Seacliff Management Pty Ltd v Acciaccarelli (Owners Corporations) [2015] VCAT 508 (22 April 2015)

Last Updated: 30 April 2015

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO.OC1905/2012

CATCHWORDS

Retirement village fees – whether increases in fees exceeded a permissible 'adjusted maintenance charge' – *Retirement Villages Act 1986* s 38, *Retirement Villages (Contractual Arrangements) Regulations 2006* reg 8A.
Retirement village management – contractual requirement to employ an on-site manager – whether the Aged Care Award 2010 applied to the employment – whether presence of the on-site manager '24-7' was required.
Retirement village accounting – whether financial statements given to residents were adequate – *Retirement Villages Act 1986* s 34.

FIRST APPLICANT:	Seacliff Management Pty Ltd (ACN: 006 746 069)
SECOND APPLICANT:	Tidak Pty Ltd (ACN: 005 168 972)
RESPONDENT:	Jacqueline Acciaccarelli
RESPONDENT:	David Brown and Coral Brown (as executors of the estate of Isobel Brown deceased)
RESPONDENT:	Rae Campbell-Nott
RESPONDENT:	Wendy Canny
RESPONDENT:	Patty Chaplin
RESPONDENT:	Maureen Collard
RESPONDENT:	Ira Galperin
RESPONDENT:	Mark Galperin
RESPONDENT:	Kay Hancock
RESPONDENT:	Joan Hocking
RESPONDENT:	Elizabeth Ann Hudson
RESPONDENT:	Anne Kenna
RESPONDENT:	Dianne Parris
RESPONDENT:	Barbara Penson
RESPONDENT:	Ray Toman
RESPONDENT:	Leonie Toman
RESPONDENT:	Lily Wilson

INTERESTED PARTY:	Owners Corporation SP273384A
WHERE HELD:	Melbourne
BEFORE:	Senior Member A. Vassie
HEARING TYPE:	Hearing
DATE OF HEARING:	17-19, 23 and 24 March 2015
DATE OF ORDER:	22 April 2015
DATE OF REASONS	22 April 2015
CITATION	Seacliff Management Pty Ltd v Acciaccarelli (Owners Corporations) [2015] VCAT 508

ORDER

1. The respondent Wendy Canny shall pay to the first applicant $4,950.63.
2. The respondents Ray Toman and Leonie Toman shall pay to the first applicant $9,651.52.

SENIOR MEMBER A VASSIE

APPEARANCES:

For the Applicants:	Mr N Jones of Counsel
For the Respondents Toman:	Mr R Toman
For the Respondent Canny:	Mr R Toman (agent)

No appearance by any other respondent or by the interested party.

REASONS FOR DECISION

Introduction

1. Seacliffs Retirement Village ('the village') is situated at 130 Beach Road, Parkdale. Owners Corporation SP273384A ('the owners corporation') affects the land on which the village is situated. On strata plan of subdivision 273384A there are 31 units and common property which includes a community centre. Residents, or resident couples, occupy 30 of the 31 units.
2. The majority of the residents are unit owners. The others are lessees of their units, under long term leases from the owner, Tidak Pty Ltd ('Tidak'). Tidak was the developer of the village. Tidak also owns unit 1, which adjoins the community centre and is occupied by the village's on-site manager.
3. Each resident has entered into a management agreement with Seacliff Management Pty Ltd ('Seacliff'). Under each management agreement Seacliff agrees to manage the village and to provide various services to the residents, and agrees to

employ a manager to attend to the needs and reasonable requests of the residents. In return, the resident agrees to pay a service fee to Seacliff.

4. Seacliff and Tidak are related companies. The Stone family controls them both.

5. There are two proceedings which I am deciding. Many parties are named in their titles. By the time that I am deciding them, however, the two proceedings have come to be between Seacliff and three residents: Raymond Toman, Leonie Toman and Wendy Canny. The proceedings have been settled as between all other parties.

6. Raymond Toman and Leonie Toman jointly own units 14 and 15. Mr Toman resides in unit 14. Mrs Toman resides in unit 15. Ms Canny owns and resides in unit 23. The management agreements with Seacliff that relate to those units are in identical terms.

7. Since about May 2009 the residents of the village have been paying two separate fees. One is an owners corporation fee, which the owners corporations manager receives on the owners corporation's behalf. The other is a service fee under the maintenance agreement, which they pay to Seacliff. The service fee is a maintenance charge within the meaning of that term in the *Retirement Villages Act 1986*.

8. The main event that has given rise to these two proceedings is a substantial increase in the service fee, or maintenance charge, that occurred on 1 October 2012.

9. The disputes in the two proceedings relate to the service fee, or maintenance charge, which Seacliff has demanded from the Tomans and from Ms Canny since 1 October 2012, and relate to what obligations Seacliff has to them under the maintenance agreement. Seacliff calculates a monthly service fee per unit for a financial year by preparing a budget for the financial year and by dividing the budgeted figure by 12 and then by 30 (there being 30 units with residents in them). The service fee increased substantially from 1 October 2012 following an increase in the budget from $70,366.31 for 2011-2012 to $160,491.00 for 2012-2013. The Tomans and Ms Canny have not paid the whole of the increase. They say that the increase was not permitted by law and so the fees are excessive. They have paid to Seacliff only what they have estimated is the proper monthly service fee.

10. In proceeding OC1905/2012 ('the Seacliff proceeding') Seacliff is claiming the balance of the service fees which it alleges the Tomans and Ms Canny owe. By an amendment to Seacliff's application which I allowed during the hearing, the sums which it claims are $11,411.52 from the Tomans and $5,930.63 from Ms Canny.[1]

11. In proceeding C5466/2013 ('the Toman proceeding') the Tomans and Ms Canny are claiming relief against Seacliff, the supplier of services to them under their management agreements. In brief, they seek declarations that Seacliff in various ways is not acting in accordance with its obligations under the maintenance agreements or otherwise in accordance with the law.

12. The word 'manager' is capable of being used in several different senses in the context of these proceedings. The *Retirement Villages Act 1986*, in s 3, defines 'manager' as 'a person who manages a retirement village'. Each management agreement describes Seacliff as 'the Management Company' and requires it to employ 'a Manager' to manage the communal facilities of the village and to attend to the residents' needs. Seacliff has sought to meet that requirement by employing a person who resides in unit 1, which Tidak owns, and who fulfils the role of manager. At present that person is Cassandra Rhodes. The residents call her the manager. Then there is the owners corporation manager, who originally was Debra Stone, an officer of Seacliff, but is now Campbell Corporate Services (formerly called Bentleigh

Management Services). Whenever in these reasons I refer to 'the manager' I mean the individual on-site manager from time to time, unless the context shows that I mean Seacliff. The terminology I use is:

- 'the retirement village manager' for Seacliff;
- 'the on-site manager', or 'the manager', for the employee of Seacliff from time to time who has fulfilled the role of attending to the day to day needs of residents, and
- 'the owners corporation manager' for the person whom or which the owners corporation has appointed from time to time to act as such.

Increased Maintenance Charges: The Law

13. The law which governs how maintenance charges under a management contract between a retirement village manager and a resident may be increased is the *Retirement Villages Act 1986* ('the Act'), s 38, and the *Retirement Villages (Contractual Arrangements) Regulations* 2006, reg 8A.

14. Neither the Act nor the regulations made under it provide for how a maintenance charge under a management contract must be set initially. They provide only for how the maintenance charge, once set, may be increased each financial year.

15. Section 38 of the Act defines 'adjusted maintenance charge' as meaning the adjusted maintenance charge determined and indexed in accordance with the regulations. The relevant regulation is reg 8A.

16. So far as is relevant to the financial years that apply to the disputes in these proceedings, reg 8A provides that an adjusted maintenance charge for the next financial year must be determined in accordance with a formula A x B/C, where (I paraphrase):

A is the adjusted maintenance charge for the previous financial year,

B is the sum of the consumer price index numbers[2] for the four quarters of the previous financial year, and

C is the sum of the consumer price index numbers for the four quarters of the financial year before that previous financial year.

17. Definitions in s 3 of the Act of expressions used in s 38 are:

maintenance charge means a recurring charge payable by a resident for the provision of goods or services by a manager;

management contract means a contract between a resident and a manager which relates to the provision of services by the manager to the resident;

retirement village land means land used or to be used for the purposes of a retirement village, other than any part of any such land on which a residential care facility is situated;

...

18. Section 38, so far as is presently relevant, provides:

38 Increases in maintenance charges

(1) In this section –

adjusted maintenance charge means the adjusted maintenance charge determined and indexed in accordance with the regulations;

...

(2) Despite anything to the contrary in a residence contract, a management contract or the by-laws a resident is not required to pay a maintenance charge to the extent to which it is greater than the adjusted maintenance charge.

(3) ...

(4) Subsection (2) does not apply if the payment of a maintenance charge that is greater than the adjusted maintenance charge has been approved by resolution of a majority of the residents at a meeting of the residents or is approved by resolution of the residents committee.

(5) Subsection (2) does not apply to the payment of a maintenance charge which is greater than the adjusted maintenance charge to the extent to which the greater amount represents –

(a) rates, taxes or charges in respect of retirement village land or the use of a retirement village land levied under an Act or subordinate instrument; or

(b) salaries or wages paid in accordance with an award made by a Commission, Tribunal, Board or other body under –

(i) an Act other than this Act; or

(ii) a Commonwealth Act –

if the salaries or wages are paid to a manager or a person employed in connexion with the retirement village.

