



In the Matter of The Retirement Villages Act 2003

And in the Matter of A Dispute

**Between Mrs Sandra Williams
Apartment D201
Waitakere Gardens Retirement Village
Henderson Auckland
The Applicant**

**and Metlifecare Ltd on behalf of
Waitakere Group Ltd
The Respondent Operator**

Disputes Panel Member Mr Robert Ashcroft, Wellington

Date of Dispute Notice 30 May 2019

**Date of Appointment of Disputes Panel
Member 4 June 2019**

Applicant's Representative Johan Kritzinger

**Respondent's Representatives Andrew Peskett
Emma Haycock**

DECISION OF DISPUTES PANEL

Date: 7 August 2019



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APPENDIX I: RECORD OF MEETINGS AND UPDATES



SUMMARY – FINDINGS AND DECISIONS

1. Mrs Williams occupied Apartment D201 in the Waitakere Garden Retirement Village owned by the Waitakere Group. Remediation works were undertaken to address weathertight issues in the block containing Apartment D201. This required the temporary relocation of Mrs Williams to Apartment B201. Three disputes have arisen in relation to these circumstances: the impact on Mrs Williams of the works undertaken to Apartment D201; Mrs Williams' refusal to move out of Apartment B201 pending resolution of those issues; and the notified intent of the Operator to terminate Mrs Williams' right to occupy Apartment D201.
2. The disputes panel appointed under the Retirement Villages Act 2003 to resolve the disputes between the applicant and the respondent has decided on the disputes as follows.

Matters in Dispute

3. The matters in dispute as set out as in the dispute notice are:
 - **Dispute No 1** The alleged illegal and unacceptable unilateral reduction of the originally bought-into quality of natural airflow through Apartment D201, occupied by Mrs Williams under the Occupation Licence re Apartment D201 executed between MLC and Mrs Williams.
 - **Dispute No 2** The service of a Notice to Terminate the right to occupy Apartment B201, occupied on a temporary basis by Mrs Williams.
 - **Dispute No 3** The service of a Notice of Intention to Terminate the Occupation Licence re Apartment D201.

Dispute No 1

Findings on material issues of fact

4. The panel's findings on relevant issues of fact are as follows.
 - That MLC provided advance notice to residents that the remediation works solution involved enclosed walkways.
 - That there is no evidence MLC provided advance notice to residents that the remediation works solution involved fire doors and fixed windows.
 - That MLC were entitled to adopt the remediation works design put in place.
 - That, in relation to the impact of the fire doors and fixed windows, the impact on Apartment D201 is not more than minor.
 - That, in relation to the high temperatures being experienced in the walkway, MLC are taking appropriate actions to investigate and mitigate the impacts.



- That no evidence has been sighted which substantiates the allegations of bullying of and exploitation of residents by MLC.
 - That MLC failed to follow the relevant MLC Complaints Policy and Procedures.
5. The panel's findings as to the specific bases of the claim are as follows.
- ORA 23.1(a) Mrs Williams' claim succeeds in part.
 - ORA 24.1(a) Mrs Williams' claim succeeds in part.
 - ORA 39.1 Mrs Williams' claim fails.
 - ORA 39.2 Mrs Williams' claim succeeds in part – as a consequence of the findings in relation to 23.1(a) and 24.1(a).
 - ORA 40.1 Mrs Williams' claim succeeds in part – as a consequence of the findings in relation to the Retirement Villages Code of Practice set out below.
 - ORA 48.1 Mrs Williams' claim fails.
 - ORA 48.2 Mrs Williams' claim fails.
 - RVCOP In relation to the claim by Mrs Williams that MLC are in violation of Clause 28 of the Retirement Villages Code of Practice 2008, I find Mrs Williams' claim succeeds, in particular with reference to clause 28.3.
 - MLC CRR In relation to the claim by Mrs Williams that MLC are in violation of Clauses 2 and 3 of the Metlifecare Code of Residents' Rights, I find Mrs Williams' claim succeeds.
 - MLC CPP In relation to the claim by Mrs Williams that MLC are in violation of the Metlifecare Complaints Policy and Procedure, I find Mrs Williams' claim succeeds.

Panel's decision

6. The disputes panel finds partly in favour of the applicant as set out above.
- 7. The disputes panel makes no orders under section 69(1) of the Retirement Villages Act 2003.**

Dispute No 2

Findings on material issues of fact

8. The panel's findings on relevant issues of fact are as follows.
- That MLC have fulfilled their obligations in regards to making Apartment D201 ready for re-occupation by Mrs Williams.



Panel's decision

9. The disputes panel finds fully in favour of the respondent and makes the following order under section 69(1)(b) of the Retirement Villages Act 2003:

That Mrs Williams vacate Apartment B201 within 14 calendar days of the date of this decision, or some other date as the parties may agree.

Dispute No 3

Findings on material issues of fact

10. The panel's findings on relevant issues of fact are:

- That the Notice of Intent to Terminate the Occupation Licence for Apartment D201 issued by MLC is not a valid Notice in terms of the Occupation Right Agreement.

Panel's decision

11. The disputes panel finds fully in favour of the applicant and makes the following order under section 69(1)(b) of the Retirement Villages Act 2003:

That the Notice of Intent to Terminate the Occupation Licence for Apartment D201 issued by MLC is invalid and shall be withdrawn by MLC within 7 calendar days of the date of this decision.



REASONS FOR DECISIONS

Background

General

12. The original dispute relates to remediation works carried out to Apartment D201, and access ways thereto, located in the building within the Waitakere Gardens Retirement Village known as Rosecourt. The retirement village is operated by Waitakere Group Ltd, a subsidiary of Metlifecare. The right to occupy Apartment D201 is held by Mrs Sandra Williams under an Occupation Right Agreement.
13. Two further disputes have arisen, firstly in relation to a Notice to Terminate the Licence to Occupy Apartment B201, which has been occupied on a temporary basis by Mrs Williams while the remediation works have been undertaken to Rosecourt, and secondly, in relation to a Notice of Intent to Terminate Mrs Williams right to occupy Apartment D201.
14. These disputes arise from issues that have been alive over an extended period of time. The originating dispute was the subject to a previous formal dispute process, under the Act, which commenced in April 2017. In that instance the application was on behalf of twelve applicants, including Mrs Williams. At that point in time remediation works, which had not been commenced, had been suspended while Metlifecare undertook further engagement and consultation with residents. In the event the disputes panel member refused, under section 66(1)(a) of the Act, to continue to hear the dispute on the grounds that to do so would be an abuse of process. In part this decision was based on the finding of the disputes panel in relation to his powers to order remedies. He stated in paragraph 18 of his decision dated 5 December 2017:

“At a very early stage in these proceedings I identified a fundamental issue with the applicants’ case. The issue is that even if I was to find the respondent had breached obligations to the applicants, there was no remedy I could order. This largely was the result of the remedial works which are the subject of the dispute having been suspended with the intention of being replaced by new proposals.”
15. It is relevant to note a further contributing consideration to the decision of the dispute panel was his view, set out in paragraphs 52 and 53 of his decision, that continuing the dispute process with the then representative for the applicants would exacerbate the then existing fractious relationship between residents and the operator, and given that the issues in dispute continued



to be magnified, that he should refuse to hear the dispute on the grounds it was now an abuse of process.

First Complaint Notice

16. Mrs Williams filed a Complaint Notice on 4 Oct 2018¹. This may be summarised as follows:

Complaint:

- Violation of causes 2 and 3 of the Code of Residents' Rights by the MLC Operations Manager.

