

IN THE MATTER of a dispute under the
Retirement Villages Act 2003

BETWEEN [REDACTED] and
[REDACTED]
Applicants

AND [REDACTED] Limited
Respondent

Counsel for Applicants: Mr [REDACTED] P [REDACTED] Barrister¹

Counsel for Respondent: Ms [REDACTED] K [REDACTED] Solicitor²

DECISION OF DISPUTES PANEL

Overview

1. The applicants have been residents at the [REDACTED] residential retirement village for the past 5 years. They wish to remain village residents.
2. [REDACTED] comprises some [REDACTED] apartments and townhouses situated on a [REDACTED] acre garden landscape.
3. The relationship between the applicants and respondent over the past 5 years has been a fraught one.
4. Matters came to a head on 8 October 2020 when Mr [REDACTED] created an incident in the village manager's office. He entered the office unannounced, and refused to leave. The respondent says that his manner and behaviour in the office were frightening and aggressive.
5. This resulted shortly thereafter in the respondent's solicitors issuing the applicants with a notice of intention to terminate their occupation right agreement (ORA), citing the 8 October incident and a refusal to comply with fire safety requirements.
6. The notice gave the applicants 7 days to remedy the harm and distress which the respondent said their actions had caused.
7. The required remedies were 5 in number. The respondent accepts that the applicants undertook 4 of the remedial steps.

¹ Instructed by [REDACTED]

² Partner, Si [REDACTED]

8. The respondent does not consider that the 5th required remedial step was completed. This step was that Mr [REDACTED] give a written full and unreserved apology for his actions on 8 October 2020, addressed to everyone who was involved in, or witnessed the incident.
9. Although Mr [REDACTED] gave a written apology, the respondent says its content fell short of what was required, particularly having regard to the gravity of the 8 October incident.
10. Given the alleged failure of the applicants to satisfy this remedial requirement, the respondent proceeded through its solicitors to issue the applicants with a notice of termination of ORA.
11. The applicants say that they completed all 5 of the required remedial steps, and hence the notice of termination is invalid.
12. They say the written apology was sufficient. The body of the apology read:

"Dear All,

I am sincerely sorry for my actions in entering [the village manager's] office unannounced, for demanding documents and for uplifting [a] file to peruse.

I apologise unreservedly and assure you it will not happen again.

Yours sincerely"
13. Faced with what they say is an invalid notice of termination, the applicants issued a dispute notice under the Act with a view to a disputes panel overturning the notice of termination.
14. A disputes panel (the writer) was duly appointed. Synopses of position and witness briefs were exchanged between the parties. A hearing was held on 2 February 2021. It started at 10am and finished at 7pm. Oral evidence was heard, and submissions made.
15. The parties ask the disputes panel to decide whether the apology satisfied the respondent's remedial requirement.
16. The parties dispute the scope of the considerations which the panel member is permitted to take into account when assessing the apology. The applicants argue for a narrow focus on the 8 October incident. The respondent argues the historical context of the 8 October incident can, and should be taken into account.
17. The parties appear to agree that if the apology fell short of what was required, then the applicants will be required to depart the village in a matter of weeks.

Conversely, if the disputes panel member decides that the apology fulfilled the remedial requirement, the applicants will be permitted to remain village residents.

18. For the applicants, their residential security and stability are at stake. For the respondent, the wider good of the village is at stake.
19. It is little wonder therefore, that this was a hard-fought dispute.
20. Following the hearing on 2 February 2021, the disputes panel took time to consider what decision he should make. This Decision advises the decision and the reasons for it. As will be explained, the Disputes Panel decides the dispute not on the basis of whether the apology was sufficient, but whether for other reasons, the Retirement Villages Code of Practice was complied with.

The witnesses

21. The sole witness for the applicants was Mr [REDACTED].
22. The witnesses for the respondent were Mr [REDACTED] J [REDACTED], the village manager, Mr [REDACTED] M [REDACTED], the chief executive officer for P [REDACTED] (P [REDACTED] the parent company of the respondent, and Mr [REDACTED] Pe [REDACTED] the board chair of P [REDACTED].
23. The applicants did not require Mr [REDACTED] to attend the hearing to be cross-examined on his brief of evidence.
24. Mr [REDACTED], Mr M [REDACTED] and Mr Pe [REDACTED] all provided written briefs and were cross examined on those briefs at the hearing.
25. Mrs [REDACTED] was present throughout the hearing but did not give evidence.
26. An audio recording was taken of all evidence and submissions given at the hearing.

The occupation right agreement

27. The applicants were licensed to occupy [REDACTED] a townhouse on the [REDACTED] village campus from 27 January 2016. They paid \$849,000 for the licence. Ownership of the townhouse remains with the respondent.
28. Clause 10.1.9 of the ORA allows the respondent to notify the applicants of its intention to terminate the agreement if, amongst other things, the applicants have caused, or are highly likely to cause, serious injury, harm or distress to the respondent or other residents, or employees of the respondent, unless the injury, harm or distress are remedied in a specified time that the respondent assesses is

reasonable in the circumstances. If the situation has not been remedied within the specified time, then clause 10.1.7 allows for termination within one month.

29. These provisions are subject to the Code of Practice which will be referred to later, but in any event, reflect the terms of that Code.
30. The respondent considers that the provisions just mentioned provide it with a sound contractual basis to terminate the applicants' ORA, having regard not only to the 8 October 2020 incident itself, but also the wider historical context. This context will now be outlined.

