

UNDER The Retirement Villages Act 2003

IN THE MATTER of a dispute

BETWEEN **DR D GATLEY, L GATLEY, T
JONES and G MACKENZIE**

Applicants

AND **METLIFECARE POYNTON LTD
(MLC)**

Operator

DECISION OF DISPUTES PANEL

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Date of Dispute Notice 25 July 2018
Date of Dispute Hearing 4 October 2018
Date of Decision 29 October 2018
Present at Hearing **DR D GATELY** Applicant Occupier
L GATLEY Applicant Occupier
T JONES Applicant Occupier
G MACKENZIE Applicant Occupier
C PEPLOE MLC Village Manager, The Poynton
C LEE MLC Clinical Quality and Risk Manager
A PESKETT MLC General Counsel & Co Secretary
S BUTE MLC Operations Manager
R BOEREBOOM MLC Senior Legal Counsel & Assistant Co Secretary

[1] It was agreed at the Pre-Hearing Conference on 6 September 2018 that the hearing would be open to the public. A member of the Media was present, and the issue was raised by MLC. The Panel's decision was that the hearing was open to the public, and a journalist is such a person.

WHAT LEGAL DOCUMENTS ARE RELEVANT TO THIS DISPUTE?

- [2] All issues the Panel will address are regulated by the following:
- The Retirement Villages Act 2003 (RVA);
 - The Retirement Villages Code of Practice 2008 (Code of Practice);
 - The Code of Resident's Rights The Poynton (Code of Rights); and
 - The Occupation Rights Agreement (ORA).

THE HEARING

- [3] This is a hearing under the Retirement Villages Act 2003 (the RVA) in respect to a Dispute Notice dated 25 July 2018, issued by Dr D Gatley, Mrs L Gatley, Mr T Jones, and Mr G MacKenzie (The Applicants), against Metlifecare Poynton Ltd (MLC). The Applicants are residents at The Poynton, at 142 Shakespeare Rd Takapuna Auckland, which MLC operates.
- [4] The Applicants and MLC have an ORA contract between them. The ORA's were signed by the Applicants at different times, but have similar contractual terms. In its most basic form, the ORA provides a right to each of the Applicants to occupy a particular unit, and use of the communal facilities at The Poynton, on certain terms and conditions.
- [5] The Disputes Panel to hear this dispute was appointed under s60 of the RVA, on 27 August 2018.

INTRODUCTION

- [6] The issues on which the Panel is to make decisions, were set at the Pre-Hearing Conference on 6 September 2018, based on the Dispute Notice. Additional issues such as jurisdiction, time limits and remedies, follow directly from the Dispute Notice issues.
- [7] The Applicants' issues raised in the Dispute Notice, and confirmed at the Pre Hearing Conference are that there has been;
- (a) A unilateral increase in the minimum entry age for new residents at The Poynton by MLC; and
 - (b) A unilateral reduction of the health standard for entry for new residents to The Poynton by MLC; and
 - (c) An unofficial change in the character of the Poynton, to the Applicants' detriment; as a result of (a) and (b) above.
- [8] The Applicants have added a number of additional issues into their Submissions which were not included in the Dispute Notice, or addressed at the Pre Hearing Conference, and therefore cannot be heard by this Panel.

- [9] The Applicants' evidence is that MLC have made a commercial decision to increase the number of transfer fees payable to MLC by The Poynton residents, by raising the preferred age of new residents from 55 to 70+ years, and reducing medical requirements for entry into The Poynton. The Applicants assert by increasing the entry age, and reducing the medical requirements for entry into The Poynton, more transfer fees will be payable to MLC at an earlier date. The Applicants submit the changes in age of entry and reduced medical requirements have caused a less conducive environment at The Poynton, which is to the Applicants' detriment.
- [10] Transfer fees can be charged at MLC's discretion, when a resident changes from for instance a fully independent living unit (ILU), to a serviced apartment (SA) at The Poynton, or when residents move out of The Poynton to hospital or dementia level or other facilities. Older and less well residents are more likely to require a change in accommodation sooner than others, and hence the potential for a transfer fee being received by MLC is increased.
- [11] The Applicants further assert that MLC had no legal right to change the entry age, or medical requirements in the manner it did, it should have consulted with the Applicants as residents. The Applicants argue the age increase and medical requirements involved a change of a Rule upon which consultation is required.
- [12] In their Submissions the Applicants seek a finding of misrepresentation by MLC, and damages against them, as to the quality of lifestyle which the Applicants were promised on signing the ORA for The Poynton. This was not addressed in the Dispute Notice, or Pre Hearing Conference.
- [13] The Applicants also seek recompense for their personal time spent on this dispute. The Applicants have raised issues of repairs and maintenance, and design and construction faults at The Poynton in their Submissions, but not in the Dispute Notice, or Pre Hearing Conference.
- [14] MLC's position is that the Applicants' Dispute Notice is not within the criteria the Panel can decide upon, and is outside of the time limit for serving the Dispute Notice.
- [15] MLC disputes it has increased the age of entry to increase its profit, but rather in line with industry standards. MLC contends the increase in minimum age of entry also accords with the actual age of residents at The Poynton.
- [16] MLC denies it has reduced the medical standard for entry into The Poynton. It provides copies of the required medical certificates completed by all new residents, as part of the application process to enter The Poynton. The medical certificates are unchanged as to the level of medical information required since 2013, when some of the Applicants entered The Poynton.
- [17] Furthermore, MLC submits that any changes to age, and medical requirements (the latter of which it disputes have been made) are matters of policy which may effect occupation rights, rather than being Rules. As such MLC contends the Applicants must only be advised of, and not consulted on any changes.