Basis of the complaint:

- failure of MLC to consult re the walkways since pre 5 Feb 2018
- such failure is a breach of the Retirement Villages Code of Practice (non-specified but being clause 28 by inspection)

Second Complaint Notice

17. Mrs Williams filed a Complaint Notice on 20 March 2019². This may be summarised as follows:

Complaint:

- Violation of causes 28 of the Retirement Villages Code of Practice
- Violation of causes 2 and 3 of the Code of Residents' Rights by the MLC Operations Manager
- Violation of MLC Complaints Policy and Procedure formal complaints resolution procedure

Basis of the complaint:

- The history of events as summarised in Mrs Williams' letter to Richard Callander (MLC General Manager Operations) dated 25 Feb 2019 and his response dated 8 Mar 2019.
- The failure of MLC to respond to the earlier Complaint Notice of 4 Oct 2018.
- The failure of MLC to respond to the subsequent correspondence, specifically noting a lack of a substantiated response to the letter of 25 Feb 2019.
- The failure of MLC to provide evidence of its compliance with steps 1, 2 and 3 of the Formal Complaints Resolution Procedure.

¹ MLC Bundle page 80.

² MLC Bundle page 84.



18. The substantive complaint is set out (in part) as follows:

The original apartment I bought into had no fixed windows, with free airflow in the walkway. Air flow through the other windows in the apartment (with or without stays) can never replace or replicate the air flow caused by the north western breeze via the opened front door and windows which are now fixed.

Opening the window stays in my apartment was never a consideration of, or request by, me. The same comments apply to the so-called removal of the covered walkway.

What I however repeatedly have stated, is that my originally bought-into quality of living has been negatively impacted by the illegal Metlifecare action. Apart from being totally unacceptable to me, it will also last for the rest of my stay in Waitakere Gardens.

I want to re-iterate my previously expressed written requirements to you once again

"I will not move back to Apartment D201 until the original situation, which Metlifecare illegally and without consultation changed for the worse, has been restored, viz

- no fixed windows in my apartment

- an acceptable "open" walkway outside my apartment (louvers)

- no meaningful interaction on this matter can take place prior to resolving the current complaint"

The current remediated walkway is an illegal structure and has come about without any consultation with the affected residents and after only one (early-conceptual stage) consultation meeting during August 2017. The claim of "Compliance with the current Building Code" is thus irrelevant, because compliance is the end-result of Council requirements on a design proposal by Metlifecare, which happened without any consultation with residents, and also contrary to the Metlifecare statutory obligation and all the previous Metlifecare commitments, promises, undertakings, etc .

In this regard you are specifically referred to Item 3 of my letter of 25 February 2019.

Statutory Supervisor Involvement

19. In accordance with MLC complaints procedure – which is reviewed further below – this matter was referred to Statutory Supervisor, Covenant Trustee Services. Their conclusions are set out in a letter from them dated 10 April 2019, signed by Garreth Haynes³. This letter may be summarised as follows:

- The complaint being addressed is that dated 4 Oct 2018. [NB: no reference is made to the complaint dated 20 March 2019.]
- As MLC could not resolve the complaint with Mrs Williams it was referred to Covenant Trustee Services.
- MLC referred the complaint to the Statutory Supervisor on 18 Jan 2018.

³ MLC Bundle page 88.



- The role of the Statutory Supervisor is not to make findings or rulings but to work with the parties to identify practical solutions that can be the basis for recommending a way forward.
- Any recommendation is not binding on the parties.
- Mrs Williams was not willing to meet with the Statutory Supervisor.
- The Statutory Supervisor concluded:
 - referral of the complaint to the Statutory Supervisor by MLC was outside of the period specified in the MLC complaints procedure of 20 working days
 - there was consultation with the residents regarding the design of the remediation works, and that the initial consultation was followed by regular meetings and project updates from MLC
 - the decision to proceed with the enclosed walkways followed that consultation
 - fixing of windows to the walkway was required under the Building Code because the enclosed walkways were deemed to be fire cells
 - it was not possible for MLC to provide Mrs Williams with opening windows onto the walkway and an open walkway
 - that the issue of ventilation was very important to Mrs Williams
 - that the level of airflow through the apartment , while not exactly the same as previously, was “still good”, and this issue should not prevent Mrs Williams moving back in to the apartment.
- The Statutory Supervisor noted:
 - MLC’s acknowledgement that the consultation process may not have been clear that walkway windows and apartment windows facing the walkway would be fixed
 - MLC has issued a letter of apology dated 31 Oct 2018 in that regard and provided clarification of reasons for the closed walkway solution
 - the enclosed walkways had resulted in reduced ventilation and an issue with heat build-up for which solutions were being explored by MLC.
- The Statutory Supervisor made the following recommendations as to a way forward:
 - that MLC provide an apology to Mrs Williams regarding any deficiencies there may have been in their consultation process and for any non-compliance with their complaints policy
 - that MLC provide some monetary compensation to Mrs Williams for her compromising on the ventilation issue
 - that Mrs Williams relocate back into Apartment D201
 - that MLC waive the weekly village fee for a period of 3 months.



Termination of the Temporary Right to Occupy Apartment B201

20. The terms of the agreement between MLC and Mrs Williams re her temporary licence to occupy Apartment B201 are set out in a document dated 12 December 2017⁴. The copy sighted is unsigned but I will assume it correctly captures the agreed terms as that has not been disputed. I note the following relevant provisions:

2 *Apartment/Unit B201 (temporary accommodation)*

Your obligations under your Occupation Right Agreement will apply to the temporary accommodation as if it were Rosecourt Apartment D201.

2.1 *Commencement and termination date of temporary accommodation:*

You will be able to occupy the temporary accommodation from Monday 8 January 2018 ... until the date you are notified that the remedial/refurbishment works on your Apartment have been completed and your Apartment is ready to be re-occupied. We will give you at least two weeks' notice of the date of termination of the temporary accommodation. Your occupation of the temporary accommodation will be as licensee not as a tenant and the Residential Tenancies Act does not apply to this arrangement.

21. By Notice dated 16 May 2019⁵, MLC:

- recorded that Mrs Williams had failed to vacate Apartment B201 as per the terms of the licence to occupy, and in particular had failed to vacate by 14 May 2019 as per previous notice
- gave notice to Mrs Williams that her right to reside in Apartment B201 had terminated and required her immediate vacation, giving her a deadline of 30 May 2019 by which to vacate.

Notice of Intent to Terminate Occupation Licence re Apartment D201

22. By Notice dated 16 May 2019⁶ MLC advised Mrs Williams of their intention to terminate her Occupation Licence for Apartment D201 unless she returned to Apartment D201 within one month. MLC advised that such termination, if it were to proceed, would be on the following proposed grounds:

⁴ MLC Bundle page 77.

⁵ MLC Bundle page 94.

⁶ MLC Bundle page 95.



- That Mrs Williams' continuing failure to resume occupation of Apartment D201 amounted to abandonment of the Apartment, such abandonment being grounds under clause 64.7(a) of the Occupation Right Agreement to terminate the agreement.
- That Mrs Williams' continuing occupation of Apartment B201 was causing MLC nuisance annoyance and distress, and was causing other residents nuisance and distress, and potentially serious distress as it was going to delay the relocation of residents from another block of apartments, the Millbrook building. MLC stated these outcomes were grounds under clauses 32.1 and 64.4 to terminate the Occupation Right Agreement.

Dispute Notice

23. Mrs Williams filed a Dispute Notice on 20 May 2019⁷. This states:

"I give notice of a dispute about the Operator – Metlifecare Ltd

"The dispute is about the following matters

- *The illegal and unacceptable unilateral reduction of the originally bought-into quality of natural airflow through my apartment, and serving unsubstantiated 'termination of right to occupy' and 'intention to terminate occupation licence' notices on me prior to the resolution of the currently unresolved complaint(s), against the background of your obligation to honour the following ORA clauses:*
- *23.1(a); 24.1(a); 39.1; 39.2; 40.1; 48.1; 48.2.*

"The grounds for my dispute are:

- *MLC's violation of Clause 28 of the Retirement Villages Code of Practice 2008*
- *MLC's violation of Clauses 2 and 3 of the Metlifecare Code of Residents' Rights*
- *MLC's violation of the Metlifecare Complaints Policy and Procedure"*

24. For convenience I set out below the references clauses etc. identified in the Dispute Notice.

ORA clauses:-23.1(a); 24.1(a); 39.1; 39.2; 40.1; 48.1; 48.2

- 23.1(a)** (MLC) will consult with you about any proposed changes in
- a) the services and benefits we provide
 - b) your payments

⁷ Attachment to email from Rowena Boereboom received 4 June 2019.



that will or might have a material impact on your occupancy or your ability to pay for the services and benefits we provide.