19. The effect of s 38 and of reg 8A may be summarised as follows. A maintenance charge may be lawfully increased if:

- it does not become greater than

* the adjusted maintenance charge, in accordance with movements in the consumer price index ('CPI') as provided for in reg 8A, plus

* the amount that represents rates, taxes or charges in respect of retirement village land or its use, plus

* the amount that represents salaries or wages, payable in accordance with an award, if paid to a manager or to a person employed in connection with the retirement village; or

- the residents or the residents' committee approve the increase.

20. It is common ground that neither the residents nor the residents' committee have approved any increase in the service fee payable to Seacliff for the year 2012-2013 or since.

21. It is also obvious that the increased service fee for the year 2012-2013, set following an increase in the budget from $70,366.31 for 2011-2012 to $160,491.00 for 2012-2013, could not be explained by reference alone to movements in the CPI.

22. Seacliff has sought to justify the increase by relying on s 38(5). It says that the rates, taxes and charges payable in relation to unit 1, which it provides for the on-site manager's accommodation, and the salary paid to and other benefits provided to the on-site manager, explain the increase.

The Issues

23. The issues that arise in the two proceedings are set against that legislative background. It is convenient to summarise together the defences that the Tomans and Ms Canny have put forward in the Seacliff proceeding, the claims they are making in the Toman proceeding and other grievances that they have expressed.

(a) *Only CPI increases in the service fee are permitted*. The service fees that Seacliff has charged since 1 October 2012 are greater than it has been entitled to charge, as an adjusted maintenance charge, under the Act. Since 1 October 2012 they have been paying to Seacliff a monthly amount that represents the monthly fee that they were paying in 2011-2012 increased in proportion to movements in the CPI. In the circumstances of this retirement village, that is the only increase to a maintenance charge that Seacliff is entitled by law to make each year.

(b) *The Aged Care Award does not apply*. Although by law a retirement village manager like Seacliff is entitled to increase its maintenance charge each year not only by virtue of CPI increases but also in accordance with salaries if paid under an industrial award, Seacliff cannot do so because there is no applicable industrial award. Since 1 October 2012 Seacliff has maintained that the Aged Care Award 2010 ('the award') governs the salary payable to the on-site manager and the benefits that must be provided to the on-site manager under 'sleepover' provisions in that award, and that the increased maintenance charges have taken into account the salary and the benefits. But, say the Tomans and Ms Canny, the Aged Care Award 2010 is not applicable and Seacliff has no legal obligation to pay or provide such salary and benefits and thus had no right to increase the maintenance charges by reference to those things.

(c) *Budgeted items are not Award items*. If the Aged Care Award does apply, some of the items in the budgets for 2012-2013 and 2013-2014, on the basis of which Seacliff has set its services fees, cannot be justified by reference to the need to comply with the provisions of the award. To that extent, the increased maintenance charges went beyond what was permitted by law.

(d) *The on-site manager need not be there '24/7'*. Seacliff provides an on-site manager on the basis that someone is present at the village to attend to the residents' needs all the time. It does this by providing accommodation to the on-site manager and by engaging 'relievers' who deputise for her when she is absent on work breaks or on leave or for other reasons. The parties have referred to this state of affairs as management '24/7' that is to say, for 24 hours a day, 7 days a week. The Tomans and Ms Canny say that Seacliff is not obliged to provide

management ‘24/7’ and its choice to do that and incur the unnecessary costs of accommodation and ‘relievers’ has impacted upon the maintenance charge to the residents. They are asking me to declare, in the Toman proceeding, that Seacliff’s obligation does not include an obligation to provide one on a ‘24/7’ basis. The factual findings, were I to make them, that would precede the declaration would bear upon the service fees issue too.

(e) *Financial information is not detailed or properly audited*. In recent years Seacliff has not presented to the residents’ annual meeting a financial statement that shows details of all items of expenditure on the provision of Seacliff’s services; it has merely presented a budget without any details. Moreover, there has been no proper auditing of the budgets before they are presented, let alone an auditing of any detailed financial statement. Auditing has taken place after the event. The Tomans and Ms Canny are asking me to find and declare that Seacliff has not complied with its legal obligations with regard to financial statements and to auditing.

(f) *The ‘Smart Caller’ system is unnecessary*. Under the management agreements Seacliff is obliged to provide an emergency call system for the residents. At the end of June 2010 it replaced what had been the emergency call system, which had been available to all residents, with a new ‘Smart Caller’ system which is available only to those residents who choose to have it and pay a small additional fee for doing so. The Tomans do not have it. They say that Seacliff would fulfil its contractual obligations more satisfactorily and cheaply if it provided a different system.

(g) *Not providing an owners corporation manager is a breach of contract*. Until early 2009 Debra Stone, an officer of Seacliff, was the owners corporation manager. She did not charge a fee for her services in that capacity. In early 2009 Ms Stone resigned as owners corporation manager. The unit-owning residents, members of the owners corporation, appointed as its manager the firm which is now called Campbell Corporate Services. That firm charges a fee. So the unit-owning residents now pay both a service fee to Seacliff and an additional owners corporation fee, involving those residents in greater expense than they bore when Debra Shaw was the owners corporation manager. There is a dispute as to whether Debra Stone, or the unit-owning residents, instigated the change of owners corporation manager. The Tomans and Ms Canny claim that Debra Stone’s resignation as manager, and Seacliff’s non-provision of owners corporation management services since her resignation, is a breach of contract on Seacliff’s part. They ask for a declaration accordingly.

> 24. The issues that arise for a determination as to what amount, if any, the Tomans and Ms Canny owe to Seacliff, and as to whether the findings and declarations that they seek ought to be made, are therefore as follows:

(i) Is Seacliff acting accordance with its contractual obligations by employing an on-site manager who is at the village ‘24/7’, and, if not, is Seacliff entitled to impose service fees on the basis that the on-site manager is there ‘24/7’?

(ii) Does the Aged Care Award 2010 apply to the employment of the on-site manager? If so, are the remuneration paid and benefits provided to the on-site manager justifiable by reference to the award, and properly included in the calculation of a maintenance charge?

(iii) Are the increased maintenance charges from 1 October 2012 onwards greater than are permitted by law?

(iv) Have the financial information that Seacliff has provided to residents from 1 October 2012 onwards, and the auditing of that information, met Seacliff's legal obligations?

(v) Should Seacliff be providing an emergency call system that is different from the 'Smart Caller' system?

(vi) Is Seacliff in breach of contract by no longer providing, through one of its officers, owners corporation management services?

25. I proceed to deal with those issues, but in a different order from the logical order (so it seems to me) in which they appear in the previous paragraph. Before I do so, however, I ought to give an explanation for the presence of other parties in the two proceedings at various times and for the procedure that was followed during the hearing.

The Other Parties

26. The Seacliff proceeding was filed in the Owners Corporations List. At its outset there were two applicants, Seacliff and Tidak, and one respondent, the owners corporation. It involved an owners corporation dispute, at least as between Tidak (a unit owner) and the owners corporation.[3]

27. Later, on Seacliff's application, 17 unit-owning residents (including the Tomans and Ms Canny) were joined as respondents to the Seacliff proceeding.[4] All the joined residents had been paying only part of the service fees that Seacliff had been charging them since 1 October 2012. Seacliff joined those respondents for the purpose of claiming the fees allegedly owed.

28. The Toman proceeding was filed in the Civil Claims List. At the outset there were only two applicants, Mr and Mrs Toman. Seacliff was the respondent. Seven other residents later applied to be joined as co-applicants. They were.[5]

29. The two proceedings were case-managed together, with a view to their being heard together, as they were.

30. Following a compulsory conference in the two proceedings, the claims that Seacliff and Tidak had made against the owners corporation in the Seacliff proceeding were settled. The Seacliff proceeding continued against the resident respondents only.[6] The owners corporation became an interested party, not a respondent.[7] Even though the Seacliff proceeding then no longer involved any owners corporation dispute, but was a civil claim for fees, for administrative convenience it remained in the Owners Corporations List.

31. Before the hearing eventually began, all claims that the residents – other than the Tomans and the Ms Canny – and Seacliff had had against each other were settled. A settlement involving some of the residents occurred shortly before the hearing date. A settlement with others occurred following a compulsory conference in both proceedings held the day before the hearing date.[8]

32. So it was that, when the two proceedings came on for hearing on 17 March 2015, the only parties who had outstanding claims against each other were Seacliff on the one side and the Tomans and Ms Canny on the other.

The Hearing

33. At the hearing Mr Jones of Counsel appeared for Seacliff. Mr Toman represented himself, Mrs Toman and Ms Canny.
34. During the case-management process I had made directions[9] as to the procedure that was to be followed during the hearing. The procedure was unusual. In accordance with those directions,

- (a) Seacliff adduced evidence in support of its claim for fees in the Seacliff proceeding;
- (b) Mr Toman's cross-examination of the principal witnesses who gave that evidence was deferred;
- (c) Mr Toman, who was the only witness on his side, gave his evidence in chief in both proceedings, then was cross-examined;
- (d) By way of a rebutting case in the Toman proceeding, Seacliff adduced further evidence;
- (e) Mr Toman then cross-examined witnesses who had given evidence for Seacliff, either in relation to the claim for fees or during Seacliff's rebutting case;
- (f) The parties gave their final addresses.