- [18] MLC also denies that the character of The Poynton has changed to the detriment of current residents including the Applicants, due to the issues of increased age of entry, and medical wellness.
- [19] Finally, MLC submits that the remedies sought by the Applicants, are not remedies the Panel is able to order, in respect to this dispute.

THE ISSUES

- [20] The issues the Panel is required to decide are set out below, they are commenced with a question, then the parties' positions in respect to the question, and finally the Panel's decision with reasons. Not all of the issues raised, are ones the Panel is required to answer, because they were not raised in the Dispute Notice, or at the Pre hearing Conference, and cannot be later raised in Submissions.

Is the Dispute within the criteria the Panel can hear?

- [21] The Applicants' submission is that MLC has breached the Applicants' occupation rights, or rights to access services or facilities by raising the age limit for entry to The Poynton, and lowering the medical requirements for new residents. The Applicants state the changes were undertaken without the required consultation. The Applicants further submit that MLC's actions have changed the character of The Poynton to the Applicant's detriment.
- [22] In addition the Applicants seek in their Submissions a finding of, and remedy for misrepresentation in respect to the units they occupy at The Poynton. Maintenance and repair, design and construction issues are also raised. Financial remedies are sought by the Applicants.
- [23] MLC questions whether any of the disputed issues brought by the Applicants are ones which can properly be brought under s 53 (1) of the RVA.

The Panel's Decision

- [24] As a preliminary step the Panel needs to decide which, if any of the issues raised by the Applicants are ones which can properly be heard by the Panel.
- [25] Section 53(1) of the RVA sets out the types of disputes a Panel may hear. 53(1) states;

53 *Types of disputes for which resident may give a dispute notice*

- (1) *A resident may give a dispute notice for the resolution of a dispute concerning any of the operator's decisions ---*
- (a) *Affecting the resident's occupation right or right to access services or facilities;*
- (d) *Relating to an alleged breach of a right referred to in the code of resident's rights or the code of practice.*

- [26] It is arguable, that the claims of increased age, and reduced health requirements for entry into The Poynton, if proven, have the capacity to impact on the Applicants' occupation rights as residents, or rights to access services, or facilities. The Applicants also argue that their right to consultation under the Code of Practice may have been breached.
- [27] To support their claims of a breach of their occupation rights, the Applicants rely on descriptions of behaviour by new residents, including that the Applicants are interrupted in their units at inappropriate hours by lost and disorientated residents. The Applicants also allege they are prevented from enjoying the facilities provided at The Poynton, because of what the Applicants allege is an increased level of impairment suffered by newly arrived aged residents, and medically impaired residents.
- [28] Residents staring into space, chairs wet through incontinent residents, and a resident being returned by the police after wandering, and being unable to find the way home are further examples given, of the impact on the Applicants' occupation rights, or rights to access services or facilities. The Applicants allege this behaviour from new residents is caused by MLC's deliberate increase in age and reduction of medical requirements for entry into The Poynton, to enable MLC to acquire more transfer fees.
- [29] Some words in section 53(1) require definition. Occupation rights, and the corresponding common areas are defined in clause 1 of the ORA, and facilities and services are defined in section 5 of the RVA as follows:

Occupation Right--- *Means a licence to occupy the Unit without interruption or disturbance from the Operator and a right to use the Common Areas (in conjunction with all other residents of the Village and all other persons as authorised from time to time by the Operator) on the terms and conditions set out in this Agreement.*

Common Areas --- *means those parts of the Village designated by the Operator as common areas for use by all residents including entrances..... gardens, grounds and other common amenities and conveniences other than those reserved from time to time by the Operator.*

Facilities, *in relation to a retirement village, means facilities of a shared or communal kind provided in the retirement village for the benefit of residents of the retirement village and includes recreational facilities and amenities.*

Services, *means services provided at the retirement village of 1 or more of the following kinds:*

- (b) *nursing and medical services;*
- (c) *the provision of meals*
- (h) *services for recreation or entertainment;*
- (i) *security services;*
- (j) *other services for the care or benefit of residents.*

- [30] The question is which if any issues raised by the Applicants, potentially fit within the categories of occupation rights, and access to facilities and services.