- 24.1(a)** (MLC) will promptly notify you about any matter that would or might have a material impact on:
- a) your Occupation Right, or your rights to quiet enjoyment.
- 39.1** (MLC) will use reasonable care and skill in ensuring that the affairs of the village are conducted properly and efficiently.
- 39.2** (MLC) will use reasonable care and skill in the exercise and performance of our powers duties and functions.
- 40.1** When (MLC) have adopted the Code of Practice we will meet all of the requirements of the Code of Practice (subject to any exemptions we may obtain).
- 48.1** (MLC) will ensure that (MLC), and our staff and all people who provide services at the Village treat Village residents with courtesy and respect their rights.
- 48.2** (MLC) will ensure that (MLC), all of (MLC's) staff and all people who provide services at the Village do not exploit Village residents.

Clause 28 of the Retirement Villages Code of Practice 2008 (April 2017 Update)

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.

Consultation process

- 3 When consulting residents the operator must:
 - a give them all the relevant information so they are able to provide informed comment and advice about the matter
 - b allow enough time for residents being consulted to consider and draw up their comments or advice



- c fully consider any comment or advice before reaching a decision.
- 4 Residents may, individually or as a group, appoint a person or people to represent their views in the consultation process.
- 5 The operator must not decide a matter before consultation has been completed, but is not obliged to agree with every comment or to act on the advice provided. The operator must consider all responses received with an open mind. The outcome cannot have already been decided.
- 6 Following consultation the operator must tell residents as soon as reasonably practicable the decision(s) made, with reasons.
- 7 The consultation process must take into account the operator's need to operate and manage the retirement village effectively and to provide the facilities and services for the benefit of all residents.

Clauses 2 and 3 of the Metlifecare Code of Residents' Rights

2 Information

You have the right to information relating to any matters affecting, or likely to affect, the terms and conditions of your residency.

3 Consultation

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
- b) ability to pay for the services or benefits provided.

Metlifecare Complaints Policy and Procedure

In essence the relevant provisions noted within the Feb 2018 issue of this document are:

Level 1 Issues can be raised with the Village Manager or MLC verbally or in writing. Effectively MLC will acknowledge in writing within 5 working days. MLC will respond an informal within a reasonable time. If MLC has not responded within 20 days of the and issue being raised they will advise progress to date and expected timing for optional the final response. The Village Manager will advise the outcome of the process. investigation in writing.

Level 2 This must be made in writing. This may be the initial step taken or may follow A Formal the outcome under Level 1. Prior to raising the complaint the resident may Complaint. contact the Statutory Supervisor, the Registrar of Retirement Villages, and or the Retirement Commissioner.

As an alternative to, or in addition to, raising a Formal Complaint, if the



complaint relates to a breach of the Code of Resident's Rights the resident may contact the Statutory Supervisor.

MLC will acknowledge in writing within 5 working days. MLC will endeavour to resolve the complaint within 20 working days of the issue being raised. If that does not happen they will advise the reason for the delay, and they will request the Statutory Supervisor assist the parties and to recommend a way forward.

If the complaint has not been resolved within 20 working days of being referred to the Statutory Supervisor the resident will be offered a mediation

Level 3
Issue a
Dispute
Notice

A Dispute Notice may be issued at any time 20 working days after issue of a Formal Complaint but no more than 6 months and 20 working days later. However the right to issue a Dispute Notice is subject to the Act.

[NB: a Dispute Notice is a prerequisite to invoking the dispute resolution provisions under the Act.]

Submission on Behalf of Mrs Williams

25. No formal submission in the expected form was received from, or on behalf of, Mrs Williams, the Applicant. The documents lodged with the disputes panel comprised the Notice of Dispute and referenced prior correspondence. Mr Kritzinger provided⁸ correspondence dated 16 Jan 2019 and 25 Feb 2019 from Mrs Williams to Richard Callander. Further correspondence submitted subsequently at my request comprised Johan Kritzinger to Richard Callander dated 30 Oct 2018, and Richard Callander to Mrs Williams dated 19 Feb 2019.

26. In my view the letter from Mrs Williams to Richard Callander dated 16 Jan 2019 summarises her position effectively. The following extracts are noted.

"This letter summarises the relevant aspects of the Rosecourt Remedial Project debacle

- *MLC are unilaterally bulldozing their own way through the entire remediation project, with total disregard for the needs and rights of not only me, but all the Affected Rosecourt Residents, the law and their own codes of practice.*
- *My personal requirement for ventilation in my apartment is well documented and non-negotiable. This was the main reason why I originally bought into Apartment D201.*

⁸ JK email dated 10 June 2019.



- *Affected Residents were not consulted over the conservatory changes, the non-opening windows and the walkway. The residents were not given a chance to see the revised changes, consult on or discuss the proposed design changes with MLC prior to the finalisation of the detailed plans.*
- *MLC all along, on paper, committed themselves to transparent consultation with the Rosecourt residents through all the various design phases (from conceptual design through to detailed design) of the remediation project. These commitments have been totally ignored and violated by MLC, virtually throughout the entire duration of the remediation project.*
- *The very last consultation (the second of only two consultations) since 25 January 2017, prior to submittal of final detail plans to the Council for building consent during January 2018, took place on 10 August 2017 (at the beginning of the concept design phase of the conservatories and walkways)*
- *Due to the above MLC violations, a formal complaint was lodged by me on 8 October 2018. To this very day MLC has fully ignored the complaint and are violating their own policy and procedure in this regard.*
- *Until the satisfactory resolution of the lodged complaint, I am not moving back to my own apartment*
- *The real matter basically revolves around the violation by MLC of the Retirement Villages Code of Practice and the MLC Code of Residents' Rights up to January 2018 on the Rosecourt Remediation Project, followed by the violation of its own Complaints Policy and Procedure from October 2018 onwards by MLC.*
- *It is for MLC to come clear on this matter, to respond to the outstanding numerous and repeated written challenges and requests reflected in this letter, and to make good all their blunders on the design of the new Rosecourt conservatories and walkways in consultation with the Affected Residents.*

.....

"Let me now please refresh your mind:

- *I am still awaiting your reply to the letter dated 30 October 2018, requesting you to respond in full to the email of 24 October 2018 to you re the requested written evidence substantiating your claims on the nature of interaction between MLC and Affected Rosecourt Residents, requested guidelines from you on communication with the MLC Operations Manager (your letter dated 24 October 2018), as well as your response to my rejection letter (24 October 2018) of the Update Meeting Minutes of 15 October 2018*
- *I am still awaiting your reply to the letter dated 25 October 2018 on my formal complaint submitted on 8 October 2018 about the Violation of Clauses 2 and 3 of the Code of Residents' Rights by the MLC Operations Manager re*
-No formal acknowledgement to date of my complaint by MLC, not to mention the stipulated 5 working days allowed for that in the MLC Complaints Policy Procedure



-No information on the progress with the resolution of the formal complaint within 20 working days, nor reasons for the delay, nor regular information about the progress of the Formal Complaint, as stipulated in the MLC Complaints Policy Procedure

-No notification or advice by MLC of any possible referral of the Formal Complaint to the Statutory Supervisor or any alternative actions, as stipulated in the MLC Complaints Policy Procedure, should they be unable to resolve the Formal Complaint within 20 working days

- *I am still awaiting your response to the letter dated 25 October 2018 on my stated position:*

“Due to the violation of the Retirement Villages Code of Practice, the violation of the MLC Code of Residents’ Rights and the violation of the MLC Complaints Policy and Procedure by MLC, no meaningful interaction between MLC and me on the matter can take place prior to resolving the current outstanding complaint. I am awaiting the outcome of the current violation complaint and will then decide on my appropriate future actions.”

