchasers of homes. Mr and Mrs Probin purchased their home located on site 180 in September 2007 and Julia Goetz purchased her home situated on site 109 in 2000. These purchasers were advised by the sales

representative that rental increases were only ever by an annual adjustment based on the CPI for the Brisbane March Quarter. They were also advised to get independent legal advice, and their solicitors advised that the site agreements were watertight and the only way the rent could be increased was as per the CPI site agreement clause.

57 Valma Hintz was engaged by the applicant to sell homes in the park and as a part of her training it was necessary for her to familiarise herself with the terms in the site agreement and she was informed that the rent was to be increased by the CPI factor only and this was disclosed to the new home owners.

58 In evidence, Mr Arnold said he first became aware that a market review rental increase could be made after he became aware of the *Palmpoint* decision.

59 I accept that the applicant was of the view that it was only entitled to make a claim for a site rent increase based on the express terms of the site agreement and it informed the home owners and prospective home owners to this effect. However, the position changed with the delivery of the *Palmpoint* decision. It now makes a claim based on the reasoning in that decision.

60 It is not uncommon for a market review rental clause to be included in a site agreement and is enlivened every three years with a CPI rental adjustment clause to take effect every other year. This is not what the applicants are seeking in this case. The applicant increased the rent in July 2008 based on the CPI, gave notice of a market review increase to take effect as at 1 January 2009, and claim a CPI increase in rent to take effect in July 2009. I am satisfied that the two increases in rent for the one year is unfair and inequitable, and that the 2009 CPI increase would result in a rental being paid that exceeds the market rent.

61 The conduct of the park owner has been commendable in many aspects and Mr Bell readily made this concession. The park owner makes a \$400 per month contribution to the Residents Committee and gives a discount for single occupant home owners, a very expensive exercise for the applicant. Mr Bell acknowledged these issues and says they reflect very positively on the applicant.

62 The terms of the site agreement are significant factors to take into account and a Tribunal should always be reluctant to make an order that is contrary to these terms. Despite these express terms, I am required to consider the factors listed in section 70(3) of the MHRP Act. Even though there is an express clause for an annual CPI rental adjustment in this site agreement and the applicant has made representations to prospective or current home owners that the rental adjustment is to be by CPI only, I am satisfied that market review assessment should be undertaken in this case. The significant factor is that the applicant has not applied or not applied a full CPI rental adjustment for every year since the parks establishment, with the effect that the rental paid is now less than the market rental.

63 After taking into account all the factors listed in section 70(3), I am prepared to allow an increase in rental based on a market rental adjustment.

64 In assessing this adjustment there is one significant factor that has to be taken into account. It is common place for a market review to occur every three years and a CPI adjustment in the in-between years. However, in this case, the applicant has not only claimed a market review increase in January 2009 but an annual CPI increase in July 2009. If the latter increase was permitted the new rental paid would be in excess of the

market rent. Two increases in one year should not be permitted. However, to be fair to the applicant, it was said that the annual CPI notice was given as they had to comply with the time requirements prior to July 2009 and before this decision was handed down.

65 Therefore, I will allow the market review as claimed in the notice upon an undertaking by the applicant to withdraw the CPI notice for the annual CPI increase and an undertaking not to give a further notice until the year 2010 pursuant to the site agreements. In the absence of this undertaking, the increase would not be allowed.

### **Order**

66 Upon an undertaking by the applicant to withdraw the notice of rental increase issued pursuant to clause 3 of the site agreements and dated 29 May 2009:

- a) The increase of \$10.10 per week for single occupants is confirmed; and
- b) The increase of \$7.60 per week for double occupants is confirmed.

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MR S SHEAFFE  
**MEMBER**  
**Commercial and Consumer Tribunal**