History of dealings

31. It should first be noted that the applicants say that most of the following history is entirely irrelevant to whether or not a proper apology was given by Mr [REDACTED]. The respondent says the history is entirely of relevance.
32. As Mr [REDACTED] acknowledges, relations between he and the respondent have been fraught. The respondent says this fraught relationship dates to the commencement of the applicants' residence in the village. It says that almost as soon as the applicants took up residence 5 years ago, they started to express dissatisfaction with a range of maintenance issues. It says that over time, these escalated into complaints about various aspects of management of the village and progressed to various forms of legal action on a range of issues against a wide range of parties.
33. Mr M [REDACTED] says that the respondent reacted promptly every time the applicants raised an issue, but that Mr [REDACTED] expressed very fixed views on every issue and how it should be resolved, and did not respond well if anyone disagreed with him. Mr M [REDACTED] said that unless the respondent did everything Mr [REDACTED] asked, in the way that he asked, he continued to complain. Mr M [REDACTED] says that while some of the issues Mr [REDACTED] raised were legitimate, he does not agree that every matter raised was a legitimate complaint.
34. Mr M [REDACTED] says that rudeness and insults have seemed to be the primary way in which the applicants have opted to communicate with staff and management at [REDACTED]. He estimates that over the past 5 years he has received some 4000 emails from the applicants or relating to matters concerning the applicants. He says a very large proportion of the emails he has received from the applicants contain rude, dismissive and often outright insulting language and accusations, including accusations of incompetence and dishonesty about him and members of the board and senior village staff.
35. An issue underlying the 8 October incident was that of the village fire safety. As a result of a notification by the applicants, the NZ Fire Service carried out an

inspection of the village. The Fire Service identified an issue with flammable material being stored in cupboards under the stairs in the foyers of each of the village residential buildings. The applicants had not complained about this. The respondent had been permitting residents to use the cupboards to store belongings.

36. On 18 August 2020, the respondent wrote to residents asking them to empty out the storage cupboards by 1 September. All the residents did so except for the applicants. There was much email correspondence between the applicants and respondent about this. This issue in turn spawned secondary complaints from the applicants. One was about them having been identified by the village manager as the notifiers to the Fire Service. Another was about village management removing from availability to residents a copy of correspondence about fire safety the applicants had written to the residents' committee.
37. The respondent says that over the 5 years of their residency in the village, the applicants have complained amongst others to the Retirement Commissioner about a dispute panellist, to the Licenced Buildings Practitioners Board about the son of one of the village directors, to the Institute of Architects about an architect engaged by the respondent, to the Law Society about a solicitor previously engaged by the respondent, and to the Ministry of Business Innovation and Employment about the [REDACTED] Council over the processing of building consents for work at the village.
38. The applicants and respondent have been engaged in mediation, disputes panel proceedings, Disputes Tribunal proceedings and District Court proceedings.
39. There are still complaints and claims between the applicants and respondent yet to be dealt with or finalised.
40. The respondent says that the applicants have become a disruptive and harmful influence in the village. They are out of step with other village residents. The respondent regards the 8 October incident as a dramatic and worrying escalation of difficulties with the applicants.
41. The perspective of the applicants is entirely different. They point to their right to make complaints. They deny being abusive or disrespectful towards village management, staff or contractors. They say they have used plain or blunt language only because it is justified. They say they have chosen their words carefully. They say that they have been aghast at the failures of village management, and contractors they have engaged. They are frustrated about long delays in rectifying issues, including in relation to their townhouse.
42. In dealing with the respondent, Mr [REDACTED] utilises his experience and expertise as a senior civil engineer. He asserts that in multiple instances, he has been right, and the respondent has been wrong.

The 8 October 2020 incident

43. Mr J [REDACTED] says that in the weeks leading up to the incident on 8 October 2020 Mr [REDACTED] became particularly obsessed with getting hold of copies of new fire evacuation plans that the village had prepared. The respondent was reluctant to give them to him until it had completed a proper roll-out of the new and updated plan across the entire village, because it was concerned that Mr [REDACTED] might try to interfere with the roll-out.

44. At 5.37pm on the day before the incident, Mr [REDACTED] emailed Mr J [REDACTED] to say that he would be calling over to reception at 8.30 the following morning to pick up written approved copies of the fire evacuation plans for [REDACTED] block, "both buildings we live in or frequent". He said, "please make sure these are available."

45. Mr J [REDACTED] replied at 7.46 the following morning (8 October) stating:

"As this forms part of your formal complaint and dispute with [REDACTED] I will seek [advice] and come back to you by the close of business today."

46. Mr [REDACTED] then emailed Mr J [REDACTED] at 7.57am stating:

"[REDACTED] The dispute is that you are withholding documents we are clearly entitled to as you are aware as I showed you the legislation. If you do not have such documents and cannot provide them then please advise."

47. Mr J [REDACTED] states in his brief of evidence:

"I was therefore very surprised when [Mr [REDACTED]] walked into my office, without any warning, at approximately 8.30 am. [REDACTED] did not stop at reception to ask to see me and just entered into the back office area marked private. When I questioned him about this he said he was using our "open door" policy, I explained to him as I have done so on occasions before that this is certainly not what this means."

48. Mr J [REDACTED] goes on to state:

"That incident was the worst I have ever seen [REDACTED]. Throughout the incident, which lasted about 25 minutes, my heart was racing. [REDACTED] was very red in the face and exceptionally agitated – I was concerned that he was about to completely snap. I was shocked when he ripped the glasses off my face. I felt like I did not know what he might do next. I could not retaliate."