35. At the time that I had made directions as to the procedure to be followed during the hearing, the active parties still included residents other than the Tomans and Ms Canny. Some residents who were then parties were represented by a lawyer, some were represented by a person who was not a lawyer, and the Tomans and Ms Canny were self-represented. I made those directions so that the residents who were not represented by a lawyer would be spared the task of putting their case thoroughly to Seacliff's witnesses during cross-examination; their case could emerge during their evidence in chief, and Seacliff could present a rebutting case. I considered that the hearing would be fairer and more efficient if it were to proceed in that fashion.
36. I allowed Seacliff to depart a little from that procedure. On the second day of the hearing, while Seacliff was still presenting its case in the Seacliff proceeding, several residents of the village attended the hearing and were called to give evidence that described the benefits that they gained from the on-site manager being at the village '24/7'. Mr Toman cross-examined each of them at that stage.
37. The other witnesses for Seacliff were Lori Stone, Timothy Stone, Cassandra Rhodes and Debra Stone: Lori Stone and Timothy Stone during both Seacliff's initial case and during its rebutting case, Cassandra Rhodes during the initial case only, and Debra Stone during the rebutting case only. Mr Toman cross-examined Lori Stone and Timothy Stone during the course of the rebutting case. He did not seek to cross-examine the others. I allowed Mr Toman to interrupt the rebutting case, to re-open his case and to give further evidence. I also allowed him to cross-examine further some of the resident witnesses who had given evidence earlier.
38. As I mentioned above I allowed Seacliff to amend its application in the Seacliff proceeding so that the amounts it was claiming were increased. Mr Toman did not oppose the application to amend.
39. On the fourth day of the hearing Mr Toman made an application for amendment of the claim in the Toman proceeding so that it included a claim for recovery of fees paid before 1 October 2012, which he wanted to allege had been overpaid. Seacliff opposed this application. I refused it and gave oral reasons for the refusal. At the end of these written reasons I shall repeat those oral reasons.
40. The hearing concluded on the fifth day. I reserved my decision in both proceedings.

The On-Site Manager

41. At least since 2002 there has been at the retirement village an on-site manager, employed by Seacliff, who has lived in unit 1 – accommodation provided by Seacliff, by arrangement with Tidak, unit 1's owner – and has been available there on a '24/7' basis – for 24 hours a day, 7 days a week – to provide whatever assistance residents may require. Until 8 July 2012 Theresa Musgrove had been the on-site manager. After she had resigned, Peter Harman was engaged in her stead. He was the on-site manager for about a year. From July 2013 to 2 October 2013 there was a temporary relieving on-site manager. Cassandra Rhodes, the present on-site manager, began her employment on 2 October 2013. She is present in unit 1 and available on a '24/7' basis, but has two 8-hour breaks every 7 days and 2 weeks' annual leave. A reliever deputises for her during those times.

42. Mr and Mrs Toman and Ms Canny bought units in the village, and signed management agreements, in 2005. When they did so they knew, or ought to have known, that there was an on-site manager who was available '24/7' and that her salary and accommodation costs would be a constituent of the service fee that was payable under the management agreement.

43. They contend, however, that the presence of an on-site manager '24/7' is unnecessary and that remuneration and accommodation of an on-site manager on that basis unnecessarily inflates the service fees that Seacliff is claiming from them. They are not alone in that opinion. In October 2013 (after these two proceedings had been commenced) a ballot of the members of the owners corporation produced a majority vote against the idea of a '24/7' on-site manager. That was Mr Toman's evidence, which Seacliff did not dispute.

44. By contrast, five residents gave evidence at the hearing which was strongly supportive of the idea of a '24/7' on-site manager and which described the benefits that they say they gain from that state of affairs. Two of them gave evidence that one of the facts that induced them to become residents of the village was the knowledge and comfort that there was an on-site manager there '24/7'. Most of them were lessee-residents, not unit-owners, so they were not members of the owners corporation.

45. The emergency call system which has operated at the village from time to time has always been connected to unit 1 where the on-site manager lives. Ms Rhodes and other witnesses gave evidence of how this has enabled her to deal with medical emergencies, actual or feared, that have occurred at night time, and with bouts of anxiety that residents have had. Various of the five resident witnesses gave evidence of particular assistance that Ms Rhodes has given them. The most striking piece of evidence in that regard was that of Francis Binsack, a resident with bad eyesight, who told of the help that Ms Rhodes had given him with his banking, with his computer and with international calls that he needed to made to pursue a compensation claim.

46. Mr Toman argued that although the management agreement required Seacliff to employ a manager it did not require Seacliff to employ an on-site manager on a '24/7' basis. Clause 1(a) and (j) of the management agreement provides:

> 1. (a) The Management Company shall employ a Manager (hereinafter called "the Manager") to manage and administer the communal facilities of Seacliffs, to attend to the comfort and all reasonable and proper requests and demands of the residents thereof and to ensure that the residents enjoy such reasonable privacy and quiet possession and enjoyment of their unit and the communal facilities as is consistent with the physical characteristics of a

retirement community complex designed for the residence of persons of fifty five (55) years and over.

...

(j) The Management Company agrees to maintain an effective 24 hour emergency call system for use by the Occupant from the Unit to the Manager's Unit.[10]

The management agreement does not define 'the Manager's Unit' or refer to it otherwise than in the definition of 'the Service Fee'. That expression is defined as meaning the Occupant's proportion of the estimated total expenses and outgoings of Seacliff for each financial year, which expenses and outgoings include:

(ix) the salary or fee of the Manager appointed by the Management Company to manage Seacliffs.

(x) The cost of administration and general management of Seacliffs and any other expenditure reasonably and properly incurred by the Management Company in the operation of Seacliffs including all rates taxes charges duties fees and other like outgoings on the unit occupied by the Manager.

> 47. It is true that clause 1(a) of the management agreement, read in isolation, does not impose upon Seacliff an obligation to ensure that the manager lives on site or is available '24/7'. But the clause should not be read in isolation. The management agreement should be read as a whole. When it is, the references to a unit being occupied by the manager, and to the maintenance of a '24 hour emergency call system' to the manager's unit, would lead reasonable persons in the position of the parties at the time that the management agreement was entered into[11] to conclude that it was the parties' intention that the manager, whom Seacliff was obliged to employ, should be occupying a unit in the village and should be able to respond to an emergency call made at any time of a day.
> 48. Accordingly, I reject the submission that in employing an on-site manager on a '24/7' basis Seacliff is going beyond what it is contractually obliged to do. On the contrary, I consider that the proper construction of the maintenance agreement is that it requires Seacliff to employ a manager who is given the resources to be able to respond to an emergency call made by a resident at any time of a day. Employing a manager, accommodating the manager in a unit on the village, connecting the emergency alarm system to the unit, and ensuring that the manager is present '24/7' to be able to respond to the call, is acting in a way consistent with that requirement.
> 49. Even if the maintenance agreement does not expressly oblige Seacliff to employ a manager on that particular basis, I see nothing unreasonable in its doing so. The presence of an on-site manager who is available '24/7' seems to me to be entirely consistent with proper attendance to needs of elderly residents that arise both within and outside normal business hours. It is not over-servicing. The Tomans and Ms Canny, and other residents, may not have a particular need for an on-site manager, but I am persuaded that other residents have had, and still have, that particular need.

The Aged Care Award

50. The salary that Seacliff paid to the on-site manager Theresa Musgrove in the financial year 2011-2012 was $35,256.90. It paid that salary to her under a written contract of employment. Seacliff did not have any regard to the provisions of any industrial award when it entered not the contract of employment and set the amount of the salary.

51. When Ms Musgrove gave notice on 18 May 2012 that she would be resigning on 18 July 2012, Seacliff engaged a firm of human relations consultants to seek a replacement for her. To check what salary level ought to be offered, Lori Stone of Seacliff made enquiries of the Fair Work Commission. Following those enquiries, she formed the belief that the salary had to accord with the Aged Care Award 2010, a Commonwealth industrial award. So when Peter Harman was sourced as the replacement, Seacliff offered him a salary of $50,000.00 per year and entered into a contract of employment with him, basing the salary on the Aged Care Award. The budget that Seacliff prepared for 2012-2013, and offered to the residents for approval, included an allowance for $50,000.00 for a manager's salary.

52. Mr Harman lasted for only a year. Seacliff engaged a relieving manager until 2 October 2013 when Ms Rhodes' employment commenced, she also having been sourced by the human relations consultant. Seacliff paid the relieving manager in accordance with what it believed its obligations were under the award, and entered into a written contract with Ms Rhodes for payment of a salary to her of $52,000.00 per year, a figure it believed accorded with the requirements of the award.

53. The contracts of employment with Mr Harman and Ms Rhodes were in identical terms except for the salary figure and for dates. Clause 1 of each contact contained the following definition:

1.17 **"Total Remuneration Package"** means the value of the total annual remuneration package including cash salary and employment benefits, referred to in Clause 3 and Clause 4 or as varied in accordance with this Agreement;

Clause 1.3 defined 'Award' as meaning the Aged Care Award 2010 as amended from time to time.

54. Clause 3.1 provided for the payment of an annual salary: in Mr Harman's case, $50,000.00, and in Ms Rhodes' case $52,000.00.

55. Clauses 3.2, 3.5, 3.7 and 3.8 provided:

3.2 The Manager's salary does not include the cost of engaging a relief Manager as provided in paragraph 2 of the Schedule to this Agreement but includes a 'sleepover' allowance as provided in the Award in recognition of the employment requiring the Manager to be a resident Manager and reside in the Village on a full time basis.

...

3.5 The Employer will make superannuation contributions to the Manager's nominated superannuation scheme (which must be a complying fund in accordance with the occupational superannuation standards). As at the date of this agreement the employer contributions (which must not be less than the minimum requirements under the *Superannuation Guarantee Act* 1992 (Cth)) are 9% of the cash salary. Superannuation contributions paid by the Employer into an approved fund in accordance with superannuation guarantee legislation form part of the Total Remuneration Package.

...

3.7 The employer undertakes to pay the Total Remuneration Package in relation to the performance of work for the duration of the Manager's employment with the Employer.