- [31] The loss in potential value of the Applicants' units on the basis of misrepresentation, was not raised as an issue for hearing in the Dispute Notice, or at the Pre Hearing Conference. In any event none of the evidence provided showed that MLC as operator was interfering with the Applicants right to "*occupy the Unit without interruption or disturbance, from the operator*" the evidence was that other residents were the ones interrupting and disturbing. This is not covered in section 53(1) of the RVA as to the types of dispute the Panel can hear.
- [32] The issues of repairs and maintenance, or design and construction issues, were also not raised in the Dispute Notice, or at the Pre Hearing Conference. The issues cannot be heard by the Panel.
- [33] The Panel finds accordingly that it cannot deal with the misrepresentation, or repair, and maintenance, or construction and design issues, at this hearing. Issues not raised in the Dispute Notice, or at the Pre hearing Conference, cannot be properly raised at a later date in Submissions, even if it was an issue on which the Panel could decide. The Panel does not need to make further findings about whether they are issues it could hear, even if properly raised. Both may be issues for another forum.
- [34] The allegations made by the Applicants of the less than optimal functioning of some new residents, in public areas such as lounges, and eating areas, may relate to occupation rights including use of common areas. The involvement of the Police in returning a resident when staff were allegedly not available, may relate to security services.
- [35] The Panel finds that increased age and reduced medical capacity, could potentially impact on occupation rights including use of common areas, and rights to access facilities and services, in some of the examples provided above by the Applicants. Similarly the issue of a potential breach of the consultation requirements in the Code of Practice is also an issue which may be heard.
- [36] The Panel therefore finds that the issues raised by the Applicants in the Dispute Notice, and confirmed at the Pre Hearing Conference as to increased age and decreased medical requirements are within section 53(1) of the RVA, and consequently are disputes the Panel can hear.

Is the Dispute Notice out of time?

- [37] The Applicant's acknowledge in their Submission that MLC "*were initially notified of our dispute, on 9 January 2018*". The Applicants then put the complaint in writing on 5 February 2018. They assert in their Submissions in Reply, the dispute was not formally raised until 5 February, in spite of receiving an email from MLC dated 10 January 2018, acknowledging receipt of the dispute as follows;

"Further to my earlier email acknowledging receipt of your formal complaint, we will work directly with you with the objective of resolving your complaint. We have 20 working days to do so".

(MLC Submission exhibit 1).

- [38] MLC's position is that the Dispute Notice is out of time, as MLC was notified of the dispute on 9 January 2018, which it acknowledged in the email of 10 January. MLC

was not prepared to waive the 6 month time limit, between formal raising of the dispute, and service of the Dispute Notice on MLC, under s.53(2) of the RVA.

The Panel's Decision

[39] The relevant legislation on the time limits for raising a dispute between the Applicants and MLC by serving a Dispute Notice is section 57(1) of the RVA which states:

57 *Time for giving dispute notice*

(i) *A dispute notice must be given within 6 months after the dispute was first referred to the complaints facility.....*

[40] Section 57(1) refers to the operation of a complaints facility which is the process for resolving disputes set out in Part 4 of the RVA, clauses 32 to 36 of the Code of Practice, and clause 23 of the ORA. As soon as a dispute is referred to the complaints facility then the 6 month time limits for a Dispute Notice to be served commences, under section 57(1).

[41] It is agreed by both parties that the dispute was first raised by the Applicants on 9 January 2018. The email of 10 January from MLC to the Applicants notes receipt of what MLC refers to as a "*formal complaint*", and notes it has 20 days to deal with it.

[42] However, the Applicants then served on MLC what the Applicants refer to as "*the formal notice of the dispute*" on 5 February 2018. The Applicants state that if they had intended their complaint to be a formal one on 9 January, there would have been no need to file another "*formal notice*" on 5 February 2018. The Applicants evidence is that they saw their 9 January approach as an informal one, which they hoped would be successfully resolved. The Applicants gave evidence about the number of meetings they attended in an attempt to resolve the matters informally.

[43] Clause 31 of the Code of Practice enables disputes to be raised informally as well as formally. Clauses 32 to 35 of the Code then sets out the process for resolving formal disputes.