49. He says that at one point:

"... [REDACTED] held his phone up to my face, about 6 inches away from my face, stating that he was videoing me. I was sitting at my desk at that point, and he was standing

and leaning over me, talking forcefully and quite incoherently the whole time, and it was a struggle for me not to react. I felt very threatened having him looming over me, especially since he had already pushed A [A B], the village maintenance manager] in the face and snatched the glasses off my face. At that point, I was concentrating on holding myself together and waiting for the police to arrive... Once [redacted] left, M [redacted] [account administrator] was in tears. A H [redacted] [receptionist] was visibly shaken as well and appeared very much on edge. A [redacted] looked quite rattled and flustered at one point as well, which is unusual for him. I felt quite shaky. [redacted] is quite a large man and I definitely felt threatened and unsure of whether he would take a swing at me or A [redacted]... I made a formal complaint with NZ Police over the incident. When I contacted the Police to follow up on my complaint, I was told that the police had issued [redacted] with a warning."

50. Mr J [redacted] states that others who were involved or who witnessed what happened were G [redacted], receptionist and Sn [redacted], head of nursing.

51. The subsequent notice of intention of termination of ORA issued to the applicants by Si [redacted] on 12 October 2020 included a long recital of what they had been instructed by the respondent had taken place. Amongst other things, the letter states:

"Mr J [redacted] attempted to diffuse the situation by stepping out of the office, but Mr [redacted] still did not leave instead taking the opportunity to pick up and start reading a folder from the top of Mr J [redacted] filing cabinet. Mr J [redacted] re-entered the office and told Mr [redacted] that he was not permitted to read the folder and tried to take the folder from him. Mr [redacted] refused to hand the folder over and pushed Mr J [redacted] away... The Village Maintenance Manager, A B [redacted] arrived and attempted to assist in calming the situation... Mr [redacted] ... handed over Mr J [redacted] phone, which Mr [redacted] ... had taken at some point... Mr J [redacted] made a phone call to [redacted] solicitor ... Mr [redacted] stated that he was recording the conversation ... Ms G [redacted] arrived at about this point and observed Mr J [redacted] asking Mr [redacted] to leave, Mr [redacted] refusal to do so and the next events ... Mr [redacted] moved toward the door of Mr J [redacted] office, as if to exit. Mr B [redacted] stepped to the door behind Mr [redacted] and started to close it behind Mr [redacted] as he was exiting. Mr [redacted] turned back and pushed against Mr B [redacted], pushing Mr B [redacted] in the face. Mr B [redacted] reports the push was "rather hard". Mr B [redacted] immediately stepped back to avoid further contact with Mr [redacted] ... Ms Sn [redacted] Head of Nursing, arrived at about this point, and observed Mr [redacted] rambling loudly and aggressively, laughing at times and acting in an intimidating manner... Eventually, Mr [redacted] left the office, looked directly at Ms Sn [redacted] smiled and said "I'll be back"... Mr [redacted] returned to the [redacted] a short time later but staff had locked the door to the private offices... Mr [redacted] returned again and asked to speak to [redacted] N [redacted] CFO..."

52. Mr [redacted] does not accept that the incident was as serious as claimed by the respondent. He says that the whole incident was some 10 minutes in duration, not 25 minutes. He claims that he was pushed by Mr E [redacted]. He accepts however, that he entered Mr J [redacted] office uninvited, was repeatedly asked to leave but

declined to do so, picked up a file from Mr J [REDACTED] desk without permission, and took Mr J [REDACTED] glasses off his face.

53. The disputes panellist is unable to resolve the conflicts of evidence between Mr [REDACTED] and the respondent concerning the 8 October incident, despite having listened to the sound recordings of the incident made by Mr [REDACTED]. More evidence would be required in order that a definitive view could be reached as to precisely what took place.

54. The disputes panel member does, however, find that the incident was very disturbing to those involved and those who saw or heard the incident. It involved inexcusable behaviour on the part of Mr [REDACTED]. His claim that the respondent's open-door policy allowed him to walk directly into Mr J [REDACTED] office unannounced and uninvited is specious. His breach of common courtesy was compounded by his refusal to leave, despite repeated requests. His aggressive behaviour worsened the situation still further. He was angry, and undoubtedly frightening and intimidating.

Events after 8 October incident

55. As mentioned, the notice of intention to terminate the ORA was issued on 12 October 2020. It gave the applicant 7 days to complete 5 remedial steps.

56. Mr F [REDACTED] was instructed by the applicants in relation to the notice. He sought an extension of time for compliance with the notice. The respondent, through Si [REDACTED], granted him an additional 5 working days. The compliance deadline became 19 October.

57. At 12.33pm on 19 October Mr F [REDACTED] emailed Ms K [REDACTED] as follows:

"Dear Ms K [REDACTED],

I attach a draft of the document, which the [REDACTED] would sign, for your approval or comments.

You will see there are 2 surnames required.

Does [REDACTED] wish for an individualised apology or, as drafted a global one?"

58. The draft document referred to, included the wording of the apology which was subsequently provided.

59. Not having received a response from Ms K [REDACTED], Mr F [REDACTED] emailed her at 3.25 pm that same day (19 October) as follows:

"Dear Ms K [REDACTED]

I could not risk running out of time, while I waited for your approval to the drafts. I did try to speak with you and your assistant on the phone but neither of you was about.

So, attached are my clients' genuine attempts to comply with your client's demands; I expect they are satisfactory."

60. Thus, the apology (along with other remedial requirements) was delivered within the allowed time.

61. At 8.17am the following day (20 October) Ms K [REDACTED] emailed Mr P [REDACTED] stating, amongst other things:

"Our client has carefully considered the apology offered by Mr [REDACTED] in writing yesterday.

Our client does not consider it to be a full and unreserved apology for Mr [REDACTED] actions. Further, our client doubts the sincerity of the very brief gesture that has been offered, in light of the obvious seriousness of the incident. In particular, Mr [REDACTED] makes no acknowledgment of, and expresses no regret for, many significant aspects of the overall incident ...

... Even leaving aside the alleged physical assaults ... the office staff are frightened of Mr [REDACTED] and of the possibility of a repeat of this incident, and nothing has since transpired to allay those fears.