3.8 Except as expressly provided to the contrary in this Agreement, the Total Remuneration Package is provided to the Manager and taken by the Manager as full compensation for any entitlement the Manager may have under the Award or other instrument created under a law of a State or a law of the Commonwealth, or any entitlement payable under a law relating to the Manager's work, including but not limited to entitlements relating to overtime, wages, allowances, loadings, penalties and leave loading.

56. Clause 4.1 provided:

4.1 In addition to the remuneration referred to in paragraph 3 above the Manager will be provided with a two bedroom unit and garage within the Village for the use of the Manager and the Manager's immediate family during the continuation of this Agreement (**"the accommodation"**). Seacliff will, in addition, pay utilities for the accommodation.

57. The Tomans and Ms Canny argue that the Aged Care Award 2010 has no application to the on-site manager, there was no need for Seacliff to engage on-site managers in 2012-2013 and thereafter at a salary that was required under the award or to agree to provide other benefits in accordance with the award, the budgets fro 2012-2013 and 2013-2014 allowed unnecessarily for those things, and so the service fees calculated in accordance with those budgets have been too high.

58. Seacliff tendered in evidence a copy of the Aged Care Award 2010 published by the Fair Work Commission and expressed to have incorporated all amendments up to and including 8 January 2015. The award is expressed to govern remuneration and conditions in the aged care industry. In the copy which Seacliff tendered, clause 3.1 of the award defines that expression:

aged care industry means the provision of accommodation and care services for aged persons in a hostel, nursing home, aged care independent living units, aged care serviced apartments, garden settlement, retirement village or any other residential accommodation facility.

Mr Toman tendered in evidence an extract from another copy of the award which in clause 3.1 had a slightly different definition of 'aged care industry'. It added the words 'including in the home' after the words 'accommodation facility'. It may be that his copy represented the version of the award that was current in July 2012 when Ms Musgrove's resignation took effect and Mr Harman was engaged as the on-site manager; I cannot say whether that is so, but I shall assume that it is.

59. As I understood Mr Toman's argument, it was that the definition of 'aged care industry' restricts its meaning to the provision of high-level care to aged persons, usually by means of qualified nursing staff, and excludes the provision of care to aged persons who can look after themselves; Seacliff retirement village is not a place that provides high-level care; it provides assistance, not care, and so is not in the aged care industry and Seacliff's employees are not governed by the award. The words 'nursing home' and 'including in the home' in the definition might support such an argument,

but nothing else in the definition does. The presence of the words 'aged care independent living units' specifically tells against it. Seacliffs retirement village meets the description of 'retirement village' in the definition. I consider that it at all material times has been engaged in the aged care industry within the meaning of that expression in the award.

60. Clause 22.9 of the award is headed 'Sleepovers'. So far as presently relevant, it provides:

- **22.9 Sleepovers**

Employees may, in addition to normal rostered shifts, be required to sleepover. A **sleepover** means sleeping in at night in order to be on call for emergencies.

The following conditions will apply to each night of sleepover:

(a) The span for a sleepover will be not less than eight hours and not more than 10 hours on any one night.
(b) Employees will be provided with free board and lodging for each night on which they are required to sleepover.
(c) Employees will be provided with a separate room with a bed and use of staff facilities or client facilities where applicable.
(d) In addition to the provision of free board and lodging for sleepovers, the employee will be entitled to a sleepover allowance of 5.2% of the standard rate for each night on which they sleep over.
(e) ...
(f) An employee directed to perform work other than that of an emergency nature during any sleepover will be paid the appropriate hourly rate from the start of the sleepover to the end of the non-emergency work, or from the start of the non-emergency work to the end of the sleepover, whichever is the lesser, in addition to the sleepover allowance in clause 22.9(d).
(g) All time worked during any sleepover will count as time worked and be paid for in accordance with the following provisions:

- (i) All time worked by full-time employees during any sleepover will be paid for at overtime rates.
- (ii) ...
- (iii) All time worked by casual employees during any sleepover will be paid for at ordinary pay plus applicable shift and weekend penalties; provided that if the total number of hours worked in the week exceeds 38 hours, or exceeds 76 hours in the fortnight, then the excess hours worked in that week or fortnight will be paid for at overtime rates.

...

The clause not only justifies Seacliff's inclusion in the on-site manager's salary a sleepover allowance, but also provides for the rates of pay for 'relievers' who act as on-site manager while the permanent one is absent.

61. Mr Toman also submitted that, even if Seacliff was in the 'aged care industry' as the award defines it, Seacliff could have chosen to make an enterprise agreement with its on-site manager, similar to the contract which it had had with Ms Musgrove, rather than bind itself to pay salary and provide benefits in accordance with the award. He pointed out, correctly, that clause 4.3 of the award provides that the award does

not cover employees who are covered by a modern enterprise award or an enterprise instrument.

62. Matters of industrial law are ordinarily beyond this Tribunal's jurisdiction and purview. I think that is not my function to decide whether Seacliff could have legally, or should have, made enterprise agreements with Mr Harman and Ms Rhodes, or whether either the salaries or the total remuneration packages actually paid and provided under their contracts of employment were such as Seacliff was required, under the award, to pay or to provide. I find that it was reasonable for Seacliff, after its officer had made enquiries of the Fair Work Commission, to decide to enter into contracts of employment that were fashioned to comply with the award.

63. In view of the terms of the contracts of employment set out in paragraphs 53 to 56 above, I consider that it is the 'total remuneration package' paid or provided under each contract, not just the 'salary' part of the package, which meets the description 'salary or wages paid in accordance with the award' in s 38(5)(b) of the Act. So I conclude that the stipulation in s 38(2), that a resident is not required to pay a maintenance charge to the extent to which it is greater than the adjusted maintenance charge, does not apply to:

- (a) the salary paid to the on-site manager, calculated in accordance with the award and providing for a sleepover allowance;
- (b) the reasonable cost to Seacliff of providing the 'separate room with a bed' that, under the sleepover provision in the award, it is required to provide to the on-site manager, and of otherwise providing the 'total remuneration package' that it has agreed to provide to the on-site manager; and
- (c) the reasonable cost to Seacliff of relievers to whom the sleepover provision in the award applies.

The 'Smart Caller' System

64. In September 2009 Seacliff notified the residents of its intention to replace the existing emergency call system. It recommended replacing it with a new system called 'Smart Caller'. At the end of June 2010 it disconnected the old system and provided instead the new 'Smart Caller' system which had been installed. These events were one of three series of events that have caused friction between Seacliff and some of the residents. The second, which began at about the same time as the first, was the series of events that led to the resignation of Debra Stone as owners corporation manager and the appointment of a new owners corporation manager. The timing suggests that those two series of events were connected, but there was no evidence of a connection. The third series of events followed Seacliff's presentation of a greatly increased budget for the year 2012-2013 and led to greatly increased service fees.

65. The emergency call system that operated in the village before June 2010 was one that had a wired connection from each resident's unit to the on-site manager's unit. A resident could operate the system by pressing a red button. At some stage the system was augmented by the provision of an electronic pager to each resident.

66. In 2009 Seacliff formed the view that the system needed to be replaced. Timothy Stone gave evidence that there were two reasons. The first was that changes in radio frequencies were causing interference with the pagers and hampering their use. The second was that the copper wiring for the system was corroding and was threatening to fail. How Mr Stone arrived at the second of those reasons was not

obvious. There was no evidence of there having been any expert examination of the wiring.

67. The 'Smart Caller' system is not hard-wired. A resident who has an emergency is able to register it with an external monitoring agency, INS Monitoring ('INS'), by activating a call button in the resident's unit or on a necklace or pendant that the resident wears. Once the emergency is registered, INS telephones the resident and a nurse speaks to the resident on a speaker-phone; or, if the resident does not respond to the call, INS telephones the on-site manager on a dedicated mobile telephone. The registration of the emergency also operates a blue strobe light in the driveway close to the resident's unit.

68. Unlike the previous emergency call system, the 'Smart Caller' system is not available to all residents. It is available only to those residents who opt into the system by paying a proportion of its installation cost and by paying, on top of the service fee, an additional $2.20 per week for access to the system. Those who do not opt into the system are not required to pay anything at all towards it. The Tomans have not opted into the system. I infer that Ms Canny has not, because she has not been paying the additional $2.20 per week.

69. Those residents who were from time to time active parties in these two proceedings filed material that expressed a grievance about the old system and the provision of an optional new system. So during the hearing a good deal of evidence was led on the topic. At the conclusion of his evidence, however, Mr Toman told me that he was not asking me to make any declaration or order about the matter, and that he had simply wanted to explain the grievance. I have inferred that he wanted me to make findings that Seacliff could and should provide a better and cheaper emergency call system, but to go no further than that.

70. I think that the conduct of persons on both sides of the divide on this matter merits some criticism. Seacliff began reasonably enough by circularising the residents on 8 September 2009 with options for the replacement of the emergency call system, recommending the 'Smart Caller' option, but informing them that if that system was adopted they would have to pay a proportionate part of the cost of its acquisition and a small additional weekly sum on top of the service fee. When, however, on 15 November 2009 22 of the residents signed letters, in identical terms, addressed to Seacliff which expressed opposition to the proposal to change to the 'Smart Caller' system and objection to its cost, Seacliff pressed on regardless, giving an unfortunate impression that it knew better than the residents what was good for them. The objecting residents made matters worse by threatening to deny access to their units when it was sought to install the new system. That threat prompted a letter to them from Seacliff's solicitors. A more conciliatory 'discussion paper' that Mr Toman circulated to the residents and to Seacliff on 5 May 2010 about other options for an emergency call system was met with Seacliff's response on 11 June 2010 that each resident could choose to have, or not to have, the use of the new system but the old system would be discontinued as from 1 July 2010.