- *The real matter basically revolves around the violation by MLC of the Retirement Villages Code of Practice and the MLC Code of Residents’ Rights up to January 2018 on the Rosecourt Remediation Project, followed by the violation of its own Complaints Policy and Procedure from October 2018 onwards by MLC.”*

27. An “Impact Statement” prepared by Mrs Williams dated 1 June 2019 was received on 18 June 2019⁹. The salient matters set out were as follows.

- An important factor in Mrs Williams’ original decision to occupy Apartment D201 was its excellent air flow.
- Assertions of poor recognition of residents’ rights by MLC when remediation was initially initiated, including an intent to leave residents in their apartments while the work was done.
- Inadequate consultation.
- Enclosure of the walkways was not discussed in advance with residents.
- Fire doors and fixed windows to the walkways were not discussed in advance with residents.

⁹ JK email dated 18 June 2019.



- The impact of the enclosed walkways with extended solid cladding to the columns and the fixed windows and closed fire doors resulted in a serious diminution of the light and airflows within all apartments.
- Assertions that MLC staff conceded the configuration (defining the apartments as fire cells) was “all lies” and that the real reason was to minimise long term maintenance.
- Implies that the plan to install louvres follows pressure from residents.
- That the walkways can no longer be used as sitting areas as previously.
- That MLC’s behaviour towards her amounts to “unscrupulous bullying”.
- The receipt of the Notice of Termination caused her “absolute shock and devastation” and “unimaginable” stress.

28. The applicant’s submission did not include any reference to remedies sought. By letter dated 13 June 2019 I specifically requested further particulars as to the remedies sought and the basis of claimed entitlement thereto. In response¹⁰ the applicant advised that the remedies sought were as follows:

- The replacement of all the walkway exterior windows with louvres (MLC have already started doing some work in this regard as a result of the relocated affected residents' dissatisfaction with the new situation). This can impact on the "fire cell" status of the walkway and the need for fixed apartment windows.
- Removal of the walkway door at the elevator shaft.
- The apartment windows facing the walkway to be returned to their original state.
- Withdrawal of the “Termination of Right to Occupy Apartment B201” notice letter dated 16 May 2019.
- Withdrawal of the "Notice of Intention to Terminate your Occupancy Licence" of Apartment D201 notice letter dated 16 May 2019.
- Acknowledgement of and apology for (similar to the 30 April 2019 one) abuse of elderly resident, false statement on 'breach of confidentiality', slandering, character assassination, flagrant false statements (even in the termination letter dated 16 May 2019),

¹⁰ JK email dated 18 June 2019.



inconvenience, emotional distress, anxiety, stress, etc. experienced over an extended period of time as a result of the mismanagement of the remediation project by MLC.

The Reply From MLC Dated 17 June 2019

29. [Para 4] MLC waives any objection that the disputes relating to the two Notices to Terminate have not been subject to a prior formal complaint as is required under the Act.
30. [Para 8] In relation to the originating dispute MLC does not accept any of the matters of dispute raised by Mrs Williams, and asserts it has not breached the Occupation Right Agreement, or any of the Codes, or its own Complaints Policy.
31. [Para 9] MLC states the disputes panel has no jurisdiction to hear the full scope of the complaints set out because the scope of matters the disputes panel can determine is limited by section 53 of the Act. In particular MLC says the dispute relating to the Notice to Terminate occupancy of Apartment B201 (para 49) is outside of the scope of section 53 of the Act. Further, MLC asserts that in relation to consultation and information regarding the remediation works, there are no effective remedies the disputes panel can order, and the disputes panel should refuse to hear those matters pursuant to section 69(1)(a) of the Act on the basis that continuation would be an abuse of process.
32. MLC says it has complied properly with its obligations to consult, and has followed consultation process guidelines set out in section 28 of the Retirement Villages Code of Practice 2008. It notes that under this section:
 - The operator is not obliged to agree with every comment or act on the advice provided.
 - As part of its decision making process following consultation the operator is required to take into account its own needs to operate and manage the retirement village effectively and to provide the facilities and services for the benefit of all residents.
33. MLC has provided substantial documentation to support its assertion that it undertook an extensive programme of “consultation”¹¹. A summary record of referenced meetings and correspondence is included in Appendix I.
34. MLC asserts that their issue of the Notice of Intent to Terminate Mrs Williams’ occupancy of Apartment D201 is lawful, and that the Notice to Terminate Mrs Williams’ occupancy of Apartment B201 is also lawful.

¹¹ MLC Bundle pages 100 to 188.



35. MLC states that the temporary occupation of Apartment B201 was on the express basis that Mrs Williams vacate on two weeks' notice when she was advised remediation works had been completed on Apartment D201 and it was ready for occupation. MLC notes that, in addition to the briefings provided to all affected residents, MLC separately had extensive communications with Mrs Williams on the matter in the period between November 2018 to May 2019. Evidence of this communication has been provided¹². MLC states that Mrs Williams failed to respond usefully to many requests from MLC regarding a programme for her relocation back to Apartment D201.

36. The fundamental position of MLC is captured by para 57 of their submission:

"Simply put, she cannot continue to occupy two apartments simultaneously, when there is no reasonable basis for her to refuse to move back to D201 and the remediation work cannot reasonably be altered to Mrs Williams' specific demands."

which they expand upon in para 61 of their submission:

"Mrs Williams is refusing to vacate temporary Apartment B201 on the basis that her complaints about the remediation of Apartment D201 have not been resolved: namely that the remediation has not been undone as she insists. However MLC has made it clear that, in the circumstances, there is no opportunity to alter the remediation work on D201 or redesign the walkways."

37. MLC's submission para 63 contains the following statement:

"MLC remain concerned that Mrs Williams has totally unrealistic expectations about her complaint and the matters that can be changed. There can be no 'resolution' on Sandra's terms, and she cannot reasonably insist that resolution means all her issues are dealt with as she wishes. This is not constructive or in good faith."

38. MLC concludes noting that, until recently, Mrs Williams' continuing occupation of Apartment B201 was causing costly delays to MLC commencing remediation works on another block.

¹² MLC bundle pages 189 – 228.



Response by Mrs Williams to MLC Reply Dated 24 June 2019

39. Mrs Williams submitted a Reply¹³, which was not requested, and nor was approval sought to produce it. In the interest of seeking the correct outcome I have reviewed this submission. The principal points noted are as follows:

- “Consultation” as defined in Clause 28 of the Retirement Villages Code of Practice must be distinguished from “meeting”, “feedback”, “update”, “communication” etc.
- Repeats no consultation by MLC with the Affected Rosecourt Residents group took place from 10 August 2017 until October 2018, which was after the remediation construction had been completed.
- Notes:

From the above it is clear that the walkway design, which was submitted to Council for building consent without consultation with the affected residents does not satisfy the affected residents' requirements and that interaction on the matter between MLC and them is still ongoing. Although the walkway is physically there, it is subject to modifications to the louvres, committed to by MLC. Those modifications will have an impact on the 'fire cell' status of the walkway, which can impact on the 'fire doors' and fixed apartment windows. The walkway issue is far from settled and the process can't be regarded as complete or that nothing to be done about it. All these actions only taking place from October 2018 onwards, long after obtaining building consent in February 2018.