In the circumstances our client does not accept the apology that was offered and does not consider that the Notice of Intention to Terminate has been complied with."

62. About this response from the respondent, Mr [REDACTED] states in his brief of evidence:

"It was too late to revisit the apology; the time for compliance had passed. If I had sent a re-worded apology, it could have been rejected as time-barred and it might well have been taken as an admission by me that the apology delivered was deficient, when, I assert it was most certainly not. That said, the reference to the office staff being frightened of me was troublesome, so I sent the office staff some flowers with a note...."

63. The note read:

*"For [REDACTED]
Sorry for the [ruckus]. I will not repeat.
Sincerely, [REDACTED]"*

64. At 4.28pm on 21 October Mr [REDACTED] emailed Ms K [REDACTED] stating, amongst other things:

"P [REDACTED] has sent me your letter from yesterday where you state that my apology was not sincere. I assure you that it was and is. To back up my sincerity, yesterday I sent flowers to the ladies affected by my bad behaviour with a promise of no repeated incidents."

65. At 9.34am on 22 October Mr P [REDACTED] emailed Ms K [REDACTED] as follows:

"Dear Ms K [REDACTED]

Respectfully, I think you would be hard-pushed to assert non-compliance with the termination notice and, it would seem, it would be appropriate for you to confirm satisfaction.

If you maintain there are issues, would you be so kind as to tell me?

Yours faithfully".

66. Mr P [REDACTED] did not receive a response to his message. The next development from the applicants' point of view was their receipt on 28 October 2020 of the notice of termination of ORA.

The apology

67. As mentioned, the apology sent by Mr [REDACTED] to the respondent via the respective lawyers at 3.25 pm on 19 October used the same wording as the draft submitted some 3 hours earlier.

68. The full apology reads:

[REDACTED]

Date: 19 October 2020

To: [REDACTED] J [REDACTED], A [REDACTED] B [REDACTED], G [REDACTED], S [REDACTED], A [REDACTED] H [REDACTED] and M [REDACTED] H [REDACTED]

Via email to [REDACTED] K [REDACTED]

Apology for Disturbance in [REDACTED] J [REDACTED]'s Office on 8th October 2020

Dear All,

I am sincerely sorry for my actions in entering [REDACTED] office unannounced, for demanding documents and for uplifting an [REDACTED] file to peruse.

I apologise unreservedly and assure you it will not happen again.

Yours sincerely,

[Signature]



Evidence of [REDACTED] Pe [REDACTED]

69. Mr Pe [REDACTED] is the board chair of P [REDACTED], the parent company of the respondent. He holds a Doctor of Business Administration in governance from [REDACTED]. As well as being a company director he is a senior level executive search consultant, advising on board and top executive appointments. He has some 40 years business experience. He has been the chair of the board of P [REDACTED] for 3 years.

70. In his brief of evidence, Mr Pe [REDACTED] states:

"During the entirety of my chairmanship, I have been aware of the issues around the deck remediation of the apartment above the one occupied by [REDACTED], and which causes water to leak down the exterior of their patio door..."

The reasons we have not been able to address the problems are, in simple terms, access to the apartment with the [REDACTED] permission... and the [REDACTED] view of how this rectification work should be done. Mr [REDACTED] has his own views, as an engineer on how the problem should be addressed. However, he is not the building owner and as a board, reporting to the shareholders, we are obliged to work with the advice of our external engineering consultants, who in turn need regulatory approval for this work...

During these three years... Mr and Mrs [REDACTED] have expanded their list of complaints and have seen fit to question and, indeed, take action against contractors, engineers and architects in a much wider scope of building maintenance issues. They have also made continuous complaints about the management of the Village and the conduct of Settlers' staff and other residents, that have now led to a number of formal disputes...

Over the past four years we believe we have done the right thing by Mr and Mrs [REDACTED]. We have applied a huge amount of patience in acknowledging and dealing with the issues, complaints and disputes that they have raised...

Put simply, no other resident, past or present, has been the source of, or involved in, so much negativity and conflict.... Sadly, the [REDACTED] stand out by reason of the volume of complaints they make and the aggressive and dogmatic way in which they elect to pursue them.

In the early stages of my chairmanship I noticed, with some concern, a string of emails from the [REDACTED] to our chief executive Mr [REDACTED] M [REDACTED]. These could only be termed as abusive and I considered them bullying tactics... The board was so concerned with this form of abuse and the impact it was having on the health of the CEO that they requested me to ask Mr [REDACTED] to address these matters to me rather than harass the chief executive.

... I likewise have received aggressive and abusive emails with, at times, significant and irrelevant information including one email that attached over 1000 pages of information. These emails continued until I requested that the [REDACTED] forward any claims or correspondence direct to our lawyers rather than to me or management...

... It appears to me that [ongoing complaints, disputes and incidents] have been escalating, both in number and intensity ...

My main concern – and the sole reason the board has elected to pursue this action [of termination] – is our belief that Mr [REDACTED] now represents a physical danger to other residents and our staff... We have a responsibility for ensuring the health and safety of all our residents, our staff and our contractors....

.... The issue in the [REDACTED] Village Manager's office on 8 October 2020 is, I feel, a progression over time in increasingly aggressive behaviour...

We have ... had a very clear indication in a petition signed by just over 200 of our residents at [REDACTED] ... that the [REDACTED] are seen as a disruptive influence in the village and is an issue that we, as management, should be addressing...

... I have seen the apology that Mr [REDACTED] offered, in response to the Notice of Intention to Terminate that was served on him. In my opinion it is totally inadequate and I do not believe it serves the purpose of genuinely apologising to the actual people that he offended and insulted. It seems to be a superficial attempt to cover off an obligation he felt he had to meet, rather than a genuine acknowledgement of wrong doing. As a board, we cannot accept Mr [REDACTED] assurance that this will not occur again, and we have no option but to pursue this course of action."