[44] Once the Applicants' complaint was laid formally, MLC was required to refer the complaint to the complaints facility. No evidence was provided by MLC as to exactly when the referral to the complaints facility was made, beyond the email earlier referred to. MLC relied on the Applicant's statement in their Submissions as triggering the process on 9 January 2018. The Complaints Committee process is set out in clause 23 of the ORA, requires a panel of 3 to be appointed, which must make its decision within 20 working days.

[45] The Panel prefers the Applicants evidence, who may not have the same level of expertise as MLC do in dealing with the intricacies of the RVA, but were clear they filed their formal complaint on 5 February 2018.

[46] The Panel finds by serving the formal complaint on 5 February 2018, and the Dispute Notice on 25 July 2018, the Applicants' Dispute Notice is within the 6 month time limit under section 57 (1) of the RVA.

[47] In any event even if the date of the formal complaint is 9 January 2018, the over-run of 17 days, could perhaps be categorised as “de minimis”. This is especially so when the section 3 requirements of the RVA are considered, namely that one of the purposes of the RVA is to protect the interests and rights of residents as follows;

3 *Purpose*

The purpose of the Act is ---

(a) *To protect the interests of residents and intending residents of retirement villages*

(c) *for the purposes in paragraphs (a) ...*

(v) *to provide an environment of security, and protection of rights for residents of retirement villages;*

[48] The Panel finds the Dispute Notice is within time, under section 57(1) of the RVA for the above reasons.

Has MLC increased the minimum entry age for new residents at The Poynton from 55 to 70+years?

[49] The Applicants contend that MLC has increased the minimum age limit for entry into The Poynton from 55 years, when some of the Applicants became residents in November 2013, (Applicants Submissions ORA exhibit G) to 65 years by approximately June 2015 (Applicants Submission exhibit K) and to 70+ years by approximately November 2016 (Applicants Submission exhibit L).

[50] MLC agrees it has raised the preferred admission age, it says in line with industry standards (MLC Submission exhibit 2). Residents were advised of the changes in various ways, such as in answer to questions at resident meetings, and then in writing in the Minutes.

The Panel’s Decision

[51] The Panel finds, with the agreement of both parties, and on the evidence referred to above, that MLC has increased its targeted entry age to The Poynton from 55 years in 2013 to 70+ years in 2016.

Did MLC have the legal authority to increase the minimum age for new residents, or medical standards at The Poynton, in the manner it did?

[52] The Applicants submit that MLC did not have the right to increase the minimum age, or reduce the medical standards for entry into the Poynton in the way it did. The Applicants say MLC had an obligation to consult with them prior to making a decision to increase the entry age for new residents, or reduce the medical requirements, because both issues are Rules, upon which consultation is required to change or implement new Rules. The Applicants rely on section 34(1) of the RVA, clause 28 of the Code of Practice and clause 5.41(c) of the ORA.

- [53] MLC submits under section 34 (1) of the RVA, that when it changed the preferred age of entry to The Poynton, in line with industry standards, it was not required to consult with the Applicants, but only inform them promptly, which it did.
- [54] MLC refers to evidence of the steps it took to comply with its obligations to promptly inform residents under s.34(1); being a letter dated 17 June 2015 informing residents of the change of age to 65 (MLC Submissions Exhibit 2); a Deed of Variation dated 16 July 2015 between MLC and the Statutory Supervisor, changing the age to 65 (MLC Submission Exhibit 3); the Village Manager’s Report dated 11 October 2016 advising of the change of age to 70+ (MLC Submission Exhibit 4); and a Deed of Variation between MLC and the Statutory Supervisor dated 28 September 2016 changing the Deed of Supervision to “*Those primarily over the age of 65 as determined from time to time by the Operator*”(MLC Submission Exhibit 5).
- [55] MLC denies the change in age of entry is a change in a Rule, on which consultation may be required, or a Rule at all. It attaches a copy of The Poynton Rules and Compendium to its Submission (MLC Submission exhibit 7).
- [56] MLC refers to the definition of Rules in clause 1.2(c) of the ORA as follows;
- 1.2 (c) “Rules” means the Operator’s rules for the Village which will be handed to the Resident following the Commencement Date. The rules are subject to change in accordance with this Agreement.*
- [57] MLC also provides a Table of the average age of residents at The Poynton from 2009 to 2018, which shows the average age for residents, in each year was in their mid to late 70’s. MLC submits the age of residents is actually at 70+, so the change in preferred age of entry to The Poynton, is simply reflecting the reality of the actual age of residents (MLC Submissions page 4)