71. At all events, by now 18 of the 30 residents have opted into the 'Smart Caller' system which became operative on 1 July 2010. Of those 18, 3 opted into the system while they were negotiating for a sale of their units to Tidak and a long lease back from Tidak, so their option may not have been altogether uninfluenced by Seacliff and Tidak. Those who have opted in have contributed towards the cost of the system's acquisition and pay, as well as the monthly service fee, a small additional amount each month to Seacliff which matches the usage fee that INS Monitoring charges to

Seacliff. Those, like the Tomans, who have not opted in are unaffected financially by the presence and operation of the 'Smart Caller' system.

72. Mr Toman has resorted to his own personal system, one which depends upon ownership of a Smartphone. That would not be a suitable alternative emergency call system for the village because it would require every resident to own a Smartphone. Other residents who qualify for the provision by the local municipal council of a free emergency call system have taken advantage of it. My understanding of the evidence is that nobody has been left without any means of making an emergency call. It is not being contended that Seacliff is in breach of its contractual obligation to provide an emergency call system to each resident. What is being contended is that Seacliff could and should do it better.

73. The history of the 'Smart Caller' system is water under the bridge. Residents who are now very close to a majority, if they are not an absolute majority, are using it. Nobody is alleging that it does not work well. Ms Rhodes' evidence was that it is working very well indeed. Whether it should be changed to something else is for the majority of residents to urge upon Seacliff if they see fit to do so. Its introduction and use do not affect the budget upon which service fees are based or the service fees that the Tomans and Ms Canny are complaining about. In those circumstances I see no need to make any findings on the subject or to do anything else.

Budget and Service Fees 2012-2013

74. Table A, set out below, shows in the right column the budget for the village for the financial year 2011-2012. The two other columns compare the same budget items for 2010-2011 and the actual expenditure on those items in 2010-2011.

TABLE A

2010/2011 Budget Yearly $	**2010/2011 Actual Yearly $**		**2011/2012 Budget Yearly $**
6,000.00	6,000.00	Administration Service Fees	6,216.00
120.00	151.41	Bank Fees	156.86
800.00	933.29	Rates	966.89
3,181.82	3,181.82	Insurance	3,296.37
545.45	-	Legal + Accounting Fees	5,000.00
374.55	181.82	Carpet Cleaning	-
140.00	-	Fireplace Maintenance	-
187.27	-	Firewood	-
1,181.82	1,126.68	Petty Cash	-
1,727.27	700.07	Telephone	-
218.18	94.37	Internet	-
772.73	577.27	Window Cleaning	-
34,032.00	34,123.61	Wages	35,256.90

12,400.00	17,197.92	Relievers	12,656.00
3,063.00	3,047.90	Superannuation	3,173.12
1,014.55	1,116.00	Workers Compensation	1,156.18
1,656.00	1,656.00	Provision for LSL	2,488.00
67,414.64	**70,088.16**	**TOTALS**	**70,366.31**

75. On the basis of the budgeted figure of $70,366.31 for 2011-2012, Seacliff set the monthly service fee for that year under each maintenance agreement for the Tomans and for Ms Canny at $215.00. This was not controversial, at least at the time. The Tomans and Ms Canny paid their monthly service fees at that rate.

76. Table B, set out below, shows the budget for the village for the financial year 2012-2013, the actual expenditure on those budgeted items in that financial year, and the budget for the financial year 2013-2014.

TABLE

	Budget 2012/2013 $	**Actuals 2012/2013 $**	**Budget 2013/2014 $**
Admin Service Fee	6,315.00	6,315.00	6,500.00
Bank Fee	120.00	142.74	150.00
Rates	1,014.00	1,029.15	1,200.00
Insurance #	3,553.00	0.00	0.00
Legals #	20,000.00	0.00	0.00
Accounting Fee	3,000.00	2,172.50	2,225.00
Audit Fee	2,645.00	2,645.00	1,500.00
Printing & Stationery, CE	700.00	764.74	782.00
Petty Cash	1,200.00	657.65	672.00
Misc Expenditure	-	2,964.74	3,035.00
Fireplace Maintenance	140.00	0.00	143.00
FireWood	350.00	0.00	358.00
Telephone	1,400.00	1,495.91	1,535.00
Internet	243.00	217.68	230.00
Water	255.00	727.40	750.00
Electricity + Gas	1,600.00	952.91	980.00
Unit 1 OC Fees (Rmbsmnt)	2,500.00	2,565.32	2,650.00
Employment Costs			
Salary	50,000.00	49,673.45	52,000.00
Rent (Unit 1)	18,720.00	13,736.67	19,170.00
Relievers	34,130.00	17,791.50	26,855.00

Superannuation	4,500.00	4,008.83	4,810.00
Workers Comp	1,806.00	592.49	1,344.00
LSL provision	850.00	5,232.31	885.00
HR Costs	5,450.00	5,450.00	5,500.00
Total	**160,491.99**	**119,135.99**	**133,274.00**

77. On the basis of the greatly increased budget of $160,491.00 for 2012-2013 (in comparison to $70,366.31 for 2011-2012), Seacliff set the monthly service fee for that financial year under each maintenance agreement for the Tomans and for Ms Canny at $489.22, commencing from 1 October 2012. They refused to pay that amount. They continued to pay monthly but only $219.97 per month, claiming that that was the only increase from $215.00 per month that was justified by CPI movements in accordance with reg 8A.

78. From a comparison of the budgets for 2011-2012 and for 2012-2013 it is apparent that the principal items which created a large increase in the budget were:

- 'wages/salary', increased from $35,250.90 to $50,000.00;
- 'relievers', increased from $12,656.00 to $34,130.00;
- there was a new item, 'legals', in 2012-2013, of $20,000.00;
- there was a second new item, 'rent (unit 1)' in 2012-2013, of $18,720.00; and
- there was a third new item, 'HR Costs' [the fee of the human relations consultant] in 2012-2013, of $5,450.00.

79. Following negotiations with the residents in 2013, Seacliff nominally removed from the budget for 2012-2013 the items of $20,000.00 for 'legals' and $3,553.00 for 'insurance' so that the budgeted figure was adjusted to $136,938.00 and the monthly service fee was reduced from $489.22 to $417.86 as from 1 July 2013. In Seacliff's customer ledger for the service fees each resident was given a credit for the difference between those two monthly figures for the period from 1 October 2012 to 1 July 2013. So it is fair to regard the budgeted figure for 2012-2013 as having been $136,938.00, not $160,491.00.

80. Seacliff rendered numerous documents which satisfactorily established that it had actually expended each amount listed under the column headed 'Actuals, 2012-2013' in Table B for the item to which that amount related.[12]

81. Some of the items are uncontroversial. Some need an explanation. Mr Toman positively challenged some. For the purpose of my deciding whether the monthly service fee of $417.86 that Seacliff eventually charged during 2012-2013 was properly charged, the questions that need to be considered for each item in the 2012-2013 budget are:

- (a) Is the item properly part of an estimated total of expenses and outgoings for the village, and, in particular, properly part of the cost of administration and general management of the village or other expenditure reasonably and properly incurred by Seacliff, so that it is the proper basis for a 'service fee' as defined in the management agreement?
- (b) Is the item one to which, by virtue of s 38(5) of the Act, the limitation of a resident's liability for a maintenance charge to the 'adjusted maintenance charge' does not apply?
- (c) Is the amount estimated for each item reasonable?

82. It is convenient to repeat that by the maintenance agreement the 'occupant' is required to pay a service fee to Seacliff, and that the maintenance agreement defines

'service fee' as meaning (in substance) the occupant's proportion of the village's total and expenses and outgoings for each financial year and in particular:

- (ix) the salary or fee of the Manager appointed by the Management Company to manage Seacliffs.
- (x) The cost of administration and general management of Seacliffs and any other expenditure reasonably and properly incurred by the Management Company in the operation of Seacliffs including all rates taxes charges duties fees and other like outgoings on the unit occupied by the Manager.

83. *Administration service fee*. This fee represents part of the salary which Seacliff pays to Lori Stone for her services in administering the village. She is paid a salary by both Tidak and Seacliff. She looks after the village's books of account and liaises with the on-site manager. Her evidence was that, years ago, the residents approved the arrangement whereby in their service fees they would meet part of the cost to Seacliff of her salary, that part having been fixed initially at $500.00 per month and increased in subsequent years by reference to CPI increases. Seacliff did not tender any document which supported her evidence in that regard, but I see no reason not to accept it. I do. I also accept her evidence of the work she does towards administration and general management of the village and that the sum of $6,500.00 estimated in the budget for 2012-2013 and eventually paid to her,[13] was a reasonable one. It was properly included in the service fee for 2012-2013.

84. *Accounting and auditing*. Under the Act, the retirement village manager is required to prepare and submit to each annual general meeting of the residents a financial statement giving details of income and expenditure[14] and to have had the financial statement audited by a registered company auditor.[15] The cost of engaging professional accountants and auditors to perform those tasks is a cost of administration and general management which Seacliff reasonably and properly incurred and is properly included in the service fee.

85. The budgeted item for audit fees matches the amount actually paid for audit fees in 2012-2013 and so was reasonable. The budgeted item for accounting fees, $3,000.00, exceeded by about $800.00 the amount actually paid for accounting fees in 2012-2013, but the corresponding amount paid in 2011-2012 was $2,889.00,[16] so the estimate of $3,000.00 for 2012-2013 was reasonable.