71. Mr Pe [REDACTED] went on to state in his evidence that:

"... given the history of our interactions with the [REDACTED], the past and likely future costs of our ongoing disputes with them, and the very strong message we are receiving from staff and other residents that they would like the [REDACTED] to move out of the village, P [REDACTED] and [REDACTED] would agree to ..."

He then goes on to make what the respondent considers is a concessionary financial offer to the applicants.

Financial consequences of termination

72. The applicants say that a termination of the ORA would result in severe financial loss for them. Depending on how the loss is assessed, they say that it is in the range of around \$729,000.00 to \$1.1M.
73. The respondent disputes the applicants' calculations. Amongst other things, it disputes that the applicants can claim a loss of over \$400,000 in capital gains because they say an ORA is not an investment.
74. In noting the applicants' view as to the losses they would incur if their ORA was terminated, the respondent says that it has for its part incurred legal and other fees well over \$400,000 in one way or another in consequence of dealing with the applicants' various complaints and disputes.
75. The disputes panel is not able to determine the likely financial consequences to the applicants of a termination of their ORA. More evidence would be required for such a determination. He is prepared to accept, however, that termination will have significant financial consequence for the applicants.
76. Apart from any financial loss, the termination of an ORA of residents in their seventies (as the applicants are) can be expected to be very disruptive of their lives. During the hearing, Mr M [REDACTED] fairly and properly acknowledged that the termination of an ORA in the present circumstances is a very serious matter, because of the impact of an expulsion from the village on the lives of the applicants.

Retirement Villages Code of Practice 2008

77. The purpose of the Code of Practice is to set out the minimum requirements that operators of retirement villages must carry out, or make sure are carried out, to meet their legal obligations under the Retirement Villages Act 2003.³
78. The Code of Practice is enforceable as a contract by a resident and prevails over any less favourable position in the resident's occupation right agreement.⁴
79. Clause 48.5 of the Code reads:

"The operator may have grounds for termination of a resident's occupation right agreement if the resident has materially breached the agreement. The following conditions apply to this right of termination:

³ Clause 4.2

⁴ Clause 6.2 and section 92(2) of the Act.

- a. *the operator must have notified the resident in writing of the operator's intention to terminate the occupation right agreement unless the breach is remedied*
- b. *the operator must have given the resident reasonable time, not less than one month, to remedy the breach*
- c. *the operator must have taken into account the nature and extent of the breach in determining the time given for the resident to provide a remedy*
- d. *the resident must have failed to remedy the breach in the time given."*

80. As already mentioned, sub-clauses 10.1.7 and 10.1.9 of the ORA between the applicants and respondent echo this provision.

Material breach

81. As can be seen, clause 48.5 of the Code provides that the operator may have grounds for termination of a resident's ORA if the resident has materially breached the agreement.

82. Clause 5.14 of the applicants' ORA requires that they must not:

"Make excessive noise or disturb or annoy or be a nuisance to other residents or [REDACTED]"

83. In the disputes panel's view, Mr [REDACTED] behaviour on 8 October 2020 breached the clause 5.14 obligation, and constitutes a material breach in terms of clause 48.55 of the Code.

84. Furthermore, clause 10.1.9 of the ORA constitutes an implied contractual obligation by the applicants not to cause serious injury, harm or distress to the respondent or other residents or employees of the respondent.

85. In paragraph 30 of the synopsis of position of respondent Ms K [REDACTED] cites the definition in Black's Legal Dictionary of emotional distress, which the dispute panel accepts:

"A highly unpleasant mental reaction (such as anguish, grief, fright, humiliation, or fury) that results from another person's conduct; emotional pain and suffering..."

... The intensity and duration of the distress are factors to be considered in determining its severity..."

86. In the dispute panel's view Mr [REDACTED] did on 8 October cause (emotional) distress in terms of clause 10.1.9 of the ORA.

87. This also therefore, constituted a material breach in terms of clause 48.5 of the Code.

The fundamental issue

88. The applicants do not allege that the respondent failed to follow the requirements of paragraphs a, b, and c of clause 48.5 of the Code.

89. Rather, the applicants say, in the language of paragraph d of clause 48.5 of the Code, that they did not fail to remedy the breach in the time given. Put more clearly, they say that they did remedy the breach. Hence, they say, the respondent is not permitted to terminate their ORA.

90. For its part, the respondent says the applicants failed to remedy the breach.

91. The arguments by the parties as to whether clause 48.5 of the Code was complied with are essentially the same as whether the requirements of clauses 10.1.7 and 10.1.9 of the ORA were complied with. The disputes panel will proceed on the basis that there is no material difference in the arguments applying to each provision.

92. The fundamental issue is whether or not there has been compliance with clause 48.5 of the Code.

The remedies required by the respondent

93. The exact wording in the notice of intention to terminate is of central importance in this case.

94. That wording is contained in paragraph 32 of the notice. The paragraph reads as follows:

"In order to provide a remedy, [REDACTED] requires:

(a) That Mr [REDACTED] give a full and unreserved apology, in writing, for his actions on 8 October 2020, addressed to everyone who was involved and who witnessed the incident; and

(b) That Mr [REDACTED] arrange to attend counselling, at his cost, to address his behaviour towards [REDACTED] personnel. If you require assistance identifying suitable counsellors, [REDACTED] will be happy to assist. It is noted that such counselling may not be able to occur within the 7 days allowed, but [REDACTED] requires evidence that an appointment has been arranged within the 7 day remedy period, and that Mr [REDACTED] is committed to attending it; and