The Panel’s Decision

Section 34 RVA

- [58] The Panel must decide which interpretation of section 34(1) of the RVA is legally correct. The Applicants submit section 34 (1) of the RVA requires MLC to consult with the Applicants in respect to the change of age of entry for new residents to The Poynton, or reduced medical standards, as factors relevant to occupancy, or quiet enjoyment. Consultation does not imply the Applicants would have decision making power. MLC submits the section requires residents only to be “*promptly informed*”.
- [59] Section 34 of the RVA states:
- 34 *Right to be supplied with information relevant to occupancy*
- (1) *Each resident or intending resident of a retirement village has the right to be promptly informed by the operator of the retirement village about any matter that would be or might have a material impact on ----*
- (a) *The occupancy right, or rights to quiet enjoyment, of the resident or intended resident;*

- (1) *The operator of a retirement village must,---*
 - (a) *If the village has a statutory supervisor, promptly notify the statutory supervisor and, if the statutory supervisor so directs, each resident and intending resident of the retirement village of the matters referred to in subsection (3);*
- (2) *The matters required to be notified under subsection (3) are---*

- [60] There are two definitions required as to what prompt information is required to be given to residents about, in section 34 (1) of the RVA. The matters on which residents must be “*promptly informed*” are if there is a likely impact on “*occupancy rights*” or “*rights to quiet enjoyment*”.
- [61] Neither term is defined in the RVA, Codes or ORA, however “*occupancy rights*” are perhaps synonymous with the definition of an ORA, both involve conferring the right to occupy, subject to terms and conditions. The “*right to quiet enjoyment*” is the right to use and occupy without disturbance, and with enjoyment.
- [62] Both the issues of increased age and reduced medical requirements have the potential to impact on “*occupancy rights*” and “*rights to quiet enjoyment*”. Lost residents knocking on the Applicants’ doors, and Police returning lost residents, and low functioning residents in public areas, are potential examples, which may impact on occupation, and quiet enjoyment.
- [63] The first issue the Panel has to consider is whether prompt information has been provided to residents of the age and medical changes. The evidence before the Panel does not record exactly when the decisions were made to extend the minimum age of entry from 55 to 65 years, to ascertain if advice was promptly provided, but both the Applicants and MLC attach the letter to residents dated 17 June 2015 to their Submissions, informing of an increase in minimum age to 65 years. (Applicants Submission exhibit K and MLC Submission exhibit 2). MLC also attaches evidence of its advice of the age increase, not only to residents, but also the Statutory Supervisor (MLC Submission exhibit 3).
- [64] The Statutory Supervisor’s duties and powers are set out in sections 42 and 43 of the RVA, and are effectively ensuring the Operator complies with its financial and other obligations under the RVA, and associated legislation. The Statutory Supervisor has a Deed of Supervision with the Operator, in this case MLC. Under section 42 and 43 of the RVA the Statutory Supervisor is required to report annually to residents, and can require MLC to advise all residents on any issue the Statutory Supervisor considers necessary.
- [65] In respect to the increase in preferred age of new residents, from 65 to 70+ years, MLC negotiated a variation to the Deed of Supervision, through a Deed of Variation dated 28 September 2016, between MLC and the Statutory Supervisor. The Deed of Variation includes reference to the change in age as follows:

2 ***Amendment to Deeds of Supervision***

(a) *The Deed of Supervision is hereby amended by deleting the words and replacing them with the words:*

“Those primarily over the age of 65 or as determined from time to time by the Operator”
(MLC Submission Exhibit 5)

- [66] There is no evidence before the Panel to suggest the Statutory Supervisor required MLC to advise residents directly in respect to the raised ages of admission to The Poynton.
- [67] The Panel finds that the correct legal interpretation of section 34(1) of the RVA, only requires that residents be “*promptly informed*” of information relevant to “*occupation rights*”, or “*rights to quiet enjoyment*”.
- [68] The Panel also finds that MLC has complied with its obligations under section 34(1) of the RVA, by promptly informing the Applicants of the change in minimum age of entry to The Poynton. Section 34 (1) of the RVA does not require consultation by MLC with the Applicants.
- [69] There has been no prompt informing of the Applicants by MLC in respect to medical requirements, as MLC submits it has not made any changes to the medical requirements to enter The Poynton.
- [70] The Panel finds there is no evidence available to it, to suggest changes have been made to medical requirements to enter The Poynton, so no prompt provision of information is required.