86. *Fireplace*. There were budgeted items totalling $490.00 for maintenance of the fireplace in the community centre and for firewood. There was nothing expended on these items in 2012-2013 and there had been nothing allowed for them in the 2011-2012 budget. Moreover the maintenance item would seem to be something that should be covered in the owners corporation fee rather than in a maintenance charge properly included in the service fee. So the budget probably included those items unnecessarily. Nevertheless the amounts are comparatively small and I propose to disregard them.

87. *Telephone and internet*. These items are for a telephone in a room in the community centre which, in 2012-2013, Seacliff used as an office, and for an internet service provider's fee. Communication by telephone and by e-mail are necessary incidents of any business, irrespective of whether Seacliff actually did or needed to communicate with residents by telephone or by e-mail. Budgeting for those items was a budgeting for reasonably and properly incurred expenditure on administration and general management of the village. There was a reasonable equivalence between the amounts budgeted for and the expenditure actually incurred. They were properly included in the service fee.

88. *Salary*. I have already dealt with this matter. An estimate in the budget by reference to the salary payable under the Aged Care Award 2010 was proper. The increase in salary is not taken into account for calculation of the permissible 'adjusted maintenance charge'.

89. *Relievers*. Inclusion of an item in the budget for the cost of engaging suitable persons to relieve the on-site manager during the manager's work breaks or periods of absence was also proper and a matter not to be taken into account for calculation of the permissible 'adjusted maintenance charge'.

90. The estimate of $34,130.00, however, was large. There was no evidence of how or why that figure was arrived at. It was nearly double the amount expended on relievers in 2012-2013: $17,791.00. According to the evidence which is shown in Table A, the amount actually spent on relievers in 2010-2011 had been $17,197.92 and the amount budgeted for 2011-2012 had been $12,656.00. The amount actually spent on relievers in 2011-2012 was only $5,200.00.[17] Nothing in the evidence lent any justification to an estimate as large as $34,130.00 in the 2012-2013 budget. On the evidence I conclude that there was an over-estimate of about $17,500.00.

91. *Superannuation, workers compensation, provision for long service leave*. These items, connected with the employment of the on-site manager, were properly included in the budget: expenditure reasonably and properly incurred. Comparisons of budgets and 'actuals' in Tables A and B show that the estimated amounts for superannuation and for long service leave were reasonable. As for workers' compensation premiums, the estimate of $1,806.00 seems somewhat high in the light of the comparisons. There was no evidence of why it was so high. It appears to have been excessive by about $500.00. Being part of the 'total remuneration package' under the contract of employment of the on-site manager, these items were not to be taken into account for calculation of the permissible 'adjusted maintenance charge'.

92. *Rent*. This item, an allowance of $18,720.00, was introduced into a budget for the first time in 2012-2013. It is a significant reason why the budget for 2012-2013 was so much higher than the budget for 2011-2012 and why the service fees increased from $215.00 per month to $417.86 per month as they eventually became.

93. As the sleepover provision in the award required Seacliff to provide the on-site a manager with a bedroom and free board and lodging, and as the contract of employment of the on-site manager did likewise, in my opinion the provision of those things was part of the on-site manager's 'total remuneration package' under the contract, the cost to Seacliff of providing those things was part of its expenditure reasonably and properly incurred in administration and management of the village and so properly included in the service fee, and the rent was not to be taken into account for calculation of the permissible 'adjusted maintenance charge'.

94. The Tomans and Ms Canny objected to the inclusion of the item in the budget at all. Mr Toman argued that there was no justification for Seacliff's inclusion of the item when in previous years Tidak had never charged Seacliff rent for unit 1 and so there had never been any such item previously. He also produced evidence of Seacliff's having written a letter to a resident in 1992 in which Seacliff said that Tidak would not be charging rent for an on-site manager's occupation of unit 1. He told me, however, that he had not been aware of the letter at the times when he and Mrs Toman had purchased their two units.

95. There was no evidence of Mr and Mrs Toman or Ms Canny or of any other resident having in any way acted to his or her detriment on the basis of any belief, induced by any conduct of Seacliff, that Tidak would never charge Seacliff rent for the on-site manager's occupation of unit 1 or that Seacliff would never include a rent

component in the service fee if Tidak did charge rent. There is no reason in law, in my opinion, why Tidak could not depart from its previous practice and require Seacliff to pay rent for unit 1 in 2012-2103.

96. Lori Stone gave evidence, which I accept, of Seacliff having obtained an estate agent's rental valuation for unit 1 at $23,464.00 per year and of having entered into a lease from Tidak at a rental of $1,560.00 per calendar month, which was 80% of that valuation. The estimate of $18,720.00 for the item of rent in the budget for 2012-2013 was correct. Seacliff commenced to pay the rent on 1 October 2012.

97. *Water, electricity and gas*. These items represent utility charges for unit 1. Again, they were in a budget for the first time in 2012-2013, but their inclusion was justified for the same reasons that the inclusion of an item for rent for unit 1 was justified. Compared to actual expenditure for the items in 2012-2013, the estimate for electricity and gas was an over-estimate but for water was an under-estimate; the errors virtually cancel themselves out, with the result that in combination the estimates were reasonable. These items, like all others related to the on-site manager's occupation of unit 1, are not to be taken into account for calculation of the permissible 'adjusted maintenance charge'.

98. *Rates and owners corporation fees*. These are outgoings for unit 1. Mr Toman did not dispute the inclusion in the budget of an item for rates; it had been in the budget for previous years. The item of owners corporation fees for unit 1 was in the budget for the first time in 2012-2013. For the same reasons as applied to the items for rent and utilities, they were properly included and are not to be taken into account for calculation of the permissible 'adjusted maintenance charge'. Comparison with actual expenditure on rates and on owners corporation fees in 2012-2013 shows that the estimated figures were reasonable.

99. *'HR Costs'*. The decision to engage a human relations consultant to source a replacement for Ms Musgrove as the on-site manager in 2012-2013 led to the inclusion in the budget of the consultant's fee. I confess that my first reaction was to agree with Mr Toman's objection to its inclusion. On reflection, however, I have concluded that it comes within the definition of 'service fee' in the management agreement as being expenditure reasonably and properly incurred by Seacliff in the operation of the village. Although Seacliff budgeted for and incurred a similar expense again in 2013-2014 it is unlikely to recur regularly. Being salary-related it is not to be taken into account for calculation of the permissible 'adjusted maintenance charge'.

100. *'Adjusted maintenance charge' increase*. The items in the budgets for 2011-2012 and 2012-2013 that are not to be taken into account for calculation of the permissible 'adjusted maintenance charge' are:

Item	**2011-2012 $**	**2012-2013 $**
Rates	966.89	1,014.00
Water		255.00
Electricity and gas		1,600.00
Owners corporation fees		2,500.00
Salary	35,256.90	50,000.00
Rent		18,720.00
Relievers	12,656.00	34,130.00

Superannuation	3,173.12	4,500.00
Workers compensation	1,156.18	1,806.00
Long service leave provision	2,488.00	850.00
HR costs		5,450.00
	55,697.09	**120,825.00**

When one bears in mind that the budgeted amount for 2012-2013 eventually became $136,938.30, once the items for 'legals' and 'insurance' were omitted, the comparison between the budgets for 'adjusted maintenance charges' purposes becomes:

	2011-2012 $	**2012-2013 $**
Budget	70,366.31	136,938.30
Less items not to be taken in account	55,697.09	120,825.00
	14,669.22	**16,113.30**

101. While the comparison gives rise to a suspicion that an increase from $14,669.22 to $16,113.30 was greater than was permissible under reg 8A, in the absence of any precise evidence about CPI movements I cannot and do not find that the increase was to an amount greater than the 'adjusted maintenance charge' permissible under reg 8A.

102. *Over-estimates*. Nevertheless, I have concluded that over-estimates in the budget for 2012-2013 meant that the budgeted figure was about $18,000.00 more than it should reasonably have been. It follows that the service fees per unit charged to the Tomans and Ms Canny, based upon the budgeted figure, were $50.00 per month more than they should have been.[18]

Budget and Service Fees 2013-2014

103. Table C, set out below, shows the budget for the village for the financial year 2013-2014 (a column repeated from Table B), the actual expenditure on those budgeted items in that financial year, and the budget for the financial year 2014-2015.

TABLE C

	Budget 2013-2014 $	**Actuals 2013-2014 $**	**Budget 2014-2015 $**
Admin Service Fee	6,500.00	6,500.00	6,695.00
Bank Fee	150.00	399.00	150.00
Rates	1,200.00	1,200.00	1,236.00
Accounting Fee	2,225.00	1,526.00	1,600.00
Audit Fee	1,500.00	1,500.00	1,550.00
Printing & Stationery, CE	782.00	544.00	560.00

Petty Cash	672.00	672.00	692.00
Misc Expenditure	3,035.00	320.00	330.00
Fireplace Maintenance	143.00	0.00	143.00
FireWood	358.00	0.00	358.00
Telephone	1,535.00	1,331.00	1,370.00
Internet	230.00	411.00	425.00
Water	750.00	1,074.00	1,110.00
Electricity + Gas	980.00	2,375.00	2,450.00
Unit 1 OC Fees (Reimbursement)	2,650.00	3,044.00	3,341.00
Salary	52,000.00	44,564.00	53,560.00
Rent (Unit 1)	19,170.00	19,170.00	19,745.00
Relievers	26,855.00	20,604.00	27,660.00
Superannuation	4,810.00	3,826.00	5,088.20
Workers Comp	1,344.00	1,258.00	1,300.00
LSL provision	885.00	885.00	927.00
HR Costs	5,500.00	5,681.00	0.00
Total	**133,274.00**	**116,884.00**	**130,290.20**

104. On the basis of the budget of $133,274.00 for 2013-2014 Seacliff set the monthly service fee for that financial year under each maintenance agreement for the Tomans and for Ms Canny at $407.23 commencing from 1 January 2014. But they have paid $219.97 only per month until 1 March 2014 and then $224.85 per month.