Once again, in line with their behaviour during the first and now the second Rosecourt Remediation Projects, MLC are following the same approach in dealing with the Millbrook relocations – doing nothing, wasting time on non-addressing real issues, waiting for a self-made crisis to happen, take the road of least resistance, violate their own procedures and obligations, use their power base and abuse elderly residents, serve me with termination orders, make use of slandering against me in public, false propaganda, trying character assassination of me, act in self-interest, trying to project a false public image of caring for their elderly residents, etc.

MLC Submission dated 3 July 2019

40. At the site inspection held on Wednesday 26 June 2019 MLC were asked to provide evidence as to the date(s) they advised the residents of the enclosed walkway solution, and implications thereof (e.g. fixed windows). MLC advised¹⁴ that, as detailed in their Reply, the closed walkways were advised in presentations held on 13 Dec 2017 and 15 Feb 2018 – refer para 33 above. They advised that MLC staff did not recall the matter of the fixed windows ever being raised with residents before September 2018.

¹³ JK email 24 June 2019.

¹⁴ MLC email 3 July 2019.



41. Further, MLC stated that had the issues of the fixed windows and the mechanical ventilation been addressed earlier the outcome would be the same because, given the Building Code and other design considerations, there was no viable alternative.

Question Set 1

42. The following questions were issued by the disputes panel to MLC on 17 July 2019.

- 1.1 Is clause 55 of the Occupation Right Agreement applicable to the rights of the parties in relation to this dispute? If so, specifically how?
- 1.2 In the record of the meeting held 26 October 2018 (refer MLC Bundle page 163) at the top of page 164 it is stated:
- “This fresh air system is common in all new apartment buildings and complies with Best Practice Guidelines.”*
- What evidence can MLC provide to support these claims?
- 1.3 In relation to the advice from Maynard Marks dated 30 Oct 2018 attached to the MLC email sent June 25 2019 at 4:33pm:
- a) Does the requirement for a 2 hour fire rated wall between the apartments and the “enclosed walkway” apply whether or not the external wall of the walkway has opening windows/louvres?
 - b) Does the requirement for a fire door to the stair well apply whether or not the external wall of the walkway has opening windows/ louvres?

43. The reason for question 1.1 arises from the following provisions set out in clause 55 of the Occupation Right Agreement:

- 55 **DAMAGE TO RESIDENTIAL UNIT OR VILLAGE**
- 55.1 ~~Subject to clauses 55.2 and 55.4 below, if the Residential Unit is damaged or destroyed by fire, earthquake, storm, enemy action, inevitable accident or other risk against which we are insured, then we will repair and reinstate the Residential Unit. However, we are not bound to expend any more money than the actual amount of the insurance money we receive.~~



- (a) Subject to the above, we will ensure that the Residential Unit is reinstated to a design we consider appropriate and to a standard and with a floor area at least equal to that of the Residential Unit prior to it being destroyed or damaged.

44. The response from MLC, and comment thereon from Mrs Williams, are summarised as follows:

Question	MLC Reply	SW Comment
1.1	<p>ORA clause 55 does not apply in this case because the water tightness issues are not an insured event.</p> <p>Further, the fact that this risk cannot be insured against means “MLC has to ensure the repair maximises long term building integrity to try and avoid future damage”.</p>	No relevant comments.
1.2	<p>Stephenson & Turner¹⁵ responded via MLC. Their advice:</p> <ul style="list-style-type: none"> • Did not address the question of this being a common solution. • Noted they are unaware of Best Practice Guidelines • Noted the solution has been designed to “HVAC good practice design”, and complies with the Building Code. • Noted that the solution allows for heat pumps to be installed on request to provide cooling in summer to address the issue of higher temperatures being experienced (due to enclosed walkways and sealed windows), as 	<p>Asserts building integrity and weather-tightness took precedence over residents’ rights. Natural ventilation has been destroyed.</p> <p>Asserts at residents’ cost.</p>

¹⁵ A tier one design consultancy.



	well as heating in winter, within the apartments.	
1.3(a)	Stephenson & Turner responded via MLC. Their advice is that the requirement for the fire rated wall applies whether or not the external walkway has opening windows or louvres.	
1.3(b)	Stephenson & Turner responded via MLC. Their advice is that the requirement for the fire doors to the stairwell applies whether or not the external walkway has opening windows or louvres.	Notes difference to ground floor where no fire door exists to the stairwell.

Question Set 2

45. The following questions were issued by the disputes panel to MLC on 22 July 2019.

The Notice of Intention to terminate the Occupation Right Agreement for Apartment D201 proposes to rely upon breaches of clauses 32.1, 64.4, and 64.7(a) of the ORA.

- 2.1 If MLC are continuing to rely upon a breach of clause 32.1 (nuisance etc.), please refer me to specific argument and/or evidence within your submission dated 17 July 2019, and the provision within the ORA that makes this grounds for termination. If you are not, please confirm.
- 2.2 If MLC are continuing to rely upon a breach of clause 64.4 (serious damage etc.), please refer me to specific argument and/or evidence within your submission dated 17 July 2019. At first look clause 64.4 appears to relate to situations where physical damage or personal injury arises. If you are not, please confirm.

46. The response from MLC, and comment thereon from Mrs Williams, are summarised as follows:

Question	MLC Reply	SW Comment
2.1	MLC are continuing to rely upon a breach of clause 32.1. Relevant elements of their submission of 17 June 2019 were referenced. MLC consider provision within the ORA that makes this grounds for termination include 64.4(c) and 64.7(b).	SW comment comprised further general submission.
2.2	MLC are continuing to rely upon (but not a breach of) clause 64.4.	



Question Set 3

47. The following question was issued by the disputes panel to MLC on 24 July 2019.

- 3.1 The MLC response to Question Set 2 included the statement that MLC had offered to install a heat pump to Apartment D201 at MLC's cost, contrary to earlier advice from Mr Kritzinger. Can MLC please provide supporting evidence to support this statement.

48. The response from MLC, and comment thereon from Mrs Williams, are summarised as follows:

Question	MLC Reply	SW Comment
3.1	Advised that the letter dated 12 February 2019 ¹⁶ – which states that “an air conditioning unit” can be installed in D201 followed a discussion whereby MLC offered to install a heat pump at their cost. MLC advised that they have agreed to install heat pumps in two other units at their cost.	None

Disputes Procedure

49. A Preliminary Conference was held by a teleconference at 1:15 pm on 20 June 2019. The relevant outcomes from that conference were:

- In relation to the originating dispute, MLC waived non-compliance by Mrs Williams with sections 56 and 57 of the Act.
- In relation to the dispute re the Notice to Terminate the right to occupy Apartment B201, MLC waived non-compliance by Mrs Williams with sections 52, 56 and 57 of the Act.
- In relation to the dispute re the Notice of Intent to Terminate the licence to occupy Apartment D201, MLC waived non-compliance by Mrs Williams with sections 52, 56 and 57 of the Act.
- With respect to section 65 of the Act, the parties agreed a hearing was not required, affidavits of statements were not required, and the Rules of Evidence would not be applied.

¹⁶ MLC Bundle page 218.



50. An inspection of the site was held on 26 June 2019. Attendees comprised Sandra Williams and her advocate Johan Kritzinger; and, representing MLC, Karen Kemp, Theresa Henson, Simon Barber and Scott Bracy. The site inspection comprised a walk through of the two Apartments B201 and D201, and the walkway leading to Apartment D201. Various features were discussed and examined.