Clause 28 Code of Practice

- [71] The Applicants submit clause 28 of the Code of Practice requires MLC to consult the Applicants in respect to the increase in age, and medical fitness issues. Clause 28 requires MLC to consult with the Applicants, about any changes to rights under the Code of Rights, or ORA, and before implementing new Rules, or changing existing Rules. Clause 28 of the Code of Practice states:

28 *Residents’ participation in decision-making*

Operator must consult residents

- 1 *Residents have the right to be consulted by the operator. Subgroups of residents, or individual residents, are also entitled to be consulted. Right 3, Code of Residents’ rights*
- 2 *The operator must consult residents:*
 - a. *as required in the Code of Residents’ Rights and the occupation right agreement. Right 3, Code of Residents’ rights*
 - b. *about the content of any proposed rules if not already established by the operator, or any proposed amendment or addition to the existing rules by the operator.*

[72] For completeness Right 3 of the Code of Residents Rights states:

Consultation

3 You have the right to be consulted by the operator about any proposed changes in the services and benefits provided or the charges that you pay that will or might have a material impact on your---

(a) Occupancy; or

[73] Right 3 requires consultation in respect to changes in services or benefits. The age of entry to The Poynton, or medical requirements do not involve a service or benefit. Services are defined in section 5 of the ORA as follows:

Services, means services provided at the retirement village of 1 or more of the following kinds:

(b) Nursing and medical services;

(c) The provision of meals;

(h) Services for recreation or entertainment;

(i) Security services;

(j) Other services for the care or benefit of residents.

[74] A “benefit” is not defined in any of the relevant documents applicable to this hearing, but the Oxford Dictionary defines a benefit as “an advantage”.

[75] The Panel finds the increase in entry age, or change in medical requirements are neither “services”, nor “benefits” provided to the Applicants, so Right 3 of the Code of Rights does not apply. MLC is not required to consult with the Applicants in respect to the issues of entry age or medical levels, under Right 3.

[76] The Applicants’ argue that the increased age of entry, or reduced medical requirements are Rules and clause 28(2) (b) of the Code of Practice applies. This clause requires a definition of Rules. Rules are variously defined in the ORA, Code of Practice, and the Village Compendium.

[77] Rules are defined in clause 1.2 of the ORA as:

“Rules” means the Operator’s rules for the Village which will be handed to the Resident following the Commencement Date. The rules are subject to change in accordance with this Agreement.

[78] Rules are also defined in the clause 2 Definition section of the Code of Practice as:

Rules mean the rules governing the day-to day management and operation of the retirement village which the operator and residents must comply with. The rules include without limitation body corporate rules, rules in leases, and licences to occupy, and organisational rules.

- [79] The Village Compendium (MLC Submission exhibit 7) is more of an information document on everything from residents reporting if intending to be away overnight, to clause 68 of the Compendium which defines Rules as;

68 Village Rules

Village rules are for the well-being and protection of every resident and are contained in the back of this compendium. These rules are standard for all Metlifecare villages. Rules specific to Metlifecare, The Poynton are detailed in the relevant sections of this compendium. Your adherence to these rules is appreciated in keeping this village a safe and enjoyable place in which to live.

- [80] An example of The Poynton Rules, and the Village Compendium is attached to the MLC Submission (MLC Submission exhibit 7). The Poynton Rules include Rules on visitors complying with the rules, abiding by the pool rules, behaviour so as not to annoy or offend others, parking in designated areas, prior consent to have pets, site and personal security, cooperating with a smoking free environment, and prohibition on public display of laundry.
- [81] Rules under the various documents set out above, are generally about, day-to-day management and operational issues. By implication to know what Rules require someone to do, or not do, the Rules must be published, or at least advised to those who need to comply, and those who police compliance. The Rules of The Poynton are required to be given to new residents under clause 1.2 of the ORA.
- [82] There is no evidence available to the Panel that there is a Rule about age of entry, or change in entry age to The Poynton, or medical requirements. The Rules for The Poynton are mostly telling the residents, what practical actions they must and must not take. There are few Rules which apply directly to MLC, except that it implements and polices the Rules.
- [83] The Panel finds there are no Rules about the increase in age, or medical fitness to enter The Poynton, and therefore MLC is not required to consult the Applicants under clause 28 (2) (b) of the Code of Practice.

Clause 5.41(c) ORA

- [84] The Applicants final legal argument is that clause 5.41(c) of the ORA applies to the issues of increased age, and reduced medical requirements, and requires consultation with the Applicants over the age, and medical issues.
- [85] Clause 5.41(c) of the ORA states:

5.41 Compliance with Rules

(c) The Operator is entitled from time to time, subject to consultation with the residents in the Village, to establish, review, cancel, suspend, add to or amend the Rules provided that the Rules may not detract from Resident's rights under this Agreement. In the event of any inconsistency between the Agreement and the Rules, the provisions of this Agreement will prevail.