105. The items in the two budgets for 2012-2013 and 2013-2014 are identical. Except for comments about amounts, the comments that I have made above upon items in the 2012-2013 budget apply also to the corresponding items in the 2013-2014 budget. Seacliff tendered numerous documents which established that it had actually expended each amount listed under the column headed ‘Actuals 2013-2014’ in Table C for the item to which that amount related.

106. By and large, a comparison of the budgeted amounts for 2013-2014 with ‘actuals’ both in 2012-2013 (shown in Table B) and in 2013-2014 shows that the estimates in the budgeted amounts were reasonable. Again, however, there has been no explanation for why the estimate for relievers was as high as $26,855.00 when the actual expenditure on relievers was $17,791.50 in 2012-2013 and $20,604.00 in 2013-2014. Using that last figure as a yardstick, I conclude that there was an unreasonable over-estimation to the extent of $6,200.00. Moreover the estimate of $4,810.00 for superannuation appears too high when compared to expenditure of $4,008.83 in 2012-2013 and $3,826.00 for 2013-2014: an over-estimate to the extent of about $1,000.00.

107. The items in the budget for 2013-2014 that are not to be taken into account for calculation of the ‘adjusted maintenance charge’ are:

Rates $ 1,200.00

Water 750.00

Electricity and gas 980.00

Owners corporation fees 2,650.00

Salary 52,000.00

Rent 19,170.00

Relievers 26,885.00

Superannuation 4,810.00

Workers compensation 1,344.00

Long service leave provision 885.00

HR costs 5,550.00

$116,224.00

The budget for 'adjusted maintenance charge' purposes becomes:

Budget $133,274.00

Less items not to be taken

Into account 116,224.00

$ 17,050.00

108. Again, while the increase from $16,113.30 to $17,050.00 gives rise to a suspicion, in the absence of any precise evidence about CPI movements I cannot and do not find that the increase was to an amount greater than the 'adjusted maintenance charge' permissible under reg 81A.

109. Nevertheless, I have concluded that over-estimates for relievers and superannuation in the budget for 2013-2014 meant that the budgeted figure was about $7,200.00 more than it should reasonably have been. It follows that the service fees per unit charged to the Tomans and Ms Canny, based upon the budgeted figure, were $20.00 per month more than they should have been.[19]

Overcharging of Service Fees: The Totals

110. Between 1 October 2012 and 30 December 2013 Seacliff charged the Tomans and Ms Canny $417.86 per month per unit as a service fee, based upon the (adjusted) budget of $136,938.00 for the financial year 2012-2013. I have concluded that this monthly service fee was $50.00 too much. So the total overcharging of the Tomans for the 14 months was $1,400.00 and of Ms Canny was $700.00.

111. Between 1 January 2014 and 30 September 2014 Seacliff charged the Tomans and Ms Canny $407.23 per month per unit as a service fee, based upon the budget of $133,274.00 for the financial year 2013-2014. I have concluded that this monthly service fee was $20.00 too much. So the total overcharging of the Tomans for the 9 months was $360.00 and of Ms Canny was $180.00.

112. From 1 October 2014 onwards the service fee that Seacliff has charged has been based upon the budget of $130,290.20 for the financial year 2014-2015. That budget has not been the subject of evidence in the two proceedings. All I have been told about how the service fee for 1 October 2014 onwards has been set is that it has been set in the same way as in previous years: by dividing the budgeted figure by 12 then by 30 to arrive at the monthly amount per unit. At first sight, therefore, the service fee appears correct. There has been no evidence that could establish that any part of it includes an 'adjusted maintenance charge' that is greater than is permitted by law. My inquiry into the service fees stops at 30 September 2014.

113. I conclude that the amount that Ms Canny owes to Seacliff is $4,950.63, calculated as follows:

Amount claimed $ 4,950.63

Overcharge (1) $ 700.00

Overcharge (2) $ 180.00 $ 980.00

$ 4,950.63

114. I conclude that the amount that the Tomans owe to Seacliff is $9,651.52, calculated as follows:

Amount claimed $11,411.52

Overcharge (1) $ 1,400.00

Overcharge (2) $ 360.00 $ 1,760.00

$ 9,651.52

Financial Statements and Auditing

115. So far as is presently relevant, ss 33 and 34 of the Act provide:

33 Annual meeting

In each year the manager of a retirement village must convene an annual meeting of the residents of the retirement village.

Penalty: 50 penalty units.

34 Proceedings at annual meetings

(1) ...

(2) ...

(3) The manager must prepare and present to the annual meeting a financial statement showing in respect of the prescribed period –

(a) the source of income received by way of charges for the provision of goods and services by the manager; and

(b) details of expenditure on the provision of goods and services for the village by the manager, including the amounts spent and the items to which the expenditure related –

and details of what provision (if any) has been made for future extra ordinary or major works in the village and showing, in respect of the period of 12 months beginning immediately after the prescribed period ends –

(c) details of anticipated expenditure on goods and services for the village; and
(d) details of any proposed increases in maintenance charges to be paid by residents; and
(e) details of any special levies which it is proposed to ask residents to pay.

Penalty: 100 penalty units

(4) A statement prepared under subsection (3) must be audited by a registered company auditor within the meaning of the Corporations Act unless at the annual meeting held in the year immediately before the year in which the statement is to be presented, the residents present at the meeting decide by special resolution to dispense with the auditing requirements.
(5) This section is in addition to the provisions of the **Owners Corporations Act 2006**.

116. The management agreements with the Tomans, and the management agreement with Ms Canny, provided in clause 3(c) (so far as it is presently relevant):

As soon as practicable after the end of each financial year the Management Company shall furnish the Occupant with a statement in reasonable details of actual expenses and outgoings of Seacliffs paid or incurred by the Management Company during such financial year ...

117. When Seacliff gave notice of an annual general meeting of residents for 30 January 2009 it also gave the residents documents which constituted a financial statement for the village for the previous financial year. The documents were a profit and loss statement, a balance sheet, a profit and loss analysis and a copy of a 14-page general ledger which set out details of Seacliff's expenditure. In so doing, Seacliff complied with s 34(3) of the Act and clause 3(c) of the management agreement.

118. For every annual general meeting of residents since 30 January 2009, however, Seacliff has accompanied its notice of a general meeting only with a one-page table which sets out bare totals of budgeted items and expenditure. For example, what accompanied the notice of a general meeting for 21 January 2014 was a one-page table in the form of Table B in paragraph 76 above, but nothing more, and what accompanied a general meeting for 24 September 2014 was a one-page table in the form of Table C in paragraph 103 above, but nothing more.

119. Mr Toman argued that the mere provision of one-page tables like those is not the provision of a financial statement in compliance with s 38(3) of the Act and is not the provision of a statement in reasonable detail of actual expenses and outgoings in compliance with clause 3(c) of the management agreement. He has not only made that argument during the hearing. He has made it at three annual general meetings of the village residents.[20]

120. I agree with his argument. The one-page tables did not constitute financial statements with 'details' of the kinds described in s 38(3) or statements 'in reasonable

detail' for the purposes of clause 3(c). Seacliff would have fulfilled its obligations under s 38(3) and under clause 3(c) to give details of expenditure if, as it had done in 2009, it had provided the residents with a copy of a ledger. Seacliff did not attempt to explain why it had not done since what it had done in 2009. It seems to me that it would be a simple matter to provide each resident with a copy of a ledger showing all items of expenditure. It ought to be simpler than it was in 2009 because the owners corporation is now undertaking some of the expenditure that Seacliff had been undertaking in 2009.

121. The first and last non-complying notices of general meeting and one-page tables of which there was evidence were the notice for a general meeting on 12 November 2010 and the notice for a general meeting on 24 September 2014.

122. I think that the Tomans and Ms Canny are entitled to a declaration, in the Toman proceeding, that between 12 November 2010 and 24 September 2014 Seacliff has failed to comply with s 38(3) of the Act, in that it has not presented at an annual general meeting a financial statement that complies with s 38(3) of the Act, in that it has not presented at an annual general meeting a financial statement that complies with s 38(3), and has failed to comply with clause 3(c) of the management agreement, in that it has not as soon as practicable after the end of each financial year furnished them with a statement in reasonable detail of actual expenses and outgoings of the village paid or incurred by Seacliff during such financial year.

123. The residents have never decided, pursuant to s 38(4) of the Act, to dispense with the requirement to have each year's financial statement audited. There was evidence of two reports by a registered company auditor. The first was dated 3 September 2012. It referred to a one-page statement of income and expenditure for the financial year 2011-2012 and said that the statement represented fairly the appropriation of income and expenditure of Seacliff for that year in accordance with the *Corporations Act 2001* and the Australian Accounting Standards. Accompanying the report was a copy of the statement. The other was dated 5 September 2014. It referred to a statement of income and expenditure for the financial year 2013-2014 and made a similar report about the statement's fair representation of income and expenditure; however, no such statement accompanied the report, and so the report was hardly meaningful to any resident who received it that form.

124. Mr Toman criticised both of those auditor's reports. Some of his criticism was warranted. There was no evidence that the first report was made before the annual meeting held in the relevant year, as s 38(4) requires. The second report was affected by the omission to which I have referred. The omission may just have been a clerical error which could have been rectified quickly if anyone had seen fit to point it out. The ventilation of the criticisms during the hearing ought to have a salutary effect. I do not think it necessary to make any declaration about past shortcomings in the auditing process. The more important shortcoming has been the absence of details in what Seacliff has seen fit to disclose to the residents about village expenditure.