51. By agreement no hearing was held.

Jurisdiction

MLC Challenge of Jurisdiction

52. MLC challenged my jurisdiction to hear the dispute in relation to the remediation works undertaken to Apartment D201 on the basis that the disputes panel has no power under section 69(1) of the Act to order the remedies sought, and therefore to continue to hear the dispute would be an abuse of process¹⁷. Section 69(1) of the Act states:

69 Powers of disputes panel

(1) A disputes panel may—

- (a) amend an occupation right agreement so that it complies with any applicable code of practice or section 27(1); or
- (b) order any party to comply with its obligations under an occupation right agreement or the code of practice, or to give effect to a right referred to in the code of residents' rights; or
- (c) in the case of a dispute with the operator concerning the liability for, or payment of, any monetary amount, order the operator or, as the case may be, the resident to pay or refund all or part of the amount in dispute; or
- (d) in the case of a dispute where the operator is not a party to the dispute,—
 - (i) order a party to return to the other party specific property not exceeding \$1,000 in value; or
 - (ii) order a party to pay the other party an amount by way of compensation not exceeding \$1,000; or
- (e) not impose any other obligation other than in relation to the payment of costs on any party.

53. Further, MLC challenged my jurisdiction to hear the dispute in relation to the Notice to Terminate the Temporary Right to Occupy Apartment B201 on the basis that it does not fall

¹⁷ MLC submission dated 25 June 2019.



within the type of dispute which the disputes panel can hear under section 53 of the Act. Section 53 of the Act states:

53 Types of dispute for which resident may give 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; or
- (b) relating to changes to charges for outgoings or access to services or facilities imposed or payable under the resident's occupation right agreement; or
- (c) relating to the charges or deductions imposed as a result of the resident's occupation right coming to an end for any reason or relating to money due to the resident under the resident's occupation right agreement following termination or avoidance under section 31 of the resident's occupation right agreement; or
- (d) relating to an alleged breach of a right referred to in the code of residents' rights or of the code of practice.

(2) Nothing in subsection (1) enables a resident to give a dispute notice concerning any health services or disability services, or any facilities to which the Code of Health and Disability Services Consumers' Rights under the Health and Disability Commissioner Act 1994 applies.

(3) A resident may give a dispute notice for resolution of a dispute concerning the operator's breach of the resident's occupation right agreement or code of practice in disposing of a residential unit in a retirement village formerly occupied by the resident.

(4) A resident may give a dispute notice for the resolution of a dispute affecting the resident's occupation right between the resident and any other person who is—

- (a) another resident of the retirement village; or
- (b) in another resident's residential unit with that other resident's permission.

54. MLC have not challenged my jurisdiction to hear the dispute in relation to the Notice of Intention to Terminate the Occupation Licence re Apartment D201.

Jurisdiction to Hear the Original Dispute in Relation to Apartment D201

55. In summary the position of MLC is that:

- Mrs Williams seeks a remedy that is outside of the powers of the disputes panel as defined in section 69(1) of the Act.
- Therefore there is no effective remedy that the disputes panel can order.



- Therefore it would be an abuse of process for the disputes panel to continue to determine this dispute.

56. My response to MLC¹⁸ was:

“Even assuming it is the case that the disputes panel cannot order a remedy of the type being sought, and I have not reached a concluded opinion on that, it is clearly possible in general terms for a disputes panel to reach a conclusion which does not provide any remedy outside of those allowed under S69, and indeed which may not even provide any such remedy, but which allows for a validly determined outcome. Therefore, in the general case, it is not possible to say whether or not the disputes panel will not have jurisdiction in advance of its findings. In my view that is the case here.”

57. On further consideration my viewpoint has not changed: whether I will have jurisdiction in relation to this dispute depends on my conclusions as to any entitlement to remedies.

Jurisdiction to Hear the Dispute in relation to Apartment B201

58. In summary the position of MLC is that jurisdiction does not exist because:

- The applicant’s rights to occupy B201 arises under a Temporary Right to Occupy
- The status of such a right is not a right derived from, or governed by, an Occupation Rights Agreement
- As such it is not an Occupation Rights Agreement and cannot be deemed relevant to the operation of S 53(1) generally
- In particular, termination of a Temporary Right to Occupy is not a matter to be considered under S53.1(a) of the RVA because such termination does not impact on Mrs Williams’ Occupation Rights Agreement, or relate to services or facilities she can access under the Occupation Rights Agreement
- S53(1)(b) and 53(1)(c) are not relevant to the substantive issue and so cannot apply
- S53(1)(d) does not apply because the Temporary Right to Occupy is not a Code of Residents’ Rights or a Code of Practice
- That, even if the disputes panel had jurisdiction to hear the dispute, it has no powers under the Act to order a remedy that would provide an outcome.

59. My response to MLC¹⁹ was:

¹⁸ RFA letter to MLC 2 July 2019.

¹⁹ Letter RFA to MLC 2 July 2019.



“Firstly, and in my view significantly, the position of MLC, that the Temporary Right to Occupy is not a right derived from, or governed by, an Occupation Rights Agreement, is contradicted by clause 2 of the Temporary Right to Occupy, which states:

‘Your obligations under your Occupation Right Agreement will apply to (Apartment B201) as if it were Rosecourt Apartment D201.’

“That suggests there is a strong case to:

- *impute the rights under the Occupation Right Agreement into the Temporary Right to Occupy*
- *allow for the application of S53(1)(a) in respect of the Temporary Right to Occupy.*

“I think it is unlikely the parties contemplated at any time that the relevant rights and obligations defined under Occupation Right Agreement were removed by the execution to the Temporary Right to Occupy.”

60. On further consideration my viewpoint has not changed and I conclude there is no prejudice to my jurisdiction in relation to this dispute.

Relevant Issues and Findings

Remediation Works

61. In relation to this matter I consider the following issues are relevant.

- MLC communication of solution.
- The issues arising from the remediation works.
- Were MLC entitled to enclose walkways and adopt fire cells?
- Was the required consultation undertaken?
- Allegations by Mrs Williams of bullying and exploitation by MLC and its staff.
- Allegations by Mrs Williams of MLC’s failure to comply with their Complaints Policy.
- Findings as to Mrs Williams’ basis of claim.
- The impact on Mrs Williams.
- Is Mrs Williams entitled to the remedies sought?
- Jurisdiction of disputes panel to make a determination in this instance.

MLC communication of solution

62. The evidence is clear that MLC’s proposal to enclose the walkways was advised to the residents at least as early as 13 December 2017 – refer para 40.

63. There is no evidence that MLC advised the residents at any time before September 2018 that the remediation solution included fire rating of the walls between the apartments and the walkways and inserting fire door before the stair well, with the consequence that fixed windows were required for all windows into the walkway.



The issues arising from the remediation works

64. In essence, issues of two types have arisen with the remediation works to Rosecourt.
65. Firstly, there are the issues arising from the consequences of the decision to include fire cells. Specifically these include the fire doors, the sealed windows and the mechanical ventilation provided as a necessary consequence. These are “global” issues: they will be present in all apartments in all blocks once remediation works are completed.
66. Secondly, in the case of Rosecourt, there are currently issues with the temperatures being experienced in the walkways. Further, despite the sealed windows and fire doors, the apartments are agreed to be heating up uncomfortably in certain weather conditions. This is not a global issue in my view: whether or not this problem will occur on other blocks as future remediation works are progressed will depend upon the orientation of the block. In any case MLC are actively investigating solutions to this problem: these include increasing the area of louvres and possible mechanical ventilation of the walkways. I accept MLC’s position that Mrs Williams, and other residents, have been offered to have a heat pump installed within their apartments, at no cost, to provide cooling.

Were MLC entitled to enclose walkways and adopt fire cells

67. Firstly, it is useful to note, briefly, outcomes from the remediation solution adopted by MLC.
- MLC note that one benefit they received from the closed walkways was the enhanced weather tightness of the building. But it can be expected that residents will get benefits from the enclosed walkways when it is raining or windy.
 - Since they own the apartments presumably MLC get a benefit from installing the fire protection: directly as a consequence of reduced insurance premiums, and longer term from less exposure to damage. Mrs Williams notes the real inconvenience of the sealed windows, required by the fire protection solution designed. But the design solution, which includes sprinklers inside the apartments, offers the residents significantly enhanced protection in the event they have to exit the building via the walkways because of fire.
68. MLC have not argued that they were required under the building code to adopt closed walkways, so the following discussion is premised on their option to choose to do so. I am satisfied from the submissions made by Stephenson and Turner (refer para 44) that once that option had been selected it was requirement of the building code to provide fire separation to the apartments. I note the advice contained in the letter from Stephenson & Turner that the fire separation requirements apply even when the external wall to the walkway has opening windows. This expert advice can be contrasted with Mrs Williams’ understanding that providing opening windows/louvres to the walkway “*can impact on the fire doors and fixed apartment windows*” – refer para 39.