- (c) *That you will conduct any ongoing and future complaints, disputes or proceedings you have against [REDACTED] in a courteous manner and will comply with [REDACTED] request to communicate with counsel and not directly with [REDACTED] management and directors, when asked to do so; and*
- (d) *That you both give a written undertaking that you will treat everyone at the Village with courtesy and respect, and that you will refrain from using raised voices and insults towards anyone who visits, works or lives at the Village, and that you will comply with all reasonable requests by [REDACTED] made in accordance with your ORA, including requests relating to fire and other safety matters; and*
- (e) *That you agree, in writing, to terminate your ORA on 30 days' notice if you breach your written undertaking."*

95. As already mentioned, the respondent agrees that there has been compliance by the applicants with the remedial requirements (b) to (e) referred to above.
96. That being said, the respondent has a degree of scepticism as to the benefit which Mr [REDACTED] derived from the counselling which he undertook. More generally, it is sceptical that there has been an attitudinal shift on the part of the applicants to give it confidence that they will in future display much improved behaviour, despite declared compliance with requirement (b) –(e).

Was there compliance with the apology requirement?

97. This case seemed⁵ to boil down to whether Mr [REDACTED] gave:

"... a full and unreserved apology, in writing, for his actions on 8 October 2020, addressed to everyone who was involved and who witnessed the incident..."

98. The respondent considers the apology neither full nor unreserved.

99. In the notice of termination, the respondent through its lawyer states:

"You have failed to comply with a Notice of Termination issued on 12 October 2020. Specifically, Mr [REDACTED] has failed to give a full and unreserved apology, in writing, for his actions on 8 October 2020, addressed to everyone who was involved and who witnessed the incident. While two apologies have been offered (one in writing to [REDACTED] and another by way of a card and flowers addressed to the reception staff), [REDACTED] does not consider either apology to be sincere and to reflect any true acknowledgement of the seriousness of the incident on 8 October 2020 and its effect on those who interacted with Mr [REDACTED] that day, or who witnessed the incident.

In assessing the apology offered, [REDACTED] has been mindful both of the seriousness and prolonged nature of the incident itself, the distress it caused to all of those involved and

⁵ This was not actually the case. As will be explained later, the Disputes Panel has reached a decision on a different basis.

who were present, and Mr [REDACTED] conduct immediately following the incident. [REDACTED] has also taken into account the history of insulting and occasionally abusive interactions between [REDACTED] representatives and you, since you moved into the Village ...

Overall, [REDACTED] remains of the view that your actions have caused serious harm and distress to [REDACTED] employees and representatives, and that you have failed to remedy that harm. [REDACTED] is also of the view that such harm is highly likely to occur again."

100. The respondent says, in other words, that not only did the apology fail to have sufficient regard to the seriousness of the 8 October incident, but also failed to have regard to the wider context of fraught relations between it and the applicants, of which the 8 October incident was a part.
101. The respondent considers that someone in Mr [REDACTED] position must surely have realised that a fulsome apology was required in the circumstances. The respondent says that instead, the apology was brief to the point of being dismissive. It says the apology specifically mentions 3 actions on the part of Mr [REDACTED] but fails to mention any of the other aggravating and more serious aspects of the incident, thereby evincing no appreciation of the respondent's perspective, and no sincerity.
102. In her synopsis of the respondent's position, Ms K [REDACTED] submits that amongst others, the following factors point to the apology being less than genuine.
103. Firstly, she notes that immediately after the incident, Mr [REDACTED] issued an addendum in ongoing complaint proceedings, expressing the view that he was the victim in the 8 October incident, stating that he had been "man-handled and pushed around" and stating that the respondent had "added insult to injury" by lodging a police complaint.
104. Secondly, Ms K [REDACTED] says that the day after the incident Mr [REDACTED] sent Mr J [REDACTED] an email in which he attempted to justify his presence in Mr J [REDACTED] office on the basis that he did not realise that [REDACTED] "open door policy" was just a metaphor. Ms K [REDACTED] says that he did apologise for "losing his cool somewhat" and "uplifting the [REDACTED] folder" but went on to repeat the allegation that it was he who had been man-handled, and to further press his demand for the evacuation plans.
105. Thirdly, Ms K [REDACTED] says that Mr [REDACTED] then followed up with an email to Mr M [REDACTED] in which he claimed that he had been "pushed and shoved and injured" by Mr J [REDACTED] and Mr E [REDACTED].
106. Mr E [REDACTED], on the other hand, submits that the key consideration in determining whether the apology was acceptable, is looking at what Mr [REDACTED] was asked to do. He submits that complete focus must be on the words referred to in paragraph 97 above.