- [86] The same arguments about whether the increase in entry age, and medical certification are Rules which require consultation, and which apply to clause 28 Code of Practice, also apply to clause 5.41(c) of the ORA. Both clauses require evidence that there is a Rule about entry age, or medical certification in existence, or being considered. Consultation is only required if there is a Rule, or a change of Rule, or a proposed Rule on the entry age, or medical requirements to enter The Poynton.
- [87] The Panel finds that there is no evidence provided that there is a Rule setting a preferred entry age for The Poynton, or about medical certification. Neither issues fit the criteria for a Rule, for if they were Rules, the Applicants and MLC should have been able to provide the Panel with a copy of them, or other evidence of their existence. This is on the basis that if Rules are to be followed, they are published in some way, or advised to the residents who must follow them.
- [88] In summary the Panel finds that MLC has complied with its obligations to promptly inform residents under section 34 (1) of the RVA, about the increase in age. Only if there is evidence of a change in medical requirements, does MLC have an obligation to inform promptly. That issue is dealt with in paragraphs [89] to [100] below. MLC has no obligations to consult with the Applicants under Right 3 of the Code of Rights, clause 28 of the Code of Practice, or clause 5.41(c) of the ORA, on either the age or medical issues for admission to The Poynton.

Has MLC decreased the minimum medical standard for new residents at The Poynton?

- [89] The Applicants' position is that MLC has reduced the medical requirements for sufficient independence to, for instance live in Independent Living Units (ILU's), and is now enabling 90 year olds to live in ILU's at The Poynton. The financial benefit alleged for MLC is that sooner, rather than later a person of that age will need to move to more supported living, and potentially be required to pay a transfer fee to MLC.
- [90] MLC provided evidence by way of Statutory Declarations, from Mr Peskett General Counsel and Company Secretary, and Ms Bish Clinical Nurse Director, and made Mr Peskett, Ms Lee Clinical Quality and Risk Manager, and Ms Bute Operations Manager available for questioning at the hearing.
- [91] No explanation was given as to why Ms Bish was not available for questioning, and indeed why Mr Peploe the Village Manager, who was advised at the Pre Hearing Conference to be a witness, and was present at the hearing, did not choose to give evidence, even when asked to do so by the Applicants. That approach is perhaps unlikely to engender trust for the future relationship between MLC and the Applicants. Ms Bish's evidence will not be considered by the Panel as she was not available for questioning.
- [92] All of the MLC witnesses disputed there was any change in the medical requirements for new residents to The Poynton. The witnesses attested that there were two different medical certificates, one for residents wanting to move into an ILU, and the other for those wanting a Serviced Apartment (SA).
- [93] The expectation, by the MLC witnesses was that SA applicants should provide a more extensive medical certificate, as some, but not all, had greater medical needs than those

who chose to live in ILU's. MLC attached the two types of medical certificates used to its Submissions (MLC Submissions exhibits 9 and 10). The Applicants have submitted the same Medical Form as the one exhibited by MLC as exhibit 10. (Applicants' Submission exhibit J) MLC declined to provide statistics about the level of medical capacity or incapacity, at The Poynton currently, as it stated numbers could change from day to day.

The Panel's Decision

[94] Clause 5.9 of the ORA states:

Conditions

This Agreement is subject to each of the following conditions being satisfied:

- (a) ***Approval of Medical Reports:*** *The Operator receiving a medical report from the Residents which is satisfactory to the Operator prior to settlement (in its absolute and sole discretion)*

[95] Clause 5.9 of the ORA provides MLC with total control over what medical information it is entitled to ask prospective residents for. There is no mechanism within the RVA, Codes or under clause 5.9 of the ORA to hand any control to the residents, as to what medical information MLC can require, or who can or cannot be accepted as an occupier at The Poynton.

[96] The type of medical information required by MLC is not subject to a Rule, requiring consultation. Approval of medical reports is at the "*absolute and sole discretion*" of MLC under clause 5.9 of the ORA.

[97] MLC denies it has lowered the medical requirements to enter The Poynton, and provided copies of its current medical forms, one of which is the same form as signed by Dr and Mrs Gatley in 2013.

[98] It may be an understandable conclusion reached by the Applicants that the medical entry requirements have been reduced, based on their observations of new residents' behaviour the Applicants described in their evidence. However there is insufficient evidence provided to the Panel, for the link to be made between the observed behaviour, and alleged reduced medical standards.

[99] The Panel cannot conclude that MLC has lowered the medical requirements for entry into The Poynton, based on the evidence available to the Panel being the medical forms. The same medical evidence appears to have been asked for in the medical forms between 2013 and 2018.

[100] In any event MLC may well have the absolute discretion to increase or reduce medical information it seeks under clause 5.9 of the ORA. The evidence of a 90 year old living in an ILU, has insufficient direct evidence to assist the Panel significantly, self-sufficiency is not necessarily based on age, but on individual abilities.

Has there been a change in character at The Poynton to the detriment of the Applicants, as a result of the increased minimum entry age for new residents, and/or the decreased minimum medical standard for new residents?