69. As noted in para 43, clause 55.1 of the Occupation Right Agreement provides expressly for the operator to have the right to reinstate a residential unit where it has been damaged or destroyed by an insured event:

“... to a design we consider appropriate and to a standard and with a floor area at least equal to that of the residential unit prior to it being destroyed or damaged”

70. There is no corresponding provision relating to the circumstance, as here, where damage arises from an event for which MLC has no insurance. But if the right to adopt “a design [the operator] considers appropriate” exists in the case where repairs arise from an insured event, it would be reasonable to apply a similar provision to an uninsured event.

71. On that basis I find that MLC were entitled to adopt the particular design for the remedial works, subject to maintaining a standard “... at least equal to that of the Residential Unit prior to it being ... damaged”.

72. This ignores the possibility that installation of a sprinkler system is a mandatory requirement arising under clause 20 of the Retirement Villages Code of Practice, which states:

20 Protection of residential units and retirement village facilities from fire

- 1 The operator must have measures and systems in place to protect the residential units, facilities, and indoor areas in the retirement village from fire.

Was the required consultation undertaken

73. The right of a resident to be consulted in relation to the remedial works is clearly defined under Right 3 of the Code of Residents’ Rights²⁰ and Clause 28.2 of the Retirement Villages Code of Practice. The consultation process defined under the Retirement Villages Code of Practice therefore applies – refer para 24.

74. Mrs Williams’ position is that no “consultation” took place after August 2017- refer para 26. In particular she stated during the site inspection that the series of meetings and updates occurring after 10 August 2017 – refer Appendix I – did not constitute consultation. I disagree with that conclusion based on my review of the documents provided, although I agree notification per se does not constitute consultation.

75. Mrs Williams’ position that the enclosure of the walkways was not discussed with the residents prior to September 2018 – refer para 27 – cannot be sustained.

²⁰ MLC Bundle page 013.



- On page 4 of her letter to Richard Callander dated 25 Feb 2019 she notes:

“On the topic of the walkway, your summary of the August [10 August 2017] meeting inter alia states that:

- *On the south side we have to consider weather tightness and the walkways*
 - *Enclose the walkways – same discussion on the bottom level whether that should be open or closed ...*
 - *We just need to make sure we’ve got the appropriate air flow and louvres in here as well”*
- Refer the table of meetings and communications set out in Appendix I. I note the covered walkways were discussed at meetings, contained in presentations, or otherwise noted, on the following dates: 10 Aug 2017, 13 Dec 2017, 9 Feb 2018, 15 Feb 2018, and 20 Aug 2018.

76. MLC have been unable to establish that there was useful information provided, or useful consultation undertaken, with respect to the implications of adopting fire cells: i.e. the fixed windows and the heavy fire doors. This apparent omission is hard to explain. At the very least it is non-compliant with Retirement Villages Code of Practice. I note Mrs Williams considers this to be evidence of bad faith. On the evidence available to me I am unable to go that far, but this omission is certainly a basis for criticism of MLC.

77. However, I conclude that the reality is the remedial works design solution would not have been different had the desired consultation occurred. There is good reason to enclose the walkways, and in my view MLC were entitled to do so – refer para 71. I am satisfied that as a consequence, MLC were required under the Building Code to fire separate the walkway. As noted above this enhances the safety of the residents.

78. I note that , on the recommendation of the Statutory Supervisor, MLC provided an apology to Mrs Williams in relation to deficiencies in the consultation process – refer para 19.

Allegations by Mrs Williams of bullying and exploitation by MLC and its staff

79. I have no evidence from which I would conclude that Mrs Williams has been bullied.

80. I am satisfied Mrs Williams has not been exploited by MLC.

Allegations by Mrs Williams of MLC’s failure to comply with their Complaints Policy

81. It is apparent from the events set out above that MLC have not followed their own policy and procedures in relation to the originating complaint.

82. Mrs Williams has not substantiated a loss or prejudice arising from MLC’s default.



83. It is relevant to note that MLC have waived their rights to insist that Mrs Williams follows that defined processes in relation to her disputes as to the Notice to Terminate Apartment B201, and the Notice of Intent to terminate Apartment D201. MLC's waivers are helpful to Mrs Williams' resolution of all matters.

Findings as to Mrs Williams' basis of claim

84. In relation to the claim by Mrs Williams that MLC are in breach of specific terms of the Occupation Right Agreement, I find as follows:

- **23.1(a)** Mrs Williams' claim succeeds in part.
- **24.1(a)** Mrs Williams' claim succeeds in part.
- **39.1** Mrs Williams' claim fails.
- **39.2** Mrs Williams' claim succeeds in part – as a consequence of my findings in relation to 23.1(a) and 24.1(a).
- **40.1** Mrs Williams' claim succeeds in part – as a consequence of my findings in relation to the Retirement Villages Code of Practice set out below.
- **48.1** Mrs Williams' claim fails.
- **48.2** Mrs Williams' claim fails.

85. In relation to the claim by Mrs Williams that MLC are in violation of Clause 28 of the Retirement Villages Code of Practice 2008, I find Mrs Williams' claim succeeds, in particular with reference to clause 28.3.

86. In relation to the claim by Mrs Williams that MLC are in violation of Clauses 2 and 3 of the Metlifecare Code of Residents' Rights, I find Mrs Williams' claim succeeds.

87. In relation to the claim by Mrs Williams that MLC are in violation of the Metlifecare Complaints Policy and Procedure, I find Mrs Williams' claim succeeds.

The impact on Mrs Williams

88. I have no doubt that Mrs Williams places real value on the quality of the environment she enjoyed in Apartment D201 prior to the remediation works occurring.

89. This discussion addresses the impacts from the "global issues" as defined in para 65.



90. Mrs Williams claims the loss of the benefit of sitting in the walkway. It is not clear to me that it will necessarily be the case the space is too small to allow such use, and given the enclosure it is likely that it will be a more pleasant environment than previously in mixed weather conditions. That assumes residents are allowed to use this area in that way. Such the use of that area is not provided for in the Occupation Right Agreement for Apartment D201²¹ – refer clause 1.4 of the document. If Mrs Williams was using the space in this way previously it was a concession. If she is unable to use this space in that way in future she has suffered no loss of amenity, service, or benefit envisaged in the Occupation Right Agreement. Separately, such use, historically and in the future, may not comply with code requirements for fire egress.
91. Mrs Williams’ complaints include the loss of light and natural ventilation to the “utility” room. [I have used this label based on Mrs Williams’ description of use.] The loss of light arises from the now extended walls to the walkway. The loss of natural ventilation arises from the window now being fixed. To address this, MLC have provided for mechanical ventilation, said by the design consultants to meet best practice. I observed that it is very quiet and allowed for variable air flow volume settings. I conclude that the reduction in amenity is real but, in the context of the apartment as a whole, minor.
92. Mrs Williams’ complaints include the diminution of natural ventilation to the apartment as a whole. This arises because of the windows in the entry lobby which face into the walkway being fixed, and the present inability to hold the fire door open. I note the fire doors are having catches fitted to allow them to be held open, but to close automatically in the event of an alarm – refer letter MLC to Mrs Williams dated 12 Feb 2019²². This can be expected to improve through ventilation of all apartments, including Mrs Williams’.
93. Irrespective of holding the fire doors open, I note Apartment D201 has opening windows to three sides and that it was the opinion of the Statutory Supervisor (refer para 19) that the level of air flow was “still good” and should not prevent Mrs Williams moving back in to the apartment. Based on my site inspection, given the extent of openable windows I conclude that the diminution in the available natural ventilation is not more than minor, and would be acceptable to most people.
94. The fact that all apartments and walkway have been fitted with sprinklers, and that the walkway is a separate fire cell, provides a real benefit to all residents.