107. Mr P [REDACTED] submits that the apology was "full" in the sense that it was broadly cast, and was "unreserved" because there were no reservations expressed within the apology.
108. Mr P [REDACTED] submits that the respondent is wrongly placing weight on the sincerity or otherwise of the apology. He refers to the use of the word "sincere" in the reasons given by the respondent for rejecting the apology. [See first paragraph of extract in paragraph 99 above.] He submits that Mr [REDACTED] was not required to give a "sincere" apology, simply a "full and unreserved" apology.
109. Mr P [REDACTED] submits that in any event, Mr [REDACTED] evinced sincerity by sending the note and flowers [referred to in paragraphs 62 and 63 above].
110. He submits that whatever Mr [REDACTED] may have said about the incident immediately following the incident [see paragraphs 103-105 above], is irrelevant because the sole issue is whether the apology satisfied the terms of apology asked of him.
111. Mr P [REDACTED] submits that the apology should not be viewed in isolation from the other remedial requirements. [See paragraph 94 above]. He submits that it can hardly be said that Mr [REDACTED] and his wife lack sincerity when Mr [REDACTED] undertook anger management counselling, that an undertaking about conducting future complaints, disputes or proceedings in a courteous manner was provided, that an undertaking to treat everyone at the village with courtesy and respect was given, and an undertaking to self-terminate the ORA if the 2 undertakings just mentioned were breached, was provided. He submits that it cannot be said that the conduct that the respondent complains about is likely to reoccur in the future when a continuous threat of termination hangs over the applicants as a result of the 3 undertakings.
112. Mr P [REDACTED] submits that the fraught history between the applicants and the respondent is entirely irrelevant to the question of whether the applicants have made the remedies required of them. Consistent with this view Mr P [REDACTED] objected at the hearing to Ms K [REDACTED] lengthy cross-examination of Mr [REDACTED] designed to show him to be the man described by Mr M [REDACTED] [see paragraphs 33 and 34 above] and Mr Pe [REDACTED] [see paragraph 70 above].
113. Mr P [REDACTED] submits that no matter how the applicants have behaved in the past, the only pertinent issue is whether or not they complied with the remedial requirements imposed by the respondent. He points out that there were just 2 matters that formed the basis of the notice of intention to terminate, namely the "Incident on 8 October 2020" and the "Refusal to Comply with Fire Safety Requirements". These were the two sub-headings in the section of the notice titled "Proposed Grounds for Termination and How They Apply to Your Actions." The applicants removed their belongings from the under-stair storage by the time the apology was given. This removed the fire safety as an issue for present purposes.

Therefore, submits Mr P [REDACTED], the only remaining subject of the notice was the 8 October 2020 incident.

114. Mr P [REDACTED] took issue with the respondent's view that the apology was deficient in part because it identified some actions by Mr [REDACTED] but not other more concerning actions. These actions had been spelt out in detail in the notice of intention to terminate. [See paragraph 51 above]. Mr P [REDACTED] submits that had Mr [REDACTED] gone through and addressed each and every one of the concerns detailed in the notice, then that would have been perceived as an insincere tick-box exercise.
115. Ms K [REDACTED] countered that it was not expected that Mr [REDACTED] would address each and every point which she raised in the notice, simply that whatever wording Mr [REDACTED] chose, it would reflect the true seriousness of the incident. She reiterated that by choosing to refer to some of his behaviour but not referring to other serious behaviour, he was limiting the scope and meaningfulness of the apology.
116. Mr P [REDACTED] submitted that it would have been helpful if guidance had been given by the respondent as to the required contents of the apology. Ms K [REDACTED] countered that it was not up to the respondent to formulate Mr [REDACTED] apology for him. She submitted that it was perfectly obvious what was required of him, and that was, wording which was reflective of the seriousness of the incident.
117. Mr I [REDACTED] submitted that it is common practice that in order to settle defamation claims, draft apologies are submitted to the defamed persons for their consideration and approval. Ms K [REDACTED] countered that this case does not involve the settlement of a claim, but the protection of the village, and those who work and live in it.
118. Mr P [REDACTED] submitted that the remedial requirements in clause 48.5 of the Code of Practice are reflective of approaches taken in the law generally. He referred by way of example to the provisions in section 246 of the Property Law Act 2007 with regard to notices concerning the breach of non-rent covenants. Referring to legal commentary about section 246, Mr P [REDACTED] submitted that in equivalent terms, the notice required by clause 48.5 of the Code must enable the residents to understand with reasonable certainty what is required of them. He submitted that Mr [REDACTED] was not provided with reasonable certainty as to the required content of his apology.
119. Ms K [REDACTED] countered that having regard to what took place on 8 October, and having regard to the respondent's concerns having been spelt out in great detail in the notice of intention to terminate, it was plainly obvious to Mr [REDACTED] what was required of him.

120. Ms K [REDACTED] cited the judgment of the Supreme Court of New Zealand in Hessell v. The Queen SC102/2009 [2010] NZSC135.

121. Hessell concerns the approach to be taken by sentencing courts when a person charged with an offence pleads guilty. At paragraph 64 the Court states:

"Remorse is not necessarily shown simply by pleading guilty. Sentencing judges are very much aware that remorse may well be no more than self pity of an accused for his or her predicament and will properly be sceptical about unsubstantiated claims that the offender is genuinely remorseful. But a proper and robust evaluation of all the circumstances may demonstrate a defendant's remorse."

122. Ms K [REDACTED] submits that in an equivalent way, the disputes panel is entitled and obliged to undertake "a proper and robust evaluation of all the circumstances" in order to evaluate whether Mr [REDACTED] provided a true apology. She submits, in short, that the purported apology was not an apology at all, but akin to "no more than self pity of an accused for his or her predicament."

The disputes panel's concerns

123. Throughout the course of the dispute resolution process, the disputes panel harboured a concern about whether the purported termination of the applicants' ORA accorded with fair process.

124. This concern was put by the disputes panel to Ms K [REDACTED] in a series of questions towards the end of the hearing on 2 February. (Questions were also put to Mr F [REDACTED], challenging the applicants' submissions).

125. The panel member's concerns have not been allayed.

126. It must be said at this point, that the disputes panel has a great deal of sympathy for the respondent and the challenges that it has had in dealing with the applicants.

127. There can be no doubt that the respondent has found the applicants exceptionally difficult to deal with. Mr [REDACTED] personality was apparent during the course of his cross-examination by Ms [REDACTED] (which the disputes panel permitted).

128. Mr [REDACTED] presented to the disputes panel as personable, amiable and respectful. Nonetheless, his cross-examination revealed character traits which accorded with those described by Mr M [REDACTED] [paragraph 33 and 34 above] and Mr Pe [REDACTED] [paragraph 70 above].