- [101] The Applicants gave evidence of what they described as the deterioration of the character of The Poynton from a Lifestyle Village to more like a Rest home. They described residents sitting in communal areas staring into space, requiring full-time carers because of physical and/or mental frailty, and of a resident being returned by the Police, after wandering. On other occasions public space seating was wet through residents' incontinence. The Applicants also described lost and disorientated residents mistakenly attempting to enter the Applicants' units, and a 90 year old living in an ILU.
- [102] The Applicants' concern was the numbers of infirm residents appeared to be increasing, leading to a less conducive shared space atmosphere, where the Applicants could interact comfortably, and bring visitors to. The Applicants were also concerned that as a result of the lowered standard of resident at The Poynton, the Applicants' investments in their ILU's for which they had paid a premium, were declining in value.
- [103] MLC denied the character of The Poynton had deteriorated, and pointed to the over 35 refurbishment projects in train, including new lounge furniture. That did not address the new residents' reported behaviour of concern to the Applicants.
- [104] The witnesses for MLC declined to provide details of the number of new residents with infirmity, and described infirm residents as a changing phenomenon from day to day, and as part of the retirement village dimension.
- [105] MLC however provided a Table in its Submission (MLC Submissions page 4) showing the average age of residents in 2009 being 78.30 years, to a low in 2014 of 76.05 years, a high of 80.56 years in 2017, and 77.23 years in 2018. MLC contend there has been a consistency in an average age of 70+ years from 2009 to 2018 at The Poynton.
- [106] The MLC witnesses declined to discuss the transfer fee issue within the hearing, stating it did not fit within the agreed issues for the hearing, but offered to meet with the Applicants, and discuss the issue at some time after the hearing.

The Panel's Decision

- [107] The Panel finds there is limited direct evidence available to it, but prefers the evidence of the Applicants, that there have been incidents of behaviour by some reportedly new residents, which will have been distasteful, or concerning to those of the Applicants who observed, or heard about the incidents.
- [108] The Panel must consider however, if based on the evidence provided, it is able to attribute the reported behaviour, to the policy increase in age of entry of residents, or a reduction in required medical standards.
- [109] In respect to the increased age of entry, MLC did not provide evidence about the ages, and level of infirmity of "new" residents at The Poynton, of say since 2017. It would be surprising if such statistics could not have been made available by MLC.

- [110] However MLC did provide a Table of the actual average ages of residents between 2009 and 2018. The Table shows a minimum age of 76.05 and a maximum age of 80.56 between 2009 and 2018. The 2018 average age is 77.23. The difference in age range between the youngest and oldest average years is 4.51 years. The 2018 average is the second youngest average age since 2009.
- [111] The average ages of residents from 2009 to 2018 appear to have been consistently in the 70+ category, so the behaviours complained of by the Applicants, cannot be tied to the increased age policy, rather than for instance to the specific residents accepted to The Poynton, or a myriad of other possible options. Age Tables do not address the issue of any infirmity in the new residents.
- [112] The actual residents accepted into The Poynton, and the types of accommodation they are offered, which may impact on behaviour, are factors over which the Applicants have no control under the RVA, Codes of Practice or Rights or the ORA.
- [113] For the Applicants' argument to succeed that the change in quality at The Poynton is caused by a reduction in medical standards, there must be proof that the medical standard has been reduced. There is no evidence before the Panel except the medical certificates which are reportedly completed by new residents, which appear to be the same certificates for ILU's to those used in 2013.
- [114] The example provided by the Applicants of a 90year old in an ILU is not specific enough, or the evidence direct enough, to show whether that resident is, or is not capable of ILU living, or whether or not that person is one of the residents whose functioning causes distress to the Applicants, or when the person entered The Poynton. Privacy issues may arise with obtaining greater information on specific residents.
- [115] The Panel finds there is insufficient evidence to show a direct link between the alleged relaxation of medical standards for new entrants to The Poynton, which is denied by MLC, and the distressing observations made by the Applicants, of some presumably new residents' behaviour at The Poynton.
- [116] In summary the Panel does not find there is sufficient evidence to state the reported behaviours in some new residents, which the Applicants complain of at The Poynton, can be attributed to either the increase in preferred age of entry, as a policy, or the alleged reduction in medical requirements.
- [117] Regardless of the Panel's decision there are ways MLC could, no doubt address some of the behavioural concerns held by the Applicants.

Are the remedies sought by the Applicants, ones which the Panel can order?

- [118] The Applicants have not prevailed in their substantive arguments, so no remedies are available to them. The Panel does observe however, that section 70 of the RVA, under which compensation is sought, does not apply to the current dispute, but rather to the sale of units. The Panel does not need to address other issues raised in respect to remedies, as no remedies are ordered.

Costs

[119] There is no issue in respect to costs.



Claudia Elliott
Disputes Panel