²¹ MLC Bundle page 018.

²² MLC Bundle page 218.



95. I am satisfied, using the terminology from clause 55.1(a) of the Occupation Right Agreement (refer para 43), that the remediation works have effectively resulted in Apartment D201 being completed to a standard “at least equal to” the pre-existing situation.

Is Mrs Williams entitled to the remedies sought

96. As noted in para 28, by way of remedies Mrs Williams seeks replacement of all exterior windows to the walkways with louvres. I find that Mrs Williams is not entitled to this remedy as MLC are separately seeking an engineered solution to the problem of high temperatures in the walkways.

97. Further, Mrs Williams requires that the fire door to the elevator shaft be removed and all fixed windows between the apartments and the walkway be returned to their original state. I find that Mrs Williams is not entitled to this remedy as MLC are, for the reasons set out above, entitled to make the changes they have.

98. Further, Mrs Williams requires that she receive acknowledgement of, and an apology for the listed unacceptable behaviours of MLC (refer para 28). I note that MLC have already issued an apology²³ in relation to some of these behaviours, albeit on the recommendation of the Statutory Supervisor. I find that Mrs Williams has not adequately substantiated the other alleged failings of MLC, and on that basis do not consider a further apology has been justified.

Jurisdiction of disputes panel to make a determination in this instance

99. Refer to paras 55 to 57 re the issues arising in relation to jurisdiction. Given the findings above, any consideration of entitlement to remedies sought being outside of the scope of section 69 of the Act is not an issue. I conclude the disputes panel has jurisdiction in relation to this dispute.

Notice of Termination of Right to Occupy Apartment B201

100. I am satisfied, by inspection, that the remediation works to Apartment D201 have been completed to a satisfactory standard. Therefore I find that MLC have fulfilled their obligations in regards to making Apartment D201 ready for re-occupation by Mrs Williams.

101. I find that the Notice issued by MLC to Mrs Williams on 30 April 2019²⁴ constituted proper notice that the conditions necessary for termination of the temporary accommodation, as required under clause 2.1 of the Temporary Right To Occupy (refer para 20), had been fulfilled. this Notice required that Mrs Williams vacate by 14 May 2019.

²³ MLC Bundle page 227.

²⁴ MLC Bundle page 94.



102. I find that the Notice of Termination of Right to Occupy Apartment B201 has been properly issued and is valid.

Notice of Intention to Terminate Occupation Licence re Apartment D201

103. MLC issued this Notice on 16 May 2019²⁵, and rely upon three grounds to support the position set out therein. These grounds are:

- That the actions of Mrs Williams constitute an ongoing breach of clause 32 .1 of the Occupation Right Agreement, on the basis that her actions have caused serious and significant distress to others.
- That this constitutes grounds to terminate the Occupation Right Agreement under clause 64.4 (c).
- That Mrs Williams has effectively abandoned Apartment D201, which is a breach of clause 64.7(a) of the Occupation Right Agreement.

104. I am not persuaded that the intent of clause 32.1 of the Occupation Right Agreement is applicable to the present circumstance. This clause relates to “doing things” which lead to the nuisance or distress being created: I conclude this relates to prejudice of the environment for others. In this case Mrs Williams has not taken any action which does that. She has a bona fide complaint with the actions of MLC. In their response to Question 2.1 MLC referred me to specific paragraphs within their submission which they say are evidence of non-compliance with clause 32.1. This primarily relies on the issue of distress being experienced by other residents whose expectations as to progress of remediation works to their block have not been met.

105. I do not accept the position of MLC that Mrs Williams has abandoned Apartment D201.

106. I find that MLC’s Notice of Intent to Terminate the Occupation Licence for Apartment D201 is not a valid Notice in terms of the Occupation Right Agreement.

²⁵ MLC Bundle page 95.



Rob Ashcroft

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Robert Francis Ashcroft

Single member

7 August 2019

.....
Date of decision

Note to parties

You have the right to appeal against the decision of the disputes panel (or of the District Court sitting as a disputes panel) under section 75 of the Retirement Villages Act 2003. An appeal must be filed in the appropriate court within 20 working days of the panel's decision.

Any costs and expenses awarded by the disputes panel must be paid within 28 days.



APPENDIX I

RECORD OF MEETINGS, UPDATES, ETC

Meetings	Correspondence related to a specific meeting	Correspondence not related to a specific meeting	Note
13 Jul 2017			MLC advise all residents to be relocated during the works
10 Aug 2017			Refers to a meeting held 2 weeks earlier. Design focus is watertightness. Specific discussion re: <ul style="list-style-type: none"> • enclosing walkways • louvres to the walkways • need to maintain good airflows
14 Aug 2017			Primarily relocation logistics.
		16 Oct 2017	Addresses relocation FAQ. Specifically notes ORA is for permanent home, but that rights as a resident do not change while temporarily relocated.
13 Dec 2017 Concept design presentation			Hard to read drawing notes but shows enclose walkways - MLC Bundle page 120.
		19 Dec 2017	Pre holiday update
		9 Feb 2018	Update. Specifically notes "new enclosed walkways to the south".
15 Feb 2018 Presentation			Hard to read drawing notes but shows enclose walkways - MLC Bundle page 140.
20 Feb 2018			
23 Mar 2018			
		29 Mar 2018	Visuals of conservatory design issued to residents.
		4 April 2018	Update on construction issues.
21 May 2018			
18 Jun 2018			
		29 Jun 2018	Update on construction issues.
16 Jul 2018			



Meetings	Correspondence related to a specific meeting	Correspondence not related to a specific meeting	Note
20 Aug 2018			Notes windows have been installed (to the south side) giving a weatherproof exterior.
17 Sep 2018	24 Sep 2018		Note building wrap now removed as at 24 Sep post the meeting of 17 Sep. References the covered walkway to the south. Question asked acknowledging the existence of louvres to the walkway. Two questions asked acknowledging the existence of mechanical ventilation – which suggests knowledge of fixed windows..
Pre 23 Oct 2018	23 Oct 2018		Question raised as to MLC's consideration of open versus closed walkways. MLC response is this issue was considered prior to presentation of the concept design Jul/Aug 2017. Pros and cons of closed vs open noted. States that mechanical ventilation can provide an improved solution to heat build up in the apartments. Notes that the enclosed walkway required to be a fire cell under the Building Code. Concerns noted re the feel of the enclosed walkways and the fixed windows in the apartments.
26 Oct 2018	31 Oct 2018 MLC bundle page 163 – sets out consultant's advice re fire code requirements.		Meeting to specifically address enclosed walkways and ventilation issues. MLC noted the governing considerations driving the design solution were weather tightness, safety, and fire regulations. MLC apologised if the fixed windows were not well signalled. Noted mechanical ventilation. From questions raised it is clear residents concerned about air flows with fire doors in place and closed.



Meetings	Correspondence related to a specific meeting	Correspondence not related to a specific meeting	Note
		14 Nov 2018	Response to queries raised at meeting on 26 Oct 2018. Notes screen doors not allowed. MLC commit to additional louvres and tinted glass if appropriate after further experience.
19 Nov 2018	20 Nov 2018		Follows a resident's walk through. Expands on points made in the letter of 14 Nov re Building Code requirements driving fire doors and fixed windows.
25 Feb 2019	4 Mar 2019		Notes options being explored to address temperature issues in walkways.
10 Apr 2019	16 Apr 2019		Presentation of specific louvre modifications proposed – feedback sought.