Change of Owners Corporation Manager

125. Until 28 January 2009 Debra Stone had been the owners corporation manager. On that day she submitted her letter of resignation. The members of the owners corporation appointed the firm which was then called Bentleigh Management Services, and is now called Campbell Corporate Services, as owners corporation manager. It is still the owners corporation manager.

126. Debra Stone had not charged a fee for her services as owners corporation manager. The residents paid only Seacliff's service fee. Seacliff performed the services which, under the legislation governing owners corporations, were the obligation of the owners corporation to perform, as well as those which were not.
127. Campbell Corporate Services charges a fee for its services as owners corporations manager. So the unit-owning residents, members of the owners corporation, are now paying two fees: the service fee and an owners corporation fee. The owners corporation, through the owners corporation manager, performs the services which an owners corporation is obliged by law to perform. Seacliff no longer performs them. The financial consequence to the unit-owning residents of the splitting of functions between Seacliff and the owners corporation manager is that they bear a greater expense in fees than they bore when Debra Stone was the owners corporation manager.
128. In the Toman proceeding the Tomans and Ms Canny are asking me to declare that by permitting Debra Stone to resign as owners corporation manager, and by its non-performance of services which under the management agreement it had promised to perform but which are now being performed by the present owners corporation manager, Seacliff is in breach of the management agreement.
129. There is dispute over who instigated the change of owners corporation manager. The Tomans and Ms Canny allege that it was Debra Stone, and that her resignation forced the residents to engage another owners corporation manager. Seacliff alleges that some of the unit-owning residents conducted a campaign to get rid of Debra Stone and had decided to appoint another owners corporation manager to replace her, so that they forced her hand and virtually drove her to resign. If I were to find that Seacliff had proved its allegation, there would be no basis for the claim that her resignation amounted to a breach of contract by Seacliff.
130. Debra Stone gave evidence that at meetings with the residents that she had arranged in 2008, so that a solicitor could explain to them the ramifications of the *Owners Corporations Act 2006*,[21] residents objected to her chairing the meetings. That seemed to be the foundation for her belief that at that time some of the residents had already decided to replace her as owners corporation manager. Mr Binsack supported her evidence to some extent. His evidence was that a resident, Graeme Walker, was saying that he wanted to replace her and was saying this before Debra Stone resigned. In contrast Mr Toman's evidence was that he had always got on well with Debra Stone and had not wanted her to resign, and that her resignation had forced the owners corporation committee, of which he was chairman, to replace her as owners corporation manager.
131. The events in dispute occurred long ago. I think that the documents that the parties created in 2009 are a better guide to the probabilities of the matter than disputed oral evidence. The documents seem to me to support Mr Toman's version of events. Debra Stone's letter of resignation did not make any allegation of pressure upon her to resign. All it claimed was that some residents were putting the interests of the owners corporation above the interests of the village as a whole. On 20 September 2009 Mr Toman wrote a chairperson's report to members of the owners corporation. It recorded that, following Debra Stone's resignation, the owners corporation committee recommended the appointment of Bentleigh Management Services and that the members had approved the appointment. The report did not contain any criticism of Debra Stone.
132. While I accept the evidence of Debra Stone that before her resignation there was some conflict between her and residents over the chairing of meetings, and that

that influenced her decision to resign, I do not accept that she was pressured to resign. I find that she resigned voluntarily and that her resignation was a cause of the appointment of a new owners corporation manager, not the other way around.

133. Yet the unit-owning residents at the time chose to appoint a new owners corporation manager. They did not attempt to compel Seacliff to have another of its officers replace Debra Stone. I reject the contention that her resignation was a breach of contract. The management contract obliged Seacliff to engage a 'manager'. It did: the on-site manager. Through Debra Stone it in fact performed the functions of an owners corporation manager but was not obliged to do so in perpetuity. I also reject the contention that Seacliff's non-performance of functions that are now being performed by the owners corporation manager is a breach of contract. Seacliff's non-performance of them is simply a consequence of the owners corporation's engagement of an owners corporation manager to perform them instead. The Tomans and Ms Canny are not entitled to the declaration they seek.

Refusal of Application to Amend the Toman Proceeding

134. At the time that Mr Toman made his application to amend the claim in the Toman proceeding to include a claim for recovery of service fees that the Tomans and Ms Canny had paid before 1 October 2012, the hearing was in its fourth day. Between them, the parties tendered more than 100 documents, which I received as exhibits. Although Mr Toman handed to me a document which was an attempt to particularise the fees paid before 1 October 2012 of which he was wanting to seek recovery, the document was far from clear.

135. Had I allowed the application to amend, I would have opened up for inquiry all the budgets and details of expenditure for an uncertain number of years. A hearing which had already taken four days, and ended up taking five, may have taken many more. There had been no occasion for Seacliff to prepare for such an inquiry. Had I allowed the application I would have been obliged, I considered, to adjourn the haring so that Seacliff had a fair opportunity to consider and meet the amended claim. It had already taken more than two years of difficult case management to achieve a fixing of the two proceedings for hearing. At no directions hearing or at any other time before the proceedings were fixed for hearing had there been any suggestion that any resident had wanted to make a claim, for recovery of fees already paid, that Mr Toman was applying for leave to make.

136. Allowing the amendment, and inevitably adjourning the hearing, would have involved Seacliff in additional legal costs, in proceedings which are subject to a general rule, which may well be applicable to these proceedings (although I do not yet decide whether it is), that parties bear their own costs.[22]

137. While he was making the application for amendment I put to Mr Toman that there had been no notice to Seacliff of any such application before he made it during the hearing. He did not demur. At the time, however, a letter dated 14 March 2015 which he had sent to the principal registrar, and which he had apparently copied to Seacliff's solicitors, had not been brought to my attention. That letter did indicate that the Tomans and Ms Canny were seeking an order that 'where it can be shown the residents have been over charged that money will immediately be returned to all the Seacliff residents who have paid it'.[23] So it was not correct, as I had put to him that there had been no notice at all. The notice, however, was vague and was still very late.

138. For the reasons I have given in the previous four paragraphs, and which accord with the reasons I gave orally during the hearing, I concluded that the prejudice that

Seacliff would suffer from an allowance of the amendment outweighed the prejudice that the Tomans and Ms Canny might suffer from not being able to claim recovery of money that they had voluntarily paid before 1 October 2012. There has to be an end to litigation somewhere. It should end with the hearing before me. I refused the application for leave to amend.

Conclusion

139. In the Seacliff proceeding there will be an order that Ms Canny pay Seacliff $4,950.63 and an order that Mr and Mrs Toman pay Seacliff $9,651.52.
140. In the Toman proceeding there will be declarations that the financial statements presented to general meetings of residents between 12 November 2010 and 24 September 2014 did not comply with the requirements of s 34(3) of the Act or with clause 3(c) of the management agreement. Otherwise the proceeding will be dismissed.

SENIOR MEMBER A VASSIE

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[1] In the order dated 24 March 2015 which confirmed the amendment I wrongly recorded the amount of the increased claim against Ms Canny as $5,930.35. It should have been $5,930.63.

[2] Regulation 4 defines 'consumer price index number' as meaning the all groups consumer price index number for Melbourne fixed by the Australian Statistician.

[3] Seacliff's claim had been for reimbursement of expenses which it had paid but which the owners corporation ought to have paid for maintenance of common property. Tidak's claim was that the owners corporation had failed to repair common property; it sought an order requiring it to repair.

[4] Tribunal's order dated 10 October 2013.

[5] Tribunal's order dated 10 October 2013.

[6] By the Tribunal's order dated 16 April 2014, paragraphs 5 to 41 of the Further Amended Points of Claim were struck out. Those paragraphs had contained Seacliff's and Tidak's claims against the owners corporation.

[7] Tribunal's order dated 9 October 2014.

[8] By the Tribunal's orders dated 24 March 2015 in the respective proceedings, made at the conclusion of the hearing, the Seacliff proceeding, as against all respondents other than the Tomans and Ms Canny, was struck out with a right of reinstatement, and in the Toman proceeding all applicants other than the Tomans and Ms Canny were removed as parties pursuant to s 60A of the *Victorian Civil and Administrative Tribunal Act 1998*.

[9] By the Tribunal's order dated 9 October 2014 in each proceeding.

[10] In their respective management agreements the Tomans and Ms Canny are described as 'the Occupant'.

[11] *Toll (FGCR) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40].

[12] The exception was the item 'Petty Cash', which Mr Toman did not require Seacliff to prove.

[13] Lori Stone's evidence of how the payment was made was not easy to follow. She told me that Seacliff did not pay her invoice to it for $6,500.00 directly because it did not have the funds. Then she proceeded to describe a round-robin arrangement whereby Tidak advanced funds to Seacliff and whereby (as I understood her evidence) her invoice was paid.

[14] Section 34(3); see paragraph 115 below.

[15] Section 34(4); see paragraph 115 below.

[16] The evidence of 'actuals' paid for 2011-2012 was found in a document which Mr Toman tendered: Exhibit 6. The document emanated from Seacliff.

[17] See footnote 16 beneath paragraph 85 above.

[18] $18,000.00 ÷ 12 ÷ 30 = $50.00. See paragraph 9 above.

[19] $7,200.00 ÷ 12 ÷ 30 = $20.00. See paragraph 9.

[20] The meetings were on 26 July 2012, 21 January 2014 and 24 September 2014.

[21] The *Owners Corporations Act 2006* commenced operation on 31 December 2007.

[22] VCAT Act 1998 s 109(1).

[23] In Points of Defence which Mr Toman had filed in the Seacliff proceeding he had foreshadowed a similar claim in similar language, but that was an obscure way in which to foreshadow it.