129. The disputes panel holds that Mr [REDACTED] displays a high degree of confidence in the correctness of his views. He does not find it easy to countenance the possibility that he may be incorrect. He appears to consider that when he assesses the views of others to be unreasonable, wrong or stupid, this gives him

the licence to be condemnatory of those persons, impugning their integrity, competence and goodwill. His style of communication can unduly blunt and bereft of social niceties. He finds it difficult to make allowance for the fact that mistaken views may be genuinely and honestly held. He appears not to understand that progress is unlikely to be achieved by making multiple and incessant complaints which only serve to alienate the decision-makers.

130. There are indications in the evidence that Mrs [REDACTED] likewise may at times have an unfortunately unhelpful manner of dealing with others.
131. The reasons provided by Mr Pe [REDACTED] and referred to in paragraph 70 above for the issuing of the two notices are entirely understandable.
132. Having said all this, the notice of termination should only be upheld if all applicable procedural requirements were followed.
133. The purpose of the Act⁶ includes: *"to protect the interests of residents ... of retirement villages"* and *"to provide an environment of security and protection of rights of residents of retirement villages."* Such purpose extends to the Retirement Villages Code of Practice 2008 issued under the authority of section 89 of the Act.
134. The clear intent of clause 48.5 of the Code [as set out in paragraph 79 above] is that terminations should not automatically follow from material breaches. Terminations should only occur following material breaches if the resident is given proper opportunity to remedy the breach and has failed to do so.
135. The fundamental difficulty with the respondent's case, is the inherent difficulty in gauging the meaning and intent of apologies. The niceties of language, and the different perspectives that readers of apologies bring to bear, render their "true" meaning elusive. Their interpretation lends to argument, as this case illustrates.
136. This is why, to illustrate the point, it is well understood in the context of complaint resolution, that risks attach to requesting or requiring an apology, because the tendered apology may only serve to disappoint or aggravate the complainant⁷.
137. Given the problematic nature of apologies, Mr [REDACTED] could not be sure what he needed to say in his apology in order to meet the remedial requirement imposed by the respondent.
138. It lay with the respondent to determine whether or not the apology was sufficient, but that determination lacked clear, specific, and objective criteria made known to the applicants.

⁶ Section 3

⁷ This case is, however, one of dispute resolution, not complaint resolution.

139. It was as if the respondent was saying to the applicants "give us an apology that will satisfy us, but we are not going to tell you what is going to satisfy us, you should be able to work that out for yourselves."
140. Counsel did not explain to the disputes panel member exactly how he should go about assessing the apology. It appears that he was being asked to make a common sense, but in the final analysis subjective evaluation based on whatever considerations and imponderables that he might take into account.
141. Should it really be the case that the disputes panel is expected to make a judgment call about the adequacy of an apology when so much rests on that judgement call, and yet no identified and agreed objective criteria are available to him for the purpose? The answer must be no.
142. The disputes panel member was left with the impression that the respondent was seeking an apology that not just expressed regret, but also evinced a turn-around of attitude. Mr [REDACTED] is well into his [REDACTED], and his personality is not about to change, although hopefully, he is not beyond learning.
143. The disputes panel holds that clause 48.5 of the Code requires that residents must be told with a high degree of clarity and precision as to what is required of them in order to remedy the material breach. The open-ended request for an apology in this case does not achieve the required clarity and precision.
144. The applicants should have been able gauge in advance with confidence, by reference to identified objective criteria, that the apology they were about to give was acceptable to the respondent, and hence constituted the required remedy. They were not able to do that.
145. Perhaps if the respondent had given specific wording for the apology the required clarity and precision would have been achieved. The respondent's objection that this approach would only lead to a hollow or perfunctory apology, only serves to illustrate the problematic nature of apologies.
146. There is no onus on the applicants to prove that the apology satisfied the remedial requirement. Nor is there an onus on the respondent to prove that the apology did not satisfy the remedial requirement. This is because this dispute process is in the nature of an enquiry or investigation.
147. There is, however, no need for the disputes panel to decide whether or not the apology was acceptable, because of his finding that the process was flawed having regard to the requirements of clause 48.5 of the Code.

148. It follows from the finding that clause 48.5 of the Code was not fully observed, and hence that the termination process was flawed, that the respondent is not permitted to action the notice of termination.

149. As mentioned in footnote 5 [paragraph 97] this case was not, in the end, about the adequacy of the apology after all. It was about due process.

The outcome

150. The disputes panel orders, pursuant to section 69 (1)(b) of the Act, that the respondent comply with its obligations under the applicant's occupation right agreement by continuing to give effect to that agreement, and disregarding the notice of termination.

Costs

151. Although section 74(2)(a) of the Act gives the disputes panel power to make an award of costs against the respondent, given that the Decision is in favour of the applicants, he is not prepared to do so.

152. This dispute results primarily from the unacceptable conduct of Mr [REDACTED] on 8 October. It was understandable that the respondent issued the notice of intention to terminate, albeit that it was technically flawed in one respect. The 8 October incident, viewed against a long and troubled history, demanded a firm response from the respondent.

153. Overall justice demands that the respondent not incur more expense than it already has as a result of the 8 October incident and its aftermath.

Concluding comments

154. The applicants should not view this Decision as vindication of their behaviour, nor as condemnation of the respondent. Far from it. The disputes panel is most concerned about the impact of the applicants' behaviour on the wellbeing of the village, and all those who live and work in it and are responsible for it.

155. The litigious and combative conduct of the applicants needs to cease, following mature reflection by them. Their actions have undoubtedly caused considerable and unjustified annoyance, frustration, worry and distress to many persons. That must not continue.

[REDACTED]

[REDACTED]

Disputes Panel Member

15 February 2021 | 5:16 PM NZDT

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Date